IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,2874

ERNEST CHARLES DOWNS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

GREGORY C. SMITH
Capital Collateral Representative
Northern Region
Florida Bar No. 279080

ANDREW THOMAS
Chief Assistant CCC - NR
Florida Bar No. 0317942

JOHN A. TOMASINO
Assistant CCC - NR
Florida Bar No. 106021

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533-B South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

References in this brief will be consistent with those made in Appellant's Initial Brief, with the following additions:

"IB at _____." Appellant's Initial Brief

"AB at _____." Appellee's Answer Brief.

"PC-R.2S ___." Supplemental Record on Appeal on the Second 3.850 Appeal to this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENTS IN REPLY

Mr. Downs addresses three issues in his reply brief. The first two issues, the non-compliance of the Jacksonville Sheriff's Office (JSO) with chapter 119 and the Brady[1] claim are inextricably linked. Mr. Downs contends that the JSO has failed to turn over all records generated in the investigation of Mr. Harris' (the victim) death. The circuit court erred in finding the record uncontroverted that the JSO has fully complied. The records custodian himself testified that he could not say that all records generated by the JSO had been produced. Obviously, this placed controverted evidence on the record that the JSO had fully complied with chapter 119.

The circuit court's failure to allow Mr. Downs the opportunity to discover additional records in the possession of the JSO is even more egregious when considered in light of the Brady issue. Counsel for Mr. Downs has received a handwritten memorandum generated by either the JSO and/or the Duval State Attorney's Office outlining the extent of the investigation conducted that focused not on the theory presented during Mr. Downs' original trial and re-sentencing hearing by the State. The memorandum focused instead on the exact theory that Mr. Downs repeatedly attempted to put before the jury but was precluded each and every time by the circuit court. The JSO and/or the Duval State Attorney's Office, as evidenced by the memorandum, actively investigated an alternate theory of Mr. Harris'

---

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

disappearance and death before, during, and after Mr. Downs' conviction. No records have been turned over by the JSO reflecting this investigation. The circuit court erred in dismissing this claim as procedurally barred.

The circuit court also erred in summarily denying Mr. Downs' claim of ineffective assistance of counsel. The circuit court curtly dismissed this claim under the guise that Mr. Downs represented himself; therefore, he could not raise this claim. The circuit court disregarded the active role Mr. Arias, supposed "stand-by counsel" to Mr. Downs, played in Mr. Downs' re-sentencing. Mr. Arias conducted himself as co-counsel and was treated as co-counsel by the trial judge. The circuit court, as evidenced by its ruling, made an erroneous legal ruling by summarily denying this claim and denying Mr. Downs the opportunity to present evidence to support this claim.

ISSUE I: THE 119 PUBLIC RECORDS CLAIM

The circuit court erred in denying Mr. Downs the opportunity to question the Jacksonville Sheriff's Office (JSO) personnel regarding the existence of previously undisclosed 119 materials. Counsel for Mr. Downs, at both a telephonic hearing and at a subsequent hearing scheduled for the purpose of the judge hearing legal argument, placed on the record numerous indicators that the JSO was not in full compliance with the dictates of chapter 119 and the Florida Constitution. (PC-R.2 at 277-301, PC-R.2S at 1-108.)

On July 11, 1994, the circuit court held a telephonic hearing. Counsel for Mr. Downs, Steve Kissinger, requested a full evidentiary hearing regarding the non-compliance of the JSO. (PC-R.2 at 288.) Specifically, Mr. Kissinger requested sufficient time to issue witness subpoenas. (PC-R.2 at 293.) The State strenuously objected to the calling of any witnesses. (PC-R.2 at 293.) The circuit court adopted the State's position and scheduled a hearing for the presentment of <u>legal</u> argument regarding the non-compliance of the JSO: "Well, let me suggest this: Perhaps if we have a hearing on the legal issues with counsel to provide the court with the case law so that I can be better educated in this area rather than planning an extensive long hearing. I think that might be premature." (PC-R.2 at 293.)

At this next scheduled hearing held purportedly for the presentment of legal argument, the circuit court, over objection from Mr. Kissinger, allowed the State to present the <u>non-legal</u> testimony of a representative from the JSO. Mr. Kissinger sought permission from the circuit court to issue subpoenas for witnesses for this hearing, which was denied after the State's objection. The State precluded Mr. Kissinger from calling witnesses but then presented the testimony of their own witness. The circuit court precluded Mr. Kissinger from calling witnesses but then allowed the State to present testimony over objection. This egregious due process violation necessitates a remand to the

circuit court for an evidentiary hearing on the 119 claim.[2] See Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994) ("While Johnson's motion was purportedly denied as a matter of law, the trial judge permitted the State to introduce evidence from a rap sheet that Pruitt was much shorter and lighter in weight than the description given by Summitt. Under these circumstances, it is difficult to see why Johnson should have been precluded from also putting on evidence.")

At this subsequent hearing, Mr. Kissinger again placed on the record the numerous indicators that the JSO was not in full compliance with chapter 119. (PC-R.2 at 21-29.) The State, in its Answer Brief, went to great pains to direct this Court's attention away from this portion of the record. Instead, the State structured its Answer Brief to give the illusion that Mr. Kissinger was demanding an 119 evidentiary hearing based on the size (one inch) of materials produced by the JSO. (AB at 16-27). The State asserted: "Merely because Mr. Kissinger did not think the JSO file was thick enough, does not mean an evidentiary hearing was required." (AB at 27.)

Mr. Kissinger's argument, however, was substantially more fleshed out than reported by the State:

> Your honor, specifically -- and we began to go over these things last week, but this will give the sheriff's department specific items to look for. And again, we're not saying these are the only items, it's just apparent

---

[2]In its answer brief, the State completely disregarded this important, substantive issue.

from the fact that these times are missing, that the file is not complete.

Beginning, Detective D.L. Starling, Officer Fred Williams, and Sergeant Patrick Miles were assigned had (sic) to the case when Forrest Jerry Harris disappeared. Together they interviewed Elaine Harris, Bob Browning, Gary Holmes, Chris Palluchi, Larry Johnson, Jerry Sapp, John Barfield and Ernest Downs. We have no notes, with the possible exception of Officer Williams, from any of these interviews. Now, we may have Officer Williams' notes, but we do not have Detective Starling's notes or Sergeant Miles' notes. . . .

James Lamar Suber went along with others from the sheriff's when Johnson -- Larry Johnson led them to the body of Forest Jerry Harris. Mr. Suber has talked to Larry Johnson, has spoken to Mr. Downs on more than one occasion, we have no notes from any of -- either from the trip out to the body of Mr. Harris or from the interviews.

Next item, Sergeant Miles was in charge of the Harris investigation. He talked to Forrest Jerry Harris' associates, Elaine Harris, Bob Browning, Jerry Hutchinson, people at American National Bank, people at Craig Airport, Fran -- and I'm not exactly (sic) who Fran is -- but -- and other woman that Harris ran around with. Gary Holmes and Ernest Downs. We have no notes from any of these individuals.

Jim Spaulding was involved in the Downs case, or actually in the Forrest Jerry Harris case, from the beginning. He reviewed Farris -- Harris', I'm sorry, phone index cards. He interviewed Jerry Hutchinson, Larry Johnson, O. P. Michael, Robin Downs, Ernest Downs. Spaulding also said that Ernest confessed to the murder, confessed the murder to his cellmate, a man by the name of Harry Rafuse, It's R-a -- capital R, a-f-u-s-e. We have no notes from any of these interviews. Julian Wilson was the polygraph examiner with the sheriff's office.

On August 10th of 1977, Mr. Wilson ran four charts on Larry Johnson. We do not have any of the questions, results, or Wilson's opinion on the test. Here is another good example, we don't know whether -- well the charts were obviously generated, but we don't

> no whether Wilson issued any written opinions, but the only way to tell that is to have Mr. Wilson here to talk about it.
>
> Next item, Detective Fred Williams was involved in the case from the beginning. In addition to arresting John Barfield, he also spoke to John Barfield -- and again, we are just a tad repetitive here, Your Honor, -- Larry Johnson, Elaine Harris, Elsie Harris, Bob Browning, people with American National Bank, people at Craig Field, O.P. Michael. And he did that on more that one occasion. Williams also looked at the flight logbook at Craig Airport. Other than the spiral notebook that we've looked at, that we spoke of before, that doesn't appear to contain all of the notes, we have no notes from any of those interviews.
>
> Detective Starling was on the case for three and a half months prior to Johnson's first statement. We have no notes from any of Detective Starling's activities. Officer Don K. Bryan, from the crime lab, took photographs of the scene. We did not receive any photographs from the sheriff's office. Now, as Mr. Corey pointed out last week, we did receive some photos from the state attorney's office, but we do not know if those photos were the same -- the same photos taken by Officer Bryan or what the source of those photos was (sic).[3]

---

[3]The State argued at the hearing and in its Answer Brief that CCC-NR, by pointing out items that existed but were never turned over by an agency, were simply requesting duplication of effort. The State is creating an insurmountable catch 22 that CCC-NR will never be able to overcome. If CCC-NR states that we know the sheriff's department took photos because we received sheriff photos from the defense attorney file, the State counters that because we have the photos, our request is dilatory, duplicitous, and disingenuous. But is not the best evidence that CCR can present that an agency has not found or produced all public records generated in a specific case the existence of materials that have never been turned over?

Absent specific materials turned over by other agencies that originated by an agency in non-compliance with chapter 119, CCC-NR must present circumstantial evidence that an agency has failed to comply. But when CCC-NR relies on circumstantial evidence to prove the existence of unproduced records, the State asks this Court to deny a hearing based on CCC-NR's <u>mere speculation</u> that said documents exist. This crafty sophistry would effectively

Next item, August 2nd, 1977, report by Detective Williams. He indicates that the investigation into Mr. Harris' disappearance developed a great deal of information about Mr. Harris and his many business associates. Detective Williams goes on to say that the information will be detailed in a later report. We never received that later report regarding Mr. Harris' many business associates. Detective William, by the way, wrote two reports during the entire investigation. He was the only person that -- he was the only person that we have any notes from thus far.

I believe there was a press release issued on August 23rd, 1977, indicating that since Mr. Harris' disappearance, hundreds of manhours had been utilized in the investigation. Detective Williams' two reports do not reflect the hundreds of manhours of investigations.

Next item, the crime lab van. I believe it was driven by Mr. Bryan, took Mr. Harris' body or the remains of Mr. Harris' body to the medical examiner's office. There is no report by Mr. Bryan regarding his activities in -- his activities in relation to taking the body there. The steno pad, which we mentioned before, has notes from April 29th, 1977 -- excuse me -- to May 17th, 1977. By my account, that is 18 days. Investigation didn't end on May 17th, 1977. There were still people interviewed after that date, but that's all of the notes that we have. . . .

We have some arrest and booking reports when the co-defendants in this matter were arrested for -- in the first degree murder, conspiracy to commit first degree murder charges. The second page of -- the second sides of those arrest and booking reports were missing.

Again, that's a situation where it's a two-page page document, and simply because it isn't -- it isn't -- sometimes those back pages get left out because you're switching constantly from single-side to double-sided documents. That could have been inadvertent. We don't know that, but they appear to be missing. . . .

---

end chapter 119 compliance if adopted by this Court.

> Again, perhaps if we had the officers who generated reports here, then they could say, Yeah, that's mine, that's the one I wrote, that's the extent of my -- the extent of my involvement in this case. Those are the -- those are the specific -- specific items in this case. I know the State is -- feels that Chapter 119 has become a vehicle of abuse for capital defendants, but as the Court is well aware, this is a case that was involving a number of co-conspirators. And one of the primary co-conspirators in this case, a person who has admitted involvement up to the point of the actual shooting, Larry Johnson, wasn't just allowed to plead to -- to life or to a -- or a lesser offense. Larry Johnson was given complete immunity and did not serve a single day in prison for this offense.

(PC-R.2 at 21-29.)

Mr. Kissinger placed on the record substantial direct and circumstantial evidence that records generated by the JSO were never produced for collateral counsel's review. The circuit court's ruling that "[t]he evidence [is] uncontroverted that all records of JSO have been provided defense (sic)" is clearly erroneous. (PC-R.2S at 109-119.) Even the representative of the JSO that testified over defense objection stated that he could not testify that the JSO turned over everything in its possession. (PC-R.2S at 60.) Clearly, the evidence was controverted that all records of the JSO had been provided to Mr. Downs and thus the circuit court erred in summarily denying an evidentiary hearing on this 3.850 claim. See, Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993) (evidentiary hearing on 3.850 motion is a proper vehicle for raising non-compliance with chapter 119); see also, Ventura v. State, 673 So. 2d 479, 481

(Fla. 1996) (dismissal of 3.850 motion premature in light of unfulfilled public record requests); see also, Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993) (movant is entitled to an evidentiary hearing unless the motion, files, and records conclusively show that the movant is not entitled to relief).

The State's reliance on Mendyk v. State, 1997 WL 758793 (Fla.) (successive post-conviction case) is misplaced. In Mendyk, there was the question as to whether notes from one interview had been released to collateral counsel.[4] Id. at 3. To answer this question, the state submitted an affidavit from the officer that conducted the interview that he took no notes. Id. Counsel for Mendyk made no allegations tending to impugn the veracity of the affidavit. Id. Based on these facts, this Court concluded: "In the absence of a showing that such notes or recording may have been made, the trial judge did not abuse his discretion in denying Mendyk's motion in this regard." Id. (emphasis added). The State, in its answer brief, appears to concede that Mr. Downs is entitled to an evidentiary hearing on this claim. (AB at 23). The State opined: "Second, he based his assertion that those materials were incomplete because he found they were only two inches thick, and conjectured from the police reports he reviewed that there may have been notes, which may have been incorporated into those reports." (AB at 23)

---

[4]Whereas in the case at bar, there were numerous interviews and hundreds of hours of investigative field work that resulted in only one deputy's notes being released to Mr. Downs.

(emphasis in the original.)[5] Therefore, Mendyk's holding dictates that because there was a showing that these items may have existed, an evidentiary hearing is required. The State submitted no affidavits from the JSO deputies that worked on Mr. Downs' case and the custodian of records that testified over objection stated emphatically that he did not know whether the JSO had turned over everything in its possession. The record from the 119 hearings is ripe with examples that notes may have been made by the various officers investigating Harris' disappearance, but that none were produced. Mendyk dictates that the circuit court erred in summarily denying Downs' 119 claim and an evidentiary hearing must be held.

Mendyk also involved the whereabouts of an unedited videotape. Id. at 2. Again, the state submitted affidavits from various personnel attesting that the videotape could not be found. Id. This Court stated that "Mendyk should not have been precluded from either exploring by deposition or at an evidentiary hearing the existence or location of the missing records." Id. This Court, however, reasoned that due to the existence of the edited videotape, coupled with the defendant's repeated confession of committing the murder, there was "no

---

[5]In actuality, Mr. Kissinger based his argument on the paucity of the materials produced coupled with the inordinate number of man-hours spent on the case, the large number of investigators working on the case, and the large number of persons interviewed for this case, and the virtually complete absence of notes turned over by the JSO. (See infra.)

possibility that the unedited video would contain any information which could form the basis for a claim under rule 3.850." Id. Such an assertion can not be reached in the case at bar. Mr. Downs has repeatedly professed that Larry Johnson was the trigger man. Furthermore, Mr. Downs has repeatedly asserted that the State was investigating an alternative motive for the murder of Mr. Harris than the one presented by the State during the original trial and subsequent re-sentencing of Mr. Downs. Finally, Mr. Downs has asserted a Brady violation that specifically relates to the non-compliance of the JSO. Mendyk dictates that an evidentiary hearing, or at a minimum, discovery depositions, be allowed to investigate the breadth of the JSO non-compliance.

The State also relied on Mills v. State, 684 So. 2d 801 (Fla. 1996) (successive post-conviction case) for the misplaced proposition that the circuit court's summary denial of the 119 claim was proper. Mills addressed the 119 issue with the following paragraph:

> "However, the sheriff's department contends that it does not have the requested documents. We find no abuse of discretion in the trial court's failure to order the production of records where there is no demonstration that the records exist."

Id. at 806 (emphasis added). Mr. Kissinger clearly demonstrated certain documents may exist but were never turned over by the JSO. (PC-R.2 at 21-27.) Additionally, Mr. Kissinger demonstrated that records had been received from other agencies and that these records were generated by the JSO but have never

been turned over by the JSO. (PC-R.2 at 21-27.) Lastly, the records custodian for the JSO testified that he did not have knowledge as to whether the JSO was in full compliance with chapter 119. (PC-R.2S at 60).

The State asserted in its answer brief that Downs' 119 claim is waived because he did not amend his 3.850 motion when the circuit court granted an additional 45 days to file any amendments. (AB at 18.) The State argued that because Downs told the circuit court that he had no basis upon which to amend the 3.850 motion, his 119 claim is waived and moot. (AB at 18.) The State disregards the fact that because the circuit court erroneously failed to compel the JSO to provide undisclosed records, Mr. Downs had no new records to form the basis of an amended claim. The circuit court gave Mr. Downs an additional 45 days to amend the motion after receiving records that are not at issue on this appeal. Solely because other records, from other agencies, were produced, and Mr. Downs was given the opportunity to amend based on that disclosure is totally irrelevant as to the issue of the propriety of the circuit court's ruling on the 119 claim as it pertains to the JSO.

ISSUE II: THE BRADY CLAIM

The circuit court dismissed the Brady claim as procedurally barred, relying upon a misinterpretation of Brady. The State relied upon the circuit court's argument summarily denying Mr. Downs' initial 3.850 Brady claim. The circuit court and the State stressed that because Mr. Downs has been attempting to

argue since his arrest that the State's theory of motive was wrong -- Mr. Harris was not murdered for insurance purposes and that Mr. Johnson, not Mr. Downs, was the actual triggerman -- Mr. Downs has no valid Brady claim. However, a handwritten memorandum heretofore withheld by the State reveals that, in the more than four months which elapsed between the time of Mr. Harris' disappearance and the time Mr. Johnson came forward with his story that Mr. Downs had killed Mr. Harris, the JSO and/or the Duval County State Attorney's Office had focused their investigation on the connection between Mr. Harris' disappearance and his cooperation with federal authorities.

Mr. Downs has repeatedly asserted that Mr. Johnson shot Mr. Harris not for insurance proceeds, but because of his cooperation with federal authorities on federal banking fraud charges, but to no avail. Mr. Downs has repeatedly proffered this connection at the circuit court and has been shut down each time. But Mr. Downs never had anything to offer the courts other than his word, which has never been accepted.

The State has now produced a memorandum corroborating Mr. Downs' version of events and discrediting Mr. Johnson's version. This exculpatory evidence is critical to the penalty phase of Mr. Downs' re-sentencing as it is directly pertinent to the issue of proportionality.

Because the State has a continuing duty to disclose Brady material, and the Brady material has just come to light, this issue is not procedurally barred. See Brady v. Maryland, 373

U.S. 83 (1963); see also Johnson v. Butterworth, 707 So. 2d 334, 337 (Fla. 1998) "([T]he State is under a continuing obligation to disclose any exculpatory evidence."); Pennsylvania v. Ritchie, 107 S. Ct. 989, 1002 (1987); Smith v. Roberts, 115 F.3d 818 (10th Cir. 1997). At Mr. Downs' original trial proceedings, he attempted to discredit the only eye witness, Larry Johnson, by showing that Mr. Johnson's testimony concerning the motive for the killing was fabricated. The circuit court allowed a proffer of the connection between Mr. Hamowitz and the federal government's investigation into his illegal banking activities and the fact that Mr. Harris was a key witness for the federal government in this investigation, but then ruled that there was too tenuous a connection and did not allow this evidence to go before the jury. Had Mr. Downs been able to produce evidence confirming the link between Hamowitz, Harris, and the federal investigation, the circuit court's ruling would have been different.

At the re-sentencing, Mr. Downs once again attempted to convince the circuit court to allow the jury to hear the alternative theory of motive and trigger man. In fact, Mr. Downs called as a witness his original trial attorney to testify as to the pressure that was brought to bear on him and other factual matters that supported Mr. Downs' theory of motive and trigger man:

> Q Would you please give your address to the court please?

A My name is Richard L. Brown. My address is 6121 Town Colony Drive, Apartment 724, Boca Raton, Florida.
Q And what do you do, sir?
A I am a lawyer.
Q I would like for you to back up to August of 1977. Do you recall the first time that you ever met me?
A Yes.
Q Do you recall the dates, sir?
A No. In January of 1989 I don't recall the date. What it was in 1977, no.
Q Did you represent me back in 1977 in regards to the Jerry Foster Harris murder case?
A Yes.
Q Do you know Judge Pate?
A Yes.
Q She was the judge during that trial, was that correct?
A Yes.
Q Do you recall that my trial started December 12th of 1977?
A Again I don't recall the dates here 12 years later.
Q Do you recall that the state rested its case December 15th, 1977?
A Again I don't recall the date. That sounds about right.
Q Do you recall on the evening or early morning of December 16th, 1977 that my mother called you, sir?
A The date I wouldn't recall, but I know I talked to your mother many, many, many times.
Q On this particular time frame, sir, do you recall exactly what my mother said to you or give some idea what she said to you during the course of that conversation? . . .
Q I talked to your mother about many things. I would have to be directed to a specific area.
Q Okay. I am talking about --
A Subject matter or something like that.
Q I am talking about prior to the state's resting its case and when we was fixing to present ours.
A Again I would have to be directed to a subject area. I talked to her about many, many different things.

Q Do you recall a conversation in which she said she had received a phone call in regards to you?
A Yes. That happened.
Q Would you please tell the Court what was said during the course of that conversation?
A That she received a phone call in regards to me?
Q Yes.
A She called me one time and was very upset and told me that she had been informed that I had sold you out, something to that effect.
Q Okay. Shortly after that conversation with my mother do you recall that you and I was in Judge Paten's chambers in the back?
A Well, we were there several times.
Q But I mean this was within hours after that phone call, you know, the following morning.
A 12 years later I don't know the sequence of it.
Q Do you recall sitting in Judge Paten's chambers and me telling you that I had spoken to my mother in regards to that?
A There was a time you told me that. I don't know whether it was in Judge Paten's chambers or what but, yes, that's correct.
Q Do you recall telling me that a lot of strange things had been happening and that someone had tried to set you up in a motel room with some women?
A Again I don't know the exact timing of it but I did at some point tell you that I had gotten some calls which were very strange with some strange offers that did involve women and motel room, yes.
Q During the course of the defense of my case were you ever pressured by anyone?
A From the beginning?
Q Yes.
A I had one of the potential witnesses in the case tried to persuade me not to involve him.
Q And which one was that, sir?
A That was Buddy Haimowitz.
Q Do you feel that this pressure or all these strange things that went on back then do you feel that could have

affected your judgment in the defense of my case?

A I would hope that it didn't, but I -- you know, 12 15 years ago I can't recapitulate all of my mind thinkings and so forth at that particular time and all the gyrations that my mind was going through when we were trying that case.

Q Are you familiar with the people involved in the Jerry Harris case as far as co-defendants went?

A Yes.

Q Do you believe it's fair for the state to seek the death penalty in this case against me when all the other co-conspirators were able to get deals or some sort of immunity?

A No, no.

Q I have no further questions, Your Honor.

THE COURT: Okay. . .

MR. DOWNS: I can most certainly understand the state's objection, but back in 1982 and '83 when I placed Mr. Brown on the witness stand during the course of a 3.850 proceeding my -- I was in fact limited into what we could say, and in fact Mr. Brown was held in contempt of court back then and in fact placed under arrest and led from the room courtroom and you had to call the Public Defender's Office to defend him, and it wasn't until Mr. Brown and I met in jury's chambers and I told Mr. Brown in advance what I would ask him before he ever agreed to come in the courtroom and testify. Only thing I want to do, Your Honor, is get this on the record any way possible.

THE COURT: All right. Because I think the questions to Mr. Brown as far as his opinion whether the death penalty is warranted in your case because of the deals cut with other defendants or co-defendants would be part of the jury's decision in this case, so I don't think that would be appropriate, and the other matters that have been testified to I don't think would go, so I would sustain the state's objection on this.

(R.2 at 760-765.)

But yet again, the circuit court did not allow the jury to hear this evidence. Had the State produced the Brady material in its possession showing their investigation before, during and after Mr. Downs' original trial into the connection between Harris' death and his knowledge of the illegal activities of Harold Hamowitz, the circuit court would have been compelled to allow Mr. Brown's testimony before the jury.

This evidence would have directly impacted the issue of proportionality and cast a serious doubt on the validity of the State's theory and on the crucial testimony of the only eye witness, Larry Johnson. Larry Johnson, a co-conspirator intimately involved in the conspiracy, did not spend one day in jail for his role in the Harris murder. The State told Mr. Johnson, and the re-sentencing jury, that Mr. Johnson's deal was conditioned on Mr. Johnson telling the truth. Mr. Johnson parroted the State's theory of motive to the jury. Had Mr. Downs been allowed to cast doubt on the truthfulness of Mr. Johnson with record evidence of the State's investigation into the Harris-Hamowitz connection, Mr. Downs would not have received the death penalty in his re-sentencing, considering the slim 8-4 margin without this evidence.

The circuit court's ruling procedurally barring the Brady claim is even more egregious when considered in light of Larry Johnson's alleged unavailability at the re-sentencing. The State called its investigator to testify as to how he was unable to locate Larry Johnson for the re-sentencing. (R.2 529.) The

circuit court ruled that Mr. Johnson was unavailable and thus his original trial testimony was read into the record.[6] Therefore, Mr. Downs did not have the opportunity to cross-examine Mr. Johnson at the re-sentencing and had to rely on the direct and cross testimony from the original proceedings. Mr. Downs attempted to object, stating that the reason for the cross-examination of Mr. Johnson was different at the original guilt-innocence phase than at the re-sentencing phase:

> Downs: I'd like to argue, Your Honor, that there was restricted cross examination in regards to Larry Johnson back in 1977.
> Court: Okay, would you refresh my recollection on --
> Downs: I don't have an exact page and line.
> Court: Mr. Arias, if you can be of help in that?
> Arias: Your Honor, maybe what Mr. Downs is saying, that, one, at the trial, just because I believe Mr. Brown attempted to cross examine further Mr. Johnson, he was restricted by

---

[6]The State's investigator testified he sent a letter to the U.S. Marshall's Service inquiring of Mr. Johnson's whereabouts after his release from the federal witness protection program. The U.S. Marshall's Service never answered the letter and the State's investigator did not follow up with the Marshall's Service. The State's investigator then ran an NCIC check and found an arrest in Louisiana on Mr. Johnson. When arrested, Mr. Johnson gave a Texas address. The State's investigator then sent a subpoena to this Texas address which was returned "no such address." On cross-examination, Mr. Downs inquired if the State's investigator had attempted to contact Mr. Johnson's sister in Texas. The investigator replied he did not even realize Mr. Johnson had a sister. Mr. Downs then inquired as to whether the investigator realized that Mr. Johnson had given an address of Conroe, Texas during his sworn statements and depositions taken during the original proceedings. The investigator answered he was unaware of that address. Based on this very limited, cursory investigation, the circuit court ruled Mr. Johnson unavailable. (R.2 at 521-35.)

this Court. I don't know whether that was an issue on appeal, but that was indeed the case. As the Court, apparently you, and the State -- I mean the State and Mr. Brown were going into some new area, and they took a recess, or approached the bench, and afterwords (sic), when court was resumed, he was not examined. Correct?

Downs: No, you are thinking about Sapp.

Arias: I'm sorry. . . .

(R2. 529-530). This Court upheld the circuit court's ruling of unavailability, utilizing fundamental error analysis because of a perceived lack of contemporaneous objection. See Downs v. State, 572 So. 2d 895, 900 (Fla. 1990). Without Mr. Downs having the opportunity to cross-examine Mr. Johnson at the re-sentencing, the documents in the possession of the JSO and/or Duval State Attorney's Office tracking the investigation of the Harris-Hamowitz connection are even more crucial if Mr. Downs is to convince a jury regarding the lack of proportionality of Mr. Downs' sentence and Mr. Johnson's full immunity. The handwritten memorandum previously undisclosed is direct evidence that the JSO and/or Duval State Attorney's Office is withholding critical, material, exculpatory evidence.

ISSUE III: INEFFECTIVE ASSISTANCE OF COUNSEL

The circuit court erred in ruling that Mr. Downs "has forever waived this claim" based on his waiver of counsel. (AB at 61.) Mr. Downs was originally represented by out-of-state counsel at the beginning of the re-sentencing proceedings. (R2. at 26.) Pro Hac Vice counsel then withdrew, citing health

reasons prohibiting travel from New York. (R2. at 42.) After Mr. Downs was unable to acquire alternate counsel, he informed the circuit court that he wished to make an approximately two minute statement to the court. (R2. at 16.) The circuit court denied this request and conducted an inquiry into Mr. Downs' solvency. (R2. at 17.) The circuit court found Mr. Downs insolvent and asked if he wished counsel appointed. Mr. Downs responded negatively. (R2. at 17.) The circuit court then appointed Mr. Arias as counsel and granted a recess so that Mr. Downs could consult with Mr. Arias about making the statement to the court. (R2. at 18.) After the recess, Mr. Arias informed the court that he was unable to advise Mr. Downs whether or not to make the statement because Mr. Arias was unfamiliar with the record. (R2. at 19.) The circuit court then attempted a Faretta[7] inquiry and reserved ruling on Mr. Downs' request to waive counsel.[8] The circuit court stated:

> Now, I realize that you have a right to waive counsel, and I think what I'm going to do is reserve ruling on your request for waiver of counsel, maintain the appointment presently of Mr. Arias. I would reconsider that at a later time.
>
> I realize he is giving me good answers, also I'm a little uneasy about not having some legal protections here at this stage of the proceedings.

---

[7]Faretta v. California, 422 U.S. 806 (1975).

[8]Mr. Downs relies on his initial brief regarding the failure of the circuit court to conduct an adequate Faretta inquiry as to whether Mr. Downs made a voluntary, knowing and intelligent waiver of the right to counsel in violation of the U.S. and Florida constitutions.

(R2. at 27.)

At the next court proceedings held on August 19, 1988, the Assistant State Attorney requested that the judge consider the matter of Mr. Downs' prior waiver of counsel:

> Getting back more properly, last time in court Mr. Downs asked to represent himself. I think we need to take that up first.
>
> My reason, he filed pro se matters with the Court, indicates law is pretty clear defendant don't have a right to act as co-counsel. Any motion would be null unless adopted by the counsel. First order of business should do is to resolve this thing whether Mr. Downs wants to represent himself or not.

(R2. at 40-41.) Mr. Downs responded, correcting the assertion of the Assistant State Attorney:

> Mr. Steven Kuntz brought up a good point. He said that I could not be afforded the right to act as co-counsel, which I believe is incorrect. The Court <u>can</u> rule a defendant can be co-counsel with a lawyer. <u>I would ask at this time to be named as co-counsel with counselor.</u>

(R2. at 42.) (Emphasis added.) The circuit court responded:

> Okay. At the last hearing two or three things concerned me. You had written the Court a couple of weeks before asking for counsel. All of a sudden you appeared in court and said you wanted to represent yourself.
>
> Also, you know, there has to be, anyone whose (sic) worked in criminal law at any time, some handicap to a person whose incarcerated; investigation, doing it plus the fact, although you have been in the courtroom quite a bit, you don't have training as far as an attorney in admissibility of evidence some of the intricacies of a trial itself, particularly before the jury. I guess your request today is to represent yourself along with Mr. Arias, is that what you're saying?

(R2. at 43-44.) The circuit court then appointed Mr. Arias as standby counsel. (R2. at 46.)

Even though the circuit court labeled Mr. Arias as "standby counsel", the record is clear that Mr. Arias' played a much more active role. The circuit court, after hearing argument from the State, declined to appoint Mr. Arias as co-counsel, as was Mr. Downs' original wish, but then treated Mr. Arias as co-counsel throughout the entire proceedings.

Mr. Arias filed motions on behalf of Mr. Downs; he made argument before the jury; he made argument before the judge; Mr. Arias interviewed and located witnesses; he regularly conferred with the State; and he fully represented Mr. Downs during the latter stages of the proceedings, calling defense witnesses, making closing argument and preparing and arguing jury instructions.[9] The judge herself frequently inquired directly

---

[9]The following is a non-exhaustive listing of the record cites where Mr. Arias' role was that of co-counsel, as opposed to stand-by counsel: R.2 at 59 (Arias making argument directly to court), 64 (Arias inquiring about co-counselor status), 150 (Court addressed Arias for argument on a motion filed by Mr. Downs), 153 (Arias making argument to the judge), 160 (Arias making argument on a motion), 173-4 ("Continue the appointment of Mr. Arias to be of assistance") (emphasis added), 192-4 (Arias lining up witnesses and preparing them for testimony), 374 (Judge addressed Arias specifically as to length of Mr. Downs' case), 389 (Arias making argument on an objection), 429-30 (Downs requested Arias to do cross of a co-conspirator but State objected), 436-38 (Arias speaking out in presence of jury), 529-30 (Judge specifically addressed Arias concerning objection raised by Mr. Downs; Arias failed to properly preserve the issue for appellate review), 631 (Arias directly addressing the court), 640 (Arias directly responding to State's argument), 641 (Arias again addressing the court specifically), 643 (Arias meeting with the media about the possible closure of the courtroom), 648 (Arias files Notice of Hearing delivered to media re: closing courtroom due to Dugger's expected testimony), 649 (Judge stating

of Mr. Arias, bypassing Mr. Downs' input altogether. The circuit court erred in relying upon Tate v. State, 387 So. 2d 338 (Fla. 1980) in summarily denying this claim.

It is within the trial court's sound discretion to appoint co-counsel. See, Davis v. State, 586 So. 2d 1038, 1041 (Fla. 1991); see also, United States v. Kimmel, 672 F. 2d 720, 721 (9th Cir. 1982). The State argued that the circuit court did not have the discretion to appoint Mr. Arias as co-counsel. The circuit court was incorrectly persuaded by the State and declined to appoint Mr. Arias as co-counsel. Nonetheless, the circuit court treated Mr. Arias as co-counsel, and Mr. Arias himself acted as co-counsel.

---

to Arias: "I think you certainly did your duty"), 653-4 (Arias discusses Dugger and his expected testimony), 657 (Arias voir dires Dugger to establish predicate for excluding the media), 687 (Arias involved in the proffered testimony of a detective), 697 (Arias conducts unreported bench conference), 708 Arias re-opens State's direct testimony of a co-conspirator), 718-19 (Arias filing Motion and Order), 723 (Arias announces stipulation of deposition testimony and then plays the role of the witness), 728-736 (Arias argues whether a deceased witnesses testimony should be introduced), 740-44 (Arias again actively involved in argument before the court), 747-49 (Arias involved in the mitigation testimony of a defense witness), 757-58 (Arias involved in the proffer of Downs' original trial attorney's testimony), 766 (Arias involved in on explaining to the jury why Brown, Downs' original trial attorney, won't be testifying), 773-74 (Arias at side-bar discussing an objection), 785-86 (Arias involved with another bench conference), 798 (Difference of opinion between Mr. Downs and Arias on number of witnesses to be presented), 801 (Arias provides argument on closing argument and jury instructions), 803 (Arias at sidebar without court reporter), 808-810 (Arias discusses with court his requested jury instructions), 848-51 (Downs renews his desire for Arias to conduct the examination of an expert witness; State again objects and prevents the judge from considering the request).

One exchange between the judge, Mr. Downs, and Mr. Arias is particularly telling. Mr. Downs was in the process of objecting to the circuit court's ruling that Mr. Johnson was unavailable as a witness. The circuit court cut Mr. Downs off and inquired of Mr. Arias. Mr. Arias spoke at length but he did not have his facts straight and made argument in regards to another co-conspirator. (R2. at 529-530.) This Court, upon direct review, examined the propriety of the circuit court's ruling that Mr. Johnson was unavailable. See Downs v. State, 572 So. 2d 895, 900 (Fla. 1990). This Court evaluated the circuit court's finding of unavailability and the allowance of Mr. Johnson's prior trial testimony read into the record utilizing the fundamental error analysis, based on the perceived lack of a contemporaneous objection. Id. However, Mr. Downs was in the process of placing on the record the proper objection -- that the scope of the cross-examination of Mr. Johnson was different at the original guilt phase than at the current penalty phase -- but the circuit court turned to Mr. Arias and he failed to properly preserve the issue for review because of his lack of knowledge of the record.

The circuit court's summary denial of the ineffective assistance of counsel at penalty phase was clearly in error. The circuit court failed to even consider the role of Mr. Arias and simply concluded that because Mr. Downs had elected to represent himself (when in actuality he elected to have Mr. Arias appointed as co-counsel and Mr. Arias acted as co-counsel despite the court's labeling of Mr. Arias' representation as "standby"

counsel) there could be no ineffective assistance claim. See Bundy v. State, 497 So. 2d 1209, 1210 (Fla. 1986); see also, Raulerson v. State, 437 So. 2d 1105, 1108 (Fla. 1983) (reviewing the trial court's evaluation of effectiveness of co-counsel in claim of ineffective assistance of counsel raised in 3.850 motion).[10] The circuit court's ruling was based on an incorrect assessment of the law and factual determination of the record and therefore this issue must be remanded to the circuit court for consideration under Strickland v. Washington, 466 U.S. 668 (1984).

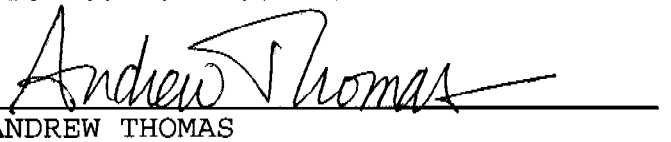
As to the remaining issues addressed by the State in its answer brief, Appellant stands on the argument presented in his Initial Brief to this Court.

---

[10]Had the circuit court failed to conduct a Faretta inquiry, the State would surely be arguing that one was not required because Mr. Arias acted as co-counsel. See Haslom v. State, 643 So. 2d 59, 60 (4th DCA 1994) ("The state argues that there was no need to conduct a Faretta inquiry because defendant's request to represent himself was not unequivocal and that, in any case, the [Assistant Public Defender] acted as co-counsel and thus defendant did not proceed to trial without the assistance of counsel."); see also, United States v. Kimmel, 672 F. 2d 720, 721 (9th Cir. 1982) ("The Government argues that when the accused and his lawyer join forces to manage and present the defense, the accused receives all the benefits of representation by a lawyer and, consequently, there is no need for a waiver of counsel.")

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May 11, 1998.

GREGORY C. SMITH
Capital Collateral Counsel
Northern Region
Florida Bar No. 279080



ANDREW THOMAS
Florida Bar No. 0317942
Chief Assistant CCRC
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(904) 487-4376
Attorney for Appellant

Copies furnished to:

Mark Dunn
Assistant Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050

Angela Corry
Assistant State Attorney
Office of the State Attorney
600 Duval County Courthouse
330 East Bay Street
Jacksonville, Florida 32202