IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-459

THOMAS JAMES MOORE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY TO STATE'S STATEMENT OF THE CASE AND FACTS

At this juncture, Mr. Moore must assert that it is the State's "facts" that are argumentative and self-serving (See Answer Brief at 2).[1]

For example, the State makes the following assertion:

> Moore (IB 14 n.22) contends that Moore, 820 So. 2d 199 (Fla. 2002), "found [non-reversible] merit to" a prosecutorial argument claim, but Moore's discussion overlooks that Moore, 820 So. 2d at 207-208, actually indicated that two "references to Moore as 'the devil'" by the prosecutor were "ill advised," but they were "not so prejudicial as to vitiate the entire trial."

Answer Brief at 3-4 (bracket material in original). However,

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[1]It is not entirely clear what point the State is trying to make in disputing Mr. Moore's recitation of the history of public records litigation that occurred during the pendency of his initial Rule 3.851 motion in 2000. See Answer Brief at 2-3. Seemingly, the State is trying to challenge the adequacy of Mr. Moore's collateral representation by John Jackson with CCRC-North, who was then representing Mr. Moore. See Answer Brief at 2 (quoting in bold typeface the following from Moore v. State, 820 So. 2d 199, 204-05 (Fla. 2002): "Moore's own delays in reviewing available records and his failure to comply with the requirements of Florida Rule of Criminal Procedure 3.852(i)."). Under Martinez v. Ryan, 132 S. Ct. 1309 (2012), to the extent that the State is challenging the diligence exercised by Mr. Moore's then collateral counsel, counsel's failings in this regard would constitute ineffective assistance of counsel. However, the circuit court during the evidentiary hearing cut off a portion of Mr. Moore's direct examination of Mr. Jackson because neither party was challenging his diligence while representing Mr. Moore (3PC-R. 810-11).

The State also makes the point that Mr. Moore's third amended Rule 3.851 was struck by the trial court because "it failed to comply with the trial court's prior directive." Answer Brief at 2. Again, it is not clear if the State is now raising on appeal an absence of diligence by Mr. Moore's then collateral counsel. If so, that counsel's want of diligence would constitute ineffective assistance under Martinez v. Ryan.

what Mr. Moore said in his Initial Brief was simply: "this Court found merit as to Claim 9, but the error was not so egregious as to warrant relief." Initial Brief at 15, n.22. As this Court indicated in its opinion that in Claim 9, "Moore claims that defense counsel was ineffective for failing to object to the [prosecutor's] remarks" calling Mr. Moore "the devil." Moore v. State, 820 So. 2d at 207. In denying Mr. Moore's Claim 9, this Court ultimately concluded: "there is no reasonable probability that, but for the deficiency, the result of the proceeding would have been different." Id. at 208.[2] This sentence indicates that the failure to object to the prosecutor's remarks calling Mr. Moore "the devil" was deficient performance.

As another example of the State's "facts" as argumentative and self-serving, the State asserts:

> Moore (IB 16-17) attempts to minimize his prior violent felony aggravator, but he overlooks the proportionality discussion of the weighty aggravation and minimal mitigation in Moore v. State, 701 So. 2d 545, 551 (Fla. 1997):
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> > The jury recommended death by a vote of nine to

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[2]In ignoring this Court's holding that "there is no reasonable probability that, but for the deficiency" (Moore v. State, 820 So. 2d at 208), it appears that the State is seeking to avoid having this specifically identified deficient performance from being included in the cumulative prejudice analysis that this Court has held is required for Strickland, Brady and newly discovered evidence claims. Parker v. State, 89 So. 3d 844, 867 (Fla. 2012). Indeed despite Mr. Moore's heavy reliance on Parker in his Initial Brief, there is no citation to it in the State's Answer Brief according to its Table of Contents (Answer Brief at vi).

> three. The trial court found three aggravating factors: 1) Moore had been convicted of the prior violent felonies of armed robbery and aggravating battery; 2) he committed the murder to avoid arrest; and 3) he committed the murder for pecuniary gain. Although the court found one statutory mitigating factor-that Moore was nineteen years old-it was given only slight weight since Moore was first treated as an adult before the court at the age of fifteen. There were no nonstatutory mitigating factors.
>
> Indeed, penalty phase testimony indicated that Moore was identified "as being the suspect with the pistol" in the armed robbery.

Answer Brief at 4-5.

However, the portion of the Initial Brief that the State is taking issue with here merely set forth the fact that Mr. Moore had filed a petition for a writ of habeas corpus in 2005 that was premised upon Roper v. Simmons, 543 U.S. 551 (2005). The Initial Brief noted that the habeas petition challenged "the State's use of Mr. Moore's convictions of crimes committed when he was a juvenile to establish an aggravating circumstance justifying the sentence of death."[3] So in fact, Mr. Moore did not overlook "the

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[3]The U.S. Supreme Court explained in Roper the basis for its conclusion that the Eighth Amendment barred the imposition of a death sentence for crimes committed by a juvenile as follows:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often

proportionality discussion" (Answer Brief at 4), he merely noted in the Initial Brief that he had argued in his habeas petition

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> result in impetuous and ill-considered actions and decisions." *Johnson, supra,* at 367, 113 S.Ct. 2658; see also *Eddings, supra,* at 115-116, 102 S.Ct. 869 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992). * * *
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra,* at 115, 102 S.Ct. 869 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). * * *
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).
>
> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835, 108 S.Ct. 2687 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford,* 492 U.S., at 395, 109 S.Ct. 2969 (Brennan, J., dissenting). * * * From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. * * *

Roper, 543 U.S. at 569-70.

that the sentencing order and "the proportionality discussion" premised upon it violated the Eighth Amendment for the reasons explained in Roper v. Simmons, a retroactive decision issued in 2005 some time after Mr. Moore's direct appeal.[4] Indeed, this Court recognized that Roper applied retroactively in Bonifay v. State, Case No. SC04-675, when it issued an order less than five months after Roper was rendered which provided:

> In light of the United States Supreme Court decision in *Roper v. Simmons*, 125 S.Ct. 1183 (2005), holding the death penalty unconstitutional for individuals who were under eighteen years of age at the time of their capital crimes, this Court vacates the death sentence in this case. The case is remanded to the circuit court for imposition of a sentence of life imprisonment without eligibility for parole for twenty-five years, in accordance with section 775.082(1) & (2), Florida Statutes (1989).

Order of July 25, 2005, Bonifay v. State, Case No. SC04-675.[5] An identical order issued in LeCroy v. State, Case No. SC05-136. Order of August 17, 2005, LeCroy v, State, Case No. SC05-136.[6]

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[4]The reliance upon crimes committed by a juvenile to establish an aggravating factor and justify a sentence of death is simply contrary to Roper. Moreover, neither the sentencing findings nor this Court's proportionality discussion recognize the "[t]hree general differences between juveniles under 18 and adults [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." Roper v. Simmons, 543 U.S. at 569. The State in its Answer Brief overlooks this fact.

[5]Mr. Bonifay's sentence of death had been affirmed by this Court on direct appeal in 1996. Bonifay v. State, 680 So. 2d 413 (Fla. 1996).

[6]Mr. LeCroy's sentence of death had been affirmed by this Court on direct appeal in 1988. LeCroy v. State, 533 So. 2d 750

Using the Initial Brief's brief discussion of the habeas petition premised upon Roper as a spring board, the State sets forth extensive quotations from the sentencing judge's findings which not only used juvenile convictions as an aggravating circumstance and a justification for a death sentence, but also denigrated the mitigating value of Mr. Moore's juvenile status as to the crimes used to establish an aggravator as well as Mr. Moore's youth (19 years of age) at the time of homicide. Indeed, no where in the Answer Brief is there any discussion of Roper v. Simmons and its significance as to sentencing findings made twelve years before Roper was handed down. According to the U.S. Supreme Court in Roper, the differences between a juvenile and an adult "render suspect any conclusion that a juvenile falls among the worst offenders." Roper v. Simmons, 543 U.S. at 570.[7]

As another example of the State's "facts" as argumentative and self-serving, the State asserts "Moore overlooks his personal insistence on no penalty-phase issues and his attorney's concession that '[t]here are no penalty-phase issues in the

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(Fla. 1988).

[7]Mr. Moore readily acknowledges as he did in his Initial Brief that "this Court summarily denied Mr. Moore's petition premised upon *Roper v. Simmons*." Initial Brief at 17. Nonetheless, Roper is the law now and it does apply retroactively, and it is completely ignored by the State in its Answer Brief.

motion.' (PCR2012/v 892-93)" Answer Brief at 6.[8] The reference is to a discussion occurring in circuit court on March 22, 2011, before Mr. Moore filed a motion to amend his Rule 3.851 motion on April 6, 2011, which was verified by Mr. Moore on April 6, 2011 (3PC-R. 279-304).[9] This motion was verified and filed after the State had arrested Mr. Moore on a new murder charge at the conclusion of the March 22nd evidentiary hearing (3PC-R. 414-15).[10] In fact, Mr. Moore was being held in the Duval County

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[8]At no time was what the phrase "penalty-phase issues" meant explained on the record by anyone. Mr. Moore merely said: "The penalty phase issues I want to withdraw" (3PC-R. 892). Collateral counsel responded that "[t]here are no penalty phase issues in the [pending] motion" (3PC-R. 892).

[9]The circuit court permitted the amendment and addressed the claims presented therein on the merits (3PC-R. 404-07). The State in addressing Mr. Moore's motion for rehearing acknowledged that the Giglio and Brady claims contained in the amendment were before the circuit court (3PC-R. 432-35).

[10]The circumstances of Mr. Moore's arrest on a 1990 murder charge were explained in Mr. Moore's motion for rehearing which was served on January 21, 2012:

> After the evidence was closed on March 22nd and after Judge Southwood had advised the parties of the fact that "this testimony concerns me" and after Mr. Moore was taken back to the jail and after his counsel had left Jacksonville to return to his office in the Fort Lauderdale area and was not available to speak with Mr. Moore, the Office of the State Attorney had Mr. Moore arrested on new murder charges. These new murder charges were in a case arising from the murder of a prostitute in August of 1990 when Mr. Moore was a juvenile. The only link to Mr. Moore is an alleged 9 loci match to a male DNA profile taken from a vaginal swab. However after the victim's body had been discovered on a Sunday afternoon in August of 1990, the police went to the place that the victim resided and

Jail on the new murder charge when he signed the verification on April 6, 2011.

The March 22nd discussion to which the State refers in its Answer Brief resulted when Mr. Moore heard Judge Southwood explain on the record that the evidence presented that day

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> learned the identity of a white male in whose company the victim was last seen. The police tracked this white male to his place of employment, a hospital. He advised that he had indeed been with the victim until after 3 AM when he claimed that two black men in a pickup truck had approached him and the victim in a secluded area claiming that they were vice officers. According to the while male, the black men made him strip and held a gun to his testicles and threatened him. They then departed with the victim. The white male then spent 3 hours looking for his car key and ultimately called a towing service. Once he got home, he went to work. He did not at any time call the police. He only related his story to the police after they located him. He provided the police with descriptions of the two black men which did not and do not match Mr. Moore. A composite sketch was prepared which does not look like Mr. Moore.
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> The police officer who was present at the scene where the victim's body was located noted that she observed ejaculate in the victim's mouth, anus and vagina. However, the medical examiner saw no signs of a sexual assault and indicated that no semen was observed in the victim's mouth or anus. The victim had died as a result of gunshot wounds.
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> At the time that this motion is being prepared, Mr. Moore is being housed in the Duval County jail awaiting trial.
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> Mr. Moore's arrest on these charges which followed the close of evidence in Mr. Moore's case was reported by Jacksonville news media outlets and was well known within the halls of the Duval County courthouse.

(3PC-R. 414-15 n.2). On October 24, 2012, Mr. Moore was found not guilty of all charges in that case. See State v. Moore, Case No. 16-2011-CF-006221-AXXX-MA (Duval County Clerk of Court online docket).

concerned him:

> THE COURT: I'm not sure yet what I can tell you. Okay? I have to make a decision as to whether or not -- I don't necessarily have to determine the truthfulness of any or all of these witnesses. I will tell everybody. For what it's worth, that all of this testimony concerns me. Okay? I'm not at this point in time ready to absolutely disregard all of the testimony I've heard. I may. But the **cumulative effect** concerns me of the testimony. So for whatever that's worth to you.

(3PC-R. 890) (emphasis added). It was after hearing Judge Southwood's "concerns" that Mr. Moore asked to address Judge Southwood (3PC-R. 890). It was in that context that Mr. Moore asserted that he wanted a new trial, not just a resentencing (3PC-R. 897) ("The penalty phase issues I want to withdraw"). Judge Southwood let Mr. Moore speak, and when he was done, made no ruling of any kind (3PC-R. 897-98). When Mr. Moore finished explaining that he wanted a new trial, the State did not ask for further inquiry or a ruling; instead, the State's counsel simply said: "Judge, could we have, say, 30 days from receipt of the transcript to do the memo" (3PC-R. 893).

As another example of the State's "facts" as argumentative and self-serving and contrary to this Court's case law, the State says: "Moore's 'facts' (IB 18 n.26) improperly conclude that the State's 'rebuttal closing' contained 'false argument' that the "State knew" was false." Answer Brief at 6. The State then chastises Mr. Moore for "self-servingly cit[ing] to his bare accusations (at PCR2012/I 8) as purported support for these

'facts.'" (Answer Brief at 7-8). However, the State overlooks the fact that an evidentiary hearing was not granted on the specific claim being discussed which was premised upon the prosecutor's false assertions in her rebuttal closing argument to the jury.[11] This Court has long held that a post-conviction defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.'" Lemon v. State, 498 So. 2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. Factual allegations set forth in a Rule 3.851 motion are accepted as true and warrant evidentiary development so long as not conclusively refuted by the record. Card v. State, 652 So. 2d 344, 346 (Fla. 1995); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Thus, the factual allegations in a claim on which no evidentiary hearing was held are taken as true on appeal. If the State wished to challenge the bare allegations set forth in Claim I of

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[11]The claim at issue in footnote 26 of the Initial Brief is Mr. Moore's Giglio claim which appeared as Claim I of the Rule 3.851 motion served on January 27, 2006 (3PC-R. 6-12, 25). The State opposed granting an evidentiary hearing on Claim I (3PC-R. 37). The circuit court did not grant an evidentiary hearing on the claim (3PC-R. 393). See Initial Brief at 76. Indeed, the State notes elsewhere in its Answer Brief that: "The State agreed to an evidentiary hearing only on the newly discovered evidence sub-claim that Clemons and Gaines committed the murder and blamed it on Moore (PCR2012/IV 661-62) and made statements to others concerning their relative roles in the murder events." Answer Brief at 15. And the State further noted that: "The trial court indicated that the evidentiary hearing will be limited to allegations in item '3-A' on pages 14-17 of the 8/2009 postconviction motion." Answer Brief at 16.

the Rule 3.851 currently before the Court, it should have agreed to an evidentiary hearing on the claim. Where an evidentiary is not granted on a Rule 3.851 claim, this Court's case law is clear that the factual allegations set forth in the Rule 3.851 motion are to be accepted as true on appeal. The State overlooks this well settled law.

As another example of the State's "facts" as argumentative and self-serving, the State says "Moore's 'facts' (IB 21) conclude that the trial court, after the 2011 postconviction evidentiary hearing, 'allowed Mr. Moore to amend his Rule 3.851 with a *Giglio* claim ...,' but this oversimplifies the trial court's ruling." Answer Brief at 7. The State then quotes from Judge Southwood's order and highlights with bold typeface this line: "the state argues that the Defendant's violation of Rule 3.851's spirit has 'grown from the egregious to the absurd". The State then highlights with bold typeface, the footnote that Judge Southwood dropped at that point: "A statement with which this Court agrees." Answer Brief at 7. The State seemingly wants Judge Southwood's stated frustration with the capital process in Florida to constitute some kind of ruling. In so doing, the State chooses to ignore the record and the number of instances in which Judge Southwood repeatedly expressed his frustration with the capital process in Florida.

Indeed, a motion to disqualify Judge Southwood was filed on

July 5, 2006 (3PC-R. 80). The motion was premised upon statements made by Judge Southwood during a conversation with counsel for the State on an open phone line. Collateral counsel in State v. Turner overheard "Judge Southwood engaged in *ex parte* contact with an assistant attorney general discussing the lengthy delay in capital cases" (3PC-R. 80).

Also during a June 27, 2006, hearing in Mr. Moore's case, Judge Southwood said: "I'm concerned about, you know, how long at [sic] infinitum can we take and consider these pleadings. I mean, it just seems like it goes on forever. It never stops."[12] (3PC-R. 476). Later, Judge Southwood lamented:

> THE COURT: You know, I sometimes wonder why we even bother with trial courts because all of these matters with regard to - - just on occasion, it really doesn't matter what I do. It's insignificant what I do, because whatever I do the other side's going to appeal and it's going to go up there for the ultimate decision anyway. I sometimes feel like why am I bothering, why don't you just go on up there and hear it because that's where it's going to end up anyway.
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> * * *
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> THE COURT: The Supreme Court can do whatever they want to do, that's what you have to realize. They don't have to step down.
>
> MS. CHARBULA: I realize that, Your Honor, but also in federal habeas proceedings when the matter's time barred, that has significant impact on federal habeas

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[12]Judge Southwood at the hearing seemed troubled by the length of time a federal habeas petition had been pending in federal court in the Turner case (3PC-R. 465)("Based upon the prior in Turner if you file a federal habeas you get at least nine years.").

proceedings and so don't - - don't sell yourself short, Judge. A trial judge in these proceedings is very important.

THE COURT: Yeah, but you will agree that nothing I do is final.

MS. CHARBULA: Yes, sir, I certainly agree.

(3PC-R. 498).

At a hearing on September 6, 2006, Judge Southwood advised the parties:

THE COURT: Okay. Now, let me pose this hypotheses, based upon everything we've been through and all of these pleadings and et cetera, et cetera, et cetera, it would appear to me that inevitably we're going to have some type of evidentiary hearing because I am of the opinion that the Florida Supreme Court is not going to allow me to do things that I might consider doing because of certain factors which are raised.

(3PC-R. 508).[13]

At a March 27, 2008, hearing, Judge Southwood explained:

THE COURT: - - I have changed my philosophy to some degree on these cases because of the courses I have been forced to take, the death penalty review

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[13]At one point during the September 6, 2006, hearing, the following exchange occurred regarding a successive Rule 3.851 proceeding:

MS. COREY: We don't know because we shouldn't be on a second round quite frankly.

THE COURT: Well, I agree, neither should I.

(3PC-R. 522). Later during that same hearing, Judge Southwood stated: "Miss Corey has more experience with me than anybody here but she knows delay is one of my least favorite words. I think I'm infamous in this circuit, Miss Corey, for hating delay, but some times I don't have a choice" (3PC-R. 536).

update course or whatever, but the Supreme Court leans very, very heavily in one direction, counsel, and I am sure you are aware of that.

I mean they lean to that side of the table just very, very - - and I have changed my outlook on what is required of me by the Supreme Court unfortunately but **I don't necessarily agree with all they do but I have to do what they say**.

MR. WHITE: But your wisdom was affirmed, Judge, in this case.

THE COURT: I know, but when you start dealing with this - - you have to sit through this course when they are teaching the judges all day long in the death penalty update and I was astounded. I mean I was absolutely astounded.

(3PC-R. 562) (emphasis added).

At the July 15, 2009, hearing, Judge Southwood had the following exchange with the State:

MR. WHITE: - - Mr. McClain's aggressiveness, but, I mean, enough already in terms of substance. We're on the amended second successive, may I repeat.

THE COURT: Mr. White, I am totally sympathetic to this Court having to endure one after another; but that's the law, and that's what we're going to do.

(3PC-R. 600).

While Judge Southwood throughout the pendency of the Rule 3.851 motion at issue in this appeal expressed sympathy for the State's concerns and objections, he nonetheless actually granted the April 6, 2011, motion to amend saying: "this Court will nonetheless address the Defendant's newly raised claims **as the Defendant could file these claims within one year of discovery**."

(3PC-R. 404) (emphasis added).[14]

As another example of the State's "facts" as argumentative and self-serving, its use of a numbering system to count each amendment or addendum to a Rule 3.851 as a separate Rule 3.851 motion. Through this imaginative numbering methodology, the State represents that the "April 2011 proposed post-evidentiary hearing amendment to his postconviction motion, listed in the Timeline, supra, would be his **ninth** version of his postconviction motion."[15] Answer Brief at 16 (bold and underscored emphasis in original).

In fact, Mr. Moore filed a Rule 3.851 motion in March of 1999 which was amended a number of times as public records were disclosed and as directed by the circuit court. When that motion was denied, Mr. Moore appealed and this Court affirmed. Moore v.

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[14]The April 6th motion to amend was premised upon the testimony of Carlos Clemons and Vincent Gaines in depositions conducted on February 24, 2011, and at the March 22, 2011, evidentiary hearing (3PC-R. 279, 285). Thus, the motion to amend was filed within six weeks of the February 24th depositions and within 15 days of the March 22nd evidentiary hearing, well within the one year time period set forth in Rule 3.851 to which Judge Southwood referred when ruling that he would consider the claims presented in the motion to amend on the merits (3PC-R. 404).

[15]Besides the dubiousness of the State's method of counting, the number of Rule 3.851 motions and/or amendments is not really relevant to whether in a successive Rule 3.51 motion, a capital defendant is entitled to relief from either his conviction or sentence of death. Johnson v. State, 44 So. 3d 51, 55-56 (Fla. 2010) (Rule 3.851 relief granted even though Mr. Johnson had filed a Rule 3.851 motion in 1994, which was amended at least three times, filed a successive Rule 3.851 motion in 2003, and a second successive Rule 3.851 motion in 2007).

State, 820 So. 2d 199 (Fla. 2002). Mr. Moore filed his second Rule 3.851 in 2006 (3PC-R. 1). Following the disclosure of additional public records, the circuit court granted Mr. Moore leave to file an amendment based upon the newly disclosed records (3PC-R. 110, 549-51). Subsequently at the State's urging, the circuit court ordered Mr. Moore to again amend the motion (3PC-R. 592) ("I'm going to require Mr. McClain to further amend this motion to comply with the rule that you just cited"). Pursuant to Judge Southwood's order, Mr. Moore was forced to file another amendment to the Rule 3.851 motion on August 17, 2009 (3PC-R. 180). On April 6, 2011, Mr. Moore on his own initiative sought leave to amend that second Rule 3.851 in light of the depositions of Carlos Clemons and Vincent Gaines conducted on February 24, 2011, and in light of the their testimony at the March 22, 2011, when called to testify by the State at the evidentiary hearing on Mr. Moore's Rule 3.851 (3PC-R. 279).

Thus contrary to the State's assertion of nine motions to vacate, there have been three.

REPLY TO ARGUMENT

REPLY TO OVERARCHING STANDARD OF APPELLATE REVIEW

The State asserts that the "Tipsy Coachmen" principle constitutes the standard of review in Mr. Moore's appeal.[16] The

[16]In advancing the "Tipsy Coachmen" as the standard of review, the State ignores and does not address the standard of review set forth by Mr. Moore in his brief. See Initial Brief at

case specifically relied upon by the State for this proposition is State v. Hankerson, 65 So. 3d 502 (Fla. 2011). There this Court merely made the unremarkable observation that: "[a] reviewing court may not preclude an appellee from raising an alternative basis to support the trial court's ruling solely because the argument was not preserved." Hankerson, 65 So. 3d at 505.[17] However, such a principle of appellate review in Florida is of course subject to the Due Process Clause of the Fourteenth Amendment. The touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Ed. v. Loudermill, 470

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54. The State does drop a footnote in this section of its brief referencing fundamental error and the "fundamental-error's high appellate burden." Answer Brief at 18 n.5. While the language of this is remarkably vague, the State completely ignores this Court's well settled law that Giglio claims, Brady claims, and Strickland claims present mixed questions of law and fact. Johnson v. State, 921 So. 2d 490, 507(Fla. 2005) (citations omitted) ("When reviewing *Brady* claims, this Court applies a mixed standard of review, 'defer[ring] to the factual findings made by the trial court to the extent that are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law'"). See Parker v. State, 89 So. 3d 844 (Fla. 2011) (applying this standard to an ineffective assistance of counsel claim); Johnson v. State, 44 So. 3d 41, 65 (Fla. 2010) (applying this standard to a Giglio claim.

[17]For this observation, this Court relied upon its decision in a civil case, Dade County School Board v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999). A review of that decision shows that all of the cases relied upon therein for the proposition discussed in Hankerson were civil cases.

U.S. 532, 542 (1985), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

Accordingly, the State must not only give clear notice that it is not defending the lower court's ruling on the basis provided by that court, it must give clear notice of the alternative basis for an affirmance on which it relies. Moreover, due process cannot countenance the advancement by the State of a new basis for an affirmance that was not presented below when the failure to give notice of this alternative legal theory deprived the criminal defendant of notice and opportunity to present evidence to rebut and/or refute the alternative legal theory offered on appeal as alternative basis for an affirmance.[18] See Cannady v. State, 620 So. 2d 165 (Fla. 1993).

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[18]The State in its brief asserts that Robertson v. State, 829 So. 3d 901 (Fla. 2002), is in accord with Hankerson. This is not an accurate representation. In Robertson, this Court noted the due process limitation placed upon the "Tipsy Coachmen" principle:

> Moreover, because no notice was provided and because the State never attempted to seek the admission of this evidence on the basis of the *Williams* rule, Robertson never received an opportunity to present evidence or make argument as to why the incident involving his ex-wife should not have been admitted under the *Williams* rule. In short, the record did not permit the Third District to affirm the trial court's admission of collateral crime evidence as *Williams* rule evidence. Thus, in so doing, the Third District improperly relied upon the "tipsy coachman" doctrine to affirm the trial court's admission of this evidence.

Robertson v. State, 829 So. 3d at 908-09.

ARGUMENT I

Giglio standard

In setting forth the Giglio standard, the State fails to recognize that the hallmark of a due process violation under Giglio and its progeny, is "deliberate deception." Answer Brief at 19. In Giglio v. United States, 405 U.S. 150, 153 (1972), the Supreme Court citing to Mooney v. Holohan, 294 U.S. 103 (1935), explained:

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'

Based upon Mooney and its progeny, the capital habeas petitioner in Gray v. Netherland, 518 U.S. 152, 162 (1996) (emphasis added), alleged that "the Commonwealth violated due process by **misleading** petitioner about the evidence it intended to use at sentencing." The U.S. Supreme Court in Gray found a basis for this constitutional claim under Mooney: "*Mooney* forbade the prosecution to engage in 'a deliberate deception of court and jury.'" The Supreme Court then concluded that:

> *Mooney*, of course, would lend support to petitioner's claim if it could be shown that the prosecutor deliberately **misled** him, not just that he changed his mind over the course of the trial.

Gray v. Netherland, 518 U.S. at 165 (emphasis added).

Thus, the touchstone of the Mooney/Giglio line of cases

addressing a criminal defendant's due process rights is a prosecutor's deliberate deception in order to gain a conviction or sentence of death. To establish such impermissible deception it is not incumbent on a convicted criminal defendant to establish that the testimony presented by the State was clearly false. It is enough if the testimony and/or arguments of the prosecutor were misleading and/or deceptive and the prosecutor deliberately chose to mislead and/or deceive.

Timeliness of Giglio claims concerning Clemons and Gaines[19]

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[19]The State in making its untimeliness argument completely ignores the fact that Mr. Moore in his January 2006 motion to vacate pled a Giglio claim as Claim I, which was premised upon the prosecutor's deliberate deception in presenting its case and making its closing argument regarding the sequence of events involving Randy Jackson and Mr. Moore and a fight between them which led to Mr. Jackson having Mr. Moore arrested on criminal charges (3PC-R. 6). This claim also appeared in Mr. Moore's amendments to that January 2006 motion.

The State also ignores that Claim II of his January 2006 motion to vacate was alternatively pled as a Brady/Giglio/Strickland/newly discovered evidence claim (3PC-R. 12) ("BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE"). Within this claim, Mr. Moore included factual allegations regarding statements that others reported that Mr. Clemons had made (3PC-R. 12). Within this claim, Mr. Moore included factual allegations regarding statements made by Mr. Gaines to various individuals and Mr. Gaines' statements when confronted with purported statements that had allegedly been made by Mr. Clemons (3PC-R. 13). Pursuant to Judge Southwood's directive that the factual allegations be more specific, the Rule 3.851 motion was amended to include more details about an investigator's interview of Mr. Gaines in 2005 after Mr. Gaines agreed to be interviewed and the statements that Mr. Gaines made that contradicted his trial testimony (3PC-R. 16).

The record shows that Mr. Moore pled the information that he got from Mr. Gaines within one year of when Mr. Gaines first agreed to talk and provide some information. The record shows

In its Answer Brief, the State attempts to deceive this Court into believing that Judge Southwood ruled that the Giglio claims that Mr. Moore presented in his April 6, 2011, motion to amend were untimely. The State's representations are wrong, as an examination of Judge Southwood's order shows.

On April 6, 2011, Mr. Moore filed his motion to amend his Rule 3.851 motion to a claim that was labeled "Claim A" (3PC-R. 286). As explained in that motion, Mr. Moore was first given the opportunity to depose Carlos Clemons and Vincent Gaines in collateral proceedings when the State indicated that it would make them available to Mr. Moore's counsel for purposes of taking sworn testimony from them (3PC-R. 285). Mr. Moore was given a second opportunity to elicit sworn testimony from Mr. Clemons and Mr. Gaines when the State called both of them to testify on March 22, 2011, during the evidentiary hearing on Mr. Moore's Rule 3.851 motion. Within the April 6th motion to amend, Mr. Moore relied upon the testimony of Mr. Clemons at the February 24th

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that a sworn statement was not obtained from Mr. Gaines until the State announced it would make him available for a deposition. The record shows that Mr. Clemons did not agree to be interviewed by anyone representing Mr. Moore until after the State announced it would make him available. Even then, Mr. Moore's counsel was not provided with any means of contacting Mr. Clemons directly - he was required to rely upon the State to make him available for the deposition on February 24, 2011 (3PC-R. 647) (MS. COREY: * * * I have Carlos Clemons as well and I will - - I do not intend to furnish an address for Carlos Clemons due to matters outside of this case. It's for Carlos' safety. I don't feel like I need to give Mr. McClain an address and it's a transient situation anyway that I have a way to get ahold of Carlos.").

deposition and at the March 22nd evidentiary hearing as the basis for his Giglio claim as to Mr. Clemons (3PC-R. 286-94). Within the April 6th motion to amend, Mr. Moore relied upon the testimony of Mr. Gaines at the March 22nd evidentiary hearing as the basis for his Giglio claim as to Mr. Gaines (3PC-R. 294-99).

In his order denying Rule 3.851 relief, Judge Southwood noted the State's complaint that Mr. Moore's "violation of Rule 3.851's spirit" and then said: "this Court will **nonetheless** address the Defendant's newly raised claims **as the Defendant could file these claims within one year of discovery**." (3PC-R. 404) (emphasis added). This is a clear holding that because the April 6th motion to amend was filed well within a year of the February 24th depositions and the March 22nd evidentiary hearing, Mr. Moore was able under Rule 3.851 to present the claims set forth in the April 6th motion to amend.[20]

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[20]Because the State does not acknowledge that Judge Southwood ruled that the motion to amend was not untimely because it was filed within one year of the February 24th depositions and March 22nd testimony, it does not address Jennings v. State, 91 So. 3d 132 (Fla. 2012). There, this Court held that a circuit court has discretion in deciding whether to permit an amendment to a Rule 3.851 motion even after the motion has been summarily denied, but while the summary denial is not yet final. However, there because the discretion had been exercised to deny the motion to amend, this Court granted Mr. Jennings 30 days after this Court's decision affirming to "file a successive postconviction motion in circuit court raising claims asserted in the motion to amend, nunc pro tunc to . . . the date his motion to amend was filed in the circuit court." It is clear under Jennings, that Mr. Moore is entitled to have his Giglio claims premised upon the February 24, 2011, depositions and the March 22, 2011, evidentiary hearing testimony heard.

Without ever acknowledging Judge Southwood's adverse ruling, the State seems to be implicitly relying on its "Tipsy Coachmen" standard of review to argue that the April 6th motion to amend should be found untimely.[21] If such an implicit argument was intended, the State overlooks the fact that Mr. Moore pled his due diligence in his April 6th motion, alleging that the sworn testimony of Mr. Clemons and Mr. Gaines on February 24th and March 22nd that evidence did not exist and had not been previously available. Under this Court's jurisprudence, allegations of diligence must be accepted as true unless refuted by the record or until an evidentiary hearing is conducted.

An evidentiary hearing has not been held on the April 6th motion to amend.[22] At the March 22nd evidentiary hearing on

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[21]In one brief sentence, the State almost makes this implicit argument explicit. In that sentence, it says: "Moore's proposed amendments . . . were clearly untimely. The trial court's rejection of these claims was correct for this alternative reason, meriting affirmance." Answer Brief at 24.

[22]In a footnote at the very end of the "untimeliness" section of the State's brief, the State makes a pro forma argument for a remand for an evidentiary hearing that does not appear any where else in the answer brief, and certainly not in the "conclusion." Answer Brief at 25 n.8 ("If somehow this Court finds that Moore's belated claims have prima facie merit and should be heard, even though they are 'absurd[ly]' untimely, then, at most, the case should be sent to the trial court for full development of the record."). Yet in another footnote, the State says: "**Moore bore the burden** of proving due diligence in timely discovering these claims. He failed to meet that burden." Answer Brief at 23 n.7 (bold typeface and underscoring in original). Then on the very next page, the State says: "Moore's failure to show due diligence in this case, resulting in these claims being raised after the evidentiary hearing, has lead [sic]

paragraph "3A" of Claim II of Mr. Moore's Rule 3.851, diligence was not contested by the State. Indeed, Mr. Moore's direct examination of predecessor collateral counsel, John Jackson, was curtailed after Judge Southwood questioned the necessity of presenting evidence of due diligence (3PC-R. 810-11). Certainly, the State did not contest Mr. Jackson's diligence in its exceedingly brief cross of Mr. Jackson (3PC-R. 813).[23]

No where in its brief does the State address this Court's recent pronouncement regarding collateral counsel's diligence and the timeliness of a successive Rule 3.851 motion in Waterhouse v. State, 82 So. 3d 84 (Fla. 2012). There a successive Rule 3.851 motion was filed raising a Brady claim and a newly discovered evidence claim over 30 years after the defendant was convicted.

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to a record that is not fully developed." Answer Brief at 24. Then, the State notes that Rule 3.851(f)(4) only allows amendments "up to 30 days **prior to** the evidentiary hearing," (bold type face and underscoring in original) but fails to address the fact that February 22nd depositions occurred 26 days before the evidentiary hearing. So under Rule 3.851 Mr. Moore was precluded from being able to file an amendment based upon the February 24th depositions prior to the March 22nd evidentiary hearing. These scattershot and inconsistent arguments make it impossible to know what exactly is the State's position. Mr. Moore simply does not have notice of what really is the State's position in the appeal, other than it wants this Court to rule against Mr. Moore for any reason set forth by the circuit court or some reason not set forth by the circuit court or alternatively remand for another evidentiary hearing. It hard to imagine a more nebulous position.

[23]In the course of its one page cross, the State asked Mr. Jackson: "But in spite of any other evidence pointing to this defendant's guilt, you still would have pursued all these lines of investigation that you just mentioned, correct?" (3PC-R. 813).

There, this Court wrote:

> Essentially, we must determine whether collateral counsel should be held to a different, higher standard of investigation than original trial counsel. Having considered the assertions of the State and Waterhouse, we conclude that collateral counsel should *not* be held to a higher standard. While pretrial resources are unquestionably limited, collateral counsel's resources are also not unlimited. Thus, requiring collateral counsel to verify every detail and contact every witness in a police report—even where the police report indicates that the witness has no useful information—would place an equally onerous burden on collateral counsel, with little chance of discovering helpful or useful information.

Waterhouse v. State, 82 So. 3d at 104. This is now the governing standard for determining a collateral counsel's diligence in a capital case. Yet, it is not mentioned, let alone addressed by the State in trying to argue that Mr. Moore's motion to amend filed within six weeks of depositions of two State witnesses and within 15 days of their testimony at an evidentiary hearing is untimely because Mr. Moore's collateral counsel was not diligent.

Carlos Clemons

When the State turns to the merits of Mr. Moore's Giglio claim regarding Carlos Clemons, it refuses to acknowledge the context of Mr. Clemons' sworn testimony on March 22, 2011, when he was called by the State to testify. During the March 22nd evidentiary hearing, Mr. Moore's trial prosecutor, Angela Corey was in attendance and in fact conducted the direct examination of Mr. Clemons when she called him to testify. Judge Southwood asked Ms. Corey while Mr. Clemons was on the witness stand, "Can

you tell me or ask him, either one, **what was the deal for him to testify**?" (3PC-R. 860). In response to that question, Ms. Corey did not herself advise Judge Southwood of the terms of "the deal for him to testify." Instead, she said "I'll go over that, Your Honor. Thank you for that reminder." (3PC-R. 860). She then proceeded to question Mr. Clemons who was sitting in the courtroom and had heard Judge Southwood's inquiry about the nature of "the deal for him to testify." Ms. Corey was the one who then elicited the following testimony in direct examination of Mr. Clemons:

> Q * * * Can you relate to the Court your memory of the plea agreement between you and Ms. Watson and the State of Florida?
>
> A That I would go to a juvenile facility, either from - - till I turn 18 or 21. It didn't really speculate.
>
> Q Okay. What charges did you enter a plea to?
>
> A Manslaughter.

(3PC-R. 860-61).

At no time did Ms. Corey correct Mr. Clemons and say anything to challenge what he said was "the deal for him to testify." She presented the testimony in response to an inquiry from Judge Southwood. She chose to present the testimony instead of simply herself explain what the agreement was in response to the judge's request. In so doing in that context, she adopted that testimony as reflecting her memory of the "deal."

On cross, Mr. Moore's counsel sought to reiterate Mr. Clemons' testimony that there was a deal for his testimony in place. At that time, Mr. Clemons testified that there was a plea agreement when he testified at Mr. Moore's trial. Mr. Clemons made it extremely clear that under the "agreement" his ability to plead to the lesser included offense of manslaughter was tied to testifying at Mr. Moore's trial:

> Q But was there an agreement to testify truthfully in the case?
>
> A Yes, sir.
>
> Q And what were the terms of the plea agreement? Do you recall?
>
> A I just know I was going to a juvenile facility and didn't state no time. It just --
>
> Q **So in exchange for testifying against Mr. Moore you would be able to plead to manslaughter and go to a juvenile facility?**
>
> A **Yes, sir.**
>
> Q That was your understanding?
>
> A Yes, sir.

(3PC-R. 864-65) (emphasis added). In his 2011 testimony, Mr. Clemons agreed that in exchange for his testimony, he "would be able to plead to manslaughter" (3PC-R. 864-65). Thus, his testimony is not that he had entered a plea in his own case when he testified in 1993 at Mr. Moore's trial, but that he "would be able to". And Mr. Clemons clearly testified that the plea agreement called for him to plead to manslaughter after he

testified. He was not referring to the vacated plea agreement in which he had entered a plea to second degree murder. There is no ambiguity in Mr. Clemons' testimony.

After collateral counsel's cross regarding the terms of the deal, Ms. Corey, the trial prosecutor, did not correct Mr. Clemons' testimony regarding what the "deal" for his testimony was or in any way indicate that it was not accurate (3PC-R. 866).

Given that Mr. Clemons' testimony was elicited by the trial prosecutor in response to a request by Judge Southwood to explain "**what was the deal for him to testify,**" and given that at no time did the State contest the accuracy of Mr. Clemons' testimony regarding what the deal was, Mr. Moore was entitled to rely on the uncontested evidence as to what the deal was for his testimony.[24] Judge Southwood in his order denying Rule 3.851 relief and the State in its Answer Brief, both ignore that the evidence was presented by the State and was uncontested when they assert that Mr. Moore should have presented more evidence beyond

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[24]Not only did the prosecutor fail to apprise the presiding judge and Mr. Moore's counsel that Mr. Clemons March 22nd testimony was incorrect, the State did not present any proffered testimony or evidence to contest that testimony after the April 6th motion to amend was filed which relied upon Mr. Clemons' testimony as establishing a Giglio violation (3PC-R. 350-53). The State's response to the Giglio violation set forth in the April 6th motion has been in both the circuit court and before this Court merely to try to inject ambiguity into Mr. Clemons' unambiguous March 22nd testimony. It has not proffered any evidence from the trial prosecutor or the State Attorney's files to demonstrate that in fact there was no deal or understanding with Mr. Clemons for his testimony at Mr. Moore's trial.

the testimony presented by the trial prosecutor as to what the deal was for his testimony.

The U.S. Supreme Court has spoken in this area and said: "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 540 U.S. 668, 675-76 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 696. "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." Id.

In addressing the question of whether the Giglio violation is harmless beyond a reasonable, the State, like Judge Southwood, ignores the fact that, not only was Mr. Clemons' testimony false that he was testifying without a deal and without any promises from the State (T. 812-13), but the prosecutor's jury closing was also deliberately deceptive on this point. The prosecutor urged the jury to believe Mr. Clemons because:

> Carlos Clemons **without any deals** - - and he took the stand **without any deals**. He gave a statement to the police without any deals instantly. He never denied his involvement. **He took the stand without any deals**. You saw his attorney sitting here. And he told you he has never said anything different than what you heard here in this courtroom.

(T. 1221)(emphasis added).[25] Thus, the Giglio violation does not begin and end with Mr. Clemons false testimony. The prosecutor specifically and intentionally relied upon the deception as a reason why the jury should believe Mr. Clemons. The truth not only demonstrates that the testimony was false, it also shows the prosecutor was deliberately seeking to deceive the jury. The truth would have undermined the prosecutor's credibility and the entirety of the State's case would have been tainted by the knowledge that the prosecutor was willing to fudge the facts in order to convict Mr. Moore.[26]

Further, the State, like Judge Southwood, fails to engage in any cumulative analysis of the various Giglio violations, as well

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[25]The prosecutor also falsely argued in her jury closing:

> Carlos Clemons goes into a program the very next day. He does not talk to Vincent. They don't even see each other until after they have given their statements. And I don't know if they have seen each other even since then. But they do not get together and make up their statements and put it together before they talked to the police. Carlos is in the program, some sort of juvenile program.

(T. 1230). However in Mr. Gaines' 2011 testimony, he testified that Mr. Clemons was in the juvenile pod at the same time he was in 1993 (3PC-R. 878). Mr. Gaines further testified that he was able to talk with Mr. Clemons during that time and that they did "talk about [their] case" (3PC-R. 879).

[26]See Johnson v. State, 44 So. 3d at 54 ("In other words, **whenever the State seeks to obfuscate the truth-seeking function of a court by knowingly using false testimony or misleading argument, the integrity of the judicial proceeding is placed in jeopardy.**") (emphasis added).

as the Brady violations (and/or Strickland violations). In fact, the State says that Mr. Moore's claim that a cumulative analysis should have been conducted is unpreserved. Answer Brief at 39. However, Mr. Moore in his motion for rehearing which was filed in circuit court argued: "In the order denying Mr. Moore's Rule 3.851, this Court erroneously overlooked controlling authority requiring Mr. Moore's claims and witnesses to be evaluated cumulatively." (3PC-R. 418). He also argued: "Moreover, this Court sliced and diced the testimony presented at the evidentiary hearing and evaluating separately, and not cumulatively as required, which is clearly contrary to *Kyles v. Whitley* and *Smith v. State*." (3PC-R. 419). Clearly, the want of a cumulative analysis by the circuit court was raised in the circuit court and is preserved.

The circuit court did not consider the Giglio violation in presenting Mr. Clemons' testimony that there was no deal or promises made and allowing that erroneous testimony to go uncorrected cumulatively with the Giglio violation occurring when the prosecutor deceptively argued to the jury that Mr. Clemons was credible because he was testifying without a deal. It did not consider these Giglio violations cumulatively with Vincent Gaines' false testimony that he and Mr. Clemons had chased Little Terry on the day of the homicide. It did not consider these Giglio violations cumulatively with the prosecutor's false

representations regarding the sequence of events surrounding Mr. Moore's dispute with Randy Jackson and the criminal complaint that Mr. Jackson had filed against Mr. Moore. Nor were any of these Giglio violations considered cumulatively with the Brady violations and/or Strickland violations that were demonstrated at the evidentiary hearing.

Vincent Gaines

As to the Vincent Gaines Giglio claim, the State first says: "Moore failed to prove that the State knew of any false trial testimony that it produced or did not correct." Answer Brief at 42. Yet the State subsequently in the Answer Brief, inconsistently asserts that in the trial prosecutor's closing she "conceded that Clemons and Gaines chased Little Terry, but properly put it in context to show that this is inconsequential." Answer Brief at 43. Thus, by the State's own arguments in its Answer Brief, the State concedes that the prosecutor knew that Vincent Gaines' trial testimony that he was not with Mr. Clemons and did not chase Little Terry (T. 568-69) was false.

The trial prosecutor, while "conced[ing] that Clemons and Gaines chased Little Terry, tried to downplay the significance of this concession, i.e. that Mr. Gaines' testimony was false and therefore he was not a credible witness. And more importantly, the trial prosecutor failed to advise the trial judge, when he sustained the State's objection to the cross of Mr. Gaines

regarding his claim that he was not with Mr. Clemons and did not chase Little Terry, that Mr. Gaines' testimony was false and that Mr. Moore's counsel should in fact be able to confront Mr. Gaines with the fact that he was on the witness stand lying to Mr. Moore's jury. Indeed as noted in the Initial Brief, this limitation on Mr. Moore's right to confront Mr. Gaines was the lead issue in Mr. Moore's direct appeal. Moore v. State, 701 So. 2d at 548.[27] Yet, this Court was not advised in the direct appeal that Mr. Gaines' testimony on this point was false; in fact Mr. Gaines' false testimony was relied upon by the State as providing a reasonable basis for the judge's limitation on Mr. Moore's right of confrontation.

Also overlooked by the State in its Answer Brief is the pivotal nature of the Little Terry incident to Mr. Moore's defense. Mr. Moore testified in his own behalf and testified that he was aware of the Little Terry incident and warned the victim to be careful of Mr. Clemons and Mr. Gaines. The Giglio violation as to Mr. Gaines is not harmless beyond a reasonable doubt, particularly when evaluated cumulatively with the Giglio

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[27]In its Answer Brief, the State falsely states: "Moore also may be attempting to raise a confrontation-clause-related claim (See IB 74-75), but he did not timely develop such an argument in the trial court, thereby failing to preserve it." Answer Brief at 49. However, Mr. Moore did argue in his April 6th motion to amend that the State had used Mr. Gaines' false trial testimony to erroneously limit Mr. Moore's cross-examination of Mr. Gaines (3PC-R. 295-96).

violation as to Mr. Clemons' false testimony.

ARGUMENT II

As to Argument II, the State in its Answer Brief chooses to restate Mr. Moore's argument rather than address the fact that in his Rule 3.851 motion he pled the claim alternatively as grounded on Brady, on Strickland or on Jones v. State. And in pleading the claim on alternative grounds, Mr. Moore relied upon State v. Gunsby, 620 So. 2d at 924.

By slicing and dicing Mr. Moore's argument, the State attempts to runaway from the fact that during its cross-examination of David Hallback, it elicited testimony from Mr. Hallback about the fact that he had advised Mr. Moore's trial attorneys about his conversations with Mr. Clemons in the juvenile pod well before Mr. Moore's trial.

The State falsely asserts in its Answer Brief that: "A claim specifying Hallback was not asserted until 2009, in Moore's amendment to his 2006 second successive postconviction, in essence, the eighth version of Moore's postconviction motions." Answer Brief at 62. Mr. Moore presented his Brady/Strickland/Giglio/Jones v. State claim as Claim II of his January 2006 motion. This claim was premised in part upon what Mr. Hallback advised Mr. Moore's counsel in 2005 and Mr. Hallback was specifically listed as a witness that Mr. Moore intended to call

at an evidentiary hearing on the claim (3PC-R. 24 n.11). The State, as noted previously, did not contest predecessor collateral counsel's diligence in locating Mr. Hallback. Mr. Hallback was specifically pled and identified in the 2006 motion to vacate which was filed less than one year after he had been located and first interviewed by Mr. Moore's collateral counsel.

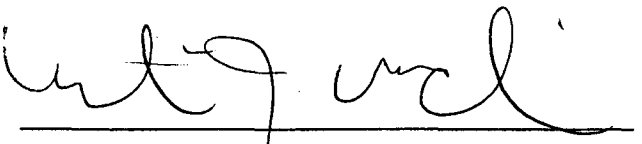
Following the State's cross of Mr. Hallback at the 2011 evidentiary hearing, Mr. Moore introduced as evidence documentation from trial counsel's file verifying that Mr. Hallback had indeed advised the defense of his conversations with Mr. Clemons in the juvenile jail pod. Trial counsel was on notice that Mr. Clemons and Mr. Gaines were making exculpatory statements in the juvenile jail pod, but did not further investigate and/or present that evidence during Mr. Moore's trial. On either a Strickland or a Brady claim, no deference is due to a postconviction judge's credibility analysis of favorable evidence offered to establish prejudice and/or materiality. Porter v. McCollum, 130 S. Ct. 447 (2009). The State simply ignores this constitutionally mandated standard of review.

CONCLUSION

Based upon the record and the arguments presented herein and in his Initial Brief, Mr. Moore respectfully urges the Court to reverse the circuit court and vacate his conviction and/or sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by email service to CapApp@MyFloridaLegal.com which is the primary email address given for opposing counsel, Stephen White, on December 6, 2012.



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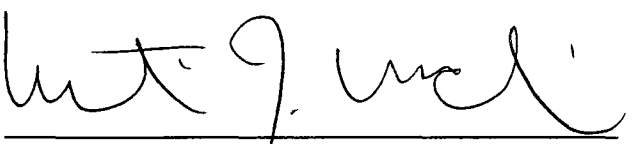

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