IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,070

JASON DIRK WALTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT COURT, IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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STATEMENT OF FONT

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ARGUMENT I

INEFFECTIVE ASSISTANCE OF COUNSEL

The facts underlying Mr. Walton's claims were raised under alternative legal theories – newly-discovered evidence, Brady, and ineffective assistance of counsel. The cumulative effect of those facts in light of the record as a whole must be assessed. Not only must this Court consider Mr. Walton's claims in light of the record as a whole, but this Court also should consider the cumulative effect of the evidence that the jury never heard.

As this Court held in State v. Gunsby, 670 So. 2d 920 (Fla. 1996), a combination of Brady violations, ineffective assistance of counsel and newly-discovered evidence may cumulatively establish prejudice sufficient to require granting relief. In Gunsby, this Court ordered a new trial based on the combined effect of Brady violations, newly-discovered evidence and ineffective assistance of counsel. Gunsby, 670 So. 2d at 924.

In the context of ineffective assistance of counsel, the United States Supreme Court explained how the totality of the circumstances approach applies:

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Strickland v. Washington, 466 U.S. 668, 695-96 (1984)(emphasis added).

The Supreme Court previously described the totality of the circumstances analysis as follows:

> [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-13 (1976)(emphasis added)(footnote omitted).

The trial court here failed to consider the evidence presented in light of the totality of the circumstances analysis.

In its Answer Brief, the State argues that while Drs. Fleming and Sultan conducted additional evaluations on Mr. Walton based on the withheld information about Robin Fridella, "defense counsel's testimony made it clear that no prejudice resulted from the failure to use this information at trial." (Answer Brief at 11).

The State's conclusory remark and the remainder of its argument that trial counsel "repeatedly testified that any information relating to Robin Fridella's involvement was totally irrelevant to this defense" (Answer Brief at 11) fails to address the reasonableness of trial counsel's decision in light of his understanding of the law. Just because trial counsel said so does not make it so, particularly when counsel's answers were contrary to the defense he actually presented at trial. See, Argument II.

Trial counsel Donald Mr. O'Leary claimed that he would not have investigated or presented any newly-discovered evidence concerning Robin Fridella to the jury or to the mental health experts because it conflicted with his theory of defense. His theory of defense was "a planned robbery gone bad" (PC.-1 at 3930). The robbery was supposedly for drugs. Mr. O'Leary did not explain that his theory conceded felony murder. Nor did he explain how this theory of defense

mattered at resentencing when the jury had already determined guilt.

In fact, the Robin Fridella information explained aspects of Mr. Walton's personality -- his obsessive relationship with Ms. Fridella. The information provided, at least, some explanation for the series of events that occurred. As it stood under Mr. O'Leary's "theory of defense," the jury was left with no explanation or reason for the crime other than a robbery for drugs.

In addition, at resentencing, guilt had already been established. Therefore, the information about Ms. Fridella provided a unique insight into Mr. Walton's personality. See, Argument II.

It is abundantly clear that trial counsel had no idea what mitigating evidence was or how to go about investigating it. Mr. O'Leary testified that he was unaware of Mr. Walton's background and had not known of his dysfunctional family experience, his childhood drug use, or his SEED placement (PC-R. 55-57, 78-79).

He had no strategic or tactical reason for not contacting family members about this type of mitigation and there was no reason for his failing to ask the family members he did contact about these subjects (PC-R. 129).

Mr. O'Leary testified that because Mr. Walton's sisters "did not seek me out," he made no effort to contact them (PC-R. 58; 125). Mr. Walton's father sought him out during the penalty phase (PC-R. 58), but Mr. O'Leary failed to consider or even speak with Mr. McCoy about mitigation. Trial counsel was only aware of one stepfather in Mr. Walton's life (PC-R. 125). Apparently, Mr. O'Leary's opinion was that Mr. Walton had the duty to investigate and provide his own mitigation to his trial counsel. See, Washington v. Smith, 219 F. 3d 620, 631 (7th Cir. 2000) (telling a client who is in custody to produce his own witnesses falls short of conducting a reasonable investigation).

Besides failing to speak with mitigation witnesses, Mr. O'Leary failed to ask for or obtain any of Mr. Walton's school records (PC-R. 76). He failed to investigate whether Mr. Walton suffered from any head injuries or was involved in any car accidents (PC-R. 77). He failed to discover if Mr. Walton was seen by a mental health expert or psychiatrist earlier in his life (PC-R. 77). Mr. O'Leary failed to ask for or obtain any of the Department of Corrections records on Mr. Walton from 1984, the year of his first conviction, through his 1986 penalty phase, which reflected his good conduct while in custody (PC-R. 71-72, 121). He failed to use Mr. Walton's 1984

pre-sentence investigation report that showed the avoiding lawful arrest aggravating factor was not present (PC-R. 73-75).

Mr. O'Leary did no independent investigation into Mr. Walton's background. His knowledge of Mr. Walton's drug use came from Mr. Walton himself. He did not ask any of Mr. Walton's friends or acquaintances about his drug and alcohol use. He hired no mental health expert to evaluate him. He said he knew that Mr. Walton smoked marijuana and drank beer. "...the picture I got was that's just what young boys, his peers in Marion County do on weekends, **I guess**" (PC-R. 128). Mr. O'Leary did not take the time to find out. Mr. O'Leary explained that he did not feel a need to investigate further because he never heard the word "addiction" from Mr. Walton or his mother (PC-R. 129). Without the proper terminology, Mr. O'Leary did not feel it necessary to investigate his client's background.

Yet, Mrs. Walton, who voluntarily provided information on her son, had no idea of her son's lifestyle. She was unaware of his drug and alcohol abuse. She did not know that her second husband, Porter Gates, was supplying Mr. Walton with drugs and alcohol (PC-R. 164-165). Mr. O'Leary testified that he had no tactical or strategic reason for failing to use a

confidential defense mental health expert (PC-R. 79-81, 84-85).

Besides not knowing the law regarding mitigation investigation, Mr. O'Leary did not know evidentiary law, either. He testified that had he known introducing Mr. Walton's rap sheet as evidence of lack of prior convictions would have opened the door for state evidence of collateral misconduct (See R2. 782-94), he would not have done so (PC-R. 66-70).

In light of his testimony, Mr. O'Leary's answer that he would not have used the evidence withheld by the State, is cast in a new light. It is not surprising that in 1999, when the State withheld information was shown to Mr. O'Leary, he said it would not have given him reason to attack the aggravating factors and that he would not have used the information to investigate possible mitigating evidence for his client (PC-1. 3912-3951). It is not surprising because Mr. O'Leary did not have an even rudimentary understanding of the law or his role in gathering mitigating evidence.

It also is not surprising that Mr. O'Leary did not know that mitigating evidence existed because he did not look. Mr. O'Leary failed to develop a mitigation case for Mr. Walton. Mr. O'Leary made no effort to obtain or present Mr. Walton's

prison records at resentencing because it never occurred to him (PC-R. 120-21). Had he obtained these records and spoken with the guards at the prison, he would have learned that Mr. Walton was a model inmate who had never received any disciplinary reports while on death row (PC-R. 10-11).

Other mitigating issues could have been presented but were ignored because Mr. O'Leary did not understand the significance of them. He testified that he had no tactical reason for failing to raise the proportionality argument about disparate treatment(PC-R. 82-82). Mr. O'Leary failed to obtain a confidential mental health expert. (PC-R. 79-81, 84-85). Had he done so, substantial mental health mitigation would have been identified. Background materials were easily accessible to Mr. Walton's defense counsel or could have been easily obtained had Mr. O'Leary asked for them. Having evaluated Mr. Walton and studied his background, a mental health expert would have been able to testify at an evidentiary hearing to the existence of significant non-statutory mitigation, such as Mr. Walton's caring nature, his non-violent nature, and his long history of drug and alcohol abuse. Mr. O'Leary missed all of it.

The State in its Answer Brief only briefly mentions that Drs. Pat Fleming and Faye Sultan conducted additional

evaluations on Mr. Walton based on the information that the State withheld. The State failed to address what these evaluations revealed.

Dr. Fleming initially evaluated Mr. Walton before the 1991 evidentiary hearing. She testified then that Mr. Walton came from an unstable family life, in which Mrs. Walton was gone a great deal and Mr. Walton was taken care of by his eldest sister. Mrs. Walton was involved in numerous affairs. After his father left the home when he was 12, Mr. Walton's life changed. He became involved in drugs and alcohol. His mother remarried within six months and his stepfather began supplying him with alcohol and access to drugs.

While his drug use began at the age of 12, it escalated to heroin when he was in the Army in Germany. His drug of choice was LSD (PC-R. 175). Dr. Fleming described "red flags" that should have alerted defense counsel for the need for mental health testing. Presumably, this information would have been helpful to know since Mr. O'Leary's defense theory was a robbery for drugs gone bad. Dr. Fleming found that Mr. Walton suffered numerous head injuries; had been in drug rehabilitation; and was given psychoactive medication while in the jail. He also had been to a psychologist or psychiatrist

in high school, which indicated mental health problems (PC-R. 151).

In 1991, Dr. Fleming testified that she found two statutory mitigating factors: that Mr. Walton acted under the influence of extreme mental disturbance and that his capacity to conform his conduct to the requirements of law was substantially impaired. She also testified to many non-statutory mitigating factors (PC-R. 283-84).[1]

In 1999, Dr. Fleming was given the documents that the State conceded it withheld to determine if they would have made a difference in her initial evaluation. She described that information as "critical" to her evaluation. Based on the withheld information, she found Mr. Walton to be controlled and manipulated by his girlfriend, Robin Fridella, whom he loved. She found evidence of Robin Fridella's deception and this information was not available to her in 1991.

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[1]The trial judge found the aggravating factors that (1) the murders were committed during the commission of a robbery and burglary; (2) the murders were committed for pecuniary gain; (3) the murders were committed in an especially heinous, atrocious or cruel fashion; (4) the murders were committed in a cold, calculated and premeditated manner; and (5) the murders were committed for the purpose of avoiding a lawful arrest. The trial court found no mitigating circumstances. Walton v. State, 547 So. 2d 622, 624 (Fla. 1989).

Dr. Faye Sultan, who evaluated Mr. Walton in 1999, agreed with Dr. Fleming and found Mr. Walton to be easily manipulated and controlled by others. Dr. Sultan said:

> I learned mostly, I think, about Mr. Walton's relationship with Robin Frudella (sic) and about the level of deception that she had used in their relationship and about Mr. Walton's perception that in fact, he had been foolish in his belief of her, very dependent on her, highly vulnerable to her influence, and her suggestions.
>
> And I learned about how little Mr. Walton felt that he was able to be the mover of his own life, the initiator of his own actions of his own life.

(PC-1. at 4835).

Despite the fact that the mental health experts found the withheld documents valuable in providing mental health mitigating evidence, Mr. O'Leary said he would not have sought additional investigation and he would not have used the information to investigate mitigation (PC-1. 3912-3951). Because the information was inconsistent with his theory of defense, "a planned robbery gone bad," he would not have bothered to investigate Mr. Walton's relationship with Robin Fridella because he found it too "insulting" to present it to the jury (PC-1. 3949-3951).

This was not reasonable, particularly in light of Drs. Fleming and Sultan's testimony that the information was valuable as an insight into Mr. Walton's personality. Trial

counsel's performance was woefully inadequate and his testimony that he would not even consider investigating the withheld information and Robin Fridella's hold over Mr. Walton was deficient.

It is not surprising for Mr. O'Leary to say he would not have investigated Mr. Walton's relationship with Ms. Fridella because he did not investigate anything else. There is no reason to think Mr. O'Leary would suddenly be competent.

In Collier v. Turpin, 177 F. 3d 1184 (11th Cir. 1999), the Eleventh Circuit noted that Collier's defense attorneys presented testimony that their client had a good reputation, was hard working and took care of his family, but the Court found that his attorneys did not meet the standard of objective reasonableness required by the Sixth Amendment.

They described counsel's performance as "no more than a hollow shell" of the testimony necessary for a "particularized consideration of relevant aspects of the character and record of [a] convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303, 96 S. Ct. 2978, 2991, 49 L.Ed. 2d 944 (1976).

> Although counsel were aware of the Supreme Court's opinion in Lockett, and recognized that the sentencing phase was the most important part of the

> trial given the overwhelming evidence of guilt, they presented almost none of the readily available evidence of Collier's background and character that would have led the jury to eschew the death penalty. Instead of developing an image of Collier as a human being who was generally a good family man and a good public citizen, who had a background of poverty but who had worked hard as a child and as an adult to support his family and close relatives, counsel's presentation tended to give the impression that the witness knew little or nothing about Collier. In failing to present any of the available evidence of Collier's upbringing, his gentle disposition, his record of helping family in times of need, specific instances of his heroism and compassion, and evidence of his circumstances at the time of the crimes – including his recent loss of his job, his poverty, and his diabetic condition – counsel's performance brought into question the reliability of the jury's determination that death was the appropriate sentence. See Woodson [citations omitted].

Collier v. Turpin, 177 F. 3d 1202.

The Eleventh Circuit found that Collier's attorneys did not perform as objectively reasonable attorneys would have and that their performance fell below the standards of the profession. Id.

No matter what the trial attorneys said, the Eleventh Circuit still examined the reasons behind the decisions they made.

The same should be true for Mr. Walton. His attorney's reasons and performance fell below the objective for reasonableness and below the profession's standards. Like Mr.

Collier, Mr. Walton's defense attorney failed to present evidence of his background and character that would have the given the jury an alternative to death.

Moreover, the State urges this Court to adopt Mr. O'Leary's testimony as "reasonable" when his basis for not investigating or presenting mitigating evidence did not exist. He had no tactical or strategic reasons for not seeking school or prison records, for not seeking independent background information; for not even asking about mental health or substance abuse from his family and friends. Mr. O'Leary claimed that there was no indication that Mr. Walton had a substance abuse problem. Yet, his theory of defense was a "planned robbery gone bad." The robbery, if one existed at all, was to have been for drugs. The first question competent counsel would ask if he were pursuing such a defense, is why is Mr. Walton participating in a robbery for drugs if he does not have a drug problem.

The trial court and the State overlooked these important factual distinctions and misapplied the law to those facts. Contrary to Gunsby v. State, 670 So. 2d 920 (Fla. 1996), and Kyles v. Whitley, 514 U.S. 419 (1995), the trial court failed to conduct any cumulative error analysis. Throughout its order, the Court analyzed each claim as an independent fact

and issues instead of addressing the cumulative effects of this mitigating information not reaching the jury. The jury had no idea that Mr. Walton's obsessive relationship with Robin Fridella existed and that he would do anything for her. The jury had no idea that Ms. Fridella made statements that she would do "anything" to keep her children in a nasty custody battle with her ex-husband. The jury had no idea that Ms. Fridella was deceptive in many areas of her life and in fact, flunked a polygraph test. The trial court's analysis of the facts was contrary to the law. Mr. Walton is entitled to relief.

ARGUMENT II

THE BRADY CLAIM

In its Answer Brief, the State simply repeats the lower court's order, line by line and word for word without explanation as to why the order is correct or supported by the record. The State provides no facts supporting the lower court's legal analysis. The lower court and the State are both mistaken because the order is contrary to the facts and the law.

Mr. Walton raised this issue as Brady and newly-discovered evidence (PC-1. 1921-1936). The State Attorney conceded that the documents were withheld by the State and "may have been newly discovered, they were always available with due diligence" (PC-1. 2232). The Assistant Attorney General argued that Mr. Walton failed to "identify any newly discovered evidence which would justify granting a new trial" (Answer Brief at 14). There is no explanation for the State's inconsistent positions.

In determining whether newly-discovered evidence warrants a new trial, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court must then undertake a cumulative analysis by evaluating the newly-discovered evidence in conjunction with evidence presented at all prior evidentiary hearings and evidence presented at trial. Robinson v. State, 770 So. 2d 1167 (Fla. 2000). That clearly was not done in this case.

In the context of Brady, the United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995);

Young v. State, 739 So. 2d 553, 559 (Fla. 1999). The analysis is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 1566 (footnote omitted).

The question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So.2d at 553. If it did and it did not disclose this information, a new trial is warranted where confidence is undermined in the outcome of the trial. In making this determination "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So.2d 373, 385 (Fla. 2001). This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446. Information regarding "coaching" of State witnesses is Brady material because it gives the defense a tool to argue against the witness' credibility. Rogers v. State, 782 So.2d at 384.

At Mr. Walton’s evidentiary hearing it was established and the State conceded it failed to disclose exculpatory evidence to the defense, but that the information could have been discovered through due diligence. In its Answer Brief, the State failed to explain how counsel’s five demands for discovery failed to establish due diligence or how the withheld information did not constitute impeachment.

Both the trial court and the State overlooked binding legal precedent establishing that diligence is not an element of a Brady claim. Strickler v. Greene, 527 U.S. 263, 281-82 (1999); Kyles v. Whitley, 514 U.S. 419 (1995). See also Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) (noting that "`due diligence' requirement is absent from Supreme Court's most recent formulation of the Brady test"); Banks v. Reynolds, 54 F. 3d 1508, 1517 (10th Cir. 1995) (prosecution's obligation to turn over evidence "stands independent of the defendant's knowledge").

In Hoffman v. State, 800 So. 2d 174 (Fla. 2001), this Court rejected the State’s argument that defense counsel lacked diligence in failing to discover exculpatory evidence “[t]his 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."

Under Hoffman, "the suppressed evidence must be viewed in context with the other evidence that was presented at trial." Id. In its Answer Brief, the State does not say that the information is not exculpatory, nor does the State argue that it is not Brady material. The State simply parrots the trial court's order and says that Mr. Walton has not shown he is entitled to a new trial or resentencing.

The State argues in a footnote (Answer Brief at 19), that Mr. Walton's argument should fail because he could have possessed the information with "reasonable diligence." However, the State fails to address how defense counsel attempted to obtain the exculpatory materials within the State's possession, but that material was never turned over to the defense pre-trial and was only turned over to the defense in public records litigation.

Robin Fridella's involvement in the crime was never an issue before because the key materials were withheld and suppressed by the State. None of this information was given to the defense at trial or resentencing. Nor was there any reason to believe it existed. The State failed to show how a defendant was to know, for example, that Ms. Fridella had

flunked a polygraph test unless it was disclosed by the State. Under Kyles, knowledge of exculpatory information is imputed to the prosecutor, whether or not the prosecutor has actual knowledge. The individual prosecutor has a duty to know of any favorable evidence known to others acting on the government's behalf, including the police and sheriff. Kyles.

This withheld information was material to motive, Mr. Walton's mental state at the time of the crime, and the State's ability to prove the aggravating factors against Mr. Walton. It could have provided impeachment evidence and offered an alternative theory of the crime than that forwarded by the State. The information also was material to the penalty phase and resentencing because it could have provided an explanation for Mr. Walton's conduct.

Mr. O'Leary testified that he sought discovery from the State before trial. He filed four motions to compel the state to provide him with discovery (PC-1. 3914-3918; 4249-4250; 4252). Each motion he filed sought exculpatory information.

At the 1999 evidentiary hearing, Mr. O'Leary testified that he expected to receive all relevant discovery and he said, he "assumed that I was getting everything I was entitled to" (PC-1. 3920). He did not file any additional motions at resentencing because he believed that he had all the materials

to which he was entitled (PC-1. 3919). He had no indication from the State or any other source that more Brady material existed.

At the 1999 evidentiary hearing, Mr. O'Leary identified the following documents, ***none*** of which were turned over to him before trial:

- **S** a police report that showed a civil trespass violation against Robin Fridella filed by Steven Fridella involving the couple's son (PC-1. 3922)(Exhibit 7);

- **S** a Pinellas County Sheriff's Office supplemental report dated June 18, 1982 that showed that Robin Fridella was administered a polygraph, about three days after the homicide. The polygraphist concluded that Robin Fridella was not telling the entire truth and was deceptive in her answers.[2] (PC-1. 3923-24; 4254)(Exhibit 8);

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[2]The State relies heavily on the fact "that Detective Poe no longer believes that Fridella's polygraph shows deception." Answer Brief at 17. Detective Poe only changed his mind about Robin Fridella's polygraph eleven (11) years after the fact and immediately before he was to testify for the State about his results in an evidentiary hearing in post-conviction. (PC-1. 4243). He conducted no additional testing 11 years later.

It should be noted that Robin Fridella's deception was not limited to the polygraph exam. She was dishonest in many areas of her life (PC. 1 - 4156). Dr. Sultan testified that Robin Fridella had a history of being deceptive and contradictory when it came to the relationship with her husband and her marital status and her children (PC-1. 4836; 4847-48). Both defense mental health experts testified that it was irrelevant to their opinion that the polygraphist changed his mind 11 years after the fact because Ms. Fridella had been deceptive in other areas(PC. 1 - 4848).

- handwritten police field notes that said, “Robin didn’t get along with her brother Gary Peterson. If she couldn’t have Christopher and Steven back, no one could have him. Told Robin is involved with MC gang connection” (PC-1. 3928; 4256)(Exhibit 10).

- handwritten police notes that read, “Had a lot of problems with Robin over the children. She said if she couldn’t have them, no one would. ...Robin said she would do anything to get the kid” (PC-1. 3929)(Exhibit 11).

- Police interview notes that read, “Steve burned her enough that she might have something to do with it” (PC-1. 4258)(Exhibit 12).

The State conceded it withheld this information from the defense until 1996-1997, when it was finally turned over in public records litigation in post-conviction proceedings. This information was suppressed by the State and fell within the parameters of Brady. This information was exculpatory and impeaching and cast doubt on Mr. Walton’s role in the crime. This information could have been used to attack the State’s theory of the case – that the murders were the result of a robbery and that Mr. Walton was the “mastermind” who had control over three young boys. The new information shows that the “mastermind” may have been the person who would do anything to keep her children and the person who had more of a motive than anyone else. The withheld information showed that Robin Fridella was not to be believed; may have been involved

in the murders; and may have had a strong influence over Mr. Walton that was not known by the jury. This information also could have been used in mitigation to show how deceptive Robin Fridella was and explain her relationship with Mr. Walton.

Armed with this information, a competent defense attorney would have known how to use it or at least have caused him to conduct further investigation. A competent defense attorney who understood the concept of Brady could have effectively used this information. But, Mr. O'Leary was not competent. He failed to understand the concept of Brady. He thought Brady violations **only** occurred when exculpatory information was withheld. He did not know that Brady meant any evidence favorable to the defense should be disclosed. See, Kyles v. Whitley. He did not understand that Brady could be used for impeachment, too.

> Q: Okay. Can you tell me, Mr. O'Leary, what your understanding of Brady is?
>
> A: That you're entitled to all relevant information that would tend to indicate, – well, it would tend to indicate guilt or innocence.

(PC. 1- 3928).

Mr. O'Leary failed to understand that the information could have led to further investigation.

> Q: No. I'm asking you, as a defense attorney, would you have wanted to investigate any of the

information contained in the records that I provided you today?

A. No, ma'am.

(PC-1. 3950).

Mr. O'Leary claimed he would not have even investigated the information about Robin Fridella because it was "insulting" and contrary to his theory of defense. But without investigation, Mr. O'Leary could not know if he would find anything helpful. He simply chose not to look. This is the exact same approach he used to put on penalty phase mitigation where he decided not to look. See, Williams v. Taylor, 120 S. Ct. 1495 (2000)(counsel was ineffective for failing to adequately investigate and present mitigating evidence and the defendant was prejudiced by counsel's ineffectiveness).

Further, the theory of defense, "a planned robbery gone bad," left the jury with the impression that Mr. Walton, the "mastermind," had staged a robbery for no other reason than to get drugs for which, according to Mr. O'Leary, he was not addicted. Besides conceding felony murder, Mr. O'Leary's theory of defense was really no defense at all.

Mr. O'Leary also failed to explain how this new Brady information could not have been helpful at penalty phase or resentencing when guilt had already been established. Mr.

O'Leary's reasoning is particularly ludicrous in light of both Drs. Fleming and Sultan's testimony that the information was helpful to them in learning about who Mr. Walton was.

Not only did Mr. O'Leary not know what Brady was, but he did not care enough to investigate, even when he had the information.

In White v. Hellings, 194 F. 3d 937, 946 (8th Cir. 1999), the Eighth Circuit held that the withheld information, although not necessarily admissible at trial, was nonetheless material under Brady because it "would surely have been the basis for further investigation." In Mr. Walton's case, Mr. O'Leary failed to understand the concept of Brady and failed to understand the importance of this information as an investigative tool. See also, Sellers v. Estelle, 651 F. 2d 1074, 1077 n. 6 (5th Cir. 1981)("the evidence here suppressed was material to the preparation of petitioner's defense, regardless of whether it was intended to be admitted into evidence or not").

Not only did Mr. O'Leary fail to understand his role, but the trial court here also failed to consider the cumulative effect of the suppressed evidence. Under Kyles v Whitley, 115 S. Ct. 1555 (1995), it is not enough for a reviewing court to note in passing that any or all the information would not have

likely made a difference. The question was whether the favorable evidence would reasonably be taken to put the whole guilt phase and resentencing in such a different light as to undermine confidence in verdict. That is what happened here. This new information explained Mr. Walton's behavior and personality, where before there was no explanation. Mitigating explanations are precisely what the jury is to consider. Mr. Walton is entitled to a new trial.

ARGUMENT III

NO PROPER CROSS EXAMINATION AND CONFLICT OF INTEREST

In its Answer Brief, the State misunderstood the argument advanced in the Supplemental Initial Brief. The State simply reiterated what Dr. Merin said. Dr. Merin "specifically testified that, after reviewing the new material, nothing changed his opinion as initially expressed in 1991" (Answer Brief at 24).

The fact that his opinion remained the same was precisely the point. It should not have. It is beyond comprehension that Dr. Merin found nothing important in the evidence withheld by the State, particularly when the new evidence contained insight into Mr. Walton's interaction with others, his personality, and his obsessive relationship with Robin Fridella. Dr. Merin found that Mr. Walton was manipulative and a dominating personality who controlled the personality of Mr. Cooper (Cooper record at 412; 414; 418; 433). [3] Dr. Merin was the confidential expert for Richard Cooper, Mr. Walton's co-defendant and the witness against Mr. Walton for the State.

[3]New evidence of co-defendant Van Royal's testimony in Mr. Cooper's case showed that Mr. Walton was not the mastermind. Dr. Merin never considered this evidence in his evaluation. See, Argument IV.

It also was significant since Dr. Merin found no mitigation whatsoever pertaining to Mr. Walton. Dr. Merin evaluated Mr. Walton in 1991 for the State. In that evaluation, he found no statutory mitigation and no brain damage(PC.-R. 455).

In making his evaluation, Dr. Merin failed to consider any additional independent information besides his limited interview with Mr. Walton and the statements of co-defendant, Jeff McCoy (PC-R. 467). He testified that Mr. Walton had no "particular emotional disturbance," as it related to Robin Fridella (PC-R. 491). Dr. Merin said it was limited to "some emotional feelings, which in my opinion did not rise to the level of such impairment that it affected his thinking. He was emotionally involved" (PC-R. 491).

Despite that testimony, Dr. Merin in 1999, said his opinion did not change from 1991 even after reviewing the withheld documents that proved that Robin Fridella was manipulative and deceptive. According to Dr. Merin in 1991, he found Mr. Walton feeling rejected by Robin and was jealous of her (PC-R. 493).

In 1999, after he received the state withheld documents, Dr. Merin did not re-evaluate Mr. Walton or ask him any questions about the new information. He did not interview any

of Mr. Walton's family members. He did not read the letters written by Mr. Walton to Robin Fridella in light of the new information. He did not speak to anyone about Mr. Walton's relationship with Robin Fridella. He did not speak to any of Mr. Walton's friends about the relationship or its effects on Mr. Walton. He did not know anything about Ms. Fridella's lifestyle, the type of mother she was or if she had any drug problems.

In his December 7, 1999 deposition, Dr. Merin testified that his job was to evaluate Mr. Walton "rather than to evaluate Robin or to talk with any of the persons" who knew the couple (PC-1. 2104-2137). In that deposition, he testified that all he knew about the relationship between Mr. Walton and Robin Fridella was that there was a "romantic involvement. Beyond that, they related with one another." (PC-1 2104-2137).

The inconsistencies in Dr. Merin's opinion are significant. The relationship with Robin Fridella was important enough to bear mention in 1991. If Dr. Merin did not think Ms. Fridella's relationship with Mr. Walton was insignifiant, he would not have mentioned it in his testimony. The only reason he minimized it now is that it does not serve

his client's interests.[4] When Dr. Merin characterized Mr. Walton as manipulative and domineering, surely he relied on information about his relationship with other people. That included other people besides the co-defendant Cooper, for which he was paid as a defense expert. The conflicting interests of these two individuals was never addressed by Dr. Merin, who relied on one of his clients, Mr. Cooper, to serve the purpose of his other client, the State of Florida, against Mr. Walton.

When Dr. Merin was asked about how his evaluation of Mr. Cooper impacted on his evaluation of Mr. Walton, trial court erroneously held that no conflict of interest existed and it should have been raised earlier.

The conflict of interest **was** raised earlier in 1991, but the trial court was ignorant of this fact. There clearly was a conflict of interest here yet counsel was prohibited from questioning Dr. Merin about the actual conflict. The State also argues that because Dr. Merin did not include information he used in his work with Cooper, that no conflict existed (Answer Brief at 25). The State also argues that Mr. Walton

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[4]Dr. Merin's client in the Walton case is the State. In Mr. Cooper's case, Dr. Merin switched sides and testified for the defense. He did not see an ethical problem with switching sides despite the professional ethical considerations.

"fails to identify any testimony from Dr. Merin resulting from his evaluation of Cooper." (Answer Brief at 25).[5]

The State omits the fact that counsel for Mr. Walton was unable to question Dr. Merin about his evaluation of Mr. Cooper because the Court prohibited it (PC-1. 4172-4173).

Despite the obvious conflict, and despite the fact that Dr. Merin was the mental health expert with the least amount of background material and involvement in Mr. Walton's case, the trial court nevertheless erroneously relied on the opinion of Dr. Merin. Therefore, the court's opinion is contrary to the weight of the evidence and the facts adduced at the evidentiary hearing.

The trial court's reliance on Dr. Merin's testimony and the fact that Mr. Walton was unable to confront Dr. Merin about the conflict of interest, denied Mr Walton his rights to a full and fair hearing. Mr. Walton is entitled to a new trial.

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[5]Arguably, Dr. Merin did use information he retrieved from co-defendant Cooper regarding his domineering and manipulative relationship with Mr. Walton and Robin Fridella to use against Mr. Walton. Therefore, the two interests are adverse.

ARGUMENT IV

NEWLY-DISCOVERED EVIDENCE

The State argues that the newly-discovered evidence of Mr. Van Royal's statements are not related to the public records documents and the issue is procedurally barred because it was not addressed by this Court in the remand (Answer Brief at 28).

First, the trial court specifically allowed this evidence to be presented. Second, the State failed to object at the time the testimony was presented, and thus waived its ability to object now. Third, the remand from this Court was in 1993. Since that time, Gunsby v. State, 670 So. 2d 920 (Fla. 1996) and Kyles v. Whitley, 115 S.Ct. 1555 (1995) were issued, both cases that explain how the courts are to look at the "whole picture" of the case before it. In that respect, the trial court attempted to follow the law. This claim was properly presented to the trial court and is properly presented here.

In the context of newly-discovered evidence, this Court has held that the analysis requires a judge "to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). In Lightbourne v. State, 742 So. 238

(Fla. 1999), this Court explained the analysis to be used when evaluating a successive motion for post-conviction relief:

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

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

While the trial court allowed the evidence of Van Royal's recanted statements to be presented, it then failed to analyze the effect of the evidence cumulatively. Under Gunsby, it was required to do so. This Court also is required to conduct a de novo review and not merely adopt the findings of the lower court.

> Despite this deference to a trial court's findings of fact, the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle. This obligation stems from the appellate court's responsibilities to ensure that the law is applied uniformly in decisions based on similar facts and that the defendant's representation is within constitutionally acceptable parameters. This is especially critical because the Sixth Amendment right to assistance of counsel is predicated on the assumption that counsel "plays the role necessary to ensure that the trial is fair." Strickland, 466 U.S. at 685. "The Sixth Amendment...envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." Id.(emphasis added).

Stephens v. State, 748 So. 2d 1028 (Fla. 2000).

The new information presented at the evidentiary hearing was that Mr. Walton was not the mastermind, domineering or manipulative, as described by the State and its expert, Dr.

Merin. This information was unknown at the time of trial and would have been admissible at trial, if only for impeachment.

In denying relief, trial court completely ignored the testimony presented and failed to address the fact that co-defendant Mr. Van Royal had repeatedly lied under oath in his effort to hurt Mr. Walton (PC-1. 2419-2420).

In Gunsby v. State, 670 So. 2d 920 (Fla. 1996), this Court granted a new trial to the defendant because defense counsel failed to discover evidence that the brother of the victim was a indebted drug dealer rather than a hardworking convenience store owner, and because of two Brady violations that involved undisclosed deals with two state witnesses so they would not be discredited on the stand. In post-conviction, this Court admitted that there were problems:

> ...two eyewitnesses who positively identified Gunsby as the shooter and the Brady violations involved only one of those eyewitnesses. Additionally, at least three people overheard Gunsby make admissions concerning his commissions of the murder and the Brady violations involve only one of those individuals.
>
> ...a number of other inconsistencies existed between testimony presented at the rule 3.850 hearing and the testimony presented at trial, which we do not address in detail here.
>
> * * *
>
> ...it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial...

> Nevertheless, when we consider **the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome**. Cf. Cherry v. State, 659 So. 2d 1069 (Fla. 1995)(cumulative effect of numerous errors in counsel's performance constitute prejudice); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(same). Consequently, we find that we must reverse the trial judge's order denying Gunsby's motion to vacate his conviction.

Gunsby, 670 So. 2d at 923 (emphasis added). A cumulative analysis is required here. This means that all of Mr. Walton's claims require consideration. He did not receive a constitutionally adequate adversarial testing because his jury did not hear favorable and exculpatory evidence. These claims must be evaluated cumulatively with the evidence presented. Way v. State, 760 So. 2d 903 (Fla. 2000). If considering the claims cumulatively results in a loss of confidence in the reliability of the outcome, relief is warranted. Young v. State, Kyles v. Whitley.

CONCLUSION

Mr. Walton submits that relief is warranted in the form of a new trial and/or new sentencing proceeding. As to those issues not discussed in the Reply Brief, Mr. Walton relies on the arguments set forth in his Initial Brief and on the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Reply Brief has been furnished by United States Mail, first-class postage prepaid, to Kimberly Nolen Hopkins, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, FL 33607 this 3rd day of April, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Supplemental Reply Brief satisfies the Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

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