IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-633

RODNEY TYRONE LOWE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, STATE OF FLORIDA

CORRECTED REPLY/CROSS ANSWER BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT IN ANSWER TO ARGUMENT ON CROSS-APPEAL

The lower court properly found that Mr. Lowe is entitled to a new penalty phase. If this court does not grant a new trial to Mr. Lowe, the lower court's granting of a new penalty phase should stand, based on the lower court's Enmund/Tison analysis.

ARGUMENT IN REPLY

ARGUMENT 1

MR. LOWE WAS DENIED AN ADVERSARIAL TESTING BECAUSE THE JURY DID NOT KNOW THAT DWAYNE BLACKMON WAS THE SHOOTER

The State asserts that Mr. Lowe should not receive a new trial despite Dwayne Blackmon's repeated boastful confessions that he and not Rodney Lowe was the shooter in this case. The State's position on these claims in untenable since it ignores the facts elicited at trial and the evidentiary hearing, misstates the law, and fails to conduct an appropriate cumulative prejudice analysis.

A. Ineffective assistance of counsel for failing to investigate Lisa Miller and Ben Carter

The State contends that trial counsel was not ineffective for failing to investigate this evidence that Dwayne Bl ackmon confessed to shooting Donna Burrell. First, the State finds fault with the lower court's determination that trial counsel afforded deficient performance for failing to investigate these witnesses.

The State cites to Wiggins v. Smith, 539 U.S. 510, 533 (2003) for its proposition that counsel is not required to investigate every conceivable line of evidence and that it was perfectly proper for counsel to omit to interview these witnesses. Answer Brief at 17. However the State overlooks the vast factual distinction between the instant cause and the exhaustive mitigation investigation that it claims is not mandated by Wiggins. Here, as the lower court noted:

> According to the evidence produced at the evidentiary hearing on February 11, 2003, Ben Carter was involved in the case at the time of the crime. Ben Carter was also listed on the State's Answer to Notice of Discovery dated August 9, 1990. The investigator for CCRC-South, Jeff Walsh testified at the evidentiary hearing that he found Lisa Miller through Ben Carter.

(PCR. 2045).

The lower court found that because of this, the testimony of Ben Carter and Lisa Miller did not constitute newly discovered evidence, but that counsel's failure to investigate a listed witness and a witness easily reached through him constituted deficient performance. See PCR 2048. The lower court's analysis in this regard is undeniably correct. The Supreme Court has emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

Wiggins v. Smith, 539 U.S. 510, 527 (2003). Furthermore:

> Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation.

Id. at 528, citing Strickland v. Washington, 466 U.S. 668, 690-691 (1984).

The State ignores the fact that applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice heralded by Wiggins as guides to what is reasonable. See Wiggins v. Smith, 539 U.S. at 524. Wiggins is clear that the ABA Guidelines[1] supply the guide to what is reasonable in investigating a capital case.[2]

The State, makes absolutely no mention of the duty to investigate enshrined in the Guidelines. The 2003 Guidelines are explicit that "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Guideline 10.7 (2003). The commentary to the Guideline makes it clear that counsel should seek out and interview potential witnesses including "eyewitnesses or other witnesses having knowledge of events surrounding the alleged offense itself"; and "all sources of possible impeachment

[1] American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)

[2] Although Wiggins refers to the 1989 Guidelines, there is no doubt that the 2003 Guidelines are equally applicable to Mr. Lowe's case even though they were promulgated after his trial occurred. See Rompilla v. Beard, 545 U.S. 374 (2005).

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of defense and prosecution witnesses." Ben Carter clearly fitted into these categories and the lower court correctly determined that his failure to interview Ben Carter, a listed witness, and Lisa Miller who could have been located through Ben Carter, was deficient performance.

The State argues that the lower court was correct in not finding prejudice. The State bases its arguments on its interpretation of the lower court's credibility findings relating to Carter and Miller, and on its finding that there was sufficient evidence to support a conviction of felony murder. However, the State bases its argument entirely on the lower court's original order dated August 8, 2004 in which it denied all post conviction relief. It makes no mention of the order dated March 17, 2005, which granted rehearing to Mr. Lowe as to the penalty phase, based in part upon the testimony of Miller and Carter, as corroborated by the later testimony of Lisa Grone. In that order the lower court noted that "...despite evidence presented at the evidentiary hearing attacking the trustworthiness of Miller and Carter, this court finds their testimony sufficiently credible to warrant consideration by a penalty phase jury." PCR 2583.

Second, any credibility findings by the lower court do not necessarily preclude the grant of a new trial by this court. A proper prejudice analysis focuses on the impact the unpresented evidence might have had on the jury hearing the case. Lisa Miller was not a convicted felon at the time of Mr. Lowe's trial. As she

and her mother Cynthia testified, she was a child in her teens. She would not have been impeached by her subsequent felony convictions had she been presented at Mr. Lowe's capital trial.[3]

The lower court's finding that there was no prejudice because there was evidence to support a conviction predicated on felony murder is also erroneous. The State makes no mention of the fact that this Court has not hesitated to grant a new trial even when the defendant would not be completely exonerated by the unpresented evidence.[4] See also Cardona v. State, 826 So. 2d 968 (Fla. 2002).[5]

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[3] The issue is whether the jury "would reasonably have been troubled" by the withheld information and whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." Kyles v. Whitley, 514 U.S. 419, 441-43 (1995). In Kyles, the lower court found the Brady material unworthy of belief. The Kyles majority, however, determined that this credibility finding was not fatal to the Brady analysis because the lower court's post-trial credibility determination "could [not] possibly have effected the jury's appraisal of [the witness'] credibility at the time of Kyles's trials." Kyles at 450 n.19 (emphasis added). The materiality test for a Brady claim is identical to the prejudice test for a Strickland claim. See Strickler v. Greene, 527 U.S. 263 (1999). As such, the Kyles analysis applies with equal force to a Strickland prejudice analysis.

[4] As this Court has stated, "In effect this means that only one juror finding reasonable doubt would change the verdict." Floyd v. State, 902 So. 2d 775, 785 (Fla., 2005)(discussing prejudice in Brady context).

[5] he facts of the Brady violation in Mr. Lowe's case are however even more egregious than those that prompted relief in Cardona. In Cardona, the jury were neither instructed on a theory of premeditation nor exposed to testimony that Ms. Cardona was the sole actor in the death of the child victim. The issue was purely based on the relative culpability of the two co-defendants. In Mr. Lowe's case, by

Prejudice has been established.

B. The State suppressed evidence that Dwayne Blackmon admitted killing Donna Burrell to Lisa Miller and Michael Lee

The State contends that Mr. Lowe has not proved that the State withheld material exculpatory evidence in violation of Brady[6] that Dwayne Blackmon admitted to Lisa Miller and Michael Lee that he and not Rodney Lowe killed Donna Burrell. Answer Brief at 52 et seq. Regarding Lisa Miller's statement, the State totally disregards the affidavit of Matthew Dixon which gives support to the fact that she made repeated attempts to tell the authorities of Dwayne Blackmo n's admissions to her. Regarding Michael Lee, the State purports to dismiss him as "incredible" and meritless. Regarding his credibility, it is noteworthy that the State actually conceded an evidentiary hearing on this matter but the lower court issued its order granting penalty phase relief and did not hold any hearing on the Michael Lee claim. The lower court did not make any credibility finding as to Michael Lee because it never heard his testimony. It did not address the Brady aspect of this

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contrast, the testimony at trial was elicited to show that Mr. Lowe acted alone and was the shooter. Dwayne Blackmon, the State's star witness, testified that he had no involvement in the crime because he was at home with a sore throat. The impeachment value of Blackmon's sundry confessions is thus even more devastating than in Cardona.

6 Brady v. Maryland, 373 U.S. 83 (1963). Giglio violations also occurred with respect to Michael Lee. Giglio v. United States 405 U.S. 150 (1972).

evidence.

The State also claims, without authority, that the testimony of Michael Lee would be "inadmissible" in a guilt phase trial. The State does not address Mr. Lowe's analogy of his Brady claim with that in Cardona. Just like the testimony of Lisa Miller and Ben Carter, the testimony of Michael Lee would have been admissible as impeachment at the very least:

> …Impeaching [Blackmon] as to these material inconsistencies could have further undermined [Blackmon's] credibility before the jury and thus bolstered the defense's contention that [Blackmon] and not [Mr. Lowe] was the primary actor in the - . . . . death of [the victim].

Cardona v. State, 826 So. 2d 968, 981 (Fla. 2002). See also Fla. Stat. § 90.608(1)(1990).

The State complains that there is no prejudice because of the felony murder jury instruction. However, as this Court has noted:

> ...[a] showing of materiality 'does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal.'" 760 So. 2d at 913 (quoting Kyles v. Whitley, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)).

Cardona, 826 So. 2d at 973-974.[7] Relief is warranted.

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[7] As noted *supra*, the prejudice to Mr. Lowe is greater than that in the Cardona case. In Cardona, the jury were aware of the involvement of both co-

C. Newly discovered evidence

Mr. Lowe presented evidence that Dwayne Blackmon made confessions to Lisa Grone, Maureen McQuade and David Stinsion at various times after Mr. Lowe's trial. The lower court found that it was newly discovered evidence, but that it would not produce an acquittal because of the felony murder jury instruction. Answer brief at 29. However as noted above, the State makes no mention of the fact that the State's theory at trial, as shown by the opening statement and closing argument, as well as the testimony of Blackmon, was predicated purely on a theory of premeditation. The fact that the jury was given a felony murder instruction would have been of little significance. Second, the State attempts to show lack of prejudice in the instant case by analogizing the facts of this case to those adduced in Jones v. State, 709 So. 2d 512 (Fla. 1998). This is utterly misleading. The State makes much of the fact that in Jones, the confessions were all made in prison to witnesses with extensive felony records. Answer Brief at 31. This is not the case here. The only witness who actually testified, Lisa

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defendants in the felony. The issue was one of relative culpability between the two. Here, the jury heard not only that Rodney Lowe was the sole actor, the actual shooter and had premeditated the shooting, but that Dwayne Blackmon had absolutely nothing to do with the crime. The impact of the impeachment of Blackmon's confessions that he was present and was the actual shooter would therefore have been correspondingly greater.

Grone, does not have a lengthy felony record.[8] Blackmon's confession to her was made when they were living together as boyfriend and girlfriend. It was only with reluctance that she came forward. She testified that Blackmon had been good to her. The fact that she was in the Indian River County Jail at the time of the evidentiary hearing is pure coincidence and does not affect her credibility. In any event, the State overlooks the fact that the lower court found her testimony to be credible enough to grant penalty phase relief. The factual scenario is vastly different from that of Jones.

The State also complains that the evidence of Grone, McQuade and Stinson is "classic hearsay" and therefore would not be admissible at a new trial because it would be offered for the truth of the matter asserted. Again the State is assuming facts that are not borne out by the record. First, the State is assuming that Mr. Lowe would want to use the evidence as substantive evidence only. However, assuming that in a new trial the State were to proceed on a premeditation theory of the case, as at the original trial, the State would be clamoring to introduce the hearsay statements of Dwayne Blackmon as an unavailable witness.[9] If the State

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[8] While no credibility findings were made regarding Maureen McQuade or David Stinson, the State appears to be implying that they would be incredible because of their lengthy felony records. In fact there is no indication in the record that they have such records.

[9] Fla. Stat. § 90.804 allows the former testimony of a witness who is found to be

proceeded on this tack, then the testimony of Grone, McQuade and Stinson could be admitted as impeachment evidence. Second, Dwayne Blackmon's statements would fall under the "statement against interest" exception to the hearsay rule, which provides for the admission of such statements if the declarant is unavailable, as Dwayne Blackmon undoubtedly is.[10] Here it is clear that Blackmon's statements were against his interests, because they would have exposed him to criminal liability for the murder of Donna Burrell. Furthermore, they are corroborated by the testimony of Ben Carter, Lisa Miller and the prospective testimony of Michael Lee, all of which confessions occurred closer to the time of trial. The evidence would be admissible for the truth of Blackmon's statements as well as for impeachment purposes.

Even if the Court finds that the new evidence would not be admissible under the "statement against interest" hearsay exception described in § 90.804(4)(2) Fla. Stat., it must consider the constitutional impact of failing to allow Mr. Lowe to

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unavailable because of death to be admitted as a hearsay exception.

[10] Section 90.804(4)(2) describes such statements as "a statement which at the time of its making was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible unless corroborating circumstances show the trustworthiness of the statement.

present this defense at any new trial.[11] The United States Supreme Court has recently re-emphasized that while state and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials, that:

> This latitude has limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or the Confrontation clause of the Sixth Amendment, the Constitution gives criminal defendants a meaningful opportunity to present a complete defense. This right is abrogated by evidence rules that infringe upon a weighty interest of the accused and are "arbitrary or disproportionate to the purpose they are designed to serve.

Holmes v. South Carolina, 126 S. Ct. 1727, 1731 (2006) (citations omitted).

The Holmes opinion refers to a number of cases in which such constitutional violations required that state evidence rules be stricken. These include Chambers v. Mississippi, 410 U.S. 284, 302-303 (1973), in which the State baldly asserts is inapplicable to the instant cause, because in Mr. Lowe's case "the statement's reliability was not established clearly." Answer Brief at 35. On the contrary the record of Mr. Lowe's Rule 3.851 proceedings show that the lower court explicitly found the testimony of Lisa Grone, the affidavits of Maureen McQuade and David

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[11] Although the State asserts that witness Steven Leudtke saw "a lone black male wearing a Gator Lumber uniform" leaving the store, Answer Brief at 33, it is not clear from the record whether Leudtke testified that the man was wearing a Gator Lumber uniform (R. 546 – 573).

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Stinson, and the allegations regarding Michael Lee to be sufficiently credible and consistent enough with each other to warrant the grant of a new penalty phase. See PCR. 2583-2586. The fact that the lower court recognized the indicia of reliability of these witnesses shows that the State's attempt to distinguish Chambers is fruitless.[12] Similar considerations apply equally well to Mr. Lowe's case. While it is true that:

> Evidence tending to show the commission of the crime charged may be introduced by accused when it is inconsistent with and raises a reasonable doubt of his own guilt, but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded.

Holmes, 126 S. Ct. at 1733 (citations omitted), such considerations are not apposite

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[12] In fact this case bears marked similarities to Chambers, which involved a murder in which a third party witness had confessed on three separate occasions to being the actual killer. In the Chambers case, as the United States Supreme Court explained in Holmes:

> ...the State hearsay rule did not include an exception against penal interest, the defendant was not permitted to introduce evidence that [Blackmon] had made self-incriminating statements to three other persons…. [T]his Court held that the exclusion of [the] evidence of [Blackmon's] out of Court statements coupled with the State's refusal to permit [the defendant] to cross-examine [Blackmon], denied him a trial in accord with traditional and fundamental standards of due process.

Holmes v. South Carolina, 126 S. Ct. 1727, 1732 (2006).

here. Blackmon's confessions to the various witnesses occurred over a length of time that encompassed the pretrial period to a date after the initial post conviction evidentiary hearing was held. The probative value of this evidence that Mr. Lowe was not the sole actor and not the shooter in this case is not outweighed by unfair prejudice, confusion or potential to mislead the jury. They are not "remote" and they do not lack connection to the crime. The Due Process clause requires that such evidence be admitted at a new trial.

D. Cumulative prejudice

The State does not address Mr. Lowe's contention that this Court should analyze the prejudice arising from the separate parts of this issue cumulatively other than to state baldly that since there was no prejudice, there could be no cumulative prejudice. See Answer Brief at 36. However, all this evidence must be examined "collectively, not item by item." Kyles, v. Whitley, 514 U.S. at 436. Cumulatively the total picture in this case compels this court to grant Mr. Lowe relief in the instant cause. Mordenti v. State, 894 So. 2d 161, 175 (Fla. 2004). See also State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996). Relief, in the form of a new trial, is warranted.

ARGUMENT II

BRADY AND STRICKLAND VIOLATIONS REGARDING THE STATES CASE THAT MR. LOWE ACTED ALONE AND WAS THE SHOOTER

A. Donna Burrell's dying declaration

The State argues that Mr. Lowe did not prove his claim that Mr. Long was ineffective for failing to elicit evidence of the victim's dying declaration that she did not know the person who shot her. Answer Brief at 39. Significantly, the State does not deny that the victim told Sgt. Ewert in a dying declaration that she did not know the person who shot her. Instead, the State claims that there simply is "no evidence" that the victim knew Mr. Lowe such that she would have recognized him if she had seen him. Answer Brief at 40. However, the State fails to explain how Mr. Lowe's statement to police, in which Mr. Lowe admitted that he was "pretty good friends" with the victim, is not evidence that the victim knew Mr. Lowe such that she would have recognized him. Also, the State's argument is premised on an incorrect reading of the record. Contrary to the State's assertion, Mr. Lowe did indeed know the victim by name.

The State supports its argument in large part on its reading of the transcript of the trial that indicates that Mr. Lowe told police in his taped statement that he did not know the victim by name. Answer Brief at 40. See (R. 705)("MR. LOWE: Now Donna, you know, I didn't really know her by name.") However, the court

reporter at the trial incorrectly transcribed this portion of the tape recording of Mr. Lowe's statement. Contrary to the State's assertion, a review of the actual audiotape submitted into evidence (State's Exhibit 28) as well as the transcript that was provided to the jury at the time of trial and admitted into evidence (State's Exhibit 29) establishes that Mr. Lowe did know the victim by name.

While the court reporter at trial attempted to transcribe the audiotape of Mr. Lowe's statement to police as it was played for the jury, the transcription is not entirely accurate. However, the State admitted into evidence at trial a previously created transcript of Mr. Lowe's statement (State's trial Exhibit 29; R. 684-85) that, per State Attorney Investigator Steve Kerby, "fairly and accurately depict[s] what is said on the tape." (R. 684). Obviously, any differences between the transcript represented by State's Exhibit 29 (which was prepared before trial and was certified by Investigator Kerby as "fairly and accurately depict[ing] what is said on the tape") and the portion of the transcript of the trial that represents the court reporter's attempt to record the substance of the audiotape played during the trial must be resolved in favor of the transcript certified as accurate by Investigator Kerby. Clearly Green and Kerby believed that, based on what Mr. Lowe told them, Mr. Lowe and the victim knew each other and that the victim would have

recognized him.[13] At trial, the State pointedly argued to the jury that Mr. Lowe was "good friends" with the victim. (R. 1081). Additionally, as noted above, the State played and provided the jury the transcript of the interrogation of Mr. Lowe in which State Attorney Investigator Kerby and Detective Green repeatedly made known their belief that Mr. Lowe and the victim would recognize each other. Now, the State tries to argue that there is "no evidence" that Mr. Lowe and the victim were friends. For the State to assert such contradictory theories in a capital case violates all notions of fairness and due process. Cf. Thompson v. Calderon, 120 F. 3d 1045, 1057-59 (9th Cir. 1997) reversed on other grounds Calderon v.

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[13] Contrary to what is contained in the transcript of the trial, the actual conversation between Mr. Lowe and Det. Green and Investigator Kerby pertinent to Mr. Lowe relationship with the victim, Donna Burnell, is in relevant parts as follows:

> SK: So what about this person you're talking about, Donna?
> RL: Well, Donna, you know, you know, I just really know her by name. Somebody said the name, then I recognized who it was and you know, place her name with her face and stuff like that, you know.

(State's trial Exhibit 29; Transcript of interview with Rodney Lowe, pp.10-12)(emphasis added). As the emphasized portion of Exhibit 29 establishes, the trial transcript is incorrect where it reads that Mr. Lowe stated "I didn't really know her by name" (R. 705, lines 6-7). Because the record establishes that Mr. Lowe did in fact know the victim by name, the State's assertion to the contrary does not support its argument.

Thompson, 523 U.S. 538 (1998).[14]

The State is apparently confused when it argues that there is no prejudice and no deficient performance by Mr. Long because there is no evidence that the victim knew her assailant. Answer Brief at 40. The victim in fact told Sgt. Ewert that she did not know who shot her. For the State to suggest that Burrell's repeated "no" does not support the claim because "it is unclear whether she was responding cogently" is plain absurdity. Because the victim and Mr. Lowe were friends, it is reasonably likely that the victim would have recognized Mr. Lowe if Mr. Lowe was the real killer and that she would have so indicated when Sgt. Ewert asked her if she knew her assailant. The fact that she told Ewert that she did not know her assailant is strong evidence that Mr. Lowe did not shoot her.

The possibility that the victim knew Mr. Lowe and, therefore would have recognized him if she saw him, shows the possibility that the person who killed the victim was not Mr. Lowe. This in turn establishes reasonable doubt. Given counsel's failure to elicit this evidence, and in light of the Strickland and Brady violations, there is more than a reasonable probability that the jury would have

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[14] The American Bar Association also recognizes the special place of prosecutors in our constitutional system. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." ABA Model Code of Prof. Responsibility EC 7-13 (1981); see also ABA Standards for Criminal Justice §3-5.8(c)(d)(2d ed. 1981)(prosecutor has responsibility to guard rights of accused and those of society).

concluded that Mr. Lowe did not kill Donna Burnell and acquitted him of first-degree murder.

B. The time analysis

The State argues that Mr. Lowe has failed to establish that Mr. Long rendered deficient performance because, per the State, in light of Mr. Long's closing argument about the videotaped "time studies," "the accuracy of the time studies was irrelevant." Answer Brief at 69. The State's argument is meritless. Mr. Long admitted at the evidentiary hearing that he entirely underestimated the importance of the State's time period analysis and that "he didn't think the State was going to rely on it as much as they did." The State made known explicitly to the jury that the purpose of the time study was to "prove" that, contrary to Mr. Lowe's statements to the police, Blackmon and Sailor could not have been involved in the crime and that, therefore, the only person who could have possibly shot and killed the victim was Mr. Lowe. See (R. 1090). For Mr. Long to have made a closing argument in which he accused the state of picking and choosing aspects of the study but not attacking its accuracy, evidences for all practical purposes a concession on the part of Mr. Long to the State's argument to the jury that Mr. Lowe's statement to police that Blackmon and Sailor were involved was not true. Wiggins is clear that strategic choices made after less than complete investigation are reasonable "only to the extent that reasonable professional

judgments support the limitations on investigation." A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." Wiggins v. Smith, 123 S. Ct. at 2541.

Mr. Long made a decision not to enlist the assistance of an expert in his investigation into the police department's "time analysis." The question is whether this decision by Long was reasonable under all the circumstances. Undeniably it was not. Long's failure to enlist expert assistance, which, as established at the evidentiary hearing, would have provided powerful evidence calling into serious question the accuracy and reliability of the time study, was due to his own admitted underestimation of the importance of the evidence and his incorrect assessment that the State was not "going to rely on it as much that they did." His decision to forego the aid of an expert and to rely solely on his cross-examination is not objectively reasonable. The only information Mr. Long elicited on cross-examination was the existence of shorter routes that, by implication, would have allowed Mr. Lowe to more quickly pick up and later drop off Blackmon and Sailor. The weakness with this line of inquiry was that the route the detectives drove was, as far as the jury knew, based on the route Mr. Lowe described in his own statement. Therefore, to the jury, the fact that there may have been other, shorter routes, had absolutely no impact on the jury's view at trial of the accuracy of the time period analysis. For this reason, Mr. Long's decision to rely on his cross-

examination on this issue in lieu of hiring and utilizing expert assistance was not objectively reasonable under Strickland.

Mr. Long obviously did not even consider the possibility that the results of the study was open to attack because he testified that he was not sure what he could have done. What he could have done in this capital case was to consult an expert. See Wiggins.

The State argues that even if counsel had attacked the reliability of the State's evidence utilizing experts such as Mr. Felicella, there is not a reasonable probability that the "verdict would have been different." Answer brief at 70. The State first asserts that Mr. Lowe failed to establish that the time study done by police was not reliable. However, the State does not attack or take issue with Mr. Felicella's findings that, based on his review of the evidence and his knowledge and expertise, the time period analysis conducted by police was not valid due to the detectives' failure to follow accepted protocol, failure to properly document the analysis, and due to inconsistencies regarding times and speed. Instead, the State complains only that Mr. Felicella did not conduct a time study of his own and that, as part of his investigation into the reliability of the police study, he consulted internet-based map services. Mr. Felicella concluded that due to the unscientific manner in which police conduct their "study," there existed serious doubt as to the accuracy of the results. The State presented no evidence to rebut Mr. Felicella's

conclusions.

The State argues that Mr. Lowe has not established the prejudice prong of Strickland because Mr. Felicella did not conduct a time study on his own. As Mr. Felicella testified, he could not have conducted such a study because, the examiner would have to travel as fast as possible and for Mr. Felicella to have done so would have raised serious practical concerns. Indeed, Mr. Felicella testified that one of the serious problems with the police study was that the detectives traveled either with the flow of traffic or only a little above posted speed limits and failed to take advantage of the opportunity to travel fast along open stretches of highway. As he explained, because the purpose of the police study was to prove, as the prosecutor argued to the jury in closing (R. 1090), that Mr. Lowe could not have picked up Blackmon and Sailor and committed the crime with them as he told police in Lowe's taped statement within the 36 minute time frame, a study conducted using normal speeds and normal driving completely omits the possibility that persons fleeing from an armed robbery in which someone has been shot would be traveling well-above normal speeds and without due regard to the rules of the road. This point also highlights Mr. Felicella's point of the importance of documenting the time spent stopped behind traffic or at traffic control devices - which the police did not do.

The State also complains that Mr. Felicella, as part of his evaluation of the

police study, received input from internet-based map services. The State did not object to, and the Court did not exclude, Mr. Felicella's testimony regarding the 33 to 39 minute time frames gathered by Mr. Felicella from the internet-based services [15]

C. Danny Butts' statements

The State argues that Mr. Lowe's claims that the jury never knew of critical exculpatory evidence that the child eyewitness, Danny Butts, indicated that more than one person was involved in the crime due to trial counsel's ineffectiveness and the State violation of Brady should be rejected. The State first argues that the ineffectiveness portion of the claim is procedurally barred because this Court on direct appeal affirmed the trial court's ruling that Danny Butts was incompetent to testify. The State then attempts to address the merits of Mr. Lowe's claim by asserting that the finding that Danny was incompetent to testify renders the "excited utterance" hearsay exception inapplicable. Both arguments are without

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[15] The State does not argue that this testimony by Mr. Felicella was inadmissible or would be inadmissible at trial. While Mr. Felicella testified that he would not use the internet-based map service time results as a substitute for doing a proper time study, he utilized the results as one of his many reference materials and relied on these results to give him a general idea of an average run time under normal speed and conditions. See § 90.704, Fla. Stat.; Houghton v. Bond, 680 So. 2d 514 (Fla. 1st DCA 1996)(no error in permitting expert to rely on inadmissible governmental study produced by the National Highway Traffic Safety Study which contains crash data on cars).

merit.

The trial court's finding that Danny Butts was incompetent to testify was based solely on one statement made by the child. The State fails to address the fact that there existed two more, separate, but consistent statements by the child indicating that more than one person was involved in the crime. These statements were never considered by either the trial court or the lower court. The State fails to address how the fact that the child made additional, highly consistent statements would not be relevant to the trial court's decision on whether or not the child was competent to testify. The child's unwavering consistency on this critical fact strongly suggests that the child was competent. Had the child not had the ability to accurately describe the tragic event on the issue of the number of people involved, he very likely would not have made three different statements separated in time that were all consistent in describing the fact that he saw that more than one person. Furthermore, the statement that the State knew about but never disclosed to the defense was astonishingly accurate in describing both the number and the location of shots fired that struck the victim. In that particular statement, not only did the child describe two men being involved, but he indicated that his mother was shot three times, twice in the "face" and once in the chest. See Defendant's Exhibit 18. His description of the number and location of the shots is very accurate. See (R. 609-27) - (trial testimony of Dr. Hobin describing number and

location of bullet wounds). This fact provides compelling evidence that his three statements regarding the event he witnessed were accurate, reliable, and consistent.

The State argues that Mr. Lowe has not shown prejudice because the statement by Butts was not reliable and therefore inadmissible. This begs the question of whether or not the court would have still found the child not competent had the court known of the two additional statements. A child who was incapable of relating what he saw would not have provided three separate yet consistent statements all indicating that more than one person was involved and could not have provided a statement which accurately describes not only the number of times his mother was shot, but the locations of the bullet wounds. The trial court's finding that the child was not competent to testify simply cannot withstand the existence of the two additional statements, one that trial counsel failed to call to the court's attention and the other that the State knew about but failed to disclose to the defense.

With regard to the Brady portion of the claim, the State apparently concedes that the note representing the third consistent statement by the child as represented in the note contained in the State Attorney's Office file indicating that "two (2) men shoot Mommy 3x [-] 2x in face 1x in chest" is favorable to the defense and was not disclosed to the defense by the State. The State concedes that this statement was consistent with the other statements made by the child. See Answer

Brief at 57. The State instead repeats its argument that because the court found the child not competent to testify, this evidence would not have been admissible at trial.

D. Stephen Leutke

The State asserts that Mr. Lowe has established neither deficient performance nor prejudice with regard to his claim that trial counsel was ineffective for failing to cross-examine Stephen Leutke effectively. The State bases its argument on the fact that the jury did "not use a lack of identification in determining guilt." Answer Brief at 46. However the State ignores Mr. Lowe's arguments made elsewhere in his initial brief and herein which show that but for the cumulative effect of trial counsel's other unprofessional errors and the Brady material witheld by the State there would not have been a conviction.[16] But for counsel's ineffectiveness this would not have been so. The State ignores the cumulative effect of this omission in its analysis.

ARGUMENT III

FAILURE TO IMPEACH DWAYNE BLACKMON

A. Trial counsel's failure to impeach Blackmon with his affidavit

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[16] This is especially true given the State's overwhelming reliance on the theory of the crime advanced during opening statements and closing arguments that Mr. Lowe acted alone and was the shooter. See Argument 1 *supra*.

The State suggests that the impeachment value of Blackmon's affidavit is "questionable", Answer Brief at 25, and that even if counsel had done so there was no prejudice. The State however fails to address Mr. Lowe's argument that the State's entire theory of the case was predicated on Mr. Lowe acting alone and being the shooter. See Argument 1. Given Blackmon's status as the State's star witness, the suggestion that he was less than truthful in his testimony would have provided valuable impeachment, not only regarding the facts of the affidavit but also of his veracity in general.

The State suggests that Long's failure to impeach Blackmon was objectively reasonable under the Strickland deficiency prong because, had he done so, the State could have established that the public defender, coerced Blackmon to sign the affidavit" and introduced Blackmon's statement to ASA Vaughn "to refute any impeachment." See Answer Brief at 27. The State then attempts to argue that Mr. Lowe was not prejudiced by Long's failure to impeach Blackmon with the affidavit. The State's argument fails on numerous levels.

First of all, Mr. Long never testified that this was indeed the reason why he did not attack Blackmon's credibility using the affidavit. In fact, Mr. Long could not recall why he did not raise the issue of the affidavit in his cross-examination of Mr. Blackmon nor could he recall even considering whether or not he should have used it. He further testified that any reason that he could think of now as to why he

did not use the affidavit to establish that Blackmon was not credible would "just be total speculation." See T. 482-485. Thus there is no competent substantial evidence to conclude that his failure to do so was grounded on any strategic or tactical reason. Therefore he rendered deficient performance under Strickland.

Additionally, even if the State's suggested "strategy" was the reason Long failed to impeach Blackmon, it was not an objectively reasonable course of action because Blackmon's credibility would have been seriously impugned. Any "recantation" by Mr. Blackmon of the facts he swore to in the affidavit itself seriously undermines his credibility. The possibility that Blackmon would accuse Mr. Unruh of wrongdoing if Mr. Long confronted him with his affidavit during cross-examination is irrelevant. It is not an objectively reasonable basis for Mr. Long to ignore both the undeniably damning nature of the affidavit and subsequent sworn statement against Blackmon's credibility.

The State in effect is arguing that Blackmon's statement to ASA Vaughn not only nullifies any impeachment value of the affidavit, but also makes the public defenders (Unruh and Barnes) look bad and, therefore, through association, reflects badly on Mr. Lowe. However, Blackmon's statement to Vaughn is hardly a recantation and, rather than rendering Blackmon unimpeachable, would have had the opposite effect by entangling Blackmon in an even thicker web of deceit. Mr. Long could also have impeached Blackmon with the fact that in November 1990,

then-Assistant State Attorney Dan Vaughn offered Blackmon immunity from prosecution to persuade him to recant the affidavit as false. (PCR 1523). Given Blackmon's evidentiary hearing testimony, it is very likely, and certainly quite reasonable to assume, that no jury would believe anything Blackmon said.[17]

The State's argument that Mr. Lowe was not prejudiced by Mr. Long's failure to impeach Blackmon with the affidavit is simply not persuasive. The State's star witness, Blackmon, told the jury that Mr. Lowe admitted to acting alone and shooting the victim. None of the other evidence alluded to by the State would not have lessened the devastating impact on Blackmon's credibility had Mr. Long cross-examined him regarding the affidavit. Had Mr. Long impeached Blackmon with the affidavit, the jury likely would have found Blackmon to be completely untrustworthy and, as a result, disbelieved Blackmon's testimony that Mr. Lowe admitted to acting alone and shooting the victim.

B. The State withheld information that Blackmon was a paid police informant

The State complains that Mr. Lowe fails to show how evidence that

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[17] Furthermore, at the time of trial, the public defender's office did not represent Mr. Lowe. The State's argument that the possibility of Blackmon impugning the character of Mr. Unruh and Mr. Barnes by claiming that they "coerced "Blackmon's to sign the affidavit, even if believable, would not have been used by the jury to discredit Mr. Lowe. Neither Mr. Lowe nor Mr. Long were included in any of Blackmon's accusations of being "tricked" into swearing to a false affidavit.

Blackmon was a paid police informant was "suppressed or favorable to the defense" Answer Brief at 55. The State's argument lacks merit because Mr. Lowe presented uncontroverted testimony from witness Carter and an affidavit from witness McQuade that Blackmon was a paid confidential informant for the Sebastian Police Department from approximately 1989 to 1992. (PCR 2497; T. 775, 1245).[18] The State's argument that Mr. Lowe presented "no evidence to support this claim" is refuted by the record.

ARGUMENT IV

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IRRELEVANTAND INFLAMMATORY EVIDENCE

A. The PSI report, the sunglasses and the letters

The State argues that this Court's finding on direct appeal that any error in admitting into evidence the items contained in the box was harmless establishes that there can be no prejudice to Mr. Lowe caused by counsel's failure to have excluded from evidence the irrelevant sunglasses. The State's argument fails because it is premised on an incorrect reading of the trial record that the sunglasses

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[18] The State called numerous law enforcement officers at the evidentiary hearing to testify in rebuttal on other issues, but presented no evidence to rebut Carter's testimony on this point. Not once has the State ever argued or even suggested that Blackmon was not an informant for the police. It is notable also that during his trial testimony, Blackmon testified that he was "good friends" with several police officers.

were one of the items contained in the box at the time the box was admitted into evidence.[19]

As the record establishes, Deputy Sinclair testified that, in his search of Mr. Lowe's residence, he found a newspaper inside "a box containing personal paperwork of the Defendant." (R. 507-08). Sinclair testified that investigators, "took [possession of] the whole box of his personal paper work and the [news]paper was in it." (R. 509). Sinclair testified that the box was made of cardboard, about ten inches high and was found on the kitchen table. (R. 522-24). On cross-examination, Sinclair admitted that he did not know who put the sunglasses in the box, that other people lived in the house, and that Blackmon and Sailor were present in the house when they executed the search warrant. (R. 524-25). In apparent response to the fact that the cross-examination of Sinclair suggested that the sunglasses could have belonged to or been placed in the box by

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[19] The trial record establishes that the sunglasses were not one of the items contained in the box when the box was proffered for admission and thereafter admitted into evidence. Because the sunglasses were admitted into evidence separately and were not one of the items inside the box when the box was proffered for admission and ultimately admitted, this Court's discussion of the prejudicial nature of the items continued in the box necessarily does not in any manner infer that the admission into evidence of the sunglasses was not prejudicial or was harmless. To the extent that the language of this Court's opinion on direct appeal suggests that the sunglasses were one of the items contained in the box at the time of trial when the box was offered and accepted into evidence, the opinion is plainly incorrect.

someone other than Mr. Lowe, including Blackmon or Sailor, the State, - much later in the trial (during the testimony of Patricia White), moved to admit the box into evidence in order to suggest that the sunglasses, which had previously been admitted into evidence, belonged to Mr. Lowe. (R. 863-66).[20]

As for the argument raised for the first time on direct appeal that the items in the box as the box was admitted at trial were unduly prejudicial, the Court held that the argument was not preserved for appellate review because Mr. Long did not make that objection. The Court also held that, even if this argument had been preserved, any error in admitting the items in the box was harmless "given the record in this case." Lowe v. State, 650 So. 2d 969, 974 (Fla. 2004). The State's reliance on this holding by this Court for the proposition that the issue of prejudice to Mr. Lowe caused by the admission of the sunglasses has been decided on direct

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[20] This Court's finding that any error in admitting the items contained in the box was harmless, has nothing to do with the sunglasses. The issue on direct appeal was not whether it was error for the trial court to have admitted the sunglasses. Mr. Long did not object to their admission. The issue on direct appeal was whether reversible error occurred when the items inside the box at the time of trial were admitted over Mr. Long's relevancy objection. Mr. Lowe's appellate counsel on direct appeal argued not only that the contents of the box were irrelevant but also unduly prejudicial. This Court first held that the trial court properly admitted the box over Mr. Long's relevancy objection because the contents of the box suggested that Mr. Lowe owned the items in the box and, therefore, by extension, owned the sunglasses, which had allegedly been inside the box at one time. Therefore, per this Court, the items in the box were relevant to prove Mr. Lowe's ownership of the sunglasses.

appeal ignores the fact that the Court's finding of harmless error was not directed to, the sunglasses. Therefore, because nothing in the Court's opinion on direct appeal addresses the issue of prejudice caused by the sunglasses, there can be no procedural bar.

As for Mr. Lowe's claim that Mr. Long was ineffective for failing to take the proper steps to assure that the jury, especially during the guilt-innocence phase of the trial, would not be exposed to the PSI and letters, the State argues that the claim is procedurally barred because the issue was decided on direct appeal. The State also argues that this Court's conclusion on direct appeal that the admission of the PSI and letters was harmless forecloses any relief.[21] The instant claim is not procedurally barred because the record in this case has now been expanded to include critical exculpatory and impeachment evidence that the jury never learned due to trial counsel's ineffectiveness and the State's Brady violations. Therefore, this is not simply a reassertion of Mr. Lowe's original argument on direct appeal. The opinion was based only on the trial record and did not include all the other

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[21] On direct appeal, Mr. Lowe argued that the items in the box were not relevant (which had been trial counsel's objection) and that the items were unduly prejudicial. As noted above, this Court held 1) that the items were relevant to infer ownership of the sunglasses (which had been admitted into evidence without objection separately before the box was offered) and 2) that the argument that the items were unduly prejudicial had not been preserved for review and, even if it had, any error would have been harmless "given the record in this case " Lowe v. State, 650 So. 2d at 974 (emphasis added).

exculpatory and impeachment evidence that the jury never knew about.[22]

It does not matter whether or not Long knew that the PSI and letters were in the box. If he knew about it, he failed to make the proper objection. If he did not know about it, he should have taken the time to familiarize himself with the proffered evidence such that he would have learned about it so he then could have made the proper objection.

B. The unredacted portions of Mr. Lowe's statement to police

The State argues that Mr. Lowe's claim that trial counsel was ineffective for failing to object to numerous statements contained in his statement to police is procedurally barred because the claim was raised and rejected on direct appeal and because on direct appeal the Court held that no fundamental error occurred when the jury heard this evidence. The claim is not procedurally barred because that Mr. Long was ineffective in failing to object to the offending evidence. The fact that admission of this evidence did not rise to the level of fundamental error is not determinative because this Court must analyze prejudice with all the other instances of ineffective assistance and violations of Brady. See State v. Gunsby.

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[22] This Court must assess the instant claim in conjunction with all the other evidence the jury never learned. See State v. Gunsby. Given the other evidence presented at the evidentiary hearing which this Court of course did not consider on direct appeal - this claim is not procedurally barred. Had the jury known of all the evidence presented at the evidentiary hearing, it cannot be said that the PSI and the letters were harmless beyond a reasonable doubt.

When prejudice is assessed in this light, there is a reasonable probability that the outcome of both the guilt-innocence phase and penalty phase would have been different.

C. The videotaped police "re-enactment" of the crime

See Argument II c supra.

ARGUMENT V

FAILURE TO CHALLENGE THE ADMISSION OF MR. LOWE'S STATEMENT AND FAILING TO IMPEACH PATRICIA WHITE

The State argues that the issue of Patricia White's recantation of her previous testimony is procedurally barred because the issue was addressed on direct appeal. Answer Brief at 72. This argument is without merit because White's evidentiary hearing testimony constitutes newly discovered evidence establishing that police effectively employed White as an agent to interrogate Mr. Lowe after he had invoked his right against self-incrimination. The issue is not procedurally barred because the claim is grounded on new evidence, White's recantation. Similarly, Mr. Lowe's claim that trial counsel was ineffective is not procedurally barred. The State ignores the substance of the claim, which is that had counsel impeached White with her deposition testimony, the trial court would have granted the motion to suppress Mr. Lowe's statement. Trial counsel was ineffective when he failed to confront her with this fact when she testified at the motion to suppress

hearing. Relief is warranted.[23]

ARGUMENT IN ANSWER TO ARGUMENT ON CROSS APPEAL

THE LOWER COURT DID NOT ERR IN GRANTING PENALTY PHASE RELIEF BASED ON NEWLY DISCOVERED EVIDENCE AND INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The lower court granted a new penalty phase to Mr. Lowe, which the State has cross appealed. Mr. Lowe at the outset submits that the Court need not reach the merits of this appeal because his own appeal for a new trial should be granted. However if the Court is not persuaded by Mr. Lowe's arguments regarding his guilt phase issues, the lower court's order granting a new penalty phase should stand for the following reasons.

The lower court based its grant of a new penalty phase on the evidentiary hearing testimony of Ben Carter and Lisa Miller,[24] and on the testimony of Lisa Grone.[25] The State's complaints about both of these findings are without merit.

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[23] The State misses the entire point of Mr. Lowe's ineffective assistance claim, which is that in her deposition given prior to the hearing on the motion to suppress Mr. Lowe's statement, White maintained that police asked her to talk to Mr. Lowe. Contrary to the State's argument, her evidentiary hearing testimony is not a mere recantation, but conforms to her original testimony in her deposition.

[24] The lower court found this testimony supported the finding that trial counsel was ineffective at Mr. Lowe's penalty phase.

[25] The lower court found that Lisa Grone's testimony was newly discovered evidence.

Regarding the ineffective assistance of counsel claim, the lower court found that:

> At the evidentiary hearing, both Miller and Carter testified that Blackmon admitted to participating in the attempted robbery and to shooting the victim. Although the testimony of these two witnesses is inconsistent on some details of the crime and differs in describing some of the circumstances surrounding Blackmon's admissions, the Court finds the testimony consistent on issues material to the weighing of aggravating and mitigating factors. Furthermore, despite evidence presented at the evidentiary hearing attacking the trustworthiness of the testimony of Miller and Carter, the Court finds their testimony sufficiently credible to warrant consideration by a penalty phase jury and the trial court in determining the defendant's sentence.
>
> Both Miller and Carter testified that Blackmon told them that three men including Blackmon and the Defendant were at the store at the time of the attempted robbery; and that Blackmon, not the Defendant, shot the victim. Although Blackmon denied these admissions at the evidentiary hearing, this undiscovered testimony rebuts Blackmon's trial testimony relied upon by the penalty phase jury and the trial court to determine the extent of the Defendant's role in the attempted robbery and murder. Consequently, this undiscovered testimony undermines the jury's recommendation of death and the trial court's findings in the sentencing order (a) that the Defendant acted alone, and (b) that two of the mitigating factors were not established by the evidence. Therefore a new penalty phase is required because there is a reasonable probability that the balance of aggravating and mitigating factors would have been different. Rose v. State, 675 So. 2d 567, 570-571 (Fla. 1006).

(PCR. 2583).

The State does not challenge the fact that trial counsel rendered deficient

performance in this regard. However it complains that the lower court did not utilize the correct standard for assessing prejudice in this context. See Answer brief at 83. The State then goes off into a lengthy rehash of the purported "facts" of the crime as adduced at the trial and evidentiary hearing to support its contention that the outcome of the penalty phase would not have been different. However it is the State that is in error in this analysis. The State asserts that 'whether counsel was ineffective under Strickland is reviewed de novo" Answer Brief at 77. While it is certainly the case that ineffective assistance of counsel is a mixed question of law and fact and as such reviewed de novo, this Court has long deferred to the trial court's findings of fact in this context. As this Court noted:

> So long as the [trial court's] decisions were supported by competent substantial evidence, this Court will not substitute its judgment for the trial court on questions of fact and likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.

Porter v. State, 788 So. 2d 917 (Fla. 2001).

Here, the lower court made specific credibility findings with regard to the testimony of Lisa Miller and Ben Carter. It found that the testimony of both "rebuts Blackmon's trial testimony relied upon by the penalty phase jury and the trial court to determine the extent of the Defendant's role in the attempted robbery

and murder. Consequently this undiscovered testimony undermines the jury's recommendation of death...." (PCR. 2583). It is precisely the impeachment value of this testimony that casts doubt upon the veracity of Blackmon. This Court should give due deference to the lower court's factual determination. It cannot be credibly disputed that the evidence that Blackmon admitted to killing the victim would have had a significant impact on the jury's decision whether or not to recommend the death penalty. Indeed, the trial court specifically instructed the jury prior to its penalty phase deliberations: "Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings." (TRT 1304)(emphasis added).

Moreover, the State ignores the fact that for purposes of the penalty phase, evidence that Blackmon admitted to killing the victim would have been admissible as substantive evidence, not just as impeachment evidence. Section 921.141(1) provides that, in the penalty phase proceedings of a capital trial:

> [E]vidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Fla. Stat. § 921.141(1)(1989)(emphasis added); See Chandler v. State, 534 So. 2d 701 (Fla. 1988). Lisa Miller's and Ben Carter's testimony that Blackmon admitted to them that he - and not Mr. Lowe - confronted the victim, demanded money and then shot her would have been admissible and considered by the jury in the penalty phase as substantive evidence "relevant to the nature of the crime." Specifically, relevant to establishing that Mr. Lowe was far less culpable than portrayed by the prosecution because, contrary to the State's theory, Mr. Lowe did not shoot and did not kill the victim.

The State also overlooks the fact that the trial court explicitly relied upon its conclusion that Mr. Lowe acted alone as a basis to reject two separate mitigating factors considered by the trial court: (1) that a death sentence would be disproportionate because others were involved in the crime; and (2) that Mr. Lowe was an accomplice in a capital felony committed by another person and his participation was relatively minor. (R. 1854, 1855). Most significantly, there can be no credible argument disputing that, even if Mr. Lowe was an accomplice and went into the store, if Blackmon, and not Mr. Lowe, was the person who confronted the victim and shot her multiple times, Mr. Lowe's death sentence is disproportionate in light of the fact that Blackmon was never even charged with a crime. Regardless of which aggravators the jury was instructed on, and regardless

of which aggravators the trial court used to support the death sentence, there can be no credible argument that there is not a reasonable probability of a different outcome had the jury believed that Blackmon had shot and killed the victim and not Mr. Lowe, especially when Blackmon was the State's star witness and was not charged with any crimes. See e.g. Ray v. State, 755 So. 2d 604, 611 (Fla. 2000) ("Where a more culpable co-defendant receives a life sentence, a sentence of death should not be imposed on the less culpable defendant.")

The case of State v. Parker, 721 So. 2d 1147 (Fla. 1998), illustrates how this Court overlooked the law in denying Mr. Lowe penalty phase relief. In Parker, Mr. Parker was convicted of kidnapping, robbery with a firearm, and first-degree murder. The evidence presented at trial showed that Parker and three other defendants, Bush, Cave, and Johnson, robbed a convenience store. Money was taken from the store and the female store clerk (the victim) was also taken from the store and placed in Bush's car. The victim was later found dead; she had been shot and stabbed. Death was caused by a gunshot wound to the back of the head. Bush's girlfriend testified that Parker had admitted to her that he shot the victim and that Bush had stabbed her. Parker's pre-trial statements to police regarding the crime were also introduced and Parker also testified at trial. Just like Mr. Lowe did in his pre-trial statements, Parker implicated himself in the crimes but denied being the shooter. Parker was sentenced to death for the first-degree murder conviction,

following an eight-to-four jury recommendation.

The state failed to disclose to Parker evidence known by law enforcement that a jail inmate who was housed with two of the co-defendants (Bryant and Cave) prior to the trial overheard them talking and that, per their conversation, Bush stabbed the victim and Cave shot her. Upon Parker's motion for post-conviction relief, the trial court vacated his death sentence and the state appealed. This Court agreed that Parker's death sentence was properly vacated due to the fact that the penalty phase jury did not know about the evidence that suggested that Parker was not the person who actually killed the victim. Because the state conceded that it had suppressed the evidence and that counsel could not have discovered it through the use of due diligence, the only issue before the court was, under the prejudice prong required to be shown in Brady claim, "Whether a reasonable probability exists that the outcome of Parker's penalty phase proceeding would have been different had the evidence been disclosed." It is well-established that the prejudice prong in Brady is the same as the prejudice prong in Strickland.

This Court concluded in Parker that confidence in the jury's recommendation was undermined. The Court noted that the evidence that the co-defendants admitted to committing the physical act of killing the victim and effectively exonerating Parker from doing so, could have been used to impeach the co-defendant's girlfriend who provided the only direct evidence that Parker was

the shooter. The Court also noted, and considered in concluding a new penalty phase was required, the existence of previously determined error which had been treated as harmless on direct appeal.

Like Parker, the only direct evidence that Mr. Lowe was the shooter came from the testimony of a single, questionable witness - Blackmon. In fact, Blackmon had a much stronger reason to lie than the girlfriend in Parker because, according to his statements to Lisa Miller and Ben Carter, Blackmon confronted the victim, demanded money, and then shot her. The girlfriend in Parker was simply covering for her boyfriend.

In another analogous case, Green v. Georgia, 442 U.S. 95 (1979), the evidence at trial indicated that the defendant and a co-defendant abducted the victim and, either in concert or separately, raped and murdered her. During the second phase penalty proceedings, the trial court, citing the hearsay rule, prohibited the defendant from introducing evidence in the form a witness who would have testified that the co-defendant admitted to him that the co-defendant killed the victim after ordering the defendant to run an errand. The United States Supreme Court held that the trial court denied the defendant a fair sentencing proceeding because, "The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial." Green, 442 U.S. at 97 citing Lockett v. Ohio, 438 U.S. 586, 604-05 (1978)(plurality opinion) and 613-616 (opinion of

BLACKMUN, J.). The Court noted that the statement was made by the co-defendant against his interest and that there was no reasons to believe he had any ulterior motive in making it. Green, 442 U.S. at 97.

The State's blatant disregard of the probable effect on the jury's penalty phase recommendation caused by counsel's failure to present evidence that Blackmon admitted to killing the victim not only is contrary to clearly established law governing review of ineffective assistance of penalty phase counsel claims, but also adversely implicates Mr. Lowe's Eighth Amendment right to a non-arbitrary and non-capricious capital sentencing proceeding. In Lockett, the United States Supreme Court held:

> Although legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases, the plurality opinion in Woodson, after reviewing the historical repudiation of mandatory sentencing in capital cases, 428 U.S., at 289-298, concluded that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id., at 304.
>
> That declaration rested "on the predicate that the penalty of death is qualitatively different" from any other sentence. Id., at 305. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed. The mandatory death penalty statute in Woodson was held invalid because it permitted no consideration of "relevant facets of the character and

record of the individual offender or the circumstances of the particular offense." Id., at 304. The plurality did not attempt to indicate, however, which facets of an offender or his offense it deemed "relevant" in capital sentencing or what degree of consideration of "relevant facets" it would require.

We are now faced with those questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques -- probation, parole, work furloughs, to name a few -- and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record

> and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Lockett v. Ohio, 438 U.S. 586, 604-05 (1978)(plurality opinion)(footnotes omitted)(emphasis. added). Evidence that Blackmon admitted to shooting and killing the victim constituted mitigation that the jury did not know about as a direct result of his trial counsel's deficient performance. Lockett; Hess v. State, 794 So. 2d 1249, 1269 (Fla. 2001)(Lockett requires "the admission of evidence that establishes facts relevant to the defendant's character, his prior record, and the circumstances of the offense in issue."); see also Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990)(receded from in part); Trease v. State, 798 So. 2d 1050, 1055 (Fla. 2000). Evidence that Blackmon admitted to shooting and killing the victim constituted a critical "circumstance of the offense" that the jury may have used to justify a life recommendation. The State has simply failed to conduct a critical analysis on the probable effect on the jury's penalty phase recommendation. If the jury believed that Mr. Lowe was involved in the crime but that he was not the person who shot the vi ctim multiple times, there is much more than a reasonable probability that the jury would have recommended a life sentence. A new penalty phase is clearly warranted.

The State also complains that the lower court was incorrect in its newly discovered evidence analysis regarding the testimony of Lisa Grone. The lower court found that the testimony of Ms. Grone that before Blackmon died in August 2003, he his confession that he was the shooter was credible. The court also found that because this "[E]vidence could not have been known to defense counsel prior to May 2004, it could not have been discovered by exercise of due diligence prior to that date and therefore it constitutes newly discovered evidence." See PCR. 2584.

The State asserts that the lower Court misapplied the standard for granting relief set forth in Jones v. State, 709 So. 2d 512 (Fla. 1998). In Jones this Court held:

> Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994).
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Jones [v. State], 591 So. 2d at 911, 915 ["Jones I"]. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id. at 916.

Jones v. State, 709 So. 2d at 521.

In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. See Johnson v. Singletary, 647 So. 2d 106, 110-11 (Fla. 1994); cf. Bain v. State, 691 So. 2d 508, 509 (Fla. 5th DCA 1997). Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. See Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994). The trial court should also determine whether the evidence is cumulative to other evidence in the case. See State v. Spaziano, 692 So. 2d 174, 177 (Fla. 1997); Williamson, 651 So. 2d at 89. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

In light of the Jones criteria, had the evidence that Blackmon admitted to killing Donna Burnell been presented at trial, the jury, at the very least, would have recommended a life sentence. Had the jury recommended a life sentence, the trial court would have been required to impose a life sentence because evidence that Blackmon - and not Mr. Lowe - shot and killed the victim would have constituted a reasonable basis to support a life recommendation. Under these circumstances, the trial judge could not have lawfully overridden the jury's life recommendation. See

Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)("In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."); Keen v. State, 775 So. 2d 263, 283 (Fla. 2000)(" 'In other words, we must reverse the override if there is a reasonable basis in the record to support the jury's recommendation of life.'") Evidence that Blackmon admitted to shooting the victim would have constituted a reasonable basis to support a life recommendation from the jury such as to prohibit the trial court from overriding the jury's recommendation.

In light of the newly discovered evidence, and also based upon the previously established evidence set forth in the evidentiary hearing testimony of Miller and Carter, as well as the evidence of Maureen McQuade, David Stinson and Michael Lee, the lower court's grant of a new penalty phase must stand because, had the jury known that Dwayne Blackmon - on at least two occasions - admitted to shooting and killing the victim, the jury probably would have recommended a life sentence. See Jones, 591 So. 2d at 915. This is especially true when considering the newly discovered evidence in conjunction with the ineffective assistance of counsel discussed supra. If the jury did not believe that Rodney Lowe acted alone and shot and killed the victim, the jury probably would not have recommended death and the trial court would not have - and could not

legally have - sentenced Mr. Lowe to death. This Court should uphold the vacation of Mr. Lowe's death sentence.

It cannot be credibly disputed that the evidence that Blackmon admitted to killing the victim would not have had a significant impact on the jury's decision whether or not to recommend the death penalty. Indeed, the trial court specifically instructed the jury prior to its penalty phase deliberations: "Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings." (R. 1304). Moreover as noted supra in the ineffectiveness discussion, for purposes of the penalty phase, evidence that Blackmon admitted to killing the victim would have been admissible as substantive evidence, not just as impeachment evidence. Lisa Grone's testimony that Blackmon admitted to them that he shot the victim would have been admissible and considered by the jury in the penalty phase as substantive evidence "relevant to the nature of the crime." Specifically, it was relevant to establishing that Mr. Lowe was far less culpable than portrayed by the prosecution because, contrary to the State's theory, Mr. Lowe did not shoot and did not kill the victim.

Based upon the evidence presented by the State during the guilt-innocence phase of the trial and the prosecutor's arguments to the jury, the jury necessarily concluded that Mr. Lowe acted alone and therefore necessarily was the person who

actually shot and killed the victim. During penalty phase closing arguments, the prosecutor urged the jury to recommend death based on the evidence presented during the guilt-innocence phase that Mr. Lowe shot the victim. Not once did the prosecutor ever suggest to the jury that if the jury believed that others were involved and that Mr. Lowe was not the shooter, the jury should still recommend death. In its sentencing order, the trial court specifically found that Mr. Lowe acted alone and used this finding to support its decision to impose the death penalty. (R. 1852-53, 1854, 1855).

The newly discovered evidence directly contradicts Dwayne Blackmon's testimony that he had nothing to do with the crime. The State relied on Blackmon's testimony to establish not simply that Mr. Lowe acted alone and shot and killed the victim, but also to establish: (1) that prior to the crime, Mr. Lowe "talked about he would shoot somebody"; (2) that close to a month prior Fto the crime, Mr. Lowe deliberately sought out a handgun; (3) that he acted cold and callous about what he allegedly did (allegedly telling Blackmon that he "shot the whore three times" but didn't even get a pack of cigarettes; (4) that Mr. Lowe was the leader of the prior attempts by Lowe, Blackmon, and Sailor to rob the store and that Blackmon was just the driver and did not want to participate in the plan; and (5) that the attempted robbery was exclusively Mr. Lowe's idea contrived to get money for Lowe to pay his rent. (R. 918-35). The State relied exclusively on

Blackmon to establish these allegations. Blackmon's testimony on these issues directly supported the prosecutor's argument for the CCP and the HAC aggravator by suggesting that Mr. Lowe not only shot the victim, but that he planned all along to do so.[26]

Blackmon's testimony explicitly championed the State's theory that Mr. Lowe acted entirely alone and therefore must have shot the victim. His testimony was in direct conflict with Mr. Lowe's statement to the police that Blackmon and Lorenzo Sailor were involved in the attempted robbery and that Mr. Lowe did not shoot the victim. In order for the jury to have believed that Mr. Lowe did not shoot the victim, the jury necessarily had to reject the truth of Dwayne Blackmon's trial testimony that Mr. Lowe admitted to killing the victim. On the other hand, had the jury determined Blackmon to be an incredible, unbelievable witness, the jury reasonably could have concluded that the State failed to establish that Mr. Lowe shot the victim. Had the jury been given sufficient reason to doubt the veracity of Blackmon's testimony, the jury would have rejected his testimony that Mr. Lowe

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[26] The fact that the trial court did not ultimately find the HAC and CCP aggravators is not the issue here. The issue is whether the instructions on these aggravators would have affected the jury. As the United States Supreme Court has explained the issue is whether the jury "would reasonably have been troubled" by the withheld information and whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." Kyles v. Whitley, 514 U.S. 419, 441-43 (1995). See Argument 1 *supra.*

admitted to committing the crime alone as a lie asserted by Blackmon to shield himself from being charged and prosecuted for murder.

Of course, evidence that Blackmon admitted to killing the victim is not only evidence impeaching Blackmon's credibility that the jury never knew about. The jury also never knew that Blackmon had sworn to false statements in his affidavit about the investigation into this case and also had sworn to statements that he has since confirmed as true that police threatened him with a long prison term or the death penalty if he did not cooperate with them. In its order denying the initial motion for post-conviction relief, this Court indeed found that Blackmon admitted at the evidentiary hearing "that the only statement in the affidavit that was true was that he was 'threatened with 15 to 100 years in prison' if he did not testify and cooperate in the State's case against the Defendant" and that police told him he would "get the chair." This Court must still consider this evidence in the required cumulative analysis relative to the instant claim of newly discovered evidence. See Gunsby. Given Blackmon's admissions to participating in the robbery and killing the victim and, given trial counsel's failure to impeach Blackmon with his affidavit, it cannot be said with any degree of confidence that the jury would have recommended the death penalty had the jury known of this evidence.

Blackmon's testimony painted for the jury a picture of Rodney Lowe as a cold-hearted killer who carried out a pre-arranged plan to rob the store and to kill

the clerk in order to eliminate her as a witness. At the same time, Blackmon portrayed himself to the jury as having nothing to do with the actual crime and as having only a minimal role in the prior "attempts" to rob the store. According to Blackmon, Rodney was the leader of the group who, on his own, conceived of the plan and ultimately carried it out on his own.

Blackmon even went so far as to testify that he told Sailor that Blackmon predicted that Mr. Lowe would go by himself to the Nu-Pack and attempt a robbery:

> Q: Did you and Defendant discuss going there a third time?
> A: No. No. No more. All right. We left on - - on our way going back to the house, we went by Cumberland Farms to get gas and I was telling Loren - - I say, "Rod gonna go try to do this, you know, by himself and gonna get himself in trouble."

(R. 930).

The State's penalty phase closing argument was entirely premised on the jury believing that Rodney Lowe himself shot the victim. The State asked for jury instructions on both the heinous, atrocious, and cruel ("HAC") aggravating circumstance and the cold, calculated, and premeditated ("CCP") circumstance.[27] The prosecutor never suggested or implied that death would be the appropriate

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[27] The jury was instructed on (1) the prior violent felony aggravator, (2) the contemporaneous felony aggravator, (3) HAC and (4) CCP.

recommendation even if the jury believed that Mr. Lowe was a participant but did not shoot the victim. To the contrary, the State asked the jury to recommend the death penalty precisely because, according to the State, Mr. Lowe himself shot the victim.

At the outset of his penalty phase arguments, the prosecutor made it a point to stress that, in considering its penalty phase recommendation, the jury must consider the evidence presented during the guilt phase (R. 1273), which of course included Dwayne Blackmon's testimony which implicated Mr. Lowe being the lone participant in this crime who shot and killed the victim. In arguing that the jury should find the existence of the HAC aggravator, the prosecutor unequivocally argued that Lowe himself pulled the trigger. (R. 1275-76). The prosecutor also urged the jury to recommend the death penalty because, according to the prosecutor's argument, Mr. Lowe killed the victim in order to eliminate a witness (because she knew Mr. Lowe) and in light of the State's allegation as to the manner in which Mr. Lowe killed the victim. (R. 1279-82). In sum, the foundational "fact" of the State's case for convincing the jury to recommend the death penalty was that Rodney Lowe, acting alone, pulled the trigger. The notion that Mr. Lowe was not alone and did not actually shoot the victim was mutually exclusive to the State's case for death. If the jury did not believe that Mr. Lowe acted alone and shot the victim himself, then the jury clearly would not have voted

to recommend the death penalty, especially in light of the 9 to 3 vote. (R. 1833).

Similarly, in opening statements of the guilt-innocence phase, the prosecutor reviewed for the jury what the prosecution thought the evidence was going to show and asserted a single theory that Mr. Lowe acted entirely alone and therefore killed the victim. (R. 435-9). In the guilt-innocence phase closing arguments, the prosecutor unequivocally argued that Mr. Lowe was the person who shot the victim. (R. 1063-64).

The State in fact took the position that its own evidence established that it was impossible for Blackmon and Sailor to have been involved in the shooting on July 3, 1990. The prosecutor argued that the videotaped "time period analysis" created by the police proved that Blackmon and Sailor could not have been involved in the crime. (R. 1090-91). Regarding Mr. Lowe's statement to police that he did not shoot the victim and that Blackmon and Sailor participated in the crime, the prosecutor argued to the jury that "the police spent the time over two days making those video tapes for you to show that that story could not be true." (R. 1090)(emphasis added). Of course, Mr. Lowe presented evidence at the 2003 evidentiary hearings that called into question the reliability of the detectives' "time study." Even if the "study" met the minimal threshold for admissibility, certainly on re-trial as shown by the testimony of post-conviction expert traffic engineer, competent counsel would present a compelling argument for the jury to discount

the reliability of the detectives' conclusions.

The State further urged the jury during guilt-innocence phase closing arguments to accept the lone gunman theory by arguing that the single eye-witness, Steven Leudtke, saw the white car and

> . . . knows one thing for certain there's no one else in that car. No one else is in that white car. Not someone in the back seat. Not someone else in the front seat. There aren't these three people that the Defendant later claims committed this robbery.
>
> * * * *
>
> Mr. Leudtke told you that he was sure of only one thing. The white car and no one in it. And one person who was black leaving that store.

(R. 1077, 1079)(emphasis added).[28] In sum, the State predicated its entire case on its theory that Mr. Lowe acted alone and therefore shot the victim. The notion that Dwayne Blackmon and Lorenzo Sailor were involved and that Mr. Lowe was not the shooter was mutually exclusive to the State's case. Therefore, both the jury's verdict and subsequent death recommendation were undoubtedly based upon a finding consistent with the State's theory, i.e. that Mr. Lowe acted alone and

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[28] Contrary to the prosecutor's argument to the jury, Leudtke did not testify that he "kn[e]w[] . . . for certain there [was] no one else in that car," rather, he testified simply that he did not see any one else in the white car and in fact conceded that he did not walk over and look at the car but just "glanced" at it (ROA 556).

necessarily was the person that killed the victim.

In practical terms, had the State given any credence any other theory but the theory that Mr. Lowe acted alone and shot the victim, the State would have necessarily called into question the credibility of its own star witness (Blackmon) and its "time analysis" evidence. The State's reliance on Dwayne Blackmon's testimony and the time analysis evidence "locked" the State into the State's theory of the case that Mr. Lowe shot the victim a theory that the State relied upon to convince the jury to recommend the death penalty.

In urging the jury to recommend the death penalty, the prosecutor never suggested that the death penalty would still be an appropriate recommendation if the jury believed that Mr. Lowe did not act alone and was not the shooter. To the contrary, the State's penalty phase closing argument for death (R. 1273-83) was grounded on two simple themes: (1) that Mr. Lowe shot and killed the victim in a "cold-blooded" manner because he had "learned" from the circumstances surrounding the prior felony conviction to make sure he kills the witness/victim, especially when a victim, like Donna Burnell, knows him; and (2) that the manner in which the victim was killed was "brutal", "atrocious", "cruel" and caused her to suffer. In terms of the aggravating circumstances upon which the jury was instructed, the State's argument that Mr. Lowe shot and killed the victim because he had "learned" from the circumstances surrounding the prior felony conviction to

make sure he shot and killed Donna Burnell was an argument for the jury to find that CCP aggravator in that the State argued that Mr. Lowe planned to kill Donna Burnell because she knew who he was and he did not want her to be a witness against him. The State's strong emphasis on the manner of the killing and the tremendous suffering endured by the victim obviously was meant to convince the jury to find the HAC aggravator.

In addition to the prosecutor's penalty phase closing argument in support of the CCP aggravator that, based on Dwayne Blackmon's testimony, Mr. Lowe planned to, and in fact did, shoot and kill the victim in order to eliminate her as a witness, Blackmon's testimony, if believed by the jury, provided significant additional support for the CCP aggravator. The court instructed the jury that the State established the CCP aggravator if the jury found that, ". . . the crime . . . was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (R. 1305). In order to prove the existence of the CCP aggravator, the State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill. See Bell v. State, 699 So. 2d 674, 677 (Fla. 1997); Bradley v. State, 787 So. 2d 732, 744 (Fla. 2001). Blackmon's testimony was peppered with allegations supported CCP if believed by the jury. As reviewed above, Blackmon's testimony painted for the jury a picture of Rodney Lowe as a cold-hearted killer who both masterminded

and, ultimately, carried out on his own, a pre-arranged plan to rob the Nu-Pack and to kill the clerk in order to eliminate her as a witness.

Most significant was Blackmon's testimony that Mr. Lowe, prior to the shooting, "had talked about he would shoot somebody." (R. 935). This testimony directly implied that Mr. Lowe had considered the matter and concluded that he would shoot someone when he committed a robbery. This testimony, if believed by the jury, alone provided sufficient evidence for the jury to find the existence of the CCP aggravator. See Bell v. State, 699 So. 2d 674, 677-78 (Fla. 1997)(the heightened premeditation necessary for a CCP finding does not have to be directed toward the specific victim). Blackmon also testified that, within a month prior to the shooting, Blackmon obtained a gun for Mr. Lowe per Lowe's request. (R. 918, 919). This testimony provide further support for the CCP aggravator. See Bell v. State, 699 So. 2d 674 (Fla. 1997)(advanced procurement of a weapon is an indication of the existence of the CCP aggravator); Cruse v. State, 588 So. 2d 983 (Fla. 1991)(same). Blackmon also testified that Mr. Lowe was the "head man" with regard to the planned robbery of the Nu-Pack and that it was Mr. Lowe who came up with the plan in order to get money to pay the rent. (R. 923-30). In contrast, Blackmon of course portrayed himself as not really wanting to rob the store and having nothing but a minimal role in the two aborted attempts to rob the store on the preceding Friday and Saturday. (R. 923-30, 946, 949). Blackmon also

portrayed Mr. Lowe as having an unwavering pre-arranged intent to commit the robbery when he testified that, after the second aborted attempt on Saturday, Blackmon told Sailor that "'Rod gonna go try to do this, you know, by himself and gonna get himself in trouble'" R. 930).

Blackmon's description of his alleged conversation with Mr. Lowe in which Mr. Lowe allegedly admitted that he had gone to the store and shot the victim portrayed Mr. Lowe as having a very callous attitude to what he allegedly had done. Blackmon claimed that Mr. Lowe told him that he had "shot the whore three times." (R. 934)(emphasis added). If the jury believed this testimony from Mr. Blackmon, then the jury was likely affected by it in a very serious way. Such an ugly, matter-of-fact reference to the victim in this case as a "whore" - a victim whose murder was witnessed by her three year-old child - portrays Mr. Lowe as a remorseless, callous, and cold-hearted killer with absolutely no respect for human life. The jury very likely relied on this testimony from Blackmon to find the existence of the CCP aggravator. Blackmon testified also that when he asked Mr. Lowe if he had stolen anything, Mr. Lowe replied "'[n]ot even a pack of Newport cigarettes.'" (R. 934). See Bell v. State, 699 So. 2d 674 (Fla. 1997)(killing carried out as a matter of course indicates presence of CCP aggravator). If the jury believed Dwayne Blackmon, then his testimony provided the jury with powerful evidence to find the existence of the CCP aggravator. See Bradley, 787 So. 2d at

744.

The State's penalty phase closing arguments, when viewed together with evidence presented by the State (namely, - Blackmon's testimony) make perfectly clear that the State urged the jury to recommend the death penalty directly because Mr. Lowe shot the victim. Even if the jury believed that Mr. Lowe was a participant in the attempted robbery and had actually gone into the store at the time of the shooting, if the jury did not believe that Mr. Lowe was the person who actually shot the victim, there is more than a reasonable probability that at least three of the nine jurors who voted to recommend death would have instead voted to recommend a life sentence.

Evidence that Blackmon admitted to shooting and killing the victim constituted mitigation that the jury did not know about. Lockett v. Ohio, 438 U.S. 586 (1978)(the Eighth and Fourteenth Amendments mandate that the sentencer be allowed to consider the "circumstances of the particular offense" in determining whether or not death is the appropriate punishment); Hess v. State, 794 So. 2d 1249, 1269 (Fla. 2001)(holding that Lockett requires "the admission of evidence that establishes facts relevant to the defendant's character, his prior record, and the circumstances of the offense in issue."). Evidence that Blackmon admitted to shooting and killing the victim constituted a critical "circumstance of the offense" that the jury may have used to justify a life recommendation. This Court cannot

simply rely upon the obvious point that the aggravating circumstance of committed while engaged, or an accomplice, in the commission of an attempt robbery would still apply even if Mr. Lowe did not shoot and kill the victim to conclude that there was not a reasonable probability of a different outcome had the jury known that Blackmon admitted to killing the victim. The Court must instead conduct a critical analysis on the probable effect on the jury's penalty phase recommendation. If the jury believed that Mr. Lowe was involved in the crime but that he was not the person who shot the victim multiple times, there is much more than a reasonable probability that the jury would have recommended a life sentence. The lower court considered all newly discovered evidence, which would be admissible at trial.[29] Based on its specific credibility findings, the lower court clearly evaluated "the weight of both the newly discovered evidence and the evidence that was introduced at the trial." Jones, 709 So. 2d at 521. The lower court clearly found that Lisa Grone's testimony

> ...rebuts evidence that the Defendant acted alone in attempting the robbery and that Blackmon not the Defendant shot the victim. Furthermore, despite some evidence attacking the trustworthiness of Grone's testimony and the State's argument challenging the reliability of Blackmon's recanted evidentiary hearing testimony, the Court finds Grone's testimony sufficiently

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[29] As noted *supra*, the testimony of Lisa Grone would be admissible for substantive as well as impeachment purposes at a new penalty phase.

> credible to warrant consideration by a penalty phase jury and the trial court in determining the Defendant's level of participation in the murder sufficient to justify the imposition of the death penalty.

(PCR. 2586).

The court clearly considered that Grone's testimony when weighed in conjunction with that of Carter and Miller would lead to a life sentence. The Court correctly conducted its analysis by addressing the cumulative effects of the testimony of Grone, Carter and Miller.[30, 31] When so viewed, confidence in the outcome of Mr. Lowe's trial has been severely undermined. There is a more than reasonable probability of a different outcome. See Gunsby, 670 So. 2d at 924. All this evidence must be examined "collectively, not item by item." Kyles v. Whitley, 514 U.S. at 436. Cumulatively the total picture in this case compels this court to grant Mr. Lowe relief in the instant cause. Mordenti v. State, 894 So. 2d 161, 175 (Fla. 2004).

The State appears to be asserting that because Blackmon was never indicted, the "after the fact allegations" supporting the ineffective assistance of counsel and

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[30] Additionally there is the anticipated testimony of Michael Lee, Maureen McQuade and David Stinson, a fact that the State does not address in this context.

[31] Contrary to the State's characterization of these witnesses as "Lowe's friends" there is no evidence in the records that any of them even knew Mr. Lowe.

newly discovered evidence do not establish an Enmund/Tison[32] issue as found by the trial court. The State cites this Court's decision in Franqui v. State, 804 So. 2d 1185, 1206 in support of it's contention that the Enmund culpability requirement has been met in Mr. Lowe's case. The State persists in its position that Mr. Lowe was a major participant in this crime and therefore sufficiently culpable to receive the death penalty under the Eighth Amendment. See Answer Brief at 97. However the State cannot get around the plain language of the lower court's finding that there "is a reasonable probability that the balance of aggravating and mitigating factors would have been different", and thus that there is a reasonable probability of a life recommendation. The State ignores the plain language of the order which states that

> To satisfy the Enmund/Tison requirement this court must find that either the defendant participated in the killing or that the defendant was a major participant in the attempted robbery with a reckless indifference to human life. Thus a new penalty phase is required to address these requirements in light of the undiscovered evidence.

(PCR.2584)(Emphasis added).

This finding is based upon the court's explicit credibility findings. The State cannot substitute its own opinions upon such clear factual findings, nor can this

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[32] Enmund v. Florida, 458 U.S. 782 (1982), Tison v. Arizona, 481 U.S. 137 (1987).

Court substitute its own factual finding, credibility findings or weighing of the evidence over that of the lower court's "superior vantage point." Porter v. State, 788 So. 2d 917 (Fla. 2001). If this Court does not grant a new trial, the lower court's grant of a new penalty phase must be upheld.

CONCLUSION

Based upon the foregoing and the record, Mr. Lowe respectfully urges this Court to reverse the lower court order as to the guilt phase of his capital trial and grant a new trial. As to the State's cross appeal, Mr. Lowe requests this Court affirm the grant of a new penalty phase ordered by the lower court and grant any other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, on this 5th day of April, 2007, to Leslie Campbell, Assistant Attorney General, Office of Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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