IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,234

LEO ALEXANDER JONES,

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

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REPLY TO STATEMENT OF THE CASE

In its Statement of the Case, the State asserts: "The defense at the original trial included a theory that Glen Schofield was the person who really murdered officer Szafranski. The theory obviously was rejected by the jury, which convicted Jones. " Answer Brief at 1. At the trial, Mr. Jones testified that he did not kill Officer Szafranski. He was not in a position to know who actually did the murder. Mr Jones' attorney argued that Mr. Jones was innocent. However, he was not in a position to solve the murder because he did not have the evidence that is available now. Thus, the jury did not hear the evidence that twelve people have reported that Glenn Schofield has confessed to this murder. The jury did not hear that Glenn Schofield admitted to being with Marion Manning and Shorty Williams that night and, in fact, asserted that they were his alibi. The jury did not hear Shorty testify that he saw Glenn Schofield kneel down with the rifle and aim in the direction of a police car moments before the shot rang out. The jury did not hear Marion Manning say Shorty flagged her down saying Glenn was in trouble and needed to be picked up. The jury did not hear the two witnesses that Glenn Schofield gave as his alibi both give testimony incriminating Glenn Schofield in the murder, The jury did not hear Daniel Cole and Denise Reed testify that Glenn Schofield was running away from the shooting carrying a rifle shortly after the sounds of the shooting. The jury did not hear James Corbett testify that he too saw Glenn Schofield running from the scene. And even more was not heard by the jury. The jury did not hear Cleveland Smith, a retired Jacksonville police officer with citations for bravery and letters of commendation who has testified for the State over a hundred of times, testify that Officer Mundy had told him that he beat Jones at the time of his arrest with the

intent to kill him. The jury did not hear that Mundy told Cleveland Smith that another officer had to stop him from killing Jones. The jury did not hear Cleveland Smith testify that police officers had been instructed to do everything in their power to get Leo Jones. The jury did not hear Cleveland Smith say that Mundy was a person who would falsify police reports, that he was a "hit man" for the police, that Mundy was given "certain leeway, " and that the department covered it up (H. 220-21). The jury did not hear Bill White testify that Hugh Eason told him that Eason was the police officer who had to pull Mundy off of Leo Jones. And the jury did not hear Cleveland Smith, after being asked by the prosecutor whether he was saying that there "wasn't one person you could tell about Lynwood Mundy's comments or Hugh Eason's reputation," answer: "I think everybody already knew them and nobody did anything about it" (H. 225).

The fact that the jury convicted Mr. Jones without hearing the evidence available now proves the point and proves the prejudice. The result of the trial is unreliable and must be vacated and a new trial ordered.

In its Statement of the Case, the State says: "Once again (for at least the fourth time), he has been given the opportunity to present evidence on his claim that he is innocent and that Glen Schofield is the real killer. " Answer Brief at 2. The State conveniently ignores the fact that it conceded that the evidentiary hearing was necessary.

REPLY TO STATEMENT OF THE FACTS

The State begins its Statement of the Facts with argument over what is the proper "standard for evaluating newly-discovered claims of innocence" Answer Brief at 3. Ignoring for the moment that it is inappropriate to have argument in the Statement of the Facts, the

State's contention that Mr. Jones is not entitled to a cumulative consideration of all the evidence of innocence presented throughout the history of the case is simply wrong. This Court's decision in Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996), could hardly be more clear that the evaluation requires cumulative consideration of evidence presented in a prior 3.850 and at trial. Of course, the Table of Citations in the State's Answer Brief contains not a single reference to Swafford, nor could undersigned counsel find a reference to Swafford in the entirety of the Answer Brief. Not only did the State ignore the Swafford opinion which undersigned counsel specifically cited in the Initial Brief at page 71, the State cites no authority whatsoever for its argument set forth in the Statement of the Facts.

The State asserts that Mr. Jones had Mundy and Eason under subpoena at the December 1997 evidentiary hearing (Answer Brief at 5). The State misrepresents the record. Undersigned counsel on page 1031 indicated that he was considering calling Mundy and Eason, and, on Wednesday, December 17th, counsel specifically indicated that he would not call Mundy (H. 1031). Counsel never indicated that either of those individuals were under subpoena. In fact, on the morning of Thursday, December 18th, counsel indicated that Hugh Eason had refused service of a subpoena (H. 1035). At that point, Angela Corey Lee, Assistant State Attorney stated: "Judge, Mr. Eason is no problem. If you need Mr. Eason here, I'll get him here." (Id.). Thereupon, undersigned counsel explained that his purpose in desiring the testimony of Hugh Eason was in connection with the admissibility of a report Eason had compiled regarding in part his contact with Glenn Schofield. When the State announced that it would agree to the admission of the report, undersigned announced that he

would not need to call Eason. [1] The transcript shows that at least Eason was never subpoenaed by Mr. Jones, It does not reflect one way or the other as to Mundy. However, the important point overlooked by the State is that the State had the ability to get Eason and Mundy to the courthouse as Ms. Corey-Lee stated, but the State chose not to call Mundy and Eason, and thus, the testimony of Cleveland Smith and the testimony of Bill White was unrebutted.

It is all well and good that the State wants to incorporate by reference some of its Answer Brief in a previous "case to save time and energy, but that does not explain the total absence of record cites from its slanted synopsis of the trial evidence. Answer Brief 5-7. It makes it impossible to address the record support for the State's representation.

The State says: "Two Marlin 30-30 lever action rifles was [sic] found under his bed, one of which had Jones' fingerprint on it. Ballistics examination conclusively identified the murder weapon as a Marlin 30-30 lever action rifle, and testified [sic] that the striations and other markings on the fragmented bullet were consistent in all identifiable respects with having been fired from the Marlin 30-30 lever action rifle found under Jones' bed with his fingerprint on it. " (Answer Brief at 6-7). There are no record cites for this representation. And, in fact, the testimony from David Warniment, the firearms examiner, was as follows:

> Q. Now, were you able to arrive at any ultimate conclusions like this in this case or like that in this case?
>
> A. Not that the fragments were fired from the particular weapon, no.

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[1] The transcript indicates that "MS. COREY" stated that "Then at this point I do not need to call Mr. Eason." (H. 1040). That is in error. This statement was made by Mr. McClain.

Q. And why not?

A. It's essentially the amount of damage that was presented by the fragments. There was [sic] insufficient individual characteristics or consistent markings.

(R. 1048).

The State states without a record cite: "However, he [Shorty Williams] subsequently testified that he had been three blocks away, on 3rd and Davis [at the time of the shooting]. " (Answer Brief at 9). The transcript, however, shows the following exchange between the prosecutor and Mr. Williams during recross:

Q. Now, you said that after the shooting you told your female friend to go look in the police car?

A, I said when I passed by there, we were going on the way back to Third and Davis, Fourth and Davis, and we passed by there.

(H. 440).

The State asserts in its brief:- "Williams revealed that HE CANNOT READ AND NO ONE READ THE AFFIDAVIT TO HIM BEFORE HE SIGNED IT." (Answer Brief at 11) (All caps in the original). However, the State ignores the following testimony from Shorty Williams on redirect:

Q. [By Mr. McClain] Mr. Williams, I'm going to hand you what I showed you yesterday, Defendant's Exhibit C for the record, and it's a handwritten affidavit. Now, do you remember when I came to see you in New River?

A. Yes.

Q. And do you remember me reading that affidavit to you?

A. (Nods head.)

Q. And do you remember me asking you if it was all true?

A. Yes, sir.

Q. And did you tell me it was all true?

A. Yes, sir.

(H. 444). The State conducted no further examination of Shorty on that point.

The State says in its brief: "As previously noted, he [Shorty Williams] testified that officer Szafranski's car had been parked in front of Leo Jones' apartment, which is south of the intersection, instead of being in the intersection, turning north on Davis, when the shots were fired," (Answer Brief at 12). Though this statement is true enough, it leaves out the INCREDIBLY IMPORTANT FACT THAT THE STATE CALLED A WITNESS, OFFICER WILMOTH, WHO TESTIFIED THAT HIS POLICE CAR WAS PARKED ON DAVIS SOUTH OF THE INTERSECTION OF SIXTH AND DAVIS, EXACTLY WHERE SHORTY WILLIAMS SAID A POLICE CAR W-AS PARKED RIGHT BEFORE THE SHOOTING. Thus, Shorty Williams' testimony is accurate according to the State's own witness on the very point the State tries to argue is incredible.

The State asserts that the testimony of Dwayne Hagans (that Glenn Schofield was driving the car when Schofield tried to unload a rifle on Hagans) is impeached by the testimony of Shorty Williams (that Marion Manning was driving the car that picked Schofield up after Schofield shot Szafranski). (Answer Brief at 14). First, that implies that the State believes Shorty Williams' testimony, which is contrary to the entire thrust of the State's brief. If the State is asserting that Shorty Williams is not to be believed, then why is it asserting that Dwayne Hagans cannot be believed because his testimony does not match that

of Shorty Williams. Moreover, their testimony is not inconsistent. Just because at some point that night after the shooting Glenn Schofield was driving a car, does not mean that Marion Manning was not driving the car when she picked up Glenn Schofield at Shorty's request in order to get Schofield out of the area.

The State tries to make much out James Corbett's dispute with the prosecutor who examined him as to whether Leo Jones' apartment was right in front of a driver on Sixth that pulled up to the stop sign at Davis. However, the State's diagram attached to the brief shows that Corbett was absolutely correct. The North edge of Jones' apartment building is even with where the passenger side of a car stopped at the stop sign would be. (Exhibit B attached to Answer Brief).

In footnote 17, the State asserts: "State's Exhibit 6 shows a daytime photograph of the upstairs porch. That area was dark even in the daytime." (Answer Brief at 17 n. 17). In the daytime, the sun is high in the sky. As a result of the angle of the sun, shade is produced upon porches. In fact, that is the purpose of the roof over the porch, to produce a shady area, which in a photograph is darker than the surrounding areas open to the sunlight. Thus, a daytime photograph is not helpful is determining what is well lit at night. Here, the best evidence is the State's diagram (attached as Exhibit B to the Answer Brief) showing a street light at street level (i.e. below the second story porch) directly across the street from the porch, and the testimony of Officer Wilmoth who said he could see the porch clearly enough to tell that there was no one there at the time of the shooting one hour after James Corbett saw Schofield on the porch (H. 1241).

The State argues that Jones has now presented testimony (i.e. Schofield) that

contradicts Jones' trial testimony (Answer Brief at 17 n. 18). It should go without saying that Jones presented Schofield as a witness below, not because Jones contends that Schofield is telling the truth. As to where Schofield was living, Schofield made it clear that he had several girlfriends and several different places that he was staying. The apartment at the Emerson Arms Apartments was where he would spend time with one of his girlfriends, Patricia Owens. Schofield did not have one residence any more than he had one woman in his life.

The State says: "Schofield's testimony was essentially consistent with the statement he gave in 1984 to Louis Eliopulos, then an investigator for the public defender." (Answer Brief at 18). This statement is true enough, but it leaves out one critical fact. Schofield denied ever talking with Eliopulos or anyone else representing Jones (H. 546). Mr. Jones presented Schofield as a witness not because his testimony or his prior statements were true. But in fact because much of what he says is false, It is only by hearing what he has to say and comparing it to known facts and what other witnesses have to say that one can attempt to sort out fact from fiction. It requires the kind of cumulative analysis this Court mandated in Swafford which the State says is not required and which Judge Johnson below failed to conduct.

REPLY TO ARGUMENT I

The State contends that Mr. Jones has failed to prove his Brady claim for the following reasons: the majority of Mr. Smith's testimony is hearsay admissible only as impeachment,[2] the evidence is cumulative to that available since 1984;[3] Mr. Smith was

[2]Impeachment evidence qualifies as Seed Evidence. d States v. Bagley.

neither present at Mr. Jones' arrest nor involved in the investigation of this case;[4] Mr. Smith's testimony is inconsistent with the evidence presented at Mr. Jones' trial;' and Mr Jones' confession was not obtained until hours after his arrest.[6] In regard to Mr. Smith's testimony that the police were instructed at roll call to get Mr. Jones in prison, the State says that this is "hardly remarkable" considering Mr. Jones' prior encounter with the police and that it would not have made a difference at Mr. Jones' trial.

The State also contends that this claim is procedurally barred because a post-conviction defendant must present his claims within the time limits established by Rule 3.850. Mr. Smith contacted Mr. Jones' counsel in October 1997, and counsel orally amended the Rule 3.850 motion at the evidentiary hearing in December 1997 (H. 1303). The circuit court allowed counsel to amend the motion over the State's objection (H. 1304). This claim is not procedurally barred under Rule 3.850 which gives counsel one year from the date of discovery of new information in which to file or amend a motion to vacate. In any event, the circuit court's ruling that the amendment was proper was premised upon a finding of no procedural bar. The circuit court denied the claim on the merits employing an erroneous standard of review. Mr. Jones filed a notice of appeal challenging the standard employed. The State did not cross-appeal and should not be heard to argue that the circuit

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[3]This is simply not true.

[4]This misses the point that he nonetheless testified to statements that impeach the evidence presented by the State at trial.

'That is why it constitutes impeachment evidence. See Bagley .

"This point is premised upon the State's implicit argument that a confession is only suppressible where it is obtained within a certain unspecified number of minutes following a beating. The law is, in fact, contrary to the State's position.

court erred in rejecting its procedural bar argument.

The State recognizes that Mr. Smith did not share this information with anyone before approaching Mr. Jones' counsel but mischaracterizes his motivation in not coming forward sooner: "[Smith] came forward only in October of 1997 to report matters which allegedly occurred in 1981, and . . . explained his delay in coming forward as a product of his concern for a pension. " (Answer Brief at 32)(citations omitted). While Mr. Smith admitted that he did not come forward until after retiring from the sheriffs department, he also explained that a prior experience with internal affairs caused him to fear the consequences of telling anyone about Mundy's actions on this case (H. 219). In addition, Mr. Smith explained that everyone in the department knew about Mundy and Detective Eason but that until they were no longer useful to the department no one was willing to do anything about it (H. 217, 221, 225). The fact that Smith's fear of his department prevented him from disclosing information about Mundy lends further support to Mr. Jones' contention that State action caused the suppression of material, exculpatory evidence.

The State also implies that Mr. Jones has not proven his Brady claim because neither Mundy nor Eason was called to testify (Answer Brief at 35, 38). Mr. Jones is under no obligation to call the witnesses whose testimony was impeached by Mr. Smith. In fact, undersigned counsel informed the court and counsel for the State that he had unsuccessfully attempted to subpoena Detective Eason (H. 1035). Assistant State Attorney Corey Lee immediately told the court that she could make Eason available to testify (Id.). The State implies that Mr. Jones has failed to prove his claim because he did not call Eason and Mundy to testify, yet the State did not call these witnesses either when it would have been in

their interest to attempt to rebut the testimony of Mr. Smith and Mr. White. Ms. Corey Lee elicited from Mr. Smith a list of other police officers who were present when Mundy told him that he beat Jones (H. 222). However, the State called no witnesses to contradict Mr. Smith. Mr. Smith's and Mr. White's testimony is in fact unrebutted.

In addition, a defendant is not required to present testimony at an evidentiary hearing from a witness whose trial testimony is impeached by newly discovered evidence that had been withheld by the State. In Roman v. State, 528 So. 2d 1169 (Fla. 1988), this Court ordered a new trial after an evidentiary hearing on the defendant's claim that the State had violated Brady by withholding statements that could have been used to impeach a State trial witness.? There, Roman did not call the witness to testify at the evidentiary hearing, and this Court did not indicate that the defendant was required to do so in order to prove the elements of his Brady claim. See also Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

The State argues that because Mr. Smith's testimony about Mundy's statements is hearsay and would only be admissible as impeachment of Officer Mundy , Mr. Jones has

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'This Court's opinion in Roman is controlling here. At issue in Roman was a prior inconsistent statement of a witness who testified for the State at trial. The inconsistency was on a point that was in contention (in Roman, whether the defendant was intoxicated, here, whether Mundy beat Jones such that Jones was reasonably in fear for his life). The prior inconsistent statement was made to a police officer who otherwise did not have first hand knowledge (in Roman, the police officer did not observe Roman prior to the homicide to know whether he was intoxicated; here, Cleveland Smith was not present when Jones was arrested and did not observe Mundy beat him). The only difference between Roman and the circumstances here is that the police officer in Roman wrote the prior inconsistent statement down and that writing was introduced at the evidentiary hearing, here Cleveland Smith did not write it down, but former Officer Smith testified at the hearing as to the statement and when it was made. That distinction is not one that matters under the proper Brady analysis.

failed to prove that the State violated Brady v. Maryland.[8] As Mr. Jones has already stated in his initial brief, the failure to disclose information regarding a witness's credibility is just as violative of the dictates of Brady as the withholding of evidence regarding a defendant's innocence as this Court held in Roman and Garcia. See also United States v. Baalev, 473 U.S. 667 (1985); United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997).

As in Roman, Cleveland Smith's testimony was not just impeachment. That he testified on cross-examination that Officer Mundy was "like a hit man on the police department" and that he would be called by other officers specifically to beat up difficult suspects (H. 220). Mr. Smith also provided examples of specific instances of misconduct he observed when he patrolled with Mundy: that he would make up charges and falsify police reports (H. 189-90). Smith also testified on a proffer about a specific incident when he saw Mundy use vice grips on a suspect's genitals to get information (H. 192). On cross-examination, Mr. Smith testified that Mundy had spoken about beating Mr. Jones at his arrest:

> A Well, I asked him, I said, "what happened?" He says, "Man, you should have seen it." He says, "Man, I just went and I kicked the door open." He says, "There was this guy in there and I just started beating him and beating him."

[8] The State repeatedly notes that Mr. Smith was not present at Mr. Jones' arrest, that he knows no details about Mr. Jones' confession, and that he was not involved in the investigation of this case. The State indicates that "he [Smith] did not have any actual knowledge, other than what Mundy had told him, of whether or not that [sic] Mundy had ever touched Jones" and that "all he [Smith] knows is what Mundy told him." (Answer Brief at 33, 35). Mr. Smith never claimed that he had first-hand knowledge of what happened at Mr. Jones' arrest. However, the fact that some of Mr. Smith's testimony was hearsay does not defeat Mr. Jones' claim; Smith's testimony about Mundy's incriminating statements would have been admissible to impeach Mundy at both the suppression hearing and trial.

I said "Beating who? "

He said, "A guy we put in jail,"

I said, "How did you know that was the one?"

He said, "Man, we didn't care who we got. We were going to get somebody. "

(H. 223). Mr. Smith testified that Mundy had bragged to him and other officers about beating the confession out of Mr. Jones (Id.).[9] Mr. Smith also testified that shortly before the Szafranski shooting the police were told that an officer had a fight with Mr. Jones, and they were instructed to do everything in their power to put him in jail (H. 199). This is incredibly important evidence from a police officer showing that the police were in fact out to get Leo Jones.

Mr. Smith's testimony about Mundy bragging about beating Mr. Jones at his arrest is corroborated by Bill White's testimony about incriminating statements made to him by Detective Hugh Eason. Mr. White testified: "Eason had witnessed L.F. Mundy beating Leo Jones and had to pull him off. He also told me if I ever told anyone that, that he would deny it if he took the stand." (H. 1143). This corroborates Cleveland Smith's testimony and also establishes Hugh Eason's willingness to lie. The very State which indicated on the record below that it could produce Hugh Eason as a witness, "no problem," did not call

[9]Similar testimony from Mr. Smith was offered during his direct examination but was admitted only as a proffer. The State's cross-examination of Mr. Smith was not within the proffer and this testimony was presented without objection and was therefore admitted into evidence. The State's contention that "Smith never testified that he heard Mundy bragging about beating a confession out of Jones," (Answer Brief at 32), overlooks that it was Assistant State Attorney Corey Lee who elicited this testimony on cross-examination (H. 223).

Hugh Eason to rebut Bill White's testimony. This failure to contest the accuracy of Bill White's testimony is highly significant. Detective Eason's knowledge that Mr. Jones was beaten at his arrest is also material exculpatory evidence that was withheld by the State.

The State feebly argues that Mr. White's testimony "is inadmissible hearsay, not admissible even to impeach Mundy's testimony . . . . Jones has presented no admissible evidence here, and the trial court did not err by failing to consider it. " (Answer Brief at 38). The State is ignores the fact that Bill White's testimony is corroborative of Cleveland Smith. The State also ignores that Detective Eason testified at Mr. Jones' suppression hearing and trial, and that Mr. White's testimony would be admissible to impeach his testimony that Mr. Jones was not beaten. BUT MOST IMPORTANTLY, the State failed to contemporaneously object to Mr. White's testimony and cannot raise this issue for the first time on appeal. \$90.104 (l)(a), Fla. Stat. See Jones v. State, 701 So. 2d 76, 78 (Fla. 1997)(rejecting defendant's challenge on appeal to improper admission of expert testimony because of failure to object during the expert's testimony); Clark v. State, 363 So. 2d 331, 332 (Fla. 1978)(A contemporaneous objection is required to preserve for appeal improper comment on defendant's right to remain silent).[10] The State did not object to Bill White's testimony regarding Hugh Eason's statements to him. The evidence was thus admitted without objection.

Officer Mundy testified at both the suppression hearing and at Mr. Jones' trial. At the suppression hearing, he testified that Officers Torrible and Butler arrested Mr. Jones,

[10]This Court has held that the State is equally bound by procedural rules. Cannadv v. State, 620 So. 2d 165, 170 (Fla. 1993).

while he and Officer Roberts arrested Bobby Hammonds (Transcript of Motion to Suppress, p. 258). Mundy was initially in a back room of the apartment looking for more suspects when he heard noise in the front hallway and observed Mr. Jones in a "furious scuffle" with Officers Butler and Torrible; Mundy testified that he could not determine whether Mr. Jones was fighting back or was being hit by the officers because "it was just a big go-around" (Id. at 260). Mundy assisted Roberts with Mr. Hammonds who was "kicking and thrashing" (Id. at 262). Both Jones and Hammonds were subdued shortly thereafter (Id. at 261). Detective Eason testified that he could not remember Mr. Jones having any bruises when he interviewed him at the police station (Id. at 322).

Mundy's trial testimony was similar to that at the suppression hearing: that Torrible and Butler arrested Mr. Jones; that Bobby Hammonds fought with Roberts; and that he, Mundy, assisted Roberts with Hammonds (R. 792). Mundy testified that there was no physical abuse of Jones and Hammonds aside from at the scene of their arrest and that there was no abuse at the police station (R. 850). Mundy described the altercation at Mr. Jones' apartment as a "scuffle" (Id.). Torrible testified at Mr. Jones' trial that the scuffle with Jones began when he heard a bullet drop as Jones put his hands up on the wall (R. 979-80). He testified that Mundy never hit Mr. Jones and that after a minor scuffle, Mr. Jones was subdued (R. 980-81). Detective Eason testified that Mr. Jones had only slight injuries and that his confession was voluntary.

If it had been available at trial, Mr. Smith's testimony could have been used to impeach Officer Mundy's credibility when he testified that Mr. Jones was involved in only a minor scuffle, that he was not threatened, and that any force used by the police was

necessary to subdue him at the scene of his arrest. In addition, Mr. Smith's testimony about the instruction at roll call to get Mr. Jones in jail could have been used to impeach the testimony of any police officer who testified that Mr. Jones was not beaten, as could have been Smith's testimony about Mundy being the department's "hit man. " This evidence also provides a context in which the jury could evaluate the other evidence that was used to convict Mr. Jones -- the prejudicial testimony about the threats he allegedly made one week prior to his arrest and Mundy's inaccurate testimony about the triangulation diagrams from the Carter shooting. Bill White's testimony about Detective Eason's statements to him could have been used to impeach Eason's testimony that Mr. Jones had only minor injuries, and Eason's conclusion that Mr. Jones' confession was voluntary, The testimony of Mr. Smith and Mr. White would have corroborated Mr. Jones' trial testimony that he had been beaten and that he signed the confession only because he feared for his life. Because the State suppressed this material exculpatory evidence, Mr. Jones' testimony was the only evidence available to the defense to contradict the police officers' testimony that Mr. Jones had not been mistreated, that his injuries were a result of his resisting arrest, and that his confession was voluntary. [11]

"In addition to its usefulness at Mr. Jones' suppression hearing, the testimony of Mr. Smith and Mr. White could have been used at Mr. Jones' trial. In Crane v. Kentucky, 476 U.S. 683 (1986), the Supreme Court held that evidence pertaining to the voluntariness of a defendant's confession is admissible at his trial because of its relevance to the jury's determination whether the confession is reliable, The Court explained: "the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that are found to be voluntary, are not conclusive of guilt. And, as with

Because the trial and suppression hearing evidence presented by the State and the defense was in direct contradiction, the jury was forced to decide the case based on the credibility of the witnesses. The State at Mr. Jones' trial relied upon the credibility of the police officer witnesses to reject any suggestion that Mr. Jones had been beaten and that his confession was involuntary. During his closing argument, the State Attorney contrasted the honesty of the police with Mr. Jones' dishonesty. After listing all of the State's witnesses, the State Attorney encouraged the jury to compare their credibility with that of Mr. Jones:

> Were they honest and straightforward in answering? I submit to you they were. They were as honest and straightforward in answering as they could possibly be. Did they have any interest? Let me tell you something, they want to convict the guy that killed their friend, Tom Szafranski, but they don't want to get the guy that didn't. . , ,
>
> Well, what about Leo Alexander Jones? Was he honest and straightforward? I submit to you that he was everything but honest and straightforward. He lied repeatedly and he was not straightforward. He was argumentative. Hatred, I think, came oozing out as he sat there on the witness stand.

(R. 1386-87). The State Attorney also specifically praised Officer Mundy:

> He sort of took charge. He went up those stairs, he went into that apartment that he thought that the shot came from and then he went upstairs in order to look for a sniper, a cowardly,

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any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise . . . unworthy of belief. " Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" 476 U.S. at 688-89. Because the State withheld material exculpatory evidence regarding the circumstances under which Mr. Jones' confession was obtained, he was prevented from demonstrating to his jury that, although Judge Soud ruled the confession was voluntary, it was not necessarily reliable. The testimony of Mr. Smith and Mr. White, if presented to Mr. Jones' jury, would have resulted in a different outcome at his trial.

> animalistic person who is laying in the dark to assassinate another human being, and he went out there with all that danger and all that exposure and he walked in there in the dark in a hall thinking that there were people in there. He carried out his duty; he was brave. He was securing a scene. He acted reasonably, he acted professionally in everything he did. He was a lot braver than most anybody I know to have gone in there in a crouched position in a dark hall, and it makes you wonder how we get people to do things like that. But that man carried out his duties and he carried them out magnificently.

(R. 1449). Clearly, the issue of the voluntariness of Mr. Jones' confession was resolved based upon the "honest and,, straightforward" testimony of the police in comparison to Mr. Jones' "argumentative" testimony and hateful demeanor. Due to the State's misconduct, Mr. Jones was deprived of valuable evidence with which to impeach one of the State's most important witnesses against him, and the jury was deprived of material evidence that would have assisted its evaluation of the State's case against Mr. Jones.[12]

The evidence Smith provided about Mundy cannot be dismissed as cumulative because it is qualitatively different from what was previously available through any witness. In

[12]This evidence is not, as the State alleges, "cumulative to information that has been publicly available at least since 1984. " (Answer Brief, p. 31). The State refers to the transcript of a police disciplinary hearing and an appellate opinion that Mr. Jones attempted to offer at the 1992 evidentiary hearing which contained information about Officer Mundy's reputation for dishonesty. The evidence previously offered regarding Officer Mundy did not relate specifically to this case or to Officer Mundy's reputation for violence and the excessive use of force. Although the State characterizes Mr. Smith's testimony as "opinions about Mundy's credibility, " (Answer Brief at 31), Mr. Smith provided specific details about Mr. Jones' arrest, Officer Mundy's incriminating statements about his treatment of Mr. Jones, and first-hand knowledge of Officer Mundy's excessive use of force in arresting other suspects. In addition, the State's limited description ignores Smith's testimony about the instruction at roll call telling the police force to do everything they could to get Mr. Jones in jail. The State's erroneous conclusion that this evidence is "merely cumulative of information Jones already possessed," (Answer Brief at 36), is possible only if one ignores the most important aspects of Mr. Smith's testimony -- those that pertain specifically to this case.

Porter v. Singletary, 49 F.2d 1483 (11th Cir. 1995), the Eleventh Circuit Court of Appeals recognized that newly discovered evidence of judicial bias, even when an argument of bias had previously been made, can be grounds for relief. The Eleventh Circuit noted that "[t]hat evidence is not comparable at all to the evidence now proffered. " 49 F.3d at 1488. The newly discovered evidence in that case concerned specific statements by the trial judge expressing his intent to sentence Mr. Porter to death. The new evidence in this case is similar in that it entails specific statements relevant to Mr. Jones' case rather than the previously available more general information that Mundy had a reputation for dishonesty. The new evidence is both more specific, in that it directly concerns Mundy's actions on this case, and more relevant because it concerns his excessive use of force and his admission that Mr. Jones' confession was the result. Contrary to the State's contention that "Jones has offered nothing new here, " (Answer Brief at 34-35), the evidence presented through Mr. Smith's testimony is qualitatively different from the evidence previously available about Mundy .

The State has clearly missed the point about the effect that Mr. Smith's testimony would have had on Mr. Jones' trial.[13] The State states that "Smith's testimony that Mundy

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[13]The State mischaracterizes Smith's testimony when it notes that "Smith never testified that he heard Mundy bragging about beating a confession out of Jones; in fact, Smith only stated that he had read in the paper that Jones had stated that Mundy had beaten a confession out of him. " (Answer Brief at 32-33). Mr. Smith testified on cross-examination that Mundy had bragged to him and other officers about beating the confession out of Mr. Jones (H. 223). Mr. Smith did not initially believe Mundy because of his reputation as a "braggert" and a liar (H. 215-17). When Mr. Smith learned that Mr. Jones alleged that he was beaten, Mr. Smith knew that Mundy had not been exaggerating or lying but had been telling the truth about beating Mr. Jones (H. 216, 197-98). The State has attempted to minimize the potential impact of Mr. Smith's testimony by implying that the source of his knowledge is a newspaper article rather than Mundy himself.

had bragged about just kicking in the door and started beating everybody is not Brady material. It is wholly inconsistent with the trial evidence, and amounts to no more than his exaggerating 'some of his doings out on the street"' (Answer Brief at 36). The issue whether Mundy's incriminating statements were merely exaggeration should have been determined by Mr. Jones' jury, not by the State. And the fact that this testimony is inconsistent with the evidence offered at trial does not defeat Mr. Jones' Brady claim, it proves it. Jones attempted to prove that he had been beaten and that his confession was involuntary, but his trial attorney lacked the evidence to substantiate this claim. If there had been other reliable evidence presented at trial about Mundy beating Mr. Jones, Mr, Smith's testimony would be cumulative, and its potential effect on the trial would be more difficult to determine. The fact that his testimony is inconsistent with the State's evidence at trial strengthens Mr. Jones' claim that Mr. Smith's testimony would have resulted in a different outcome had it been available. The State also attempts to minimize the effect of Mr. Smith's testimony about Mundy's statements regarding his state of mind when he entered Mr. Jones' apartment: "even if Mundy ever had an intention to kill, he obviously did not carry it out. Jones was not killed" (Answer Brief at 35). The fact that Mr. Jones was not killed at the scene of his arrest is due to the fortuitous arrival of Detective Eason who pulled Mundy off of Jones H. 1143). Mundy 's statement about his intent to kill whomever he found in the apartment supports Mr. Jones' contention that he was beaten at his arrest and that he was in fear for his life when he signed a two-sentence confession. The evidentiary value of this statement is neither rebutted nor minimized by the fact that Mr. Jones survived.

Under this Court's precedent, Mr. Jones is entitled to relief based on the State's

withholding of material exculpatory evidence. Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Roman v. State, 528 So. 2d 1169 (Fla. 1988). In Roman, the primary issue at trial was whether the defendant was drunk at the time of the crime. The State presented seven witnesses that the defendant was not drunk, while the defense presented three witnesses that he was. The State withheld two statements by one of its witnesses indicating that, contrary to his trial testimony, the defendant was drunk at the relevant time. The State in Roman admitted that it had withheld the evidence but argued that it was not material because the defense had impeached the witness with other evidence. This Court found that although the witness had been impeached, he had also been rehabilitated, and the prior inconsistent statements were therefore material. In Garcia, the State withheld a statement corroborating the defendant's claim that he was not the shooter. This Court held that the statement was not material to guilt or innocence because there was sufficient evidence of Garcia's complicity in the crime. However, this Court ordered a new sentencing because the withheld statement would have assisted the defense in arguing that Garcia was not the shooter and was therefore undeserving of the death penalty. Because the materiality of Mr. Jones' Brady claim goes to his guilt/innocence phase, he is entitled to a new trial.

The State acknowledges, as did the State Attorney at Mr. Jones' trial, that "there was a physical altercation during Jones' arrest. " (Answer Brief at 35). At trial, the State Attorney told the jury: "Now, I don't doubt and I don't think you doubt that some folks got knocked around up there in that hall. " (R. 145 1). The issue whether Mr. Jones was beaten and coerced into signing a confession or whether the police used reasonable force to subdue a suspect resisting arrest was determined solely by the credibility of the witnesses -- Officers

Mundy and Torrible and Detective Eason, on the one hand, and Mr. Jones, on the other. Testimony from a police officer that Mundy made incriminating statements about intending to kill whomever he found in the apartment and that he had beaten the confession out of Mr. Jones would have tipped the balance in favor of Mr. Jones and enabled the defense to impeach the credibility of the State's witnesses. As in Roman, where the State and defense presented witnesses who directly contradicted each other on a key issue, the resolution of Mr. Jones' case was based on a credibility determination. Mr. Smith, a police officer, would have not only weakened the State's case against Mr. Jones, but would also have strengthened the defense evidence that Mr. Jones had been beaten and that his confession was coerced. Mr. Jones has demonstrated more than a reasonable probability that this evidence that was improperly withheld by the State would have resulted in a different outcome at Mr Jones' trial. This Court must order a new trial.

REPLY TO ARGUMENT II

The State urges this Court to rely on its 1996 opinion in this case upholding the circuit court's exclusion of Mr. Schofield's confessions: "Jones' present Schofield-confessed claim is in fact merely a variation of his prior claim, and is procedurally barred on that basis alone. " (Answer Brief at 44-45).[14] The State's argument that Mr. Jones' newly discovered

[14]The State relies on Mills v. State, 684 So. 2d 801 (Fla. 1996), to argue that Mr. Jones' claim is a "mere variation" of his earlier claims. In Mills, this Court rejected Mills' Brady claim because the new witnesses presented were discovered through a trial witness and therefore were available to Mills' counsel earlier through the exercise of due diligence. This Court noted that "Mills has failed to demonstrate that the present claim is not just a variation of his prior Bradv claims or that the assertion now made could not have been part of the prior Brady claims. " Id. at 805. This Court specifically distinguished Swafford v. State, 679 So. 2d 736 (Fla. 1996), in which the newly discovered evidence, like that offered by Mr. Jones, was not previously available. Id. at 805 n. 9.

evidence claim should be treated as a "mere variation" of his prior newly discovered evidence claim ignores that Mr. Jones' new witnesses, unlike those in Mills, were not available earlier and that the issue of the admissibility of the newly discovered evidence is completely changed by the fact that Glenn Schofield has testified. The State never addresses this Court's opinion in Swafford specifically requiring the evidence from a prior 3,850 hearing to be considered cumulatively with new evidence.

After a lengthy summary of the 1991 hearing and this Court's affirmance of the circuit court's exclusion of 'Mr. Schofield's confessions, the State concludes:

> [T]estimony about Schofield's alleged confessions was determined at the first hearing not to be admissible evidence. It would seem that such testimony should have been equally inadmissible at this hearing unless Jones could present newly-discovered evidence, not discoverable previously in the exercise of due diligence, establishing that Schofield's alleged confessions would be admissible under the declaration-against-penal-interest exception to the hearsay rule or otherwise. The only "new" evidence Jones has presented as to Schofield's availability to testify is the testimony of Schofield himself, which Jones presented at this hearing for the first time--five years after having. wilfully declined to present it at the 1992 hearing.

(Answer Brief at 45). [15] The State objected at the evidentiary hearing that Mr. Jones should be prohibited from calling Mr. Schofield as a witness because he was available in 1992 (H. 138-39). Judge Johnson overruled the objection, noting that counsel could call him because the 1992 hearing was a separate proceeding (H. 139). Counsel has never described Mr.

[15] At the 1992 hearing, counsel for Mr. Jones explained that he was not calling Mr. Schofield as a witness because he had observed Schofield interviewing Mr. Jones' hearing witnesses at the Duval County Jail in the presence of Detective Housend. Mr. Jones' attorney who represented him in 1992 testified at the 1997 hearing and explained his understanding that Mr. Schofield had become "part and parcel of the State's prosecution team" (H. 474).

Schofield as a newly discovered witness, nor is it necessary to do so. Judge Johnson properly permitted counsel to present Mr. Schofield's testimony without meeting the standard for newly discovered evidence, and the State's argument that this claim should be dismissed based on this Court's 1996 opinion ignores that the admissibility issue is no longer limited to the declaration against penal interest exception to the hearsay rule. The confessions are now admissible to impeach Mr. Schofield, and, while Judge Johnson recognized this in his order, he failed to consider their cumulative effect and discuss Glenn Schofield's testimony. Instead, he implicitly accepted Schofield's testimony without considering whether, in light of the substantial impeachment evidence offered by Mr. Jones, a jury would have a reasonable doubt as to Mr. Jones' guilt based on the wealth of evidence incriminating Schofield.

The State also argues that State v. Gunsby does not apply to Mr. Jones' claim because that case did not concern a successive 3.850. Notably, the State does not, and cannot, cite any part of this Court's opinion in Gunsby to support this argument as never indicated that its holding about the necessity of conducting a cumulative analysis of all evidence discovered since a defendant's trial is limited to an initial 3.850. Mr. Jones' argument about the necessity of conducting a cumulative analysis of all the new evidence is premised upon the clear dictates of Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996), that newly discovered evidence must be considered "in conjunction" with evidence presented in a prior 3.850 proceeding, as well as that presented at trial. Clearly, this Court's recognition of the importance of a cumulative analysis is not limited to initial Rule 3.850 motions.

The State offers an additional explanation of why Gunsby does not apply to Mr. Jones' claim:

> Gunsbv does not even hint, much less hold, that evidence not meeting the test for newly-discovered evidence may be considered 16 years after trial when there is no other basis for the consideration of such evidence. In this case, unlike Gunsbv, any evidence which does not properly qualify itself as newly-discovered evidence is not admissible under a theory of ineffectiveness of trial counsel; Jones has already had his "full and fair hearing on his claim of ineffectiveness of trial counsel."

(Answer Brief at 41). The State ignores that this Court's holding in Swafford which is directly on point. The State ignores the fact that in Gunsbv this Court required a cumulative consideration of all evidence discovered since a defendant's trial specifically including evidence not presented due to trial counsel's ineffectiveness, evidence improperly withheld by the State in violation of Brady v. Maryland, and newly discovered evidence of innocence not previously available. [16]

The State also claims that Judge Johnson conducted a cumulative analysis of the new evidence based on his statement that he considered the "combined" effect of all the admissible testimony (Answer Brief at 39). [17] The State argues that "Judge Johnson certainly did not give inadequate consideration to testimony of witnesses who testified in

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[16] Despite the State's complaint in Argument I about the excessive attention devoted to Mr. Jones' Brady claim in his initial brief, this claim seems to have been completely forgotten by the State in its determination that Gunsbv does not apply here. In 1997, Mr. Jones presented new evidence under two theories, newly discovered evidence of innocence and newly discovered evidence that was improperly withheld by the State. Gunsbv applies to both claims and requires that the circuit court conduct a cumulative analysis of the effect of all of this evidence, as well as that presented in Mr. Jones' prior post-conviction proceedings. Swafford. Judge Johnson listened to the State's erroneous assertions and did comply with the analysis required by Swafford and Gunsbv.

[17] Of course, the State's argument is premised upon its view that "cumulative" does not include consideration of prior 3.850 evidence. Swafford clearly establishes that the State is wrong on that assumption.

1992 and whose testimony was found by both Judge Soud and this Court not to have been admissible evidence, and there is no merit to Jones' 'cumulative effect' issue." (Answer Brief at 46). Judge Johnson's order denying relief reveals that he did not conduct a cumulative analysis of all the new evidence. Judge Johnson independently considered each witness's testimony and found that "the combined testimony of Roy Williams, James Corbett and Dwayne Hagans, or any two of them, if given at trial would not probably result in defendant's acquittal." (PC-R. 148). A mere reference to "the combined testimony" is not a cumulative analysis. Judge' Johnson analyzed each witness individually and did not consider the effect that they would have on the testimony offered at trial. Notably, Judge Johnson completely ignored the newly discovered evidence presented in 1992 -- Denise Reed, Daniel Cole, and Martha Bell -- and Marion Manning's 1986 testimony. He also completely ignored Cleveland Smith's unrebutted testimony and Bill White's unrebutted testimony. His analysis is like that of the lower court that was rejected by the Supreme Court in Kyles v. Whitley with the following criticism: "the opinion also contains references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone . . . . The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by Bagley." 115 S. Ct. 1555, 1569 (1995). This Court should similarly reject Judge Johnson's analysis of Mr. Jones' evidence.

The State argues that even if all the evidence discovered since Mr. Jones' trial were considered cumulatively, Mr. Jones would still lose on this claim because "nothing about Jones' various offerings over the years is consistent except the bare allegation of Schofield's

involvement. " (Answer Brief at 46). The State then details what it considers to be the inconsistencies in the testimony of Mr. Jones' witnesses. For example, the State notes that witnesses offered different stories about what Mr. Schofield did with the murder weapon -- whether "he tried to give it away, or he threw it into the river, or he left it in Katherine Dixon's apartment" -- that are not mutually exclusive and could all accurately describe what Mr. Schofield did or said he did with the rifle at different times after the shooting. [18]

During his closing argument at Mr. Jones' trial, the State Attorney admitted that the State's witnesses did not always agree on the details of what they had observed or heard. Rather than allowing this to undermine their credibility, he offered an explanation that applies with equal force to Mr. Jones' witnesses:

> There's some inconsistent -- not inconsistencies, but variations in the testimony that come out in the trial of a case. Two shots, one shot, three shots. Mr. Fallin wants you to believe that the police will go down to the police station and dummy up a confession, wants you to believe that they would manufacture and lie and come up here and commit felonies and perjure themselves, and that they wouldn't get that straight before they come in here, that they -- in other words, what the point I'm making to you, ladies and gentlemen of the jury, is **those inconsistencies show the total honesty of the police conduct in this case, because if they were lying it would have been perfect, it would have been put to you just perfectly. . .** But common sense tells you that the police officers -- if they're going to come in here and manufacture evidence they're not going to be that amateurish about it. What they do is they come in and tell you the best they know how, the best they know how.

[18] The source of other statements in the State's "summary" of Mr. Jones' evidence cannot be determined. For example, Mr. Jones never offered evidence that Mr. Schofield went to Georgia the day after the murder, that he hid the rifle under Mr. Jones' bed, or that he escaped by running to a car parked at the crime scene (Answer Brief at 47).

(R. 1447-48)(emphasis added). Mr. Jones' witnesses also testified as "best they know how" about events that occurred sixteen years ago, and what the State views as inconsistencies in their testimony supports their credibility.

Finally, the State notes that "nowhere in his brief does Jones argue that the evidence admitted at this hearing suffices to establish his innocence. " (Answer Brief at 47). To the contrary, the statement of facts in Mr. Jones' initial brief begins with the same statement that counsel for Mr. Jones has repeated for years: "Mr. Jones is innocent of the crime for which he was convicted and sentenced to death." (Initial Brief p. 3). Moreover, Mr. Jones has met the applicable standard by demonstrating that the evidence discovered since his trial raises a reasonable doubt about his guilt and would have resulted in a different outcome at his trial. See Jones v. State, 591 So. 2d at 915. He has also demonstrated that confidence in the outcome is undermined. See Gunsby. Mr. Jones is innocent of the murder which was in fact committed by Glenn Schofield.

REPLY TO ARGUMENT III

The State argues that Judge Johnson properly excluded Mr. Schofield's hearsay confessions, again relying on this Court's 1996 opinion and concluding that " [t]he argument was rejected then; it is equally meritless now. " (Answer Brief at 50). The State simply wants this Court to ignore the additional witnesses discovered since the 1992 hearing who provided testimony further implicating Mr. Schofield as the person solely responsible for Officer Szafranski's murder. These new witnesses include James Corbett who saw Mr. Schofield at the crime scene earlier in the night with a rifle and later saw him fleeing the scene moments after he heard the shots that killed Officer Szafranski (H. 1068-69; 1071-72);

Roy Williams who saw Mr. Schofield at the crime scene bending down and aiming a rifle immediately before he heard the shots that killed Officer Szafranksi (H. 287-89); Dwayne Hagans who saw Mr. Schofield on the night of the shooting and testified that Mr. Schofield was trying to borrow money to get out of town and asked Hagans to hold a rifle for him (H. 851-52). This new evidence further supports Mr. Jones' argument that Mr. Schofield's confessions bear sufficient indicia of reliability and should be admitted as substantive evidence.

The State also notes that "Jones cites no case holding that a state evidentiary rule must be invalidated whenever it prevents a criminal defendant from admitting any evidence, no matter how dubious. " (Answer Brief at 50). Counsel agrees that no such case was cited in his brief and that no such case exists. The law is that, where a criminal defendant presents adequate circumstantial guarantees of trustworthiness, the evidence is admissible. Here, such circumstances have now been presented.

The State incorrectly claims that "[n]or has Jones cited any case in which a rule concerning the use of prior inconsistent statements has been found to violate a criminal defendant's right to present a defense. " (Answer Brief at 50). In Rivera v. Director, Department of Corrections, 915 F.2d 280 (7th Cir. 1990), the court reversed the defendant's conviction because the out-of-court confession of another man that exculpated the defendant was excluded based on the state's hearsay rule. The court explained:

> The Supreme Court held in Chambers v. Mississippi, that "the hearsay rule may not be applied mechanistically to defeat the ends of justice." The due process clause entitles a criminal defendant to demand, irrespective of the state's hearsay rule, a trial "adequate to separate the guilty from the innocent. " Gomez v. Greer, 896 F.2d 252, 254 (7th Cir. 1990). So if the

> defendant tenders vital evidence the judge cannot refuse to admit it without giving a better reason than that it is hearsay.

915 F.2d at 281. In Rivera, the court noted that the State argued that the confession was unreliable because it was contradicted by trial testimony implicating Rivera; the court referred to this argument as "silly" and noted that Rivera's motivation in offering the confession was to rebut the State's witnesses. The court in Rivera also noted that "the Supreme Court does not sit to decide cases that will control only cases having identical facts." Id. at 282. The fact that the hearsay confession in Rivera was not made under circumstances identical to those in Chambers was not a valid reason to exclude it, This same logic refutes the State's discussion of Chambers and its conclusion that "Chambers is inapposite. " (Answer Brief at 50).

REPLY TO ARGUMENT IV

The State misconstrues Mr. Jones' argument in order to claim that it is unconstitutional to draw adverse inferences from a witness's invocation of his right to remain silent. [19] The State questions counsel's argument on this issue, expressing "serious[] doubts" about the constitutionality of drawing inferences from a witness's invocation of this right, as though counsel did not explain the caselaw and cite binding Supreme Court precedent. The State has failed to either rebut or distinguish the cases cited in counsel's initial brief.

The State attempts to dismiss the probative value of Mr. Schofield's invocation of his right to remain silent: "So why would we draw any adverse inferences from Schofield's

[19] The State alleges that Mr. Schofield "merely used the invocation of his Fifth Amendment right as a means to secure his right to counsel. " (Answer Brief at 53). The simple fact that Schofield felt the need for counsel or was concerned about incriminating himself is relevant evidence.

invocation of his right to consult with counsel? And even if we did, so what?" (Answer Brief at 54). In Lefkowitz v. Turley, 414 U.S. 70, 77 (1973), the Supreme Court explained that the Fifth Amendment "privileges [an individual] not to answer official questions . . . where the answers might incriminate him." Because the right to remain silent protects an individual's right against self-incrimination, the permissible inference that may be drawn from Mr. Schofield's invocation is probative of Mr. Jones' innocence. Although Mr. Schofield was also impeached with his criminal record, the impeachment value of his invocation of the Fifth Amendment is qualitatively different from that provided by his prior convictions because it is directly related to Schofield's state of mind and his guilt of the crime for which Mr. Jones was convicted. Just as evidence of flight is frequently used to show consciousness of guilt, evidence of the invocation of the Fifth Amendment, though not admissible against the person who invokes the Fifth, is admissible to show consciousness of guilt in other proceedings, Using this evidence in this context does not violate the Fifth Amendment. It provides relevant evidence casting further doubt on Mr. Jones' guilt and should have been considered below.

REPLY TO ARGUMENT. V

The State misunderstands Mr. Jones' argument about his right to examine Mr. Schofield about his criminal past and his repeated efforts to minimize and distort his criminal liability in order to avoid punishment. The State argues that "[n]one of the 'evidence' proffered here would be admissible at any trial of Leo Jones, and was properly excluded by Judge Johnson. " (Answer Brief at 56). Counsel explained that his purpose in questioning Mr. Schofield in these areas was to impeach his credibility by showing his bias and motive to

lie (H. 560-61). Counsel also explained, and the court agreed, that some of this evidence would be admissible at a penalty phase if Mr. Schofield were ever convicted of killing Officer Szafranski (H. 560). This further supports counsel's argument that Mr. Schofield had a motive to lie at the evidentiary hearing. This is a proper method and area of impeachment, and Judge Johnson erroneously prohibited counsel for Mr. Jones from pursuing it. [20]

The State alleges that Judge Johnson properly prohibited counsel from proffering testimony from Cleveland Smith about Mr. Schofield's status as a confidential informant in 1981 (Answer Brief at 57). The fact that the testimony would be hearsay is irrelevant to counsel's right to proffer it.[21] The purpose of proffering testimony is to create a record for the appellate court that includes testimony that has been ruled inadmissible. The State also notes that even if this ruling was erroneous, it was harmless because Judge Johnson allowed

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[20]Regarding counsel's effort to question Mr. Schofield about his 1991 statement denying that he ever confessed to killing Officer Szafranski, the State merely summarizes what occurred at the evidentiary hearing without addressing Mr. Jones' argument about why he should be permitted to question Mr. Schofield about what is not in the statement (Answer Brief at 56). The fact that Mr. Schofield provided an alibi for the night of Officer Szafranski's death when he testified in 1997 but did not do so when questioned by the sheriff's department in 1991 renders that 1991 statement a prior inconsistent statement. As such, it is admissible as impeachment evidence. As this Court explained in State v. Smith, "[t]o be inconsistent, a prior statement must either directly contradict or materially differ from the expected testimony at trial. This includes allowing 'witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.'" 573 So. 2d 306, 3 13 (Fla. 1990)(quoting Jenkins v. Anderson, 447 U.S. 231, 239, 100 S. Ct. 2124, 2129, 65 L.Ed.2d 86 (1980)). Mr. Schofield's failure to provide an alibi in 1991, under circumstances when it would be natural to do so, is a permissible area of inquiry. Judge Johnson erred in prohibiting this line of inquiry.

[21]Moreover, the evidence was not irrelevant because it impeached Glenn Schofield's contrary testimony.

Jasper Kirtsey to testify that Mr. Schofield told him that he, Schofield, was a confidential informant (Answer at 57). The State cannot contend that the probative value of this information is the same regardless of its source. The fact that Mr. Kirtsey offered this testimony would impeach Mr. Schofield's testimony denying that he was a confidential informant and corroborate the same information if offered by Mr. Smith. However, testimony from a police officer that fellow officers told him Mr. Schofield was a confidential informant would have more credibility. Judge Johnson's erroneous denial of the request to proffer this testimony was not harmless.

REPLY TO ARGUMENT. VI

The State argues that there is no evidence proving that a bribe was ever conveyed to Judge Harvey by Judge Soud on behalf of Mr. Jones (Answer at 57). The State also incorrectly states that Mr. Jones has admitted that the "allegation" about the bribe is "without any substance whatever. " (Answer Brief at 61). Alberta Brown testified about her involvement in the bribery scheme, and Mr. Jones stands by this witness's testimony (H. 884).[22] The State suggests that Ms. Brown is not credible and that her delay in coming forward is unreasonable, noting that if the bribe never occurred, Ms. Brown had no reason to

[22]This is an appeal from Judge Johnson's ruling; it is not a de novo proceeding. The fact that undersigned counsel is following recognized rules of appellate procedure including this Court's standard of review cannot be argued as a concession that the claim was without substance. Undersigned counsel absolutely believes Alberta Brown's testimony. Undersigned counsel found Judge Soud's denial of any memory of representation of Mr. Jones or cash payments from Leo Jones' mother and Ms. Brown wholly incredible and unworthy of belief. But, of course, undersigned counsel's personal beliefs are not relevant in this appeal from Judge Johnson's order. And it is worth observing that three justices of this Court would have recused Judge Soud from the electric chair claim on the basis of undersigned counsel's claim that Judge Soud had demonstrated bias against Leo Jones, even before the evidence in question surfaced.

fear getting Mr. Jones' mother in trouble, and she would have disclosed the information about Judge Soud's representation of Mr. Jones earlier in order to save his life (Answer at 59 n. 29). The State concludes that Ms. Brown's explanation "provide[s] no justification for the delay if no bribery occurred, as clearly it did not." (Answer Brief at 59 n. 29). However, if the bribe did occur, Ms. Brown's explanation of her reluctance to come forward is perfectly reasonable, The fact that Ms. Brown had information potentially helpful to Mr. Jones but did not disclose it sooner implies that there were other factors motivating her to not get involved, specifically that she feared Mr. Jones' mother would be prosecuted for her role in bribing Judge Harvey.

The State also questions whether Judge Soud ever represented Mr. Jones (Answer at 59). Suggesting there is any doubt about this issue requires that the State completely ignore the 1969 court file containing Judge Soud's name as "Atty for Deft" on the very same date on which Mr. Jones' sentence was vacated and set aside. The State argues that there is "no direct testimony that Judge Soud ever appeared in court on Leo Jones' behalf. " (Answer Brief at 59). While it is true that neither Ms. Brown nor Mr. Jones was present in court that day and cannot provide "direct" testimony about Judge Soud's representation, the court file presents unrebutted documentary proof that Judge Soud represented Mr. Jones in 1969.

The State next argues that even if Judge Soud did represent Mr. Jones in 1969, this would not automatically require his recusal in 1981 (Answer at 60). Whether Judge Soud would have been required to recuse himself is not the only issue raised by Mr. Jones. The State's Answer Brief completely ignores that Judge Soud made a partial and misleading disclosure on the record before securing the parties' consent allowing him to remain on Mr.

Jones' capital case. This undermines the State's suggestion that this claim is procedurally barred because Mr. Jones' counsel justifiably relied on Judge Soud's misleading disclosure and his false statement that there were no grounds for recusal. In addition, the State's suggestion that Porter v. Singletary "does not excuse a defendant's failure to raise a ground for disqualification of which he should be at least as aware of as the judge, " (Answer Brief at 60 n. 30), implies that if Mr. Jones was remiss in not knowing of the grounds for disqualification, Judge Soud is equally responsible. Porter supports Mr. Jones' argument that the burden of disclosing any potential conflict rests with the judge and that a defendant cannot be penalized for his counsel's good faith reliance on a judge's disclosure. 49 F.3d 1483, 1489 (11th Cir. 1995).

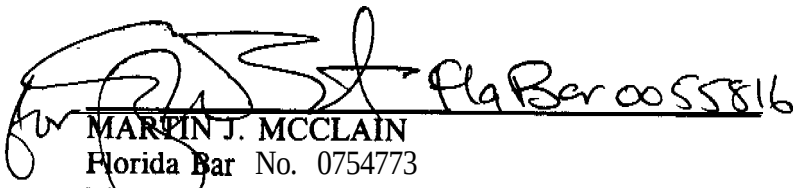
REPLY TO ARGUMENT WI

The State argues that Mr. Jones' request for Mr. Schofield's presentence investigation is untimely and that he has not demonstrated his entitlement to the PSI. In its recent order Buenoano v. State, this Court apparently recognized that Rule 3.852, Fla. R. Crim. P., does not apply to situations such as those presented in this case. See Attachment A. As stated in Mr. Jones' initial brief, Mr. Schofield's PSI contains material exculpatory evidence to which he is entitled under Bradv v. Maryland.

CONCLUSION

For the reasons stated herein and in the Initial Brief, a new trial is required.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by facsimile transmission, to all counsel of record on February 20, 1998.



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ATTACHMENT A

Supreme Court of Florida

MONDAY, FEBRUARY 9, 1998

JUDY A. BUENOANO, etc., Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 92,233 Circuit Court No. CR84-4741 (Orange)

After hearing oral argument in this case and reviewing the February 6, 1998 Notice of Filing by Office of the State Attorney for the Ninth Judicial Circuit and the Response of the Office of the Capital Collateral Regional Counsel-Northern Region (CCRC), the Court concludes that expedited release to Judy A. Buenoano of the sealed documents at issue here is necessary in light of the pressing circumstance with which the Court and the parties are faced. The Court directs that the sealed documents, which were the subject of the State's Request for In Camera Inspection and Judicial Determination of Prosecutorial Obligation, be immediately returned to the trial court, with directions to make them available to CCRC, on behalf of Judy A. Buenoano. The sealed documents shall be made available on the conditions outlined in the Court's February 5, 1998 order temporarily limiting access to documents contained in Volume 4 of the record, pending further order of the trial court.

The Court's ruling here renders Buenoano's challenge to the trial court's Order Regarding State's Request for In Camera Inspection and Judicial Determination of Prosecutorial Obligation moot. Therefore, the Court also orders that no rulings that have been made to date in connection with the documents which were the subject of that order, either by this Court or the trial court, shall be used to the prejudice of either party in further postconviction proceedings.

It is further ordered that the State has until February 11, 1998, in which to file in the trial court a motion for protective order covering all documents and court records the State seeks to protect from public disclosure; responses to said motion shall be filed with the trial court by February 17, 1998. If the State does not timely file a motion for protective order with the trial court, the conditions outlined in the Court's February 5, 1998 order shall no longer apply; if such motion is timely filed, these conditions shall remain in effect until the trial court rules on the motion. The trial court shall hold a hearing on the State's motion for protective order by February 18, 1998, and rule on that motion by February 20, 1998.

The Motion of The New York Times Regional Newspapers to Intervene for The Limited Purpose of Opposing Closure of Records is transferred to the trial court, and responses thereto shall be filed in the trial court by February 11, 1998. The trial court shall hold a hearing on the Motion to Intervene by February 13, 1998, and rule on the motion by February 16, 1998.

NO MOTION FOR REHEARING IS ALLOWED.

KOGAN, C.J., OVERTON, SHAW, HARDING, WELLS, ANSTEAD, and PARIENTE, JJ., concur

TC
cc: Ms. Sylvia W. Smith
Mr. Robert Friedman
Ms. Candance Sabella
Ms. Katherine V. Blanco
Ms. Paula Coffman
Ms. Judy A. Buenoano
Hon. Fran Carlton, Clerk
Hon. Reginald K. Whitehead, Judge
Mr. Gregg D. Thomas
Ms. Susan L. Turner
Ms. Kimberly A. Stott
Mr. Adam Liptak
Ms. Tamara L. Gappen
Mr. Lee O'Brien

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Supreme Court of Florida

FRIDAY, FEBRUARY 6, 1998

AMENDED ORDER

JUDY A. BUENOANO, etc.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92,233

Circuit Court No. CR84-4741
(Orange)

After hearing argument in this matter, the Court directs the Office of the State Attorney for the Ninth Judicial Circuit, in and for Orange County, Florida, the Orange County Sheriff's Department and the Orlando Police Department (1) to make available to the Office of the Capital Collateral Regional Counsel-Northern Region (CCRC) all documents in their possession which are encompassed by the chapter 119 requests at issue in this case and which have not previously been provided to Buenoano, or (2) to raise any exemptions they may claim to such production in the trial court within ten (10) days from the date of this Order. The Court further directs that by February 16, 1998, the agencies certify to the trial court that a diligent search has been made and that all documents requested by Buenoano as of that date for which no exemptions are claimed have been produced.

NO MOTION FOR REHEARING IS ALLOWED.

TC
cc: Ms. Sylvia W. Smith
Mr. Robert Friedman
Ms. Candance M. Sabella
Ms. Katherine V. Blanco
Ms. Paula Coffman
Hon. Fran Carlton, Clerk
Hon. Reginald K. Whitehead, Judge
Ms. Tamara L. Gappen
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Mr. Adam Liptak

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Sid
Clerk, Supreme Court