IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-633

RODNEY TYRONE LOWE,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA, (Criminal Division)

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REPLY BRIEF OF CROSS-APPELLANT

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PRELIMINARY STATEMENT

Appellant, Rodney Tyrone Lowe, was the defendant at trial and will be referred to as the "Defendant" or "Lowe". Appellee, the State of Florida, the prosecution below will be referred to as the "State". References to records and briefs will be as follows: Record on Direct Appeal - "ROA" for case number 60-79037; Postconviction record in case number SC05-633 - "PCR-R"; Postconviction transcripts in same case - "PCR-T"; Appellant's brief - "IB" Supplemental records will be designated by the symbol "S" preceding the record type. Where appropriate, the volume and page number(s) will be given.

STATEMENT OF THE CASE AND FACTS

The State relies upon its Statement of Case and Facts presented in its Answer Brief/Initial Brief on Cross-Appeal and adds that the ruling at issue here provides in part:

> On August 26, 2004, the Defendant requested rehearing on Claim VII of the initial postconviction motion. In Claim VII, the Defendant contends that penalty phase counsel was ineffective for failing to discover and present evidence that Dwayne Blackmon admitted to Lisa Miller and Benjamin Carter that Blackmon, not the defendant, shot and killed the victim while attempting to commit robbery. Concurrent with the motion for rehearing, the Defendant filed a successive postconviction motion raising a claim of newly discovered evidence. In the first successive motion, the Defendant contends that before Dwayne Blackmon died in 2003, Blackmon made an additional statement to Lisa Grone admitting that he, not the

Defendant, shot and killed the victim while attempting to commit robbery. The Defendant claims Blackmon's admission undermines the outcomes of both the guilt and penalty phases. The Court heard evidence and argument on the motion for rehearing and on the first successive motion.

On January 14, 2005, before the Court ruled on the motion for rehearing and on the first successive motion, the Defendant filed a second successive motion ... that Blackmon made additional statements to Maureen McQuade and David Stinson that Blackmon, not the Defendant, shot and killed the victim while attempting to commit robbery ...

On March 2, 2005, before the Court ruled on the second successive motion, the Defendant filed an amendment ... [with] claims that Blackmon made an additional statement to Michael Lee that Blackmon, not the Defendant, shot the victim while attempting to commit robbery. In addition, Capital Collateral Counsel avers that Lee will testify that the police were aware that Blackmon, not Lowe, was the killer. Counsel contends that failure to disclose this evidence was a *Brady* violation. The State has not had the opportunity to answer the Defendant's amendment.

SUMMARY OF ISSUES

The Court now has before it three postconviction motions and an amendment premised on claims of ineffective assistance of counsel and newly discovered evidence. These motions present claims from six witnesses that Dwayne Blackmon made pre-trial and post-trial statements that Blackmon, not the Defendant, shot and killed the victim while attempting to commit robbery. The Court must determine whether the reports from these witnesses constitute newly discovered evidence, and if so, whether the evidence would probably produce acquittal on retrial of the guilt phase or would reasonably produce a different balance of the aggravating and mitigating factors in the penalty phase resulting in a life sentence. *Jones v. State*, 709 So.2d (Fla. 1998); *Rose v. State*, 675 So.2d 567, 570-571 (Fla. 1996).

REHEARING ON CLAIM VII OF INITIAL POSTCONVICTION MOTION

In Claim VII of the initial postconviction motion, the Defendant contends that the trial counsel was ineffective in the penalty phase for failing to discover and present evidence that before trial Dwayne Blackmon admitted to Lisa Miller and Benjamin Carter that he, not the Defendant, shot and killed the victim while attempting to commit robbery. In the August 9, 2004, order, this Court determined that ... Blackmon's pre-trial statements to Miller and Carter had impeachment value since Blackmon was the State's key witness ... the admissions of Miller and Carter were not newly discovered evidence ... and therefore counsel was deficient in failing to discover and present this impeachment evidence. ... Consequently, the issue on rehearing of Claim VII is whether counsel's failure to discover and present witnesses Miller and Carter prejudiced the outcome of the penalty phase.

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 in 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. Further, 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 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. 1996).

Further, even though sufficient direct evidence was presented at trial to support a felony murder conviction and to support two aggravating factors, this undiscovered evidence of multiple perpetrators and a shooter other than the Defendant introduces an *Enmund/Tison* culpability issue that was not addressed by the trial court when the death sentence was imposed. To satisfy the *Enmund/Tison* requirement, the Court must find that either the Defendant participated in the killing, or the Defendant was a major participant in the attempted robbery with a reckless indifference to human life. *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987). Thus, a new penalty phase is required to address these requirements in light of the undiscovered evidence....

FIRST SUCCESSIVE MOTION

In his first successive motion the Defendant raises an additional claim of newly discovered evidence. The Defendant contends that after Dwayne Blackmon testified at the evidentiary hearing on the initial postconviction motion in January 2003, and before Blackmon died in August 2003, that Blackmon confessed to a third person. The Defendant alleges that Blackmon made a post-trial statement to Lisa Grone, admitting that he, not the Defendant, shot and killed the victim while attempting to commit robbery. The Defendant avers that Blackmon's statement to Lisa Grone was not known to the Defendant until May, 2004. The Defendant claims that this evidence would probably produce an acquittal on retrial, or in the alternative

a life sentence.

The Court construes Blackmon's statement as recantation of his trial and evidentiary hearing testimony that could not have been discovered through the exercise of due diligence, and thus, considers the recantation newly discovered evidence. *Lightbourne v. State*, 742 So.2d 238, 247 (1999); *Armstrong v. State*, 642 So.2d 730, 735 (Fla. 1994).

The Court conducted an evidentiary hearing on Blackmon's admission to Grone. The Court finds Grone's testimony consistent with Miller's and Carter's in failing to rebut any evidence supporting the Defendant's first-degree murder conviction under the theory of felony murder. Specifically, like Miller and Carter, Grone did not provide any facts that undermine the Defendant's confession to his girlfriend that he was the driver of the getaway car involved in the crime, evidence of the Defendant's fingerprint found at the scene, testimony concerning the sighting of the Defendant's girlfriend's car in the parking lot of the convenience store immediately after the shooting, evidence that the Defendant's gun was used in the shooting, or evidence of the Defendant's time card showing that he was clocked out from work at the time of the murder. Therefore, because the jury was instructed on the alternate theories of first degree premeditated murder and first degree felony murder (TT 1116-1118), and absent evidence rebutting trial evidence supporting a felony murder conviction, the Court finds no prejudice to the outcome of the guilt phase.

However, the Court does find prejudice to the outcome of the penalty phase. Even though Grone's testimony was inconsistent with Miller's and Carter's testimony concerning some of the details of the crime, the Court finds Grone's testimony consistent on issues material to the weighing of aggravating and mitigating factors. Like Miller and Carter, Grone testified that Blackmon told her 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. As discussed in the rehearing of Claim VII, *supra*, this testimony rebuts

> evidence that the Defendant acted alone in attempting the robbery, and evidence that the Defendant killed the victim. Further, 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 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 a death sentence.

(PCR-R.14 2582-86).

SUMMARY OF THE ARGUMENT

CROSS-APPEAL – It was error of law and fact, to grant a new penalty phase. The court merely assumed similar accounts of Blackmon's alleged admissions should be heard by a jury, but failed to take into account the admissibility of the accounts or their impact upon the sentence given the trial evidence.

ARGUMENT ON CROSS APPEAL

THE COURT FAILED TO FOLLOW THE LAW WHEN IT GRANTED A NEW PENALTY PHASE BASED ON CLAIMS OF INEFFECTIVE ASSISTANCE AND NEWLY DISCOVERED EVIDENCE RELATED TO ALLEGATIONS BLACKMON CONFESSED TO KILLING THE VICTIM.

The court erred in granting a new penalty phase as it failed to apply the correct law to the testimony offered by Lisa Miller ("Miller") and Ben Carter ("Carter") under Strickland v. Washington, 466 U.S. 688 (1984) and in analyzing the claim of newly discovered evidence under Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998) with respect to Lisa Grone ("Grone").[1] The court failed to make

[1] While Lowe identified David Stinson ("Stinson"), Maureen McQuade ("McQuade"), and Michael Lee ("Lee") as additional witnesses to Blackmon's alleged comment, the court did not rule on these witnesses, stating:

> The Court reserved ruling on the legal sufficiency of these claims and the need for an evidentiary hearing on the second successive motion.
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> ...
>
> The Court now finds in light of its ruling on the motion for rehearing and the first successive motion, *supra*, that an evidentiary hearing is not required on the amended second successive motion.
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> As to the prejudice to the outcome of the penalty phase, an evidentiary hearing is not required to consider the merits of the amended second successive motion because a new penalty phase has already been granted on the Defendant's motion for rehearing and first successive motion, *supra*.

findings regarding the admissibility of these witnesses' testimony on re-trial.[2] Further, the court also failed to

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(PCR-R.14 2587-88)

Even though the trial court in the conclusion to the March 17, 2005 order "granted" relief on the second successive and amended second successive motion, it is the State's position that the Court either did not rule on these motions (given the statement the court was reserving ruling or that it did not have to grant a hearing given that relief was granted on the rehearing and first successive motions) or failed to follow the legal analysis required to grant relief under Strickland and for "newly discovered evidence." In either case, the court erred and this Court should reverse.

[2] With respect to McQuade, Stinson, and Lee, the statements to McQuade were alleged to have been made in the late 1990's when they lived together, and those to Stinson were alleged to have been given in 1992 when they "were getting high" together (Affidavits attached to 1/13/05 Motion), and the one to Lee was made sometime prior to trial. It is the State's position, as offered below, that these accounts are not newly discovered evidence because due diligence was not shown given the timing and manner the defense claimed to have found these witnesses. (PCR-R.14 2521-78). There was no showing below why these witnesses could not have been discovered sooner; at a minimum, prior to the litigation of the November 2004 successive motion. Clearly there was a lack of due diligence and abuse of the process. Even if this Court concludes the evidence is "newly discovered," Lowe has not explained how such would be admissible in a new guilt phase as Blackmon is deceased, as was established at the November 2004 evidentiary hearing. Nonetheless, the trial court did not address the legal claims as it had granted relief on prior motions, thus, he State reserves the right to argue these legal matters again, should this Court agree with the State that the trial court failed to apply the proper law, but disagree that the witnesses McQuade, Stinson, or Lee can be rejected summarily for the same reasons that the testimony of as Miller, Carter, and Grone would not produce a life sentence. See Glock v. Moore, 776 So.2d 243, 251 (Fla. 2001) (holding claim of newly discovered evidence in capital case must be brought

analyze if any such admissible evidence, assessed **in light of the existing trial facts/evidence**, would undermine confidence in the sentence as required by Strickland or if such admissible evidence, **considering the trial facts**, would have resulted in a lesser sentence under Jones.

Lowe, asserts that there was no error in that the court found the new witnesses credible[3] and the new evidence

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within one year of date evidence was discovered or could have been discovered through due diligence); Buenoano v. State, 708 So.2d 941, 947-48 (Fla. 1998); White, 664 So.2d at 244. Moreover, Lowe is abusing the process by litigating this claim in piecemeal fashion. Cf. Pope v. State, 702 So.2d 221, 223 (Fla. 1997) (noting successive postconviction motion may be denied summarily as an abuse of the process where no newly discovered evidence is presented and there is no basis for not having raised claim in earlier motion). As provided in Cherry v. State, 2007 WL 1074931, *2 (Fla. Apr. 12, 2007) the defendant "must show that the evidence could not have been discovered with due diligence at the time of trial. Torres-Arboleda v. Dugger, 636 So.2d 1321, 1324-25 (Fla. 1994). Moreover, "any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence." Glock v. Moore, 776 So.2d 243, 251 (Fla. 2001)."

[3] Contrary to Lowe's position, the court's ruling, read in a light best for the defense, merely found that the accounts of Miller and Carter, and later Grone because she too claimed Blackmon had admitted to being at the crime scene and shooting the victim, were "sufficiently credible to warrant consideration" in a new penalty phase. Such is not the test under either Strickland or Jones. As will be discussed again below, mere consistency among new witnesses is not the end of the inquiry, but such must be found to offer admissible evidence and that evidence must then be weighed and tested against that which was presented at trial. If such cannot and does not undermine the trial

would have been admissible as substantive and impeachment evidence tending to show Blackmon was the killer. He also asserts that the new evidence would have rebutted the State's arguments for the aggravators of heinous, atrocious, or cruel ("HAC") and cold calculated and premeditated ("CCP"), led to a life sentence. Lowe, as did the court, made the same error of law in not following each step of the Strickland and newly discovered evidence standards.

Claims of **ineffective assistance of counsel** are governed by the standards announced in Strickland. For a defendant to prevail on an ineffective assistance claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89. The standard for evaluating claims of **newly discovered evidence** was announced in Jones, where this Court concluded:

> 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." [c.o.]

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facts, then it matters not how consistent the new witnesses are among themselves.

> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. [c.o] **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**." [c.o.]
>
> 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. [c.o.] 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. [c.o.] The trial court should also determine whether the evidence is cumulative to other evidence in the case. [c.o.] The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

Jones v State, 709 So.2d 512, 521-22 (Fla. 1998) (emphasis supplied).

As the State argued below and again here, the court first had to consider whether the new testimony would be admissible, and in fact, Miller's and Carter's accounts were not substantive evidence and that Grone's[4] testimony

[4] The State asked the court to consider whether the new testimony by Grone would be admissible at a re-trial and noted Lowe has not shown that Blackmon was available for re-trial, therefore, Lowe has not shown that such hearsay statements would be admissible. The State argued that Lowe had not carried his burden of proving that the alleged recantation is truthful and would lead to an acquittal upon re-trial. (PCR-R.13 2439-55; PCR-R.14 2521-48).

was not admissible at all. (PCR-R.13 2445; PCR-R.14 2521-48). None of Blackmon's alleged statements to Miller or Carter[5] are admissible as substantive evidence at either the evidentiary hearing or at a trial because Blackmon was available and testified at the hearing and at the original trial. Such testimony would be admissible as impeachment only. See Jones, 709 So.2d at 524 (finding declarant's alleged statements that he, rather than the defendant, murdered the officer were not admissible as substantive evidence as a declaration against penal interest, where the declarant was available to testify, testimony would be admissible as impeachment). (PCR-R.13 2439-55; PCR-R.14 2521-48). Given this, there is nothing to undermine confidence in the sentencing.

There is no substantive evidence of Blackmon's involvement in the crime. The jury knew there had been a prior casing of the convenience store, but that Blackmon did not follow through with the plan due to his sickness

[5] Given that Lee's affidavit claims that Blackmon spoke to him sometime before trial, Lee's account, if found credible and admissible, could only be evaluated as impeachment evidence when assessing its possible impact on the existing evidence under Strickland, assuming, but not agreeing, that Lowe could prove that counsel was ineffective for not having found this witness. The same would be true if the newly discovered evidence standard were found to apply to Lee, and then to McQuade, and Stinson who claimed Blackmon spoke to them after the trial, because the witnesses could not be found with due diligence.

that morning as confirmed by Vickie Blackmon McBride ("Vickie") and Patricia White ("White"). The jury rejected Lowe's statement that he remained outside and was merely the getaway-driver given that his fingerprints were found on a hamburger wrapper in the store. Under Strickland, any alleged impeachment value that might have been presented at trial would not undermine confidence in the nine to three recommendation of death. As such, a new penalty phase should not have been granted.

Likewise, "[i]n reviewing a claim of newly discovered evidence, a 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.'" Kokal v. State, 901 So.2d 766, 776 (Fla. 2005) (citations omitted).

Here, the alleged newly discovered "evidence" consists of Grone's[6] testimony relating hearsay statements of Blackmon, who is deceased. The preliminary question, which the trial court failed to answer, is whether or not such

[6] While Lowe may argue that the accounts of Stinson, McQuade, and Lee, for various reasons may be considered newly discovered, the State reminds this Court that the trial court, as discussed above, did not rule on these witnesses given that it had granted relief on the basis of Miller, Carter, and Grone.

evidence would even be admissible. See Sims v. State, 754 So. 2d 657, 660 (Fla. 2000) (stating that even "[a]ssuming the defendant's evidence meets the threshold requirement by qualifying as newly discovered, no relief is warranted if the evidence would not be admissible at trial."). Lowe has not shown that the hearsay statements from Grone[7] would be

[7] The same argument applies to witnesses regarding the admissibility of hearsay statements offered by Stinson, McQuade, and Lee, who allegedly overheard statements by Blackmon in 1992, the late 1990's, and prior to the trial respectively. The court reserved ruling on these witnesses presented in the second successive motion, and noted "an evidentiary hearing is not required to consider the merits of the amended second successive motion because a new penalty phase has already been granted" on the rehearing and first successive motion. (PCR-R.14 2588). Hence, the State did not address these witnesses at length in its initial brief on cross-appeal. Nonetheless, assuming arguendo that Blackmon's evidentiary hearing testimony, that **he never told anyone** that he killed the victim, is considered as opening the door to these witnesses, then again it would not be substantive evidence, but merely impeachment. However, none, either individually or cumulatively satisfy the Strickland or newly discovered evidence standard for granting a new penalty phase on their hearsay accounts in light of the overwhelming and un-refuted testimony of White and Vickie that Blackmon was home in bed on the morning of the robbery/homicide, thereby making it physically impossible for him to have been involved in the robbery/homicide irrespective of what statements witnesses now attribute to Blackmon. To this day, Lowe has not impeached either White or Vickie, nor has the trial court assessed their testimony. This alone, shows no matter how many people are brought forward to impeach Blackmon's testimony; nothing undermines the conviction and sentence establishing that Lowe was the sole perpetrator of the robbery/homicide. The following makes it even clearer that even if the new witnesses are offered for impeachment evidence as to whether Blackmon commented that he was the killer, their testimony would not change in

admissible in new penalty phase as substantive evidence as Blackmon had not testified in Lowe's original penalty phase and he has not had an opportunity to answer the allegations she has leveled against him. See Grim v. State, 841 So.2d 455, 464 (Fla. 2003) (finding no abuse of discretion in refusing to admit hearsay testimony under Chambers v. Mississippi, 410 U.S. 284 (1973), where, unlike Chambers, statement's reliability was not established clearly); Sliney v. State, 699 So.2d 662, 670 (Fla. 1997) (rejecting claim hearsay was admissible under Chambers because

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the least the imposed death sentence. Steven Leudtke put only Lowe in White's car at the scene; Carl Dordelman placed the .32 caliber gun in Lowe's hand two days before the murder; Mary Burke reported Lowe was punched out of work at the time of the murder; Sergeant Green noted the time of Leudtke's 911 call, the last store sale, and the victim's death due to three shots from Lowe's gun; Ronald Sinclare reported the time trials showing Lowe's version of events could not have taken place nor involved Blackmon; Gary Rathman stated the recovered bullets came from Lowe's gun; and Deborah Fisher testified Lowe's prints were on the hamburger wrapper found in the store, thereby putting him in the store contrary to his account. (ROA 450, 452, 464-66, 469, 490, 503-04, 512-15, 548, 550, 552, 554-58, 571, 635-36, 667-67, 819, 822-24, 830-31; 969-70, 976-77). See Jones, 709 So.2d at 524 (finding declarant's alleged statements that he, rather than defendant, murdered the victim/officer were not admissible as substantive evidence as declaration against penal interest, where declarant was available to testify, testimony would be admissible as impeachment). Blackmon's alleged comments do not establish him as the actual killer nor that he was involved in the crime. See Baugh v. State, case no. SC04-21 (Fla. Apr. 26, 2007) (noting prior inconsistent statements are insufficient to prove guilt unless accompanied by admissible, "proper corroborating evidence").

statements were critical to Sliney's defense, and noting in Chambers "court held that such third party confessions should "have been admitted because the statements' reliability was clearly established" and Sliney had not made requisite showing). As such, this Court should find that the trial court erred in not considering the admissibility of Blackmon's alleged statements on retrial.

Czubak v. State, 644 So.2d 93 (Fla. 2d DCA 1994) is instructive. There, the trial court evaluated the veracity of several witnesses who were offered presented to offer hearsay accounts that another person admitted to committing the murder for which the defendant was on trial. The court likewise considered whether there was any corroborating evidence to establish trustworthiness of the hearsay accounts. Because the statements lack credibility, as was required under Chambers, the statements were excluded. Had the trial court in this case conducted the appropriate analysis as was done in Czubak, it too, would have found the accounts of the new witnesses to be unreliable and inadmissible hearsay. While the court recognized that the accounts of these witnesses were inconsistent in several respects, the court focused on the fact each reported that Blackmon claimed to have killed the victim. Yet, there was no corroboration of this either through consistency in the

witnesses' accounts of exactly what Blackmon was to have said or with the trial evidence which showed Blackmon to be home in bed at the time of the murder.

Lowe cites to Green v. Georgia, 442 U.S. 95 (1979) to support admission of Blackmon's statement. However, the Supreme Court's determination was based solely on the constitutionality of Georgia's hearsay law excluding hearsay in one context (when against penal interest), but not another (permitting it if hearsay was admission against pecuniary interest). Not only was there evidence that two people were involved in the crime address in Green, but the state had used the co-defendant's admissions against him in that prosecution, but prevailed in keeping the same information out of Green trial. That is not the situations here. There is no evidence of Blackmon's involvement in the robbery/murder and the State did not prosecute him for the crime. Also, the admissibility of such evidence is not the sole issue here given the procedural posture of the case. Hence, even if the Court finds that the admissions would be admissible, further evaluation is required. Namely, under the newly discovered evidence or ineffectiveness claims, an evaluation of how this new information would impact the existing evidence was required, but was not conducted by the trial court.

Another way of looking at the statements that Lowe wishes to use at a new penalty phase is as lingering/residual doubt as to the identity of the shooter.[8] Lowe's confession to the police, played for the jury, was that he, Blackmon, and Lorenzo Sailor decided to rob the convenience store – Sailor wanted money because he just got out of prison, Lowe needed rent money, and Blackmon wanted cash to move. They went to the convenience store and upon arrival; Lowe asked "Are you all really ready to do this." Sailor and Blackmon got out of the car, and "Lorenzo was the one supposed to go do it" because he would "shoot somebody quick." Lowe stated that he stayed in the car when Sailor went into the store with the gun and Blackmon remained outside the store checking the roadway. Blackmon returned to the car first, followed a short time after by Sailor. Lorenzo Sailor reported shooting the clerk, who had been playing with her child, and shooting and hitting the cash register when he could not get it open (ROA.5 764-88). Yet, residual/lingering doubt is not a proper subject for mitigation.

As this Court stated in Williamson v. State, 2007 WL

[8] The record reflects that Blackmon testified at trial as to his whereabouts at the time of the crime. (ROA 918-19, 921, 923-24, 931-32, 943-44) This was confirmed by his then wife, Vickie, (ROA 892, 895-98, 909-13), and corroborated by Lowe's girlfriend, White. (ROA 852, 854-61, 863, 876).

1362872, *8 (Fla. 2007):

> This Court has held that "residual or lingering doubt ... is not an appropriate matter to be raised in mitigation during the penalty phase proceedings of a capital case." *Rose v. State*, 675 So.2d 567, 572 n. 5 (Fla. 1996); *see also Reynolds v. State*, 934 So.2d 1128, 1152 (Fla. 2006) (concluding that the trial court "appropriately excluded evidence offered to establish residual or lingering doubt from consideration when making its sentencing determination"). Further, although section 921.141(1), Florida Statutes (2006), "'relaxes the evidentiary rules during the penalty phase of a capital trial' a party cannot introduce hearsay evidence unless the opposing party has a fair opportunity to rebut the hearsay." *Parker v. State*, 873 So.2d 270, 282 (Fla. 2004) (quoting *Blackwood v. State*, 777 So.2d 399, 411 (Fla. 2000)). In *Parker*, this Court affirmed a trial court's decision to exclude contents of an affidavit by a deceased victim that were not admissible under section 90.804, Florida Statutes, on grounds that "the State had no fair opportunity to rebut because the State could not question the victim." *Id*.

Blackmon is deceased and his trial testimony generally was limited to his actions prior to and on the day of the murder. He was not asked if he ever told anyone that he was in fact the shooter, thus, only if Blackmon's evidentiary hearing testimony is permitted to be re-read to the jury on retrial, in a light best for Lowe, might the new testimony, from Miller and Carter and others, become an issue.[9]

[9] Grone's testimony would not be admissible at all as it could not be considered a prior inconsistent statement,

However, should this Court find the statements admissible, then this Court should review the impact these statements may have on the penalty phase. A review of the trial court's order confirms that it rests upon a finding that all of the "new witnesses" gave a generally consistent version of Blackmon's alleged statement that he killed the victim, but that they differed as to crime facts. The consistency in this case is minor given that few if any specific details of the crime were offered. This matter was never addressed by the trial court. More important to the ultimate issue is that the claim that Blackmon killed the victim was never assessed in light of the trial evidence, and the evidentiary hearing testimony during which Blackmon denied making any such statements or being at the crime scene on the day of the robbery/homicide. Further, the court never assessed, in fact, never mentioned, the unrefuted trial testimony of White and Vickie, both of which placed Blackmon home sick in bed at the time of the murder, and thereby, making it physically

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given that she alleges the statement was made after the evidentiary hearing. Likewise, the allegations from Stinson and McQuade about statements made by Blackmon after trial, but before the evidentiary hearing, likewise would not satisfy the "prior inconsistent statement" exception to the hearsay rule even if Lowe could prove that he used diligence in finding these witnesses and the case is remanded for consideration of their allegations.

impossible for him to have committed the murder. Moreover, the trial court did not address that portion of Lowe's confession where he said Sailor was the one who entered the convenience store and shot the victim as Blackmon remained outside as look-out (ROA.5 764-88), but only years later during the postconviction process does Lowe claim Blackmon was the shooter. Given the court's failure to conduct the appropriate analysis, it is the State's position that the court erred in applying Strickland and the newly discovered evidence standards, and that Lowe failed to show, in light of the existing trial and evidentiary hearing evidence, that the sentencing would have been different.

"[I]n conducting a cumulative analysis of newly discovered evidence, we must evaluate the newly discovered evidence in conjunction with the evidence submitted at trial and the evidence presented at prior evidentiary hearings. See Jones, 709 So. 2d at 522." Kokal, 901 So.2d at 776. While recantation testimony may be considered newly discovered evidence, Lightbourne v. State, 742 So.2d 238, 247 (1999), it is regarded as "exceedingly unreliable." In Armstrong v. State, 642 So.2d 730, 735 (Fla. 1994), this Court reiterated that recanted testimony could be considered newly discovered, but the trial judge is required to review "all the circumstances of the case"

while bearing in mind that recanted testimony is "exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true." Only upon the court's satisfaction the recanted testimony is of such a nature that a different verdict would probably be rendered, should a new trial be granted. Id.

Here, Blackmon has not recanted; he has testified under oath that he did not make any admissions to Miller or Carter, and by extension McQuade, Stinson, and Lee. This fact should have ended the inquiry because under Armstrong: "**Only when it appears that, on a new trial, the witness's testimony** [in this case Blackmon's testimony] **will change to such an extent as to render probable a different verdict will a new trial be granted**." Armstrong, 642 So.2d at 735 (emphasis supplied). See Dailey v. State, case no. SC05-1512, slip op. 11 (Fla. May 31, 2007) (agreeing that hearsay testimony that person other than defendant admitted to the murder is not credible in part because the declarant had had numerous opportunities to testify on defendant's behalf, but did not). Given Blackmon's denial of the allegation that he admitted killing the victim, and trial testimony, corroborated by other witnesses, that he was home at the time of the crime, the court should have found

that the witness' testimony would not have changed to such a degree to produce a different outcome. Had the trial court followed the law, relief would have been denied. Moreover, the only evidentiary value the new witnesses may have would be for impeachment. Yet, their impeachment value, assuming the evidence is admissible, would be of no effect as Blackmon was at home at the time of the crime, as confirmed by Vickie and White. Again, there could be no finding, other than the result of the sentencing would not have changed, and relief should have been denied. See Smith v. State, 931 So2d 790, 802-03 (Fla. 2006) (finding that statement by witness that co-defendant admitted he killed victim, not defendant, was insufficient to warrant a new trial under newly discovered evidence test based in part, because co-defendant testified he never contacted witness or admitted to killing victim).

However, assuming Grone's account of a statement by Blackmon subsequent to his evidentiary hearing testimony, undermines the State's position, the court's incomplete analysis rendered its ruling erroneous. Merely because there are multiple witnesses[10] coming forward to accuse

[10] See Jones v. State, 709 So.2d 512, 523 (Fla. 1998) (reasoning "unlike the confessions in Chambers, the alleged confessions in this case lack indicia of trustworthiness. The fact that more inmates have come forward does not

Blackmon after his death,[11] does not entitle him to a new penalty phase. This is because these witness either do not all qualify as "newly discovered", or they do not factually support the granting of a new sentencing, because they do not undermine the trial evidence that Lowe was the sole perpetrator, and the Blackmon was physically unable to be at the crime scene; he was home in bed as recounted by his own testimony, that of his then wife, and Lowe's girlfriend. See Melendez v. State, 718 So.2d 746, 747-48 (Fla. 1998) (rejecting claim of newly discovered evidence of five witnesses, who alleged another suspect confessed to the murder where new witnesses were convicted felons, none of which were credible enough to change the jury's verdict); Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997) (affirming rejection of relief upon claim of newly discovered evidence as new witnesses were not credible and offered testimony inconsistent with trial evidence).

To the extent that Lowe points to the giving of the HAC and CCP aggravator instructions to support his claim that the jury's recommendation would have been different,

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necessarily render the confessions trustworthy").

[11] These witnesses would be Grone, McQuade, and Stinson and/or Lee if the proper showing were made. The State offers this analysis to explain fully the error of the trial court's ruling, but in no fashion, concedes that a sufficient showing has been made for admission of these witness's accounts.

such is without merit. Not only did this Court reject the direct appeal claim that it was error to give the instructions, Lowe v. State, 650 So.2d 969, 977, n.9 (Fla. 1994), but the trial court did not find these aggravators. Lowe's sentence was not based upon a finding of HAC or CCP, therefore, there is nothing to undermine in this regard. The only aggravation and mitigation that could be at issue if Blackmon's statements are found to be admissible, is the felony murder aggravator and the rejection of the mitigator that Lowe was a minor participant. The trial court correctly rejected the challenge to the felony murder conviction given Lowe's own account, in addition to other evidence placing him at the scene. (PCE-R.14 2585) Without question, Lowe admits to being a principal, via his confession to White, and later to the police,[12] when he confesses that he knew the purpose of going to the convenience store was to get money, that his weapon, a .32 caliber handgun, was given to Sailor because he would shoot a person, that Sailor was the person to enter the store, and Sailor eventually killed the victim during his attempt to get cash from the register (ROA.5 764-88). That,

[12] The trial court rested its decision on White's account and some of the forensic evidence to deny the request for a new trial; however, it should have considered the police confession as further support.

coupled with the fact that Lowe was in the store, it was his car used to escape, and his gun which was the murder weapon all show that the felony murder aggravator was found properly.

These facts likewise undermine the alleged Enmund/Tison[13] issue suggested by the trial court. (PCR-R.14 2584). In Enmund, the United States Supreme Court overturned Enmund's death sentence for felony murder because this Court "affirmed the death penalty in th[e] case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken." Enmund, 458 U.S. at 801. Enmund was reconsidered in Tison when the Supreme Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Tison, 481 U.S. at 158. In order for there to be an Enmund/Tison issue then, there must be evidence that there is more than one perpetrator. Here, we have nothing but Lowe's self-serving claim that he was the getaway-driver and that two others were involved. Yet, as Lowe's self-serving police confession reveals, he was much

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

more involved, in fact he was an integral part of the robbery/homicide. The confession[14] alone undercuts completely any alleged Enmund/Tison issue as Lowe participated in the planning of the robbery, anticipated getting money from it, drove the parties to and from the scene, provided the murder weapon, and gave it to the person he knew would "shoot quick." (ROA.5 764-88)

It is important to note that it was not until well into the postconviction process that Lowe first accused Blackmon of being the shooter. In fact, as this Court will recall, during trial (ROA.5 764-88), and again in the postconviction relief motion,[15] Lowe claimed Lorenzo Sailor

[14] The State is not agreeing that Lowe's account is accurate or that he was not the sole perpetrator, but is merely stating that his self-serving account, standing by itself would refute any claim that he was not a major participant in the planned robbery and homicide.

[15] In Claim II of the April 30, 2001 motion for postconviction relief, Lowe pled that there was either newly discovered evidence and/or ineffective assistance in not discovering Dwayne Blackmon and Lorenzo Sailor went to the Nu-Pack convenience store with Lowe and Lowe did not shoot the victim, that Blackmon was a paid informant, that Blackmon and Sailor admitted involvement in the crime and that Sailor killed the victim. (PCR-R.6 1005-1216; PCR-R.11 (court's order) 2043-44, 2047, 2058). During the January, 2003 evidentiary hearing the allegations against Blackmon were presented and then, on January 23, 2003, Lowe filed a Supplemental Amendment to Second Amended Motion to Vacate asserting a Brady v. Maryland, 373 U.S. 83 (1963) violation. It was his position the State had withheld information that certain Indian River County Sheriff's detectives knew of alleged statements by Blackmon in which

was the shooter. Moreover, there is no evidence corroborating the claim that there was more that one perpetrator. The eye-witness testimony from Leudtke and the testimony from Lowe's girlfriend and Blackmon's wife/later ex-wife,[16] as well as Blackmon all establish that Lowe was alone at the robbery/homicide scene and that

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he had admitted to Miller and others, that he was involved in the robbery of the Nu-Pack store and was the actual shooter. The trial court found no merit to this claim. (PCR-R.11 2072-73). In so doing, the court found Lisa Miller to not be credible because she was a "multiple convicted felon and is currently incarcerated." The court also found that the police refuted her allegations. (PCR-R.11 2073). It is interesting that in this situation, Miller's felony convictions render her not credible, but merely because other repeat what Miller claims Blackmon said, she becomes someone the jury should hear. This is incongruous especially in light of the fact that Blackmon, Vickie, and White testified Blackmon was home in bed at the time of the crime. Moreover, even Lowe's exculpatory account has Blackmon outside the convenience store on the day of the murder, and has Sailor killing the victim. Given this, again, the trial court erred in his factual analysis, legal conclusions, and the granting of a new penalty phase.

[16] As this Court will recall, during the evidentiary hearing, Vickie reiterated her trial testimony confirming that Blackmon was home in bed sick that morning which covered the time of the robbery/homicide. (PCR-T.19 1031-34) This was in spite of the suggestion from postconviction counsel's investigator, Jeff, to Vickie that "Well, wouldn't it be easiest just to get rid of [Blackmon] and say he did [the murder]?" Jeff said he did not "want Rodney to die." (PCR-R 1041-42). Vickie also testified at the hearing that she and Blackmon divorced in 1998, were presently in a custody dispute, and she hated her ex-husband. She recalled that in 1990, she and Blackmon were living together and never, during all the years they knew each other, did Blackmon admit to the murder at the Nu-Pack store, nor has he ever said he was with Lowe on the day of the murder. (PCR-T.19 1033-34).

Blackmon was home in bed at the time. ((ROA 450, 452, 464-66, 469, 490, 503-04, 512-15, 548, 550, 552, 554-58, 571, 635-36, 667-67, 819, 822-24, 830-31, 852, 854-63, 876, 892, 895-98, 909-13, 918-24, 931-32, 943-44, 969-70, 976-77).

Lowe's reliance upon Ray v. State, 755 So.2d 604, 611 (Fla. 2000) which was addressed to proportionality, and State v. Parker, 721 So.2d 1147 (Fla. 1998) is misplaced. Ray is distinguishable on the fact that there was ample evidence of two participants. Not only were both men tried and convicted, but there was eye-witness and forensic evidence putting both men at the murder scene. Here, there is no evidence forensic or eye-witness placing Blackmon at the scene. At best, Lowe could point to his self-serving police statement where he claimed Blackmon remained outside the convenience store checking the roadway. Any of his other "new" witnesses merely are reporting what they claim are admissions made by Blackmon, there is no substantive evidence to support the allegation. Likewise, Parker is of no assistance to Lowe, as again, there was more than the self-serving statement of the defendant to establish that more than one assailant was involved in the crime. As the Court will recall, when under oath, Blackmon has maintained that he was not involved on the day of the murder and other witnesses establish Blackmon's presence away from the crime

scene at the critical time. Further, both the forensic evidence and testimony from Leudtke establish that Lowe was alone at the convenience store.

The only support that Blackmon was involved with the homicide is hearsay admissions, which Blackmon denied; that he killed the victim and which, even if shown to be admissible would come in as impeachment evidence only. Such, without corroborating evidence is not sufficient to sustain a conviction. Jones, 709 So.2d at 524 (finding declarant's alleged statements that he, rather than the defendant, murdered the officer were not admissible as substantive evidence as a declaration against penal interest, where the declarant was available to testify, testimony would be admissible as impeachment). Given this Court's conclusion in Baugh v. State, case no. SC04-21 (Fla. Apr. 26, 2007), that there must be "proper corroborating [and admissible] evidence" supporting prior inconsistent statements before those statements may be used to sustain a conviction would tend to indicate that an indictment of Blackmon may not have even been obtainable. Hence, there can be no showing of an Enmund/Tison dilemma – there is no proof that Lowe is a less culpable co-

defendant.[17] Instead, there only is proof that there was one perpetrator, and that perpetrator was Lowe. For these same reasons, Lowe has not shown that any of his postconviction allegations would undermine the rejection of the mitigator that he was a minor participant.

As part of their overall analysis, both the trial court and Lowe failed to assess the impact of the new testimony given the overwhelming evidence, not only from Blackmon's account, but from other witnesses and forensic evidence that Lowe was the sole perpetrator of the robbery and murder. A fair reading of the overall tenor and rational of the trial court's order is that as Lowe brought forward witnesses to impeach Blackmon, and the court found those witnesses to be consistent to the extent that they

[17] Franqui v. State, 804 So.2d 1185, 1206 n.12 (Fla. 2001), the Florida Supreme Court stated: "In *Tison v. Arizona* ... the Court held that a finding of major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement for consistency with the Eighth Amendment." Lowe was a major participant; he had the gun, he was in the Nu-Pak based on his fingerprints, he admitted to driving from the scene, a man fitting his description was the sole person seen leaving the scene and driving White car, and Lowe had the opportunity to commit the crime as he was clocked out of work at the time, while Blackmon was home in bed. In fact, even Lowe's new witnesses, Miller and Grone put Lowe not only at the scene, but in the convenience store. (PCR-T.16 710, 717-22; PCR-T.25 1375, 1381). There is no disparate treatment as the evidence shows Blackmon was not present at the crime scene and he was not charged with the crime as there was no evidence tending to corroborate his alleged statement of involvement.

reported Blackmon to have admitted to killing the victim in this case, then the new witnesses must be credible because they all told similar tales. It was the court's conclusion that mere credibility required submission of the evidence to the jury on the possibility that the jury may believe Blackmon was the killer.

Merely finding that new witnesses are relatively consistent in their testimony, and thus, are credible in and of themselves, does not end the inquiry. Instead, the trial court must look at that new evidence in conjunction with the original trial evidence and assess whether or not the result of the sentencing would be different under Strickland or whether a life sentence would be obtained under Jones. When the new witnesses are assessed in light of the original trial testimony and forensic evidence as outlined in detail in the State's initial brief on cross-appeal and reiterated here, it is clear that the new accounts, no matter how consistent with one another they are, are directly refuted by the known facts that Lowe acted alone and that Blackmon could not have been at the convenience store. As a result, the accounts of the new witnesses, under either Strickland or newly discovered evidence, are rendered of no consequence to the overwhelming trial evidence. The new witnesses do not

undermine confidence in the sentencing and would not effectuate a life sentence on retrial. Lowe acted alone, the evidence supports this and Blackmon was not involved in the robbery/homicide even if it is believed that Blackmon stated that he was the actual shooter. As such, it was error for the trial court to have granted Lowe a new penalty phase. This Court should reverse and remand for the trial court to reinstitute the death sentence.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of post-conviction relief related to guilt phase issues, but reverse the court's order granting of a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail to Rachael L. Day, Esq. Office of the Capital Collateral Regional Counsel - South, 101 NE 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 on June 8, 2007.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on June 8, 2007.

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