IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,173

ROY CLIFTON SWAFFORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Swafford's motion for post-conviction relief. The circuit court denied Mr. Swafford's claims following an evidentiary hearing. Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on appeal to this Court in first direct appeal;

"PC-R1. ___" - Record on appeal from denial of the first Motion to Vacate Judgment and Sentence.

"PC-R2. ___" - Record on appeal from denial of the second Motion to Vacate Judgment and Sentence.

"PC-R3. ___" - Record on appeal from denial of the third Motion to Vacate Judgment and Sentence.

"PC-R4. ___" - Pending record on appeal from denial of relief after evidentiary hearing.

"PC-R4T. ___" - Transcript of evidentiary hearing conducted February 6-7, 1997.

All other citations will be self-explanatory or will otherwise be explained.

CERTIFICATE OF FONT

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INTRODUCTION

Mr. Swafford is innocent of the murder for which he was convicted and sentenced to death. Since the filing of the State's Answer Brief on May 17, 1999, three binding decisions have issued which are directly contrary to the State's position and mandate a new trial for Mr. Swafford. These three decisions are: Strickler v. Greene, 119 S.Ct. ___, 65 Cr. L. Rptr. 363 (June 17, 1999); Young v. State, ___ So. 2d ___, Case No. 90,207 (Fla. June 10, 1999); Lightbourne v. State, ___ So. 2d ___, Case No. 89, 526 (Fla. July 8, 1999).

REPLY TO STATEMENT OF THE CASE AND THE FACTS

The State begins its Answer Brief by making an argument that the "Introduction" and "Statement of the Case" in the Initial Brief should be stricken by this Court and disregarded. This Court has denied the State's separately filed motion to strike after receipt of Mr. Swafford's response to the motion to strike.

In its Statement of the Case and the Facts, the State accuses Mr. Swafford of having displayed "his disdain for the rules of this Honorable Court as shown by his untimely filing of his Motion for Rehearing of the Order Denying his Rule 3.850 motion and his Notice of Appeal in this case." Answer Brief at 1. This Court denied the State's Motion to Dismiss, apparently agreeing with Mr. Swafford's position as set forth in his response to the motion to dismiss that the Notice of Appeal was timely filed. The State has overlooked the fact that this Court

has ruled adversely to the State on the issue of whether the Notice of Appeal was timely filed.

In its Statement of the Case, the State spends two pages discussing the federal district court order denying Mr. Swafford's federal habeas petition. The State also attaches that order to its Answer Brief. Yet, the State fails to note that no evidentiary hearing was held in federal district court. Thus, the purported findings were in fact legal conclusions not factual determinations.

The State does briefly acknowledge that Mr. Swafford appealed the district court order to the Eleventh Circuit. However, it neglects to observe that in April of 1999 the Eleventh Circuit dismiss the appeal without prejudice on the State's motion that this Court (the Florida Supreme Court) should resolve the pending appeal before the Eleventh Circuit addresses the issues raised challenging the federal district court's order denying relief. See Attachments A, B, C and D.[1] Mr. Swafford had challenged in the Eleventh Circuit appeal the federal district's court analysis, contending that it was wrong under Kyles v. Whitley and other federal authority. The State chose to seek a dismissal of that appeal without prejudice to Mr.

[1]Given that the State attached the district court order to its Answer Brief, Mr. Swafford has attached for completeness purposes his Supplemental Brief filed in the Eleventh Circuit, the State's Motion to Dismiss Appeal, Mr. Swafford's Response, and the Eleventh Circuit's Order Dismissing the Appeal. In the Supplemental Brief, Mr. Swafford explained in considerable detail the errors in the district court's analysis.

Swafford's right to challenge the federal district court's order at some point in time in the future. Mr. Swafford has and does challenge the legal correctness of the specific passages of the district court order quoted in the Answer Brief's Statement of the Case. See Attachment A. The federal district court's order was clearly wrong as explained in Mr. Swafford's Supplemental Brief, which is attached as Attachment A. It was improper for the State to insert into its Statement of the Case excerpts of the federal district court's order as in essence argument without revealing that the order specifically has not been affirmed on appeal and that the State chose to delay Mr. Swafford's challenge to that order by successfully moving to dismiss the appeal without prejudice to Mr. Swafford.[2]

The federal district court order cited to and quoted by the State is of no precedential value. It was not introduced into evidence in circuit court in the proceedings below and at issue in this appeal. The federal district court has been challenged on appeal in the Eleventh Circuit Court of Appeals. And that appeal has yet to be decided because the State has sought to delay the resolution of Mr. Swafford's challenge to the legal correctness of the federal district court's analysis. This Court should give absolutely no deference to that order entered without

[2]The State in its brief made the conclusory allegation (that is without citation and specific reference) that Mr. Swafford had improper argument in his Statement of the Case in his Initial Brief. Yet, the quotations of the federal district court order is an attempt to insert argument into the State's Statement of the Case.

the benefit of an evidentiary hearing and entered before the discovery of the evidence by Mr. Swafford's collateral counsel which this Court already has determined warranted an evidentiary hearing. When this Court remanded this case for an evidentiary hearing, the federal district court's order was already in existence, and this Court properly ignored it. The evidence warranting a hearing had not been presented to the federal court in the habeas petition because it was not known at the time of the filing of the federal petition. Swafford v. State, 679 So. 2d 736 (Fla. 1996).

In its Statement of the case at page 7, the State repeats its allegation that "Swafford filed an untimely motion for rehearing" and that "Swafford filed an untimely Notice of Appeal". This Court's denial of the State's Motion To Dismiss constituted a determination that this Court had jurisdiction and that the Notice of Appeal was timely filed.

In its Statement of the Case, the State does not "clearly specif[y]" the areas of disagreement with Mr. Swafford's Statement of the Case. Rule 9.210(c), Fla. R. App. Pro.[3] Instead, the State provides a disjointed and confusing version of

[3]Rule 9.210(c) provides:

> The answer brief shall be prepared in the same manner as the initial brief; provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified.

the facts which is an attempt to obscure the compelling facts warranting a new trial for Mr. Swafford.

At page 15 of the Answer Brief is a discussion of Mr. Lestz' testimony of Mr. Walsh's efforts to sell guns on the night of the Brenda Rucker homicide. "Later, '[t]hat evening he wanted me to take him to some different bars and see if he could sell the guns.'" Answer Brief at 15. The State then asserts: "Mr. Lestz recalled the name of only one bar, 'the Shark Lounge.'" The State observes: "Defense counsel McClain then suggested 'the Shingle Shack,' (T 65), and when the State's objection was sustained, counsel offered 'an affidavit of Michael Eugene Lestz' which he showed to Mr. Lestz." Answer Brief at 15.[4] As the State notes, Mr. Lestz indicated that the affidavit did not refresh his recollection. The State's discussion completely fails to address the State's cross-examination of Mr. Lestz, wherein the State was successful in refreshing Mr. Lestz' memory. (PC-R4T. 122-23, 127-28). Mr. Lestz did recall in cross-examination by the State that on the night of after the Rucker homicide Mr. Lestz had driven Mr. Walsh to various bars in the Daytona Beach area, including the Shingle Shack. Mr. Walsh wished to get rid of two .38's that he had in his possession. One of the places Mr. Lestz took Mr. Walsh that evening was the Shingle Shack:

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[4]Of course, the significance of the "Shingle Shack," is that at Mr. Swafford's trial evidence was presented that the murder weapon was found in a trash can at the Shingle Shack on the night of February 14, 1982.

Q And you don't believe that you had been to the Shingle Shack several times before, correct?

A Oh, I have been there several times.

Q With Walsh?

A Yes.

Q With Walsh trying to get rid of the guns?

A I had not gone in the place with him on that particular day and –

Q I'm sorry. You had not?

A On that particular day, the 14th of February, if this is what you're asking.

Q Yes.

A But we had been in there several times prior to that date and a few times after that for other business.

Q So you had been at that bar on various occasions?

A Yes.

Q And that bar was not the one that you were in on February the 14th, right?

A We had stopped by there. We had to stop by there, you know. I believe so.

Q But not for the purpose of disposing of the guns?

A I don't know. That was during that time period. But I did not go in the tavern with him. I dropped him off in the van and he went in and came back out and like I was saying, I don't know what went on in there.

(PC-R4T. 122-23). On redirect, Mr. Lestz testified:

Q Walsh had also traded in guns; had he not?

A Yes, he had.

Q But on February 14th you recall a specific effort to dispose of particular guns?

A Yes, I do.

Q And in cross-examination you were asked about the Shingle Shack?

A Yes.

Q And my understanding is that – do you recall going to the Shingle Shack at some point in time on February 14th?

A Yes, I do.

Q Okay. With Walsh?

A Yes.

Q And you stayed in the van or did you go inside?

A I stayed in the van, I think.

Q And do you recall was that – was that during the evening hours?

A It was during the evening hours.

Q You also recall going to other bars?

A Yes, I do.

Q You mentioned the Shark?

A The Shark.

Q And did you yourself actually go inside that bar?

A I was inside that one.

Q And did you yourself go inside other bars that night?

A I think I went to one other one across the street from there.

Q Okay. But in terms of the Shingle Shack you stayed in the van?

A Yeah.

(PC-R4T. 127-28). At the Shingle Shack, Mr. Lestz remained in his vehicle while Mr. Walsh disappeared inside.[5]

At page 32 of the Answer Brief in its Statement of the Case, the State discusses the testimony of State Attorney Investigator, Deborah Champion. As to this testimony, the State simply tries to spin the testimony beyond recognition. Ms. Champion did discuss how easily she was able to obtain information when she identified herself as a State Attorney Investigator. But, she also testified that the information about Mr. Lestz would not have been revealed to a defense attorney or his proxy. (PC-R4T. 592). This corroborated the testimony of Mr. Swafford's witnesses (collateral attorneys and their investigator) that the information was not revealed to them because under federal law it could not be disclosed to defense attorneys or those who worked for them. (PC-R4T. 376). The State in its Answer Brief attempts to rely upon Ms. Champion's testimony that the person she spoke to on the phone indicated that there was a process that was not difficult for defense attorneys to obtain access to the

[5]Of course, Mr. Lestz was testifying in 1997 as to events in 1982. The reason for this delay in his testimony was the failure of the State to advise Mr. Swafford's trial counsel of Mr. Lestz at the time of trial. To the extent, that he did not remember the name Shingle Shack at the time of the direct examination, but did remember when asked by the State in cross-examination is hardly surprising. What is surprising is that the State does not acknowledge in Answer Brief that by the end of his testimony, Mr. Lestz did recall driving Mr. Walsh to the Shingle Shack on the night after the Rucker homicide while Mr. Walsh was attempting to dispose of two .38's.

information. Answer Brief at 34 n.14. However, this testimony was struck as hearsay. The State description of the hearsay objection as "tardy" is similar to the State's continual reference to an "untimely" Notice of Appeal. The court spoke and disagreed. The testimony was stricken by the circuit court. The State has not cross-appealed. Thus, there was no admissible evidence that a defense attorney could have obtained the address for Mr. Lestz.[6] Certainly had the evidence not been stricken by the circuit court, Mr. Swafford had ample evidence to present in rebuttal that this statement was not true. This evidence was not presented because in fact the testimony was stricken.

The State also cites Ms. Champion's testimony that she spoke over the phone with someone from Global Tracing, who confirmed that as early as 1990 Global was hired to try to find Mr. Lestz.

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[6]Furthermore, the State fails to see that it could have easily obtained the address and provided it to Mr. Swafford's collateral counsel at any time in 1990 through 1994 when the State knew that Mr. Swafford was trying to locate Mr. Lestz. Yet, the State did not help Mr. Swafford's counsel in any fashion even though the whole problem was created by the State's failure to disclose Mr. Lestz as a witness who possessed material information. The State's behavior during the collateral proceedings in Mr. Swafford's case and in making the arguments it is now advancing is not consistent with language recently quoted by the United States Supreme Court in Strickler v. Greene, 65 Crim. L. Rptr. at 368:

> [W]e have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

(PC-R4T. 594). However, the State fails to acknowledge that Global was unable to locate Mr. Lestz until 1994, even though the undisputed evidence was that Global did not get paid until it was successful in locating the individual it was hired to find. (PC-R4T. 421)("if Global found someone, they would call us back and say they found so-and-so and they would send us a bill a couple weeks later. If they didn't find anyone, then they would just call us that they didn't find anybody.").

ARGUMENT

The State in its Answer Brief refuses to address the arguments Mr. Swafford raised in the Initial Brief in the order in which they were raised because according to the State most of the issues raised by Mr. Swafford were not "authorized" by this Court in its opinion remanding for an evidentiary hearing. The State's position in this regard can be characterized as simply wrong. The State's position is an effort to slice and dice Mr. Swafford's compelling claims of innocence into something that the State's representative hopes can be swept under the rug.

When this Court issued its opinion remanding this case for evidentiary hearing it obviously did not address matters that had not yet arisen. In essence, the State's position is errors that occur during proceedings that are a result of remand by this Court cannot be presented to this Court once the remand is over, even if the errors are constitutional in nature or go to the fairness of the process. Apparently, this is a proposed new rule of law as is obvious from the State's failure to cite a case in

support of its argument. The absurdity of the rule is inherent on its face. The absence of a case support is quite telling. Moreover, there are many cases wherein this Court has remanded for an evidentiary, resentencing or retrial and on a subsequent appeal considered matters that arose during the subsequent proceedings which had not been addresses in the original opinion remanding. See Jones (Ronnie) v. State, ___ So. 2d ___, Case No. 91,014 (Fla. June 17, 1999)(reversing for error occurring during remand which had not been addressed in this Court's prior order remanding Jones v. State, 478 So. 2d 346 (Fla. 1985)); Jones (Leo) v. State, 701 So. 2d 76 (Fla. 1997)(this Court addressed and decided procedural issues which arose during proceedings ordered by this Court in a prior opinion); Hoffman v. State, 613 So. 2d 405 (Fla. 1992)(while reversing proceedings from earlier remand for failure to comply with prior order, this Court addressed matters which arose on remand outside scope of prior opinion); Jennings v. State, 473 So. 2d 204 (Fla. 1985)(a second retrial ordered on grounds not addressed in first opinion ordering retrial).

Accordingly, Mr. Swafford will address the argument in the order he presented them in his Initial Brief.[7]

ARGUMENT I

[7]The State's argument on the supposedly authorized claim in reality goes to Argument II of the Initial Brief after the State has attempted to shear it of any Brady component. As explained infra, the State's action is in contravention of this Court recent ruling in Lightbourne v. State and the cases relied upon therein.

Mr. Swafford presented in his Initial Brief his claim that the State violated its obligation under Brady when it represented to collateral and the courts in 1990 that "James Michael Walsh, Walter Levi, and Michael Lestz were thoroughly investigated and discarded as suspects." (Response dated 10/22/90).[8] After this Response with this representation was filed, the State disclosed in excess of one thousand additional pages of 119 records on October 24, 1990. (PC-R1. 455). Included in the 119 records was the January 31, 1983 report concerning an interview of Mr. Lestz conducted January 26, 1983. This report was the last report in sequence concerning Walsh, Lestz or Levi that was disclosed. It ended with the notation "Further investigation is to follow." (Def. Exh. 5 at 4). At no time prior to February 7, 1997, did the State reveal that in fact this "[f]urther investigation" did not occur.

The State argues in its answer Brief that the proper test is the four prong test in United States v. Arnold, 117 F. 3d 1308 (11th Cir 1997). However, the United States Supreme Court has most recently ruled and stated:

> Thus the term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence–that is, to any suppression of so-

[8]In Jones v. State, 709 So. 2d 512, 526 n. 12 (Fla. 1998), this Court noted that new evidence of a Brady claim surfaced at the evidentiary hearing in circuit court. Even though the circuit court did not address the new evidence in its order denying relief, this Court considered the Brady claim on the merits in the appeal. The situation here is virtually identical; merits consideration of this claim is required.

> called "Brady material"–although, strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppress evidence would have produced a different verdict. There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 65 Crim. L. Rptr. at 368-69. Clearly, the United States Supreme Court's enunciation of the proper test is controlling.

The State asserts Swafford has not alleged, nor shown, that the failure to interview Mr. Levi for a third time constitutes 'evidence' within the meaning of Brady." Answer Brief at 61. First, the State mischaracterizes the nondisclosure as being simply a failure to disclose that Levi was not interviewed a third time. In fact, the nondisclosure was the failure to disclose that the "[f]ollow up investigation" which was "to follow" did not occur. This constituted impeachment of the police investigation and of the representation in court that Walsh, Levi and Lestz were thoroughly investigated and discarded as suspects.

The State in its argument neglects to discuss the passage from Kyles v. Whitley, 115 S.Ct. 1555, 1572 (1995), quoted in the Initial Brief at page 45. In Kyles, the United States Supreme Court specifically indicated that information impeaching "the

reliability of the investigation" was evidence favorable to the accused within the meaning of Brady.[9]

Further, the evidence would have significantly helped Mr. Swafford in 1990. Mr. Swafford was led to believe in 1990 that he had received everything, just as Mr. Strickler's counsel was led to believe in Strickler v. Greene. According to the United States Supreme Court,

> If it was reasonable for trial counsel to rely on, not just upon the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reliable.

65 Crim. L. Rptr. at 369. Had collateral counsel known that a thorough investigation had not occurred, he would have presented that fact to this Court. This Court would have then known that in fact Walsh, Lestz and Levi were not dead leads, and the result

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[9]The State does assert that "Swafford's Kyles v. Whitley, 115 S.Ct. 1555 (1995) claim piggybacked onto the utterly deficient Brady claim is likewise devoid of merit." Answer Brief at 62. It is hard to know what the State is talking about since as the United States Supreme Court has recognized Kyles was dictated by Brady; thus a Kyles claim is a Brady claim. See Young v. State, ___ So.2d ___, Case No. 90,207, Slip Op. at 8 n.9 (Fla. June 10, 1999). If the State is trying to say that the argument that there must be cumulative consideration is a separate claim, the State is simply wrong. Young v. State. Likewise, if the State is trying to say a claim that the State failed to turn over impeachment of the reliability of its investigation is somehow a different claim not to be evaluated cumulatively with the other nondisclosures, the State is wrong. See Lightbourne v. State, ___ So. 2d ___, Case No. 89,526 (Fla. July 8, 1999).

would have been different. An evidentiary hearing would have been ordered.

As to the second element identified in Strickler, the United States Supreme Court found the element in Strickler satisfied because "there is no dispute about the fact that [at least five documents] were known to the State but not disclosed to trial counsel." 65 Crim. L. Rptr. at 369. Here, there is no dispute that trial counsel did not know about Walsh, Lestz and Levi and that collateral counsel did not know that the further investigation that was to follow never occurred.

The State in is Answer Brief in its haste to avoid discussing Brady and/or Kyles never actually argues that the trial prosecutor's pretrial discussion with Mr. Swafford's trial counsel, Ray Cass about other suspects who had been ruled out insulates the State from a Brady violation.[10] In any event, Strickler specifically establishes that: "In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.' Kyles, 514 U.S. at 437." Strickler, 65 Crim. L. Rptr. at 368. Here,

[10]The State does discuss this evidence while addressing due diligence in its argument on the purported "authorized" issue. There, it contended that trial counsel was not diligent when he accepted the prosecutor's assertion that the boxes in the prosecutor's possession contained no exculpatory evidence. Of course if trial counsel breached his obligations to Mr. Swafford by accepting the trial prosecutor's representations and was thus not diligent, then Mr. Swafford did not receive effective representation. Gunsby.

the trial prosecutor did not perform his duty to learn and disclose the Brady material. He in fact affirmatively represented that he had performed his duty and that there was no exculpatory evidence.[11]

As to the third component, the cumulative consideration was never conducted.[12] The State in its Answer Brief does not bother to address the matter except for the following cursory analysis: "Further, even had all of the allegedly exculpatory evidence and information been heard, it would have made no difference in the outcome of the trial. The evidence of Swafford's guilt was, and is, overwhelming! *See supra text,* at 55-56."[13] The text of

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[11]At the evidentiary hearing, the State did not call the trial prosecutor. Only Ray Cass testified about the conversation with the trial prosecutor. No evidence was presented by the State that the files that the trial prosecutor pointed to included the police reports concerning Walsh, Lestz and Levi. No evidence was presented that the trial prosecutor even knew of them. In fact as noted in the Initial Brief, the State Attorney's Office has never disclosed 119 materials which included any of the reports on Walsh, Lestz and Levi. See Initial Brief at footnote 6. Thus, the record contains no evidence that even if Mr. Cass had looked in the files in the trial prosecutor's possession, he would have found anything regarding Walsh, Lestz or Levi. See Strickler.

But again, in responding to the Brady arguments, the State does not assert that the trial prosecutor's representation that there was no exculpatory evidence combined with his offer of some boxes containing unknown information somehow transferred the Brady obligation to the defense attorney. Moreover, Strickler precludes such an argument.

[12]The circuit court only purported to determine if the new evidence would have probably produced an acquittal, i.e. a "more likely than not" test which is not the proper standard. See Young, Slip Op. at 9, quoting Kyles. The circuit court did not conduct a Brady prejudice analysis.

[13]The State seems to believe that the use of an exclamation point somehow relieves it of its obligation to conduct an

pages 55-56 contains a discussion of a little over page in length which purports to be a summary of the trial evidence; but, it contains not one single record cite.[14] By citing simply to an unverifiable rendition of the evidence at trial, the State is ignoring Kyles, as quoted by this Court in Young:

> The second aspect of Bagley materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Young, Slip Op. at 9, quoting Kyles. Thus, the proper analysis requires that the discussion focus on the undisclosed and unpresented exculpatory evidence.

Since the State never addresses the proper cumulative analysis required in Kyles which was set forth in the Initial

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analysis. Perhaps, the exclamation point is supposed to signal the Court just to trust the State, even though the State in this case has a history of failing to comply with due process. The gigantic Brady violation presented by Mr. Swafford to this Court should not be ignored on the basis of an exclamation point.

[14]Rule 9.210(b), Fla. R. App. Pro., does require in a statement of the case that "[r]eferences to the appropriate pages of the record or transcript shall be made." Apparently, the State believes that rule can be defeated simply by inserting a rendition of the trial evidence in the argument and not including it in the statement of the case.

Brief, Mr. Swafford continues to rely upon that which was set forth therein. Under the proper analysis which was set forth in Argument II of the Initial Brief (pages 61-72), confidence must be undermined in the reliability of the outcome. Thus, a new trial is warranted.

ARGUMENT II

As set forth in Mr. Swafford's Initial Brief, Argument II is Mr. Swafford's challenge to the analysis actually conducted by the circuit court.[15] The State in its Answer Brief shears Mr. Swafford's argument of any Brady component by arguing that such a claim is procedural barred by this Court's prior opinions finding confidence not undermined in the reliability of the outcome. Once the State has shorn Argument II of its Brady component, it treats what is left (of course an entirely different argument) in what it calls the "authorized issue." See Summary of the Argument in the Answer Brief at 36, and Argument at 39-59.

[15]In case it is not clear, Mr. Swafford reiterates that Argument I was based upon the newly disclosed Brady violation. This Brady violation was disclosed on February 7, 1997, when the State called Captain Burnsed to testify and he revealed that the further investigation which was to follow as noted in a January 31, 1983 report never occurred. Mr. Swafford presented that as Argument I because it establishes a new Brady violation which must be factored in to the cumulative analysis conducted in Argument II. As explained in Strickler, the phrase "Brady violation" is used to refer to any breach of the broad obligation to disclose exculpatory evidence, even though there is never a real "Brady violation" unless the prejudice prong is met when cumulative consideration is given to all of the material not disclosed because of the breach or breaches of the broad obligation to disclose.

However, the State's argument that the Brady component must be procedurally barred and not considered is wrong according to this Court's most recent pronouncement in this area. Lightbourne v. State. The State in the "authorized" argument section of its Answer Brief justifies the shearing off of the Brady component of Mr. Swafford's claim in the following fashion:

> The State asserts that Swafford's attempt to prop up his fatally tardy presentation of this claim with a citation to *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996) fails. First, *Mills* was decided by this Court **after** *Gunsby*, and therefore, it is the latest pronouncement on the issue. Second, *Gunsby* was expressly limited to the "unique circumstances of this case," 670 So. 2d at 924, and there are no comparable circumstances present in Swafford's case.

Answer Brief at 48 n.19.

This Court never indicated in Mills v. State, 684 So. 2d 801 (Fla. 1996), that it was overturning Gunsby. Moreover, this Court in Jones v. State, 709 So. 2d 512 (Fla. 1998), and reaffirmed in Lightbourne, made it clear that the cumulative analysis discussed in Gunsby is in fact the legally required analysis where a Brady claim and a newly discovered evidence claim are both presented.[16] The State's effort to distinguish Gunsby away must fail. Even under the State's logic (the last pronouncement of this Court controls), the State's position

[16]Perhaps it goes without saying that the State's position that this Court in Gunsby fashioned a rule that would apply only to Mr. Gunsby and that no one else could benefit from its application would constitute an arbitrary and capricious application of law which would itself violate both the Eighth and Fourteenth Amendments.

fails. The most recent pronouncement is now Lightbourne v. State.[17]

This Court in Lightbourne held that a cumulative analysis of Mr. Lightbourne's Brady claim and his newly discovered evidence was required.[18] This was true even thought this Court noted that Mr. Lightbourne had first presented a Brady claim years before. See Lightbourne v. Dugger, 549 So. 2d 1364, 1367 (Fla. 1989). In fact in Lightbourne, the Brady claim presented in 1989 was "based on the State's failure to disclose that police had engaged in a scheme with Chavers and Carson to elicit incriminating statements from Lightbourne." Slip Op at 8. The Brady claim presented in 1994 was supported by evidence not previously available ("the State committed a Brady violation in withholding evidence that Chavers' and Carson's testimony was false and elicited in violation of Henry". Slip Op. at 19). This Court's decision in Lightbourne is certainly a repudiation of the State's argument here.

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[17]It will be interesting if the State will now no longer cite Mills since the State apparently believes that Mills and Gunsby are in conflict.

[18]The State has concede (perhaps unwittingly) that the cumulative analysis required under Young and Lightbourne did not occur. In its Argument V section, the State asserted: "Moreover, as the State asserted below, the whole issue of Mr. Harper was outside the scope of the remand. (SR 15). The evidentiary hearing was limited to the allegedly new Lestz statement; it had nothing to do with witness Harper." Answer Brief at 73. Of course witness Harper was a big component of Mr. Swafford's Brady claim as explained in the Initial Brief. Thus, cumulatively consideration of the Brady violations and the newly discovered evidence did not occur according to the State.

Mr. Swafford presented a Brady claim in 1990. He subsequently located witnesses identified in the undisclosed exculpatory evidence which established prejudice from the Brady violation--a prerequisite for relief. This is nearly identical to the situation in Lightbourne. In Lightbourne, this Court required merits consideration of the Brady claim based upon this court's determination that due diligence had been established.[19]

However here in Mr. Swafford's case, there is an additional component: newly disclosed evidence that the State breached its ongoing obligation to disclose exculpatory evidence. See Argument I. The State did not disclose until February 7, 1997 that the "further investigation" that was to follow into Walsh, Lestz and Levi did not occur. This definitely impeached the State's representations to collateral counsel and this Court in 1990 that those three had been thoroughly investigated and discarded as suspects. See Argument I. This could not have been discovered any sooner because the State despite its obligation to disclose did not disclose this evidence.[20] Accordingly, the

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[19]Mr. Swafford discusses infra the due diligence analysis in Lightbourne and its application to the facts presented herein.

[20]The State does at one point assert that collateral counsel should have contacted the police officers to determine whether the prosecution's representation in court were not true and that collateral counsel's failure to learn of the inaccuracy was not due diligence. Answer Brief at 62. If collateral counsel has an obligation to assume that the State has not complied with its ongoing obligation to disclose exculpatory evidence, then there is no continuing obligation because it is unenforceable. To rely upon the prosecutor's obligation is in essence a trap for the unwary.

Moreover, collateral counsel who have refused to trust the

merits of this claim are before this Court.[21] Under Lightbourne, a cumulative analysis of the prejudice component was required. This analysis was not conducted by the circuit court. The State does not even argue that the circuit court conducted a Kyles cumulative analysis. Error occurred.

As for the State's argument that collateral counsel did not employ due diligence in their search for Lestz and Levi. Again, Lightbourne has decided the issue adversely to the State. First, the previously undisclosed Brady violation as discussed in Argument I must be before the Court on the merits, and the required cumulative consideration defeats any procedural bar argument. This is inherently reasonable since it is the State's tardy disclosure in 1997 that has created the delay in getting the issue before this Court.

Second, this Court in Lightbourne made clear that due diligence does not require perfection nor 20/20 foresight. When

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prosecutor to honor this obligation have endured the allegation that they are engaging in a fishing expedition.

In this case, collateral counsel had no reason to believe that the police would disclose such startling impeachment of their own investigation. They instead were focused upon trying to locate the witnesses who had not been disclosed at trial: Lestz and Levi. Further, there is no evidence that Captain Burnsed would have talked to Mr. Swafford's collateral counsel, let alone reveal that he did not conduct the follow up investigation.

[21]Implicit in the Lightbourne analysis is the notion that if any part of the Brady, ineffective assistance or newly discovered evidence claims requires merit consideration, then pursuant to the cumulative analysis requirement cumulative consideration must be given to even those portions previously presented and rejected because prejudice had been insufficiently established.

a witness' name has been disclosed as a person who may possess evidence which could lead to or support a post-conviction claim, all this Court requires is evidence that collateral counsel "had been actively looking for [the witness]." Slip Op. at 18. Here, the State's own evidence in circuit court was that in 1990 CCR began looking for Mr. Lestz by hiring Global Tracing. This was due diligence, particular in a case where the State was adamantly maintaining that the witness was dead lead who possess no exculpatory evidence.[22]

Finally, the State in addressing its "authorized" issue discusses Mr. Lestz' testimony in the following fashion:

> As pointed out earlier, this Court specified that the remand was based on the allegation in the CCR-prepared affidavit that Walsh had at the Shingle Shack a .38 caliber hand gun "at or near the time that the murder weapon was discovered in the locale." 679 So. 2d at 736. However, Mr. Lestz's testimony at the hearing did not establish that allegation. *See supra* text, at 40-41. Moreover, Mr. Lestz did not testify to most of the things set out in the CCR-prepared affidavit which was the basis for the hearing.

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[22]The State seeks to have it both ways. Mr. Lestz possessed no relevant or exculpatory evidence; yet, collateral counsel should have moved heaven and earth to find him. The reasonableness of the search must include an evaluation of the value of the expected testimony. Here, Mr. Lestz was not called at trial by the State (as opposed to Carsons in Lightbourne). The State specifically represented to collateral counsel and to this Court that Mr. Lestz was a dead lead and possessed no relevant or exculpatory evidence. The truly amazing thing in this case is that collateral counsel nonetheless tried to find Mr. Lestz. Global Tracing was hired and was repeatedly contacted until an address turned up. Mr. Swafford's collateral counsel did exercise due diligence; and thank God they did. Otherwise, the compelling evidence of innocence would never have been located.

Answer Brief at 53. The State completely overlooks the testimony that the State elicited from Mr. Lestz in its cross-examination: "I did not go in the [Shingle Shack] with him. I dropped him off in the van and he went in and came back out and like I was saying, I don't know what went on in there." (PC-R4T. 123). Thus, Mr. Lestz did testify that he drove Walsh to the Shingle Shack on the evening of February 14, 1982, while Walsh was attempting to unload two .38's ("that was during that time period"). (PC-R4T. 123).

The State also overlooks the significance of this testimony in relation to Mr. Swafford's trial. In his closing argument, the trial prosecutor recognized that there was a problem with the testimony from Mr. Griswold (the bouncer from the Shingle Shack who recovered the murder weapon from the trash can in the men's room) and Ms. Sarniak (the waitress from the Shingle Shack who identified Mr. Swafford and recalled standing watch at the women's room door while Mr. Swafford placed a gun in the women's room trash can). So the trial prosecutor argued: "What is important on the Shingle Shack episode where the gun was recovered is, one, there was a gun recovered, and the gun is the one which was identified here by the serial numbers by the police officers and placed in the records." (R. 1393). Later, he called the matter "a red herring run before your path here today." (R. 1394). He wrote off the contradictory testimony saying: "The only person that had any reason to throw away that gun was the person that the police were after, the person that

the police suspected. They were after Mr. Swafford. He was the only one that they were after. Is a man just going to throw away a gun when there is nobody questioning him and it doesn't even appear to be similar to anything?" (R. 1394).

Of course the jury did not know that on February 14, 1982, Mr. Walsh told Mr. Lestz to drive around the Daytona Beach area so that he could find a place to unload two .38's. This was the same Mr. Walsh who had dropped Mr. Lestz off at a laundromat a block away from the Fina station fifteen minutes before Brenda Rucker disappeared. This same Mr. Walsh whose whereabouts were unaccounted for until four hours later when he showed back up at the laundromat nervous and sweaty. This information was contained in a police report that was not received by defense counsel and would have provided an answer to the prosecutor's otherwise rhetorical question. Under Kyles and Lightbourne, the focus is the possible effect on the jury of the previously unknown exculpatory evidence. The United States Supreme Court explained in Kyles:

> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

115 S. Ct. at 1573 n. 19 (citation omitted)(emphasis added). Here then the issue is not whether Judge Hutcheson found Mr. Lestz credible, but whether confidence is undermined in the

outcome of the trial where the jury did not hear the evidence which would have answered the trial prosecutor's otherwise rhetorical question which was offered to dispose of Mr. Swafford's claim that there were two different guns at the Shingle Shack. Confidence must be undermined in the outcome when the proper cumulative analysis is employed, and Mr. Swafford continues to rely upon the cumulative analysis which is set forth in the Initial Brief as the proper analysis.

ARGUMENT III

Contrary to the State's argument, Mr. Swafford offered the Overton Commission Report and the Shevin Report under section 90.203. The circuit court gave the State ample time in circuit court to consider the reports and make any objection that it wished. The State objected on only three grounds: relevancy, hearsay, and authentication. The circuit court sustained the objection on the authentication grounds. When collateral counsel sought to explain that the judicial notice provisions precluded such a ruling, counsel was cut off and precluded from making a record.

The State's argument in its Answer Brief regarding authentication is simply not applicable under the judicial notice provisions. The State cites no authority for its position. Certainly, the statute does not provide a basis for objecting on authentication grounds.

The State's claim that there is no evidence that the Overton Commission Report or the Shevin Report were official actions is

absurd. Surely, the fact that this Court ordered the reports prepared and submitted to the Court accounts for something.

The State hearsay argument is equally silly. The conclusions and findings in those reports are no more hearsay than is the opinion of any court making legal and factual determinations.

Finally, the State's most vociferously pressed argument below (relevancy) seems now to have been abandoned in favor of exactly the opposite argument (cumulative). However, that argument makes no sense either since the circuit court did not find diligence. Evidence can only be cumulative where it is being sought to be introduced to establish a point already proven.

ARGUMENT IV

As already explained, Lightbourne v. State is virtually on point and establishes that Mr. Swafford's collateral counsel did exercise due diligence in their efforts to locate Mr. Lestz.

The State also argues that trial counsel did not exercise due diligence when he accepted the trial prosecutor's representation that all exculpatory evidence had been disclosed. This argument was squarely rejected by the United States Supreme Court in Strickler. The prosecutor cannot transfer his obligation to make a search for and disclose exculpatory evidence to defense counsel by representing that he has fulfilled his obligation and offering defense counsel an opportunity to double check. If defense counsel cannot rely upon the prosecutor to

have fulfilled his obligation, then there is no real prosecutorial obligation.

Further, the State never proved that the Walsh, Lestz and Levi materials were in the trial prosecutor's possession or in the boxes that he offered to give trial counsel access to. The State did not call the trial prosecutor as a witness at the evidentiary hearing below. Moreover, the 119 materials disclosed in this Court did not show that the State Attorney's Office possessed the Walsh, Lestz or Levi materials.

Finally, if trial counsel did not exercise due diligence in taking the prosecutor up on the offer to let him double check the prosecutor's determination that there was no exculpatory evidence in the boxes in the prosecutor's office, then his performance was unreasonable and thus deficient. This Court has already so held. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). Accordingly, relief is still warranted because cumulative consideration of all the undiscovered or undisclosed evidence must undermine confidence in the outcome of the trial where the jury did not hear the wealth of exculpatory evidence which has been uncovered in post-conviction proceedings.

CONCLUSION

For the reasons stated herein and in the Initial Brief, Mr. Swafford in entitled to a new trial. Exculpatory evidence implicating Micheal Walsh as the person who killed Brenda Rucker was not disclosed by the State. The evidence implicating Walsh in the murder would certainly have been sufficient to support a

conviction of Walsh the crime. Its nondisclosure clearly undermines confidence in the guilty verdict returned against Mr. Swafford.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 21, 1999.

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