IN THE SUPREME COURT OF FLORIDA

JAMES E. HUNTER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 82,312

APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JAMES E. HUNTER, Appellant,	)	
vs.	)	CASE NUMBER 82,312
STATE OF FLORIDA, Appellee.	)	

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE FAILURE OF THE STATE TO DISCLOSE TO THE DEFENDANT EVIDENCE WHICH TENDED TO EXCULPATE HIM.

Appellant's Brady[1] claim is based upon the fact that there were **two** sets of pictures taken of defendant depicting his clothing and appearance the night of the homicide which were not provided to counsel before trial. (TR929,935) The first set of photographs were taken by Deputy Graves minutes after the shooting. (TR929) The second set of photographs were taken by Investigator McLean after appellant was placed in police custody. (TR936)

Appellant's motion for mistrial was based upon both sets of photographs:

> MR. BURDEN: Yes. I'd make a Motion for Mistrial, Your Honor, on the fact that I was not provided those photographs, either set. Your

[1] Brady v. Maryland, 373 U.S. 83 (1963)

> Honor, it's true that the photographs that had been marked in the photo lineup were viewed in the deposition of Donald Clark involving a robbery in Deland that happened earlier that evening, upon which my client was not charged.

The trial court ruled that the first set of pictures taken by Detective Graves were qualitatively deficient in value to be considered exculpatory:

> Looking at these photos, and they will be made a part of the record, they're photos of these gentlemen unclothed. Basically head shots. I see nothing in those photos that would be exculpatory or likely to lead to exculpatory evidence. Had they shown any clothing Mr. Burden, I would not hesitate to grant you a mistrial.
>
> (R942,43)

Concerning the second set of photographs the trial court ruled that there was disclosure:

> Counsel, regarding the lineup photos, I'm finding there was disclosure, so there's no problem here with the nondisclosure, either requiring any type of Richardson inquiry or Brady inquiry.
>
> (R942)

The disclosure of the photographs taken by investigator McLean is found in State's exhibit BB, CC, DD, and EE. (R940) A courtesy photostatic copy of the exhibits were provided to counsel for the appellant at the deposition of Donald Clark and the picture taken of appellant is in State Exhibit CC. Donald Clark was the victim of an armed robbery in Deland, Florida the same night as the shootings in Daytona Beach. Appellant was not charged in the armed robbery of Donald Clark. However, counsel for appellant was present during portions of the deposition of Clark because of

the multiple scheduling of depositions that day among co-defendants to the murder that occurred in Daytona Beach later that evening.

For purposes of disclosure of Brady material, the Clark armed robbery was totally unrelated to the murder charge in Daytona Beach. Eric Boyd was appellant's co-defendant in the instant case, and it was his counsel that scheduled and performed the deposition of Donald Clark. Subsequently, the State made a photostatic copy of the lineup page and provided it to counsel for Boyd and laid a courtesy copy of the lineup page in the seating area of counsel for appellant.

If this Court reviews the photostatic copy of State Exhibit CC, it does not depict the complete photograph but merely the face. The complete photograph which was not provided shows that appellant wore beige shorts and a white Florida Gators T-Shirt when he was arrested immediately after the shooting. State witnesses described the shooter as wearing a red hat, red shirt and blue jean shorts. (R739,828) The fact that the state had color pictures depicting appellant's clothing and appearance taken minutes after the shooting in Daytona Beach was never disclosed to defense counsel. Such evidence was material exculpatory evidence. The failure of the state to disclose such evidence requires that the case must be reversed for a new trial.

The trial court's determination that there was disclosure of the second set of pictures belies the facts. The prosecution team at no time disclosed to appellant that any

pictures of appellant were taken the night of shootings because they did not know themselves of their existence:

> THE COURT: Does the state have in its possession any photographs of these defendants on the night of their arrest?
>
> MR. ALEXANDER: No, we do not. Ms. Blackburn, do you have any?
>
> MS. BLACKBURN: I'm not aware of any as I stand here right now. I know the cards were done describing their descriptions of the ones who were arrested...
>
> (R898)

During the trial court's Brady inquiry, it was revealed for the first time that one set of pictures were taken by Deputy Graves at the scene of appellant's arrest and that an additional set of pictures were taken by Investigator Mclean at the police station. The fact that the state provided a courtesy xeroxed copy of the lineup sheet which was state evidence to be used in an armed robbery prosecution of Eric Boyd does not satisfy the disclosure requirements. During oral argument counsel for appellant was asked why the pictures were not used at trial once they were discovered to exist. The reason they were not used was because the trial court ruled that the photostatic copy of the lineup that was provided to counsel for appellant was disclosure of the picture. Obviously, a review of photostatic copy of the lineup pictures demonstrates that what was actually disclosed by the state had no evidentiary value in the Brady context because it did not depict the color of the clothing of the appellant.

If one follows the trial court's finding, the state has no duty to disclose exculpatory evidence but merely provide

copies of their case file. Appellant argues that the Brady decision mandates that the state has an affirmative duty to disclose exculpatory evidence. The complete color picture of appellant taken the night of his arrest, and not the facial display that was used for the lineup picture box was exculpatory evidence in the possession of the state. The complete color picture of appellant was not provided to counsel, nor was the fact that a color picture that showed appellant's clothing the night of the shooting was in the state's possession because the prosecution team did not know of its existence.[2]

In Gorham v. State, 597 So.2d 782 (Fla. 1992) the state did not disclose to defense counsel that the state's key witness was a confidential police informant. This Court reversed Gorham's conviction and granted a new trial because of the defense counsel's inability to cross-examine the state witness concerning any bias. In the instant case the strength of the state's case was the identification of appellant by the surviving victims. Immediately after the shooting the victims described the shooter as wearing blue shorts and a red shirt. The pictures taken of appellant immediately after the shooting do not match the description given by the victims. As in Gorham, had the state disclosed to defense counsel that two sets of pictures were taken of the appellant immediately after his arrest, these

---

[2] It is irrelevant as to whether the prosecutor or the police failed to disclose. It is sufficient that the state failed to disclose. See Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984)

pictures could have been used to cross-examine the victims which would have been very powerful in supporting the defense theory that there was misidentification.

Whether Brady evidence is material is determined by whether:

> [T]here is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.
>
> Garcia v. State, 622 So.2d 1325, 1330 (Fla. 1993) citing United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)

The trial court conceded the materiality of these pictures when she ruled on the field identification pictures:

> Looking at these photos, and they will be made a part of the record, they're photos of these gentlemen unclothed. Basically head shots. I see nothing in those photos that would be exculpatory or likely to lead to exculpatory evidence. Had they shown any clothing Mr. Burden, I would not hesitate to grant you a mistrial.
>
> (R942,43)

Because the State failed to provide both sets of photographs that were both material information in its possession to the defense which could have reasonably resulted in a different outcome at trial, a new trial is required. See Duarte v. State, 598 So.2d 270 (Fla. 3rd DCA 1992) (failure of state to provide fingerprint card).

CONCLUSION

Based upon the foregoing cases, authorities, policies and argument, as well as those set forth in the initial and reply briefs, James Hunter respectfully requests that this Honorable Court vacate his convictions and sentences and remand for a new trial where life imprisonment is the maximum possible sentence.

Respectfully submitted,

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0786438
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 in his basket at the Fifth District Court of Appeal, and mailed to Mr. James E. Hunter, #115624 (45-1276-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 1st day of February, 1995.

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER