In the Supreme Court of Florida

ANTONIO LEBARON MELTON,

Appellant,

v. CASE NO. SC15-406

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, ANTONIO LEBARON MELTON, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

Melton was convicted of first-degree felony murder and armed robbery of a pawn shop and sentenced to death. The facts of this crime are recited in this Court's direct appeal opinion. *Melton v. State*, 638 So.2d 927, 928-29 (Fla. 1994). The "Carter/pawn-shop" case is the capital case where the victim, George Carter, who was the owner of the pawn shop, was murdered. The "Saylor/taxi-cab" case is the non-capital case, where the victim, Ricky Saylor, was the driver of the taxi cab, was murdered. The "Saylor/taxi-cab" conviction was used as the prior violent felony aggravator in the "Carter/pawn-shop" case.

In the direct appeal of the capital case to the Florida Supreme Court, Melton raised four issues. *Melton v. State*, 638 So.2d 927, 929 n.1 (Fla. 1994)(listing issues). This Court affirmed the convictions of first-degree felony murder and armed robbery. This Court also affirmed the sentences of life for the armed robbery and death for the first-degree murder. *Melton v. State*, 638 So.2d 927 (Fla. 1994).

Melton filed a petition for writ of certiorari in the United States Supreme Court. On October 31, 1994, the United States Supreme Court denied certiorari review. *Melton v. Florida*, 513 U.S. 971, 115 S.Ct. 441, 130 L.Ed.2d 352 (1994). Melton's convictions and death sentence became final the day after the petition was denied.

On January 16, 1996, Melton filed a shell 3.850 motion in the capital case. (PCR Vol I74-200; II 201-248).[1] On July 5, 2001, state post-conviction counsel filed a first amended motion which raised 27 claims. (PCR VI 907-1083). On October 18, 2001, the trial court held a *Huff* hearing.[2] The state postconviction court held a three day evidentiary hearing in February of 2002. It was a consolidated evidentiary hearing covering both the capital and non-capital murder convictions. Both parties submitted written post-evidentiary hearing memorandums following the evidentiary hearing. The state post-conviction court issued its order denying relief on all claims in both the "Carter/pawn-shop" case and "Saylor/taxi-cab" case on March 23, 2004.

Melton appealed the denial of postconviction relief in the "Carter/pawn-shop" capital case to the Florida Supreme Court. *Melton v. State*, 949 So.2d 994 (Fla. 2006). The Florida Supreme Court affirmed the denial of postconviction relief. *Melton v. State*, 949 So.2d 994 (Fla. 2006). Melton also filed a state habeas petition in the Florida Supreme Court. The Florida Supreme Court denied the habeas petition as well. *Melton v. State*, 949 So.2d 994 (Fla. 2006).

Melton then filed a petition for writ of certiorari from his postconviction proceedings in the United States Supreme Court,

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[1] On July 6, 1995, Melton filed a state 3.850 postconviction motion to vacate the judgment and sentence in the non-capital case. The capital and non-capital postconviction cases traveled together after this point.

[2] *Huff v. State*, 622 So.2d 982 (Fla. 1993)(setting out procedure for a motion hearing to determine which claims an evidentiary hearing should be held).

arguing that: 1) trial counsel's was ineffective as articulated in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); 2) whether *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) extends to a juvenile conviction used as an aggravating circumstance; and 3) whether *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) extends to "mental age". The Supreme Court denied the petition on October 1, 2007. *Melton v. Florida*, 552 U.S. 843, 128 S.Ct. 88, 169 L.Ed.2d 67 (2007).

On February 28, 2006, Melton filed a second successive postconviction motion in state court which the trial court denied.

On March 3, 2008, Melton filed a federal habeas petition attacking the "Carter/pawn-shop" capital murder in federal district court. Judge Smoak entered a stay pending resolution of Melton's second successive motion in state court. On May 31, 2013, after the stay was lifted, the federal district court denied the petition in the capital case. On March 3, 2015, the Eleventh Circuit denied a certificate of appealability. *Melton v. Sec'y, Fla. Dep't. of Corr.*, 778 F.3d 1234 (11th Cir. 2015).

On November 29, 2010, registry counsel, Todd Doss, filed a third successive 3.851 motion in this capital case raising a claim that the Florida Supreme Court's prejudice analysis in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). The trial court summarily denied the successive *Porter* motion. The Florida Supreme Court affirmed the summary denial. *Melton v. State*, 88 So.3d 146 (Fla. 2012)(citing *Walton v. State*, 77 So.3d 639 (Fla.2011)).

On June 11, 2014, Melton, now represented by Linda McDermott, filed a fourth successive postconviction motion in the state trial court alleging that the State's main witness at trial, Bendleon Lewis, had partially recanted his trial testimony. (SuccPC. Vol. I 1-24). The state filed an answer. (SuccPC. Vol. I 33-51). On October 28, 2014, the postconviction trial court conducted an evidentiary hearing in this capital case. (SuccPC. Vol. II 98-224). At the evidentiary hearing, two claims were explored: 1) a claim of newly discovered evidence based on an alleged partial recantation of the State's main witness at trial; and 2) a *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), claim based on alleged false testimony of that same witness regarding whether that witness had a deal with the State.

Evidentiary hearing testimony

The trial court held an evidentiary hearing on October 28, 2014 to explore the claim of newly discovered evidence based on the alleged recantation. (SuccPC. Vol. II 98-224). Four witnesses testified at the evidentiary hearing: 1) Daniel Ashton, a defense investigator; 2) Bendleon Lewis, the state's main witness at the Carter trial; 3) David Mack, another defense investigator; and 4) Michelle Angeliquie Hall-Lewis, the wife of Ben Lewis. At the evidentiary hearing, Bendleon Lewis reaffirmed his trial testimony regarding both not hearing any struggle between Melton and the victim, before Melton shot the victim and his testimony that he did not have a formal deal with the prosecutor regarding his trial testimony.

Daniel Joseph Ashton, the postconviction investigator hired for the defense, testified. (E.H. at 10). Ashton knew that Lewis was the co-defendant in the capital Carter pawn shop murder case and an unindicted co-perpetrator in the non-capital Saylor taxi-cab murder case. (E.H. at 11).

Mr. Ashton had previously spoken with Ben Lewis in January of 2009 when Lewis was incarcerated at one of the reception centers. (E.H. at 11). Mr. Ashton attempted to question Lewis but Lewis did not want to answer his questions. (E.H. at 12). At times, Lewis "flat out refused to answer." (E.H. at 12)

In 2013, he located Lewis again. (E.H. at 12-13). Lewis was no longer incarcerated and he was living in Pensacola. (E.H. at 13). On June 27, 2013, he and David Mack traveled to Pensacola to speak with Lewis again. (E.H. at 14). They found Lewis as he was about to enter his home. (E.H. at 15). They spoke with Lewis outside. (E.H. at 15). Mrs. Lewis came out of the house upon hearing the car and seeing them speaking with her husband to find out what the conversation was about. (E.H. at 16). Mrs. Lewis went back inside and they talked with Lewis for 10-15 minutes. (E.H. at 16).

They discussed the Carter murder. (E.H. at 16-17). Ashton testified that Lewis acknowledged that there was a struggle in the pawnshop during which the gun discharged. (E.H. at 17). In a PSI from the Department of Corrections, Lewis had previously told someone that the weapon had gone off during the struggle. (E.H. at 18).

Ashton also testified that Lewis also told him he had a "deal" that was "in place" before his testimony. (E.H. at 17). Lewis,

however, gave him no details about the deal. (E.H. at 17). According to Ashton, Lewis was going to get the charge reduced to second-degree murder. (E.H. at 33). And there was "no way" he would have testified and would have brought up the Saylor murder unless he and his attorney would have known what the "end result was going to be." (E.H. at 33). And a second-degree murder conviction was what Lewis actually got. (E.H. at 33-34). Lewis was sentenced to 20 years incarceration one month after Melton was sentenced. (E.H. at 34).

According to Ashton, Lewis was willing to testify to this information and willing to sign an affidavit. (E.H. at 18,19,20). They were going to draft an affidavit and have Lewis sign it. (E.H. at 20).

Their conversation was "cut prematurely short" by the return of Lewis' wife. (E.H. at 17). She came out of their home and told Lewis he had an emergency phone call. (E.H. at 17). Lewis went inside. (E.H. at 17). Ashton, Mack and Mrs. Lewis remained outside. (E.H. at 18).

According to Ashton, Mrs. Lewis wanted "no part" of her husband being involved. (E.H. at 21). She told them that she knew exactly what this was about and that Lewis had told her that he had "lied against Antonio Melton." (E.H. at 21). She told them that she was not going to let him perjure himself. (E.H. at 21). She thought that her husband would be putting himself in jeopardy of a perjury conviction. (E.H. at 21-22).

Mr. Lewis came out of their home and informed them that he and his wife had a prior commitment. (E.H. at 22). They explained that

they needed to speak with Lewis. (E.H. at 22). He gave Mrs. Lewis his business card but Lewis never called. (E.H. at 22)

On January 24, 2014, they contacted Lewis again, this time at work at the Goodyear garage on Nine Mile Road. (E.H. at 23-24). They approached Lewis as he was getting off work. (E.H. at 24). Mr. Mack and Mr. Lewis spoke about signing an affidavit and testifying. (E.H. at 24). Lewis was emotional. (E.H. at 26).

Lewis then "disappeared" into one of the bays of the garage. (E.H. at 25). Lewis was on the phone. (E.H. at 25). Lewis did not return. (E.H. at 25). Instead, the manager of Goodyear came out and told them that they were not welcome on the property. (E.H. at 25-26). The manager told them to leave the property or he would call the sheriff. (E.H. at 26).

Lewis' current attorney, Scott Ritchie of the Public Defender's Office, informed the court that Lewis was asserting the husband-wife privilege. (E.H. at 35). Bendleon Lewis II testified. (E.H. at 42). He and Melton were friends from high school. (E.H. at 42). Lewis was charged with murder in 1991 and was facing the death penalty. (E.H. at 42). He was nervous about the death penalty. (E.H. at 42).

Lewis testified that Jim Jenkins represented him at the time. (E.H. at 43-44). Mr. Jenkins told him that the case against him was overwhelming. (E.H. at 44). Mr. Jenkins advised Lewis to tell the truth. (E.H. at 44). Mr. Jenkins also advised Lewis to assist the State by testifying and by doing so he "could probably get a life sentence or something lesser." (E.H. at 45). Mr. Jenkins also told him that by cooperating he possibly would not get a death

sentence but Lewis did not know about reducing the charge to second-degree murder. (E.H. at 45). He did not know the details about Mr. Jenkins' conversation with the prosecutors. (E.H. at 46).

Lewis remembered talking to his attorney, Mr. Jenkins, about the Saylor case but he did not remember if Jenkins told him that that information about the Saylor case could help him in the Carter case. (E.H. at 52). He was 18 or 19 years old at the time and did not know about the court system. (E.H. at 52).

Lewis did not recall how he became a witness in the Saylor murder trial. (E.H. at 47,48). But he recalled testifying at the Saylor trial. (E.H. at 47).[3] He did not recall speaking with either of the prosecutors, Mr. Spencer or Mr. Patterson, about the Saylor case. (E.H. at 48).

Lewis testified that he knew Paul Sinkfield. (E.H. at 48). They were both in the county jail. (E.H. at 48). Lewis did not talk with Sinkfield about the Carter case or the Saylor case. (E.H. at 49,50,51). Lewis testified that he knew Lance Byrd but he did not talk to him about his case. (E.H. at 53). Lewis testified that he never asked his attorney to speak with Byrd. (E.H. at 53). Lewis testified that he did not know Alfonso McCary. (E.H. at 54). Lewis testified that he did not know Fred Harris. (E.H. at 54). Lewis testified that he knew David Sumler who was another inmate in jail with him. (E.H. at 54). Lewis did not talk with Sumler about the Carter case or the Saylor case. (E.H. at 54). Lewis testified that

[3] Lewis testified for the defense, not the prosecution, at the Saylor murder trial.

he did not know Bruce Crutchfield. (E.H. at 54). Lewis testified that he did not know Bruce Frazier either. (E.H. at 57-58).

Lewis testified that he knew Adrian Brooks. (E.H. at 54). He was also in the county jail at the same time as Lewis. (E.H. at 55). Lewis did not talk with Brooks about the Carter case or the Saylor case. (E.H. at 55).

Lewis did not recall the deposition he gave on July 16, 1991. (E.H. at 55). Lewis tried to use Brooks to fabricate an alibi in the Saylor case. (E.H. at 55,61). They both were young. (E.H. at 56,61). They were going to be an alibi for each other and help each other out. (E.H. at 62,63). He was trying to do anything to help himself. (E.H. at 56). He was not charged with perjury for lying in the deposition. (E.H. at 56). Once Lewis got out of prison, he saw Brooks at the car wash but did not discuss the case with him. (E.H. at 57).

Lewis testified has been married to Michelle Hall for 12 years. (E.H. at 58). They went to elementary and middle school together. (E.H. at 58). They were not dating at the time of the murders in 1991. (E.H. at 59). Lewis testified that he has never discussed the Carter case or the Saylor case with his wife. (E.H. at 59). His wife knew that he had been subpoenaed for the evidentiary hearing but they did not discuss what the nature of his testimony would be at the evidentiary hearing. (E.H. at 60).

Lewis told investigators Ashton and Mack that he did not want to see Melton on death row. (E.H. at 66-67). They did not talk about the specific circumstances of the Carter murder or his "deal" with the prosecution. (E.H. at 67). They asked what he knew and he told

them he did not witness Melton shoot Carter. (E.H. at 67). He could not say whether there was a struggle because he was trying to get out the door when he heard the shot. (E.H. at 68). He did not hear much of anything because he had all these keys on a key-ring and was trying to open all the locks. (E.H. at 68). He thinks he heard hollering and screaming. (E.H. at 68). He did not hear a scuffle. (E.H. at 68). He did not agree to sign an affidavit. (E.H. at 69). The conversation with the investigators ended when his wife came outside. (E.H. at 69). His wife told him he had a phone call, so he went inside. (E.H. at 69). His wife told them that she did not want Lewis talking to them without a lawyer "and all that stuff" (E.H. at 69).

Lewis also testified regarding the time the investigators came to his work to see him on January 24, 2014. (E.H. at 69-70,75). He only spoke to them "for a brief second or two." (E.H. at 70). Lewis denied telling them that he had a deal with the prosecutors. (E.H. at 70). He did not tell them that there was a struggle. (E.H. at 70). Lewis then went back to work. (E.H. at 70). His boss's name is Justin Norris. (E.H. at 71). His boss told him to come back to work. (E.H. at 71).

After Lewis was arrested coming out of the pawn shop, someone threatened him. (E.H. at 73). Lewis did not know who threatened him. (E.H. at 73). The person told Lewis that if they did not get what they deserved, he would be his worst nightmare or "something like that." (E.H. at 73). The person was not in a uniform. (E.H. at 73). Lewis was scared and nervous. (E.H. at 74).

Lewis pled no contest to second-degree murder and armed robbery in the Carter case. (E.H. at 74). Lewis received 20 years in prison and 20 years probation in the Carter case. (E.H. at 74). He served "nine years, nine months, and 17 days" in prison for the crime. (E.H. at 74).

On cross-examination, Lewis testified that there were no promises made to him by the prosecutors as to the outcome of his case prior to his trial testimony. (E.H. at 75). Lewis testified that his deal with the State was to tell the truth. (E.H. at 75). Lewis stated that he testified truthfully. (E.H. at 75).

On redirect, Lewis did not know if he always told the truth in the case. (E.H. at 76). He did not recall what he said after being arrested. (E.H. at 76). Lewis admitted that he did not tell the truth about Adrian Brooks during his deposition. (E.H. at 76-77).

Lewis asserted his husband-wife privilege. (E.H. at 77-78). Postconviction counsel argued that Ms. Lewis waived the privilege when she spoke to the investigators. (E.H. at 79). The trial court inquired to the lawyers whether the privilege applied when Lewis testified that he did not discuss the Carter or Saylor murders with his wife. (E.H. at 79). The trial court also inquired whether a witness rather than a party could raise the privilege. (E.H. at 80). The trial court observed that the defense was entitled to call Mrs. Lewis to testify and ask her fact questions about her own observations. (E.H. at 80). Opposing counsel relied upon *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d

513 (1988); and *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980), in support of the assertion that the martial privilege violates due process. (E.H. at 81-84).

Investigator David Mack testified. (E.H. at 91). He assisted Dan Ashton in the investigation of this case. (E.H. at 91). The goal was to locate and interview Ben Lewis. (E.H. at 92). In June of 2013, they located Lewis at his home. (E.H. at 93). Lewis was willing to talk to them. (E.H. at 94). They spent 15 minutes talking to Lewis. (E.H. at 94). They "pressed" him to "do the right thing." (E.H. at 95). Lewis got "very emotional" and "teared up." (E.H. at 95). According to Mark, Lewis admitted there was a struggle for the gun and that there was a formal deal for his trial testimony. (E.H. at 96). Lewis agreed to sign an affidavit. (E. H. at 96,97). Lewis acknowledged that the court would need to hear from the "horse's mouth." (E.H. at 97).

They attempted to ask Lewis more details about the deal but his wife came out of their home at that point. (E.H. at 97-98). Mrs. Lewis told Lewis that there was an emergency phone call for him. (E.H. at 98). Lewis went inside to answer the call. (E.H. at 98). Mrs. Lewis told them that she knew that Lewis had lied but that she did not want him to sign an affidavit due to the possibility of a perjury charge. (E.H. at 98). They gave her a business card she said she would call them. (E.H. at 101). Lewis did not come back out of their home. (E.H. at 99). Lewis and Mrs. Lewis drive off. (E.H. at 99).

They contacted Lewis again his place of employment which was Goodyear on Nine Mile Road in Pensacola. (E.H. at 99-100). The

bays of the garage were being closed. (E.H. at 104). As Lewis was getting off work and heading to his car, they approached him. (E.H. at 101-102). They reminded him of his "promise." (E.H. at 102). Again, Lewis got emotional. (E.H. at 103). Lewis was willing to sign an affidavit. (E.H. at 103). Ashton went get the affidavit. (E.H. at 103).

But then Lewis excused himself. (E.H. at 103). He was not called back by his employer. (E.H. at 103). Lewis went back into the garage. (E.H. at 104). Lewis was talking to the other employees and it looked like he was on the telephone. (E.H. at 104). They waited 10 minutes to see if Lewis would return but he did not. (E.H. at 104). The manager came out and told them they needed to leave. (E.H. at 105). The manager, with some of the other employees, told them that were trespassing and that he would call the police if they did not leave. (E.H. at 105). They went to a garage next door. (E.H. at 105). Lewis did not return to his car. (E.H. at 106). And ultimately they left. (E.H. at 106).

Michelle Angeliquie Hall-Lewis, the wife of Ben Lewis, testified. (E.H. at 106-107). She testified that she had been married to Ben Lewis for 12 years. (E.H. at 107). They went to school together. (E.H. at 108). She knew that her husband had been incarcerated. (E.H. at 108-109). She does not know Melton. (E.H. at 109). She and her husband did not talk about the crime. (E.H. at 110). She lets "the past be the past - a new beginning." (E.H. at 110). She is a Christian. (E.H. at 110).

She recalled the two investigators coming to their home in 2013. (E.H. at 110). She saw them speaking with her husband. (E.H. at

111). She did not know what they were talking about with him. (E.H. at 111). She went out to get her husband because there was a phone call for him. (E.H. at 111). Her husband did not speak for long with the investigators before the phone call - "maybe like two or three minutes". (E.H. at 111).

She talked to the investigators after Lewis went inside to answer the phone. (E.H. at 112). She did not tell the investigators that her husband had lied at the trial. (E.H. at 112). She did not discuss the affidavit with the investigators. (E.H. at 113). She did not tell the investigators that she was worried her husband would be charged with perjury. (E.H. at 113). She did not know whether her husband lied during the trial because she was not there and she does not discuss the past with her husband. (E.H. at 114-115).

The parties both filed post-evidentiary hearing memorandums of law following the evidentiary hearing. (SuccPC. Vol. III 348-380;381-421). On December 15, 2014, the trial court denied the fourth successive motion. (SuccPC. Vol. III 422-442). This appeal follows.

SUMMARY OF ARGUMENT

Melton asserts a claim of newly discovered evidence based on a recantation of the trial testimony of a key prosecution witness, Ben Lewis, regarding not seeing a struggle between the defendant and the victim and not having a deal with the prosecution in exchange for his trial testimony. There is no recantation, however. Lewis reaffirmed his trial testimony at the evidentiary hearing regarding both not seeing a struggle and not having a deal with the State. As the trial court aptly observed, the motion was due to be denied based on "the simple reason" that Lewis did not recant. The trial court specifically found Lewis credible in its order and accepted Lewis' testimony regarding his conversation with the investigators. Such a credibility finding is treated with great deference by this Court. There is no newly discovered evidence because there was no recantation and no violation of a *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), either. The trial court properly denied the fourth successive postconviction motion.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE FOURTH SUCCESSIVE 3.851 MOTION RAISING A CLAIM OF NEWLY DISCOVERED EVIDENCE BASED ON A RECANTATION WHERE THE WITNESS REAFFIRMED HIS TRIAL TESTIMONY AT THE EVIDENTIARY HEARING? (Restated)

Melton asserts a claim of newly discovered evidence based on a recantation of the trial testimony of a key prosecution witness, Ben Lewis, regarding not seeing a struggle between the defendant and the victim and not having a deal with the prosecution in exchange for his trial testimony. There is no recantation, however. Lewis reaffirmed his trial testimony at the evidentiary hearing regarding both not seeing a struggle and not having a deal with the State. As the trial court aptly observed, the motion was due to be denied based on "the simple reason" that Lewis did not recant. The trial court properly denied the fourth successive postconviction motion.

Standard of review

The standard of review of a trial court's denial of a postconviction motion following an evidentiary hearing is a mixed standard. *Hayward v. State*, - So.3d -, -, 2015 WL 3887692, *17 (Fla. June 25, 2015)(observing that "*Giglio* and *Brady* postconviction claims present mixed questions of law and fact and, where the trial court has conducted an evidentiary hearing, this Court will defer to the factual findings of the trial court that are supported by competent, substantial evidence, but will review the application of the law to the facts *de novo*" citing *Lynch v.*

State, 2 So.3d 47, 56 (Fla. 2008)). This Court reviews the legal conclusions of the trial court *de novo*. This Court, however, defers to any factual findings made by a postconviction court regarding the claim following an evidentiary hearing due to a trial court's "superior vantage point in assessing the credibility of witnesses and in making findings of fact." *Johnson v. State*, 104 So.3d 1010, 1022 (Fla. 2012). This Court does not substitute its judgment for that of the trial court on questions of the credibility of the witnesses. *Hayward*, - So.3d at -, 2015 WL 3887692 at *17.

Trial

At trial, Lewis testified as a witness for the State. *Melton v. State*, 638 So.2d 927, 928 (Fla. 1994). Lewis testified that he grabbed the victim's arm while Melton held his gun on the victim. *Melton*, 638 So.2d at 928. Lewis then gathered jewelry and guns from the pawn shop. *Id*. at 929. As Lewis tried to unlock a door, he heard a gunshot. *Id*. He did not hear or see a struggle. Lewis' testimony disputed that there was a fight or scuffle between Melton and Carter and stated that Melton shot Carter when Lewis was attempting to unlock a side door so they could escape. *Melton v. State*, 949 So.2d 994, 1012, n.11 (Fla. 2006).

Melton, on the other hand, testified at trial, that the victim attempted to grab his gun and as the two struggled over the gun; the weapon discharged, hitting the victim in the head. Melton, 638 So.2d at 929. During the prosecutor's cross-examination of Melton at trial, the State made a couple of references to Melton actually

being the triggerman, such as "the gun you later shot him with in the head," and "after you shot Carter in the head," which Melton did not deny or contradict. *Melton*, 949 So.2d at 1012.

Lewis also testified at trial that there were no promises made to him by the State in exchange for his trial testimony. *Melton v. State*, 949 So.2d 994, 1009-10 (Fla. 2006)(recounting Lewis' trial testimony regarding whether there was a deal). In the Florida Supreme Court's words, Lewis' testimony made it "clear that there was no formal plea agreement between the two parties. While Lewis may have had great expectations based upon his cooperation with the State, he testified only that he hoped to obtain a deal at some point in the future." *Melton*, 949 So.2d at 1010.

The postconviction court's ruling

The trial court denied the successive motion following the evidentiary hearing. (SuccPC. Vol. III 422-442). The trial court noted that the motion raised a claim of newly discovered evidence regarding the struggle and the deal with the State based on a conversation between the investigators and Lewis. (SuccPC. Vol. III 424-425). The trial court noted that at the evidentiary hearing, Lewis testified that, during the conversation with the investigators, he told them he did not know if there was a struggle because he only heard the gunshot and Lewis denied telling the investigators he had a deal with the State regarding his trial testimony. (SuccPC. Vol. III 425). Lewis testified at the evidentiary hearing that he had testified truthfully at trial. (SuccPC. Vol. III 426). The trial court specifically found Lewis

credible in its order and accepted Lewis' testimony regarding his conversation with the investigators. (SuccPC. Vol. III 427).

The trial court denied the successive motion for the "simple reason" that Lewis did not recant his original trial testimony at the evidentiary hearing. (SuccPC. Vol. III 427). The trial court concluded the Melton had not provided any new evidence in the form of recanted testimony. (SuccPC. Vol. III 427).

The trial court noted the only basis for the claim was the hearsay testimony of the investigators regarding their conversation with Lewis. (SuccPC. Vol. III 428). The trial court concluded that even if the hearsay was "somehow admissible at a new trial, it would not result in a different verdict because Melton was convicted of felony murder. (SuccPC. Vol. III 428). The trial court explained that, regardless of whether the shooting was intentional, because the murder occurred in the course of an armed robbery, Melton remained guilty of felony murder. (SuccPC. Vol. III 428).

The trial court concluded that the hearsay testimony of the investigators would not result in a lesser sentence either. (SuccPC. Vol. III 428). The trial court noted that the sentencing court had rejected the argument that the shooting was accidental in its sentencing order. (SuccPC. Vol. III 428). The sentencing court had found it "difficult" to believe that the Melton had accidently shot the victim in the head. (SuccPC. Vol. III 428). The trial court observed that the jury would have still recommended death and rejected any claim of accident based on the head shot and the fact Melton had committed a prior similar murder. (SuccPC. Vol. III 428-

429). The trial court found the claim of newly discovered evidence to be "without merit." (SuccPC. Vol. III 429)

The trial court also rejected the *Giglio* claim classifying it as "without merit." (SuccPC. Vol. III 429). The trial court noted Lewis testified at the evidentiary hearing consistently with his trial testimony that he had no formal deal with the State. (SuccPC. Vol. III 429). The trial court accepted Lewis' testimony and found that "he did not have an agreement with the State prior to testifying." (SuccPC. Vol. III 429). While Lewis may have had "an expectation of leniency" based on his trial testimony, his hope was an insufficient basis for the claim. (SuccPC. Vol. III 429 citing *Melton*, 949 So.2d at 1010).

The trial court also denied the cumulative error claim explaining that when the individual claims are all without merit, there is no basis for a cumulative error clam. (SuccPC. Vol. III 430 citing *Griffin v. State*, 866 So.2d 1, 22 (Fla. 2003)). The trial court noted that the testimony of Paul Sinkfield and Fred Lewis at a prior evidentiary hearing was rejected on credibility grounds and therefore, did not "substantiate" the cumulative error claim. (SuccPC. Vol. III 430).

The trial court refused to consider Melton's "lack of culpability" in the Saylor case in this case. (SuccPC. Vol. III 430). The trial court explained that Melton was not entitled to use a postconviction motion in the Carter case to "relitigate the facts in the Saylor case." (SuccPC. Vol. III 430 citing *Melton*, 949 So.2d at 1005).

Merits

Melton asserts two claims based on a recantation (that never occurred): 1) a newly discovered evidence claim regarding the existence of a struggle which would result in life sentence and a *Giglio* claim based on an alleged deal with Lewis in exchange for his testimony.

Credibility findings

The trial court, in its order denying the successive postconviction motion, specifically found Lewis' testimony at the evidentiary hearing to be credible. (SuccPC. Vol. III 427). "This Court defers to the postconviction court's factual findings so long as those findings are supported by competent, substantial evidence." *Brooks v. State*, - So.3d -, -, 2015 WL 2095808, *9 (Fla. May 7, 2015)(quoting *Bradley v. State*, 33 So.3d 664, 672 (Fla. 2010)). The federal equivalent of the competent, substantial evidence standard is the clearly erroneous standard. The clearly erroneous standard of review has been colorfully described as requiring the decision strike the reviewing court "as more than just maybe or probably wrong;" rather, it must strike the reviewing court "as wrong with the force of a five-week old, unrefrigerated dead fish." *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988). Melton presents no argument as to why the trial court's credibility findings are wrong. Indeed, opposing counsel basically ignores the trial court's credibility findings in her brief. On this basis alone, the trial court denial of the successive postconviction motion should be affirmed.

Newly discovered evidence and recantations

To be granted a new trial or penalty phase, the new evidence must be of such nature that it would probably produce an acquittal or yield a less severe sentence on retrial. *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998).[4] Newly discovered evidence satisfies the second prong if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability. *Jones*, 709 So.2d at 526. The newly discovered evidence must be admissible at trial.

Recantations are a form of newly discovered evidence. *Hurst v. State*, 18 So.3d 975, 992–93 (Fla. 2009)(recognizing the statements made by a State witness after trial acknowledging that defendant did not confess to the crime was newly discovered evidence of recantation). Recanted testimony "is subject to a different and more stringent test than other newly-discovered evidence." *Rolack v. State*, 93 So.3d 450, 452, n.2 (Fla. 3d DCA 2012). A defendant is entitled to a new trial based upon recanted testimony only if 1) the trial court is satisfied that the recantation is true; and 2) the witness' testimony will change to such an extent as to render probable a different verdict. *Armstrong v. State*, 642 So.2d 730, 735 (Fla. 1994); *Davis v. State*, 26 So.3d 519, 526 (Fla. 2009). The more stringent test reflects the fact that "recanting testimony is

[4] *Jones* has two prongs. The State withdrew any diligence argument at the evidentiary hearing due to *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008)(stating: "to be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence."). (E.H. 10)

exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." *Armstrong*, 642 So.2d at 735 (quoting *Henderson v. State*, 135 Fla. 548, 185 So. 625, 630 (1938)); *Spann v. State*, 91 So.3d 812, 816 (Fla. 2012)(observing that "recantations are, as a general matter, exceedingly unreliable" citing *Bell v. State*, 90 So.2d 704, 705 (Fla. 1956)).

There is no recantation, however. At the 2014 evidentiary hearing, Lewis reaffirmed his trial testimony. Far from a recanting, he reaffirmed his trial testimony that he did not see or hear a struggle. There simply is no actual recantation before this Court. Lewis reaffirmed his trial testimony under oath. To grant a new trial based upon a recantation, the trial court must find the "recantation is true" but the trial court found the exact opposite. There is simply no reason to grant Melton a new trial or penalty phase because Lewis's testimony would be the same at any new trial as it was at the first trial. Under such facts, there is no reasonable possibility of an acquittal or a life sentence at any new trial as required to grant relief for a newly discovered evidence claim. *Jones*, 709 So.2d at 521.

The only possible difference at any new trial or penalty phase would be if the investigators were allowed to testify to impeach Lewis. Investigators Ashton and Mack testified that Lewis recanted to them at the evidentiary hearing. But their testimony would likely be inadmissible hearsay at trial. *Downs v. State*, 2014 WL 5585912, 1 (Fla. 2014)(unpublished)(rejecting a claim of newly

discovered evidence based on an affidavit would be inadmissible evidence because it was "hearsay not falling under any exception"). The only thing more unreliable than recanted testimony, is hearsay accounts of a recantation that is denied by the alleged recanter.

But, even if the investigators testimony was admissible at any new penalty phase, it would not result in a life sentence. First, any new penalty phase jury would have to believe the investigators over Lewis regarding whether there was a struggle. Lewis had little motive to lie about the struggle at the original trial. Lewis' criminal liability was the same regardless of whether there was a struggle or not - either way he was not the actual triggerman. Struggle or no struggle, Melton, not Lewis, was still the triggerman and struggle or no struggle, Lewis was still guilty of felony murder. Second, the position of the bullet tends to rebut any claim of an accidental shooting. As the sentencing judge observed in the original sentencing order, when rejecting Melton's trial testimony that the shooting was an accident, it was highly unlikely that Melton managed to "accidentally" shoot the victim in the head during a struggle without any intent to kill. Third, no penalty phase jury, after being informed of the facts of the prior Saylor murder, would believe Melton's testimony that this shooting was an "accident." Melton had a prior conviction for robbery with a firearm and felony murder for the felony murder of taxi-cab driver Saylor which occurred just weeks before this crime. Melton intentionally shot the taxi cab driver during a robbery. The similarities between the two murders are just too telling. Melton robs and then kills his victim. At any new penalty phase, Melton

would be attempting to convince the jury that he should not be sentenced to death because, while he was the actual triggerman, the murder itself was an "accident" just as he did at the first trial. Such a theory would be beyond incredible given that Melton had murdered another person during a robbery just weeks before this crime and given the location of the bullet in the victim's body. Both the recent prior murder and the location of the victim's wounds render this version of events incredible, regardless of Lewis' alleged recantation. There is no reasonable possibility of a life sentence at any new penalty phase and therefore, the trial court properly denied the claim of newly discovered evidence of a struggle.

No *Giglio* violation[5]

Melton also asserts a violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), regarding Lewis' testimony at trial that there was no actual deal between him and the prosecution regarding his sentence. The trial court properly denied the *Giglio* claim because Lewis reaffirmed his trial testimony that there was no deal between him and the State at the evidentiary hearing.

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[5] Melton also asserts a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), regarding Lewis' testimony at trial that there was no actual deal between him and the prosecution regarding his sentence. This issue is not properly characterized as a *Brady* claim. If there was a deal, that would be a violation of *Giglio*, not a violation of *Brady*. Indeed, *Giglio* itself involved a state witness' false testimony about whether he had a deal with the prosecution.

Trial

At trial, Ben Lewis testified to the following:

Prosecutor: Mr. Lewis, have you been indicted by the grand jury for the murder of George Carter and robbery of George Carter:
Lewis: Yes.
Prosecutor: On January 23rd of '91?
A. Yes, sir.
Q. Are those charges currently pending?
A. Yes, sir.
Q. Have any promises been made by the State Attorneys' Office, law enforcement or anyone concerning the disposition of your charges if you testify here today?
A. No, sir.
Q. No promises?
A. No, sir.
Q. Any threats been made to you?
A. No.
Q. Are you represented by counsel? Are you represented by a lawyer?
A. Yes.
Q. Does your lawyer know you're testifying here today?
A. Yes, sir.
Q. What's your lawyer told you to do?
A. Just tell the truth.
Q. Do you realize that-Has your lawyer explained to you that you're here under subpoena today?
A. Yes.

Q. Can what you say here today can be used against you in the trial of your case?
A. Can it be used against me?
Q. Can what you say here today be used in the trial against you in your case?
A. I don't know. I believe it can.
Q. You're here under subpoena?
A. Yes, sir.

On cross-examination, Lewis testified:

Defense counsel: Mr. Lewis, you told Mr. Spencer [prosecutor] that you thought what you testified to today could be used against you, didn't you?
A. Yes, sir.
Q. Okay. And you're under subpoena here today, aren't you?
A. Yes.
Q. And when you're under subpoena by the State of Florida that means you get immunity, doesn't it?
A. I guess. I don't know.
Q. You don't know. Are you telling this jury you don't know what immunity is?

A. Yeah, I know what immunity is.
Q. And you've been subpoenaed here today?
A. Yes.
Q. [The prosecuting attorney is] listening to everything you're saying this morning, isn't he?
A. Yes, he is.
Q. And if you say something that hurts his case you don't think that's going to make [the prosecuting attorney] very happy, do you?
A. I'm just up here to tell the truth.
Q. What do you think, if you say something that hurts his case that's not going to make him happy, is it? You know that. Is that right?
A. Yeah.
Q. That could make him unhappy, couldn't it?
A. Yes, it could.
Q. And that could deny you a deal in the future, couldn't it, right?
A. I guess so, yeah.
Q. Okay. So you don't have a deal but I bet you're hoping for a deal, aren't you?
A. I'm hoping for something.
Q. You're hoping for probation, aren't you?
A. Uh-huh.
Q. You've been in jail ever since you were picked up on January 23rd, haven't you?

A. Yes.
Q. You're ready to get out of jail now, aren't you?
A. I'm ready to get my time served with.

Melton v. State, 949 So.2d 994, 1009-10 (Fla. 2006). During closing argument one of the prosecutors, Assistant State Attorney Schiller, stated: "Also as shown there's no deals for Mr. Lewis. Mr. Spencer very carefully developed the evidence and showed y'all that there's been no promises made to Lewis, there's no special deals, no plea negotiations with him. He stands on his own in this case." *Melton*, 949 So.2d at 1009.

Evidentiary hearing

Lewis reaffirmed his trial testimony that there was no formal deal between him and the prosecution. (E.H. at 75). Lewis'

attorney Jim Jenkins was not called by opposing counsel to establish whether there was a deal. Registry counsel did not present Jim Jenkins, who was Lewis' attorney during the original trial, to testify at the evidentiary hearing. Nor did either of the original prosecutors, John Spencer or Joseph Schiller, testify at the evidentiary hearing because both of them are dead.

Merits

To establish a *Giglio* violation, the defendant must show: 1) the prosecutor presented or failed to correct false testimony; 2) the prosecutor knew that the testimony was false; and 3) the false testimony was material. *State v. Woodel*, 145 So.3d 782, 805 (Fla. 2014)(citing *Guzman v. State*, 868 So.2d 498, 505 (Fla. 2003)). Melton, not the State, bears the burden of establishing the first two prongs. *Woodel*, 145 So.3d at 806. While both *Brady* and *Giglio* stem from the Due Process Clause, the tests for *Brady* and *Giglio* differ. The prejudice prong of *Giglio,* which requires a "reasonable *possibility*" of a different outcome, is considered more defense friendly than the prejudice prong of *Brady*, which requires a "reasonable *probability*" of a different outcome. *Mungin v. State*, 79 So.3d 726, 738 (Fla. 2011)(observing that the materiality prong of *Giglio* is more defense-friendly than that of a *Brady* claim); *Ponticelli v. Sec'y, Fla. Dep't. of Corr.*, 690 F.3d 1271, 1292 (11th Cir. 2012). The second prong of *Brady* only requires the showing of an inadvertent suppression by the prosecutor whereas the second prong of *Giglio* requires a prosecutor knowingly present false testimony. *Brady* violations occur "irrespective of the good

or bad faith of the prosecution" but *Giglio* violations necessarily involve bad faith.

At the 2014 evidentiary hearing, Lewis reaffirmed his trial testimony that there was no deal with the prosecution. On that basis alone, the trial court properly rejected the *Giglio* claim.

The Florida Supreme Court has rejected *Giglio* claims based on the failure of proof. In *Woodel*, the Florida Supreme Court rejected a *Giglio* claim based on a lenient sentence. Woodel argued that the State's witness was an habitual felony offender who should not have been able to receive relatively lenient sentences for his convictions and that the inexplicable leniency evinced that he had a deal with the State to testify against Woodel. The Florida Supreme Court concluded that Woodel failed to carry his burden "by his use of inductive reasoning." *Woodel*, 145 So.3d at 806. Melton is likewise attempting inductive reasoning from the plea to second-degree rather than a trial for first-degree murder to establish that there was a deal. Such speculation does not prove a *Giglio* violation.

Melton failed to definitively establish that Lewis' trial testimony regarding whether there was a deal was false. *Maharaj v. Sec'y Dep't. of Corr.*, 432 F.3d 1292, 1313 (11th Cir. 2005)("the suggestion that a statement may have been false is simply insufficient; the defendant must conclusively show that the statement was actually false."). While Lewis, no doubt, hoped his cooperation with the State would result in a second-degree murder conviction and a lenient sentence, a hope of a deal is not a deal.

Furthermore, Lewis' hopes and expectations regarding the benefits of testifying for the State against Melton were made perfectly clear to the jury through defense counsel's cross-examination. There necessarily is no *Giglio* violation. *Giglio* depends on the jury being intentionally mislead which did not occur in this case. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Melton has the burden to establish the testimony was false and the prosecutor knew it was false but he did not do so during the evidentiary hearing. Registry counsel did not present Jim Jenkins, who was Lewis' attorney during the original trial and presumably would have known about any deal, to testify at the evidentiary hearing. Moreover, both of the original prosecutors in this case, John Spencer and Joseph Schiller, have died and therefore cannot be called to testify about the use immunity or any deal with Lewis. *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005)(denying relief and presuming the attorney performed adequately when the attorney died before the evidentiary hearing). When both of the prosecutors involved are dead, this Court should not entertain *Giglio* claims regarding deals because the State has no means of rebutting such claims. Because capital cases last for decades, it is evitable in some cases that one of the major participants will have died. Postconviction relief cannot be based on claims where a critical player is dead (except possibly claims of actual innocence). The presumption that a prosecutor would not knowingly present false testimony, if anything, is stronger than the

presumption that defense counsel acted reasonably. The trial court properly denied the *Giglio* claim.

Cumulative error analysis

Melton incorrectly asserts that this Court must perform a cumulative error analysis including the testimony from the prior evidentiary hearings. (E.H. at 84-85). The normal rule is that all newly discovered evidence is considered cumulatively with the other evidence in deciding whether to grant a new trial or penalty phase including the evidence from prior evidentiary hearings. *Swafford v. State*, 125 So.3d 760, 775-76 (Fla. 2013)(citing *Lightbourne v. State*, 742 So.2d 238, 247 (Fla. 1999)). But the normal rule does not apply when the prior testimony from the prior evidentiary hearings was rejected on credibility grounds. *Marek v. State*, 14 So.3d 985, 991 (Fla. 2009)(refusing to consider newly discovered evidence of ineffectiveness cumulatively because throughout the extensive postconviction litigation of his case, counsel was never found deficient and when that is true a court "need not reconsider evidence previously submitted in support" of the claim).

At the 2002 evidentiary hearing, several inmates testified regarding Lewis' statements to them. Inmates Sinkfield and Harris testified regarding Lewis' role in the Carter pawn-shop murder. The trial court rejected that testimony on credibility grounds and that denial was affirmed on appeal by the Florida Supreme Court. *Melton v. State* , 949 So.2d 994, 1010-12 (Fla. 2006)(finding "no error in the trial court's conclusions as to their lack of credibility."). On appeal from the denial of his first

postconviction motion, Melton argued, based on the two inmates' testimony, that he was not the triggerman in the Carter murder. The Florida Supreme Court's own review "of Melton's testimony during his guilt phase makes clear that he admitted to being the shooter." *Melton*, 949 So.2d at 1012. The Florida Supreme Court also observed, the two inmates' testimony contradicted "not only how Lewis himself testified that the crime occurred, but they also contradict each other." *Melton*, 949 So.2d at 1012. The Florida Supreme Court noted that the "two witnesses have approximately thirty-two other felony convictions between them . . ." *Id.* at 1012.

When a trial court and the Florida Supreme Court rejects prior testimony on credibility grounds, there is nothing to cumulate. There is simply nothing to add based on the testimony at the first evidentiary hearing. This Court should not consider the testimony of either Sinkfield or Harris in its analysis of Lewis' alleged recantation. This Court should not consider the inmates' testimony in any manner, shape, or form when addressing the "recantation." Melton should not be able to relitigate prior testimony at a prior evidentiary hearing and obtain a new ruling from this court on that old settled matter. This court should consider only the testimony presented at the 2014 evidentiary hearing in deciding the issues presented in this appeal.

And, even when cumulative error analysis is proper, zero plus zero equals zero. *McCoy v. State*, 113 So.3d 701, 723 (Fla. 2013)(noting when a defendant fails to prevail on any individual claim of ineffectiveness, a claim of cumulative error cannot succeed, citing *Griffin v. State*, 866 So.2d 1, 22 (Fla. 2003));

United States v. Powell, 444 Fed.Appx. 517 (3d Cir. 2011)(noting the cumulative effect of non-error is still no error because "as the saying goes, zero plus zero equals zero.").

At the 2014 evidentiary hearing, Lewis denied knowing Fred Harris. (E.H. at 54). While Lewis admitted to knowing Paul Sinkfield, he denied ever talking to him about the Carter case or the Saylor case. (E.H. at 48,49,50,51). So, there is no "new" evidence regarding these inmates' testimony at previous evidentiary hearing to accumulate.

Prior conviction used as aggravator

Melton also improperly seeks to relitigate his guilt of the prior violent felony aggravator. Melton wants to attack not merely his capital case but attack his non-capital case as well. Melton was convicted of the felony murder of Saylor, the taxi-cab driver during a robbery, which occurred just weeks before this robbery and murder. The State used that conviction as the prior violent felony aggravating circumstance in this capital case. Melton is using a claim of newly discovered evidence of a recantation regarding the trial in this case to attempt to relitigate his guilt regarding an entirely different trial and conviction. Melton may not relitigate his guilt of the prior murder used as an aggravator based on a recantation of trial testimony concerning this murder (even if there had been recantation which there was not). It is not proper to use a capital case as a stage to relitigate an aggravator. The Florida Supreme Court has already directly stated that Melton may

not relitigate the Saylor conviction inside the Carter case. *Melton v. State*, 949 So.2d 994, 1005 (Fla. 2007)("Melton may not relitigate the Saylor murder conviction in these proceedings.").

During the 2002 evidentiary hearing, Melton presented the testimony of several other inmates regarding Lewis' statements to the inmates regarding the Saylor murder including inmates Sumler, Byrd, McCary, and Crutchfield. During the 2012 evidentiary hearing, Melton presented the testimony of Houston's brothers regarding their dying brother, Tony Houston's statements to them regarding the Saylor murder.

None of this testimony is properly considered in this case. This Court may not reevaluate the trial court's determination following the 2002 evidentiary hearing that was affirmed by the First District that these inmates' testimony regarding the Saylor murder was not credible or the trial court's determination following the 2012 evidentiary hearing, that was affirmed by the First District, that the brothers' testimony regarding the Saylor murder was not credible. *Melton v. State*, 909 So.2d 865 (Fla. 1st DCA 2005)(affirming denial of postconviction relief following 2002 evidentiary hearing); *Melton v. State*, 132 So.3d 228 (Fla. 1st DCA 2014)(affirming denial of prostconviction relief following 2012 evidentiary hearing). This Court is not empowered to override another court's earlier determination of credibility merely because the inmate has filed a successive motion. And there is no reason whatsoever for this Court to reconsider Houston's brothers testimony at the 2012 evidentiary hearing based on Lewis'

reaffirmation of his trial testimony at the 2014 evidentiary hearing.

Lewis testified at the 2014 evidentiary hearing that he did not know Bruce Crutchfield. (E.H. at 54). Lewis also denied knowing Alfonso McCary. (E.H. at 54). While Lewis testified that he knew both Lance Byrd and David Sumler, he testified that he did not speak with either of them about either the Saylor case or the Carter case. (E.H. at 53,54).

Furthermore, while Lewis testified at the Saylor trial, which was used as an aggravator in this case, Lewis did ***not*** testify for the prosecution. Lewis testified for the *defense* in the Saylor trial. Houston, not Lewis, was the State's key witness at the Saylor trial. Impeachment of a ***defense*** witness is not a valid basis for granting a new trial.

Melton may not relitigate his guilt of the Saylor murder under the guise of a cumulative error analysis in the Carter case. The only issue that is properly before this Court is the Carter trial regarding the struggle and whether there was a deal with the prosecution, not the credibility of any of the inmates, not the credibility of Houston's brothers, and not Melton's guilt of the Saylor murder. The bulk of the arguments presented in Melton's initial brief under the guise of cumulative error analysis are simply not on the table. The alleged recantation regarding a possible struggle and the *Giglio* claim based on whether Lewis had a deal with the prosecutor are the sole issues before this Court.

The trial court properly denied the fourth successive postconviction motion following the evidentiary hearing.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of the successive 3.851 motion

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via e-portal to Linda McDermott of McClain & McDermott, P.A, 141 NE 30th St., Wilton Manors, FL 33334-1064 Phone: (850) 322-2172 this 28th day of July, 2015.

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