IN THE SUPREME COURT OF FLORIDA

Case No. SC19-704

Lower Court Case No. 2010-CF-001608A

TINA LASONYA BROWN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

First, in arguing Ms. Brown's failure to comply with Rule 3.851(e), Appellee is attempting to litigate issues that are procedurally barred. (AB. 39; 43-55). These arguments involving the pleading requirements of Rule 3.851 have already been extensively litigated in this case. *See Brown v. State*, 2016 WL 3474843 (June 24, 2016) and *Brown v. State*, 2016 WL 3459727 (June 24, 2016). Appellee's contention that Ms. Brown's Rule 3.851 motion should have been denied with prejudice has no merit, and no cross-appeal was filed by Appellee as to this issue. (AB. 49-55).

Second, Appellee argues that Ms. Brown's Initial Brief fails to comply with Rule 9.210(b)(5) and should be stricken. Specifically, Appellee argues that Ms. Brown failed to identify the standard of review that applies to her claims. (AB. 40). In fact, Ms. Brown identified the standards of review in her Initial Brief on pages vi-vii, under the heading "Standard of Review" which is also clearly identified in the Table of Contents on page ii of the brief.

Finally, this reply will address only the most salient points argued by Appellee. Ms. Brown relies upon her Initial Brief in reply to any argument or authority argued by Appellee that is not specifically addressed in this Reply Brief.

TABLE OF AUTHORITIES

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ARGUMENT IN REPLY

I. THE CIRCUIT COURT ERRED IN FINDING THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF MS. BROWN'S CAPITAL TRIAL.

Appellee fails to substantively address any arguments made by Ms. Brown in her Initial Brief concerning Issue I.[1] Instead, Appellee simply asserts that due to the overwhelming evidence as to Ms. Brown's guilt, this Court need not examine all claims of deficient performance by trial counsel. (AB. 73).[2] Appellee further concludes, also without any independent analysis, that the postconviction court correctly determined that Ms. Brown failed to establish sufficient prejudice for each claim, and "this Court can take confidence in the result and affirm the trial court's decision." (AB. 73).

As argued by Ms. Brown in her Initial Brief, these findings are not based upon competent substantial evidence and should be reexamined by this Court. (IB. 68-94). However, since Appellee does not dispute the postconviction court's singular finding of deficient performance by trial counsel for failing to call Terrance Woods

[1] Appellee merely recites findings of the postconviction court's order without any analysis in response to Ms. Brown's arguments in her Initial Brief as to why the postconviction court erred in its findings. (AB. 62-72).

[2] The following will be utilized to cite to the record: "R." –record on direct appeal; "T." – trial transcript; "PC." – postconviction record on appeal; "IB." – refers to Ms. Brown's initial brief; "AB." –refers to the State's answer brief. Any additional citations will be self-explanatory.

as a witness, and since Appellee does not address any other instance of deficient performance by trial counsel, Ms. Brown relies upon her Initial Brief for a detailed recitation and analysis of these issues. (IB. 68-94).[3]

In asserting that Ms. Brown failed to establish sufficient prejudice for each claim, Appellee simply recites the postconviction court's finding that the evidence in the case against Ms. Brown was just "too strong". (AB. 71). However, Appellee fails to acknowledge the fact that the most damaging evidence at trial came from Heather Lee, and Ms. Brown's claims of deficient performance by trial counsel primarily relate to Heather Lee.

Heather Lee was the State's star witness and undermining her credibility was paramount in this case. Undermining her credibility would have necessarily weakened the State's case against Ms. Brown, if not for the guilt phase, then surely for the penalty phase. In fact, counsel testified that his defense at trial was "to put as much as [he] could on Heather Lee" and "to minimize Ms. Brown's actions". (PC. 2734-35). He regarded this as a "penalty phase case". *Id*. This guilt phase strategy naturally crossed over into the penalty phase, since that is where trial counsel made a plea for her life. Trial counsel acknowledged the importance of having a cohesive defense throughout the entire trial. (PC. 2737). This is perhaps even more critical in

[3] Appellee also fails to address Ms. Brown's argument that the court's finding as to prejudice was not based upon competent substantial evidence. Appellee merely quotes the language in the court's order.

cases such as this, where trial counsel's primary defense is to lessen culpability for purposes of obtaining a life sentence.

In each instance of deficient performance, there is substantial prejudice to Ms. Brown. Trial counsel's deficient conduct in the guilt phase carried over into the penalty phase and hindered his arguments for a life sentence. In both the guilt and penalty phases, the State argued that Ms. Brown be found guilty of first-degree murder and should receive a sentence of death because she was the aggressor while Heather Lee was merely another victim of Ms. Brown. The State argued: "Tina Brown poured that gas, lit [the victim] on fire, and never looked back …" (T. 709); and "Heather Lee was there, Heather Lee stood there, but Tina Brown killed [the victim] in one of the worst ways possible, by fire." (T. 1068). These are all facts that came out in the guilt phase of Ms. Brown's trial and that went unchallenged by defense counsel.

Trial counsel repeatedly called Heather Lee a liar in his closing argument. However, he never actually caught her in a lie before the jury. This is despite the abundant information he had available to him at the time of trial that he could have used to show the jury that she actually was a liar and that her portrayal of Ms. Brown, as the individual who planned this murder and set the victim on fire, should not be believed.

Among the information trial counsel had available to him at the time of trial was Heather Lee's prior convictions – two felonies and *two crimes of dishonesty*. There was no reasonable strategy for not presenting this information to the jury, especially when trial counsel's defense was that Heather Lee was a *liar*. Trial counsel repeatedly called Heather Lee a liar, yet had nothing to back up that argument other than speculation that her story did not make sense and that she must be lying because she's the co-defendant. The prejudice to Ms. Brown is that the jury never heard that Heather Lee had been convicted of both felonies and crimes of dishonesty. This is something definitive that trial counsel could have pointed to in order to argue that Heather Lee was a liar and should not be believed. Heather Lee was the only eyewitness in the wooded area when the victim was set on fire. The importance of her testimony to the State's case cannot be understated. By failing to bring out her prior convictions, trial counsel was unable to give the jury a reason, one which would have been included in the jury instructions, to disregard the testimony of Heather Lee as to Ms. Brown's culpability.

Other information trial counsel had in his possession prior to trial that could have been used to challenge Heather Lee's testimony was her own prior inconsistent statements about the murder. This was important because it showed how she changed her story to fit the narrative that she was just another victim in the situation. Trial counsel tried to argue that Heather Lee should not be believed because she was

Ms. Brown's co-defendant, and she took a plea to save herself from facing the death penalty. Again, he had nothing to back up this argument. Had he brought out her inconsistent statements about what occurred that night, he could have shown the jury that she was an unreliable witness and made certain statements in order to decrease her own culpability.

For instance, she made inconsistent statements about who was in the vehicle when they drove to the wooded area.[4] At trial she testified that Ms. Brown and Ms. Miller were in the front seat, while she was in the middle of the backseat. (T. 521-22). Yet she initially told prosecutors that she was in the middle of the backseat in between Ms. Miller and Ms. Azriel who were holding her back when they got out of the vehicle upon arriving in the wooded area. (PC. 3703-08). This statement was patently false, as no other witness said that Ms. Azriel drove to the wooded area with them. Heather Lee fabricated this version to make it seem as though she was taken and held against her will and unable to help the victim. She only changed her story when it became obvious that what she said could not have been true. It was not as if she was coming clean and now telling the truth. She was caught in a lie and had to change her story. Likewise, the other inconsistent statements made by Heather Lee – whether she was cleaning off blood from her shoes, how the blood got onto her

[4] During trial, the vehicle was referred to as both a car and a truck, and as having a trunk. The vehicle was actually a red Hyundai Santa Fe SUV and therefore, did not have a trunk as would be found in a car. (T. 424-25).

shoes, whether she was familiar with the wooded area prior to the murder – could have all been used to show that she is not a reliable witness and had changed her story in an attempt to reduce her own culpability. (IB. 73-75).

Additionally, trial counsel was aware of Heather Lee's bias and motive for both the murder and for testifying against Ms. Brown. His failure to utilize this information and present it to the jury prejudiced Ms. Brown. Heather Lee knew that her husband, Darren Lee, was having affairs with both the victim and Ms. Brown. (IB. 75-77). This is a significant motive to kill the victim and blame the murder on Ms. Brown. Yet, counsel failed to present this critical information to the jury. Had jurors heard of this bias and motive, Heather Lee's credibility would have been undermined which would have cast doubt on Ms. Brown's culpability in the murder.

In addition to being in possession of the above impeachment evidence against Heather Lee, trial counsel also was aware or should have been aware of witnesses who would have impeached Heather Lee. His failure to call these witnesses at trial prejudiced Ms. Brown because it deprived jurors of critical information necessary to assess Heather Lee's credibility.

The failure to call Terrance Woods as a witness was the only finding of deficient performance of trial counsel by the postconviction court. However, the court found no prejudice because Mr. Woods' testimony about Heather Lee's motive would not have changed the evidence presented at trial regarding Ms. Brown's

participation in the crime. In making this finding, the court downplays Mr. Woods' testimony at the evidentiary hearing. He did not simply testify as to Heather Lee's motive for the murder. He testified that he was present with Heather Lee's husband, Darren, when Heather Lee came inside the trailer after having a physical altercation with the victim and told Darren that "she was going to kill the bitch", referring to the victim. Mr. Woods also testified that a few days after the murder Heather Lee told Darren, while in the presence of Mr. Woods, that he "wouldn't be fucking his girlfriend anymore … because she killed her." Mr. Woods testified that Heather Lee then said that she had poured the gas on the victim and set her on fire. (PC. 3119-21). This is unquestionably compelling evidence. This evidence would have no doubt challenged the State's theory of the case and of who was the primary aggressor and set the victim on fire. Again, trial counsel's strategy was to decrease Ms. Brown's culpability for the penalty phase. This is evidence that would have supported such a defense. Ms. Brown was prejudiced because the jury never heard any of it.

Trial counsel's failure to call Darren Lee as a witness likewise prejudiced Ms. Brown because he was privy to the same conversation as testified to by Mr. Woods. Darren Lee could have corroborated the testimony by Mr. Woods as to statements made by Heather Lee about the murder. And while Heather Lee could claim, as she did at the evidentiary hearing, that she did not know Terrance Woods, she certainly

could not say the same about her own husband. Additionally, Darren Lee could have confirmed that he was having affairs with both the victim and Ms. Brown, thereby providing corroborating information as to Heather Lee's motive and bias in this case. The State's arguments at trial stressed the fact that Ms. Brown was the one who poured gas on the victim and set her on fire, and therefore, was the one who deserved a death sentence. Had jurors been presented with this very different picture of what occurred and who was responsible as stated *supra*, there is a reasonable probability that the result of the proceeding would have been different. No doubt, this evidence could have been used to support trial counsel's strategy of reducing Ms. Brown's culpability and thus supported his argument for a life sentence. Had jurors heard that it was, in fact, Heather Lee that killed the victim "in the worst way"[5], by pouring gas and her and setting her on fire, Ms. Brown would have received a life sentence.

II. THE CIRCUIT COURT ERRED IN FINDING THAT NEWLY DISCOVERED EVIDENCE WAS NEITHER NEWLY DISCOVERED NOR WAS OF SUCH A NATURE AS TO PRODUCE AN ACQUITTAL ON RETRIAL OR YIELD A LESS SEVERE SENTENCE.

Again, Appellee fails to substantively address arguments made by Ms. Brown in her Initial Brief concerning Issue II, but merely copies and pastes language from the postconviction court's order denying relief and declares without any independent analysis that "the trial court correctly determined that [Ms. Brown] failed to satisfy

[5] (T. 1068).

either prong of the *Jones* test"[6] and therefore, "this Court can take confidence in the result and affirm the trial court's decision." (AB. 80).

In actuality, the postconviction court never conducted an analysis as to the second prong of *Jones* because it found that the first prong had not been met. (IB. 104). Only the first prong was addressed by the court in its order denying relief.

As argued in Ms. Brown's Initial Brief, the postconviction court's ruling as to the first prong of *Jones* was erroneously based upon caselaw that has since been clarified by this Court. (IB. 102). *Wyatt v. State,* 71 So.3d 86 (Fla. 2011). Nevertheless, Appellee regurgitates the postconviction court's reasoning that the first prong of *Jones* was not met because "the substance of Heather Lee's statements to fellow prisoners was known to trial counsel before the trial began." (AB. 80). This is not the law, but merely an attempt by Appellee to rephrase language which has already been corrected by this Court as to whether the evidence "existed" at the time of trial.

To reiterate, prior to this Court's decision in *Wyatt,* relevant caselaw included language that newly discovered evidence is evidence that **must have existed at the time of trial**. *Moss v. State*, 860 So.2d 1007, 1009 (Fla. 5th DCA 2003) (emphasis added). However, this Court subsequently made clear in *Wyatt* that the language "must have existed at the time of trial" has never been a part of the newly discovered

[6] *Jones v. State*, 709 So.2d 512 (Fla. 1998).

analysis and **was an incorrect recitation of the test set forth in the *Jones* decisions**. *Wyatt*, 71 So.3d at 100. (emphasis added).

While Appellee attempts to parse language and claim that "the **substance** of Heather Lee's statements to fellow prisoners was known to trial counsel before the trial began", this Court has already rejected analogous arguments. In *Wyatt*, this Court stated:

> This holding is in accord with our **prior decisions, which have recognized newly discovered evidence claims predicated upon new testing methods or techniques that did not exist at the time of trial, but are used to test evidence introduced at the original trial.** *See, e.g., Preston v. State*, 970 So.2d 789, 798 (Fla.2007) ("There is no dispute that the DNA evidence concerning the pubic hair, showing that it did not belong to the victim, is newly discovered evidence."); *Hildwin v. State*, 951 So.2d 784, 788–89 (Fla.2006) (holding that new DNA testing of evidence indicating that semen and saliva on victim's panties and washcloth excluding defendant as source and which refuted the trial serology evidence constituted newly discovered evidence). Moreover, **we have also recognized newly discovered evidence claims predicated upon a witness who testified at trial but then subsequently recanted his or her testimony; the witness's recantation, which did not exist at the time of trial, constituted newly discovered evidence.** *See, e.g., Hurst v. State*, 18 So.3d 975, 992–93 (Fla.2009) (recognizing the statements made by State witness after trial acknowledging that defendant did not confess to the crime was newly discovered evidence of recantation).

Wyatt, 71 So.3d at 100. (emphasis added). Similarly, in this case, Ms. Brown's newly discovered evidence claim is predicated upon witnesses who testified to statements made by Heather Lee after Ms. Brown's trial and therefore, were not known at the

time of trial, notwithstanding the fact that Heather Lee made similar statements to other inmates prior to trial.

The proper analysis as to the first prong of *Jones* for newly discovered evidence is whether the evidence was unknown by the trial court, by the party, or by counsel at the time of trial, and whether defendant or his counsel could have known about it by the use of due diligence.[7] *Jones*, 709 So.2d at 521. In this case, the statements made by Heather Lee to these particular inmates were unknown at the time of trial and could not have been known by the use of due diligence, therefore, meet the first prong of the test set out in *Jones*.

In her motion for postconviction relief, Ms. Brown alleged that newly discovered evidence demonstrates that Heather Lee was the individual who actually killed the victim by pouring gas on her and setting her on fire and that this evidence gives reasonable doubt as to her culpability or would probably yield a less severe sentence. In support of this newly discovered claim, Ms. Brown presented the testimony of Jessica Swindle, Shayla Edmonson, Tajiri Jabali, and Nicole Henderson at the evidentiary hearing, all without any objection by the State.

[7] Appellee failed to substantively address the second prong of *Jones* in its Answer Brief, other than to copy and paste block quotes from the trial court's order, whereby Appellee improperly conflates the *Strickland* standard for ineffective assistance of counsel with the *Jones* standard for newly discovered evidence. Therefore, Ms. Brown relies upon her Initial Brief for arguments as to the second prong of *Jones* establishing prejudice. (IB. 94-106).

Jessica Swindle's testimony at the evidentiary hearing involved a confession by Heather Lee that she "set a girl on fire that was sleeping with her baby's daddy." (PC. 2812-13). These statements were made by Heather Lee to Ms. Swindle after Ms. Brown's trial, and therefore, were not known at the time of trial and could not have been known by the use of due diligence. (PC. 2811-13). This testimony supports Ms. Brown's claim of newly discovered evidence of Heather Lee's culpability and would be admissible at a new trial as impeachment evidence against Heather Lee.[8]

Shayla Edmonson's testimony at the evidentiary hearing likewise involved a confession by Heather Lee that she "killed someone and would do it again because the people that were involved in the case … were sleeping with her husband … and she set the girl on fire." (PC. 2838-39). This confession, like the one made to Ms. Swindle, occurred after Ms. Brown's trial and was not known at the time trial and could not have been known by the use of due diligence. This testimony also supports Ms. Brown's claim of newly discovered evidence of Heather Lee's culpability and would be admissible at a new trial as impeachment evidence against Heather Lee.

Tajiri Jabali's testimony at the evidentiary hearing involved statements by Heather Lee to Ms. Jabali, actions by Heather Lee that were observed by Ms. Jabali,

[8] Heather Lee was called as a witness by Ms. Brown at the evidentiary hearing and denied making any of the statements which form the basis of Ms. Brown's newly discovered evidence claim.

and descriptions of the murder in Heather Lee's journal that was read by Ms. Jabali. This evidence was unknown at the time of Ms. Brown's trial and could not have been known by the use of due diligence. This evidence would be admissible at a new trial as impeachment evidence against Heather Lee and as reverse *Williams* Rule evidence as argued in Ms. Brown's Initial Brief. (IB. 98-99).

However, this testimony by Tajiri Jabali at the evidentiary hearing was not addressed or even considered by the postconviction court because "there was no claim regarding Tajiri Jabali". (PC. 5302). Along these lines, Appellee now contends that "this claim is not properly raised on appeal because it was not a claim raised in the 3.851 motion." (AB. 58-59).

To be clear, this is not a separate claim. The claim is that newly discovered evidence demonstrates that Heather Lee was the individual who actually killed the victim by pouring gas on her and setting her on fire. Ms. Jabali's testimony is evidence supporting this claim. This is also evidence that corroborates the testimony by Ms. Swindle and Ms. Edmonson that Heather Lee confessed to setting the victim on fire because she was sleeping with her husband, and to blaming it on Ms. Brown because she was also sleeping with her husband. Additionally, Ms. Jabali's testimony corroborates testimony by Ms. Henderson that Heather Lee has a pattern of retaliating against the person with whom her significant other is having an affair.

In evaluating claims of newly discovered evidence, *Jones* requires the court 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." *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991). Here, the postconviction court erred by failing to consider the testimony of Ms. Jabali in evaluating Ms. Brown's claim of newly discovered evidence. Ms. Jabali's testimony both supports the newly discovered evidence claim and corroborates testimony by other witnesses as to this claim.

The last witness to testify in support of Ms. Brown's newly discovered evidence claim was Nicole Henderson. Not only did her testimony support this claim of newly discovered evidence, but it also encompassed evidence of ineffective assistance of trial counsel. This is because Ms. Henderson knew Heather Lee from Pensacola and from being incarcerated with her at the Escambia County Jail prior to Ms. Brown's trial, and was then later incarcerated with Heather Lee at Homestead Correctional Institution for a period of time after Ms. Brown's trial. Only the testimony by Ms. Henderson regarding events that occurred after Ms. Brown's trial are at issue for this newly discovered evidence claim. All other testimony by Ms. Henderson relates to the IAC Guilt Phase Claim.

Specifically, Ms. Henderson testified that during the time she was incarcerated with Heather Lee at Homestead Correctional Institution after Ms.

Brown's trial, she witnessed situations where Heather Lee would get into physical fights as a result of individuals sleeping with her girlfriend. Ms. Henderson testified that Heather Lee would never fight her girlfriend, but rather would always fight the individual with whom her girlfriend cheated. (IB 2820; PC. 1668-69).

Appellee is mistaken as to Ms. Henderson's testimony that supports Ms. Brown's newly discovered evidence claim. Appellee asserts that it is the testimony that Heather Lee got into a physical altercation with Ms. Henderson's sister because Ms. Lee thought Ms. Henderson's sister was sleeping with her (Ms. Lee's) boyfriend. (AB. 59-60).[9] That portion of the testimony actually supports Ms. Brown's ineffective assistance of counsel at the guilt phase claim since it could have been discovered prior to Ms. Brown's trial, and not the newly discovered evidence claim. Appellee even cites to page 92 in Ms. Brown's Initial Brief – which is in fact, the ineffective assistance of counsel claim, not the newly discovered evidence claim. (AB. 60).

To reiterate, in Ms. Brown's Initial Brief, she cited to the specific page in the record on appeal which references testimony by Ms. Henderson as to events

[9] Appellee also mistakenly assumes that Ms. Brown's characterization of this newly discovered evidence from Ms. Henderson as Reverse *Williams* Rule evidence somehow makes it a new claim. (AB. 59). Ms. Brown was merely arguing how such evidence would be admissible at a new trial. This is evidence in support of Ms. Brown's newly discovered evidence claim, which was presented to the postconviction court and, therefore, properly preserved for appeal.

witnessed while they were incarcerated at Homestead after Ms. Brown's trial. This was also raised in Ms. Brown's motion for postconviction relief. (PC. 1668-69). This evidence supporting Ms. Brown's newly discovered evidence claim is therefore properly presented on appeal. This evidence was unknown prior to trial, could not have been known through the use of due diligence, and would be admissible against Heather Lee at trial as reverse *Williams* Rule evidence, as argued in Ms. Brown's Initial Brief. (IB. 99-100).

Finally, in addition to the above testimony by witnesses at the evidentiary hearing, Ms. Brown attempted to introduce into evidence an email corroborating the other evidence indicating that Heather Lee's trial testimony was a lie. Prior to the evidentiary hearing, the State filed a motion in limine seeking to preclude this email from being admitted into evidence. (PC. 2705-13). During the evidentiary hearing, the postconviction court heard arguments as to the admissibility of the email by counsel. (PC. 2840; 3161-78). Ultimately, the court granted the State's motion in limine and did not consider this evidence supporting Ms. Brown's newly discovered evidence claim. The court did, however, allow this email to be proffered into the record in order to preserve the issue for appeal. (PC. 2845).

Appellee does not substantively respond to this particular piece of evidence, but simply asserts that this issue is impermissibly raised for the first time on appeal. (AB. 58). However, the postconviction court only heard arguments as to the State's

motion in limine to preclude this email *during* the evidentiary hearing. (PC. 2840; 3161-78). This is the first opportunity to appeal such an evidentiary ruling by the court and is therefore, properly before this Court now. Furthermore, both the Notice of Appeal and the Statement of Judicial Acts to be Reviewed that were filed by Ms. Brown include the following language:

> Defendant, TINA LASONYA BROWN, takes and enters her appeal to the Florida Supreme Court to review the Final Orders and Judgments of the Circuit Court of the First Judicial Circuit, in and for Escambia County, Florida, dated April 5, 2019; **and all other rulings, actions, or acts rendered adversely to Ms. Brown in support of said judgment**.

(PC. 5747) (emphasis added).

> The Defendant, TINA LASONYA BROWN, files the following Statement of Judicial Acts to be Reviewed: Order Denying Defendant's Third Amended Motion to Vacate Judgments of Conviction and Sentence, dated April 5, 2019; **and all other rulings, actions, and acts rendered adversely to Ms. Brown**.

(PC. 5750) (emphasis added). Such language clearly encompasses the adverse ruling by the postconviction court as it relates to this email, and is therefore, properly before this Court on appeal.

Finally, in support of its arguments that this evidence – the testimony from Ms. Jabali and Ms. Henderson, as well as the email – is impermissibly raised in this appeal, Appellee cites to *Jimenez*, *Henyard*, and *Deparvine*. (AB. 58-59). These cases all stand for the proposition that claims cannot be raised for the first time on appeal. As argued *supra*, this evidence does not constitute a new claim, but is rather

evidence supporting and corroborating the claim of newly discovered evidence that Heather Lee was the individual who actually killed the victim by pouring gas on her and setting her on fire. For this reason, the postconviction court erred in failing to consider this evidence.

III. THE CIRCUIT COURT ERRED IN FINDING THAT TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE AT THE PENALTY PHASE OF MS. BROWN'S CAPITAL TRIAL.

Appellee copies block quotes of the penalty phase testimony from this Court's opinion on direct appeal and concludes that "given the extensive mitigation evidence admitted at trial, the trial court correctly determined that trial counsel was not deficient for failing to present additional, cumulative evidence of [Ms. Brown's] life history. (AB. 82-87). Appellee does not address any of the additional information presented at the evidentiary hearing which Ms. Brown contends is not cumulative.

Ms. Brown primarily relies upon her Initial Brief for this argument, but reiterates that the information about her background was not cumulative, but rather encompasses information about the sexual, physical, and emotional abuse endured by Ms. Brown which was not previously presented at trial.

In contrast to the image that was painted at trial of Ms. Brown's family all pitching in and helping to take care of Ms. Brown and her brother, testimony presented at the evidentiary hearing cast this family situation in a much different light. That is because at some point, the family stopped helping out, and Ms. Brown

and her brother became isolated from other children and family members. "Ms. Brown's life deteriorated significantly following the separation of her biological parents and she felt very, very abandoned." (IB. 38; 2887; 2902).

Additionally, after Ms. Brown's parents separated, her father began sexually abusing her. Although there was testimony about this presented at trial, there was much more that the jury did not hear about the sexual abuse of Ms. Brown. In addition to being sexually abused by her father, Ms. Brown was also raped multiple times by a neighbor during this same time-period. (IB. 39; PC. 2864-71).

Furthermore, when her stepmother, Melinda, moved into the house, she began prostituting Ms. Brown when she was only 14 years old. Scant mention was made of this during trial. Jurors only heard that "Melinda prostituted Tina." (T. 800; 864). In reality, grown men would come into the house, use drugs with her father and Melinda, and then would be sent to Ms. Brown's bedroom to have sex with her. Money was exchanged for sex and she was required to turn the money back over to her father and Melinda. (IB. 109; PC. 2868). Jurors heard none of these details of the degrading nature of what occurred. They never heard that Ms. Brown was a young teenager when strange men were raping her in her own childhood bedroom, and that this had all been orchestrated by the individuals who were supposed to be her protectors.

Not only was there sexual abuse in the home, but there was also physical abuse. At trial, there was testimony about the domestic violence between Ms. Brown's parents and between her father and Melinda, but there was not any testimony about the physical abuse suffered by Ms. Brown and her brother. At trial, Ms. Brown's childhood was described as "neglectful and inadequate". (T. 860). However, at the evidentiary hearing, evidence was presented that Ms. Brown and her brother were scared all the time. They were both beaten with hands and electrical cords. There was constant violence in the home. As a result of Ms. Brown's father's involvement in a criminal gang, there was always drug dealers in and around the house. (IB. 39; PC. 2899; 2901-04).

When Ms. Brown moved out of the house, she continued to suffer physical abuse at the hands of boyfriends. However, at trial, there was only a brief mention of some domestic violence police reports involving Ms. Brown and her boyfriends. (T. 890-91; 897). At the evidentiary hearing, specific details were presented about this physical abuse. For instance, there was one incident involving Greg Miller, the father of Ms. Brown's children. (IB. 43; PC. 2899-2900). When Mr. Miller discovered Ms. Brown had been cheating on him. He took her into a bathroom in the park, made her strip naked, and then beat her with an extension cord. At the time, he knew that was very traumatic for her since her father used to beat her in the same manner. *Id*. There was also testimony about other boyfriends punching her in the

face and telling her she was worthless. (PC. 2893-98). This humiliating, shaming, and degrading abuse of Ms. Brown was never presented to the jury at trial.

This Court has previously held that trial counsel's performance was deficient where the jury heard some testimony about childhood abuse, but not the full extent of it. *See Ellerbee v. State*, 232 So.3d 909, 931-32 (Fla. 2017). In Ms. Brown's case, the jury heard about Ms. Brown's extended family helping to take care of her as a young child; the sexual abuse by her father that stopped shortly thereafter when Melinda moved into the home; and rumors that "Melinda prostituted Tina." This testimony was anything but comprehensive, and omitted specific details of sexual, physical, and emotional abuse that were presented at the evidentiary hearing. As in the case of *Ellerbee*, trial counsel was deficient in Ms. Brown's case and she was prejudiced because the jury never heard evidence about the extensive abuse she suffered.

With regard to the testimony presented by experts at the evidentiary hearing, Appellee again fails to discuss any of this new information as argued in Ms. Brown's Initial Brief. Instead, Appellee simply concludes "the trial court correctly determined that the additional, expert testimony presented at the evidentiary hearing was cumulative to the evidence presented at trial". (AB. 87).

Ms. Brown primarily relies upon her Initial Brief for this argument, but reiterates that this testimony was not cumulative to the evidence presented at trial,

and included compelling information that *was not* presented during the penalty phase and that would have supported a life sentence.

Critically, Dr. Sultan testified about the Adverse Childhood Experiences ("ACE factors"), and the correlation between them and bad outcomes later in life. Ms. Brown had been exposed to all ten of these risk factors. (IB. 47; PC. 2915). Dr. Sultan also testified about the impact of maternal abandonment that occurred not only with Ms. Brown's mother, but with her paternal grandmother, as well. (IB. 48-49; PC. 2869-71). She testified that the effect of knowing that nobody was coming to her aid "is cataclysmic and leads to the total collapse of the person because there is no one to whom to turn." (IB. 50; PC. 2960). She further testified about the trauma Ms. Brown suffered and stated, "many people with this kind of background wind up killing themselves, so the fact that she survived into adulthood is in and of itself remarkable." The ability to think for the future, anticipate consequences, control impulses, or think about what is best to do in a situation is gone because of this type of neurological damage from the complex trauma of physical, sexual, and emotional abuse. (IB. 50-51; PC. 2873-74). "There is no future. There is only surviving the moment." *Id*. Dr. Sultan also described Ms. Brown as "highly suggestible" and gave examples of her "feeling forced, being easily coerced into situations that were not good for her." (IB. 52; PC. 2891, 2929). This is particularly important when

considering that Ms. Azriel testified that she saw Heather Lee showing Ms. Brown how to use the Taser. (T. 465).

Finally, Dr. Sultan diagnosed Ms. Brown with post-traumatic stress disorder, including a psychotic disorder; major depressive disorder; and anxiety. (IB. 53; PC. 2919). This testimony about her mental health diagnosis was not presented to the jury during the penalty phase and is important mental health information that could have been considered by the jury when weighing the aggravators and mitigators in this case. Perhaps the most important testimony that was not presented at trial was related to the mental health statutory mitigators. Dr. Sultan found two statutory mitigators: Ms. Brown was experiencing extreme mental disturbance at the time of the offense, and that she was substantially impaired in her ability to appreciate the criminality of her conduct and to conform her conduct to the requirements of the law at the time of the offense. (IB. 53; PC. 2932).

Dr. Edwards testified about Ms. Brown's extensive drug addiction. This is important because at trial, the State portrayed Ms. Brown as someone who "successfully completed treatment" and was able to remain sober "when she wanted to". Dr. Edwards testified that this is simply not the case. The treatment Ms. Brown received was utterly inadequate to treat her addiction. (IB. 58; PC. 3042). Notably, he testified that she received no treatment for the underlying issues of abuse, and emphasized: "the literature tells us that if you don't deal with the trauma, relapse is

inevitable." (IB. 58; PC. 3043). He also described the treatment that Ms. Brown received as akin to "putting a Band-Aid on cancer" and was willfully insufficient for the level of her illness. (IB. 59; PC. 3048). When asked about whether Ms. Brown could have made a conscious decision to relapse, as was argued by the State at trial, Dr. Edwards stated: "There is not a conscious decision to relapse, once you're addicted, the intensity of the craving is likened to the intensity of craving if you were dehydrated or starving." (IB. 60; PC. 3053).

Dr. Edwards also described the withdrawals from crack saying that "after several hours [the withdrawals] get pretty intense and symptoms of it are inhibitory control problems, inability to focus, inability to predict consequences, impulsivity, paranoia, overreaction, overstimulation." (IB. 57; PC. 3037). Addicts feel a threat when they are coming off crack cocaine. "[T]he equivalent of a threat might be like a pebble, but when you're coming off [the drug], if feels like someone threw a brick in your face and you respond inappropriately and irrationally to imagined or real threats." *Id*. This testimony is important because it describes what Ms. Brown was feeling as a result of the withdrawals from crack at the time of the crime.[10] Such testimony was not presented at the penalty phase for the jury to consider. This is mitigating information because it explains any overreaction by Ms. Brown to a

[10] Although there is evidence that Ms. Brown participated in the attack, she disputes that she was the primary aggressor or the instigator, and she most certainly disputes that she was the one who threw gas on the victim and set her on fire.

perceived threat. i.e., Heather Lee escalating Ms. Brown's paranoia and emotional distress, and Ms. Brown feeling "agitated, irritated, fearful, and afraid that was going to be exposed." (IB. 61; PC. 145; 3040).

Dr. Herkov's testimony expounded upon Dr. Edwards' testimony concerning the effect of drugs on the brain. Dr. Herkov testified that development of the frontal lobe–which affects impulse control, decision-making, and self-correction–is fundamentally interrupted by drug use. (IB. 64; PC. 3075). Neuropsychological research is clear that drugs like cocaine affect long-term the person's cognitive functions long after the cocaine has left their system. (IB. 64; PC. 3078). Dr. Herkov opined that Ms. Brown's executive functioning would have been impaired at the time of the crime based on his testing and testing he reviewed that was conducted before trial. (IB. 66; PC. 3083).

This testimony by experts at the evidentiary hearing, as detailed above, was not cumulative to the evidence presented at trial, and is compelling testimony which would have affected the balance of aggravators and mitigators during the penalty phase, and would have supported a life sentence. Had the jury heard about all of the abuse Ms. Brown suffered and the extent of her drug addiction, and how those things affected her emotional and cognitive development, in addition to the other mitigation presented during the penalty phase, there is a reasonable probability that they would

have arrived at a different conclusion regarding sentencing. *See Ellerbee*, 232 So.3d at 932.

IV. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MS. BROWN'S CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE DURING JURY SELECTION BY FAILING TO STRIKE JUROR TAYLOR

First, Appellee claims "because [Ms. Brown] fails to cite or even discuss *Carratelli,*[11] this Court may deem any actual bias claim waived." (AB. 100). In fact, the first paragraph of ISSUE IV in Ms. Brown's Initial Brief cites to the postconviction court's order denying this claim for failing to show "actual juror bias". (IB. 114).

Appellee asserts that Ms. Brown refuses to acknowledge the postconviction standard for juror claims, instead relying on direct appeal standards. (AB. 100). This is a misunderstanding of Ms. Brown's argument. Ineffective assistance of counsel claims are necessarily subject to the *Strickland* standard. Accordingly, Ms. Brown argues both prongs of *Strickland* in her Initial Brief – deficient performance and prejudice. Actual juror bias is relevant to the second prong of this analysis to determine prejudice. As argued by Ms. Brown in her Initial Brief, Juror Taylor was actually biased because he stated that he would automatically vote for death if Ms. Brown was convicted of murder. (IB. 114-16). This demonstrates that Juror Taylor

[11] *Carratelli v. State*, 961 So.2d 312 (Fla. 2007).

was not impartial, that he was biased against Ms. Brown, and that evidence of this bias is plain on the face of the record. *See Carratelli*, 961 So.2d at 324. However, in order to support the claim that counsel was ineffective for failing to strike Juror Taylor, Ms. Brown is also obliged to argue the first prong of *Strickland*. In doing so, Ms. Brown asserts that trial counsel was deficient because any reasonable counsel would have stricken a juror who made such statements indicating his bias.[12]

Second, as to the merits, Appellee asserts that Ms. Brown "ignores a significant portion of the voir dire questions directed at Juror Taylor". (AB. 102). Appellee then argues that Juror Taylor's comment, when viewed in isolation, may suggest possible bias, but when viewed in the appropriate context, actual bias is not established. (AB. 103, 107-08). In support of this, Appellee cites to *Smithers*, *Bailey*, *Owen*, *Patrick*, and *Allen*, each of which can be distinguished from the case at bar. (AB. 103-08).

In *Smithers*, the juror in question initially stated that "if they are guilty without a doubt they should get the death penalty." *Smithers v. State*, 18 So.3d 460, 464 (Fla. 2009). However, the juror was then asked whether there could ever be any other sentence except the death penalty for first degree murder, whereby he answered "maybe life without parole." *Id*. He further stated that he felt there could be

[12] Ms. Brown was not granted an evidentiary hearing on this claim and was, therefore, unable to question trial counsel regarding his failure to strike Juror Taylor.

circumstances where he could vote for a recommendation for life. *Id*. This differs from Ms. Brown's case because Juror Taylor never stated that he could vote for life or that he would consider any other sentence except death for first degree murder. (T. 234-35; 242).

In *Bailey*, the juror at issue initially stated that "the death penalty is not used enough". *Bailey v. State*, 151 So.3d 1142, 1149 (Fla. 2014). However, upon further examination, the juror attested that she could follow the trial court's instructions and that she could absolutely consider all mitigation presented in the case. *Id*. She also stated that she could vote for life. *Id*. No such statements were ever made by Juror Taylor in Ms. Brown's case, specifically, Juror Taylor never indicated that he could vote for life after Ms. Brown was found guilty of first degree murder, but rather the opposite – that if Ms. Brown was found guilty of first degree murder he would automatically vote for death. (T. 242).

Owen argued that two jurors should have been removed because they indicated a personal belief that the death penalty should be automatically imposed under certain circumstances. *Owen v. State*, 986 So.2d 534, 550 (Fla. 2008). However, there was no actual bias in *Owen* because the record reflected that despite her personal viewpoint, the first juror stated a willingness and ability to lay aside her possible bias and follow the trial court's instructions. *Id*. Likewise, the second juror never equivocated as to whether she could follow the law. *Id*. An important

difference here is that the jurors in question in *Owen* stated that the death penalty should automatically be imposed under certain circumstances. *Id*. The difference being that Juror Taylor said that the death penalty should automatically be applied once someone was found guilty of first degree murder, with no exceptions. Additionally, Juror Taylor never stated that he could lay aside his bias and follow the trial court's instructions, as did the jurors in *Owen*.

In *Patrick*, Appellee points to a footnote in the decision where this Court states that the following comments from a particular juror did not show actual bias: "he leaned toward the death penalty at a level of eight or nine on a scale of one to ten … he was right in the middle concerning the death penalty… he would go by the law, and would have to hear everything." *Patrick v. State*, 246 So.3d 253, 263, n.5 (Fla. 2018)(internal quotation marks omitted). In Ms. Brown's case, Juror Taylor's comments are markedly different for those in *Patrick*. Juror Taylor never indicated a willingness to go by the law or hear everything, but simply stated that a death sentence would be automatic upon a finding of first-degree murder.

In *Allen*, this Court found that while the juror in question "did express positive sentiment toward the death penalty and expressly outlined several circumstances in which she would recommend it, she confirmed upon follow-up questioning that she was flexible, and would 'absolutely' listen to aggravation and mitigation, and would listen to mental health evidence." *Allen v. State*, 261 So.3d 1255, 1286 (Fla. 2019).

This juror also stated that "there were certain circumstances where she would not recommend the death penalty, such as if someone was 'a party of someone's death'." Id. She further stated that she was willing to listen to the evidence, be fair, and follow the law. Id. Notably, this Court found that "her statements showing that she would abide by the law and consider the evidence presented refute the claim that [she] was biased." *Id*. In Ms. Brown's case, there were no such statements made by Juror Taylor – that he would abide by the law and consider the evidence — that would refute this claim that he was biased.

Appellee's assertion that Ms. Brown is ignoring portions of Juror Taylor's testimony is not well founded. When taken together, the entirety of Juror Taylor's responses indicates an actual bias against Ms. Brown.

When first questioned by the prosecutor, Juror Taylor indicated that he would be in favor of the death penalty if he thought it was deserving, and then affirmed that he could personally impose the death penalty. There was no follow-up questioning by either the State or the defense as to what he meant by "deserving". He was then asked whether he had an open mind since the State had not yet presented any evidence, to which he stated "yes, ma'am." (T. 234-35).

His later responses to defense counsel are more definitive. When asked whether he could put his personal feelings aside, follow the Judge's instructions, and consider the evidence before imposing the death penalty, Juror Taylor responded:

"No." He went on to state that: "Depending on the evidence is how I would go either way. If it's proven without a shadow of a doubt, I would go with the death penalty. If not, then I would not." (T. 242).

His responses to defense counsel are clear. He cannot put his personal feelings aside. He cannot follow the Judge's instructions. He cannot consider the evidence before imposing the death penalty. His answer that if the case were proven, i.e., if Ms. Brown were found guilty of first-degree murder, then he would go with the death penalty, demonstrates that he would automatically impose death upon a finding of guilt. His responses to the State, when viewed in this light indicate that he could personally impose the death penalty if he thought it was "deserving", i.e., if Ms. Brown was found guilty of first-degree murder. The fact that he proclaimed to have an open mind is not inconsistent with such arguments, since the State had admittedly not yet put on any evidence. According to Juror Taylor, if there was enough evidence eventually put forth to prove that Ms. Brown was guilty of first-degree murder, then he would automatically vote for the death penalty. Conversely, if there was no evidence to prove she was guilty of first-degree murder, then he would not vote for the death penalty, at which point, it would not even be an option.

When considering the totality of Juror Taylor's responses, it is clear that he was not an impartial juror. Unlike the cases cited to by Appellee, Juror Taylor never stated that he could put his bias aside and follow the law. Rather, he clearly stated

the exact opposite – that he could *not* put such bias aside and follow the law. He never stated that there were certain circumstances for which he could find someone guilty of first-degree murder and vote for a life sentence. In fact, the final word from this juror was that if they were found guilty, he would automatically vote for death. "When a juror makes statements suggesting bias but later makes clear his or her ability to be impartial, actual bias will not be found." *Carratelli,* 961 So.2d at 327. Such was not the case with Juror Taylor.

V. THE CIRCUIT COURT ERRED IN FINDING THAT CUMULATIVE ERROR DID NOT DEPRIVE MS. BROWN OF A FUNDAMENTALLY FAIR TRIAL

Appellee argues that there cannot be a cumulative error analysis in this case because the postconviction court only found one instance of deficient performance by trial counsel and found no prejudice as to that instance. (AB. 118-19).

While that may be true, Ms. Brown asserts that the findings made by the postconviction court, as to all of the individual errors, were not based upon competent substantial evidence, and therefore, the cumulative effect of those errors should have been considered to determine whether those errors were harmless. *See Andres v. State*, 254 So.3d 283, 302-03 (Fla. 2018)(having concluded that multiple errors occurred in this case, we proceed to consider the cumulative effect of those errors to determine whether those errors are harmless); *McDuffie v. State*, 970 So.2d

312, 328 (Fla. 2007)(conducting a cumulative harmless error analysis where multiple errors occurred).

> Harmless error analysis places the burden upon the State, as beneficiary of the errors, to prove there is "no reasonable possibility that the error contributed to" the defendant's conviction. *DiGuilio*, 491 So.2d at 1138. As we have repeatedly stressed, the harmless error test "is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test" but the "focus is on the effect of the error on the trier-of-fact." *Id.* at 1139.

Andres v. State, 254 So.3d 283, 302-03 (Fla. 2018)(*citing Evans v. State*, 177 So.3d 1219, 1238 (Fla. 2015)).

It is appropriate to evaluate these claims of error cumulatively to determine if the errors collectively warrant a new trial. *Rogers v. State*, 957 So.2d 538, 553 (Fla. 2007); *Suggs v. State*, 923 So.2d 419, 441-42 (Fla. 2005).

> Where multiple errors are found, even if deemed harmless individually, "the cumulative effect of such errors" may "deny to defendant the fair and impartial trial that is the inalienable right of all litigants." *Brooks v. State*, 918 So.2d 181, 202 (Fla.2005) (quoting *Jackson v. State*, 575 So.2d 181, 189 (Fla.1991)); *see also McDuffie v. State*, 970 So.2d 312, 328 (Fla.2007).

Hurst v. State, 18 So.3d 975, 1015 (Fla. 2009).

The cumulative effect of numerous errors may constitute prejudice. *State v. Gunsby*, 670 So.2d 920, 924 (Fla. 1996).

> A number of [defendant's] other penalty phase claims relating to ineffectiveness of counsel do not appear to be such as would warrant relief under the prejudice prong of *Strickland v. Washington,* 466 U.S. 668 (1984). However, the cumulative effect of such claims, if proven,

> might bear on the ultimate determination of the effectiveness of [defendant's] counsel.

Cherry v. State, 659 So.2d 1069, 1074 (Fla. 1995)(quoting *Harvey v. Dugger*, 656 So.2d 1253, 1257 (Fla. 1995)).

Furthermore, this Court considers the cumulative effect of evidentiary errors and ineffective assistance claims together. *State v. Gunsby*, 670 So.2d 920, 924 (Fla. 1996)(granting new trial on the basis of the combined effect of newly discovered evidence, the erroneous withholding of evidence, and ineffective assistance of counsel); *see also Suggs v. State*, 923 So.2d 419, 441 (Fla. 2005)(in conducting its cumulative error analysis, the postconviction court took into consideration all claims, including allegations of *Giglio*, *Massiah*, and *Brady* violations, and claims of newly discovered evidence and ineffective assistance of counsel). Therefore, all the errors contained in Ms. Brown's appeal, including the ineffective assistance of counsel claims and the newly discovered evidence claims, should be considered cumulatively.

Thus, it is incumbent upon this Court to conduct a cumulative error analysis if it finds that multiple errors occurred in this case, as argued by Ms. Brown. *See State v. Woodel*, 145 So.3d 782, 801-03 (Fla. 2014) (where cumulative error analysis was conducted on appeal from postconviction motion, despite neither party having raised the issue on appeal, and despite the postconviction court finding it unnecessary to perform a cumulative assessment of alleged trial counsel errors).

CONCLUSION AND RELIEF SOUGHT

Ms. Brown respectfully requests this Honorable Court reverse the postconviction court's denial of her 3.851 motion and remand for new guilt and penalty phases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished via electronic service to Michael Kennett, Assistant Attorney General, on this 5th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

This is to certify that the Initial Brief of Appellant was generated in Times New Roman 14-point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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