IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-223

LOWER TRIBUNAL No. CR 87-8676-CFA

MARK JAMES ASAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

AMENDED REPLY BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Fla. Bar No. 0754773

LINDA MCDERMOTT
Fla. Bar No. 0102857

McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, Florida 33334
Telephone: (305) 984-8344

JOHN ABATECOLA
Fla. Bar No. 0112887
20301 Grande Oak Blvd
Suite 118-61
Estero, FL 33928
Telephone: (954) 560-6742

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTRODUCTION

As reflected in the Table of Contents and at the beginning of each Argument set forth in the Answer Brief, the State chooses not to address Asay's actual arguments. It instead sets forth "restated" versions. In the course of restating Asay's argument, the State omits the meat of Mr. Asay's arguments in an effort to hide the fact that it cannot refute his actual arguments.

REPLY TO STATEMENT OF THE CASE AND FACTS

The State relies upon a passage from this Court's direct appeal as establishing the facts of the crime. The two page block quote from the direct appeal opinion was based on the trial record viewed in the light most favorable to the State. Since then, there has been additional evidence presented during the course of proceedings on Asay's previous motion to vacate.

For example in his 1993 motion to vacate, Asay proffered the testimony of Thomas Gross, a state witness whose testimony was featured prominently in the passage of the direct appeal opinion that was quoted in the Answer Brief. When it affirmed the denial of the 1993 motion to vacate, this Court addressed Asay's proffer of what Gross would have said had the 3.850 judge permitted Gross to be called as witness: "[t]aking Asay's allegations as true, Gross testified falsely that Asay had confessed to him and that Asay had shown him tattoos of a swastika, 'white pride,' and 'SWP.'". *Asay v. State*, 769 So. 2d 974, 982-83 (Fla. 2000).[1]

[1]In fact, Gross would have testified that Asay never confessed to him while they were in jail together (PC-T. 1057). Asay showed Gross newspaper articles and told Gross what the

This Court devoted a full paragraph in its direct appeal opinion to Gross' testimony and the racial animus that Gross claimed that Asay expressed. As to that there are two significant points. First, Asay sought to present Gross' testimony in his prior motion to vacate that his trial testimony was false. Second, the relevance of Gross' claim that Asay expressed racial animus was dependent upon the State's evidence that Asay had shot and killed Robert Booker, a black man.[2]

The passage from this Court's opinion quoted by the State as being the facts of the crime did not include or refer to Selwyn Hall's sworn statement that Roland Pough had confessed to shooting a black man late on July 17, 1987, who ran off about 3 blocks from where Booker's body was found a few hours later:

> An acquaintance of mine "Roland" said that last Friday night he had shot a black male during what he said was a robbery attempt at 1418 N. Market St. in his side yard. "Roland" said he was shot in the right arm, and that he (Roland) shot at the B/M four or five times. Roland said he knew for sure he hit the B/M once. The B/M then ran away. Roland has a .25 cal auto pistol crome plated with brown handle. I Selwyn A. Hall have seen Roland carry this pistol many times.

(PC-R2 at 792, 1161).

---

police were saying he did (PC-T. 1057). Gross saw this as an opportunity to benefit himself, because he was facing charges. He had his lawyer tell the state that he had information regarding Asay's case (PC-T. 1057). Gross met with the prosecutor and told him what he had read in articles and what information the police had relayed to Asay (PC-T. 1958). The prosecutor then showed Gross pictures of Asay's tattoos, specifically the white pride and swastika (PC-T. 1058). Gross and Asay previously discussed Asay's tattoos, however, they never talked about the tattoos that the prosecutor showed Gross (PC-T. 1058).

[2]The other victim, Robert McDowell, was a white man as noted in the homicide continuation report.

The passage from this Court's direct appeal relied upon by the State as being the facts of the crime did not include the fact Danny and Charlie Moore wanted to receive money from the television show, Crime Watch, for their testimony. Danny testified that it was "a quick way to make a thousand bucks." (R. 659). Also, this Court made no reference to the fact that the testimony of Danny and Charlie Moore was not consistent as to when and where Asay's inculpatory statements were allegedly made.

And of course, this Court's direct appeal opinion made no reference to FDLE Agent Warniment's testimony that to a 100% certainty the bullet removed from Booker and the bullets removed from McDowell were fired by the same gun. But, this testimony was the clincher, as the prosecutor asserted in his closing argument:

> Now, the defense is going to argue, Well, you know, Mark Asay killed somebody that night, that first guy, or shot somebody, but it's not this guy, this guy just happened to be found right around the corner from where this guy was shot around the same time of the shooting.
>
> There happened to be two other people who saw a man run. In fact, one man said, "this is the same man I saw," but it was just a coincidence. **And the clincher is it was the same type of bullet, same type, no doubt about it, they both came from the same gun, but he said he didn't kill the man, it was the wrong guy.** See, because this little thing right here, that's what did it. This little tiny thing, that's what killed him. And four of those killed Mr. McDowell, those little tiny things.

(R. 872-3) (emphasis added). But we now know, that Warniment's testimony was subjective opinion without scientific foundation.

The State's reliance upon a passage from this Court's direct appeal opinion for a definitive recitation of the facts of the crime is clearly misplaced.

REPLY TO ARGUMENTS

ARGUMENT I: ASAY'S RIGHT TO DUE PROCESS WAS VIOLATED.

Contrary to this Court's jurisprudence, the State argues that it was entirely proper for Judge Salvador to consider non-record material in ruling on Asay's *Brady*/ineffective assistance of counsel claim (AB 16). *Krawczuk v. State*, 92 So. 3d 195, 202-03 (Fla. 2012) (judges considering Rule 3.851 motions are not permitted to conduct extra record investigation).[3]

The State posits that the records were not "extra-record material in the traditional sense" (AB 20), because Asay was aware that the judge was copied with the records (AB 16, 21). But, Asay's knowledge that the records had been attached to an email copied to Judge Salvador was not notice that she would open the non-record material. Asay's understanding was that the State copied Judge Salvador with the email to let her know of that the State had disclosed the public records, not that the court would rummage through the records without providing Asay an opportunity to address any of the information contained in them. "Judges are

[3]The State cites to *Parker v. State*, 633 So. 2d 72, 73 (Fla. 1st DCA 1994), to suggest that review of non-record information can be appropriately considered. *Parker* concerned the stacking of minimum mandatory sentences. Parker claimed error due to the fact that the offenses arose from a single criminal episode. *Id.* The First DCA made clear that the arrest report upon which the trial court relied was a part of the record: "The **record contains only an arrest report** from which to glean the details of events on August 14, 1992. That report sets out in sordid detail the extent of the heinous crimes committed against the victim, and **since no one has challenged its accuracy either below or on appeal**, we rely on it in resolving the issue." *Id.* Thus, the arrest report was part of the record and Parker had an opportunity to challenge it. The State's reliance upon *Parker* is misplaced.

required to follow the law and apply it fairly and objectively to all who appear before them." *In re Inquiry Concerning a Judge, J.Q.C. No. 77-16*, 357 So. 2d 172, 179 (Fla. 1978). Asay had no notice or reasonable expectation that Judge Salvador would review non-record material. *Vining v. State*, 827 So. 201 (Fla. 2002).

The State seeks to factually mislead this Court, when it states: "And counsel had knowledge that the judge was receiving that material from the emails **and from the judge's own statement at the *Huff* hearing that she had not had time yet to go looking for Hall's name in the public records materials**" (AB 21)(emphasis added). However, what Judge Salvador actually said near the ending of the hearing as the transcript shows was: "I have not been able to go through **the record** to see if there were things that had been provided that included Selwyn Hall as a witness or Selwyn Hall, whatever information he had to provide." (PC-R2 1032)(emphasis added).[4] Asay was not on notice that the judge would violate his right to due process and review materials that were not included in the record. *Krawczuk; Vining*.

Had Asay known that Judge Salvador was reviewing non-record materials, he would have explained as he does within the initial brief that the records that Judge Salvador reviewed did not

[4]The State's misrepresentation is just ethically wrong. The State has access to the ROA and the transcript of the case management hearing. The State did not include a record citation. But when the transcript is combed through, the false representation is revealed. The State changed the words "the record" that appear in the transcript into the words "the public records material" in order to completely change what was said. It is hard to imagine that the factually erroneous statement was made accidently or without an intent to deceive.

contain the *Brady* material on which his claim was based. Because Judge Salvador reviewed non-record material without notice, Asay was deprived of the opportunity to object and/or explain.

The State argues that Asay's claim that Judge Salvador should have been disqualified from presiding over his case is not preserved (AB 21). The State faults Asay for failing to file a motion to disqualify **after** he learned that Judge Salvador had reviewed the non-record material. After the judge entered her order at 4:30 PM on February 3 and revealed that she had gone outside the record, Asay would have moved to disqualify her if this Court's scheduling order had not indicated that the proceedings in the circuit court were to end at 5PM on February 3. In fact, Judge Salvador based upon this Court's scheduling order had made clear that under no circumstances would the court enter a stay or entertain additional matters due to this Court's scheduling order (PC-R2 1034)("I have postponed and delayed as much as I possibly could for each of you to file your respective pleadings, but **after today I don't see where or how we would be able to do any further reconvening given this timeline** that I'm under and the Florida Supreme Court's not having granted your petition to extend the deadlines.")(emphasis added).

Asay is not asserting that the judge should be disqualified *becaus*e her rulings were adverse. *See* AB 22. Judge Salvador violated Asay's right to due process and this Court's rulings in *Krawczek* and *Vining*. Such conduct constitutes both legal error and judicial bias. It requires that Judge Salvador be disqualified from presiding over future proceedings.

As to the *ex parte* hearing that was held on February 4, the State seeks to blame undersigned counsel for the improper *ex parte* hearing by misrepresenting the facts as to what occurred.[5] *See* AB 19. In describing what occurred on February 4, the State says that undersigned "emailed the Attorney General's Office that he intended to file the proffer regardless of its impropriety." (AB 18-9). Undersigned did not indicate that the proffer was improper. Undersigned believed that the proffer was proper; in fact, he has done it in other cases without an objection.

The State submits that reasonable notice and opportunity to be heard at the *ex parte* hearing were provided (AB 19), but fails to identify when such notice was sent. The notice of hearing that appears in the file was stamped as filed by the clerk at 4:51 PM on February 4 (PC-R2 574). The email that Judge Salvador sent notifying counsel of the 3:15 PM hearing shows that the email was sent at 3:15 PM Judge Salvador marked this email as Court Exh. 1 at the ex parte hearing that commenced at 3:15 PM (PC-R2 737). At best, the notice that undersigned counsel received of the 3:15 P.M. hearing was at 3:15 PM.[6] That is not reasonable notice.

---

[5]At the February 4 hearing, Asay was unrepresented; and both Judge Salvador and the State knew that Asay was unrepresented as they had been advised before hand that counsel was not available.

[6]However, undersigned counsel was on a conference call with Asay from 3:00 until 3:30 PM discussing Judge Salvador's order and Asay's right to seek her disqualification. As he indicated in his Initial Brief, he did not discover that email until after 4PM when he returned to his office from his trip to his bank.

Without addressing counsel's call with his client, the State says: "Counsel insists that he had to go to the bank instead of attending a court-ordered hearing which was his personal choice." (AB at 25). Again, the State flat out lies. Counsel had to go to

What the State refuses to acknowledge is that counsel for the State and Judge Salvador all had notice before the *ex parte* hearing began at 3:15 PM that undersigned was not available. Judge Salvador marked undersigned's 2:48 PM email indicating that he was "not available at all" as a court exhibit and introduced it at the hearing (PC-R2 823). The State and the judge knew that counsel was unavailable; they then chose to conduct an *ex parte* hearing in violation of the Code of Judicial Conduct.[7]

The State's molestation of the facts is clearly an ad hoc rationalization for participating in a clearly improper *ex parte* hearing. When the judge's email was sent at 3:15 PM, advising that a court reporter had been arranged for 3:15 PM, undersigned was speaking to his client. There was no "willful absence" (AB 25), but rather a lack of notice. But, the *ex parte* hearing conducted by the judge and the State was with full knowledge of counsel's unavailability.

The State and Judge Salvador's actions were improper and cannot be countenanced. Judicial disqualification is required.

ARGUMENT II: ASAY'S NEWLY DISCOVERED EVIDENCE, *BRADY* AND

---

the bank before 5PM. It was part of the reason that he notified the judge and the State that he was NOT available. When counsel went to the bank, it was before he received notice that the State and the judge had scheduled and begun a hearing for a time at which he advised them that he was unavailable.

[7]The State prevaricates when saying that undersigned refused to attend the hearing. He was unaware that the hearing had been scheduled despite his notice to the judge and the State that he was not available (AB 23, 25). Because he was on a conference call with his client, no notice was received that despite his unavailability a hearing had been scheduled.

STRICKLAND CLAIMS.[8]

A. NEWLY DISCOVERED EVIDENCE CLAIM

The State fails to address the newly discovered evidence claim that Asay actually presented. In a transparent attempt to avoid defending Judge Salvador's erroneous analysis of the claim, the State omits any reference to the newly discovered evidence on which Asay's claim was actually premised, William Tobin's proffered testimony, which was specific to Asay's case and the testimony given by Warniment. The State pretends that the newly discovered evidence on which the claim was based were "two committee reports" that are not specific to Asay's case (AB 26).[9] In the Answer Brief, the State never mentions Asay's highly qualified firearms expert, William Tobin, who was identified in January 27, 2016, motion to vacate by name. Asay wrote that after Tobin reviewed Warniment's testimony and the FDLE file:

> Tobin has concluded that the jury in Mr. Asay's case heard highly unreliable and misleading testimony. First, as has been acknowledged by DOJ, it simply cannot be said that bullets from a particular firearm display unique characteristics, or that there is

---

[8]In the State's "restated" version of Asay's Argument II, references to his *Brady* and *Strickland* claims are omitted and the basis of the newly discovered evidence claim is misrepresented. The newly discovered evidence claim is based upon the scientific analysis of Warniment's testimony by William Tobin who concludes that Warniment's testimony was scientifically erroneous and unreliable. After leaving out reference to Asay's *Brady* and *Strickland* claims in the "restated" argument caption, sections in the argument addressing the *Brady* and *Strickland* claims appear.

[9]By asserting that the newly discovered evidence claim is premised on "two committee reports" (when as a matter of fact it is not premised upon "two committee reports"), the State is able to insert the otherwise irrelevant assertion that: "But generalized reports are not newly discovered evidence." (AB 26).

> "individualization". Second, the certainty with which Warniment expressed his opinion, i.e., "100 percent" was pure speculation with absolutely no basis in research or experience. Third, Mr. Asay's case presents particular problems because it falls into a category commonly referred to as a "no gun recovery case." Without the firearm from which the bullets were fired, Warniment could not have had any knowledge concerning how the firearm was manufactured or what population of firearms existed in the area with which a comparison could have been made. Furthermore, Warniment made no mention that he had made any effort to eliminate "subclass carryover" which is an important and necessary consideration in the analysis of firearms identification. And, finally, it was highly misleading to identify a specific firearm as firing the bullets, when numerous types of firearms could have been used.

(PC-R2 132-33).[10]

The State falsely argues that Asay's newly discovered evidence is based upon the 2008 and 2009 NAS reports (AB 26, 32). However, as stated in Asay's motion, at the February 1 *Huff* hearing, in his Notice of Proffer, and in his Initial Brief, Asay has obtained "case-specific" evidence that shows that the jury in Asay's case heard highly unreliable and misleading testimony.[11]

---

[10]Asay proffered a 49-page affidavit from Tobin setting forth and detailing his findings (PC-R2 580-628).

[11]The State attempts to distinguish *Wyatt v. State*, 71 So. 3d 86 (Fla 2011), because *Wyatt* "involved comparative bullet lead analysis (CBLA), not ballistics match testimony which is still reliable and admissible after these reports" (AB 37). Not a single citation is offered in support of this non-record assertion of fact that contradicts Asay's factual allegations which under this Court's jurisprudence must be accepted as true at this juncture. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). Further, the condemnation of CBLA is nearly identical to the uncertainty and subjectivity present in firearm identification analysis. The principle announced in *Wyatt* - requiring "case-specific" information to support a claim of newly discovered evidence was applied in *Foster v. State*, 132 So. 2d 40, 72 (2013)("new research studies are not recognized as newly discovered evidence. *** Foster 'has not identified how the

At this juncture, Asay's factual allegations must be accepted as true. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). As Asay has alleged, Tobin will testify that it cannot be said that bullets from a particular firearm display unique characteristics, or that there is "individualization." Tobin will testify that the certainty with which Warniment expressed his opinion, i.e., "100 percent" was pure speculation with no basis in research or experience. Tobin will testify that Asay's case presents particular problems because it falls into a category commonly referred to as a "no gun recovery case." Tobin will testify that without the firearm from which the bullets were fired, Warniment could not have had any knowledge concerning how the firearm was manufactured or what population of firearms existed in the area with which a comparison could have been made. Tobin will also testify that Warniment made no mention that he had made any effort to eliminate "subclass carryover" which is an important and necessary consideration in the analysis of firearms identification. Tobin will also testify that it was highly misleading to identify a specific firearm as firing the bullets, when numerous types of firearms could have been used.

As to "individualization" or "uniqueness," Tobin will testify that it has not been established that examiners, like Warniment, are able to differentiate between class, subclass and

---

article would demonstrate, in any specific way, that the testing methods or opinions in his case were deficient.' *Johnston*, 27 So.3d at 21-22"). Asay's proffer of Tobin's testimony does what was not done in *Foster* (PC-R2 580-628).

individual characteristics. Because of this and contrary to the State's assertion that ballistic evidence is still admissible (AB 27), Tobin will testify that Warniment's testimony is not scientifically sound and was entirely subjective.[12] Accepting Asay's factual allegations as true and Tobin's proffer as fact, Warniment's testimony was not only scientifically unreliable, it does not qualify as admissible expert testimony under Florida law. *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001).

No where in its analysis of the newly discovered evidence does the State address the previously undisclosed statement of Selwyn Hall, which reported that Roland Pough shot a black man who then ran off a few hours before Booker's body was found a little over three blocks away:

> On 23 July 87 at approx 1:25 p.m. I Selwyn A. Hall advised Det. Housend the following information . . .
>
> An acquaintance of mine "Roland" said that last Friday night he had shot a black male during what he said was a robbery attempt at 1418 N. Market St. in his side yard. "Roland" said he was shot in the right arm, and that he (Roland) shot at the B/M four or five times. Roland said he knew for sure he hit the B/M once. The B/M then ran away. Roland has a .25 cal auto pistol crome plated with brown handle. I Selwyn A. Hall have

---

[12]The State argues that firearm identification evidence is still admissible and therefore, not significant to the analysis here (AB 33-4, 36). However, Tobin would testify that firearm identification is generally unreliable. In addition, Tobin would testify specifically that because this was a "no gun recovery case" there is simply no way to distinguish between subclass and "unique" characteristics. Some law enforcement agencies prohibit testimony about examinations under these circumstances. Tobin would also testify about other specific facts relating to Asay's case, i.e., that the jury was misled by the testimony that the bullets matched with 100% certainty and that there is no way to link a particular type of weapon to the bullets, as occurred in Asay's case. *See* R. 473, 482, 727.

> seen Roland carry this pistol many times. I Selwyn A. Hall don't think Roland ever goes without it. Three weeks ago, Roland asked me to buy some bullets for him, and I couldn't find any. Roland got some from his brother. I Selwyn A. Hall have bought crack cocaine from Roland on several occasions. I Selwyn A. Hall know for a fact that approx thirty or more people buy their crack from Roland. This is a true and accurate statement.

(PC-R2 at 792, 1161). On the basis of Hall's sworn statement, Pough was named as the main suspect in Booker's death. He was eliminated as a suspect solely on the basis of Warniment's ballistics match, which we now know is scientifically unreliable. Hall's sworn statement in conjunction with Tobin's proffered testimony provide compelling evidence that Booker died after he was shot by Pough and ran off.

Besides ignoring Hall's sworn statement, the State also misrepresents the evidence that was presented at Asay's trial when it argues that it proved that Asay's victim was Robert Booker. The State disingenuously argues that Robbie Asay and Bubba O'Quinn merely "could not identify the victim as Robert Booker" (AB 27, 34). But from the outset and through trial, Robbie stated that the man he spoke to in the early morning hours on July 18 was not the man who was found beneath the house on Laura Street and identified as Robert Booker (R. 591-92).[13]

---

[13]The police learned of multiple gunshots in the Springfield area of Jacksonville late on July 17 and/or early on July 18. As Hall swore, Pough described several shots fired at Booker, a few blocks from the abandoned house where Booker was found; Ollie Thomas reported hearing shots fired between 11PM and 12AM; Joseph Knight heard shots between 12 and 2AM; and an unidentified black female witnessed a shooting in front of the Idle Hour bar; but, police discounted the witness "as a very talkative black female seeking attention" (PC-R2 1060).

The State's reliance on Clifford Patterson as conclusive evidence that Booker was shot by Asay and not by Pough is equally misplaced (AB 26).[14] Patterson did not see the shooting or identify Robbie, Bubba or Asay or their vehicles as being near the crime scene when he saw Booker run by stating that he had been shot. Patterson did not know who had shot Booker. It may very well have been Pough who had shot Booker when, according to Pough's statement to Hall, Booker ran off. Booker did not tell Patterson who had shot him. The police were aware of Patterson's observations when Hall gave his July 23 sworn statement (PC-R2 1060). If Booker ran off after Pough shot him, he needed to just go a block to 6th Street and take a left. Patterson claimed to have seen Booker running down 6th Street and turn the corner onto Laura Street (PC-R2 1060). Joseph Knight who was all there with Patterson at the time said that "between 12 midnight and 2:00 AM he saw the victim run by" (PC-R2 1058).[15] Hall's statement that Pough shot a black male at 1418 N. Market Street was consistent with Patterson and Knight's observation of Booker running down 6th Street and turning right onto Laura Street.[16] Hall's

---

[14]The State argues that the proximity of Asay's alleged shooting and the abandoned house where Booker's body was found at 9:40 AM prove that Asay shot Booker (AB 37). The proximity of the Pough shooting and the house was also within a few blocks.

[15]Robbie, Bubba and Asay did not leave Brinkman's until it closed at 2AM.

[16]In the Answer Brief, the State falsely asserts: "Booker's body was then discovered several blocks down Laura street from [Patterson's] encounter with him" (AB 36). The corner of 6th St. and Laura St. begins the 1600 hundred block of Laura St. Booker's body was found beneath a house at 1622 N. Laura St (PC-R2 1055).

undisclosed sworn statement and Tobin's proffered testimony is no way is refuted by Patterson's observations.[17]

The "case-specific" firearm identification evidence provided by Tobin constitutes newly discovered evidence. The import of the evidence when evaluated cumulatively with the other new evidence that is admissible at a retrial demonstrates that Asay is entitled to relief. The jury heard misleading and scientifically unreliable testimony which was the only direct evidence linking Asay to the Booker homicide as the prosecutor's closing reflects.

The State's claim that Asay is trying to "resurrect previous claims" (AB 38), is premised upon a fundamental misunderstanding of this Court's governing jurisprudence. This Court has held:

> Based on the standard set forth in *Jones II*, the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial. *Swafford v. State*, 125 So.3d 760, 775-76 (Fla.2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case." *Id.* at 776 (*quoting Lightbourne v. State*, 742 So.2d 238, 247 (Fla.1999)). This determination includes
>
> > whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

---

[17]As to the medical examiner's testimony about Booker's wound, the State cannot account for the angle of the bullet since it is not consistent with how the State alleged that Asay shot Booker.

> *Jones II*, 709 So.2d at 521 (citations omitted). As this Court held in *Lightbourne*, and more recently in *Swafford*, **a postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal**. *Swafford*, 125 So.3d at 775-76; *Lightbourne*, 742 So.2d at 247; *see also Roberts v. State*, 840 So.2d 962, 972 (Fla.2002) (holding that upon remand, if the trial court determined that the testimony in a newly discovered evidence claim was reliable, the trial court was required to review that new evidence, as well as claims under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that were previously rejected in a prior postconviction motion, because the evidence was equally accessible to the defense and there was no reasonable probability that the result of the trial would have been different had the evidence been disclosed).

Hildwin v. State, 141 So. 3d 1178, 1184 (Fla. 2014) (emphasis added). The State misunderstands the requirement that this Court consider all of the previous evidence relating to the statements made by Gross that he provided false testimony and was directed to provide damning information about Asay's motives for the crimes; the impeachment of Bubba O'Quinn, Charlie Moore and Danny Moore as to the inconsistencies in their testimony and with other evidence; and the undisclosed Hall sworn statement about Pough's admission to him; along with Tobin's proffered testimony as to Warniment's misleading and scientifically unreliable testimony. All of this would be admissible at a new trial and all of it must considered in evaluating a newly discovered evidence claim under *Hildwin v. State*.[18] At a minimum, an evidentiary hearing is

[18]The State concedes that Asay's alleged "confession" to a defense investigator would not be admissible at a re-trial; but, then argues without any citation of authority that this Court can use it to deny Asay a retrial (AB 39) ("While the State could not use this testimony at any retrial, this Court certainly should

required. *Smith v. State*, 75 So. 3d 2005 (Fla. 2011).

B. *BRADY* CLAIM

As to Asay's *Brady* claim, the State argues that because Selwyn Hall's name was disclosed in the homicide continuation report and Housend's deposition, his undisclosed sworn statement does not constitute a *Brady* violation (AB 39). Specifically, the State argues: 1) Housend discussed Pough in his depo; and 2) that Hall's statement was mentioned in the homicide continuation report (AB 42-3). According to the State, that was all that was required under *Brady* (AB 43). The State is wrong as to both the facts and the law; the exculpatory information contained in Hall's sworn statement was not in fact disclosed.

The State falsely asserts: "the statement Selwyn Hall gave on July 23, 1987, that Roland Pough shot Booker, was contained in a homicide supplemental report that was disclosed." (AB 43).[19] The 7/31/87, homicide supplemental report (that Judge Salvador found in an attachment to an email sent to Asay's current counsel and on which she relied in summarily denying) lists witnesses, including: "Hall, Selwiyn [sic], 116 East 7th Street, Phone,

---

consider Asay's admission of guilt in refusing to grant the relief of a new trial."). The State is wrong. Asay did not confess to the defense investigator, who made the claim up in response to an ineffectiveness allegation. The investigator's testimony is and was not true. Moreover, any statement to the investigator is privileged and inadmissible. The alleged statement cannot be considered in assessing whether Asay is entitled to an evidentiary hearing on his claims.

[19]At this juncture, Asay's factual allegations must be accepted as true. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). Asay has alleged that Hall's sworn statement was not disclosed. The State argues what was disclosed was sufficient.

None" (PC-R2 1055). The only reference to Hall is as follows:

> TRUSSELL led this writer to a SELWIYN [sic] who was reported as being the black male who "Roland" had told him of the shooting.
>
> **1:25 P.M.** This writer interviewed SELWIYN [sic] HALL at the Pic N'Save store. MR. HALL stated that ROLAND told him that this dude was trying to rob him outside his apartment and that he had shot four or five times and he knew that he struck the guy once with one of the shots and that the dude had run off. MR. HALL also stated that there was suppose to be a drug deal at ROLAND's residence on this date at 4:00 P.M. HALL stated that ROLAND was suppose to trade some crack cocaine for a blue Mustang at that time. HALL also stated that ROLAND always had in his possession a .25 caliber automatic pistol.

(PC-R2 1062). In Housend's depo, the Pough info was described as a dead end because of Warniment's ballistic match. Neither in the July 31 report nor in Housend's depo does the contents of Hall's sworn statement appear. Hall's undisclosed sworn statement was:

> On 23 July 87 at approx 1:25 p.m. I Selwyn A. Hall advised Det. Housend the following information . . .
>
> An acquaintance of mine "**Roland**" said that **last Friday** night he had **shot a black male** during what he said was a robbery attempt **at 1418 N. Market St.** in his side yard. "Roland" said he was shot in the right arm, and that he (Roland) shot at the B/M four or five times. Roland said he knew for sure **he hit the B/M once. The B/M then ran away. Roland has a .25 cal auto pistol crome plated with brown handle.** I Selwyn A. Hall have seen Roland carry this pistol many times. I Selwyn A. Hall don't think Roland ever goes without it. Three weeks ago, Roland asked me to buy some bullets for him, and I couldn't find any. Roland got some from his brother. I Selwyn A. Hall have bought crack cocaine from Roland on several occasions. I Selwyn A. Hall know for a fact that approx thirty or more people buy their crack from Roland. This is a true and accurate statement.

(PC-R2 at 792, 1161) (emphasis added). The date, time and location that Roland said he shot the black male appear in Hall's sworn statement, but no where else. The description of the victim

as a black male appears in Hall's statement, but nowhere else. A description of Pough's gun is in the statement. In another previously undisclosed report, Hall was described as reliable.[20]

The information contained in the Hall's undisclosed sworn statement and the other undisclosed documents concerning Pough's July 23 arrest contain favorable information that was not set forth in the July 31 supplemental report and was not in Housend's depo. The State's whole argument is that disclosing that, at one point in time, Pough had been a suspect satisfies its *Brady* obligation as to Pough's admission to Hall: "Roland Pough was disclosed and therefore, the *Brady* claim is meritless." (AB 43-44). The State's position is just contrary to the law.

The seminal case is *Brady v. Maryland*, 373 U.S. 83 (1963). The facts of *Brady* demonstrates that the State's argument is a fallacy. Brady's co-defendant was Boblit. As *Brady* indicates:

> Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. **Several of those statements**

---

[20]In a handwritten supplemental report by John McCallum regarding the July 23, 1987, arrest of Pough, appears the following: "Det. Housend informed us that he received information from a reliable informant that a subject would be exchanging a blue Ford Mustang for cocaine with a subject known as Roland Pough at 1418 N. Market St. Housend related that Pough was suspected of having a gun in his possession that was involved in a homicide." (PC-R2 766). From the "reliable informant," Selwyn Hall, the police learned that Pough was selling drugs, had at least 30 customers in the neighborhood and was known to carry a Raven .25 pistol. The police then tried to arrest Pough that afternoon in the hope of obtaining the murder weapon.

Hall provided the information about Pough's gunshot wound before he was arrested. Ultimately, Pough was treated for a gunshot wound to his arm and remained in the hospital for a week.

Hall told the police that Pough was a drug dealer who sold cocaine. Booker had cocaine in his system the night of his death.

> **were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution** and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Brady, 373 U.S. at 84 (emphasis added). Brady knew Boblit's name and was provided several of Boblit's statements. *Brady* error occurred because the State did not disclose one specific Boblit statement, the one in which he admitted the homicide.

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the State had disclosed the name of individual known as Beanie. The defense was aware of Beanie, even though he was not called as a witness by the State or by the defense at Kyles' initial trial or even at his retrial.[21] Yet, the U.S. Supreme Court held that the State's failure to disclose many of Beanie's various statements to the police and to the prosecutor violated *Brady*. *Kyles*, 514 U.S. at 430 ("Notwithstanding the many inconsistencies and variations among Beanie's statements, neither Strider's notes nor any of the other notes and transcripts were given to the defense.").

In *Hoffman v. State*, 800 So. 2d 174, 179 (Fla. 2001), this Court was presented with a *Brady* claim premised upon undisclosed "results of an exculpatory hair analysis, an analysis which excluded Hoffman, codefendant White and the male victim, Ihlenfeld, as the sources of the hairs found in the female victim's hands." Just like it has argued here, the State argued

---

[21]At trial, "[t]he theory of the defense was that Kyles had been framed by Beanie, who had planted evidence in Kyles's apartment and his rubbish for the purposes of shifting suspicion away from himself, removing an impediment to romance with Pinky Burns, and obtaining reward money." *Kyles*, 514 U.S. at 429.

in *Hoffman* that it had "disclosed the existence of a hair analysis to defense counsel. This disclosure, the State assert[ed], should have placed Hoffman's attorney on notice of any other evidence flowing therefrom." *Id*.[22] This Court rejected the State's argument and granted a new trial. This Court held:

> The information solicited, however, was merely the fact that hairs were gathered at the scene. The State asserts this testimony sufficiently apprised the defense of the existence of this evidence. This argument is flawed in light of *Strickler* and *Kyles*, which squarely place **the burden on the State to disclose to the defendant all information in its possession that is exculpatory**. In failing to do so, the State committed a Brady violation when it did not disclose the results of the hair analysis pertaining to the defendant.

Id. (emphasis added). *See Smith v. Sec'y Dep't of Corrs*., 572 F.3d 1327 (11th Cir. 2009).

The State's failure to disclose Selwyn Hall's sworn statement regarding Pough's admissions against penal interest to him about shooting a black man late on July 17th a few blocks from where Booker's body was found violated *Brady*.[23] When properly evaluated with all the other exculpatory evidence including, Gross' recantation and Tobin's proffered testimony

---

[22]As here, "the State essentially argue[d] that defense counsel should have inquired further once told of the existence of other hair analyses." *Id*.

[23]As to the Charlie Moore interview notes, the State avers: "*Brady* does not require notes contain certain information." (AB 44 n.6). The State clearly does not understand that if Moore failed to provide the police with details about Asay's alleged statement and then at trial added those details, his failure to originally provide them shows an inconsistency and is impeachment to his testimony. Without providing Asay the statement and/or information that Moore later added details to his original statement, the State violated *Brady* as explained in *Kyles*.

regarding Warniment's ballistics match, confidence is undermined in the outcome of Asay's trial.[24] At the very least, an evidentiary hearing is required on his claims.

C. *STRICKLAND V. WASHINGTON* CLAIM

To the extent that the State argues that trial counsel should have known about Selwyn Hall's sworn statement, Asay has alternatively pled its recent disclosure as an ineffectiveness claim under *Strickland*. As to this alternatively pled claim, the State argues the claim is not timely (AB 47). The State's argument makes no sense. Asay's prior collateral counsel was not provided the investigative file relating to Pough which contained Hall's sworn statement and all of the facts surrounding the investigation of Pough. At issue is the same undisclosed records at issue in Asay's *Brady* claim. The State properly makes no argument of a time bar as to the *Brady* claim. That is because prior collateral counsel was not provided with Hall's handwritten sworn statement and the other files regarding Pough's July 23, 1987, arrest. Without Hall's sworn statements and the files regarding Pough's July 23, 1987, arrest, prior collateral counsel was just as unable to alternatively plead Asay's *Strickland* claim

[24]The State argues that Hall's statement is not material because of the evidence presented against Asay (AB 46). As previously stated, there was no direct evidence linking Asay to Booker's shooting. Robbie testified that the man with whom he spoke on July 18th was not Booker. A review all of the admissible evidence, including, Tobin's testimony, Hall's testimony, the medical examiner's testimony about the angle of the bullet in relation to the Booker homicide, the impeachment of Bubba and the Moores and Gross' statements that he provided false testimony and the fact that McDowell was white, establishes that confidence in Asay's convictions and sentences of death has been undermined.

as he was unable to plead Asay's *Brady* claim.[25] Accepting the factual allegations as true, an evidentiary hearing is warranted.

ARGUMENT III: ASAY'S RIGHT TO COLLATERAL COUNSEL WAS VIOLATED

The State refuses to recognize that statutory law guarantees Asay the right to effective assistance collateral representation. The cases cited by the State do not refute this fact. Neither *Ross v. Moffitt*, 417 U.S. 600 (1974),[26] nor *Zack v. State*, 911 So. 2d 1190 (Fla. 2005), nor *Gore v. State*, 91 So. 3d 769 (Fla. 2012), provide that in Florida, capital collateral defendants are not statutorily entitled to the effective assistance of registry counsel at all times. In 1985, the State of Florida determined that death sentenced individuals were entitled to state court counsel as a matter of right. Later, this Court held that pursuant to the statute "**each defendant under a sentence of death is entitled, as statutory right to effective legal representation by the capital collateral representative** in all collateral relief proceedings." *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988)

---

[25]The State's argument that it was not ineffective to fail to raise Pough as an alternative suspect because he may have had an alibi (AB 48), lacks evidentiary support and is contrary to police reports. Hall provided a statement that Pough confessed to him. The information gathered about Pough was so compelling that law enforcement arranged to arrest him in the hope of obtaining the murder weapon.

[26]In 1974, the U.S. Supreme Court held in *Ross v. Moffitt*, 417 U.S. at 611-12, that the Due Process and Equal Protection Clauses to the US Constitution did not compel counsel be appointed for discretionary review of a criminal conviction. But, the US Supreme Court also stated: "We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review." *Id.* at 618.

(emphasis added).[27] Whether capital collateral defendants have a constitutional right to counsel is not the issue. For more than thirty years, death row inmates have had the statutory right to effective collateral representation under § 27.701, Fla. Stat.

While Asay was without state court counsel from May, 2005, until January 13, 2016, he was deprived of his statutory right to effective collateral counsel.[28] He was deprived of his right with the State's full knowledge; he did not have "representation at each and every stage of the litigation." (AB 52).[29]

The prejudice that Asay has suffered is shown by the circuit court's finding a lack of diligence as to his newly discovered evidence claim. Asay cannot be faulted for a failure to exercise

---

[27]The State's interpretation of *Spalding* is a clearly obtuse reading of its import. *See* AB 56 ("The *Spalding* Court did not create a state constitutional right to collateral counsel."). Asay relies upon *Spalding* for the statutory right to effective collateral counsel. *Spalding v. Dugger*, 526 So. 2d at 72.

[28]The State repeatedly and falsely asserts that Fallis is part of Asay's defense team: "He also has federal habeas counsel on his defense team who has been his attorney for years and is familiar with his case." (AB 50); *see also* AB 53 ("And that team also includes federal habeas counsel Thomas Fallis who handled merits briefing in the federal district court and is familiar with this case."). Fallis is not involved in Asay's case and was never authorized to conduct any litigation in the state courts. The State knows this. Its false statement to the contrary shows its bad faith and demonstrates why Asay went unrepresented before the state courts for over a decade; the State wanted it so.

[29]In addition, he lost all of the 33 boxes of records maintained by the CCRC-North until July 1, 2003. The State says that Asay was able to reconstruct his records after the counsel was appointed on January 13th (AB 55). That's just not true. Undersigned has collected minimal records relating to the case. Currently, Asay's files comprise approximately 6 boxes of records which is woefully incomplete in comparison to the file that had been gathered and maintained until July 1, 2003.

due diligence as to scientific studies and reports when he was left without state court collateral counsel from May of 2005 until January of 2016. Sitting in his cell on death row, Asay was deprived of the means of exercising any diligence - he was deprived of his statutory right to collateral representation.

ARGUMENT IV: ASAY'S *HURST* CLAIM.

In response to Asay's claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016), the State in its 93 page Answer Brief in excess of this Court's page limitations makes a 4-pronged argument, much of which was not presented previously: 1) *Hurst* does not require jury sentencing; 2) *Hurst* is not retroactive; 3) *Hurst* does not apply because of a recidivist aggravator; and 4) even if *Hurst* applied, any error was harmless (AB 57, 61).

Asay would like to address each of the State's arguments and refute them. Asay did prepare a reply brief that refuted each of the State's arguments. But, this Court would not accept the reply brief due to its length. In complying with this Court's page limitation and given his other meritorious claims, Asay is unable to address the State's new *Hurst* arguments. He merely asks that if this Court considers accepting the State's arguments, it first afford him the opportunity to refute those new arguments.

CONCLUSION

Asay submits that relief is warranted in the form of a remand for an evidentiary hearing, a new trial, the imposition of a life sentence, a new sentencing proceeding, or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 23rd day of February, 2016.

/s/ Martin J. McClain
MARTIN J. MCCLAIN
Fla. Bar No. 0754773

LINDA MCDERMOTT
Fla. Bar No. 0102857

McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, Florida 33334
Telephone: (305) 984-8344

JOHN ABATECOLA
Fla. Bar No. 0112887
20301 Grande Oak Blvd
Suite 118-61
Estero, FL 33928
Telephone: (954) 560-6742

COUNSEL FOR APPELLANT

CERTIFICATE OF FONT

This is to certify that this Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

/s/ Martin J. McClain
MARTIN J. MCCLAIN