Electronically Filed 11/12/2013 05:07:28 PM ET

RECEIVED, 11/12/2013 17:08:45, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-719

JAMES AREN DUCKETT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY TO STATE'S STATEMENT OF THE CASE AND FACTS

Mr. Duckett continues to rely upon the Statement of the Case and Facts contained in the Initial Brief. However, a few brief points should be made regarding the Statement of the Case in the Answer Brief.

Rule 9.210 of the Florida Rules of Appellate Procedure provides that: "The Answer brief shall be prepared in the same manner as the initial brief, provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." Nine of the twenty-six pages of the Answer Brief are devoted to the Statement of the Case and Facts. Eight of those pages are simply a block quote from the federal district court opinion. Nowhere does it clearly specify areas of disagreement with the Statement of the Case contained in the Initial Brief. Instead it makes the conclusory allegation that "[t]he Statement of the Case and Facts as set out on pages 1-19 of Duckett's brief is argumentative and is misleading" (Answer Brief at 1). There is no citation to or explanation of where in the Initial Brief the statement was argumentative or the areas of disagreement.

Mr. Duckett will attempt to explain any specific disagreements he has with the State's Statement of Facts in the particular claims to which the evidence is relevant.

ARGUMENT IN REPLY

Response to Issue I

The state's ace in the hole at trial was the testimony from FBI agent Michael Malone. The most prestigious investigative agency in the country had evaluated the forensic evidence in the case and found "with a high degree of probability" that Mr. Duckett was the source of the pubic hair on the victim and that the chance of the hair coming from someone else was "highly unlikely at best." In other words, according to the state, the scientist at the FBI had found that there was essentially no chance that the pubic hair found on the victim belonged to anyone but Mr. Duckett. It's impossible to imagine any more persuasive evidence for the jury. We now know that these statements are not based on the laboratory findings of the state expert, overstate the evidence and are beyond the bounds of this witnesses expertise yet the State has done nothing to correct this error.

In fact, throughout these proceedings, the State has actively avoided their responsibility to seek justice. *See* ABA Standard for Criminal Justice 3-1.2 (c)("The duty of the prosecutor is to seek justice, not merely to convict."). Unlike *Bogle* where the State presented the testimony of their expert Mr. Robertson's testimony (*see* PCR2 180, 183), the State in Mr. Duckett's case has

worked diligently to ensure that the testimony of Mr. Robertson not be considered. Despite being on notice that the FBI was reviewing cases in which Malone had testified to determine if there were issues with the testimony, and despite Mr. Duckett's repeated requests for information concerning an independent review of Malone's testimony in his case, the State in Mr. Duckett's case did nothing to ensure that the testimony on which they relied to get a conviction was valid, was truthful or properly stated the review that had been conducted.

The State relies on the circuit court findings to argue that this Court should not grant Mr. Duckett an evidentiary hearing on this claim nor should the Court grant Mr. Duckett relief. Yet the circuit court, in denying this claim, made findings of fact that were erroneous, were not supported by the record, and evince a critical misunderstanding of the evidence presented below. First, the court found that Mr. Duckett hired Mr. Robertson to review Malone's findings. ("*The Defense then hired Robertson* to review Malone's work and testimony in the Duckett case...", PCR2-935; emphasis added). This is factually incorrect. What occurred, and what Mr. Duckett pled, was Mr. Duckett had made numerous requests of the State to provide information about independent testing of Malone's work over the years when newspapers had reported that such testing

was occurring. The state had always refused to provide any such information. When Mr. Duckett reviewed Steve Robertson's testimony in Brett Bogle's case, he conclusively learned that the FBI had hired Mr. Robertson to conduct independent analyses of Malone's findings. After reviewing Mr. Robertson's testimony in *Bogle*[1] and still obtaining no response from the State about whether an independent review had been conducted[2], and if it had not, then why not, Mr.

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[1]Mr. Robertson testified in *Bogle* that the FBI had hired him to review Malone's work in about 150 cases because there were allegations that his "work was improper, flawed, or his testimony was not accurate." *See* Motion to Complete the Record, Testimony of Steve Robertson in *State v. Bogle*, pp. 974-975.

[2]Mr. Duckett continues to assert that the state had a duty to investigate the independent review of Malone's work in both his case and other cases, and to turn over this information to him. *See Banks v. Dretke*, 124 S. Ct. 1256, 1263 (2004)("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."). The state knew, through its independent analysis in other cases in which Malone testified, that he was overstating his findings yet they never notified Mr. Duckett. This evidence is valuable impeachment of what is arguably one of the most important prongs of the State's case against Mr. Duckett.

In order to insure a constitutionally adequate adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon the prosecuting attorney. He is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985), *quoting Brady v. Maryland*, 373 U.S. 83, 87 (1963). See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)("the prosecutor's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable"). The prosecutor has a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police". *Kyles*, 514 U.S. at 437. The prosecutor as the State's

Duckett decided to contact Mr. Robertson directly. Upon hearing the nature of the inquiry, Mr. Robertson directed Mr. Duckett to FBI attorney Paula Wulff, who was responsible for overseeing the independent reviews of Malone's cases. When Ms. Wulff determined that Mr. Duckett's case had not had an independent review from the FBI analyst, she ordered such a review and the FBI, not Mr. Ducktt, hired Mr. Robertson to conduct an independent review of Malone's work and testimony.

The circuit court also erroneously held that Mr. Duckett chose the five questions that Mr. Robertson answered in his report ("The five (5) page 'Report' consists of five (5) questions *posed by the Defense Attorney to Robertson* and

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representative has a duty to learn of any favorable evidence known by individuals acting on the government's behalf and to disclose any exculpatory evidence in the State's possession to the defense. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). A *Brady* violation is established when:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. at 281-82. Prejudice is established where confidence in the reliability of the conviction is undermined as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence.

The circuit court's purported *Brady* analysis of this claim (*see* PCR2-951, n.6) fails to take into account the State's continuing obligation under *Brady* to disclose exculpatory evidence.

his answers." (*Id*.; emphasis added). Again, Mr. Duckett neither hired Mr. Robertson nor directed what review he did in the case. As was pled in Mr. Duckett's motion to vacate, Mr. Robertson posed and answered the same five questions in every case he reviewed in which Malone conducted testing and provided testimony. These were questions that the FBI had formulated to determine the veracity and reliability of Malone's work and testimony in all of the cases on which they conducted an independent review. Mr. Duckett had no control over what questions were asked, nor did he have any control over the review in the case.

The State argues and the circuit court held, erroneously, that the claim pled by Mr. Duckett concerning the testimony of Malone and the hair evidence "repeats the claim concerning the 'hair evidence' that was litigated in his prior Rule 3.851 motion and in his federal habeas proceedings." (PCR2-951; *see also* State's Answer, p. 13-14). This is simply not true. At no time prior to the present proceedings has any court considered the newly discovered evidence of the state's expert, Steve Robertson, that Malone's trial testimony overstated the findings in his laboratory report, was beyond the bounds of his expertise, was not consistent with the findings in his bench report, and provided the jury with misleading unsupported statistics concerning his personal expertise. *(See* PCR2-

722-723).

Rather than formulate an argument regarding the CBLA cases cited by Mr. Duckett, the state lifts verbatim a footnote from the circuit court order *Compare* Circuit Court Order Denying, n. 7 (PCR2-953) with State's Answer, p. 14, n. 3.[3] Both the State and the circuit court misunderstand Mr. Duckett's argument regarding the CBLA cases. In both the CBLA cases and the hair / Malone cases, the agency in question – the FBI – hired an independent examiner to review the evidence presented by their expert at trial. In both the CBLA cases and Mr. Duckett's case, the FBI independent examiner found that the FBI agent who had testified at trial had overstated the significance of the results. When presented with this evidence in the CBLA cases cited in Mr. Duckett's initial brief, this Court remanded to the circuit court for an evidentiary hearing. It is irrelevant to the analysis of whether an evidentiary hearing is warranted if the evidence in question is CBLA evidence or hair evidence. The significant factor

[3] Apparently the State was enamored with much of the circuit court's opinion as, when it is not block quoting the circuit court, it lifts verbatim from the circuit court order and presents it as original argument in its Answer Brief. *Compare* Order Denying, PCR2-953, ¶ 1 "When the Robertson report...there is no basis for relief" with State's Answer at 14-15 "When the Robertson report ... there is no basis for relief"; Order Denying PCR2-952-53, ¶ 1 "Duckett's motion as amended is an attempt to relitigate..." with State's Answer at 14 "Duckett's motion as amended is an attempt to relitigate..."

in both Mr. Duckett's case and the CBLA cases is that the FBI is now saying the testimony **their** expert provided at trial was overstated and should be reviewed.

The State, presumably continuing down the path laid by the circuit court, argues, without providing any support from the record, that Robertson's report is heavily biased in favor of Duckett. But Mr. Robertson is the state's expert, not Mr. Duckett's. He was hired by the FBI, the agency the state used to review the evidence in this case and to provide expert testimony on behalf of the state. It is unlikely the FBI would hire an expert with a preconceived opinion about an FBI agent (Malone) that would prevent the new expert from impartially evaluating the facts. Although it is clear from the hiring of an independent examiner that the FBI is trying to get to the truth regarding Malone's testimony in these cases, it defies reason that they would be hiring an expert to create an issue that was not there.

So contrary to the assertions of the circuit court that this is an expert hired by the defense, this is the state's own expert admitting that the expert testimony, presented by the state, was overreaching and inaccurate. It is irrelevant that the defense may have called a witness to provide testimony regarding the hair evidence. Rather than supporting a finding that no relief is warranted under the facts as presented, the circuit court's order provides strong support for why an

evidentiary hearing is required in this case, and thereafter relief from the convictions. The FBI repudiating its testimony in a capital murder trial has a legal significance profoundly different from the defense offering a witness who found the hair evidence inconclusive. Agent Malone's testimony was presented as conclusive scientific evidence from the preeminent investigative agency in the country that implicated James Duckett as the person who killed the victim.

The State's asserts: "Duckett's claim that the jury 'heard false, unreliable and misleading testimony' is simply not true – the 'Robertson Report,' when rationally considered, does not support that conclusion." (State's order at 16-17). In order to reach the desired result that no relief is warranted, the State must mischaracterize Robertson's findings which is exactly what it does with this assertion. In fact, Robertson says in his report that Malone's testimony overstated the accuracy of the hair analysis and was not consistent with the laboratory report nor bench notes. (PC-R2 719-23). The fact that the parties dispute what the statements made by Robertson in his report actually mean, or the significance of those statements, supports a finding that an evidentiary hearing is warranted.

There is no dispute that this report constitutes newly discovered evidence. The question is what to do with it. This Court's jurisprudence demonstrates that

when a capital defendant establishes that he has through the exercise of due diligence discovered new evidence not previously available, a reviewing court must revisit previous factual determinations and legal conclusions in light of the new evidence and determine the impact of the new evidence on those prior factual determinations and legal conclusions. Rule 3.851 on its face provides for this, as do numerous cases from this Court addressing the manner in which new evidence properly presented in a successive Rule 3.851 motion requires revisiting issues and claims previously addressed and decided in the direct appeal and/or appeal of the denial of a prior Rule 3.851 motion. *See Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *Lightbourne v. State*, 742 So. 2d 235, 247 (Fla. 1999); *Johnson v. State*, 44 So. 3d 51, 53 (Fla. 2010). *See also Smith v. State*, 75 So. 3d 205, 206 (Fla. 3011); *Rivera v. State*, 995 So. 2d 191, 197 (Fla. 2008); *Roberts v. State*, 840 So. 2d 962 (Fla. 2002).[4] The court must "'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of

[4]In *Wright v. State*, 857 So. 2d at 868, a case cited by the State in its brief, this Court did not revisit a previously presented *Brady* claim because: "Wright has failed to meet his burden to show the grounds for relief he alleges here were not known and could not have been known at the time of the earlier proceeding." The circumstances in *Wright* are not the circumstances here where it is uncontested that new evidence not previously available is now before this Court.

both the newly discovered evidence and the evidence which was introduced at the trial.'" *Wyatt v. State*, 78 So. 3d 512, 523 (Fla. 2011). This total picture of the case includes the evidence presented at trial, in prior collateral proceedings, and in the current proceeding, as well as revisiting claims previously denied. *Johnson v. State*, 44 So. 3d at 53; *Smith v. State*, 75 So. 3d at 206.

Indeed, it is Mr. Duckett's position that this Court's jurisprudence establishes that new evidence demonstrating that the **basis** for a previous rejection of a claim on the merits was premised upon false or erroneous facts requires the previous merits determination to be revisited in light of the new evidence. This is precisely what this Court held in *Lightbourne v. State*; *Johnson v. State*; and *Smith v. State*.

Response to Issues III and IV

The State's assertion that Mr. Duckett has made no showing nor suggestion that the affidavits of Brandie Campos and Brandon Campos could not have been obtained at the time of the prior litigation in state court is incorrect. State's Answer at 21. Mr. Duckett pled in his initial petition that counsel did not have any indication that these witnesses possessed pertinent information at the time of the previous post-conviction motions and that he did not know they had relevant evidence until his counsel was contacted on behalf

of Ms. Campos. (*See* PCR2-80) The circuit court is required to accept these factual allegations as true, unless and until an evidentiary hearing is conducted. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). Thus, contrary to the State's argument and to the circuit court's finding, the claim was not insufficiently pled nor is it procedurally defaulted.

There is no question that Gwen Gurley was a critical witness for the State. Counsel for the State at trial argued that "[Gwen Gurley's] testimony is *material and necessary to a just determination of guilt of innocense* (sic) in this case" (Motion to Perpetuate Testimony, April 13, 1988, T. 2323, emphasis added). Almost one sixth of the State's opening argument was devoted to Ms. Gurley's role in this case, discussing in detail how she saw Mr. Duckett circle around the block and return to the Circle K to pick up Ms. McAbee after he had driven off (R. 472-474). The State continued to argue her testimony in the closing argument (R. 1900) and in its rebuttal argument (R. 1950-52). Trial counsel noted in post-conviction that Ms. Gurley's testimony was the most critical testimony in the trial (PC-R. 975) as she was the only one who placed Ms. McAbee in Mr. Duckett's car. And in its brief on direct appeal, the State argued that Mr. Duckett enticed Ms. McAbee to get into his car and drive off, an assertion that was made by no one but Gwen Gurley.

It is unclear from the state's response to the claims regarding the veracity of Ms. Gurley's testimony whether they now concede that Gurley testified falsely and say it does not matter, she was never important, or whether they still contend that she gave truthful testimony at the trial. Given the fact that Gurley admitted to her own children that she testified falsely, that the witnesses who were with her on the night of the crime testified that was not at the Circle K at the time she testified thus could not have seen what she said she saw (PC-R1. 1331-1400), that one of the witnesses who was with her on the night of the crime, Vicky Davis, testified that Gurley admitted she lied and that the state was aware of it at the time of trial[5] (PC-R1. 1326, 1776), the fact that not one of the people who were at the Circle K on the night of the crime mention seeing Gurley (PC-R1. 21407-09), and the fact that she got out of jail before the conclusion of her sentence (PC-R1, D.Ex. 38-39; *see also* PC-R1. 1326), it is unlikely that the state is still trying to stand with the argument that Gurley testified truthfully.

So we are left with the assertion that Ms. Gurley's testimony was not important and that a new trial, without her testimony, would produce a different verdict. Both the State in its Answer and the circuit court in its findings cite to

[5]A fact that has never been addressed by any court that has reviewed Mr. Duckett's case.

this Court's dismissal of an earlier claim regarding the veracity of Ms. Gurley's testimony in support of the argument that the result of a new trial would be no different. (*See* PC-R2 949-50; State's Answer at 22-23). The problem with this argument is that it stands on a house of cards. This Court cited to six factors that it had found on direct appeal that supported the conviction[6], and found that only one of those factors concerned Gurley's testimony. What neither the circuit court nor the State address is the fact that the other factors have also been called into question.

Police Chief Brady and Officer Troy Smith both testified in prior post conviction proceedings that they returned to the scene later in the day after the body had been removed and the crime scene tape taken down and found traces of plaster from the tire molds only outside of the crime scene perimeter where the police cars had been parked after the body was discovered (PC-R1. 1194).[7]

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[6]The factors were that (1) the victim was last seen in Mr. Duckett's car (2) tire tracks at the scene were consistent with the police car (3) Mr. Duckett, the only police officer on duty, was not seen between the time he spoke with the victim and when he met with her mother at the police station (4) the victim's prints were found on the car although Mr. Duckett did not see her on the car (5) the pubic hair in the panties was consistent with Mr. Duckett and inconsistent with others and (6) the three *Williams* rule witnesses. (*See* PC-R2 949-50).

[7]Mr. Brady further testified that he told trial counsel this information and that trial counsel indicated he would call him for a subsequent court hearing, but that he was never contacted (PC-R1. 1198).

Former FBI latent print examiner Mervin Smith testified that, contrary to the State's evidence at trial, you could not date the age of the prints on the car, that it was impossible to tell from the prints whether the person who left the prints was sitting, standing or leaning on the car, and that smooth surfaces – such as would have been exposed if the victim was on the car with her pants pulled down – would have left a mark that is detectable by dusting (PC-R1 1069-70, 1071,1074-75, 1076). Further, the police officer who operated the car after Mr. Duckett testified that the hood of the car heated up so much when it was driven that it would be impossible to sit on the front of the car without being burned. (PC-R1 954). Mr. Duckett has presented a wealth of evidence, most recently in the newly discovered report of Mr. Robertson, that the hair evidence as presented at trial was not accurate. And finally, this Court threw out the evidence of one of the Williams rule witnesses on direct appeal and Mr. Duckett presented testimony in his initial post-conviction proceedings which called into question the accuracy of a second of the Williams rule witnesses. Thus, contrary to the factors relied upon by the circuit court and the State in support of the contention that a conviction without Ms. Gurley could still stand, there is virtually no evidence that was presented at trial that has been left unrebutted.

Cumulative Error Analysis Requires Relief

At no point does the State address Mr. Duckett's contention that cumulative error analysis in this case requires relief. In conducting cumulative consideration of newly discovered evidence, the analysis must look to the undisclosed evidence and how trial counsel may have used the evidence to undermine the State's case. Here, Mr. Duckett maintained his innocence at trial and testified that he was not the person responsible for Ms. McAbee's death. The jury was presented with a credibility determination: should it believe the State's witnesses or should it believe Mr. Duckett. As noted by trial counsel in the direct appeal, the evidence was entirely circumstantial. This is not a case where no amount of evidence could have changed the balance. Clearly, the evidence that Gwen Gurley, the only person who placed Ms. McAbee in Mr. Duckett's car, was lying would have undermined the State's case. Clearly, evidence that the FBI analyst who testified that the there was a high degree of probability that the pubic hair on the victim came from Mr. Duckett and that is was highly unlikely that it came from someone else was overstating the evidence and was testifying beyond his expertise would have undermined the State's case. And this is only two of the errors present at Mr. Duckett's trial. As pled above, Mr. Duckett has presented evidence that rebuts virtually every factor relied upon

by the State to gain a conviction.

In *Roberts v. State*, this Court addressed the issue of cumulative analysis with respect to newly discovered evidence. The Court said:

> Finally, we agree with Roberts that our case law requires cumulative analysis of newly discovered evidence. In determining whether newly discovered evidence warrants setting aside a conviction, a trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial to determine whether the evidence would probably produce a different result on retrial. *See Lightbourne v. State,* 742 So.2d 238, 247 (Fla.1999); *Jones v. State,* 709 So.2d 512, 521 (Fla.1998). This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. *Lightbourne,* 742 So.2d at 247.

Roberts v. State, 840 So. 2d at 972. Based upon this decision and well settled United States Supreme Court law, a cumulative analysis which takes into account all of the errors asserted by Mr. Duckett in his briefs to the Court, evaluated in conjunction with the evidence which was introduced at trial, is required. Such an analysis mandates a new trial.

This Court has on a number of occasions been presented with newly discovered evidence claims in a successive Rule 3.851 motion. *Smith v. State*, 75 So. 3d at 206; *Johnson v. State*, 44 So. 3d at 53; *Rivera v. State*, 995 So. 2d at 197; *Lightbourne v. State*, 742 So. 2d at 247. In each of these cases, this Court found

that the proper standard required not just the cumulative consideration of all of the favorable evidence presented in the collateral proceedings, but also the use of the constitutionally mandated yardstick - whether confidence in the reliability of the guilty verdict has been undermined - as to the constitutional claims that had been presented in the current and/or prior collateral proceedings to determine whether Rule 3.851 relief was warranted. *See also Porter v. McCollum*, 130 S. Ct. 447, 453-54 (2009) ("To assess that probability, we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.' *Williams[v. Taylor,* 529 U.S.] at 397-398, 120 S.Ct. 1495.").

The United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. at 436; *Young v. State*, 739 So.2d at 559. As the Court found in *Lightbourne*, cumulative analysis is warranted when evaluating a successive motion for post-conviction relief:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece**

> **of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision**.
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in *Jones v. State*, 709 So. 2d 512, 521-22 (Fla.) *cert. denied*, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a *Brady* claim.** *See Kyles v. Whitley*, **514 U.S. 419, 436 (1995)**.

Lightbourne, 742 So. 2d at 247-248(emphasis added)(citations omitted).

The standard to be used when considering cumulative evidence in the *Strickland* prejudice prong. As this Court has explained:

> Within our cumulative analysis, we must also consider that at the evidentiary hearing another important witness recanted his trial testimony. * * * Although on direct appeal we considered the impact of Barnes' single statement that Mordenti was “in the mob” on the outcome of Mordenti's trial, we now know due to Barnes' recantation that his entire testimony was possibly false. The falsity of Barnes' entire testimony could have impacted the jury's determination of Mordenti's character when deliberating.

Mordenti v. State, 894 So. 2d 161, 177 (Fla. 2004). Thus, this Court in cumulatively considering the *Brady* claim and the newly discovered evidence claim in *Mordenti* employed the *Brady* materiality standard, *i.e.* the *Strickland* prejudice prong standard, as the yardstick for determining whether a new trial was required.

At no time in the circuit court's analysis did it discuss the other exculpatory evidence that the jury did not hear which was presented by Mr. Duckett in his prior post-conviction proceedings. The legal standard employed by the circuit judge while denying Mr. Duckett was erroneous. When the proper cumulative consideration is given to evidence presented at trial, the evidence and claims presented in prior Rule 3.851 motions, and the evidence presented in the present matter, it is clear that Mr. Duckett is entitled to a new trial.

A "manifest injustice" – the continued imprisonment of an innocent man – will result if this Court adheres to its previous ruling. *See Strazzulla v. Hendrick*, 177 So.2d 1, 4 (Fla.1965) *(quoting Beverly Beach Props., Inc. v. Nelson*, 68 So.2d 604, 608 (Fla.1953)) (appellate court can reconsider a ruling as a matter of grace and where it is apparent that a manifest injustice will occur if the ruling is permitted to stand); *Preston v. State*, 970 So. 2d at 798. The facts on which this

Court's opinion was predicated initially, and the facts on which the circuit court relied, simply do not continue to be the facts in this case.

In *Holland v. Florida*, 590 U.S. 631, 130 S.Ct. 2549 (2010), the Supreme Court made clear that a court's equity powers should be available when adherence to absolute technical rules threatens to unleash the "evils of archaic rigidity":

> But we have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." Baggett v. Bullitt, 377 U.S. 360, 375 (1964). In emphasizing the need for "flexibility," for avoiding "mechanical rules," Holmberg v. Armbrecht, 327 U.S. 360, 375 (1946), we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity," Hazel-Atlas Glass Co. V. Hartford-Empire Co., 322 U.S. 238, 248 (1944). The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid.*

Id. at 2563. Mr. Duckett is innocent. The evidence presented in this and previous proceedings support the grant of a new trial.

CONCLUSION

The state's goal should be to find the truth, not to preserve a prior victory. This Court has explained: "Truth is critical in the operation of our judicial system." *Florida Bar v. Feinberg*, 760 So.2d 933, 939 (Fla. 2000). Undoubtedly collateral proceedings are part of the judicial system, and truth is just as critical in the adjudication of collateral claims as it is at trial.

For the reasons stated in this brief and in his Initial Brief, Mr. Duckett respectfully urges this Court to vacate his convictions and sentences and order a new trial and order his immediate release if the state fails to retry him within a reasonable period of time. In the alternative, Mr. Duckett requests that this Court remand to the circuit court for an evidentiary hearing on claims I, III and IV.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by electronic delivery to Mitchell Bishop, Office of the Attorney General, on November 12, 2013.

CERTIFICATE OF COMPLIANCE AS TO TYPE SIZE AND STYLE

I HEREBY CERTIFY that this Reply Brief of Appellant complies with the font requirements of Fl. R. App. P. 9.210(a)(2) typed in Times New Roman, 14 point type, not proportionately spaced, this date, November 12, 2013.

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