IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,266

DAVID ROSS DELAP,	)
	)
Appellant,	)
	)
vs.	)
	)
STATE OF FLORIDA,	)
	)
Appellee.	)
	)
	)

REPLY BRIEF OF APPELLANT DAVID ROSS DELAP

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Introduction: The State's Argument Has No Basis in the Law or in the Record

The position taken by the State in its brief is neither internally consistent nor one with any basis in the applicable law. On the one hand, the State asserts in a completely conclusory fashion that the defendant's motion for post-conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure is legally insufficient on its face. However, the State's entire brief is bottomed on an analysis of the records of the defendant's trials, outside of the record on appeal established by the motion for post-conviction relief. The State asserts that the record on which it relies, which is not properly before this Court in this appeal, shows "conclusively" that the defendant is not entitled to any relief. Of course, this argument by the State is facially violative of Rule 3.850 of the Florida Rules of Criminal Procedure and the basic principles of appellate practice. The fact that the State has had to resort to extensive citations to trial records in a strained attempt to refute the merits of the motion for post-conviction relief, while the court below failed to attach to its order denying this motion portions of the record which, in the trial court's view, "conclusively shows that the prisoner is entitled to no relief," graphically underscores the complete bankruptcy of the State's position in

this appeal.[1] See Rule 3.850, Florida Rules of Criminal Procedure.

However, there is a more deeply rooted and serious flaw in the State's argument to this Court than the utter inconsistency and bankruptcy of its position on the facial sufficiency of the defendant's motion for post-conviction relief. Whether done intentionally or not, the State has attempted to misrepresent the crucial facts about Lem Brumley's role in the defendant's trial which are raised in the defendant's motion for post-conviction relief by manipulating a cold appellate record to make it appear that the defendant was tried under circumstances different than actually occurred. It is disturbing that this tactic would be followed in a case in which the State seeks to hold a human life forfeit. This situation, moreover, graphically illustrates why, in light of the issues raised in the defendant's motion for post-conviction relief, the motion should have been resolved by a trial court in the context of an evidentiary hearing so that any doubt about the facts on which the defendant's motion has been based can be properly resolved. This Court should and must, at the very least, reverse the order on appeal so that a proper evidentiary

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[1] On page 11 of its brief, the State asserts as "Point I" on appeal the contention that "Appellant's Motion for Post-Conviction Relief was Legally Insufficient on Its Face". However, on page 12 of the State's brief, at the end of a short introduction to this supposed argument which pays lip service to Rule 3.850, the State then changes its tune and promises to prove to this Court a completely different proposition: "Appellee [the State] will proceed to illustrate how the instant record conclusively shows that no legally sufficient point has been raised by Appellant." Answer Brief at 12 (original emphasis).

proceeding can be conducted to decide these issues. Indeed, the denial of constitutional rights and safeguards which are documented on the unrebutted record on appeal in this case are so presumptively prejudicial that this Court should direct that the defendant be awarded a new trial.

The State's "Facial Insufficiency" Argument Has No Merit.

The State makes the statement in its brief that the defendant's claim for relief based upon a denial of the right to effective assistance of counsel is legally insufficient on its face. See Answer Brief at 11. One would expect, therefore, that the State would support this position with case law holding that a charge of failure by defense counsel to impeach the only two premeditation witnesses in a first degree murder case with their prior inconsistent statements on the alleged cause or manner of infliction of death was facially insufficient to state a claim for relief based upon a denial of the Sixth Amendment right to effective assistance of legal counsel. Of course, the State has not cited any such cases to this Court. Instead, it has presented in its brief a lengthy statement of citations to the records of the defendant's trials which the State's attorneys believe would support a conclusion that the record shows that the defendant is entitled to no relief. The State's argument on this appeal is actually not that the defendant's detailed charge of a denial of effective assistance of counsel in his Rule 3.850 motion is legally insufficient on its face, but that the trial

judge was justified in summarily denying the motion because the record conclusively shows no entitlement to relief.

One fatal flaw in this argument by the State lies in the fact that the judge below did not make any determination based upon the record and did not, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, attach any portion of the record to his order which he believed to conclusively refute the charges of serious constitutional error raised in the defendant's motion for post-conviction relief. Indeed, as the absence of any evidence of the transfer of the records of this case from the Orange County Circuit Court to the Okeechobee Circuit Court indicates, Judge Nourse could not have considered the record of the defendant's trial when he ruled, since he had no access to it. In fact, Judge Nourse, who was not even temporarily an Orange County Circuit judge when he denied the defendant's motion, completely lacked jurisdiction to enter such an order. See Wasley v. State, 254 So.2d 243 (Fla. 4th DCA 1971).

Rule 3.850 requires the judge reviewing the motion to determine if portions of the record would support the denial of a defendant's motion for post-conviction relief. This is not a determination to be made by the State's appellate counsel in an answer brief submitted to this reviewing Court. There is no record which would support the State's asserted position before this Court. The only record on this appeal is that established by the defendant's sworn motion for post-conviction relief, which conclusively demonstrates entitlement to an evidentiary hearing, if not to a new trial:

When a defendant appeals the summary denial of a 3.850 motion alleging ineffective assistance of counsel and the motion has been denied without attachment of any portion of the record, the only issue properly before us is whether the motion, on its face, alleges sufficient facts to show a prima facie right to relief. Summary denial of the motion is reversible error unless its allegations "conclusively show that the prisoner is entitled to no relief." Rule 3.850, Fla. R. Crim. P. Since the face of the motion before us shows a possible deprivation of appellant's substantial legal rights, we feel compelled to reverse and remand for further proceedings on the motion.

The procedure set up by the criminal rules is simple and straightforward. If the rules are strictly followed, these cases can be disposed of with efficiency and dispatch. The trial court first looks to the face of the motion to determine its sufficiency. If found insufficient, then the motion should be denied. If found facially sufficient, the trial court then looks to the existing record to determine whether it conclusively shows that the prisoner is entitled to no relief. If so, the motion should be denied and those portions of the record conclusively showing no right to relief will be attached to the order of denial. If not denied on this basis, an evidentiary hearing on the merits must be held.

* * * * *

Rule 3.850 requires that the trial court, when summarily denying a motion without an evidentiary hearing, shall consider and attach to its order portions of the record supporting the denial unless the motion is legally insufficient on its face. If portions of the record are not attached by the trial court, and the order makes no reference to the record, presumably the ruling is based on the face of the pleading. Since we are a court of review, our appellate decision in such cases must also be based on the face of the pleading.

> It is inappropriate to have the state select portions of the record below to support the appealed order when the trial court has not previously done so.

Thames v. State, 454 So.2d 1061, 1065-66 (Fla. 1st DCA 1984).[2]

There is also involved in this appeal a factual assertion by the State which graphically illustrates the practical reason for the requirement in Rule 3.850 that the trial court, not the reviewing appellate court, must determine whether the record conclusively establishes that a defendant should not be granted post-conviction relief. In the motion for post-conviction relief involved in his case, the defendant has asserted, with citations to the record, that the State Attorney's Chief Investigator and star witness, Lem Brumley, was allowed to remain in the courtroom through trial and to hear the prior testimony of State's witness Dr. Hampton Schofield. Brumley listened to Dr. Schofield's changed testimony to the jury concerning cause of death, which he then buttressed with his own carefully changed rendition of the defendant's alleged oral confession. The State has responded to this factual statement in the defendant's motion by arguing that the record implies that Brumley was in fact excluded from the courtroom, as he certainly should have been, after a defense attempt to require the sequestration of prosecution witnesses. State's Brief at 24. The most that the State is willing to concede about

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[2] Ironically, the State has cited the holding of this case with approval in its brief. See Answer Brief at 12.

Brumley's presence in the courtroom throughout the defendant's trial is that "[s]ome ambiguity exists in the instant record." State's Brief at 7. At best, this argument is disingenuous.

Our own review of the record, and interviews with the defendant's trial attorneys, confirms that Lem Brumley was in fact seated at the prosecution table throughout the defendant's trial. Any ambiguity in the cold record about this point is resolved by the following transcript passage of the arguments of defense counsel Russell Ferraro during Brumley's testimony, which is not cited in the defendant's motion for post-conviction relief or the State's brief:

> MR. FERRARO: First of all, he [Lem Brumley] is not a witness out in the witness room for the last three or four days. He has been sitting here. So he knows what is going on and what the jury has seen up to this point.

T.T. 867.

The statements of the trial court cited on page 8 of the State's brief (T.T. 325) for the assertion that Brumley was excluded from the courtroom apparently were mis-transcribed or contain a typographical error. We believe the trial judge actually stated: "I am going to deny your request not to allow him to stay at counsel table. By the same token, you have an investigator at your counsel table." Compare T.T. 325; Motion, at 12-13. However, whatever the exact words of the trial judge may have been, the unrebutted fact remains that Brumley sat at

counsel table during the defendant's trial, which uniquely positioned him to offer his crucial, changed testimony to confirm the medical testimony of Dr. Schofield.

Even more importantly, the fact that the State has attempted to muddy this issue on appeal and to claim that Lem Brumley did not remain in the courtroom during the testimony of the other prosecution witnesses demonstrates reason why the Florida Rules of Criminal Procedure assign to the trial court responsibility for deciding in the first instance whether the record conclusively supports a denial of post-conviction relief.[3] But it is, after all, very disturbing that in a death penalty case the State would suggest to this Court that Lem Brumley was not in the courtroom during the testimony of other prosecution witnesses when it certainly has the ability to confirm that this suggestion is not correct. In any event, the defendant's sworn motion for post-conviction relief is unrebutted in the instant appellate record.

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[3] In addition to the issue of Lem Brumley's presence at the defendant's trial, the State has also misrepresented the records of the trial proceedings below as confirming that the defendant confessed on the witness stand to killing Paula Etheridge. Answer Brief at 8. Not only is this incorrect assertion based upon matters outside of the record on appeal, but it also has been made in an effort to maximize the prejudicial impact of the misuse of that material upon the defendant in this proceeding.

The Defendant's Motion for Post-Conviction Relief is Legally Sufficient to State a Claim for Relief for Denial of Effective Assistance of Counsel.

The crucial substantive issue in the defendant's trial was premeditation. If the defendant is not guilty of premeditated murder, then he may not be sentenced to death. A conviction on a charge of premeditated murder was the State's only basis for demanding the death penalty.[4] If the jury was not presented with evidence and facts which could have influenced a reasonable juror to doubt the credibility of the State's premeditation evidence, and if this failure was attributable either to the ineffective assistance of counsel, or to the prosecution's withholding of evidence in violation of the doctrine of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), then our Constitution requires that the defendant be given a new, fair trial. The crucial procedural issue on this appeal is whether the defendant's motion for post-conviction relief, which charges in extensive factual and

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[4] Throughout its brief, the State completely glosses over the greatly prejudicial impact of defense counsel's errors on the premeditation issue in favor of argument about whether the defendant could still be sentenced to death if he did not strangle Paula Etheridge to death. However, if the jury doubted whether the defendant committed a premeditated murder, the death sentence would not become an issue in this case. Further, in what is perhaps a Freudian slip, the State admits to this Court that the "chief significance [of Lem Brumley's testimony] was in establishing the element of premeditation during the guilt phase of the trial." Answer Brief at 17. The altered testimony of Brumby and Dr. Schofield undoubtedly and demonstrably affected both the guilt and sentencing phases of the defendant's trial.

legal detail both a denial of effective assistance of counsel and the prosecution's violation of the Brady doctrine, was legally sufficient on its face. See Rule 3.850, Florida Rules of Criminal Procedure and Thames v. State, 454 So.2d 1061 (Fla. 4th DCA 1984).

Predictably, the State has responded to the defendant's petition for relief on a denial of the rights to effective assistance of legal counsel by contending that no prejudice resulted from the unprofessional errors of defense counsel. The defendant's motion, and the controlling case law definition of the Sixth Amendment right to effective assistance of counsel, completely refute the State's argument. To establish the threshold of prejudice flowing from defense counsel's mal-performance for a violation of the Sixth Amendment, there must only be a factual showing sufficient to undermine confidence in the outcome of a criminal proceeding. Strickland v. Wainwright, 466 U.S. 668, 104 S.Ct. 2052, 2068-69, 80 L.Ed.2d 674 (1984); Wilson v. Wainwright, 474 So.2d 1162, 1163-64 (Fla. 1985). A defendant certainly is not required to show that defense counsel's deficient conduct more likely than not altered the outcome in the case, although that standard, too, is satisfied here. Strickland v. Wainwright, supra, 104 S.Ct. at 2068.

The errors of defense counsel involved in this case go to the core of the life and death issue of premeditation, and the resulting prejudice infected every aspect of the legal proceedings in which the defendant was convicted of premeditated murder and meted a death sentence. The unrebutted, and indeed

admitted, facts in the motion for post-conviction relief confirm that a sufficient show of prejudice has been made to establish a Sixth Amendment violation.[5] See Wilson v. Wainwright, 474 So.2d 1162,1163-64 (Fla. 1985); United States v. Tucker, 716 F.2d 576, 585-86 (9th Cir. 1983).

There is no doubt that the State's two key witnesses at trial, the only witnesses who gave testimony directly bearing on the crucial issue of premeditation, materially changed their prior sworn statements about cause of death. The State does not, at least, dispute the fact of that change in testimony. Obviously, the changed testimony was prejudicial to the defendant. As defense counsel admitted in his remarks to the jury, evidence that the defendant had choked someone until she failed to respond any longer was strongly probative of premeditated murder. (T.T. 937-38). Motion, at 13.

There is no doubt that defense counsel failed to challenge or impeach Brumley or Schofield with their prior inconsistent testimony and statements about cause of death. The jury which convicted the defendant of premeditated murder and recommended the death sentence was entitled to learn of these inconsistent statements. If Dr. Schofield was wrong, or was lying, in his statement that "this person must have been strangled", how much credibility should be assigned to any of

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[5] In the Initial Brief on this appeal, we presented to this Court at least eight specific instances of tangible prejudice to the defendant arising from the failure of defense counsel to adequately cross-examine and impeach the prosecution's premeditation witnesses. Initial Brief at 32-33.

his testimony? If Lem Brumley was lying when he testified that the defendant orally confessed to choking the victim to death, what else did he lie about? Isn't there at least the "reasonable probability" described by the United States Supreme Court in Strickland v. Wainwright that a reasonable jury would not want to base a first degree murder conviction and a death penalty recommendation on a testimonial foundation which was not true beyond any reasonable doubt? The answers to these questions are obvious. The motion for post-conviction relief is facially sufficient to state a claim for relief for violation of the Sixth Amendment right to effective assistance of competent legal counsel.

The Defendant's Motion for Post-Conviction Relief Was Legally Sufficient to State a Claim for Relief for Violation of the Brady Doctrine.

The State's brief totally misses the point of the defendant's claim that the prosecution, through Lem Brumley, the critical member of the "prosecution team" against the defendant, suppressed or withheld vital impeachment evidence. This withheld evidence went directly to the issue of the reliability and truth-telling capacity of Lem Brumley himself. Lem Brumley was the most important trial witness, in addition to being the State Attorney's right-hand employee, who was in charge of the investigation of the case and the interrogation and arrest of the defendant. The withholding of impeachment evidence by Brumley violated the doctrine of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), since the reliability of

Brumley as a witness was determinative of a verdict of guilt or innocence against the defendant on a charge of premeditated murder.[6]

Subsequent to the defendant's conviction and death sentence, which was so largely based on Lem Brumley's testimony, Brumley pled guilty to federal charges of participation in a narcotics smuggling conspiracy. This long-time, and apparently widely respected, law enforcement officer was revealed to be in fact part of the the filth which pollutes and preys on our society with drugs. More than that, Brumley's confession and conviction showed that he had been daily living a lie: While appearing to be a tough law enforcement officer and deceiving his fellow police officers about his true character, he was actually a spy inside the police establishment for his narcotics smuggling partners in crime. See Section 90.609, Florida Statutes (1985). This evidence of Brumley's criminal activities, if revealed to the defense as it should have been, would have been devastating to Brumley's reliability as a

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[6] In an effort to dodge the Brady doctrine issue, the State contends initially that this issue cannot now be raised on a motion under Rule 3.850, because Lem Brumley was convicted on federal narcotics charges while the defendant's direct appeal was pending before this Court. None of the cases cited in the State's brief stand for that proposition. The State has merely raised a red herring to avoid having to deal with the merits of the defendant's Brady claim. Moreover, if this Court is inclined to accept the State's view of this timing issue, then the defendant will certainly file a habeas corpus petition to address the issue of whether appellate counsel's failure to raise this matter on direct appeal appeal represents ineffective assistance of counsel in violation of the safeguards of the Sixth Amendment to the Constitution of the United States.

truthful witness. Would the jury have assigned Brumley's testimony a plugged nickel's worth of credibility if they had known what he really was, especially if they also knew about his, and Dr. Hampton Schofield's, "refined" trial testimony?

The State seems to argue that a member of the prosecution must be found to have "made a deal" with a third-party witness before a Brady violation will be found. Answer Brief at 27-28. The State's position is simply incorrect. If any member of the prosecution team who testifies at trial against a defendant and withholds or suppresses material evidence, a violation of the Brady doctrine occurs. See, e.g., Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1977).

Moreover, this case bears no similarity to the case principally relied on by the State to rebut the defendant's Brady claim, United States v. Luis-Gonzalez, 719 F.2d 1539, 1548 (11th Cir. 1983). This latter case found no violation of the Brady doctrine where it was not shown that the prosecution had any actual knowledge of the criminal background of one of its witnesses, who was not a member of the prosecution team. Here, Lem Brumley was not some "third party" witness, but the key member of the prosecution team, who also testified as the star witness in the case. It has long been settled that the prosecution is chargeable, for purposes of the Brady doctrine with the knowledge of any investigative member of the prosecution team who actually testifies as a witness. See, e.g., United States v. Diecidue, 448 F. Supp. 1011, 1017 (M.D. Fla. 1978), rev'd in part on other grounds, 603 F.2d 535 (5th Cir. 1979). Brumley was especially motivated and capable of shaping his

testimony to insure that the prosecutor got his wished-for death sentence, and the defendant should have had the information necessary to argue this point to the jury.

The State's response to the defendant's Brady claim is rambling and unfocused and in no way defeats the facial legal sufficiency of the motion for post-conviction relief. It is also based in important part on the State's effort to confuse the Court into believing that Lem Brumley was in the courtroom during the defendant's entire trial. The State's arguments in no way justify the trial court's summary disposition of this motion, which must therefore be reversed.

CONCLUSION

The defendant's motion for post-conviction relief is facially sufficient. The State's feeble arguments against legal sufficiency have no merit at all. Nor can the State argue for the affirmance of the trial court's summary treatment of the motion by arguing matters outside of the record on appeal. This Court must therefore reverse the court below and remand this case for a new trial or for an evidentiary hearing on the Rule 3.850 motion.

Respectfully submitted,

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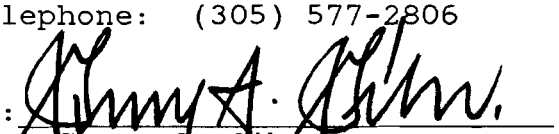
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by mail this 10th day of June, 1986 to Lee Rosenthal, Assistant Attorney General, Attorney for Appellee, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.

By: Gerry S. Gibson