IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1689

LOWER TRIBUNAL No. 91-373-CFB

ANTONIO LEBARON MELTON,

Appellant,

v.

STATE OF FLORIDA

Appellee.

REPLY BRIEF OF APPELLANT

D. TODD DOSS
Florida Bar No. 0910384

725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND PROCEDURE

TREATISES

ARGUMENT IN REPLY

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. MELTON=S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS ALSO RENDERED INEFFECTIVE BY ACTIONS OF THE PROSECUTION.

A. Jailhouse Witnesses

As demonstrated in Mr. Melton=s Initial Brief, and in the proceedings below, trial counsel failed to sufficiently challenge the weight of Mr. Melton=s prior violent felony conviction. In a case in which there were only two aggravating circumstances, pecuniary gain and the prior violent felony, the failure to neutralize the weight of this aggravating circumstance prejudiced Mr. Melton.

In response to the compelling evidence presented by Mr. Melton in support of this claim,[1] Appellee **has chosen to waive any argument** as to the merits of the issue. Rather, Appellee asserts, for the first time, that this claim is not properly before the Court because Mr. Melton was unsuccessful in challenging his prior violent felony conviction before the First District Court of Appeal.[2] In relying on such cases as

[1]Mr. Melton presented the testimony of five witnesses regarding statements made by codefendant Ben Lewis that exculpated Mr. Melton from involvement in the prior violent felony.

[2]Appellee makes this assertion despite the fact that Argument I was presented to the lower court; an evidentiary hearing was held; the lower court issued an order denying

State v. Barnum, Appellee seems to be confused about the fact that the case before this Court is separate and distinct from any collateral proceedings before a district court on a prior violent felony conviction. This is not an appeal of the district court=s determination on the prior violent felony conviction. Rather, this is a postconviction appeal relative to Mr. Melton=s conviction and sentence of death.

Contrary to Appellee=s position that this Court is lacking jurisdiction and that district courts are the final appellate courts in Florida (Answer at 11), exclusive jurisdiction to hear appeals from final judgments of trial courts imposing the death penalty rests with this Court under article V, section 3(b)(1), of the Florida Constitution. See State v. Hootman, 679 So. 2d 1259 (Fla. 2d DCA 1997). As clarified in State v. Fourth District Court of Appeal, 697 So. 2d 70 (Fla. 1997), this Court also has exclusive jurisdiction over collateral proceedings in death penalty cases:

> [W]e have rejected challenges to our jurisdiction over collateral proceedings in death penalty cases. *State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. White, 470 So. 2d 1377 (Fla. 1985).* In Sireci, we explained that an appeal from a motion for postconviction relief must be taken to the appellate court that has jurisdiction over the appeal from the underlying conviction and sentence. Collateral

---

relief; Mr. Melton filed an appropriate appeal to this Court; a briefing schedule was issued; and Mr. Melton filed his Initial Brief in a timely manner.

> proceedings in death penalty cases are essentially attacks on the imposition of the death penalty. Because this Court has jurisdiction over death penalty cases, it is logical that such attacks be directed to this Court. As a practical matter, we routinely entertain appeals from final orders in death penalty collateral proceedings, see *Fla. R. Crim. P. 3.851*, and on occasion review interlocutory orders in such proceedings. E.g., *State v. Lewis, 656 So. 2d 1248 (Fla. 1994); State v. Kokal, 562 So. 2d 324 (Fla. 1990).* In order to clarify our position, **we now hold that in addition to our appellate jurisdiction over sentences of death, we have exclusive jurisdiction to review all types of collateral proceedings in death penalty cases.** This includes cases in which this Court has vacated a death sentence and remanded for further penalty proceedings.

(Emphasis added). Contrary to Appellee=s position, this Court, and only this Court, has jurisdiction over Mr. Melton=s death penalty case and its corresponding collateral issues.

The following is a brief recitation of the facts and relevant law derived from Mr. Melton=s Initial Brief, which Appellee has **waived its opportunity to address**:

1. The trial court gave great weight to the prior violent felony (R. 1395);[3]

2. Judge Terrell, Mr. Melton=s trial attorney, clearly understood the magnitude of having a prior violent felony murder conviction (R. 1083-1084);

3. The prosecution introduced details of the prior violent felony conviction though the testimony of Assistant State Attorney Schiller;

4. During the postconviction evidentiary hearing it was learned that:

   a. Ben Lewis told David Sumler that he and Tony

[3]There were two aggravating circumstances in Mr. Melton=s case: pecuniary gain and the prior violent felony.

Houston shot a taxi driver and that Mr. Melton wasn=t there at the time (T. 420);

b. Ben Lewis told Paul Sinkfield that he robbed and killed a cab driver with T.H. [Tony Houston] (T. 453); that he himself shot the cab driver because Ahe was just nervous, got excited and shot him@ (T. 454);

c. Ben Lewis told Lance Byrd that, according to his lawyer, if he could come up with something else, he could probably get a lesser sentence [in the Carter case] (T. 487). Lewis told Byrd that he knew about the taxicab murder (T. 488), and that he was going to tell his lawyer that Melton had done it (T. 488, 499). Lewis didn=t say who did kill the taxicab driver (T. 499), but he did admit that Melton had left and that he and Houston were still there (T. 488, 500);

d. Ben Lewis admitted to Alphonso McCary that Antonio Melton didn=t know anything about the cab murder, but that he was trying to save himself now and it was better Antonio than him (T. 508);

e. Ben Lewis confessed to Bruce Crutchfield that he had shot a taxi driver and couldn=t believe what he had done (T. 592). Lewis said he was by himself when he killed the cab driver (T. 593);

5. During his testimony at the evidentiary hearing, Judge Terrell:

a. Acknowledged that while he was busy during this time, he Ashould have@ interviewed inmates (T. 184-186);

b. Stated that he had no tactical or strategic reason for not interviewing Lewis= associates and/or cellmates (T. 183, 714);

c. Testified that Officer O=Neal=s notes would have and should have led to further investigation in an attempt to corroborate Mr. Sumler=s statements (T. 164-5, 246);

6. In denying relief, the lower court failed to address this issue as an ineffective assistance of counsel claim, instead only addressing it as a newly discovered evidence claim;

7. In denying relief, the lower court erroneously concluded that since residual or lingering doubt is not a valid mitigator, this evidence could not be presented; and

8. Contrary to the lower court=s order, Mr. Melton could have presented evidence which would have neutralized, negated or rebutted a weighty aggravating factor. See, e.g., Wiggins v. Smith, 123 S.Ct. 2527 (2003), Rompilla v. Beard, 125 S.Ct. 2456, 2465 n.5 (2005).[4]

In waiving its argument to this issue, Appellee by consequence has failed to rebut any of the facts, arguments and law presented by Mr. Melton. Here, had trial counsel interviewed the people who shared cells with Lewis, there is a reasonable probability that the outcome of the proceedings would have been different.

B. Lay Witnesses and Expert Testimony

Appellee indicates that, with regard to expert testimony, there was no deficient performance because trial counsel presented a mental health expert at the penalty phase (Answer

[4]Appellee=s proclamation, that Melton would not have been able to present this evidence (Answer at 12), is erroneous as a matter of law. See, e.g., Rompilla, 125 S.Ct. at 2465, n5 (AWe may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution=s characterization of the conviction would suggest.@).

at 25). Appellee=s argument is contrary to law established by this Court. Simply presenting a mental health expert at the penalty phase does not insulate trial counsel from rendering ineffective assistance of counsel. In Orme v. State, 896 So. 2d 725, 740 (Fla. 2005), subsequent to an appeal from postconviction proceedings in the circuit court, this Court determined that trial counsel was ineffective for failure to investigate and present Orme=s bipolar disorder diagnosis. This determination was made despite the fact that during Orme=s penalty phase, trial counsel presented the testimony of two mental health experts, one of whom testified to the existence of both statutory mental mitigators. Orme, 896 So. 2d at 741 (Well J., concurring in part and dissenting in part). As demonstrated by Orme, the presentation of a mental health expert during the penalty phase does not preclude a finding of ineffective assistance of counsel. Appellee=s argument to the contrary is erroneous as a matter of law.

As to the merits, Appellee overlooks the fact that Dr. Gilgun, who testified at Mr. Melton=s penalty phase, did not evaluate Mr. Melton until a week before his trial (T. 310); that Dr. Gilgun testified that he could not recall being involved in any other capital felony cases where he wasn't called in at least two months prior to trial (T. 310); that trial counsel testified that it was not his standard practice to wait that long and had no strategic reason for doing so (T. 186); that neither trial counsel nor Dr. Gilgun had any notes

or documentation indicating any discussion of Mr. Melton=s case whatsoever; and that both testified that had such consultation occurred, they would have made note of it (T. 187, 311).

Contrary to Appellee=s assertion, Mr. Melton was harmed by the delay in obtaining the services of a mental health expert. Dr. Gilgun did not speak to any of Mr. Melton=s family or friends (T. 312). Trial counsel did not supply any of this information to him, nor any information about Mr. Melton=s upbringing (T. 312).[5] Dr. Gilgun did not know what trial counsel=s plan was as far as the penalty phase (T. 339). Usually, he discusses these things with the attorney (T. 340). Dr. Gilgun concluded that if he had been given more information, he could have potentially given more mitigation (T. 341).

Moreover, Appellee ignores the fact that even the lower court recognized trial counsel=s deficient performance regarding Dr. Gilgun:

> Dr. Gilgun did testify in the penalty phase, although his testimony appears extremely short (covering only 13 transcript pages)(CC 988-1000). While the number of transcript pages for one=s testimony is not dispositive on the issue at hand, **the penalty phase testimony and the evidence revealed in the evidentiary hearing clearly show that trial defense counsel did not spend an extensive amount of time in the investigation and preparation of mental health-related mitigation evidence.** TDC[6] provided Dr. Gilgun with only

[5]Dr. Gilgun explained that the importance of other materials is for corroboration (T. 313). Also, these material help him to structure his interview and to elicit more information (T. 313).

[6]Trial Defense Counsel.

> Defendant=s school records and numerous depositions for purposes of his evaluation of Defendant and testimony at trial; TDC did not provide copies of Defendant=s statements to police, the arrest report or any police reports, or any information about Defendant=s family or friends (CC 991-92)(EH 312-13, 338) nor any information about Defendant=s stepfather other than from Defendant himself (i.e. information that the stepfather was a heroin addict and had abused Defendant=s mother)(EH 320-21, 332). In the evidentiary hearing, Dr. Gilgun confirmed that he did not speak with any of Defendant=s family or friends during the course of his pretrial evaluation of Defendant. (EH 312).

(PCR. 1967-68)

* * * *

> The strongest evidence presented and argument made by the Defendant against his trial counsel on this issue is that the mental health expert retained by the defense counsel, Dr. Larry Gilgun, was not retained until a week before trial. **Also, it does not appear that defense counsel consulted with this expert to a great degree directly before presenting his testimony, nor discussed with him any specific trial strategy.** There was no explanation offered by defense counsel as to why he waited until a short time before the trial to retain Dr. Gilgun for his evaluation of the Defendant.

(PCR. 1973)(emphasis added).

As to the prejudice prong, Appellee claims that no significant mental health mitigation was omitted from the penalty phase (Answer at 25). In making this argument, Appellee makes no reference to Mr. Melton=s Initial Brief, wherein he delineated the differences in the brief trial testimony of Dr. Gilgun and that of a fully prepared mental health expert.[7] For example, Dr. Henry Dee, a clinical

[7]Appellee attempts to improperly characterize Mr. Melton=s claim as an Aineffective assistance of expert claim.@(Answer at

psychologist with a subspecialty in clinical neuropsychology (T. 367), was called to testify during Mr. Melton=s evidentiary hearing. Dr. Dee saw Mr. Melton in January, 1996 and again in November, 2001 for approximately 14 hours (T. 369-70). During this time, he conducted a neuropsychological evaluation and extensive interviewing (T. 370). Dr. Dee reviewed discovery materials, school records, juvenile records, a previous evaluation by Dr. Gilgun, the Florida Supreme Court appeal, and witness testimony at the penalty phase of the Carter trial (T. 370-1). Dr. Dee also spoke to Mr. Melton=s mother, his aunt Margaret Faye Johnson, Latricia Davis and his father, Mr. Stoutemire (T. 380).[8]

Contrary to Dr. Gilgun, Dr. Dee, armed with a complete family history, was able to present a thorough picture of Mr. Melton=s life. Mr. Melton had an unusual childhood (T. 373). He was in a sense overprotected (T. 373). Dr. Dee explained that Mr. Melton=s mother was a Jehovah=s witness and she involved him in this religion (T. 373). While Mr. Melton had been a gifted athlete when he was younger, his mother forced him to give it up and be more and more involved in intensive Bible study (T. 373). Also, she withdrew him from athletics

---

27-8). In reality, Mr. Melton is raising a proper claim that trial counsel was ineffective for failing to provide his expert with adequate time and materials.

[8]Similar to Dr. Gilgun, Dr. Dee explained that this material is necessary to investigate the issue of mitigation, and it is also helpful to have independent corroborative evidence (T. 371).

in part because she didn't care for the influence of peers (T. 374). By the time he reached middle adolescence, Mr. Melton was fairly isolated from his peers (T. 374).[9]

With regard to emotional maturity, Mr. Melton was a strikingly immature boy for 18 (T. 381). By the time he entered high school, he had almost no social contact (T. 381). Dr. Dee felt that Mr. Melton could be easily manipulated (T. 383).[10] That's why his mother didn't want him around the locker room and withdrew him from football (T. 383).

Mr. Melton went from a situation of being isolated and/or in the church to being with a bunch of criminals by the time he got to high school (T. 374). Mr. Melton immediately fell in with these people (T. 374). He began to skip school, use drugs, and talk back (T. 374).

As a result of this, Ms. Davis withdrew her son from school at age 16 (T. 374). She gave him a choice of either conforming to everything she believed in or to move out (T. 375). From then until the time he was arrested, Mr. Melton

---

[9]Dr. Dee explained that Ms. Davis worked a lot to support Mr. Melton and his brother (T. 373). Thus, from a fairly young age, Antonio was taking care of his brother after school (T. 373).

[10]Mr. Melton viewed Mr. Lewis and Mr. Houston as more sophisticated than himself (T. 383).

would sometimes be with his grandmother or aunt (T. 375). During the two years prior to his arrest, Mr. Melton had essentially no supervision (T. 378).

Dr. Dee commented that Mr. Melton=s stepfather was a very harsh man (T. 375). He was abusive towards Ms. Davis in front of Antonio (T. 376), to the point where he broke her arm (T. 376). Mr. Melton=s stepfather used heroin and would bring other women into the house in front of him (T. 376). It was frankly grossly immoral conduct and probably shocking to a young child (T. 376).

Dr. Dee testified that Mr. Melton=s father did not have much contact with him (T. 376). He went into the Service for about three years at the time Mr. Melton was born (T. 376). He injured his back badly and had to have a series of operations (T. 376-7). By the time he returned, his son was already an adolescent and living with his grandmother (T. 377). Unfortunately, Mr. Melton=s only male role model was an abusive heroin addict (T. 377).

Testimony similar to that of Dr. Dee would have given the jury insight into who Mr. Melton was and how he ended up in this dire situation. Further, trial counsel could have more forcefully shown, with the available information, that Mr. Melton=s mental and emotional maturity at the time of the crime was a mitigating factor. Had counsel performed effectively, there is a reasonable probability that the outcome of the proceedings would have been different. See Strickland v.

Washington, 466 U.S. 668, 687 (1984); Wiggins v. Smith, 123 S.Ct. 2527 (2003).

ARGUMENT II

THE POSTCONVICTION COURT=S IMPROPER CONSIDERATION OF ALACK OF REMORSE@ IN ITS ORDER DENYING RELIEF DEPRIVED MR. MELTON OF DUE PROCESS AND HIS RIGHT TO A FULL AND FAIR HEARING.

While Appellee acknowledges that a sentencing court may not consider Alack of remorse@ as an aggravating circumstance, Appellee then argues that this rule does not apply to a postconviction court (Answer at 30). However, Appellee fails to realize that a postconviction court is required to conduct a legal analysis with regard to various constitutional claims brought by a defendant. Here, for example, Mr. Melton asserted an ineffectiveness claim under Strickland and a suppression claim under Brady. Certainly, such an analysis cannot be conducted in a fair, constitutional manner if the postconviction court, as here, is free to consider improper factors.

In concluding that Mr. Melton was not entitled to penalty phase relief, the postconviction court stated:

> In the penalty phase, the Defendant steadfastly denied his involvement in the Saylor murder. **It is this Court=s belief that the steadfast denial of his involvement in the Saylor murder may have been one of the strongest condemning factors against him during the penalty phase. The complete denial of culpability must, of necessity, reflect a complete lack of remorse regarding the death of Ricky Saylor.** The judge and the jury had before it the overwhelming aggravating factor of the Defendant=s murder of another human being prior to the murder of

> Mr. Carter. Defense counsel was at an overwhelming disadvantage and this Court finds that he presented the best evidence and argument that could be made for the benefit of the Defendant.

(PCR. 1976)(emphasis added). Contrary to the cases upon which Appellee relies in attempting to minimize this statement as amounting to a harmless Apassing reference@ (Answer at 30, 32), here, the lower court determined that Athe steadfast denial of [] [Mr. Melton=s] involvement in the Saylor murder may have been one of the strongest condemning factors against him during the penalty phase.@ (PCR. 1976). These comments are far more damning than a Apassing reference@. Rather, the lower court determined that because Mr. Melton refuses to admit culpability for a crime he has always maintained he did not commit, there was no possibility of the court granting relief.

The lower court=s actions necessitate that a new hearing be conducted before an impartial tribunal. See Suarez v. State, 527 So. 2d 190, 192 (Fla. 1988)(Vacating the denial of a Rule 3.850 motion and remanding with directions to conduct a new proceeding on the motion within sixty days). At the minimum, the lower court=s findings should be given no consideration by this Court.[11]

[11]In an attempt to have this Court avoid addressing the merits of Argument II, Appellee proclaims that this issue was not preserved as Mr. Melton did not raise it in a motion for rehearing (Answer at 32). Appellee cites no legal authority to support this hypothesis. This argument should be disregarded as meritless.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. MELTON=S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE.

A. Failure to Disclose Favorable Information

In its answer brief, Appellee has miscast Mr. Melton=s argument as follows:

> Melton asserts that **the prosecutor violated *Brady*** when (1) the prosecutor stated in closing that Lewis was subpoenaed; (2) the prosecutor argued in closing that Lewis had no agreement with the State in exchange for his testimony; and (3) the prosecutor in the Saylor case testified in the penalty phase of this case that the evidence was that Melton was the triggerman in the Saylor case.

(Answer at 36)(emphasis added). Appellee then claims to defeat this issue by asserting that a Brady claim cannot be premised on a prosecutor=s arguments (Answer at 36). In actuality, the aforementioned arguments by Appellee were raised in Mr. Melton=s Initial Brief as constituting violations of Giglio v. United States, 405 U.S. 150, 153 (1972).[12]

Appellee never actually Aanswers@ Mr. Melton=s Brady issue, instead **choosing to waive any argument** as to the merits. Rather, Appellee once again asserts that this claim is not

[12]As he did in his Initial Brief, Mr. Melton discusses the merits of his Giglio claim in a subsequent subsection titled AUncorrected False and/or Misleading Testimony@.

properly before this Court because Mr. Melton was unsuccessful in challenging his prior violent felony conviction before the First District Court of Appeal (Answer at 36-8). Appellee=s contention that Mr. Melton is Aappellate court shopping@ (Answer at 38), is specious, since this Court has exclusive jurisdiction over Mr. Melton=s death penalty case and its corresponding collateral appeals. State v. Fourth District Court of Appeal, 697 So. 2d 70 (Fla. 1997).

What Mr. Melton actually argued in his Initial Brief as undisclosed Brady evidence, which Appellee has **waived its opportunity to address**, includes the following:

1. A set of notes by Officer O=Neal made during interviews at the jail and with Ben Lewis (T. 51, PCR. 1560-65);[13]

2. The true identity of witness ADavid Summerlin@, who was in actuality ADavid Sumler@;[14]

3. That David Sumler informed law enforcement that Ben Lewis admitted that Mr. Melton was not involved in the Saylor murder;[15]

4. That FDLE agent Don West was present for the

[13]Included are notes from a February 25, 1991 interview, with a ADavid Summerlin@ (T. 53). According to the notes, Ben Lewis told ASummerlin@ that his partner had shot the cab driver and that Lewis had admitted being there (T. 51-2). The word AMelton@ was scratched out from the notes and replaced by Apartner@. (T. 52).

[14] While Officer O=Neal testified at the evidentiary hearing that the name was later confirmed as Sumler (T. at 49), this information was never relayed to trial counsel at any time subsequent to the deposition.

[15]During a conversation, Mr. Lewis told Mr. Sumler that he and Tony Houston shot a taxi driver and that Mr. Melton wasn=t there at the time (T. 420).

interview with Sumler;[16]

5. Evidence of negotiations and anticipated deals with Mr. Melton=s co-defendants;[17]

6. Evidence that, contrary to the State=s assertion at trial, Ben Lewis approached the State to provide information to gain favorable treatment;[18] and

7. Evidence that Tony Houston testified against Antonio Melton, fully expecting to get a reduced sentence in

---

[16]Because West=s name was not disclosed, trial counsel was unaware that he could have questioned Mr. West about the validity of the name or the statement. Moreover, agent West was not listed as a witness in this case.

[17]Unbeknownst to trial counsel, Ben Lewis= attorney had contact with Officer O=Neal and/or the State Attorney=s Office on at least seventeen occasions (PCR. 1713-15).

[18]Mr. Jenkins, Lewis= trial attorney, testified at the evidentiary hearing that he told his client that his cooperation on the pawnshop case alone would not be sufficient, and that he encouraged Mr. Lewis to divulge any information about other crimes (T. 283, 285, 287-8). Lewis supplied that information at their next meeting, and Mr. Jenkins approached the State with the information in the hopes of garnering favorable treatment for his client (T. 287-8).

exchange for his testimony.[19]

Mr. Melton presented the aforementioned evidence at his postconviction evidentiary hearing. He argued its relevance in his Initial Brief. Now, Appellee wishes to avoid having to deal with it. Appellee has waived its right to confront Mr. Melton:s evidence, which established that the State possessed exculpatory information which it failed to disclose. A new trial is warranted as the non-disclosure undermines confidence in the outcome of the trial. Cardona v. State, 826 So.2d 968 (Fla. 2002); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

B. Uncorrected False and/or Misleading Testimony

[19]The jury never knew of the full extent of his expectations, only generally, and thus his motive to lie.

In addition, Mr. Melton presented evidence of uncorrected false and/or misleading testimony and argument by the State during deposition and at trial.[20] When the State failed to correct the testimony and argument, defense counsel had every reason to believe that the State was in compliance with its constitutional obligations. Strickler v. Greene, 527 U.S. 263, 281 (1999). AThe State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless error beyond a reasonable doubt.@ Guzman v. State, 868 So. 2d 498 (Fla. 2003). Having failed to do so here, a new trial is required.

C. Cumulative Consideration

A cumulative analysis of all of the withheld evidence undermines confidence in the outcome of the trial and requires that this Court grant a new trial. Justice demands that Mr. Melton receive a new trial. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Huggins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001).

---

[20]As noted above, while Appellee has chosen to address this portion of Mr. Melton=s argument, Appellee mistakenly characterizes this issue as an alleged Brady violation (Answer at 36), rather than what it actually is, a claim based on Giglio v. United States, 405 U.S. 150, 153 (1972).

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. MELTON=S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS ALSO RENDERED INEFFECTIVE BY ACTIONS OF THE PROSECUTION.

Appellee initially attempts to convince this Court that Ben Lewis, Mr. Melton=s co-defendant, could not be impeached during his testimony with prior inconsistent statements (Answer at 50). Of course, Appellee=s argument is erroneous as a matter of law.

The defense=s theory at trial was predicated upon the argument that George Carter was shot accidentally during a struggle. The State=s main witness, Ben Lewis, described a different sequence of events:

> Q. At this point did Mr. Carter make any resistance, done anything at all to thwart y=all or try to hinder you or he cooperated fully?
>
> A. Yeah, he cooperated.
>
> Q. What was he saying?
>
> A. He wasn=t saying nothing.
>
> Q. Was there -- Did you see a fight or a scuffle or anything between Mr. Melton and Mr. Carter?
>
> A. No, sir.
>
> Q. Did Mr. Carter do anything that you saw or say anything aggressive or in a fighting manner?
>
> A. No, sir.

(R. 637).

Testimony from the evidentiary hearing established that effective counsel could have impeached the trial testimony of Mr. Lewis. For example, had he conducted a diligent investigation, trial counsel would have learned that Ben Lewis told Paul Sinkfield that he got into a struggle with the owner, that Mr. Melton ran over to help and that=s when the gun went off and killed the victim (T. 456). Further, counsel would have learned that Ben Lewis told Fred Harris that he, Mr. Melton and the victim were wrestling, the gun went off, and the owner was shot (T. 635).

Contrary to Appellee=s argument, Lewis= prior inconsistent statements would have been admissible. A[I]ntroduction of a prior statement that is inconsistent with a witness=s present testimony is also one of the main ways to attack the credibility of a witness. See *' 90.608(1), Fla. Stat.* (2001); see also Charles W. Ehrhardt, Florida Evidence ' 608.4 (2002 ed.).@ Pearce v. State, 880 So. 2d 561, 569 (Fla. 2004). In State v. Mills, 788 So. 2d 249, 250 (Fla. 2001), during a postconviction evidentiary hearing, Mills presented the testimony of John Henry Anderson who indicated he knew both Mills and his codefendant, Vincent Ashley. Anderson testified that during 1980 he and Ashley were in jail at the same time, and Ashley made a statement to him that he, Ashley, was the person who had gone into the house and shot the victim. Mills, 788 So. 2d at 250. In affirming the granting of relief by the circuit court, this Court held that such evidence would have

been admissible at trial as impeachment. Id.

As in Mills, prior inconsistent statements by Mr. Melton=s codefendant would have been admissible at trial. Trial counsel conceded that he had no strategic reason for not putting forth this evidence (T. 209-10). Counsel=s failure to conduct an adequate investigation prejudiced his client. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Appellee also argues, yet again, that this issue is not properly before this Court because the district court affirmed Mr. Melton=s prior violent felony conviction (Answer at 50-2). In making this argument, Appellee fails to explain how an ineffectiveness claim, involving the failure to impeach a witness during Mr. Melton=s death penalty trial, can be foreclosed because a prior violent felony conviction was not overturned. As in previous claims, this argument is meritless.

In a new twist, however, Appellee also now claims that this issue shouldn=t have been heard by the lower court because Aa trial court is well within its discretion@ to strike an amended motion (Answer at 53-4). While Mr. Melton would be more than willing to debate this issue, it is unnecessary here, as the situation which Appellee speaks of never occurred. The lower court did not strike any amendment. Appellee knows this to be the case.[21] If Appellee took issue

[21]In fact, there was a full evidentiary hearing on the issue.

with the lower court=s ruling, it should have sought relief through an interlocutory or cross appeal. Instead, Appellee sat on its hands and is now complaining that the evidentiary hearing should be null and void. Appellee=s argument is unavailing and should be disregarded.

With regard to the merits, as Mr. Melton explained in his Initial Brief, although the facts underlying his claims are raised under alternative legal theories -- i.e., Brady, Giglio, newly discovered evidence and ineffective assistance of counsel -- the cumulative effect of those facts in light of the record as a whole must nevertheless be assessed. As with Brady error, the effects of the deficient performance must be evaluated cumulatively to determine whether the result of the trial produced a reliable outcome. When such consideration is given to the wealth of exculpatory evidence that did not reach Mr. Melton=s jury, either because the State failed to disclose, because trial counsel failed to discover,[22] or because this evidence is newly discovered, confidence in the reliability of the outcome is undermined.

ARGUMENT V

[22]Appellee=s argument, that it doesn=t matter that trial counsel admitted his own ineffectiveness (Answer at 63), is both misleading and incorrect under the circumstances of Mr. Melton=s case. First, Mr. Melton stated that AJudge Terrell conceded that he had no strategic reason for not putting forth this evidence.@ (Initial Brief at 83). Second, this is relevant because the lower court ignored this and instead erroneously concluded that Judge Terrell Awas justified in his actions (to include his trial strategy and tactics) in the guilt phase,@ (PCR. 1964).

THE LOWER COURT ERRED IN DENYING MR. MELTON=S NEWLY DISCOVERED EVIDENCE CLAIM. MR. MELTON=S CONVICTION AND SENTENCE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. ALTERNATIVELY, TO THE EXTENT THAT TRIAL COUNSEL FAILED TO DISCOVER THIS EVIDENCE, TRIAL COUNSEL WAS INEFFECTIVE.

In a familiar refrain, Appellee refuses to address a large portion of this claim, relying on its argument that this Court lacks jurisdiction to review Mr. Melton=s postconviction death penalty case (Answer at 66-68). Appellee=s argument is without merit, and Appellee has **waived its right to address** Mr. Melton=s unrebutted claims for relief.

Here, Mr. Melton has demonstrated that, in accordance with the standard enunciated in Jones v. State, 591 So. 2d 911, 915 (Fla. 1991), his newly discovered evidence warrants a new trial.[23] As discussed in Mr. Melton=s Initial Brief, six former Escambia County jail inmates testified that Mr. Lewis confessed to them that he had lied or was going to lie about his involvement and/or Mr. Melton=s involvement in the Saylor and Carter killings. Five of these people testified that Lewis told them Mr. Melton wasn=t even present when Mr. Saylor was killed, and Lewis admitted to two of these men that he, Ben Lewis, had personally murdered Ricky Saylor. Had a jury

[23]The new Jones evidence must be evaluated cumulatively with the Brady evidence and the evidence that counsel failed to discover. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); State v. Gunsby, 670 So.2d 920 (Fla. 1996).

heard this testimony there can be no doubt that Mr. Melton would have received a life sentence in the penalty phase.

Concerning the limited portion of this argument that Appellee chooses to address, two inmates, Sinkfield and Harris, testified that Ben Lewis told them that he, Mr. Melton and the victim were involved in a struggle when the gun went off, killing Mr. Carter (T. 456, 635).[24] Appellee initially argues that these statements would not be admissible at trial (Answer at 77). As established previously, Appellee=s statement is contrary to the law of this Court, which clearly provides that Ben Lewis, Mr. Melton=s co-defendant, could have been impeached during his testimony with prior inconsistent statements. See Pearce v. State, 880 So. 2d 561, 569 (Fla. 2004); State v. Mills, 788 So. 2d 249, 250 (Fla. 2001).[25]

---

[24]Confusingly, Appellee addresses the testimony of Sinkfield and Harris as it relates to the Carter murder. However, in Ground IV, Appellee argued that this same testimony was not properly before this Court because the district court affirmed Mr. Melton=s prior violent felony conviction (Answer at 50-2).

[25]Appellee=s reliance on Kokal v. State, 901 So. 2d 766, is misplaced, as the issue there concerned hearsay, from an alleged confession years after Kokal=s trial, being admitted as

a statement against interest. Here, Lewis' statements constitute prior inconsistent statements, which are admissible and do not constitute hearsay. Pearce, 880 So. 2d at 569.

Appellee also argues that the statements by Sinkfield and Harris were incredible and should be treated with skepticism because the inmates had extensive criminal histories (Answer at 80-81). To accept the credibility findings proposed by the State, one would have to accept that there was a grand conspiracy by six people, who had no common interest, motive or bond, to lie about Lewis= statements. Further, one would have to accept the fact that, despite it being known that Ben Lewis was Atalking@ while in the jail, he didn=t make any statements to any of these six individuals who came into contact with him. This theory is not supported by competent, substantial evidence.[26]

Appellee also argues that Mr. Melton=s testimony at trial conflicts with the statements of Sinkfield and Harris (Answer at 81-2). Similarly, in denying relief, the lower court found that because not all of Mr. Lewis= confession was consistent with what came out at trial, then the jury would not have believed the witnesses.[27] This ignores the more likely probability that Mr. Lewis was a liar, was not credible in his

---

[26]Moreover, if the situation were reversed, and the State had six jailhouse witnesses, with extensive criminal histories, ready to testify that Mr. Melton had confessed to them, this of course would not pose a problem. ANo truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry=s rules, while the other fights ungloved.@ Dillbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994).

[27]However, Mr. Melton=s testimony at trial that there was a struggle is consistent with the testimony of Sinkfield and Harris.

testimony, and that his testimony should have been rejected. Sinkfield and Harris were stating what they were told by Lewis. They were not the ones making up stories and negotiating deals. Unlike Lewis, they had nothing to gain from their testimony.

Here, the new evidence both impeaches Lewis= trial testimony and reduces Mr. Melton=s culpability. When considered cumulatively with the evidence of a Brady violation and the evidence of ineffective assistance of counsel, confidence is undermined in the reliability of the outcome of Mr. Melton=s penalty phase. The jury probably would have returned a life sentence had it known of the wealth of exculpatory evidence. Mr. Melton is entitled to relief.

ARGUMENT VI

AN INVALID PRIOR CONVICTION WAS INTRODUCED INTO EVIDENCE AT MR. MELTON=S PENALTY PHASE PROCEEDINGS TO ESTABLISH THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE IN VIOLATION OF JOHNSON V. MISSISSIPPI, 486 U.S. 578 (1988).

In his Initial Brief, Mr. Melton informed this Court that he Ais presently appealing the denial of postconviction relief regarding the Saylor case to the First District Court of Appeal. Should he obtain relief there, he will petition this Court for relief of his conviction and sentence.@ (Initial Brief at 90). As Appellee has noted, the district court recently affirmed the denial of Mr. Melton=s motion for postconviction relief on his prior violent felony conviction. Melton v. State, 909 SO. 2d 865 (Fla. 1st DCA 2005). Thus Mr.

Melton acknowledges that, presently, he has no legal basis for a claim premised on Johnson v. Mississippi, 486 U.S. 578 (1988).[28]

CONCLUSION

The circuit court erred in denying Mr. Melton relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by first class mail, postage prepaid, to Charmaine Millsaps, Office of the Attorney General, 400 South Monroe Street, PL-01, Tallahassee, FL 32399-6536 this 15th day of February 2006.

CERTIFICATION OF FONT

This is to certify that the Reply Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

D. TODD DOSS
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181

COUNSEL FOR APPELLANT

[28]Of course, contrary to Appellee=s many assertions, this is the only Argument not properly before this Court.