IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.CASE NO. 96, 216

JOHN STEVEN HUGGINS,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT

OF THE NINTH JUDICIAL CIRCUIT, IN

AND FOR ORANGE COUNTY, FLORIDA

Amended

ANSWER BRIEF OF APPELLEE

*Amended as to font size only

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STATEMENT OF THE FACTS

Appellee was indicted by a Grand Jury in Orange County, Florida on May 28, 1998, for the offenses of Murder in the First Degree, Carjacking, Robbery, and Kidnapping in State of Florida v. John Steven Huggins CR98-7190, the underlying criminal case in this matter. (TR440). The Appellee's Motion for Change of Venue was granted, and venue was transferred to the Fourth Judicial Circuit, in and for Duval County, Florida, where trial began on January 25, 1999. (SR Volume 1). On February 3, 1999, a jury found Appellee guilty of the Murder in the First Degree, Carjacking, Robbery and Kidnapping of Carla Larson. (SR 1606-1608)

On February 10, 1999, the jury recommended the imposition of the death penalty by a vote of eight

to four. (SR1947-1953). Venue was then returned to Orange County. The Court entered a Sentencing Order on February 26, 1999, imposing the death penalty upon Appellee for the First-Degree Murder of Carla Larson. (SR Volume 13).

On March 25, 1999, Appellee filed the instant Petition for Writ of Habeas Corpus. Appellee alleged that the State suppressed evidence favorable to the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963). (TR467-468). A hearing was held on the Petition on March 26, 1999, at which both Appellee and the Appellant appeared. (TR412-438). On March 26, 1999, the trial court entered an Order on Defendant's Petition for Writ of Habeas Corpus Ordering Evidentiary Hearing. (TR470-472).

On March 26, 1999, Mr. Huggins filed a Notice of Appeal with the Florida Supreme Court. Upon consideration of Mr. Huggins' motion to relinquish jurisdiction, this Court relinquished jurisdiction to the trial court for an evidentiary hearing on Defendant's Petition for Writ of Habeas Corpus. (Florida Supreme Court Order, April 23, 1999). An evidentiary hearing was held on May 21, 1999. Mr. Huggins and the State presented testimony, evidence and argument regarding the alleged Brady violation. (TR Volumes 2-3). At that hearing, the following course of events was established:

On June 16, 1997, an individual named Preston Ausley spoke with Detective Daniel Nazarchuk of the Orange County Sheriff s Office. (TR118-121). Mr. Ausley testified that he is an engineer with Jones LaSalle at the Orange County Courthouse. (TR210-211). Mr. Ausley contacted the Sheriff's office with information regarding the Carla Larson case. (TR125). Mr. Ausley told Detective Daniel Nazarchuk of the Orange County Sheriff's Office that a white Ford Explorer cut him off in traffic and that he had written down the tag number. (TR214-215). Mr. Ausley told Detective Nazarchuk that he had verified within one digit that the license plate number he had recorded was the same as that of Carla Larson's Explorer. (TR215-218). As a result of this conversation, lead sheet 302 was created from Detective Nazarchuk's notes. (TR 118-121). The lead sheet was provided to the defense during discovery. Lead sheet 302 does not list the five-digit license number Preston Ausley reported, the make and model of the vehicle he saw, and incorrectly indicates that Ausley saw a male driver. (Defense Exhibit 8, Lead Sheet 302).

At the evidentiary hearing, Mr. Ausley claimed that the individual he saw driving the vehicle was a white female in her late twenties to early thirties with blonde hair similar to that of Angel Huggins.

(TR212). Additionally, he testified that the woman he saw driving the white Ford Explorer was of similar shape and stature as Angel Huggins. (TR219-220). However, lead sheet 302 indicates that Detective Nazarchuk reported that Mr. Ausley said he saw a white male driving the vehicle. (Defense Exhibit 8, Lead Sheet 302). Detective Nazarchuk recorded the date of the sighting as June 12, 1997. (TR 125) However, Mr. Ausley believes it was June 11, 1997. (TR236). At the hearing, Mr. Ausley explained that he is very bad with dates and came to the conclusion that he encountered Ms. Larson's truck on June 11, 1997, by verifying the date through other sources.

Thereafter, on February 1, 1999, the day after seeing Angel Huggins on television during coverage of Defendant's trial, Preston Ausley went to the Office of the State Attorney to speak with Lawson Lamar, the State Attorney for the Ninth Judicial Circuit. (TR212, 220, 225). Mr. Ausley had never seen Angel Huggins prior to the news footage aired while the trial was in progress. (TR 264,630). Mr. Lamar was unavailable. Mr. Ausley was directed to Assistant State Attorney Dorothy Sedgwick who spoke with him briefly. (TR514-516). Ms. Sedgwick asked Pat Guice, an investigator with the State Attorney's office, to speak with Mr. Ausley and take a tape-recorded statement. (TR514).

In the recorded statement provided to Mr. Guice, Mr. Ausley stated that when he saw Angel Huggins on television it struck him that she resembled the white female with blonde hair he had seen driving the white Ford Explorer, with a license plate that matched Carla Larson's within one digit, on the morning of June 11, 1997, on International Drive. (TR97, 214-218). After he had given his statement, Mr. Guice requested that Mr. Ausley return the next day so that the attorneys, who were at that very time prosecuting Appellee's case in Jacksonville, could speak with him. (TR97). The next morning, Assistant State Attorney Jeff Ashton, who was then prosecuting Appellee's case in Jacksonville,

spoke with Mr. Ausley via telephone. After his conversation with Mr. Ausley, Mr. Ashton determined that Mr. Ausley's name had been given to defense counsel during discovery in lead sheet 302, Mr. Ausley's statement did not support what he believed the defense's theory of the case would be, and Mr. Ausley's statement was of little value. (TR350-361). Mr. Aston did not listen to the recorded statement of Preston Ausley prior to deciding not to disclose it. (TR 351). In fact, he did not listen to it until after the trial had concluded. (TR351). Mr. Ashton decided not to disclose the tape-recorded statement or the information contained therein to Defendant without ever listening to it. (TR 351,360).

Mr. Ashton attended trial after speaking with Mr. Ausley and did not disclose the fact that he had been contacted by Mr. Ausley to the Court or to defense counsel. The trial concluded that same week. At some point after Defendant's trial and sentencing, Mr. Ausley contacted Tyrone King, co-counsel for Defendant. (TR230-231). Mr. Ausley advised Mr. King of his meeting with the members of the State Attorney's Office and the substance of his February 1, 1999, tape-recorded statement. (TR231).

As indicated previously, Mr. Ausley admits that he is very bad with dates. The evidence presented indicates that Mr. Ausley may have seen this individual driving on International Drive sometime between June 11, 1997 and June 15, 1997.

Following the evidentiary hearing, and arguments of counsel, the trial court entered its Order Regarding Petition for Writ of Habeas Corpus outlining his findings and ruling as ordered by this Court. (TR808-827). The trial court's order found that the State violated Brady, and therefore vacated the convictions and sentences, and remanded the matter for a new trial. (TR826).

The State of Florida appeals the trial court's order.

SUMMARY OF THE ARGUMENT

The trial court's grant of relief should be affirmed because it is supported by competent substantial record evidence. The testimony and the evidence from the trial and evidentiary hearing were carefully considered by the trial judge only three months following the trial. The trial court properly applied the correct analysis under Brady v. Maryland, and entered a well-reasoned order granting a new trial.

The Florida Supreme Court has repeatedly honored and recognized a trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. This Court has repeatedly opined that, "This Court as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judge's conclusion." The trial court properly applied the correct law, its findings are supported by competent substantial evidence, and therefore its grant of a new trial was not an abuse of discretion.

I. THE TRIAL COURT'S GRANT OF A NEW TRIAL IS CORRECT AS A MATTER OF LAW AND IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

The record and the trial court's order indicate that the trial court properly applied the correct law and its ruling is supported by competent substantial evidence.

> In the American adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact, and exceptions to this are justifiable only by the clearest and most compelling considerations.

Dennis v. United States, 384 U.S. 855 (1966).

The prosecution has a duty to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant, of a fair trial. United States v. Bagley, 473 U.S. 667 (1985). This duty is grounded in the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Florida Constitution, The Florida Rules of Criminal Procedure, and defined to a great extent in Brady v. Maryland, 373 U.S. 83 (1963). This was a capital case in which the prosecution requested, and the trial court imposed the death penalty. Hence, heightened standards of due process apply. *See* Elledge v. State, 346 So.2d 998 (Fla.1977) ("heightened" standard of review), Mills v. Maryland, 486 U.S. 367, 376 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the fact-finding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and Beck v. Alabama, 447 U.S. 625, 638 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion) (citing cases).

In Brady, Brady and a codefendant were charged with capital murder. Their cases were severed, and before trial, Brady's attorney requested that the prosecution allow him to examine the codefendant's extradjudicial statements. Brady, 373 U.S. 83, 84 (1963). Several of those statements were shown to him, but a particular statement in which the codefendant admitted actually committing the homicide himself was withheld by the prosecution and did not come to the attention of Brady's counsel prior to trial. At trial, Brady testified in his own defense and admitted his participation in the crime, but asserted that his codefendant had

done the actual killing. Id. It was only after Brady was convicted and sentenced that his attorney became aware of the codefendant's statement that had previously been withheld from him.

In much-cited language, the Supreme Court held, "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. The Brady doctrine was refined by the U.S. Supreme Court opinion in United States v. Agurs, 427 U.S. 97 (1976).

Agurs went to trial asserting self-defense, and was convicted of second-degree murder. Three months after trial, defense counsel filed a motion for a new trial asserting that he had discovered that the victims had a prior criminal record that would have further evidenced his violent character, and that the prosecution had failed to disclose this information to the defense Id. at 100.

In Agurs, the Court explained that the Brady doctrine might arise in three different situations. The most extreme case is one in which the prosecution's case includes perjured testimony or its equivalent, and the prosecution knows or reasonably should know of the perjury. A different situation is one in which the defense makes a pretrial request for specific information. Finally, in a situation where the defense makes only a general request for pretrial discovery. The test for materiality would be at its most demanding under the third situation. Agurs, 427 U.S. at 112.

Again the Brady definition of materiality was refined in United States v. Bagley, 473 U.S. 667 (1985). The refined definition explained that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Bagley, 473 U.S. at 682. In ten years, the Court would again address the pesky issue of materiality.

Finally, with the addition of Kyles v. Whitley, 514 U.S. 419 (1995), the Supreme Court added the fourth installment in the Brady doctrine, and again addressed materiality. The Kyles Court found that four aspects of materiality under Bagley required emphasis. First, "a showing of materiality does not require demonstration by a preponderance that disclosure would have resulted ultimately in the defendant's acquittal." Kyles, 514 U.S. at 434. "The question is not whether the defendant would more likely than not have received

a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Id. at 434; Bagley, 473 U.S. at 678. The second aspect of Bagley materiality addressed by the Kyles Court was the sufficiency of the evidence.

"It is not a sufficiency of the evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles, 514 U.S. at 434-435. One shows a *Brady* violation by demonstrating that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Id. at 435.

Third, once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review. "Assuming, *arguendo*, that a harmless error enquiry were to apply, a Bagley error could not be treated as harmless, since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'"[1] "In sum, once there has been Bagley error as claimed in Kyles, it cannot subsequently be found harmless." Kyles, 514 U.S. at 436.

The fourth and final aspect of Bagley materiality addressed its definition in terms of suppressed evidence considered collectively, not item-by-item. Kyles, 514 U.S. at 436.

The definitions of materiality under Brady, Agurs, Bagley, and Kyles have been fleshed out somewhat in Florida opinions which address the duties of a

[1]Kyles at 435, *citing* Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) *quoting* Kotteakos v. United States, 328 U.S. 750, 776 (1946).

prosecutor in determining whether evidence is material. In State v. Gillespie, the reviewing court adopted the reasoning of the Maryland State Court in Brady as follows:

> As we see it the prosecutor should disclose to the defense such information as it has that may reasonably be considered admissible and useful to the defense in a sense that it is probably material and exculpatory....

227 So.2d 550 (Fla. 2d DCA 1969).

The Court went on to recite that "the 'favorable evidence' we are talking about is really that evidence which a reasonably skilled prosecutor should know could be fairly and probably used to advantage by the accused on the issues of guilt or innocence." Id., *See also* Pitts v. State**,** 362 So.2d 147 (Fla. 3d DCA 1978), where the court applied the same standard. Although the decision in Gillespie preceded the Supreme Court's decision in Agurs and Bagley, both of which address the applicable standard on review, its language is surprisingly similar to the standard ultimately set by those decisions.

The various elements of the decisions interpreting *Brady* have been accumulated by the Florida Supreme Court into a precise definition.[2] This

[2]Hildwin v. Dugger, 654 So.2d 107 (Fla.1995); *see also* Hunter v. State, 660 So.2d 244 (Fla.1995), where the Court used the following somewhat different elements: (1) that the undisclosed evidence actually exists; (2) that the evidence was suppressed; (3) that the evidence was exculpatory; and (4) that the defendant was prejudiced by the non-disclosure.

definition includes the following elements:

> that the State possessed evidence favorable to the defendant;
> 2. that the defendant did not possess the favorable evidence nor could he obtain it with any reasonable diligence;
> 3. that the State suppressed the favorable evidence; and
> 4. that had the evidence been disclosed to the defendant, a reasonable probability exists that the outcome of the proceeding would have been different.

Melendez v. State, 612 So.2d 1366 (Fla.1992); Mendyk v. State, 592 So.2d 1076 (Fla.1992); Hegwood v. State, 575 So.2d 170 (Fla.1991).

Based on the United States Supreme Court decisions in Brady, Agurs, Bagley, and Kyles, Florida's caselaw interpreting those opinions, and the aforementioned four-prong analysis, the it is evident that the trial court properly applied the prevailing law and was completely within its discretion when it granted the Appellee a new trial.

On July 21, 1999, Judge Belvin Perry entered the Order Regarding Petition For Writ of Habeas Corpus. The order is evidence that the trial judge properly applied the correct law. (TR 808-827). The trial court in the "Discussion" section of the order outlined the law applied to the facts presented at the evidentiary hearing, and the burden on the Defendant. (TR 811-812). The trial court noted that under Brady, and Jones v. State, 709 So.2d 512 (Fla.1998), the Appellant had to show that:

> (1)...the Government possessed evidence favorable to

> the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

(TR812). The trial court then applied the trial and evidentiary hearing evidence to each prong of the of the Brady analysis.

The State possessed evidence favorable to the defendant. Under the Florida analysis, the Defendant must first show that the State possessed evidence favorable to the Defendant. The trial court correctly ruled on the first element of a Brady claim. (TR812). To be favorable, the evidence must first be admissible and subject to the consideration of the trier of fact. Although the State contests the credibility of Mr. Ausley, the State failed to establish any evidentiary bars to the admissibility of the evidence which Mr. Ausley possessed. Further, favorable evidence is that evidence which a reasonably skilled prosecutor should know could be fairly and properly used to advantage by the accused on issues of guilt or punishment. Melendez v. State, 498 So.2d 1258 (Fla.1986); Smith v. State, 421 So.2d 146 (Fla.1982); State v. Connell, 478 So.2d 1176 (Fla. 2d DCA 1985). If there is room for doubt as to whether or not evidence is exculpatory, it is generally improper for the prosecutor to decide

what is useful for the defense.[3] If the exculpatory nature of the evidence is doubtful, the prosecutor should turn over his or her file to the court for a Brady inspection.[4] The trial court made abundantly clear during the trial in this case the procedure by which such important matters could be brought to the attention of the court or opposing party. At the evidentiary hearing, prosecutor Jeff Ashton admitted having knowledge of the Court's availability and procedure for such matters. (TR 349).

In this case, Mr. Ausley's statement may have been used to impeach Angel Huggins, the State's key witness. (TR812). The trial court found that Mr. Ausley's statements and observations clearly conflict with Angel Huggins' testimony at trial. (TR812). "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within th[e] general rule [of Brady]." Bagley, 105 S. Ct. at 3381 (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)). It is important to note the majority of the State's case stemmed from the assertion of Angel

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[3] Dennis v. U.S., 384 U.S. 855, 875 (1966) (determination of what may be useful to the defense can properly and effectively be made only by an advocate); U.S. v. Hibler, 463 F.2d 455 (9th Cir.1972) (prosecutor's failure to disclose police officer's statement which was consistent with his defense was reversible error).

[4] U.S. v. Lloyd, 992 F.2d 348 (D.C. Cir.1993)(case remanded for government to make a redetermination as to materiality of documents that its investigation produced, and any documents not turned over to the defendant should be reviewed *in camera*); U.S. v. Cadet, 727 F.2d 1453 (9th Cir. 1984); U.S. v. Griggs, 713 F.2d 672 (11th Cir. 1983); Hamric v. Bailey, 386 F.2d 390 (4th Cir.1967).

Huggins that John Huggins was in possession of a white Ford Explorer. Not only does Mr. Ausley's testimony conflict with that of Angel Huggins, the evidence tends to support the Appellee's assertion that Angel Huggins was involved, and that someone else was in possession of the white Ford Explorer. She attempted to gain credibility by stating that she was never inside the vehicle. (SR674). The State now argues in its Initial Brief that Angel Huggins was only referencing a specific day that she did not ride in the white Ford Explorer. At trial, the examination went as follows:

> Now, at some point, did you ride in the car or get in the car?
>
> No.
>
> That is the white Ford Explorer?
>
> A. Right. No I did not.

(SR674). The record is clear, Ms. Huggins stated that she never rode in that vehicle. The evidence from Preston Ausley is favorable to the Defendant.

It is clear from his testimony that Mr. Ashton was aware that he should have thoroughly inspected the evidence before deciding to conceal it. Mr. Ashton did quite the contrary. He did not listen to Mr. Ausley's recorded statement prior to suppressing it.

> Did you listen to the audiotape of the statement made by Preston Ausley?

Ever or before that?

While we were in Jacksonville during the trial?

No.

Were you aware that the conversation had been taped?

Yes.

(TR351). How can a prosecutor decide to conceal evidence from the defense because he has determined that it is not favorable, without ever listening to the evidence? It is disingenuous for the State to now argue that the prosecutor determined that Mr. Ausley's statement were not credible, and therefore not favorable, when the prosecutor had not listened to the recording prior to suppressing it. After carefully considering Mr. Ausley's testimony, the trial court found it to be favorable as required by Brady and Jones. (TR814). The trial court's ruling on the first prong of the Brady analysis is supported by competent substantial record evidence.

The second prong of Florida's *Brady* analysis was met by the Appellee during the evidentiary hearing. The Appellee did not possess Ausley's February 1, 1999 recorded statement nor could he have obtained it with any reasonable diligence. The state argues that Mr. Huggins could have discovered the substance of Mr. Ausley's statement if defense counsel had more fully

investigated lead sheet 302. (TR727-730). The unique timing of Ausley's observation of Angel Huggins -- while the trial was in progress -- makes it such that the defendant did not possess the favorable evidence nor could he obtain it with any reasonable diligence. Mr. Ausley's testimony and observations, which were the subject of the evidentiary hearing, did not exist prior to the trial, as he had not seen Angel Huggins until the newscast. (TR264, 630). Likewise, it is unreasonable to assume that Mr. Huggins could have discovered this information with reasonable diligence, as its discovery required Mr. Ausley seeing the likeness or image of Angel Huggins. Even the prosecutor was well aware that the evidence was not available to the defense. Mr. Ashton's testimony at the evidentiary hearing went as follows:

> Was the information that John -- I'm sorry -- Preston Ausley witnessed Angel Huggins on Channel Nine, and that's disclosed in tip sheet 302 or Detective Nazarchuk's lead sheet?
>
> A. Of course not. It didn't exist at the time.

(TR353).

It should also be noted that before the start of trial, during the deposition of Detective Daniel Nazarchuk, the Orange County Sheriff's Detective who originally spoke to Mr. Ausley in June, 1997, the following exchange took place,

> BY MR. WESLEY:...
> Q. And let me ask you; my summary indicates that in this homicide of Carla Larson, that you may have done the following things: Obtained hotel registration folio information from the Royal Mansions Resort. Obtained hotel registration information from the Days

> Inn on Cheney Highway, Titusville, and a Travelodge Hotel in Cocoa, Florida. Interviewed John August about a sighting of a poorly painted, black Ford Explorer (Indiscernible words) on Eau Gallie Causeway.
>
> A. That correct. Yeah.
>
> Q. Was there anything else that you did, Dan?
>
> A. No. Unh-unh.

(TR Defense Exhibit 10, Deposition of Daniel Nazarchuk).

The trial court found that Mr. Ausley saw Angel Huggins on television and it struck him that she resembled the person he had seen in a white Ford Explorer with a license plate that matched Carla Larson's within one character. (TR814). The court further found that lead sheet 302 was one of several hundred lead sheets provided to the defense. (TR814). After reviewing lead sheet 302, the testimony of witnesses including that of Tyrone King, co-counsel for the Defendant, the trial court found that the information in lead sheet 302 was undisputedly different from that provided in Mr. Ausley's February 1, 1999 recorded statement. (TR815). Specifically the trial court found that the gender of the driver reported on lead sheet 302 was reported as male and the driver's resemblance to Angel Huggins was not reported on the lead sheet because Mr. Ausley had not yet seen Angel Huggins. (TR815). Most importantly, based on sound reasoning and the evidence before it, the trial court stated that the nature

of Mr. Ausley's statement changed dramatically as a result of an event that occurred during Defendant's trial. (TR815). Mr. Ausley did not simply recall additional facts related to his initial statement, instead he provided new information based on an event that occurred during trial. (TR817). The trial court concluded that,

> It was during Defendant's trial that Mr. Ausley saw Ms. Huggins on television. It was upon seeing this woman that Mr. Ausley was struck by the fact that she resembled the individual driving the vehicle he had seen on International Drive in June of 1997. Thereafter, Mr. Ausley contacted the State and offered this new information. The State took a tape-recorded statement and the prosecuting attorney interviewed Mr. Ausley, but made no effort to apprise the Defendant. Defense counsel Robert Wesley and Tyrone King, were in trial in Jacksonville when Mr. Ausley came forward in Orlando. It is obvious that this evidence was not available to Defendant nor could he have obtained it through due diligence.

(TR816). Based on the foregoing, and the contents of the trial court's order, the trial court's ruling on the second prong of the Brady analysis is based on competent substantial record evidence.

Next, the trial court concluded that the State suppressed the February 1, 1999 statements and observations of Mr. Ausley. (TR820). Assistant State Attorney Dorothy Sedgwick made sure that Ausley's information would be preserved. She instructed Pat Guice, an investigator with her office, to take a

sworn tape-recorded statement from Ausley to document his observations. (TR514). She further instructed her office personnel to contact Jeff Ashton and Edward Culhan, the prosecuting, attorneys in Jacksonville while the trial was in progress. (TR515-516). Mrs. Sedgwick then instructed Mr. Ausley to return the following day so that he could speak with the prosecuting attorneys. (TR516). On the following morning, Mrs. Sedgwick was informed that the prosecuting attorneys were conducting a conference call from Jacksonville, with Mr. Ausley in Orlando. (TR523-524). She overheard a portion of the conference call and asked Mr. Ashton whether he wanted a court reporter to document the conversation between Mr. Ashton and Mr. Ausley. (TR526). Mr. Ashton refused to officially document the conversation. (TR526).

Former Assistant State Attorney, Edward Culhan did not know of the existence of Ausley's comparison of Angel Huggins to the driver he witnessed until after Mr. Culhan retired from the State Attorney's Office. (TR665). He did not know that his office possessed the recorded evidence so he could not have disclosed it. (TR665). He did state that had he known of Mr. Ausley's comparison to Angel Huggins, he would have disclosed it to counsel for Mr. Huggins. (TR152). Jeff Ashton admits knowing of the evidence, explains his analysis to determine not to disclose the evidence, and his decision not to disclose Mr. Ausley's evidence to Mr. Huggins. (TR530, 360). The State also

informed Mr. Ausley that his observations and recorded-statement would be disclosed to the defense leaving Mr. Ausley to conclude that he need not do anything more to get his information to all interested parties. (TR227).

Mr. Ashton, admitted that he did not disclose Mr. Ausley's February 1, 1999 statement to Defendant. (TR350). Questioning at the evidentiary hearing as to why Mr. Ashton did not disclose Ausley's statement went as follows:

> Why didn't you disclose it, either to defense counsel or to the court...
>
> A. It is my understanding of Brady it is my obligation to examine evidence of this type and determine whether to reveal it. It's not the Judge's job. It's mine and I did it.

(TR350). Based on the testimony of Dorothy Sedgwick, Edward Culhan, and Mr. Ashton, the court concluded that the State suppressed Ausley's February 1, 1999 recorded statement and observations. Based on the foregoing analysis and the contents of trial court's order, the trial court's ruling on the third prong of the Brady analysis is supported by competent substantial record evidence.

The trial court finally concluded that a reasonable probability exists that the outcome of the proceedings would have been different. (TR826). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a

fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles, 514 U.S. at 434; Bagley, 473 U.S. at 678.

At the conclusion of the evidentiary hearing, the court directed Mr. Huggins and the State to Jones v. State, 709 So.2d 512 (Fla.1998). At the outset of this discussion of materiality it is important to note that the Brady violation and suppressed evidence in Jones are substantially different than the suppressed evidence in this case.

Jones was convicted of first degree murder and sentenced to death in 1981. Id. Following several appeals, writs, and 3.850 motions, The Florida Supreme Court reviewed his most recent 3.850 denial. On appeal the Court addressed four separate grounds: (1) the alleged misconduct on the part of the original trial judge; (2) the State's alleged Brady violation; (3) the trial court's refusal to admit the third-party confessions as substantive evidence and failure to analyze the impeachment value of these confessions; and (4) the cumulative effect of all the newly discovered evidence and the trial court's failure to consider the cumulative effect. Id. at 517. Two of Jones' claims require our consideration.

Jones claimed that the State violated Brady by withholding exculpatory

evidence concerning Officers Mundy and Eason as disclosed by Officer Cleveland Smith. Id. at 518. Officer Smith's pertinent testimony at the evidentiary hearing regarding Mundy and Eason fell into four main categories. Id. As to two of the four categories of Officer Smith's testimony -- Mundy's and Eason's general reputation and Mundy's prior acts of misconduct -- the Court wrote,

> Jones has failed to demonstrate how testimony consisting of reputation evidence or a prior dissimilar act of misconduct would have been admissible at trial under our rules of evidence, even if it had been disclosed.... If the evidence could not have been properly admitted at trial or would not be admissible on retrial, there is no reasonable probability that the outcome of Jones' trial would have been different if the evidence had been provided to the defense.

Jones, 709 So.2d at 519.

The two remaining aspects of Officer Smith's testimony were: (1) that Mundy told Smith that he entered Jones' apartment and beat the people inside; and (2) at roll call before the murder, the officers were told to do everything in their power to get Jones. Jones at 519. With regard to beating people in Jones' apartment, the Court wrote that assuming the information was Brady material, "Smith's testimony...is not inconsistent with Mundy's trial testimony that he hit [an occupant]" of Jones' apartment. Id. at 520. Finally, in its analysis of Jones' remaining Brady claim, the Court found that,

> The testimony regarding the statement made at the roll-call meeting presents a different evidentiary issue. This hearsay testimony would not have constituted impeachment of any state witnesses, as there is no assertion that any of the state witnesses, including Mundy and Eason, were present at the roll-call or new about the statements....there is no evidence that those present at the roll-call participated in the investigation.

Id. at 520-521. Based on the aforementioned analysis, this Court granted deference to the trial court's view of the facts. The trial judge concluded there is no reasonable probability that if Smith's testimony had been disclosed, the outcome of the proceedings would have been different. Id. at 521.

Jones next claims that Smith's testimony was newly discovered evidence. Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence:

1. the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known of it by the use of diligence; and
2. the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla.1994); Jones v State, 591 So.2d 911 (Fla.1991). This standard is much more stringent than that set forth to determine a Brady violation. The Appellee has not raised this newly discovered evidence issue as this Court relinquished its appellate jurisdiction for

the limited purpose of asserting a Brady violation. The analysis of the Jones newly discovered evidence claim is irrelevant to this matter. The Appellant arguments regarding newly discovered evidence and any newly discovered evidence analysis is misplaced.

Based on the aforementioned analysis, Jones is substantially distinguishable from this case. There are no evidentiary bars to the admissibility of Ausley's testimony, there was no testimony similar to Ausley's elicited at trial, the case against the Appellee was largely circumstantial, and unlike Jones, there was no confession.

The final prong of a Brady claim -- that had the evidence been disclosed to the defendant, a reasonable probability exists that the outcome of the proceeding would have been different -- is usually dispositive and requires extended analysis. The bottom line concern is the justice of the finding of guilt. Materiality is often a function of the strength of the government's case. Therefore it is imperative at the outset to establish that the trial court concluded that the State's evidence in this matter was entirely circumstantial. (TR821). The State's case depended significantly on the testimony and credibility of Angel Huggins. With these facts as a backdrop, the testimony and observations of Preston Ausley is material.

First, Preston Ausley's testimony would have been used to impeach Angel

Huggins. The former wife of the Appellee testified that she neither drove nor sat inside the white Explorer, as explained above. She could not provide the vehicle's tag number. The jury would have found it intriguing to hear Mr. Ausley state that he saw a blonde female, of similar age and with a similar hairstyle and stature as Angel Huggins, driving what was reasonably the victim's vehicle in Orange County. No other witness in the trial testified to seeing the victim's tag during any sighting of a white Explorer. Mr. Ausley's testimony would have offered more than circumstantial evidence that the vehicle driven by the blonde female was that of the victim.

Under Bagley, in addition to evidence which tends to negate the a defendant's guilt, the prosecutor's duty to disclose favorable evidence includes evidence which affects a witness' credibility. Bagley, 473 U.S. 667. Because Ausley's suppressed testimony would have affected the credibility of Angel Huggins, the Defendant was denied due process and relief was warranted.

Second, Preston Ausley's suppressed testimony bolstered Mr. Huggins' assertion that Angel Huggins was involved in the disappearance of Carla Larson and is supported by evidence. Based on Detective Nazarchuk's report, Ausley witnessed a white truck on International Drive in Orlando. (Exhibit 8). Trial testimony revealed that the victim's white Ford Explorer was missing at this time. About the same time as Ausley's sighting, Angel Huggins checked into a

Holiday Inn on International Drive on June 14, 1997; the hotel was a few blocks away from where the blonde female driver of the victim's vehicle was seen. (Defense Exhibits 6 & 7, Holiday Inn receipts).

Angel Huggins was the cornerstone of the State's circumstantial case. Based on the intentionally suppressed evidence of Ausley, a jury would have reasonably concluded that Angel Huggins was the driver of the victim's vehicle and her testimony regarding the Appellee's possession of the vehicle was questionable.

Third, a defendant has a fundamental right to a fair trial that is free from improper argument. Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968). The U.S. Supreme Court has clearly condemned improper prosecutorial arguments by stating, "while [prosecutors] may strike hard blows, [a prosecutor] is not at liberty to strike foul ones." Berger v. U.S., 295 U.S. 78, 88 (1935). The State's closing was laced with arguments which would have been undermined by Ausley's suppressed testimony. The fundamental unfairness of the prosecutor's arguments is compounded because the arguments were made with full knowledge that the evidence he suppressed contradicted those arguments.

In his summation, Mr. Ashton argued to the jury,

> Imagination is not reasonable doubt. Reasonable doubt have to be based on the evidence, the evidence you've heard. It's not based, the proof in this case is

> not based on what I say, ***it's based on what the witnesses said***, and reasonable doubts in this case are not based on what the defense says but on what the witnesses say, the evidence shows, so keep that in mind. (emphasis added)

(SR 1437). Mr. Ashton's summation continued,

> The Defendant's possession of that car is also confirmed by other witnesses. Annette Moore lives across the street from Faye Blade where she used to live in Cocoa Beach or Melbourne.... she said I saw a white Ford Explorer in the driveway, or in front of that house on two occasions.... Annette Moore is not a part of Angel Huggins' family, not one of Kevin Smith's friends, just a neighbor and has absolutely no reason to make it up.

(SR 1459). Ashton's closing argument continued,

> [Angel Huggins] did not lie to try to get out of anything. ***I submit she hasn't lied at all.*** (emphasis added)

(SR 1554).

Like Annette Moore, Preston Ausley has nothing to gain from testifying, but is more credible as the white Explorer he noticed possessed a license tag which was strikingly similar to victim's vehicle license tag. No other witness could testify to the identity of the tag on any vehicle they saw. And, as pointed out earlier, the credibility of Angel Huggins would have been affected by Ausley's testimony, making it impossible for the State to argue that she had "not lied at all." Instead, these arguments were made despite Mr. Ashton's knowing

suppression of Ausley's testimony.

In Arango v. State, 467 So.2d 692 (Fla.1985), this Court found that a prosecutor's closing argument that, "nothing was kept from you, whatever we had is on the table," while the prosecution had not disclosed favorable evidence to the defendant, deprived the defendant of a fair trial. Then, after applying the Bagley test for materiality, this Court addressed that same facts on remand and in a new opinion was satisfied that it had originally reached the correct conclusion. Arango v. State, 497 So.2d 1161 (Fla.1986). Due process requires a new trial under the circumstances -- "suppressed exculpatory evidence coupled with the foregoing prosecutorial argument to the jury." Arango, 497 So.2d at 1162. Due process was violated in the present case because the State suppressed exculpatory evidence and made arguments which the suppressed evidence would have inhibited. A new trial was warranted and properly granted.

Fourth under the materiality prong of Brady, the State's sentencing memorandum ignored the suppressed testimony of Preston Ausley and argued evidence inconsistent with what his testimony would have been. In its attempt to prove that the Defendant committed murder for financial gain, it was argued by the State that, "The evidence proved that the Defendant was in possession of Ms. Larson's vehicle from June 10, 1997 until it was burned on June 26, 1997." (Defense Exhibit 2, Sentencing Memorandum) This argument was made by the

State despite the existence, and their knowledge, of the suppressed testimony.

Disclosure of Preston Ausley's recorded testimony would have allowed the Appellee to argue to the jury and to the Court that he was not in continuous exclusive possession of the victim's vehicle.

Finally, the Court's Sentencing Order found conclusively that "The evidence clearly showed that the Defendant was in possession of the Explorer from June 10, 1997, until June 26, 1997, when it was discovered burning in a field." (Defense Exhibit 3, Sentencing Order). Preston Ausley's suppressed testimony clearly undermines this finding. Ausley's testimony is more credible than any offered at trial as to the identity of the vehicle -- five out six characters matched the victim's tag number. As such, someone -- a blonde, white, female, between her late 20s and early 30s, with hair similar to that of Angel Huggins -- was seen with the Explorer within a few days after the murder.

The intentional suppression of Preston Ausley's testimony significantly undermines confidence in the jury's verdict as well as the sentence imposed in this case. The suppression of the testimony denied the Appellee the opportunity to impeach Angel Huggins, allowed the State to make the previously stated arguments in closing, and deprived Mr. Huggins of a compelling element of Angel Huggins' involvement. Further, as stated previously, Ausley's testimony would have affected the State's sentencing memorandum and the Court's

findings in its Sentencing Order. As stated in Kyles, the important question is not whether the Defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Kyles, 514 U.S. at 434. Those factors indicate that the Defendant did not receive a fair trial because of the suppression.

Consider the State's largely circumstantial evidence case against the Defendant. As the Court is aware, the Florida Supreme Court has consistently held that to convict on the basis of circumstantial evidence, the State must present evidence that is inconsistent with any reasonable hypothesis of innocence.[5] In a case of such a circumstantial nature, the suppression of favorable, material evidence as described above must create the "reasonable probability" of a different outcome envisioned in Bagley and Kyles**.** Where such a violation occurred, in a circumstantial evidence case, the Florida Supreme Court found that a new trial was warranted.

In Gorham v. State, 597 So.2d 782 (Fla.1992), David Gorham was charged with and at trial found guilty of first-degree murder and attempted robbery. The Florida Supreme Court remanded Gorham's case for an

[5]Long v. State, 689 So.2d 1055 (Fla.1997); Finney v. State, 660 So.2d 674 (Fla. 1995); Duckett v. State, 568 So.2d 891 (Fla. 1990); Scott v. State, 581 So.2d 887 (Fla. 1991); Cox v State, 555 So.2d 352 (Fla. 1990).

evidentiary hearing on three alleged Brady violations. One alleged violation was that the State failed to disclose that Johnson, the State's key, witness had been a police informant in other cases but not in Gorham's. After conducting an evidentiary hearing, the trial court found no merit to Gorham's claims and denied all relief. Id. at 783.

On appeal of the denial, the Florida Supreme Court noted that the evidence against the Gorham was largely circumstantial including his use of the victim's personal items and the presence of his fingerprints. Id. at 784. In its closing argument, the State noted that its key witness was believable because she "had nothing to gain" from her testimony. Id. Applying the Bagley standard for materiality, the Court wrote,

> The standard for determining "reasonable probability" is "a probability sufficient to undermine confidence in the outcome. Given this trial's circumstantial nature, Johnson's role as the State's key witness, and the defense's inability to impeach Johnson based upon the undisclosed evidence, we find that such a reasonable probability exits... "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Gorham, 597 So.2d at 785. Gorham is extremely analogous to the issues before the Court.

With an understanding that the trial judge has a superior vantage point to evaluate, to see, and hear the evidence, the trial judge stated that the "State's case against the Defendant was entirely circumstantial." (TR821). The trial judge's order makes an extensive evaluation of the witnesses at trial and the evidence, and evaluates that evidence against the February 1, 1999 statements of Preston Ausley. (TR821-824). After carefully evaluating the testimony of Mr. Ausley, and the evidence presented at the evidentiary hearing, Judge Belvin Perry found that a reasonable probability, sufficient to undermine confidence in the outcome, existed in the case. The trial court's order setting aside the Appellee conviction and sentence must be affirmed.

BECAUSE THE TRIAL COURT PROPERLY APPLIED THE CORRECT LAW, AND BASED ITS FINDINGS ON COMPETENT SUBSTANTIAL EVIDENCE, AN ASSESSMENT OF THE CREDIBILITY OF WITNESSES MUST BE LEFT TO THE TRIAL COURT'S SOUND DISCRETION

This Court has repeatedly honored and recognized a trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based on competent, substantial evidence is an important principle of appellate review. Stephens v. State, 748 So.2d 1028 (Fla.1999). "In many instances, the trial court is in a superior position to evaluate and weigh the testimony and evidence

based upon its observation of the bearing, demeanor, and credibility of the witnesses." Stephens, 748 So.2d at 1034, citing Shaw v. Shaw, 334 So.2d 13 (Fla.1976); State v. Spaziano, 692 So.2d 174 (Fla.1997). When sitting as the trier of fact, the trial judge has the "superior vantage point to see and hear the witnesses and judge their credibility." Guzman v. State, 721 So.2d 1155, 1159 (Fla.1998).

In Florida Supreme Court case number 95,251, this Court, in its order dated April 23, 1999, relinquished jurisdiction of this matter to then Chief Judge Belvin S. Perry, Jr. In that order, the Court instructed Judge Perry to conduct an evidentiary hearing and to "report to this Court...when the trial court enters an order ruling on the merits of the habeas corpus." (Florida Supreme Court Order Dated April 23, 1999). In doing so, this Court gave the trial judge the responsibility to determine whether the suppressed statements and observations of Preston Ausley warranted a new trial. This Court, under substantially similar circumstances, has given deference to a trial court's findings following an evidentiary hearing, and has affirmed the trial court's grant of a new trial.

In State v. Spaziano, this Court remanded the matter to the trial court for an evidentiary hearing on newly discovered evidence. 692 So.2d 174 (Fla.1997). In doing so, the Court gave the trial judge the responsibility to determine whether the recanted testimony of Anthony DiLisio, the State's key witness,

required a new trial. Id. At Spaziano's original trial, the State's case was almost completely dependent upon DiLisio's testimony. Id. After hearing and viewing the testimony and evidence presented, the Honorable O. H. Eaton, Jr., issued a well-reasoned order granting Spaziano a new trial based on the legal guidelines set forth by this Court. Id. The State appealed.

On appeal, this Court gave deference to the trial judge's decision by stating "This Court as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judge's conclusion. Spaziano, 692 So.2d at 175. This Court in Spaziano further stated,

> [T]he trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective. It is clear to us that there is evidence in this record to support the trial court's ruling. Therefore, this record does not establish an abuse of discretion by the trial judge.

Id. at 178. Now, in this matter, the State wants this Court to review a cold record and substitute the State's interpretation of the evidence presented at the evidentiary hearing and trial, for that of the trial judge. As long as the trial court's findings are supported by competent substantial evidence, this Court should not substitute its view of the evidence, or that of the Appellant, for that

of the trial court on questions of fact, the credibility of the witnesses, as well as the weight to be given to the evidence by the trial court. Blanco v. State, 702 So.2d (Fla.1997); Demps v. State, 462 So.2d 1074 (Fla.1984). The record in this matter shows that the trial court properly applied the law, and its findings in its order are supported by competent substantial evidence.

An attack on the credibility of Mr. Ausley is a continuous theme throughout Appellant's Initial Brief. (Initial Brief of Appell[ant]). The Appellant argues that before Mr. Ausley's testimony can be the basis for the trial court to grant Appellee a new trial, the trial court must first determine whether Mr. Ausley's testimony is itself credible. The Appellant argues that the trial court's ruling on the Brady issue is wrong as a matter of law because it failed to determine Mr. Ausley's credibility. (Initial Brief of Appell[ant], 43-41). The Appellant's analysis of the record and the law is fatally flawed.

The Appellee argues that Melendez v. State, 718 So.2d 746 (Fla.1998), stands for the proposition that the credibility of Mr. Ausley, a Brady witness, was not assessed by the trial court. The trial court addressed this claim following the evidentiary hearing. (TR813-814). In its order following the evidentiary hearing, the trial court opined that inherent in the trial court's determination whether a witness is favorable, as required by Brady, is a finding that the witness is favorable. (TR813). In essence, the trial court stated that Mr.

Ausley's testimony could not be deemed favorable unless the court at least makes some preliminary assessment of his credibility. (TR814). And, "after carefully considering Mr. Ausley's testimony", the trial court found that his testimony was favorable. (TR814).

In Melendez, this Court focused primarily on the lower court's proper application of the law and whether competent substantial evidence supported its findings. Melendez, 718 So.2d at 748. Consequently, this Court was "precluded from substituting its judgment for that of the trial court on this matter." Again, as in Spaziano, Guzman, And Stephens, this Court appeared to give deference to the trial court's superior vantage point to see and hear the witnesses, and judge their credibility. The trial court assessed the credibility of Preston Ausley when it determined that his testimony was favorable.(TR814). The trial court properly applied the correct law, its findings are supported by competent substantial evidence, and therefore its grant of a new trial was not an abuse of discretion.

CONCLUSION

Wherefore the Appellee, based upon the foregoing, submits that the Order of the Circuit Court setting aside the Appellee's convictions and sentences should be Affirmed and this matter remanded for a new trial.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Appellee has been delivered by U.S. mail to KENNETH S. NUNNELLY, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, This the 2nd day of June, 2000.

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