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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-2102

LOWER COURT CASE NO. CF02-05203A-XX

HAROLD BLAKE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd
Suite 118-61
Estero, FL 33928
(850) 322-2172
lindammcdermott@msn.com

COUNSEL FOR APPELLANT

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ARGUMENT IN REPLY[1]

PRELIMINARY MATTERS

In its statement of the case and facts the State asserts that Blake's statement of facts is incomplete because he did not include the fact that his trial testimony placed him in the vehicle driven to the scene of the crime. However, other than this brief reference to Blake's testimony, and without any context, the State never mentions Blake's testimony when repeatedly arguing that he cannot meet his burden of establishing prejudice as to his claims. Yet, much of the evidence presented in postconviction supports Blake's testimony.

At trial, Blake testified that Green and Key came to his hotel in the early morning hours of August 12, 2002 (T. 932). Green and Key wanted Blake to assist them in stealing some pressure washers from a porch (T. 934). Key's girlfriend refused to allow them to use her car, so Blake helped steal a car (T. 935-6). Later that morning, Green, Key and Demetrious Jones discussed robbing a drug dealer from Lakeland and Blake adamantly refused to assist them (T. 940). Blake told them to drop him off (T. 942). After making a stop, Key drove to Del's Go Shop where Green got out of the car. Blake thought Green was getting cigarettes, but within seconds of Green exiting the vehicle, Blake heard two shots (T. 946). Blake submits that while he

[1]Mr. Blake will not reply to every issue and argument, however he does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Mr. Blake stands on the arguments presented in his Initial Brief.

placed himself in the car used in the attempted robbery, he had no idea that Green was armed with a gun that night (T. 942). And, most importantly, he had no idea that Green intended to commit a robbery. Blake testified:

> Q: Did you make any statements about your willingness to be involved in anything?
>
> A: It was against my will.
>
> Q: Did you –
>
> A: I never – they supposed to have been drop me off.
>
> Q: Okay.
>
> A: They supposed to have been dropping me off. They wasn't supposed to take me to no store to do no robbery. They never talked about doing no robbery [of] no store. They was talking about robbing some dudes on the street in Lakeland.
>
> Q: Okay.
>
> A: I never – if I knowed it was going to happen, I would have got out of the car, would have never got in the car at the beginning.

(T. 950-1).

The State simply ignores the fact that the evidence presented in postconviction supports Blake's testimony and would have led the jury to believe that his testimony was credible.

Furthermore, the State also attempts to minimize the undisclosed evidence of the color of Green's shorts by asserting that Green's clothes were recovered sixteen (16) hours after the crime. However, there is no doubt that the color of Green's short which appears to match the shorts reflected in the surveillance video was exculpatory. Blake could have used this evidence to show that it is Green's image captured in the video

and Blake described Green as wearing red shorts during his testimony.

In addition, before law enforcement knew that the surveillance video captured the incident, Teresa Jones described Blake to law enforcement: "blue sweater, dark pants, and a bald head." See Def. Ex. 22.

And, it is not simply the color of Green's shorts that constitutes Brady. Law enforcement deceived Blake and his counsel by indicating that red shorts had been recovered from the closet that contained some of Blake's clothes at the apartment where he was staying. We now know that none of the items recovered from Blake were "red shorts".

A review of all of the facts of Blake's case demonstrates that he is entitled to a new trial.

ARGUMENT I

MR. BLAKE WAS DENIED DUE PROCESS DURING HIS POSTCONVICTION PROCEEDINGS WHEN THE STATE INTERFERED WITH HIS DEFENSE.

In response to Blake's argument that the State interfered with Blake's defense, the State relies on Assistant State Attorney Aguero's statements that were made during the arguments on Blake's motions to the circuit court and Teresa Jones' blanket statements about not changing her testimony. (Answer Brief at 25-6, 29, hereinafter "AB at ___").

First, Aguero was not under oath at the time he made the statements relating to what he was told by Teresa Jones and they are not evidence before this Court.

Further, and most importantly, Aguero's and Jones

statements are refuted by Jones' January 6, 2012, deposition, wherein she categorically stated that Blake never told her that he shot somebody and that is what she told Blake's investigator, Greenbaum. See Def Ex. 74. And, Jones' had also stated under oath that Blake did not remove any guns from an abandoned car on August 12, 2002. See Def Ex. 34. Therefore, what Greenbaum attested to in her affidavit was not "bullshit" because Jones affirmed that she had told Greenbaum what was in the affidavit.

Contrary to the State's representation, Jones did not reaffirm her testimony from trial, the deposition makes clear that she directly contradicted her trial testimony as to the fact that Blake told her he shot someone. See Def Ex. 74. The State's blatant misrepresentation of Jones' testimony is yet another attempt to disrupt the truth-seeking process and win at all costs.[2]

In the same vein, in arguing to uphold the circuit court's ruling on Blake's motion to disqualify Aguero, the State argues that these was "nothing improper" in Aguero's investigation into allegations of criminal acts. The State's argument quite simply fails to account for the impropriety of issuing a subpoena for an alleged crime that did not even occur within the jurisdiction of Aguero's office. Greenbaum spoke to Jones in Pennsylvania,

[2]The State also attempts to mischaracterize Jones' statements to Greenbaum as a "recantation" (AB at 31). However, Jones told Greenbaum information that she previously testified to under oath. Therefore, she affirmed several of her prior statements which were inconsistent with her testimony at Blake's trial which is not a recantation.

thereafter she executed an affidavit in Sarasota County – Aguero's office has no jurisdiction over these locations. Therefore, everything about Aguero's investigation was improper. Furthermore, the timing of the grand jury subpoena was also improper as it was during the midst of Blake's postconviction proceedings.

There can be no doubt that the grand jury subpoena was designed to disrupt and hinder Blake's postconviction counsel's efforts to litigate his 3.851 motion. And, it did. Blake has demonstrated actual prejudice, including that his investigator resigned in the midst of the evidentiary hearing; Greenbaum refused to testify on Blake's behalf, though Blake's counsel had intended to have her testify about several issues[3]; a once friendly Jones refused to communicate with Blake's defense team after Aguero spoke to her; Blake was unable to call Aguero to testify, though he had made himself a witness in the case[4].

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[3]The State shamelessly asserts that "Greenbaum's circumstances were directly attributable to her own affidavit" in arguing that there was no prejudice (AB at 32). However, such an assertion directly conflicts with the finding of the circuit court. Further, Aguero's timing and improper conduct created the circumstances which caused Greenbaum's conflict with Blake. And, everything Greenbaum included in the affidavit was affirmed by Jones during her sworn testimony on January 6, 2012 and during her pre-trial deposition. Therefore, Greenbaum was guilty of nothing but doing her job and discovering the truth.

[4]The State cannot cure the error that occurred when Blake was not permitted to present Aguero's testimony due to the fact that he had made self-serving statements to the court during argument on Blake's motions. The statements were not sworn and were not subject to cross-examination. Thus, they cannot be substituted for testimony and Blake was prejudiced.

Blake also established an appearance of impropriety because Aguero's subpoena to Greenbaum was intended to chill Blake's defense team and dissuade them from speaking to witnesses to uncover the truth of what occurred during the prosecution of Blake. Such behavior must be discouraged with the severest of penalties – in this case, a new trial is warranted.

As to whether and what sanctions are appropriate, the State argues that Blake relies on cases in which a trial defendant's right to due process was violated to argue that Blake is not entitled to a new trial (AB at 33). However, the distinction is without difference in a case where Blake's life is at stake. This Court has made clear that death is different, State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), therefore, greater protections must be afforded, regardless of what step of the process a capital defendant is litigating. See Huff v. State, 622 So. 2d 982, 983 (Fla. 1993)(emphasis added)("We confine our review to the issue of whether the circuit court's treatment of Huff's 3.850 motion violated his due process rights. **In view of the wide scope of issues raised below and the fact that the death penalty was involved as well as the other circumstances in this case, we agree with Huff that his due process rights were violated.** Huff should have been afforded an opportunity to raise objections and make alternative suggestions to the order before the judge signed it."); see also Graham v. State, 372 So. 2d 1363, 1366 (Fla. 1979)(holding that due process required the appointment of postconviction counsel when a prisoner filed a substantially meritorious postconviction motion and a hearing on

the motion was potentially so complex that the assistance of counsel was needed.).

Furthermore, Jones was driven from the witness stand. During her original conversation with Greenbaum, Jones indicated that she was willing to testify at Blake's postconviction proceedings; she even planned to meet with Greenbaum the next day to discuss the arrangements. It was only after Aguero spoke to Jones that she became uncooperative and refused to testify.

The State is correct that in Hendrix v. State, 82 So. 3d 1040 (Fla. 4th DCA 2011), in reversing the defendant's conviction, the reviewing court did not require that the intimidated and threatened witness be provided immunity upon retrial or the defendant would be acquitted. See AB at 35. However, in finding that Hendrix' due process rights had been violated, the appellate court relied on United States v. Morrison, wherein the 3rd Circuit Court of Appeals held that on remand the intimidated witness be provided immunity or the defendant would be acquitted. 535 F.2d 223, 229 (3d Cir. 1976)("At the new trial, in the event that the defendant calls Sally Bell as a witness, if she invokes her Fifth Amendment right not to testify, a judgment of acquittal shall be entered unless the Government, pursuant to 18 U.S.C. §§ 6002, 6003, requests use immunity for her testimony.").[5]

[5]Blake erred in citing to the holding in Morrison when citing to Hendrix. While both cases establish that a due process violation occurs when the State intimidates a witness, the Morrison court required on retrial the witness be provided immunity, whereas the Hendrix court reversed and remanded for a

In requesting this Court to uphold the circuit court's denial of discovery, the State claims that, according to Aguero, Jones told him that she did not tell Greenbaum anything different than what she had stated at trial. However, what the State ignores is: which trial? At Blake's trial on the unrelated murder charge, in June, 2004, just months before Blake's trial, Jones swore under oath that her grand jury testimony was false and she "gave them what they wanted to hear" before because "they kept messing with her." She testified:

> Q: So, you never saw Mr. Blake take any guns out of any car?
>
> A: No.
>
> Q: You never did?
>
> A: No.
>
> Q: Never?
>
> A: No.

See Def. Ex. 51.

Furthermore, at her deposition on January 6, 2012, Jones affirmed the statements that were contained in Greenbaum's affidavit relating to whether Blake had ever told her that he shot someone. Thus, Jones' testimony both before and after Mr. Blake's trial demonstrate why Blake was entitled to discovery from Aguero and the Office of the State Attorney.

Aguero's actions drove Blake's witnesses from the witness stand, created havoc for Blake's defense team and denied Blake

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new trial without a similar condition being attached to the re-trial. Blake did not intend to mislead the Court or the State.

due process when he was in the midst of presenting evidence demonstrating that his convictions must be reversed. Relief is warranted.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. BLAKE'S CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PRESENT EXCULPATORY EVIDENCE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE. AS A RESULT, THE CONVICTION IS UNRELIABLE.

After reciting the circuit court's order for over a dozen pages, the State addresses only a few points of Blake's claim in a piecemeal fashion, ignoring the complete lack of investigation or awareness of exculpatory information that resulted in a trial where Blake's trial counsel was simply not in a position to meaningfully challenge the State's case or present a comprehensive defense.

As to the evidence that demonstrated that Blake was not the individual who exited the car at Del's Go Shop, the State argues that trial counsel "repeatedly highlighted" the fact that Blake was bald and Green had dreads at trial (AB at 53 n.9). However, trial counsel never linked Demetrious Jones' singular description of Blake, Green and Key with the eyewitness descriptions and never once mentioned the physical impossibility that it was Blake that exited the car and fired the shot into Del's Go Shop during his closing argument. Though the jury heard a single witness' physical description of Blake, Green and Key, it was deficient to fail to highlight the evidence to the jury.

As to Teresa Jones, the State completely ignores Jones' testimony provided during her June 14, 2004, deposition and at his June, 2004 trial for the unrelated murder of Young, wherein Jones adamantly denied that Blake took any guns from the car on the morning of August 12, 2002, and never said he had shot someone (See Def. Ex. 34 and 51). Indeed, the State mistakenly argues that Blake relies on Jones' testimony at Green's trial (AB at 54 n.10). Blake's reference to Jones' testimony at Green's trial related to her admission that was never disclosed to Blake or his counsel that she and Green received benefits for her testimony, i.e., she and Green would not be charged with any crimes, they would receive assistance and expected benefits. See Def. Ex. 51. Thus, contrary to the State's argument, Blake need not "assume" that Jones received an "undisclosed 'deal'" (AB at 58), because she admitted under oath at Green's trial that she and Green did.

In addition, Blake's claim does not hinge on whether Jones received a deal or not. Instead, Blake's claim as to the ineffective assistance of his trial counsel related to the fact that, though counsel admitted that he needed to research Jones' charges and plea by looking at records, the arrest affidavit and other information, he did not. For example, had trial counsel reviewed the records related to Jones' criminal charges, he would have seen that Jones confessed to being the driver of the car,

contrary to Pickard's testimony[6], who followed the victim and then drove the getaway car after the robbery was completed. See Def. Ex. 6. Jones confessed to knowing the plan to rob the victim and she participated fully in that plan (Def. Ex. 6). She was not innocent, as she testified under oath at Blake's trial; indeed, Jones played a more significant role in the criminal conduct that occurred than did Blake, according to his trial testimony and Green's testimony at the evidentiary hearing. Trial counsel's failure to adequately investigate this issue severely prejudiced Blake who could have attacked Jones' motives and credibility to the point that the jury would have disregarded her testimony.[7]

Furthermore, Jones' attorney, Sites, testified, contrary to the representation by the State, that he had no idea if Jones had contact with the State about her testimony in Blake's case (PC-R. 7232). Likewise, Pickard and Castillo could only say that he had no discussion with Jones about being a witness in Blake's cases

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[6]Pickard's testimony that Jones was not an active participant was flatly contradicted by report and Jones' confession. Whether Pickard mis-remembered Jones' involvement or simply lied during his postconviction testimony is not clear.

[7]Furthermore, had trial counsel effectively impeached Jones with her June, 2004, deposition, and trial testimony, he could have established that in September, 2004, Jones had freely admitted that she had lied to the grand jury about Blake obtaining guns on August 12, 2002, and telling her he shot someone. Indeed, it was only after she was charged with a life felony that she fell back into line and recanted her sworn testimony in June, 2004. Therefore, the timing of Jones' charges and the possibility of the punishment undoubtedly provided the motive to lie at Blake's capital trial. Trial counsel failed to present this critical evidence to the jury.

(PC-R. 1385, 1496), though Pickard may have been aware that she was a witness when he offered her the lenient plea in her case (PC-R. 1493). And, clearly, none of them knew what Jones expected, which was also critical to expose in order effectively represent Blake. Davis v. Alaska, 415 U.S. 308, 315 (1974)(recognizing "that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.").

As to the issue of trial counsel's failure to introduce Green's statements inculpating himself as the shooter, the State argues that Blake has not shown how the statements were admissible (AB at 62 n.14). First, Blake clarifies that his claim did not only rely on Green's statements to others, but also witnesses' observations of him – witnesses like Key, who according to all accounts was the third person in the car at Del's Go Shop the morning of August 12, 2002, and witnesses who saw Green with the murder weapon within the hour after the shooting. Blake submits that the witnesses who observed Green could have provided admissible, relevant and exculpatory testimony. The State ignores these witnesses.

Further, Green's inculpatory statements are admissible pursuant to the rules of evidence. Florida Statute §90.804(2) permits the introduction of hearsay evidence when the statement that is made is against the interest of the declarant. This includes statements that subject the declarant to criminal liability - which is the case here.

Practically speaking, had trial counsel investigated and

discovered Green's statements he could have called Green to testify. If Green denied that he planned the robbery of Del's Go Shop, or shot Mr. Patel, Blake could have impeached him with the statements he made to Angela Parker and others. See Chambers v. Mississippi, 410 U.S. 284, 302-3 (1973). If Green invoked his right against self incrimination then the statements would have been admissible because Green was unavailable.

Moreover, Green's statements to others were "critical to [Blake's] defense". Id. Specifically, Blake asserted that his statements to law enforcement that inculpated himself as the shooter were false. Blake testified at trial he had no idea Green intended to commit a robbery. Blake testified:

> Q: Did you make any statements about your willingness to be involved in anything?
>
> A: It was against my will.
>
> Q: Did you –
>
> A: I never – they supposed to have been drop me off.
>
> Q: Okay.
>
> A: They supposed to have been dropping me off. They wasn't supposed to take me to no store to do no robbery. They never talked about doing no robbery [of] no store. They was talking about robbing some dudes on the street in Lakeland.
>
> Q: Okay.
>
> A: I never – if I knowed it was going to happen, I would have got out of the car, would have never got in the car at the beginning.

(T. 950-1). Therefore, Green's statements were admissible to corroborate Blake's testimony and demonstrate that his statement to law enforcement was false.

And, it is for this same reason that prejudice has been established. The State asserts that even if Blake was not the shooter that he still could have been guilty of the murder pursuant to the law regarding principles. However, Blake testified that he did not want anything to do with a robbery and believed that Green and Key were going to drop him off at his motel (T. 950-1). When the car stopped at Del's Go Shop, Blake believed that Green was going to buy cigarettes (T. 946). Therefore, the evidence corroborating Blake's testimony, while undermining his statement to law enforcement and Teresa Jones and Demetrious Jones' testimony, was necessary to show that Blake was not the shooter, had no intent to commit a robbery and could not be guilty under a theory that he was a principle.

As to whether trial counsel was deficient for failing to retain any experts at the guilt phase, the State relies on trial counsel's testimony at the evidentiary hearing that he did not need an expert on false confessions (AB at 65).[8] However, trial counsel failed to even file a motion to suppress until Blake filed a pro se motion requesting that counsel because of his

[8]As to using a mental health expert for the guilt phase, the State distorts trial counsel's testimony at the evidentiary hearing as to why he did not retain a mental health expert, stating that Blake refused to see one (AB at 65). However, trial counsel could not recall why he did not retain a mental health expert; he believed that he did not see any indications that Blake needed a mental health expert or that Blake did not want to see one (PC-R. 1663). And, trial counsel was questioned about the lateness of the motion for a mitigation mental health expert for penalty phase. Nothing in the record reflects that trial counsel ever contemplated retaining a mental health expert to assist in presenting evidence that Blake's statement to law enforcement was coerced and false.

refusal to file a motion to suppress (R. 155-7). Further, a review of Ofshe's testimony establishes that trial counsel failed to present the critical information to both the judge, during the motion to suppress, and jury, during the trial, that demonstrated number of significant elements that are red flags for false confession, i.e., there is no "fit" (PC-R. 2095-2106).

The information provided from Ofshe, whether he testified, or trial counsel simply used Ofshe's information to establish the lack of "fit" with the law enforcement offices, would have established that Blake's statement to law enforcement was indeed false. And, Blake was not required to prove that the statement was false, as the State suggests (AB at 66, 68). Ofshe provided critical information that established that Blake's statement to law enforcement was unreliable.

Moreover, contrary to the State's assertion (AB at 66), Ofshe wasn't relying on Blake's account of the crime to highlight the lack of "fit"; he was relying on the surveillance video, the eyewitness statements, the video of Blake's statement, the officer's accounts of the statements, along with Blake's account of the interrogation. Ofshe's opinion was based upon the objective information, which did not come from Blake, Green or law enforcement.

By contrast, the State relies on the subjective statements and testimony by Blake and Green. However, Green's statements and testimony were made at a time when, according to Teresa Jones, he was told by law enforcement that he would not be charged with any crimes if he cooperated. Indeed, he was not

charged with any crime related to the Patel homicide until two years after the crimes when he stopped cooperating with law enforcement. And, to date, he has not been charged for the murder of Young.[9] Had the information provided by Ofshe been heard, confidence in Blake's statement would have been undermined and the judge and/or jury would have ignore Blake's statement when determining the issue of guilt.

Finally, in order to rebut Ofshe's testimony, the State relies on the testimony of second chair attorney, Al Smith, that Blake confessed to him (AB at 67)("Dr. Ofshe apparently discounted to irrelevance the circumstance that Blake, in no kind of coercive setting, told one of his trial lawyers [Al Smith] that he'd shot Mr. Patel."). However, what the State ignores is that Smith's testimony was not credible. Indeed, Smith could not remember when this alleged conversation occurred or what Blake told him (PC-R. 1881).[10] Smith could not identify a visit with Blake from his time records which included only a single phone conference with Blake in May, 2004. See Def. Ex. 52 and PC-R.

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[9]The jury found that Blake was not the shooter at his trial for the murder of Young (Def. Ex. 51).

[10]Smith testified that there were things that Blake told him that weren't in the reports. Yet, when Smith identified a statement that Blake had allegedly told him – that the group left the store and then returned – that information was in fact contained in Blake's statement to law enforcement when he explained that a dog was barking at a fence so the group went back to the Lake Deer apartments (T. 776-7). Thus, the fact that Smith testified to as not being in any of the reports, in support of his recollection of an alleged confession, was contained in Blake's statement to law enforcement.

1882).[11] Smith testified that he had no notes of the conversation or any memos (PC-R. 1882). And though Smith testified that he had told Gil Colon, Blake's first chair attorney, about the alleged confession, Colon denied that he had ever been told anything about a confession (PC-R. 6978-9; see also PC-R. 1894).

Smith also testified that because of Blake's alleged confession, the defense could not have placed him on the witness stand (PC-R. 1883). But, of course, the defense did put him on the witness stand. See T. 926-1070. Indeed, Blake testified and answered numerous questions posed by trial counsel about what happened on August 12, 2002. Blake denied knowing that a robbery would occur and denied being the shooter (T. 950-1). If Blake had confessed to Smith, then Smith violated his ethical duties in failing to bring the matter to the trial court's attention. See Rule 4-3.3 of the Rules Regulating the Florida Bar. Indeed, Smith presented the opening statement to the jury in which he vouched for Blake's version of events on August 12, 2002 (T. 925).

The State also ignores the fact that Smith also testified that his memory may be mistaken (PC-R. 1892). Indeed, Smith testified that he did not know what to believe (PC-R. 1893-4), and that he was not constrained in presenting any evidence in

[11]In eighteen months, Smith had spent less that seventeen hours working on Blake's case.

representing Mr. Blake (PC-R. 1895).[12]

As to Blake's claim that trial counsel was ineffective for failing to present evidence that the State was presenting inconsistent theories as to who was the dominant participant and who did what in the crime, the State argues that there is no prejudice.[13] But in doing so the State relies on the evidence and argument at Green's trial, which according to the State, make Green and Blake "equally accountable as principals" (AB at 70). However, the State ignores the evidence presented by Blake which demonstrates that the State was inconsistent as to key points by reviewing the evidence and argument at both Blake and Green's trials. The State refuses to address the differences in the testimony from Demetrious Jones and Teresa Jones between the two trials and the State's use of Angela Parker at Green's trial.

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[12]Blake submits that Smith was mistaken and that his faulty recollection was based on the statement Blake gave to law enforcement – which Blake maintains was false. Indeed, the images depicted in the surveillance video and the eyewitness accounts corroborate Blake's contention that the statement was false. However, what is curious, is the fact that the State apparently believes that Smith's memory was not faulty and the State has relied on this notion that Blake confessed to him to argue that the denial of various claims should be affirmed. Yet, if that is truly what the State believes then the State must report Smith's clear breach of his ethical duties to the Florida Bar. And, according to the Florida Bar Website, the State has not reported Smith's conduct. See http://www.floridabar.org.

[13]The State also suggests that the claim is procedurally barred (AB at 69). However, this cannot be the case. Blake raised the issue in the context of ineffective assistance of counsel (or Brady), based upon the evidence that was presented at Green's trial. And, this is Blake's first postconviction proceedings. Blake's claim was timely and legally sound. Therefore, the State's reliance on Marek v. State, 8 So. 3d 1123 (Fla. 2009), is misplaced.

Prejudice is established because, though the jury heard an instruction regarding the law of principals, Blake testified in his own behalf and told the jury that he did not know that Green and Key intended to rob the store (T. 950-1). Blake believed that he was being driven back to his motel (T. 950-1). Thus, the testimony from Parker was critical as it would have supported Blake's testimony and undercut his statement to law enforcement in regard to whether the jury believed that he exited the car or not. Obviously, if Blake exited the car then he was guilty, but if he did not, then it was possible that he had no idea that a robbery had been planned and was to be carried out by Green.

Trial counsel's performance was deficient. Blake submits that when the evidence presented at postconviction proceedings is considered cumulatively, confidence in the outcome is undermined. Relief is warranted.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING MR. BLAKE'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

In response to Blake's Brady claims, the State argues that there is no Brady claim when evidence is equally accessible to the defense (AB at 76). The State's argument is legally erroneous. The United States Supreme Court clarified in Strickler v. Greene, 527 U.S. 263, 281-82 (1999), that there are three components of a true Brady violation, none of which include

diligence on the defense's part: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Thus, if the evidence is exculpatory it must be disclosed.

In regard to the exculpatory evidence about Teresa Jones, the State argues that there was nothing suspicious about the timing of Jones' plea (AB at 78-9). However, the State misses the point. There was much more to Jones' charges than the State ever revealed to Blake. The fact that the plea was offered just a few months after Jones had disavowed her grand jury testimony and was then not accepted until the eve of trial was critical information that should have been disclosed to Blake.

Furthermore, the records related to Jones' criminal charges reflected that Jones confessed to being the driver of the car, contrary to Pickard's testimony[14], who followed the victim and then drove the getaway car after the robbery was completed. See Def. Ex. 6. Jones confessed to knowing the plan to rob the victim and she participated fully in that plan (Def. Ex. 6).[15]

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[14]Pickard's testimony that Jones was not an active participant is flatly contradicted by the reports and Jones' confession. Whether Pickard mis-remembered Jones' involvement or simply lied during his postconviction testimony is not clear. Likely, Pickard provided the same misleading information when he spoke to Blake's trial counsel in 2005.

[15]The fact that Jones' confessed to knowing about the robbery and driving the car that followed the victim makes the State's reliance on the fact that "Jones thought she would ultimately be vindicated" (AB at 79), laughable.

She was not innocent, as she testified under oath at Blake's trial; indeed, Jones played a more significant role in the criminal conduct that occurred than did Blake, according to his trial testimony and Green's testimony at the evidentiary hearing. The State's failure to disclose the exculpatory information severely prejudiced Blake who could have attacked Jones' motives and credibility to the point that the jury would have disregarded her testimony.[16]

Furthermore, Jones' attorney, Sites, testified, contrary to the representation by the State, that he had no idea if Jones had contact with the State about her testimony in Blake's case (PC-R. 7232). Likewise, Pickard and Castillo could only say that he had no discussion with Jones about being a witness in Blake's cases (PC-R. 1385, 1496), though Pickard may have been aware that she was a witness when he offered her the lenient plea in her case (PC-R. 1493). And, clearly, none of them knew what Jones expected, which was also critical to expose in order effectively represent Blake. Davis v. Alaska,415 U.S. 308, 315 (1974)(recognizing "that the exposure of a witness' motivation in testifying is a proper and important function of the

[16]Furthermore, had trial counsel effectively impeached Jones with her June, 2004, deposition, and trial testimony, he could have established that in September, 2004, Jones had freely admitted that she had lied to the grand jury about Blake obtaining guns on August 12, 2002, and telling her he shot someone. Indeed, it was only after she was charged with a life felony that she fell back into line and recanted her sworn testimony in June, 2004. Therefore, the timing of Jones' charges and the possibility of the punishment undoubtedly provided the motive to lie at Blake's capital trial.

constitutionally protected right of cross-examination."). Thus, the information concerning Jones' charges and plea were exculpatory and the State's failure to disclose it severely prejudiced Blake.

Likewise, the fact that the State threatened Jones with removing her children from her custody was also evidence that should have been disclosed. The information was admissible to demonstrate Jones' bias and motives for changing her testimony from her deposition and testimony at Blake's trial for the unrelated murder of Young wherein she said that Blake did not confess to shooting anyone and that she did not see him with a gun on August 12, 2002. And, Priscilla Hatcher testified that she observed law enforcement threaten Jones about removing her children from her care. See PC-R. 2571-4, 2579-81, 2587.

The State argues that the undisclosed evidence relating to Teresa Jones does not undermine confidence in the outcome of Blake's conviction (AB at 80-1). But, the State fails to acknowledge that this Court is required to conduct a cumulative review of all of the favorable, undisclosed evidence.

And, a review of the undisclosed evidence relating to Jones undermines confidence in Blake's conviction. Jones was a critical State witness. She testified that Blake confessed to her that he had shot someone and that he retrieved the guns from the abandoned car. However, in the summer of 2004 Jones' revealed that her statements to law enforcement and testimony at the grand jury were not true. She testified that much of the information she provided the police was based on what people on

the neighborhood were saying. And, she revealed that she and Green had been promised benefits by the State in exchange for their cooperation. Shortly after coming clean, Jones was charged with armed robbery and confessed that she was fully aware of the plan to rob the victim and was the driver of the car that followed the victim to the location of the robbery. Jones was facing a lengthy prison sentence. Only after she was offered a plea to petit theft, a misdemeanor, and little to no time, did she come around and recant her prior testimony in June, 2004. Jones' motivation for recanting her testimony combined with this Court's belief that "recant[ed] testimony is exceedingly unreliable" Henderson v. State, 135 So. 548, 561 (Fla. 1938)(Brown, J., concurring specially), would have caused the jury to completely disregard her damaging testimony.

Likewise, had the jury known the extent of Demetrious Jones' pending criminal charges and favorable treatment by the State, his testimony would have been discounted to irrelevance. Like Teresa Jones, Demetrious Jones' statement evolved and changed throughout the prosecution of Blake. At the time of Blake's trial, Blake was aware that Jones had been charged with possession of cocaine. However, Blake was not aware that Jones had become uncooperative with the State and the State had sought to have him held as a material witness in Blake's case or that Jones' charges for possession of cocaine with intent to distribute and resisting an office stemmed from his arrest on motion to hold a material witness. Clearly, Blake could have demonstrated how the State exerted pressure of Jones to fall back

in line to assist the State at Blake's trial.

As to the State's deceptive actions regarding the clothing collected from Green and Blake, the State attempts to minimize the undisclosed evidence of the color of Green's shorts by claiming that the defense knew from the surveillance video that the shooter was wearing red shorts. While this is true, the State failed to reveal that when Green gave the police his clothes on August 12, 2002, those clothes included a pair of red shorts. Likewise, the State mislead the defense by indicating that the State had recovered red shorts from the clothes believed to be Blake's when those clothes did not include a pair of red shorts. Blake could have used this evidence to show that it was Green's image captured in the video. Blake could have also supported his trial testimony in which he described Green as wearing red shorts on the day of the crime.

In addition, before law enforcement knew that the surveillance video captured the incident, Teresa Jones described Blake: "**blue sweater, dark pants, and a bald head.**" See Def. Ex. 22 (emphasis added).

The State's argues that it's deception cannot establish a Brady violation because Blake knew that Green was wearing red shorts. However, by hiding the fact that law enforcement actually collected red shorts from Green and that the clothes collected from Blake did not include red shorts, the State violated Blake's right to due process.

Indeed, the State's argument is illogical. First, whether or not Blake knew the color of Green's shorts makes no difference

to the State's obligation to turn over the exculpatory evidence. Trial counsel could have presented the exculpatory evidence, that also corroborated Blake's testimony and revealed weaknesses with the investigation of the case, had the color of the shorts been revealed.

Indeed, in Banks v. Dretke, 540 U.S. 668 (2004), the United States Supreme Court confronted a similar argument made on behalf of the government in attempting to fault petitioner in his federal habeas proceedings. The Supreme Court explained:

> The State here nevertheless urges, in effect, that 'the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected . . . A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.

540 U.S. at 696 (citations omitted).

Likewise, the United States Supreme Court vacated the death sentence in Brady v. Maryland, based on the suppressed confession of Brady's co-defendant. 373 U.S. 83 (1963). At Brady's trial, he testified and admitted to being present during the commission of the charged crimes, however, he claimed that his co-defendant "did the actual killing." Id. at 84. Despite, Brady's protestations that his co-defendant had committed the murder, the Supreme Court held that the suppressed statement of Brady's co-defendant admitting to the murder was exculpatory and in that case material. Id. at 90. So, here, even though Blake informed his trial attorney that Green wore red shorts and was the shooter and testified to the same, the State still violated Brady in

failing to disclose the evidence to support Blake's claim. As in Brady, the State in Blake's case played "the role of an architect of a proceeding that does not comport with standards of justice ... " Id at 88.

There can be no doubt that the simple fact that Green was wearing the clothing depicted in the surveillance video would have undermined the State's entire case against Blake and supported Blake's testimony. Blake was prejudiced by the State's suppression of the evidence.

Blake submits that when the evidence presented throughout his capital postconviction proceedings is considered cumulatively, it is clear that confidence is undermined in the outcome. Relief is warranted.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. BLAKE'S CLAIM THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. BLAKE'S CONVICTION IS UNRELIABLE AND HE IS ENTITLED TO A NEW TRIAL.

The State argues that Green's and Demetrious Jones' testimony is not believable (AB at 92-4). As to Green's testimony at Blake's evidentiary hearing the State points out that his testimony is inconsistent with his prior statements and testimony at his trial that Blake was the shooter (AB at 92). But, the State asserts that his prior statements are more believable because his testimony in 2011 was "risk-free" (AB at 92). The State's position is illogical. At the time of the crime, Green had everything to gain by pointing the finger at Blake. Indeed, when he made his statement that Blake was the

shooter, Green was facing the possibility of being charged with first degree murder and being subject to the death penalty, or at a minimum a life sentence. However, Green was told by law enforcement that they only wanted the shooter. And, according to Teresa Jones, Green was told that neither he nor Teresa would be charged with any crimes if they assisted the State, they would receive assistance and expected benefits. See Def. Ex. 51. And, the State made good on it's promises – so long as Green pointed the finger at Blake and assisted the State, he was not charged. However, in the summer of 2004, Green stopped cooperating with the State and refused to testify at Blake's trial.

Thus, the logical analysis is that Green had everything to gain and nothing to lose in 2002 when he told law enforcement that Blake was the shooter. In 2011, he had nothing to gain and everything to lose, since the State could still charge Green with the murder of Kelvin Young and seek the death penalty.

However, perhaps more importantly than analyzing Green's state of mind is reviewing the evidence that has now been introduced: Green surrendered red shorts to law enforcement the day of the crimes – red shorts that appear to be the same red shorts captured by the surveillance video at Del's Go Shop; within hours of the shooting Blake was described as wearing "blue sweater, dark pants, and a bald head." See Def. Ex. 22, – not red shorts; the eyewitness account from the witness who observed the shooter for the longest period of time was that the shooter had braids; Blake was bald; Kelly Govia, a witness with no stake in the case whatsoever, but, who came forward because she was

concerned about the fact that she overheard Kevin Key recounting the shooting just hours after the crime and stating that Green was the shooter; just a few hours after the shooting, Angela Parker heard Green state: "It didn't look to me like he was shot nowhere that could kill him, he was shot in the arm, I remember him being shot in the arm not the chest or anywhere that could kill him, so he shouldn't be dead." – something that only the person who approached the store and committed the shooting would know, See Def. Ex. 23; Terrell Smith told law enforcement that Green was in possession of the 9mm gun after the crimes and he showed the police where Green disposed of the gun; Demetrious Jones initially told law enforcement that Blake was not present when Green and Key discussed committing a robbery and Kevie Hall corroborated Jones' statement see Def. Ex. 20; and a myriad of individuals told law enforcement that Green was involved.

And, contrary to the State, Green's testimony that he was the shooter is material because he also testified that Blake was unaware that Green intended to commit a robbery – just as Blake testified at trial. And, all of the evidence presented in postconviction corroborates Green's testimony and Blake's trial testimony.[17]

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[17]Once again, the State points to the questionable testimony of second chair attorney, Al Smith, that Blake confessed to him to argue that Blake was the shooter (AB at 92 n.20). However, what the State ignores is that Smith's testimony was not credible. Indeed, Smith could not remember when this alleged conversation occurred or what Blake told him (PC-R. 1881). Smith testified that there were things that Blake told him that weren't in the reports. Yet, when Smith identified a statement that Blake had allegedly told him – that the group left the store and

Furthermore, Green and Jones' testimony is certainly admissible at a new trial. Likewise, Green and Jones's statements to others inculpating Green as the shooter are admissible. Green's inculpatory statements are admissible pursuant to the rules of evidence. Florida Statute §90.804(2) permits the introduction of hearsay evidence when the statement that is made is against the interest of the declarant. This includes statements that subject the declarant to criminal liability - which is the case here.

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then returned – that statement was in fact contained in Blake's statement to law enforcement when he told law enforcement about a dog barking at a fence so the group went back to the Lake Deer apartments (T. 776-7). Thus, the fact that Smith testified to as not being in any of the reports, in support of his recollection of an alleged confession, was contained in Blake's statement to law enforcement. Smith could not identify a visit with Blake from his time records which included a single phone conference with Blake in May, 2004. See Def. Ex. 52 and PC-R. 1882). Smith testified that he had no notes of the conversation or any memos (PC-R. 1882). And though Smith testified that he had told Gil Colon, Blake's first chair attorney, about the alleged confession, Colon denied that he had ever been told anything about a confession (PC-R. 6978-9; see also PC-R. 1894).

Smith also testified that because of Blake's alleged confession, the defense could not have placed him on the witness stand (PC-R. 1883). But, of course, the defense did put him on the witness stand. See T. 926-1070. Indeed, Blake testified and answered numerous questions posed by trial counsel about what happened on August 12, 2002. Blake denied knowing that a robbery would occur and denied being the shooter (T. 950-1). If Blake had confessed to Smith, then Smith violated his ethical duties in failing to bring the matter to the trial court's attention. See Rule 4-3.3 of the Rules Regulating the Florida Bar. Indeed, Smith presented the opening statement to the jury in which he vouched for Blake's version of events on August 12, 2002 (T. 925).

The State also ignores the fact that Smith also testified that his memory may be mistaken (PC-R. 1892). Indeed, Smith testified that he did not know what to believe (PC-R. 1893-4).

Practically speaking, had trial counsel investigated and discovered Green's statements to others he could have called Green to testify. If Green denied that he planned the robbery of Del's Go Shop, or shot Mr. Patel, Blake could have impeached him with the statements he made to Angela Parker and Demetrious Jones and others. See Chambers v. Mississippi, 410 U.S. 284, 302-3 (1973). If Green invoked his right against self incrimination then the statements would have been admissible because Green was unavailable.

Moreover, Green's statements to others were "critical to [Blake's] defense". Id. Specifically, Blake asserted that his statements to law enforcement that inculpated himself as the shooter were false. Blake testified at trial he had no idea Green intended to commit a robbery. Blake testified:

> Q: Did you make any statements about your willingness to be involved in anything?
>
> A: It was against my will.
>
> Q: Did you –
>
> A: I never – they supposed to have been drop me off.
>
> Q: Okay.
>
> A: They supposed to have been dropping me off. They wasn't supposed to take me to no store to do no robbery. They never talked about doing no robbery [of] no store. They was talking about robbing some dudes on the street in Lakeland.
>
> Q: Okay.
>
> A: I never – if I knowed it was going to happen, I would have got out of the car, would have never got in the car at the beginning.

(T. 950-1). Therefore, Green's statements were admissible to

corroborate Blake's testimony and demonstrate that his statement to law enforcement was false.

As to Jones' testimony in 2011, the State also argues that he is not credible (AB at 93). However, much of Jones' testimony was corroborated by other evidence, i.e., Kelly Govia's testimony about seeing Jones speak to her niece and then overhearing the conversation between Key and his friend; and Terrell Smith's testimony about the murder weapon. Likewise, Jones' pre-trial statements to law enforcement demonstrate that Blake did not participate in planning the robbery.

Furthermore, like Green, Jones had much to gain in 2002. Jones' fingerprint was on the stolen car that was used in the robbery. Jones was considered a suspect and believed he could be charged in the Patel case (Def. Ex. 5). And, he expected assistance on his pending charges. Even Blake's trial prosecutor admitted that he assisted Jones in being released from jail at some point (PC-R. 1382). Thus, Jones had much to gain when he testified in 2002, but, nothing to gain in 2011. Jones testimony in 2011 was credible.

Blake submits that the newly discovered evidence would probably have produced an acquittal because it supports Blake's trial testimony and severely undermines the State's case against Blake. Relief is warranted.

ARGUMENT V

THE CIRCUIT COURT ERRED IN DENYING MR. BLAKE'S CLAIM THAT HE WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE THE PROSECUTOR'S ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED MR. BLAKE EFFECTIVE ASSISTANCE OF COUNSEL.

The State contends that Blake abandoned his claim (AB at 96). However, the circuit court made no such ruling and the State's argument must be denied. See PC-R. 7685.

The State, like the circuit court, also argues that the prosecutor's statements were a fair comment on the evidence (AB at 97). However, a review of the comments demonstrates that the prosecutor did not argue the evidence or even proper inferences from the evidence. Rather, the prosecutor attempted to prejudice Blake by using inflammatory rhetoric. Relief is warranted.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, Appellant, HAROLD BLAKE, urges this Court to reverse the ciruit court's order and grant him relief in the form of a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by electronic service to Katherine Blanco, Assistant Attorney General, on this 21st day of October, 2013.

CERTIFICATION OF TYPE SIZE AND STYLE

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/s/ Linda McDermott
LINDA MCDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd
Suite 118-61
Estero, FL 33928
(850) 322-2172
lindammcdermott@msn.com

COUNSEL FOR APPELLANT