IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,227

MILO A. ROSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Rose's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

"R." -- record on direct appeal to this Court;

"PC-R1." -- record on appeal from initial denial of postconviction relief;

"PC-R2." -- record on appeal in the instant proceeding;

"Supp. R." -- supplemental record on appeal materials.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

Appellee urges this Court to deny Mr. Rose an evidentiary hearing on the issues presented in his Motion for Postconviction Relief. Appellee's argument for denying Mr. Rose an evidentiary hearing is summarized as: 1) Mr. Rose's trial counsel failed to diligently uncover the State's deal with witnesses Borton and Poole; 2) the lower court is not required to evaluate the materiality of Mr. Rose's Brady claim in conjunction with the additional alleged constitutional errors in Mr. Rose's trial; and 3) Poole and Borton were completely unnecessary in securing the conviction and death sentence against Mr. Rose. Each of these assertions are false, as is discussed below, and the lower court erred in denying Mr. Rose the opportunity to prove his claims in an evidentiary hearing. See Lemon v. State, 498 So. 2d 923 (Fla. 1986).

ARGUMENT I-DILIGENCE

Pursuant to the rules regarding filing successive motions for postconviction relief, the motion must be filed within one year of when the facts germane to a claim were discovered. Fla. R. Crim. P. 3.851. Appellee is not arguing, nor did the lower court find, that Mr. Rose did not file his successive motion for postconviction relief within one year of uncovering the State's deal with Borton and Poole. Instead, the lower court, as to diligence, stated that Mr. Rose's trial counsel (Rouson) failed to inquire as to what charges were pending against Borton (PC-R2. 762). This question goes to the second prong of a Brady analysis

(whether the defense knew of the evidence in question), not to whether postconviction counsel was diligent in uncovering and presenting the claim.

Additionally, the lower court must be unfamiliar with the deposition of Borton, wherein Rouson asked the specific question the lower court pondered. When Rouson inquired of Borton's prior and pending convictions, Assistant State Attorney Young (Young) interrupted the witness and stated, "why don't you ask if the marijuana charge is a felony or a misdemeanor." (R. 209). Borton replied it was a misdemeanor (R. 209). Rouson inquired, Young interceded, and the truth of the deal between the State and Borton remained hidden from Mr. Rose. This conduct, "attributable to the State [] impeded [Mr. Rose's] access to the factual basis for making a Brady claim." Strickler v. Greene, 119 S. Ct. 1936, 1949 (1999). The State cannot actively hide information from the defense, and then complain later when the defense finally discovers it.

Appellee argues that Ms. Borton's pretrial deposition wherein she discusses her misdemeanor conviction should have somehow alerted Rouson to the deal that we now know existed between Borton and the State. Such a suggestion, that Rouson was unable to rely on the statements of a witness who was under oath and the Assistant State Attorney who failed to correct the untruth is ludicrous.

Furthermore, by suggesting that Mr. Rose was not diligent in asserting his Brady claim, Appellee apparently does not subscribe to the tenet:

> [t]he presumption, well established by "'tradition and experience,'" that prosecutors have fully "'discharged their official duties,'" United States v. Mezzanatto, 513 U.S. 196, 210, 115 S. Ct. 797, 130 L.Ed.2d 697 (1995), is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.

Strickler, 119 S. Ct. at 1951.

Mr. Rose asserted he was diligent in presenting his successive motion for postconviction relief. Appellee asserts that no factual allegations regarding diligence were presented in Mr. Rose's case (Answer at 11). Appellee apparently ignores Mr. Rose's clear statement in his Rule 3.850 motion that he learned of the Brady evidence only after Mr. Rose himself spoke to another death row inmate and learned that Ms. Borton admitted in a deposition in the Rhodes' case that she had made a deal with the State in Mr. Rose's case (PC-R2. 1-25). Further, Appellee appears to ignore this Court's existing case law instructing that allegations of fact regarding due diligence must be accepted as true. Swafford v. State, 679 So. 2d 736 (Fla. 1996); Card v. State, 652 So. 2d 344 (Fla. 1995).

It was improper for the lower court to decide, without the benefit of testimonial and documentary evidence, that Mr. Rose failed in his diligence. Mr. Rose met the pleading requirement,

and any questions as to diligence are properly decided after an evidentiary hearing on the issue, not before. Swafford, 679 at 739 ("We accept as sufficient for the purposes of demonstrating that an evidentiary hearing is required, Swafford's claim that Lestz's statement amounts to newly discovered evidence. . . Accordingly, we direct the trial court on remand to determine whether Swafford has demonstrated as a threshold requirement that his untimely and successive motion for postconviction relief was filed within two years of the time when Lestz's statement could have been discovered through the exercise of due diligence.")

In essence, the lower court held a one-sided hearing regarding the issue of diligence. The lower court allowed the State to introduce non-record materials in an attempt to show Mr. Rose had not been diligent.[1] Mr. Rose was denied the opportunity to prove his diligence and to counter the State's assertions. Mr. Rose met his burden of proof and, at a minimum, was entitled to an evidentiary hearing to offer proof in support of his diligence.

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[1] Appellee suggests that Mr. Rose had the opportunity to "offer" public records to support his claim (Answer at 12). This statement is patently false. No such opportunity was ever offered Mr. Rose. Rather, the State was in fact the party who "offered" the lower court non-record materials which were used against Mr. Rose without giving him the opportunity to rebut them.

Appellee, in her Answer Brief, concedes the lower court relied upon non-record materials. The Appellee then suggests that the non-record materials benefited Mr. Rose, disregarding the lower court's reliance on these materials in reaching its conclusion that Mr. Rose was not diligent.

ARGUMENT II-GOTCHA

The State utilized three components in securing the conviction and death sentence against Mr. Rose. Firstly, the State relied upon eyewitness testimony. Secondly, the State relied upon the inference of inculpatory blood evidence. Thirdly, the State relied upon the testimony of Poole and Borton. In denying Mr. Rose the opportunity to prove his claims in an evidentiary hearing, the lower court relied upon the first two components of the State's case. The lower court held, and the State argued, that the new information regarding the deal between the State and Borton/Poole would not have affected the outcome of the trial, because of the eyewitness testimony and the blood evidence (PC-R2. 756-758).

In Mr. Rose's initial postconviction motion for relief, he attacked the constitutionality of his conviction and sentence based upon the lack of an adversarial testing, the lack of a zealous advocate, and the ineffectiveness of his attorney. The lower court summarily denied all of these claims without the benefit of an evidentiary hearing. In so doing, the lower court relied upon the strength and damaging nature of the Borton/Poole testimony (PC-R. 756-757).

Now, with evidence surfacing attacking the Borton/Poole prong of the State's case, the lower court relies on the integrity of the first two components of the State's case and disregards the allegations Mr. Rose pleaded in his initial motion for postconviction relief attacking these components.

A proper cumulative error analysis requires the court to consider all current and previous allegations attacking the constitutionality of the original judgment and sentence. Furthermore, the court cannot simply disregard the role of the jury, and substitute its own judgment for that of the jury.

The lower court insists on only looking at the four corners of the original trial transcript. The lower court did so in 1989, in its ruling denying an evidentiary hearing on guilt phase. A myth has been created concerning the strength of the evidence supporting Mr. Rose's conviction and sentence. The myth began during trial, wherein the lower court refused to acknowledge Rouson's self-doubt regarding his own zealous advocacy for Mr. Rose (R. 914). The lower court denied Rouson's request for more time to prepare (R. 469-470), denied Rouson's requests to withdraw (R. 171a; 914), even going so far as to demand his presence in chambers to discuss his in-court statements that he could not ethically continue to represent Mr. Rose (R. 914). Not only did she try to assuage Rouson's self-doubts, when Mr. Rose brought these same matters to the court's attention, the court promised Mr. Rose these issues would be fully investigated in postconviction (R. 924). Indeed, when faced with an attack on Rouson's failure to provide effective representation and zealous advocacy, the lower court disregarded all evidence of ineffectiveness, relying on the unchallenged testimony provided at trial.

If the lower court conducted a proper cumulative error analysis, it would be clear that Mr. Rose was not afforded a constitutional trial. An effective advocate would have seriously undermined the State's story:

1. The eyewitness testimony became much stronger between the time of the original interview, conducted with all eyewitnesses together, and the time of trial. The identification by all four witnesses of Mr. Rose from a highly suggestive photo-pak that did not give "rise to that much substantial likelihood of irreparable mistaken identification" (R. 507-509) could have been suppressed. At the time of the initial interview the four witnesses had, at most, a vague description of the perpetrator. This Court is unaware of that fact, due to the lower court's continual refusal to allow Mr. Rose the chance to prove his allegations in an evidentiary hearing. Furthermore, this Court has never had the opportunity to evaluate the weakness of their identification of Mr. Rose in light of the numerous inconsistencies contained in the police reports, depositions, motion to suppress hearing, and trial testimony. Postconviction counsel is and was prepared to prove this is a classic case of misidentification. Effective counsel would have successfully suppressed the identifications, or would have destroyed the eyewitnesses in the eyes of the jury, and would have called an expert on eyewitness misidentification.

2. The State completely fabricated a story regarding the blood evidence. No blood from the victim was found on Mr. Rose.

Due to Rouson's abysmal representation, the State was able to improperly introduce, through a witness with absolutely no personal knowledge or expert qualifications, a story that the blood tests were unreliable because of "mixing of the blood" during collection. This "mixing of the blood" theory presented by the State is patently false, as evidenced by the affidavit from Dale Nute presented during Mr. Rose's initial postconviction proceedings. Furthermore, the actual report prepared by the Florida Department of Law Enforcement clearly shows that **none** of the victim's blood was found on Mr. Rose. Effective counsel would have, at a minimum, **deposed** the examiner who tested the blood and prepared the report concluding the victim's blood was not found on Mr. Rose. After deposing the examiner, it would have been clear this would have been a favorable witness to call during the defense's case-in-chief.

3. An effective advocate could have thoroughly impeached both Borton and Poole with the deal brokered by the State and the glaring inconsistencies contained in their own statements. In fact, this Court is unaware that Mr. Rose never stated he made the victim a "vegetable." Borton attributed this statement to Mr. Rose at trial, but due to Rouson's total lack of preparation and unfamiliarity with the police statements and depositions, Rouson failed to impeach Borton with her initial statement to the police. In her initial statement, she attributes the statement to herself, and not to Mr. Rose. Effective counsel would have shown to the jury that Poole was also very close to the murder

scene, was also drinking at the same bar as the victim earlier in the night, and most importantly, that Poole matched the first, general description given by the eyewitnesses. Finally, the lower court, in denying Mr. Rose the opportunity to prove his claims in an evidentiary hearing, relied on a misrepresentation perpetuated by the State that Borton/Poole never changed their story. This is patently false, but only becomes clear upon a close and detailed reading of the entire record, not just the trial testimony.

Mr. Rose's case is strikingly similar to the factual scenario in State v. Gunsby, 670 So. 2d 920 (Fla. 1996). The State's case against Mr. Gunsby consisted of eyewitness testimony (two eyewitnesses) and inculpatory remarks attributed to Mr. Gunsby by several witnesses.[2] Like Mr. Gunsby, Mr. Rose was represented by a woefully inexperienced attorney with no prior capital or even first/second degree trial experience -- attorneys so inexperienced they had never before used any mental health experts. In Gunsby, postconviction counsel attacked the effectiveness of trial counsel and alleged a Brady violation. Id. This Court, upon review of the lower court's order denying guilt phase relief, held that the guilt phase ineffectiveness

[2] At Mr. Gunsby's trial, the State presented a motive for the murder. However, in Mr. Rose's case, no motive was ever offered by the State. The fact that the victim and Mr. Rose were friends, witnesses were available to testify at trial that Mr. Rose defended the victim earlier in the evening and Mr. Rose and the victim's mother lived together, prevented the State from offering any motive that does not defy logic.

claims the lower court found meritless had to be considered in conjunction with the Brady evidence. Id. at 924.

Gunsby also teaches that in evaluating constitutional errors a court may overlook diligence and consider the evidence in conjunction with other constitutional errors:

> In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through the use of due diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel . . . Nevertheless, when we consider the cumulative effect of the testimony presented at the Rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome.

Gunsby, 670 So. 2d at 924. Counsel for Mr. Rose argued that the lower court, if it were to rely on a diligence bar, to consider the Borton/Poole deal under a Strickland analysis (PC-R2. 15). The lower court refused to do so and the Appellee has attempted to turn Appellant's request into a concession. (Answer at 11)("Rose's motion offers a claim of ineffective assistance of counsel as an alternative to the Brady claim, thus apparently acknowledging that counsel could have discovered this information."). Gunsby illustrates the propriety of alternative theories for relief.

This Court's ruling in Gunsby addressed the correctness of the lower court's ruling after an evidentiary hearing, wherein the standard for relief is higher. See Strickland v. Washington, 466 U.S. 668 (1984); Brady v. Maryland, 373 U.S. 83 (1963). In Mr. Rose's case, the proper analysis is whether Mr. Rose has now overcome the lower standard of whether or not an evidentiary hearing is warranted. Lemon v. State, 498 So. 2d 923 (Fla. 1986).

ARGUMENT III-THE DEAL

A thorough review of the record indicates that every decision made by the judge and jury at Mr. Rose's capital trial and the lower court during Mr. Rose's postconviction hearing relied on the credibility of Poole and Borton's testimony that Mr. Rose had confessed to them and requested that they provide him with an alibi. In other words, Poole and Borton were crucial in convicting and sentencing Mr. Rose to death.

Mr. Rose uncovered that at the time of his trial, Borton/Poole received lenient treatment from the State in exchange for their testimony against Mr. Rose (PC-R2. 1-25; 187-234). Neither Borton nor Poole were strangers to the criminal justice system and they knew from their prior experiences with the State how to procure benefits in exchange for a story the State wanted to hear. Borton has admitted that a deal existed in exchange for her testimony against Mr. Rose. The Appellee never once mentions this fact in her Answer. In light of Borton's admission, Young's interruption of Borton's deposition, at the moment Rouson was inquiring about prior and pending charges, can

be interpreted in no other way than outright obstruction of justice.

Appellee attempts to minimize the importance of the Borton\Poole testimony. Appellee even goes as far as to characterize these two witnesses as simply "ancillary" (Answer at 17). Clearly, Appellee must downplay the necessity of Borton and Poole's role in securing the conviction and death sentence, in an attempt to shift the focus from the State's deception. The State cannot argue that it was proper for Young to actively participate in deceiving Mr. Rose, the jury, the lower court, and this Court. The easier course, short of conceding error, is to simply mischaracterize the importance of these two critical witnesses.

Appellee continues the deception, by asserting that "the Borton/Poole trial testimony had little significance in the imposition in the death penalty." (Answer at 20). Appellee distorts the lower court's sentencing order. The lower court relied on the Borton/Poole testimony to support a finding of cold, calculated, and premeditated. The lower court relied on the Borton/Poole testimony to defeat all mental health related statutory mitigators. The lower court relied on the Borton/Poole testimony to find the testimony of a mental health expert, at the 1989 evidentiary hearing, incredible. But Appellee chooses to argue to this Court that Borton/Poole were unimportant, and the revelation of their cozy relationship with the State could have in no way affected the nine-three jury recommendation for death.

Appellee also urges this Court to recede from Bagley[3] and Giglio[4], arguing that because the suppressed evidence concerned "only" a deal between the State and the witnesses, this Court should overlook any constitutional impropriety (Answer at 17). However, the truth of a witness' testimony and a witness' motive for testifying are material questions of fact for the jury, thus, the improper withholding of information regarding a witness' credibility is just as violative of the dictates of Brady as the withholding of information regarding a defendant's innocence. Bagley, 473 U.S. 667.

In fact, Giglio dealt specifically with the government's withholding evidence of an agreement for the witnesses' testimony and then presenting testimony that there was no such agreement. 405 U.S. at 154-155. Appellee acts surprised that Mr. Rose cited to both Giglio and Agurs[5] despite his reliance on both of these cases in his motion for postconviction relief, his Huff hearing, and his initial brief on appeal. Appellee's surprise is disingenuous, when Young is on record directing witness Borton to clarify for Rouson whether her most recent charge was a felony or misdemeanor and sitting mute when Borton failed to disclose all the benefits she received, including a credit for time served on a serious felony violation of probation.

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[3] United States v. Bagley, 473 U.S. 667 (1985).

[4] United States v. Giglio, 405 U.S. 150 (1972).

[5] United States v. Agurs, 478 U.S. 97 (1976).

It is indisputable, for the purpose of whether Mr. Rose should be entitled to an evidentiary hearing, that a deal was brokered between the State and Borton/Poole. Appellee, like the lower court, confuses the proper standard by which to evaluate whether Mr. Rose should be granted an evidentiary hearing. The lower court evaluated Mr. Rose's claims as if an evidentiary hearing had already been conducted. The lower court utilized the Jones[6] test for newly discovered evidence of innocence, instead of evaluating Mr. Rose's claims under the Lemon test, as to whether an evidentiary hearing was warranted. By denying Mr. Rose the opportunity to present evidence in support of his claims at an evidentiary hearing, the court is sending a clear message to the State that it will tolerate the suppression of evidence. The State should not be allowed to prosper in this manner, especially when a man's freedom, and his life, are literally at stake.

CONCLUSION-THE MYTH CONTINUES

Appellee further distorts the facts and perpetuates the myth surrounding Mr. Rose's conviction and sentence. The State continues to manufacture the story best suited to support Mr. Rose's conviction and sentence due to Rouson's complete lack of effectiveness. When the lower court denied Mr. Rose a guilt phase evidentiary hearing, it stated that the blood evidence was immaterial in securing the conviction and sentence against Mr. Rose. When contemporaneously denying Mr. Rose an evidentiary

[6] Jones v. State, 591 So. 2d 911 (Fla. 1991).

hearing, the lower court, and the Appellee, argue that Borton/Poole are completely unnecessary in the judgment and sentence. This leaves Mr. Rose's conviction standing solely on the eyewitness testimony--testimony that has never been challenged. It was not challenged at trial, and the lower court prevented Mr. Rose from challenging that testimony at an evidentiary hearing. Considering, after the State's concessions that the other two prongs were completely unnecessary, that Mr. Rose's conviction rests solely on the eyewitness testimony, this Court must remand this case for an evidentiary hearing on the newly discovered Brady evidence in conjunction with the allegations of ineffective assistance of counsel.

The eyewitness statements contained in the police reports, witness statements, and depositions differ greatly from the testimony presented at trial. Rouson failed to make this known to the lower court. The lower court prevented Mr. Rose from making this known when it denied his motion to dismiss Rouson. The lower court prevented this from becoming known by denying Mr. Rose an evidentiary hearing on all guilt phase issues. The Court, in upholding the lower court's original order summarily denying all guilt phase claims, did not know of the different facts contained in the police reports, witness statements, and depositions. Now, after raising yet another new constitutional claim, the lower court again prevented the true facts from coming forth. The State attempts to buttress that order. This Court must step in, and halt the myth once and for all.

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 February 11, 2000.

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