IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-161
Lower Tribunal Case No. 92-3417CFAES

JAMES HUNTER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Hunter submits that the State's Answer Brief is untimely. Counsel timely served Mr. Hunter's Initial Brief on May 21, 2007. According to this Court's March 23, 2007 briefing schedule, the State was required to serve its brief forty days after service of Mr. Hunter's brief. On May 7, 2007, Mr. Hunter filed a *pro se* "Motion to Terminate Capital Collateral Regional Counsel of an Emergency Nature." On June 25, 2007, the State served a motion to toll the time to file its Answer pending this Court's disposition of Mr. Hunter's motion to terminate collateral counsel. This Court denied the motion to toll time on August 9, 2007. The State served its Answer October 19, 2007, some 71 days later.

ARGUMENT IN REPLY

REPLY TO ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. HUNTER'S CLAIMS OF NEWLY DISCOVERED EVIDENCE WITHOUT AN EVIDENTIARY HEARING.

A. Newly Discovered Evidence That Codefendant Eric Boyd Was The Shooter

The State argues in its Answer Brief that Mr. Hunter cannot meet his burden of proof on a newly discovered evidence claim under *Jones v. State*, 709 So. 2d 512 (Fla. 1998). Under *Jones*, in order to obtain relief on a claim of newly discovered

evidence, a claimant must show "first, that the newly discovered evidence was unknown to the defendant or defendant's counsel at the time of trial and could not have been discovered through due diligence and, second, that the evidence is of such a character that it would probably produce an acquittal on retrial." *Mills v. State*, 786 So. 2d 547 (Fla. 2001), *citing Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

The State argues that Mr. Hunter fails to meet the first prong because "Boyd's 'testimony' was not unknown to at the time of trial because it concerns facts wholly within Hunter's knowledge." Answer at 8, FN2. The State fails to recognize that the newly discovered evidence the confession itself, not the facts upon which it is based. That Mr. Hunter knew at the time of the trial that he was innocent and that Boyd was the shooter is of no consequence because Mr. Hunter could not prove those facts without the newly discovered evidence, i.e., Boyd's written confession.

In *Mills v. State*, 788 So. 2d 249 (Fla. 2001), this Court upheld a circuit court's order granting Mills a new sentencing hearing on the basis of newly discovered evidence that a co-defendant was the actual shooter. This Court agreed that the confession constituted newly discovered evidence despite the fact that Mills presumably knew throughout the trial that he was

not the shooter. Mr. Hunter should not be treated any differently.

The State further argues that Mr. Hunter has not met the second "prejudice" prong of *Jones* because his successive Rule 3.851 motion did not allege that Boyd killed Wayne Simpson. This argument is unfounded. In his postconviction claim, entitled "Another Codefendant Was The Shooter" (PCR2. 33), Mr. Hunter alleged that Eric Boyd had come forward and confessed to Mr. Hunter's postconviction counsel that he (Boyd) was the shooter. Mr. Hunter further alleged that the newly discovered evidence, in the form of Mr. Boyd's statement to postconviction counsel, would establish that Mr. Hunter was not involved in the shooting and that, in fact, he was not in the immediate area when the shooting took place. (PCR2. 34).

Further, the State's argument is a stunning about-face from their assertions at trial, and through postconviction proceedings, that there was only one shooter and one "real" gun. The State has maintained all along that the person who shot Taurus Cooley is the same person who shot Wayne Simpson. Only now that the true shooter, Eric Boyd, has admitted to being the shooter has the State appeared to retreat from that position.

The circuit court erred in denying this claim without an evidentiary hearing and this Court should reverse the circuit court's order and remand the case for an evidentiary hearing.

B. Newly Discovered Evidence of Trial Counsel's Actual Conflict of Interest

Mr. Hunter relies on the arguments set forth in his Initial Brief.

C. Newly Discovered Evidence That Victim And Key State Witness Taurus Cooley Was Incompetent To Testify At Trial

In its Answer, the State argues that Taurus Cooley's adjudication of not guilty by reason of insanity cannot constitute newly discovered evidence because it occurred after Mr. Hunter's sentencing, relying heavily on this Court's statement in *Porter* that "newly discovered evidence, by its very nature, is evidence which existed but was unknown at the time of sentencing." *Porter v. State*, 653 So. 2d 374, 380 (Fla. 1995). At the outset, Mr. Hunter points out that this Court has carved out several exceptions to this rule. In *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), this Court held that held that a codefendant's subsequent life sentence constitutes newly discovered evidence which would permit collateral relief. *Scott*, 604 So. 2d, 468-69 This Court explained that the co-defendant's life sentence was not imposed until after Scott's direct appeal was completed and therefore, this fact could neither be known nor discovered at the time that the Court reviewed Scott's death sentence. Similarly, Cooley's adjudication of not guilty by

reason of insanity did not occur until after Mr. Hunter's sentencing.

While this Court cautioned in *Porter v. State* that the *Scott* decision should not be extended beyond its factual situation, it clarified: "Specifically, it should not be read to mean that events other than those in *Scott* which occur after a death sentence is imposed are to be considered aggravating or mitigating factors." *Porter v. State*, 653 So. 2d 374, 379 (Fla. 1995). Unlike the situation in *Scott*, the newly discovered evidence of Mr. Cooley's insanity bears not only on aggravation and mitigation; his newly discovered evidence bears directly on the reliability of his conviction.

Additionally, as Mr. Hunter pointed out in his initial brief, in *Mills v. State*, 788 So. 2d 249 (Fla. 2001), this Court upheld the circuit court's finding that a co-defendant's confession that he was the actual shooter constituted newly discovered evidence which entitled Mills to penalty phase relief. The confession was made after the trial, and therefore did not exist at the time of trial. Likewise, Cooley's adjudication of not guilty by reason of insanity did not exist at the time of Mr. Hunter's trial. In *Mills*, however, the underlying facts which were the basis of the confession clearly existed at the time of the trial. In Mr. Hunter's case, Cooley's adjudication was based on "longstanding mental

illness." As in *Mills*, the underlying facts giving rise to Mr. Hunter's postconviction claim (Cooley's longstanding mental illness) existed at the time of trial, but could not have been discovered without Mr. Cooley's subsequent adjudication.

Furthermore, the fact that Mr. Hunter presented the testimony of Mr. Cooley at the postconviction evidentiary hearing, heavily relied upon by the lower court and the State, is of no import. As indicated in Mr. Hunter's initial brief, Mr. Cooley's evidentiary hearing testimony was limited to events that were supported by documentary evidence. Unlike his trial testimony, Mr. Cooley was not asked to remember, recall or describe his perception of events that he experienced under extremely stressful circumstances.

Lastly, to the extent that the State disputes that Cooley was indeed incompetent to testify at Mr. Hunter's trial, this simply demonstrates the need for an evidentiary hearing to resolve this issue of fact.

REPLY TO ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. HUNTER'S CLAIMS THAT THE STATE WITHHELD FAVORABLE EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND* AND/OR PRESENTED MISLEADING EVIDENCE IN VIOLATION OF *GIGLIO V. UNITED STATES* WITHOUT AN EVIDENTIARY HEARING

In his Initial Brief, Mr. Hunter argued that the circuit court erroneously denied without an evidentiary hearing his claim that the State failed to disclose threats and promises it

had made to key state witness Tammy Cowan, which resulted in her false and misleading testimony in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Rather than responding to any of Mr. Hunter's arguments, the State's Answer merely quotes the circuit court's order and states without argument that competent substantial evidence supports the circuit court's findings.

The circuit court denied Mr. Hunter's claim based on its finding that the claim contained no allegation that Cowan's testimony was false, the proposed testimony would do no more than reaffirm her reluctance to testify and does not satisfy the materiality prong of *Brady*, and that the newly discovered evidence could have been discovered previously through the exercise of due diligence. In his Initial Brief, Mr. Hunter attacked each of the substantive bases on which the circuit court relied. Initial Brief at 36-44. As to the finding that Mr. Hunter did not allege that Cowan's trial testimony was false, there is simply no basis for that finding. Mr. Hunter alleged in his Rule 3.851 motion that Cowan's testimony was false. (PCR2. 35). Her testimony placed the gun in Mr. Hunter's hand and identified Mr. Hunter as the one who shot Wayne Simpson. Since Mr. Hunter has maintained his innocence throughout these proceedings, and affirmatively asserts his innocence in his successive postconviction. It follows that his

claim is based on the allegation that Cowan's testimony to the contrary is false.

As to the lower court's finding that Cowan's statement regarding the threats and promises which caused her to testify falsely against Mr. Hunter would be cumulative of her reluctance to testify, the fact remains that the jury never heard any evidence that Cowan was a reluctant witness and had to be taken into custody as a material witness prior to trial. In fact, the record reflects that the jury was told that at the time of trial, Cowan was serving her sentence for charges related to the instant crime. (R. 695-96, 1062). In any event, reluctance to testify cannot be equated, on any level, to testifying under threat or promises, especially in the eyes of a jury.

In terms of the circuit court's finding that Cowan's testimony that she testified falsely due to threats and promises made by the State would not satisfy the materiality prong of *Brady*, this finding is not supported by competent substantial evidence. Testimony that a key state witness testified falsely--because of threats and promises made by the State--that Mr. Hunter was the shooter bears directly on Mr. Hunter's guilt or innocence.

Accepting Mr. Hunter's allegations of the State's failure to disclose evidence material to Mr. Hunter's guilt or punishment at face value, as it must be taken for purposes of

this appeal, this Court should find that the allegations are sufficient to require an evidentiary hearing with respect to whether the evidence of the threats and promises made to Cowan is newly discovered evidence, and whether the State's suppression of that evidence constitutes a *Brady* and/or *Giglio* violation. This Court should therefore remand this case to the circuit court for an evidentiary hearing on this claim. *Scott v. State*, 657 So. 2d 1129 (Fla. 1995); *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989).

CONCLUSION

Based on the foregoing, the arguments in Mr. Hunter's Initial Brief, and the totality of the evidence before this Court, this Court should reverse the circuit court's order denying Mr. Hunter's Rule 3.851 motion and remand the case to the circuit court for an evidentiary hearing on his claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Kenneth S. Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, this 30th day of November, 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief complies with Fla. R. App. P. 9.100(1) and 9.210(a)(2).

PAUL KALIL