IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-474

HARRY JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee

ON APPEAL FROM THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

A. Statement of the Case and Facts

Appellee recites this Court's opinion on direct appeal, specifically that section of the opinion setting forth the facts of the case. Jones v. State, 648 So.2d at 672-73. (Answer Brief at pages 2-3) The facts of the opinion from which Appellee freely quotes include those regarding the seizure of clothing and property from Mr. Jones while he was hospitalized. The quoted section by Appellee does not include the legal fact that much, if not all, of this evidence was held to have been illegally seized by law enforcement. This Court held so in the same opinion from which Appellee quotes. Id. at 673-79.[1]

[1] Appellee's recitation of facts from the opinion also includes that portion regarding jailhouse witness Kevin Prim. It is worthy to note here that two successor motions for post-conviction relief have been filed subsequent to the close of evidence in the original circuit court post-conviction proceedings. Both motions alleged, as newly discovered evidence, that Prim has stated to witnesses that he lied at Mr. Jones' trial about the alleged confession in this case. One of those statements was made to undersigned counsel's investigator, Jeff Walsh. Undersigned counsel previously moved this Court to relinquish jurisdiction to hear the first of the two successor motions. The motion to relinquish was denied by this Court in a 5-2 vote. The second successor motion was filed subsequent to that denial and after the Initial Brief was filed in the instant matter. Thus, two successor post-conviction motions remain pending in circuit court regarding the veracity and credibility of Kevin Prim.

Appellee cites the testimony of Mr. Jones' trial attorney, Greg Cummings, in suggesting that Cummings spoke with a mental health expert prior to a decision to reject the presentation of mental health mitigation. (Answer Brief at pages 23-24) To be clear, there was no evidence whatsoever presented at the evidentiary hearing below, other than Cummings' wavering speculation, that such a conversation occurred. Cummings did not name anyone that he specifically talked to, "such as Harry McClaren." (Answer Brief at 24) No documentary evidence was presented from Cummings' file. Cummings bill did not reflect any such conversations. Certainly the state presented no witnesses to verify this contention. Appellee's attempt to suggest that Cummings talked to a mental health expert in response to the Showalter/Berland memo fails. The suggestion makes it no more than what it is, pure speculation without any proof. Greg Cummings admitted as much.

At page 25 of its Answer, Appellee notes, in defending Cummings' failure to present mental health evidence, a DOC report that recommends placement in a "mentally disordered sex offender program." Appellee ignores the citation from another DOC report (Answer Brief at page 24), that Mr. Jones "testing revealed no sexual hang-ups. . ." Mr. Jones

has no history of sex crimes and the state presented none. Further, Dr. Berland, the only expert to evaluate Mr. Jones and testify, testified to no such problems. Any possible suggestion of sexual problems by the state at trial would have been either ignored by the jury or, more likely, reduced the state's credibility for presenting such baseless testimony.

Appellee quotes Greg Cummings testimony from the hearing wherein Cummings stated his belief that the information in the DOC files "would probably comeback to haunt us." (EHT. 80-81) (Answer Brief at page 26) Appellee, like the lower court, fails to explain how such a contention is borne out by the evidence. The evidence in Mr. Jones' DOC file of criminal activity was no mystery to the jury in this case. The state clearly presented at trial evidence of Mr. Jones prior convictions. The DOC files would have had no bearing on this. Further, evidence in the file of a possible "anti-social personality disorder" diagnosis would have had minimal effect. Dr. Berland agreed that Mr. Jones likely qualifies for ASPD as ***part*** of his diagnosis and further, that such a disorder is not something that someone chooses. Dr. Berland also stated that he reviewed the DOC files and that nothing in the files affects any of his opinions. Further, the state

never had Mr. Jones examined by any expert who could verify anything in the files. In sum, the DOC files that Appellee essentially rests its penalty phase IAC argument on are a paper tiger signifying, in the end, very little.

At page 26 of its Answer, Appellee quotes Cummings testimony that "he (Mr. Jones) did not have mental issues enough to overcome some of the bad things I found in there." The import of this testimony is, as asserted, that Cummings made a strategic decision to forego mental health testimony. However, as Cummings freely conceded, he never had Mr. Jones evaluated to determine "mental issues." Thus, Cummings' decision was uninformed and unreasonable. His own lay opinion about Mr. Jones' mental health, by itself, is not enough, relative to reasonable attorney performance, to forego mental health mitigation.

Appellee, also at page 26 of its Answer, cites to Cummings' testimony regarding the "Dillbeck" case and the fact that the use of records in that case "[d]idn't work either." The "Dillbeck" case is completely irrelevant to the instant matter in the manner cited by Cummings' testimony.

At page 27 of its answer, Appellee makes a point of emphasizing Nancy Showalter's testimony wherein she recited Mr. Jones' criminal history from records. Again, Appellee

must acknowledge that Mr. Jones' criminal history was known by the jury in this case. Nothing Mr. Cummings did prevented that. Certainly, presenting mental health mitigation would not have changed that fact.

Appellee states that Dr. Berland testified that 90 to 95 percent of the time he testifies for the defense. This is only partly accurate. (Answer Brief at page 27) What Dr. Berland actually said was that this has been true since he went into private practice. (EHT. 268) Prior to going into private practice, "the greater proportion was at the request of the State because of [Dr. Berland's] known interest in malingering. (Id.)

Appellee quotes Dr. Berland's testimony where he stated that the car wreck Mr. Jones was in involving the victim's truck makes it difficult to determine pre-existing brain injury. (Answer Brief at page 28) However, Appellee, fails to acknowledge Dr. Berland's opinion that the WAIS given in ***1978***, 13 years prior to the car wreck, did suggest brain damage at that time.

At pages 29-31 of its Answer Brief, Appellee recites the testimony of Dr. Harry McClaren. At the risk of needless re-argument, Appellant again points out that Dr. McClaren was only retained in this case several days before the hearing, did not see or evaluate Mr. Jones, and could

not offer any diagnosis or opinion as to Mr. Jones. Further, the lower court's order denying relief is devoid of any mention of Dr. McClaren's completely speculative testimony. Dr. McClaren's ethically questionable testimony in this case is irrelevant.

Although possibly a minor point, Appellee's recitation of Johnny Lambright's testimony bears correcting. Appellee quotes Lambright as stating that he has had "very much difficulties" with alcoholism. The actual question and answer are as follows:

> Q: Have you – let me ask you this, Mr. Lambright, you had – have you had any difficulties with alcoholism?
>
> A: Very much, sir.

(EHT. 316) While undersigned counsel's question was clearly less than artful, Mr. Lambright's answer was fine. Whether Appellee' misquotation was willfully designed to make Mr. Lambright appear unintelligent, or just a mistake, the quote was incorrect nonetheless.

At page 37 of its factual recitation, Appellee points out that the lower court, on the very last page of the evidentiary hearing transcript, and after both parties had rested, noted that there was a shackling claim in the post-conviction motion and that it was "false." Appellee states

that there was "no objection." Appellee conveniently and blatantly leaves out the lower court's further statement that "I just want to put that on the record in as much as we and Counsel had addressed it earlier when we went over all the various grounds. I just want to put on the record in as much as he has been shackled for the last two days. Good luck to you, Mr. Jones." (EHT. 423) The earlier discussion that the lower court refers to is the Huff[2] hearing in this matter where the shackling claim was argued and summarily denied by the lower court. (Huff hearing transcript at page 12) At the Huff hearing, the lower court stated:

> I do not think it necessitates a hearing because there was no shackles used during that entire trial. The record is void of anything relating to shackles, and the Court was there, and he was not shackled, period. Now, if the Supreme Court wants to reverse me on that and send it back for us to have a hearing where I'm going to make a finding he wasn't shackled, because he wasn't shackled, fine. But, I'm not giving you a hearing on that. You are wasting the Court's time. . . And I find it almost offensive that even a claim like that would be made when there was no shackles used during that trial. The only time Mr. Jones ever had shackles in the courtroom was at pre-trial matters. He was never in the presence of a jury with shackles on, period.

(Huff hearing transcript at page 12)

[2] Huff v. State, 622 So.2d 982 (Fla. 1993).

Further, in disposing of the post-conviction motion, the lower court dealt with the shackling issue in its order dealing with summarily denied claims. (Order of summarily denied claims at page 3) It is clear that the lower court denied an evidentiary hearing on the shackling claim. There was no need to further object or proffer evidence when the lower court made a comment about the shackling claim during the last 30 seconds of the evidentiary hearing. Appellee's suggestion to the contrary is, frankly, misleading.

B. Argument

Brady/Giglio claim

In footnote 6, at page 46 of its Answer, Appellee objects to Appellant's alternative argument of ineffective assistance of counsel as to this claim. First, Appellant asserts that this is a Brady/Giglio[3] argument as primarily argued. The lower court treated it as such and made no finding that trial counsel could or should have been aware of this issue. Appellee does not appear to make such an argument on appeal. The issue is argued in an abundance of caution should such an argument have been made or made in the future. However, as Appellee notes, the standard of

[3] Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. U.S., 405 U.S. 150 (1972).

Strickland v. Washington, 466 U.S. 668 (1984), is nearly identical to that of Brady. The arguments made in the initial brief on this issue are certainly applicable and sufficient to make out a prejudice finding should the Court go down that particular avenue of inquiry.

Appellee cites to the lower court's finding, and rests much of its argument on said finding, that Kevin Prim was released based on an altercation with Mr. Jones. The evidence in this case, by far, proves that such an altercation never happened, certainly was not the basis for the ROR, and the lower court's finding is not reasonable. At the risk of re-argument, Appellant points out support for this contention. Mike Wood, the lead detective and person who retrieved Prim from jail upon his release, testified that he did not recall any altercation being associated with Prim's release. (EHT. 343) Neill Wade, the prosecutor, acknowledged that Mike Wood's report recounting the release, makes no reference to it being associated with an altercation. (EHT. 333) Ines Suber, Prim's lawyer, testified that her motion to have Prim released was not based on any altercation and, further, she has no recollection of any altercation ever happening. (EHT. 155) When asked whether, in her experience, a jail witness would be released because of such an altercation,

Suber stated that “It has never happened. . .” (EHT. 155-56) Perhaps most telling, when Prim was asked about the basis for his release in deposition, with Neill Wade present, he mentions nothing regarding an alleged altercation and Wade does nothing to correct this. The evidence, other than Wade’s unsubstantiated recollection, does not support that the ROR was based on an altercation. All evidence is to the contrary. The lower court never accounts for the actual evidence, instead relying on Wade’s mere assertion. The finding is unreasonable, as is Appellee’s like argument.

Appellee points out, without elaboration, that Appellant did not call Kevin Prim as a witness at the evidentiary hearing. (Answer Brief at 49-50) Appellant would simply note that neither did the state, whose witness Prim is. If Prim’s credibility is still intact as the state suggests, they had equal opportunity to call him as a witness.

At page 49-50 of its Answer, Appellee writes that “Prim appears to have been ROR’d ***in order to go to Wade’s office for Wade to interview him***.” (emphasis added) This point is made as part of Appellee’s broader contention that Wade did not agree to ROR Prim in exchange for a statement. (Answer at page 49-50) Interestingly, this argument (that

Prim “appears” to have been ROR’d to speak with Wade) by Appellee appears to abandon its earlier contention that the ROR was done because of the “altercation.” Appellee’s own apparent lack of faith in the altercation contention is obvious. This is because the altercation never happened. Appellee’s assertion, at page 54 of its Answer, that the lack of evidentiary support for the altercation occurring does not support Appellant’s claim is unpersuasive. First, it is certainly difficult to “prove” that a non-event never happened. One of the ways that this is demonstrated is by pointing out the lack of evidentiary support for such a non-event. Appellant has pointed out numerous such facts. The evidence in this case shows that the “altercation” did not occur and that the real reason for the ROR was Prim’s statement, made in exchange for the ROR.

Appellee here writes that Kevin Prim’s “subjective hope” of an ROR does not constitute Brady or Giglio material. (Answer Brief at page 52) citing Melton v. State, 949 So.2d 994, 1010 (Fla. 2006). In the instant case, despite Appellee’s conclusory attempt to gloss it so, we are not dealing with the subjective. Ines Suber testified that Prim had been promised an ROR. (EHT. 151) Suber further testified that she verified what Prim told her by contacting Mike Wood. (Id.) Thus, there was no

"subjective hope", there was a promise. Melton and Appellee's corresponding argument are inapposite. There was nothing ambiguous, loose, or marginal about the promise made. Appellee's citation to Ventura v. State, 794 So.2d 553 (Fla. 2001) fails.

Appellee states that it "disputes the inference" that Prim was promised an ROR according to Ines Suber. Appellee suggests that Suber did not testify that a promise was made to Prim. Suber testified that she contacted authorities "in an effort for him (Prim) to get whatever he had been ***promised, and that was the ROR***, which I did." (EHT. 151) Appellee's arguments about inferences and double inferences is a smokescreen. Suber could not have been more clear.

The "scenario" created by Appellee at page 55 of its Answer Brief is complete speculation and should be ignored. None of this "version" crafted by Appellee was testified to by either Suber or Wade. Further, the order of the clerk stamps pointed out by Appellee is irrelevant and would be seen so by any lawyer who has ever filed pleadings with the clerk. The fact is that the clerk's office, as is still the case in Leon County, has an in-box where pleadings are dropped off. These documents are not necessarily, and are probably never, clocked in the order they are received. In fact they are just as likely to be clocked in reverse order

of their placement in the in box. The clerk date/time stamps are meaningless.

Appellee indirectly infers that Greg Cummings, Mr. Jones' trial lawyer, knew of the Prim ROR and its circumstances. (Answer Brief at pages 56-57) To the extent that Appellee is actually making this argument, Cummings' testimony is clearly to the contrary. Cummings testified that he knew of no such deal, that Prim denied it, and that if he knew about it, he certainly would have used it. Further, the lower court made no finding that Cummings knew of the promise related to the ROR.

Appellee also attempts to suggest that Cummings cured any Brady or Giglio violation by "skillfully employ[ing] the gravamen of the information in this claim." Appellee misses the main thrust of the claim, or simply chooses to ignore it. That is, Prim was not simply ROR'd. He was released based on a quid pro quo for his statement. Such an agreement or deal suggests a high motivation to lie about the confession and would have caused the jury, and this Court on direct appeal, to reject any credibility in Prim's statement. Again, Cummings own testimony regarding what he knew and what he would have wanted to know completely contradicts Appellee's argument.

Appellee also cites to Ponticelli v. State, 941 So.2d 1073, 1089 (Fla. 2006) and notes this Court's discounting of witness Dennis Freeman's testimony by way of comparison with Kevin Prim in the instant case. In citing Ponticelli, Appellee fails to include the fact that in that case there was a document from the prosecutor specifically stating that no promise or deal was being made. Id. Further, Freeman's counsel, like Suber did here, did not testify and state affirmatively that there was a promise. Finally, Freeman was not nearly as important of a witness as Prim. The instant case was a circumstantial case where Mr. Jones' guilt was vigorously contested. Ponticelli's commission of the homicides in his case appears never to have been seriously contested. Thus, there is a distinct difference between Freeman and Prim.

In arguing as to Cummings' presentation of Prim's criminal record, to demonstrate a lack of prejudice in the non-disclosure of various criminal activities by Prim, Appellee attempts to avoid the specific issue. Kevin Prim, as the evidence indicates, and in which Appellee does not contest, was involved in various criminal activities ***at the time he testified*** in Mr. Jones' trial. Further, the evidence demonstrated that these criminal activities were related to crack cocaine use. Past convictions, although

certainly impeaching, would not have the effect of evidence that Prim was engaging in thefts and smoking crack cocaine at the very time he testified. This evidence was powerful and went beyond just prior convictions.

As to the retroactive harmless error argument, Appellee first quibbles slightly with Appellant's contention that this is a felony-murder case. (Answer Brief at page 63) In doing so, Appellee merely cites to the fact that the jury was given a premeditated murder instruction. However, Appellee cites to no actual evidence of premeditation because there is none. Even under the state's theory of Mr. Jones' guilt, it does not reach to a level of premeditation. Mr. Jones certainly made no statements reflecting premeditation and the victim's wounds and manner of death reflect only a mutual struggle. This is not a case where the manner of death reflects premeditation. See Holton v. State, 573 So.2d 284, 289-90 (Fla. 1990).

Appellee ignores the fact that Appellant raised a claim of cumulative error in his post-conviction motion that is before the Court in the instant case. (PC-R. 562-565) In the motion, Appellant cited this Court's opinion in State v. Gunsby, 670 So.2d 920 (Fla. 1996). Appellee also does not acknowledge this Court's opinion in Jones v.

State, 709 So.2d 512 (Fla. 1998), reaffirming the cumulative analysis requirement of Gunsby. Such an analysis would seem to require this Court to reconsider its' harmless error analysis in light of the post-conviction evidence regarding Prim. Further, the state certainly had every opportunity to respond to the cumulative error claim below.

Appellant, contrary to Appellee's assertion, is not asking the Court to do something it rejected in Caratelli v. State, 961 So.2d 312 (Fla. 2007). There, the Court simply stated that the standards of review are different on direct appeal than in post-conviction, a point Appellant does not dispute. Appellant's argument is that this Court's harmless error review on direct appeal was not fully informed as to the utter lack of credibility of Kevin Prim. The harmless error standard should be reconsidered and applied in that light.

As to the evidence cited by Appellee allegedly demonstrating Appellant's guilt, Appellant makes several points. Jay Watson, who testified at trial, never testified that Appellant confessed to him, only that he overheard a confession to ***Kevin Prim***, a demonstrable liar. Evidence of plant life and the victim's wounds simply proves nothing vis-à-vis Appellant's guilt. It only shows

how the victim died, not who killed him. The fact that Appellant saw the victim making a purchase was one, never denied, and two, indicative of nothing. This, like the other evidence pointed to by Appellee is completely circumstantial and only highlights the fact that this Court pointed to Prim in its' harmless error analysis because he was the only direct evidence of alleged guilt.

Appellee also generally ignores a main thrust of Appellant's harmless error argument. That is, this Court's harmless error analysis, citing Prim's testimony, demonstrates the prejudice of the Brady and Giglio violations related to Prim.

Penalty Phase IAC

Appellee states at page 68 of its Answer Brief that Appellant's ability to "find additional evidence years after the conviction and sentence" is non-persuasive. This assertion ignores the fact that all of the witnesses who testified at the evidentiary hearing were available to Mr. Cummings. Specifically, Dr. Berland had seen Mr. Jones at the time of trial and Cummings declined to utilize him, much less speak with him. To suggest that the witnesses at the hearing were dug up by Appellant years after the fact is blatantly inaccurate.

Appellee's titling of Section "A" of this argument as "Another mental expert" suggests a fact not demonstrated by the evidence. There was only one expert that the evidence demonstrates Cummings was ever aware of; Dr. Berland. The suggestion that he talked with another expert at trial assumes too much. At the hearing, Cummings never identified any expert that he spoke with and was never able to state with certainty that he spoke with any expert. His files did not reveal that he spoke with any expert. Thus, this is not a case where the defense in post-conviction has hired a different expert to achieve a more favorable result. The suggestion to the contrary is again blatantly inaccurate.

Appellee incorrectly argues that Dr. Berland's testimony that Appellant may suffer from anti-social personality disorder was "crucial." (Answer Brief at page 69) Again, Dr. Berland testified that ASPD could be part of Appellant's diagnosis, but that aspect changes nothing regarding the rest of his testimony as to mental illness, brain damage, addiction, and statutory mitigation. There was nothing crucial about the ASPD testimony.

Appellee cites liberally to the testimony of Dr. Harry McClaren. Appellant would simply note that Dr. McClaren was hired only days before the hearing, when the state had

ample advanced notice of the scope of the proceedings, McClaren never saw Mr. Jones, and could not offer any diagnosis of Mr. Jones. Further, and perhaps most telling, the lower court treated Dr. McClaren's testimony as if it never occurred. The court correctly makes not one cite to Dr. McClaren. Dr. McClaren's testimony is irrelevant.

Appellee argues, by citing Cummings testimony, that the state would have used DOC records to refute expert testimony. (Answer Brief at page 71) Again, Dr. Berland testified that he received the records, was aware of them, acknowledged the efficacy of some of the records, and stated that they did not change any aspect of his opinions. Cummings' belief that the records would "haunt" him if revealed is unfounded. Further, Cummings' failure to even speak with Dr. Berland rendered him unable to analyze this evidence in the way the state suggests.

Appellee makes reference to Cummings' testimony that he personally did not believe Appellant had "mental health issues." (Answer Brief at page 71) This testimony and citation avoid the obvious point that one, Cummings is not a mental health professional and, two, he never spoke with Berland or any other expert to obtain a professional opinion as to "mental health issues." Further, based on the Showalter/Berland memorandum, Cummings was certainly

aware that there were potential mental health issues that needed to be explored beyond his simple lay opinion.

Appellee points to the fact that Cummings recognized his "highlight" and "star" on DOC reports. (Answer Brief at page 72) However, beyond these mere notations that demonstrate Cummings awareness of potential mental health issues, Cummings only speculated. Cummings could not say if he ever spoke with an expert, much less give the name of a specific expert that he spoke with. Further, the evidence in this case below is only consistent with the fact that he spoke with no one. The DOC records demonstrate, at most, that Cummings read the file. There are not even handwritten notes on the records reflecting what Cummings thought about the records. Appellee concedes as much in stating "his file does not explicitly state why he did not use a mental health expert. . . (Answer Brief at page 72) Appellee's contention that Cummings "carefully evaluated" (Answer Brief at page 73) Dr. Berland's testing and the DOC records is unsupported.

Appellee's citation to Patton v. State, 878 So.2d 368 (Fla. 2004) points to cases which are clearly distinguishable. Rose v. State, 617 So.2d 291 (Fla. 1993) is a case where the trial attorney had the defendant examined and made a decision based on the expert's opinion.

Long v. State, 610 So.2d 1268 (Fla. 1992) involves a case where a state expert actually examined the defendant and actually offered an opinion as to the defendant's mental health. Jennings v. State, 453 So.2d 1109 (Fla. 1984) involves the same scenario as Long. None of these factors are present in the instant case, as Mr. Cummings never utilized an expert at trial, in any way, and the state has never had an expert examine Appellant in this case.

At the risk of duplication and re-argument, Appellant points out that Appellee's contention that Cummings "reasonably evaluat[ed] the situation" (Answer Brief at page 73), consistent with Strickland, is patently inconsistent with the evidence. Cummings never spoke with Dr. Berland and never had Appellant evaluated by another expert. There is ***no*** evidence to support Cummings speculation that he believes he may have spoken with an unknown expert somewhere at sometime. The evidence simply does not support the "reasonable evaluation" argument made by Appellee.

Again, at page 74 of its Answer, Appellee cites to a string of cases distinguishable from the instant matter. In Sliney v. State, 944 So.2d 270 (Fla. 2006), the defendant was examined by, and counsel consulted with, several experts prior to a decision as to the presentation

of mental health evidence. In Gaskin v. State, 822 So.2d 1243 (Fla. 2002), counsel had the defendant examined by, and consulted with, Dr. Krop before making a decision on mental health. In Looney v. State, 941 So.2d 1017 (Fla. 2006), Mr. Cummings himself had the defendant examined by, and consulted with, Dr. Partyka prior to trial. In Jones v. State, 928 So.2d 1178 (Fla. 2006), Dr. Earnest Miller was hired and consulted with prior to trial. The Dufour v. State, 905 So.2d 42 (Fla. 2005), opinion indicates that counsel had a full psychiatric opinion from an expert and, further, the issue there was whether or not to present that testimony as part of a voluntary intoxication defense. Dillbeck v. State, 2007 WL 1362899 (Fla. 2007), is similarly a case where an expert was hired, consulted, and utilized. Rather than supporting Appellee's position, these cases all involve decisions made by counsel with the benefit of consultation with experts. That did not happen in the instant case.

As to lay mitigation, Appellee makes the argument, consistent with the lower court's order, that the testimony presented below was cumulative. Without elaborating to the point of re-argument, Appellant re-emphasizes the numerous points made in his initial brief demonstrating lay mitigation available to Mr. Cummings but not presented.

Simply because there was some overlap in the testimony does not equate to entirely cumulative testimony. That was obviously not the case here. Appellant would point out that neither the lower court or Appellee acknowledge or account for the numerous elements of non-cumulative lay mitigation, pretending as if it does not exist in order to accommodate their conclusions. The lower court erred and Appellee's "cumulative" argument is flawed. These are simply not the "same facts" (Answer Brief at page 79) presented at the penalty phase.

In Appellee's argument as to prejudice, it cites to Bertolotti v. State, 534 So.2d 386 (Fla. 1988), Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997), and Hannon v. State, 941 So.2d 1109 (Fla. 2006). These cases are demonstrably more aggravated than the instant case. Bertolotti involved a brutal rape, stabbing, and strangling. Haliburton had 31 stab wounds, a prior rape case, and was a case where a mental health expert was employed and rejected after consideration. Hannon involved two brutal, inexplicable murders. Appellee fails to cite to cases consistent with the basic facts of the instant matter.

Shacking Claim

Appellee erroneously cites to Finney v. State, 660 So.2d 674 (Fla. 1995). First, Appellee conveniently fails to acknowledge that Finney is a direct appeal case. Id. at 678. There, the defendant apparently was prepared to cross-examine a prior rape victim about her description of the attack, testimony which was disallowed and not followed by a proffer. Id. at 684. Therefore, the issue, without the benefit of what the testimony was, was unpreserved. Id. Appellee, as stated supra, ignores the fact that Appellant filed a post-conviction motion with a claim that he was erroneously shackled during the trial and that counsel was ineffective in failing to object to the shackling. The lower court clearly, and definitively, denied this claim without an evidentiary hearing. (Huff hearing transcript at page 12) The lower court's sua sponte comment on the last page of the hearing is irrelevant. Appellee's refusal to acknowledge that the claim was summarily denied is disconcerting. When Appellee states that Appellant "had an opportunity for the two days of the evidentiary hearing" to present evidence of shackling, this is just untrue. The claim was summarily denied. If a hearing had been granted, Appellant would have presented evidence of shackling. This claim is preserved for appellate review.

The appropriate standard of review is that set forth in Appellant's initial brief, Lemon v. State, 498 So.2d 923 (Fla. 1986). That is, whether the records and files in the case demonstrate conclusively that Appellant is entitled to no relief. Rather than records or files, the only basis for the lower court's summary denial here was the court's own untested statement that there were no shackles. The court cited to nothing from the record to support this statement. The lower court erred.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, and the arguments made in the Initial Brief, Appellant prays that this Court reverse the lower court and remand this case for a new trial.

Respectfully submitted,

_____

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CERTIFICATE OF FONT SIZE AND SERVICE

Below signed counsel certifies that this reply brief was generated in Courier New 12 point font pursuant to Fla. R. App. P. 9.210 and served by U.S. mail on Assistant Attorney General Stephen R. White, Capital Appeals, PL-01, The Capitol, Tallahassee, FL 32399 by first-class U.S. mail on this __ day of September, 2007.

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