IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO,

Appellant,

vs. **Case No. 50,250**

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

Edward S. Stafman
Stafman & Friedlander, P.A.
424 East Call Street
Tallahassee, FL 32301
(904) 681-7830

Attorney for Appellant

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I. THE TRIAL COURT ERRED BY SUMMARILY DENYING MR. SPAZIANO'S RULE 3.850 MOTION

A. There Is No Procedural Bar Which Should Preclude Consideration of Mr. Spaziano's Bradv Claims in a Successor Rule 3.850 Motion

The State argues that the 3.850 petition does not adequately allege justification for Mr. Spaziano's failure to raise his claim within the two year time period set out in Rule 3.850. However, the petition and amendment adequately allege such justification, R - 89, 197, and more importantly, Mr. Spaziano proffered in detail his factually and legally sound reasons for raising the issue at this time at the hearing below. R - 6-9, 17, 39.

The State offers no good reason'forwhy Mr. Spaziano's efforts to obtain the Bradv materials before now were unreasonable; rather, it claims that Mr. Spaziano's failure to make a formal chapter 119 demand until recently is somehow fatal to his claim without regard to other reasonable efforts he made to procure these materials. See State's Brief at 9. The State offers no authority for this position, but baldly asserts "it does not constitute due diligence to make an oral inquiry and sit back to wait . . . " Id. This assertion seeks to attach some magic to a chapter 119 demand for which there is no basis in fact or law.

The question presented herein is whether Mr. Spaziano's efforts were reasonable. Although one could certainly conclude that the previous efforts to obtain these records were reasonable

as a matter of law, at the least this factually dependent question should not be resolved without an evidentiary hearing.

Although this Court has procedurally barred Bradv claims where there was no showing that *any* effort was made to obtain the Bradv materials in a timely fashion, Agan v. State, 15 F.L.W. 5209 (Fla. April 1, 1990); Demps v. State, 515 So.2d 196 (Fla. 1989), it is equally true that this Court has held that Bradv claims are not barred where, although raised in a successive petition, the underlying facts were not discovered by the claimant despite reasonable inquiry. Lishtbourne v. Dusser, 549 So.2d 1364 (Fla. 1989). Where, as here, reasonable efforts were made to obtain the materials which the State had wrongfully withheld, the petitioner cannot be faulted and no procedural bar should apply.

Mr. Spaziano's prior efforts to secure the materials must be evaluated in light of the fact that one does not normally expect that the State has violated the Constitution by illegally withholding exculpatory evidence. In this light, this Court ought to be especially cautious of applying a procedural bar because the State is responsible for suppressing the "tools" upon which the claim is based:

> In the present case, [the petitioner] has not deliberately withheld this ground for relief, nor was his failure to raise it sooner due to any lack of diligence on his part. Rather, the cause for [the petitioner's] delay in presenting this claim rested on the State's failure to disclose. Under the circumstances, [the petitioner] has not waived his right to [be heard] on the claim.

Walker v. Lockhart, 763 F.2d 942, 955 n.26 (8th Cir. 1985); see also Freeman v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979).

In this regard, in a different but related factual context, the United States Supreme Court recently held that a State's asserted procedural obstacles are insufficient to overcome a post-conviction petitioner's entitlement to relief when it is the State's own misconduct that resulted in the petitioner's failure to urge the claim. In Amadeo v. Zant, 108 S.Ct. 1771, 1777 (1988), the United States Supreme Court noted:

> If the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents.

~~See also~~ Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987).

In federal habeas corpus cases, which also often involve procedural default issues, the United States Supreme Court has repeatedly reaffirmed that "habeas corpus has traditionally been regarded as governed by equitable principles." Kuhlmann v. Wilson, 477 U.S. 436, 437 (1986), quoting Fay v. Noia, 372 U.S. 391, 438 (1963). "Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'' Fay, 372 U.S. at 438. The State comes before this Court not with clean hands, but in breach of a fundamental constitutional duty -- to reveal to the defense

exculpatory evidence that could change the result at trial. A holding that Mr. Spaziano is barred from review under the facts of this case would not serve any equitable principles which govern the equitable nature of post-conviction remedies. Instead, it would reward the State for unconstitutional conduct.

Procedural bars, after all, depend on the proper functioning of the adversarial system. That functioning, in turn, is founded upon two independent components. On the one hand, it requires discharge of the defense function. See Murray v. Carrier, 477 U.S. 478, 496 (1986). Criminal proceedings are a "reliable adversarial testing process" only where an accused is represented by counsel whose performance satisfies professional standards commensurate with the sixth amendment. Strickland v. Washington, 466 U.S. 668 (1984). If the adversarial process is to work, defense functions must be carried out in a way that precludes "sandbagging," or the withholding of claims at trial so that they may be relied upon in subsequent proceedings. Sykes, 433 U.S. at 89. No sandbagging or intentional withholding of claims has taken place here.

The adversarial process is also impaired by the perversion of its other component, the prosecutorial function. Giglio v. United States, 405 U.S. 150 (1972); Miller v. Pate, 386 U.S. 1 (1967); Name v. Illinois, 390 U.S. 264 (1959); United States v. Bagley, 473 U.S. 667 (1985). Such a perversion unquestionably occurs where the prosecutor jeopardizes the integrity of formal proceedings by misleading or deceptive conduct that is especially

intended to accomplish illegal ends. Franks v. Delaware, 438 **U.S.** 154 (1978)(fourth amendment violated where state relies upon material misstatements in warrant proceedings); Oregon v. Kennedy, 456 U.S. 667 (1982)(fifth amendment violated where prosecutor commits acts with the specific intent to violate double jeopardy rights); Napue v. Illinois (due process violated by prosecutor's failure to correct misleading trial testimony); United States v. Bagley (due process violated by prosecutor's withholding of critical impeachment evidence).

None of the interests served by any procedural rule, or ultimately by the adversarial system, would be furthered by enforcement of a procedural bar against Mr. Spaziano. To be sure, the "sanctity" and "prominence" of his trial were undermined, Ensle v. Isaac, 456 U.S. 107, 127 (1987), but not because of Mr. Spaziano. And just as surely, his trial was marred by sandbagging, but it was not he who sought to manipulate the process to gain a tactical advantage.

In this case it was the State, not Mr. Spaziano, that has undercut the integrity of judicial process and that is responsible for the failure to litigate paramount constitutional questions in accord with state procedural law. It is the state that jeopardized the adversarial process when it withheld the factual basis for the claims.

Procedural rules must protect the defense's sood faith, as they should protect a state's sood faith attempts to honor constitutional rights. Isaac, 456 U.S. at 128 (emphasis added).

It would be ironic indeed if a doctrine rooted in equity were turned on its head and used to shield the State's deliberate subversion of a defendant's constitutional rights.

Thus, the equitable principles which govern Rule 3.850 all militate strongly against the State's assertion of procedural default here. The fairness and integrity of the process will best be served by the vindication of the important rights denied Mr. Spaziano, rights denied by the State's deliberate misconduct. Under all of the circumstances of this case, Mr. Spaziano has not engaged in any procedural default.

B. The Motion and Files Do Not Conclusively Show that Mr. Spaziano is Entitled to No Relief Because the Bradv Claims Presented Are Meritorious

The State's brief attempts to minimize the significance of the Bradv materials. The record shows otherwise. At the least, the Bradv violations require an evidentiary hearing to determine their significance.

For example, in its attempt to minimize the significance of the Joe Suarez materials, the State claims that "if defense counsel wanted to 'prove' that the [telephone] caller was Suarez, he could simply have contacted him to find out." State's Brief at 11. This argument ignores three basic facts.

First, the improperly withheld police report shows that after the police interviewed Suarez, he suddenly left town for an undisclosed location, thus making any effort to "simply contact him" difficult, if not impossible. R - 202.

Second, even if defense counsel could have successfully tracked down Suarez, this does not excuse the State's failure to meet its constitutional responsibilities by disclosing the Bradv materials. Indeed, in Miller v. Wainwright, No. 83-849 (M.D. Fla.1987),[1] the precise same argument was made and rejected:

> The state contends that because the petitioners had several opportunities to, and in fact, did, depose [the witness], the petitioners had equal access to the evidence and, accordingly, it was not suppressed. The state's argument is meritless.

Opinion at 9. The State's obligation to disclose exculpat ry materials exists regardless of whether defense counsel might discover that evidence elsewhere. Finally, the State's argument may demonstrate the need for an evidentiary hearing on this point. Factual questions which may need to be resolved at that hearing include Suarez's accessibility to defense counsel and the significance of the evidence to the defense.

The State's attempt to attach harmless error to the Suarez telephone call is clearly without merit, especially without an evidentiary hearing. The decedent's roommate gave extremely damaging testimony that on the night before the decedent's disappearance (August 4, 1974), the last person with whom the decedent had spoken was named "Joe," implying that this person was likely Joe Spaziano. Negating this crucial part of the State's case is the undisclosed police report, which positively

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[1] A copy of this opinion is appended to this brief.

identifies the caller as Joe Suarez.[2] It matters not that defense counsel was able to cast some doubt on the identity of the caller when, even with that doubt, the call remained an important piece of circumstantial evidence in a very weak prosecution case. Moreover, the State's claim that the evidence was inadmissible is without merit. As Judge Carr explained in Miller, the admissibility of wrongfully withheld Brady material is irrelevant:

> Initially, the state attempts to argue that the . . . police reports are not admissible and, therefore, are not evidence pursuant to Brady. Even assuming, arguendo, that the reports themselves are not admissible, that fact is not justification for the state's failure to produce such material where it may have led petitioners' counsel to admissible evidence or where the information was material to the preparation of petitioners' defense. See Sellers v. Estelle, 651 F.2d 1074, 1077 n.6 (5th Cir. 1981), cert. denied, 455 U.S. 927 (1982).

Miller at 9 n.5.

If the instant materials had been disclosed to the defense and Mr. Suarez ultimately could have been located, he could have testified, and if he could not have been located, his statement against his interest (which tends to show he was the killer) was admissible through the testimony of the officer. See Section 90.804(2)(c), Florida Statutes (1973). In any event, the

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[2] Although the police report identifies the date of the call as August 5 -- not August 4 -- it is plain that this is merely a scrivener's error and that all parties are referring to the same telephone call. This is because at 6:00 P.M. on August 5, the decedent had already disappeared, R - 201, and she could not have been speaking on the telephone on that latter date.

information could have been used to more effectively cross-examine the decedent's roommate.

The State's argument with respect to the police conclusion that Suarez was with the victim after her disappearance is also without merit. Although another witness gave a different account of the decedent's whereabouts, the officer concluded she was with Mr. Suarez. As in Miller, the officer's conclusions made at the time of the investigation -- even though the State may now take issue with them -- are Brady materials which must be disclosed. See Miller at pp. 13-14.

Regarding the Lynwood Tate information, the State attempts to discredit the conclusion of the police that Mr. Tate was the killer, noting "it seems odd that if the state concluded that Tate committed the murder it never presented this information to a grand jury." State's Brief at **13**. There are any number of reasons that the State may not have presented the Tate materials to the grand jury. The issue here is not whether there was sufficient evidence to indict Mr. Tate, but whether there was evidence which supported a reasonable doubt concerning Mr. Spaziano's guilt. See Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988). Although the State seems to think that Mr. Tate's suspicious activities were irrelevant to this action, we disagree. This Court should not speculate what weight a jury might have given this evidence; rather, the question here is simply whether it was favorable to the defense, which it clearly

was.[3] See Miller at 13-14.

Finally, with respect to the newly revealed evidence tending to impeach Mr. Dilisio, there can be no question about materiality where the State has candidly admitted that Mr. Dilisio's testimony was the crux of its case.

CONCLUSION

Based upon the foregoing, Mr. Spaziano respectfully requests that this Court reverse and direct that the trial court hold an evidentiary hearing on this matter.

Respectfully submitted,

Edward S. Stafman
Stafman & Friedlander, P.A.
424 East Call Street
Tallahassee, FL 32301
(904) 681-7830

Attorney for Appellant

[3] We cannot help to comment upon the State's misleading remark in its brief that the Tate information was useless to Mr. Spaziano, "himself a known rapist as well as mutilator of women, who was placed at the dump by two witnesses, one of which was a long time friend." State's Brief at 13. While it is true that Mr. Spaziano was convicted of another rape, primarily upon the same impeached, inadmissible, and unreliable hypnotically refreshed testimony of Tony Dilisio used to convict him in the instant case, that conviction is highly suspect and is currently under challenge. The "two witnesses" to whom the State refers are Dilisio and a friend of Mr. Spaziano who remembered that Mr. Spaziano had lived near the dump several Years before the murder and had stashed a small amount of marijuana there. TR - 581-82. This was a wholly different time period and circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to Kellie Anne Nielan, Esq., Assistant Attorney General, Suite 447, 210 North Palmetto Avenue, Daytona Beach, FL 32114, this 5th day of June, 1990.

Edward S. Stafman