IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1389

JOEL DALE WRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

AMENDED REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Wright's amended motion for post-conviction relief following this Court's remand for an evidentiary hearing. Wright v. State, 581 So.2d 882 (Fla. 1991). On June 5, 2000, the circuit court denied Mr. Wright's claims two and a half years after the evidentiary hearing and only after Mr. Wright filed a petition for a writ of mandamus with this Court. See Wright v. State, Sup. Ct. Case No. SC00-1119. Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

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

"PC-R1. ___" - Record on appeal to this Court from 1989 denial of the Motion to Vacate Judgment and Sentence;

"PC-R2. ___" - Record on appeal to this Court from 2000 denial of the Amended Motion to Vacate Judgment and Sentence.

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

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REPLY TO STATEMENT OF THE CASE AND FACTS

Rule 9.210 of the Florida Rules of Appellate Procedure provides that: "The Answer brief shall be prepared in the same manner as the initial brief, provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." The Statement of the Case and Facts in the Answer Brief is thirty-six pages long. Nowhere does it "clearly specify" areas of disagreement with the Statement of the Case contained in the Initial Brief.

In reply, Mr. Wright will endeavor to clearly specify areas of disagreement.

At page 2 of the Answer Brief, the State quotes from this Court's 1991 opinion partially affirming the denial of 3.850 relief in order to suggest that those matters affirmed are beyond review now. The State neglects to acknowledge that the standard of review required this Court to accept factual determination made by the circuit court after an evidentiary hearing unless not support by competent and evidence.[1] See Shaw v. Shaw, 334 So.2d 13, 16 (Fla. 1976)(the trial court has a superior position "to

[1]Despite the well known standard of review requiring deference to factual determinations, this Court has not hesitated to set aside factual determinations previously affirmed when new evidence in the post-conviction process establishes that the previous factual determinations were erroneous. For example in Porter v. State, 723 So.2d 191, 196 (Fla. 1998), this Court granted post-conviction relief on a judge bias claim because new evidence established that this prior factual resolution of the claim was in error. Similarly, in Lightbourne v. State, 742 So.2d 238 (Fla. 1999), new evidence required revisiting a previously factual resolution of a Brady claim.

evaluate and weigh the testimony . . . based upon its observation of the bearing, demeanor, and the credibility of the witnesses"). Under Florida precedent, this Court's acceptance of the circuit court's factual determinations is subject to be revisited where new evidence surfaces to establish that the prior determination was factually wrong.[2]

Also on page 2 of the Answer Brief, the State skips over entirely the proceedings that occurred in the circuit court between 1991 and 1997.[3] During that time period, the Putnam County Sheriff's Office provided a plethora of public records that had not been provided in 1988 when all public records were first requested by Mr. Wright's collateral counsel. As a result of new Chapter 119 disclosures, Mr. Wright first amended his 3.850 motion on December 11, 1991, less than five months after this Court's mandate issued (PC-R2. 115). On December 17, 1992, the presiding judge, the Honorable B.J. Driver, severed the

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[2]Indeed, Rule 3.850 was designed to allow consideration of whether the factual determinations made at trial and reviewed on appeal were erroneous and/or insufficiently reliable to support a conviction and or sentence of death. See e.g. Young v. State, 739 So.2d 553, 560 (Fla. 1999)(undisclosed exculpatory evidence specifically called into question factual finding of cold, calculated and premeditated that had been affirmed by this Court on direct appeal); State v. Mills, 788 So.2d 249 (Fla. 2001)(newly discovered evidence not previously available required revisiting factual resolution of the defendant's challenge to override of jury's life recommendation).

[3]These proceedings laid the foundation for claims raised by Mr. Wright in amendments to his Rule 3.850 motion. During the 1991-97 proceedings, Mr. Wright obtained new evidence that had not previously been provided to him or to the courts at the time of prior factual determinations.

"3.850 claims which warrant evidentiary hearing development" "so that they may be pursued in a court of competent jurisdiction." (PC-R2. 475).[4] On February 24, 1993, Mr. Wright filed a Second Amended 3.850 Motion in light of disclosures that were made during the December, 1992, proceedings before Judge Driver (PC-R2. 480).

Then on July 22, 1996, Mr. Wright gave notice that he had learned from proceedings on May 3, 1996, in Manuel Colina's case, another capital case from Putnam County, that the Putnam County Sheriff's Office had failed through a systemic error to fully comply with all prior Chapter 119 requests made by the Office of the Capital Collateral Representative (PC-R2. 704). Mr. Wright's indicated that "renewed efforts" had been made to obtain "those records not previously revealed." (PC-R2. 704). Subsequently on August 23, 1996, Mr. Wright filed a Motion to Compel seeking full access to all Chapter 119 material which had previously been requested in Mr. Wright's case (PC-R2. 706). At the Huff hearing on October 15, 1996, the State agreed that an evidentiary hearing was required and should include:

> not only on Chapter 119, but on all issues, it's just time to litigate this case. I mean, we have a number of issues to do or allegations that they've made, it's the State's request that we just go ahead and do them all, I think the Chapter 119 issue can be resolved at that time along with everything else.

(PC-R2. 719). Accordingly, the public records matter was set for

[4]Judge Driver believed that his jurisdiction was limited to the issue concerning Mr. Pearl's status as a special deputy sheriff.

an evidentiary hearing, along with the rest of Mr. Wright's claims.

At the commencement of the evidentiary hearing on March 3, 1997, Mr. Wright asserted that the Chapter 119 matters raised in the first and second amended 3.850 motions and in the motion to compel had to be addressed first. In response, Assistant State Attorney Fox stated:

> I do agree with the reference to Ventura. The supreme court Ventura case in which the court indicated that public records issues should be taken up first, because if something turns out to be a public records issue that could have affected the evidentiary hearing, then you have to start again, so I agree that we should take up the public records matter now.

(PC-R2. 2212).

Subsequently, Assistant State Attorney Fox stipulated to allowing Mr. Wright to depose sheriff personnel regarding the Chapter 119 matters because of the time consuming nature of the testimony. At a later point in the hearing, Assistant State Attorney Fox explained that as a result of the stipulation, a large number of depositions that was necessary on the issue:

> As a result of matter that occurred on Monday we stipulated to converting most of the testimony with regard to the public records issues and took depositions. We've been plodding along as best we can. And I didn't count it, but 25 [depositions] sounds probably about right.

(PC-R2. 2356). Assistant State Attorney Fox suggested that while the deposition continued, the Howard Pearl's testimony should be presented as scheduled. Assistant State Attorney Fox believed that the rest of the hearing would have to be continued,

reconvening at some point in the future after the rest of the public records depositions had been completed (PC-R2. 2358).

Following the completion of the public records depositions in September, Mr. Wright filed his Third Amended 3.850 Motion on October 8, 1997 (PC-R2. 906). In his third amendment, Mr. Wright relied upon Chapter 119 records disclosed in the course of the depositions. In its one page Response filed on October 31, 1997, the State "urge[d] th[e circuit] court to move forward with the evidentiary hearing scheduled for Monday, December 8, 1997, to finally resolve all of the allegations in this case, which ha[d] been too long delayed." (PC-R2. 968).

By the time that the evidentiary hearing resumed, Mr. Wright had filed three amendments to his 3.850 motion since this Court's remand and the State had agreed that an evidentiary hearing was necessary to consider Mr. Wright's allegations. Thus, the State had agreed in circuit court that the evidentiary hearing should cover all of Mr. Wright's allegations, not simply the matter that had been remanded by this Court.

At page 2 of the State's Answer Brief, the State discusses the March 3rd testimony of Captain Clifford Miller. In this discussion, the State asserts, "Judge Nichols ruled that the issue of '[w]ho was polygraphed?' was covered in the prior hearing.' (R. 2241)." However, Judge Nichols did not so rule. The transcript page cited by the State reflects that Judge Nichols asked, "but I think polygraph has already been covered in

the prior hearing, hasn't it?" (PC-R2. 2241). And then after hearing argument in response to his question and after taking a break, Judge Nichols subsequently ruled:

> And while I am somewhat hesitant because I think it's overly broad perhaps, I think the better course of action is to get it all over with in this proceeding either - - or one time, put it that way. Not necessarily this proceeding, but one time.
>
> And the only way that I could think of to do that would be to allow the defense to ask the questions that they seem to want to ask. And because of that I was prepared to go ahead and let's call each one up individually, if you want to do that by deposition, that's fine with me. If you think that would be more better use of everybody's time, the people here as well as yours, we can do that.

(PC-R2. 2334-35). So in fact, the questioning of Captain Miller was allowed and did occur in the deposition conducted on March 5, 1997. That deposition was admitted into evidence as Exh. 19 (PC-R2. 2519).[5]

At page 3 of the Answer Brief, the State addresses the March 3rd testimony of John Robinson, the evidence custodian for the Putnam County Sheriff's Office. The State neglects to note that during the examination of Mr. Robinson, he acknowledged that in 1996 his office admitted that it had previously failed to turn

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[5]The State's Answer Brief does not summarize the testimony contained in the forty (40) depositions that were introduced into evidence. Even though the State endeavored to summarize the testimony of each witness who testified in person, there is no summary in the State's Answer Brief of any of these forty depositions. Perhaps in preparing the Answer Brief, the State overlooked these depositions. Nevertheless, the State in circuit court did stipulate "that the depositions can be used in lieu of live testimony." (PC-R2. 2515). By the State's stipulation in circuit court, the testimony in those depositions was to be considered as live testimony.

over all public records (PC-R2. 2278). The State also neglects to mention the fact that Mr. Robinson was subsequently deposed on September 2, 1997, and that the deposition was introduced into evidence as Exh. 36 (PC-R2. 2518).

At page 3 of the Answer Brief, the State notes that defense counsel moved on March 4, 1997, for a continuance of the Judge Perry issue. The State neglects to acknowledge that the Judge Perry issue was first raised in the Second Amended 3.850 Motion filed on February 24, 1993. The State also fails to acknowledge that Mr. Wright filed a motion for leave to depose Judge Perry on October 13, 1994 (PC-R2. 615). The motion was premised in part on word of Judge Perry's ill health. A hearing was held on the motion for leave to depose Judge Perry on March 13, 1995, and the matter was taken under advisement (PC-R2. 662). Judge Nichols never issued a ruling on the motion.

On page 4 of the State's Answer Brief, the State addresses "Defense Counsel's request to postpone the hearing even as to Mr. Pearl." The State omits the basis for defense counsel's request. The record demonstrates that defense counsel explained:

> Monday evening [March 3rd] about 5:00 the governor reset the execution of Mr. Medina. It's now set for March 25th. And I went back to the office while the depositions were going on, they wanted to talk to me about something, yet another warrant on a case out of Jacksonville [Leo Jones] - -
>
> * * *
>
> And I know that it's sort of not your problem what's going on in these other cases, but it really conflicts me terribly, because I have been on Mr. Wright's case

> since 1988. And if it comes to choosing I'm going to be here on Friday to present Mr. Pearl, because I have this long time commitment to Mr. Wright and I will do that.

(PC-R2. 2352-54). Judge Nichols then ruled that he wanted to hear "anything that we can do with Mr. Pearl to get any testimony from him may be a plus" (PC-R2. 2359). So the continuance was denied as to Howard Pearl and his testimony was set to be heard on March 7th.

At page 4 of its Answer Brief, the State asserts "[o]n March 7, 1997, Defense Counsel argued that the evidentiary hearing was to encompass issues beyond the Howard Pearl Special Deputy issue, the Judge Perry Special Deputy issue, and the public records issue." This was nothing new. Since the first amendment had been filed in 1991, Mr. Wright had sought an evidentiary hearing on all of the issues raised in his amended motions. And the State in the Huff hearing on October 15, 1996, the State had agreed that all of the issues should be taken up at an evidentiary hearing. The State did not oppose Mr. Wright's view of the scope of the evidentiary hearing. The discussion on March 7, 1997, concerned the agreement earlier in the week as to the scope of Howard Pearl's testimony that was to be presented on March 7th. As stated by Assistant State Attorney Fox:

> Judge I'm going back to my notes from Monday's hearing, and I may not have taken good notes, but I don't recall that as being - - in fact, we revisited the issues that we had before this court on Wednesday when the defense requested a continuance of the Howard Pearl issue. I don't recall the things that Mr. McClain is talking about coming up in that discussion.

(PC-R2. 2379).[6]

At page 5 of its Answer Brief, the State says, "The prosecutor asserted that any claims other than the special deputy status claim(s) were procedurally barred. (R 2389)." However, the State's representation is not accurate. Assistant State Attorney Fox stated on March 7, 1997:

> And I also see from looking through the file and having had heard Mr. McClain that they did have these other claims. I believe that we would be prepared to argue that these claims are procedurally barred, but I don't believe that that's what we're going to be here for today.

(PC-R2. 2389). This statement was made while the public records depositions were ongoing. The last of these depositions were not completed until September, 1997. At the December, 1997, resumption of the hearing, the State did not challenge in any way the testimony of Jeff Walsh, an investigator for CCR. Mr. Walsh specifically identified numerous documents that Captain Miller first provided him in 1991. These documents were introduced as Exh. 46 (PC-R2. 2600-01). Mr. Walsh also identified an accordion file folder full of documents, introduced as Exh. 47, that were disclosed after the revelation in Manuel Colina's case that the Putnam County Sheriff's Office had through a systemic error failed to fully comply with previous public records requests by CCR (PC-R2. 2603). The State did not cross-examine Mr. Walsh, and the State presented no testimony contesting Mr. Walsh's

[6]Judge Nichols indicated that evidence regarding other matters and issues could be presented at a later date (PC-R2. 2389).

representations (PC-R2. 2608, 2649).

At page 9 of the Answer Brief, the State says "Mr. Pearl did not call 'the family' to testify about the 'controversy' with Perkins and some family members of the Wright family because he 'didn't think that this controversy meant anything much.' (R 2464)." Actually, Mr. Pearl's testimony was that because he did not think the controversy meant much, "I didn't call the family to talk to them." (PC-R2. 2464). Though he was aware of some problem between officer Perkins and the Wright family, he did not learn that Officer Walter Perkins had threatened Jody Wright's mother by indicating that he would make her sorry that Jody had ever been born (PC-R2. 2437, 2587-88).[7] And in fact at trial, Mr. Pearl apologized to Officer Perkins in front of the jury for initially suggesting in his questioning that Officer Perkins had any ill-will for Mr. Wright or his family (R. 2351-70).[8] Thus,

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[7]The State returns to Mr. Pearl's testimony regarding Officer Perkins on page 15 of the Answer Brief. However, the way in which the State bifurcates its discussion of the testimony regarding Officer Perkins obscures the simply fact that Mr. Pearl had failed to learn from Mr. Wright's family the exact nature of Officer Perkins' threat to Mr. Wright's mother.

[8]Officer Perkins' trial testimony comes up in this proceeding in several ways. First, Mr. Wright does contend that Mr. Pearl's status as a special deputy sheriff clouded his judgment and affected his ability to adequately represent Mr. Wright and challenge Officer Perkins' testimony. Related to that is Mr. Wright's claim that Mr. Pearl did not adequately investigate and learn of the available impeachment evidence. And finally, the State failed to disclose evidence that Officer Perkins had previously falsified a police report an was untrustworthy. These overlapping matters have a synergistic and corrosive effect when Officer Perkins' trial testimony is considered cumulatively, particularly in light of Mr. Pearl's courtroom apology to Officer

not only was the effort to impeach Officer Perkins and the criminal investigation abandoned, the apology constituted a damaging endorsement from the defense attorney.

At page 13 of the Answer Brief, the State says that at one point during the examination of Howard Pearl, Judge Nichols sustained an objection and permitted a proffer only, "noting that the defense was 'trying to reopen the other issue that's already been closed.' (R 2433)." In fact, the full quote demonstrates Judge Nichols' understanding of the cumulative analysis required under in State v. Gunsby, 670 So.2d 920 (Fla. 1996):

> THE COURT: I'll let you proffer this, but these proffers you're trying to reopen the other issue that's already been closed. The door has been closed by the supreme court already, the prior 3850 and the findings of Judge Perry on these same issues we're talking about right here.
>
> MR. MCCLAIN: Your Honor, again, all I can say is State v. Gunsby indicates that when you have new information and you have to consider other constitutional claims you cannot consider them in isolation and you have to have a full picture.
>
> THE COURT: I think you're going beyond the scope again, Mr. McClain.

(PC-R2. 2434).[9]

Perkins. The potential for damaging cross-examination expands exponentially when Officer Perkins' role in the criminal investigation is further factored in to the analysis.

[9]This Court has repeatedly acknowledged that cumulative consideration under Gunsby requires revisiting claims already decided in a prior a Rule 3.850 motion. Lightbourne v. State, 742 So.2d 238 (Fla. 1999). Even this Court's recent opinion in Jennings v. State, 782 So.2d 853, 861 (Fla. 2001)("[o]verall, the cumulative effect of the alleged Brady violations does not establish Brady materiality"), held that cumulatively

At page 15 of the Answer Brief, the State says "Defense Counsel, without even attempting to present evidence through Mr. Pearl, stated what he believed Mr. Pearl would indicate were deficiencies in his performance in Mr. Wright's case (R 2438-39)." Perhaps, the State is unaware of the record which was before the circuit court from the 1988 hearing and which is before this Court. Mr. Wright relied on the record from that proceedings as the basis for his proffer. In fact, Howard Pearl testified in 1988 that:

> I failed to prove, and I had the proof in my hand, that jar was in fact the property of Jody's mother. I failed to do it. It was a lapse, a mistake. I just - I can't explain it to you. It is as if it passed out of my mind, perhaps due to the pressure of other matters during the trial. But I cannot explain it. It was inferior performance.

(PC-R1. 819-20). Moreover, the State in circuit court did not dispute the accuracy of the proffer made by Mr. Wright's counsel. The State simply argued that Judge Perry's ruling in 1989 precluded consideration of the evidence regarding Mr. Pearl's performance as counsel.

At page 18 of the Answer Brief, the State asserts Howard Pearl "'continue[s] to be a special deputy, doing the very same thing I had been doing which was to carry a concealed firearm when I wanted to.' (R 2453)." However, the full answer and follow up question demonstrate that Mr. Pearl had meant to use

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consideration of the previously presented and previously rejected claims was required.

the word "continued," as in past tense, because as he explained he resigned his position as a special deputy sheriff in the late 80's and is no longer a special deputy sheriff:

> A No. I continue to be a special deputy, doing the very same thing I had been doing which was to carry a concealed firearm when I wanted to. It didn't change in '93 when I was relieved from 15 years in capital cases. Of course, by then I was no longer a special deputy sheriff.
>
> Q You resigned in 1989?
>
> A I think late '87 or early '88.

(PC-R2. 2454). Thus, when the his status became an issue, Mr. Pearl resigned his position as a special deputy sheriff.

At page 21 of the Answer Brief, the State turns to the resumption of the evidentiary hearing on December 8, 1997, and discusses Mildred Thomas' proffered testimony following the State's hearsay objection. The State neglects to acknowledge that after the proffer, Mr. Wright's counsel argued ofr the testimony's admission, saying that Ms. Thomas' testimony went to the prejudice suffered by Mr. Wright because Mr. Pearl as a result of his status as a special deputy failed to zealously pursue exculpatory evidence in the possession of law enforcement. Counsel also asserted that Ms. Thomas' testimony was important in confirming the sequence of events that were later testified to by her daughter, Kim Holt Holliman, and would have been available to rebut any claim that Ms. Holliman's memory was in error. After listening to Mr. Wright's argument as to why Ms. Thomas' evidence should be admissible, the judge indicated he "might reconsider"

his ruling after hearing all the evidence (PC-R2. 2514).

At page 22 of the Answer Brief when discussing the admission into evidence of the forty public records depositions, the State says, "The State agreed 'for purposes of saving time,' but did not agree that everything there was admissible, and reserved the right to object to inadmissible matter. (R 2515-16)." However, the State made no objections when the depositions were admitted into evidence (PC-R2. 2518-22). They depositions were admitted in their entirety, and any and all objections were waived.

One of the depositions admitted into evidence in its entirety was the deposition of Walter Pellicer who had been the Sheriff of Putnam County at the time of Mr. Wright's 1983 trial and at the time of the 1988 post-conviction hearing (Exh. 40). In Sheriff Pellicer's deposition, he testified under oath that Freddie Williams, the trial investigator on Mr. Wright's case, had been a bonded deputy in Putnam County (Exh. 40 at 19). During the deposition, Assistant State Attorney Fox had no cross-examination and registered no objections to this testimony.[10]

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[10]In the Argument section of the Answer Brief, the State says, "although Freddie Williams was called by the defense at the evidentiary hearing, he was not asked about any special deputy status he may, or may not, have held." Answer Brief at 50. In fact, neither Mr. Wright's counsel nor the Assistant State Attorney asked Freddie Williams regarding his status as a bond special deputy. Since the Pellicer deposition had been admitted without objection before Freddie Williams took the stand on December 8, 1997, Mr. Wright's counsel understood that the State was not contesting the matter. Certainly, the State's decision to ask no questions of Freddie Williams about his status as a bonded deputy in Putnam County was consistent with not contesting the issue. When the matter came up in closing arguments, Mr.

At page 22 of the Answer Brief, the State misrepresents the testimony of Freddie Williams when it says "he first saw that document at '[t]he first hearing we had' when they 'were all in the state attorney's office.' (R 2526)'" In fact, the record establishes quite clearly that Mr. Williams testified that he had not seen the documents in question prior to Mr. Wright's trial:

> Q In looking at that document, is that a document that had been provided to you prior to Mr. Wright's trial?
>
> A No.
>
> Q When did you first see it?
>
> A The first hearing we had, we were all in the state attorney's office.
>
> MR. FOX: Your Honor, I'm sorry to interrupt, but I believe I need to object.

(PC-R2. 2526). In responding to the objection, Mr. Wright's counsel made clear that he was presenting the evidence in order to establish that the factual determination by Judge Perry that Freddie Williams had seen the documents in question before Mr. Wright's trial was factually wrong. The documents were seen in the State Attorney's Office immediately prior to the October, 1988, evidentiary hearing, years after Mr. Wright's trial:

> MR. MCCLAIN: And for the record I do take

Wright's counsel specifically relied on Pellicer's testimony that "Freddie Williams was a bonded deputy" and argued Freddie Williams' status as a special deputy "affected his judgment" (PC-R2. 1051, 1052). And in fact in the State's closing argument in response, Assistant State Attorney Fox said "Freddie Williams had one," referring Pellicer's testimony regarding Freddie Williams' appointment as a special deputy (PC-R2. 1086).

> exception in that in this instance it is clear Judge Perry's order is wrong on the basis of - -
>
> THE COURT: You've already argued that to the supreme court, Mr. McClain.
>
> MR. MCCLAIN: I didn't have Mr. Williams sitting on the witness stand able to verify what I am saying. I simply had a cold record in an appellate court. And the proper place for that part of the motion for new trial is in the trial court, in the circuit court. I can't file a motion for a new trial in the Florida Supreme Court.

(PC-R2. 2533).

At page 24 of the Answer Brief, the State again inaccurately describes Mr. Williams' testimony. The State says, "In regard to 'a statement by Charlene Luce,' Mr. Williams said he did not remember it." In fact, Mr. Williams' testimony was, "I don't remember this document," and then he explained, "If it's on our inventory we got it; if it's not on there we didn't get it." (PC-R2. 2534). The inventory was introduced as Exh. 13 (PC-R2. 2413). This was consistent with Mr. Pearl's testimony that the inventory demonstrated that the document was not received.

At page 27 of the Answer Brief, the State seems to suggest that Judge Nichols sustained the State's objection to Wanda Brown's testimony, "The State and the postconviction judge agreed that everything previously presented should be considered with anything new presented in the instant hearing, however, no testimony on the previously decided matters should be re-presented. (R 2567)." In fact, Judge Nichols allowed the testimony after hearing argument, "THE COURT: All right. I'll

let you go ahead then." (PC-R2. 2570).

At page 28 of the Answer Brief, the State describes the testimony of Leon Wells, "According to Mr. Wells, the Jacksons 'were terrible bad boys,' but 'I was just as bad they was.' (R 2575-76, 2578). Actually, the State has spliced two separate comments together to create a false impression of Mr. Wells' testimony. At one point in his testimony, Mr. Wells explained his experiences with Henry Jackson in school when they would "box all the time. I think I came out better in every time we fought, because I was just as bad as they was." (PC-R2. 2575-76). Later, Mr. Wells discussed Henry Jackson's conduct as an adult when he filed a complaint with the police concerning an incident at a store that Mr. Wells managed. It is then that Mr. Wells was asked if he had anything else to say regarding Henry Jackson, and he said "they were terrible bad boys." (PC-R2. 2578).

At page 28 of the Answer Brief, the State notes that Assistant State Attorney Fox objected to the testimony of Kim Holt Holliman. The State neglects to acknowledge that Judge Nichols' immediate response was "I'll let you continue." (PC-R2. 2580). Accordingly, the testimony was received into evidence.

At page 30-31 of the Answer Brief, the State discusses the testimony of Jeff Walsh. The State neglects to acknowledge that the public records Mr. Walsh received in July of 1991 from Captain Miller of the Sheriff's Office were introduced into evidence without objection as Exhibit 46 (PC-R2. 2595). The

State also fails to acknowledge that Mr. Walsh testified that when the documents were handed to him by Captain Miller, Mr. Walsh was told by Captain Miller that these documents had not been previously provided to the CCR (PC-R2. 2600-01). Mr. Walsh reviewed Mr. Wright's files and verified the accuracy of this representation. Mr. Walsh understood from Captain Miller that these were the only documents that CCR had not previously received regarding Mr. Wright's case (PC-R2. 2601). The documents appearing in Exh. 46 were the basis of the new evidence claims contained in the first amended 3.850 motion filed on December 11, 1991 (PC-R2. 115).

The State also neglects to note that Mr. Walsh obtained in 1996 additional public records after it was revealed "[d]uring a hearing relating to public records in the matter of State v. Colina . . . that a thorough and complete search really was never completed upon a receipt of a records request letter from CCR" (PC-R2. 2603). In fact, the 1996 records request referred to "what was disclosed during the Colina case" (PC-R2. 2603).

The State has also neglected to note that an "accordion file folder of materials" was turned over by the Sheriff's Office in November of 1996 and during the forty 1997 depositions that were introduced into evidence (PC-R2. 2603). The State also neglected to acknowledge that the entire accordion file was introduced into evidence as Exh. 47 (PC-R2. 2596, 2603).

Exh. 47 was actually introduced into evidence before Mr.

Walsh took the stand. Collateral counsel stated on the record:

> And I'm going to have one of the composites and perhaps subject to a discussion with Mr. Fox, what's the best way to do it - - these are the documents, it's kind of thick, that are related to the 1997, October of '97 amended 3.850. And these were the documents that were received, I believe from the sheriff's department, some of them were jail records. And I again think there's no question that these came from the state, it's just a question of Mr. Walsh testifying as to whether he had received them before they were turned over in the course of the proceedings earlier this year and late last year.

(PC-R2. 2596). Assistant State Attorney Fox responded, "However, you want to do it, that's fine with me" (PC-R2. 2596). Thereupon, Judge Nichols admitted Exh. 47 into evidence.

Mr. Walsh testified that he personally reviewed those materials and determined that none of the documents contained in Exh. 47 had previously been disclosed by the Sheriff's Office:

> Q Now, have you gone through those documents there and compared them to prior disclosures to CCR in the Joel Dale Wright case?
>
> A Yes, I have.
>
> Q And are those documents that had not previously been disclosed?
>
> A Yes.

(PC-R2. 2604). The State did not object to this testimony or the exhibits that were introduced. Assistant State Attorney Fox conducted no cross-examination of Mr. Walsh (PC-R2. 2608). And, the State called no witnesses to rebut Mr. Walsh's very clear and uncontested testimony that documents were received in 1991 that had not previously been disclosed and that additional documents

were received in late 1996 and 1997 that had not been previously disclosed.

At page 33 of the State's Answer Brief, the State discusses the testimony of Joel Dale Wright at the December, 1997, proceedings. In its discussion, the State neglects to mention that besides being asked about pre-trial knowledge of the special deputy status of Mr. Pearl and Judge Perry, Mr. Wright was also asked if he had known of Freddie Williams' connection with the Putnam County Sheriff's Office (PC-R2. 2640). Mr. Wright indicated that he had not known of Freddie Williams' status, but that he would have objected had he been advised (PC-R2. 2641). The State also neglects in its Answer Brief to acknowledge that Assistant State Attorney Fox had no questions for Mr. Wright and conducted no cross-examination.

In its Answer Brief at page 34, the State skips from the close of the evidence at the December, 1997, evidentiary hearing to the June 5, 2000, decision from Judge Nichols denying Rule 3.850 relief. The State does not address the closing arguments that the parties gave on December 8, 1997. Accordingly, the State omits reference to Assistant State Attorney Fox' acknowledgment that Mr. Wright had received public records in 1991 and in 1996-97 that had not previously been disclosed:

> And the additional things that the Defense has found here today are really quite minute. In fact, compared to the things that were already argued in 1988, which Judge Perry found and the Supreme Court adopted were highly speculative in nature in terms of whether they are actually exculpatory.

> So, the additional things that the Defense have found don't change anything.

(PC-R2. 1089).

The State also omits from its Answer Brief any discussion of the two and a half year lapse between the end of the evidentiary hearing and the circuit court's ruling. In fact, the ruling only issued after Mr. Wright filed a mandamus action in this Court challenging the delay. And then, the order denying suddenly appeared ten days later and was three pages long (PC-R2. 1137).

ARGUMENTS IN REPLY

INTRODUCTION

The State in its Answer Brief attempts to slice and dice Mr. Wright's claims into small bite-size nuggets that the State argues are either insignificant, procedurally barred, or both.[11] Fortunately for Mr. Wright, this Court's precedent does not support the manner in which the State attempts to avoid dealing with the Mr. Wright's claims.[12] Evidence supporting Rule 3.850

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[11]The State's argument is a variation of the theme that appeared in the State's closing argument in the circuit court. There, the State maintained that the issues arising from the newly disclosed public records are "minute" in comparison to the undisclosed police reports presented in the 1988 (PC-R2. 1089). According to the State, since the big stuff was already rejected and thus procedurally barred from reconsideration, the new "minute" stuff cannot warrant relief. Of course, the contention stands in direct contravention of Kyles v. Whitley, 514 U.S. 419 (1995), and Young v. State, 739 So.2d 560 (Fla. 1999), two cases not even mentioned in the State's Answer Brief.

[12]And in fact, the record demonstrates that the State recognized below that there had been a failure in 1988 to fully comply with Chapter 119. Mr. Wright was permitted to amend with

claims that was not disclosed by the State in a timely manner is not procedurally barred from consideration once the evidence in fact surfaces. Once disclosed, it must be heard and considered. Ventura v. State, 673 So.2d 479, 481 (Fla. 1996)("a defendant should be allowed to amend a previously filed rule 3.850 motion after requested public records are finally furnished").[13] The courts of this State are still required to be concerned with administering justice.

What is most troubling regarding the State's Answer Brief is that the State in endeavoring to save this conviction seems to be not the least concerned with the basic American principles of truth and justice. Mr. Wright has attempted to present proof that at the heart of the previous denial of his Brady claim was a false fact, a finding by the circuit court judge that was simply false, and false testimony from a law enforcement officer. The State argues in response that "the 'what Freddie Williams knew when' component of this issue is procedurally barred" (Answer Brief at 41) and that the judge did not specifically state that he was relying on the false testimony that Jackson and Strickland had passed polygraphs (Answer Brief at 42). The State never argues that the previously found fact is true; it simply

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the new documents. The State responded, not by challenging whether the documents had been disclosed before, but by arguing that the new "things that the Defense has found here today are really quite minute" (PC-R2. 1089).

[13]This is another case that Mr. Wright relied on in his Initial Brief that is not even mentioned in the State's Answer Brief.

maintains as the State did below, true or not we are stuck with that determination regardless of whether available evidence shows that the determination was factually wrong.[14] Nor does the State contest the fact that the testimony that Jackson and Strickland had passed a polygraph was false.

The whole premise behind the post-conviction process embodied in Rule 3.850 is to revisit factual matters in a timely fashion in order to insure that justice is properly administered. Rule 3.850 proceedings were designed to permit the presentation of evidence that the factual determinations made at trial and reviewed on direct appeal or in previous Rule 3.850 proceedings were erroneous and/or insufficiently reliable to support a conviction and or sentence of death. See e.g. Young v. State, 739 So.2d at 560 (undisclosed exculpatory evidence specifically called into question factual finding of cold, calculated and premeditated that had been affirmed by this Court on direct appeal); Porter v. State, 723 So.2d at 196 (this Court granted post-conviction relief in a successive petition on a judge bias claim because new evidence established that this Court's prior factual resolution in a prior post-conviction motion was in error); Lightbourne v. State, 742 So.2d at 247 (new evidence

[14]In successfully arguing to exclude the testimony of Freddie Williams as to when he saw the police reports at issue, Assistant State Attorney Fox indicated that whether "Judge Perry may have been mistaken in his interpretation of what this witness testified to in a prior hearing" simply did not matter (PC-R2. 2528).

required revisiting a factual resolution of a Brady claim made in a prior Rule 3.850 proceeding); State v. Mills, 788 So. 2d at 250 (new evidence that co-defendant, not Mills, was triggerman).

Similarly, the State in steadfastly maintaining that all issues other than the one that this Court identified in its opinion remanding are "beyond the scope of the remand, and so, [are] not properly before this Honorable Court," (Answer Brief at 40) conveniently overlooks the record below. The State's position ignores the fact that the State, not only did not make this argument below, but conceded that the other issues were properly raised in amended Rule 3.850 motions and should be heard at the evidentiary hearing. The State's real argument below was that Judge Perry had considered the big stuff in 1988 and did not grant relief, and so relief should not be granted now.

The State in its strained efforts to minimize and/or avoid Mr. Wright's constitutional claims never addresses the forest, the plethora of evidence supporting his claim of innocence and implicating Henry Jackson and Clayton Strickland. It is this failure that is that is both troubling and deafening. As Mr. Wright's counsel argued in his reply closing on December 8, 1997, in circuit court in response to the State's same failing below:

> And what is important to note, what Mr. Fox did not argue, because he didn't argue Mr. Wright's guilt was overwhelmingly established, he didn't argue that clearly Jackson and Strickland had nothing to do with this homicide. He didn't argue the facts. Instead he wants to hide behind technicalities and say this man should be executed because someone didn't do something sooner about this.

(PC-R2. 1091).

ARGUMENT I

A. Scope of remand.

The State first contention as to Argument I is that the argument in its entirety is procedurally barred "because it is beyond the scope of the remand, and so, is not properly before this Court." Answer Brief at 40.[15] The State's position was not advanced below. In circuit court, the State conceded at the 1996 Huff hearing that all of Mr. Wright's should be heard at an evidentiary hearing (PC-R2. 719). This included the claims raised by Mr. Wright in his 1991 amended motion, in his 1993 amended motion, and in his 1996 motion to compel.

When the evidentiary hearing commenced in March, 1997, the

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[15]Without elaboration, the State cites Mendyk v. State, 707 So.2d 320, 322 (Fla. 1997), and Jennings v. State, 782 So.2d 853, 861 (Fla. 2001). These two cases involved remands for Chapter 119 disclosures. And in both cases, the defendant was permitted to file Rule 3.850 claims arising from the newly disclosed public records. In Mendyk, this Court said, "Given that the information Mendyk requested either could not be located or never existed, these jury instruction and ineffective assistance claims **are not based on any public records disclosure** and therefore are not cognizable on appeal to this Court after our limited remand." 707 So.2d at 322 (Emphasis added). Mr. Wright's claims are premised upon information and public records that were not known or disclosed at the time of this Court's 1991 remand.

In Jennings, this Court found an ineffective assistance of counsel claim procedurally barred in reliance on Pope v. State, 702 So.2d 221, 223 (Fla. 1997), because there was no accompanying "allegation of newly discovered evidence." 782 So.2d at 861. That is most assuredly not the situation here. Mr. Wright alleged and proved that the State had previously failed to disclose public records which went towards his claim that he received a constitutional inadequate adversarial testing.

State did not contest that all of Mr. Wright's claim should be heard. In fact, the State's representative specifically acknowledged that Ventura v. State, 673 So.2d 479 (Fla. 1996), applied and required the circuit court to entertain claims arising from newly disclosed public records (PC-R2. 2212). Accordingly, the State agreed that it was necessary to depose Putnam County Sheriff personnel in order to ascertain what documents had yet to be turned over to Mr. Wright's counsel.

In fact at the conclusion of evidentiary hearing in December, 1997, Assistant State Attorney Fox acknowledged that Mr. Wright had properly raised new matters based upon the public records received in 1991 and the additional records received in 1996-97:

> And the additional things that the Defense has found here today are really quite minute. In fact, compared to the things that were already argued in 1988, which Judge Perry found and the Supreme Court adopted were highly speculative in nature in terms of whether they are actually exculpatory.
>
> So, the additional things that the Defense have found don't change anything.

(PC-R2. 1089). The State's argument has no merit and was waived in the circuit court. Argument I is properly before this Court.

B. False facts.

Next, the State addresses Mr. Wright's contention that the prior resolutions of his claim that he did not receive an adequate adversarial testing was premised upon "false facts." The State first turns to Judge Perry's 1989 determination that

Freddie Williams saw the alleged Brady material in advance of the trial and that no constitutional deprivation occurred. The State notes that Mr. Wright challenged that finding on appeal and argues that "this Court's specific adoption of the trial court's order shows that this Court rejected the claim." Answer Brief at 41. However, this Court's standard of review required this Court to acceptance the factual finding unless unsupported by competent and substantial evidence. That is not the same thing as determining that Judge Perry's factual finding was correct. We now know from Freddie Williams' proffered testimony that Judge Perry's finding was factually wrong. The State had in its possession exculpatory evidence that was not disclosed to the defense. The matter must be revisited. See The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000)("Truth is critical in the operation of our judicial system").[16]

The State also attacks Mr. Wright's claim that Judge Perry's

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[16]Of course, the State seeks to ignore the problems that arise if the false factual determination is accepted as truth. It has now been revealed that Freddie Williams was a bond special deputy sheriff. This is new evidence that was discovered as a result of the 1997 public records depositions stipulated to by the State. If we are to assume that the falsehood is true (i.e. Freddie Williams saw the Brady material pre-trial), did he see the documents in his capacity as a special deputy. If so, then Judge Perry's assumption that Freddie Williams, as Mr. Pearl's investigator, would have disclosed what he saw to Mr. Pearl seems to no longer have any basis. Mr. Pearl unequivocally said that he had not seen the documents. If Freddie Williams did not reveal the existence of the Brady material to Mr. Pearl, the new evidence of Mr. Williams status as an agent of the Putnam County Sheriff's Office shows that the false fact does not defeat Mr. Wright's Brady claim, as Judge Perry, another special deputy found.

1989 denial of relief was premised upon false evidence presented by the State that Henry Jackson and Clayton Strickland passed polygraph examinations while providing each other alibis.[17] Here, the State chooses to focus on the language of Judge Perry's order, arguing that it is not clear why the judge concluded Mr. Wright's claim "is highly speculative in nature." Answer Brief at 42. However, the focus should be on the testimony presented by the State in 1988 which was false:

> Q Did you consider whether Mr. Strickland may have been lying for Mr. Jackson?
>
> A Of course that's always a possibility. And of course both of them had agreed to take a polygraph with no, no problem with that. And they ran very clean on the polygraph that neither one of them was involved with the Lima Paige Smith murder.
>
> Q You find polygraph examinations to be very reliable though?
>
> A Yes.

(PC-R. 504).

Apparently, the State's position is that it does not matter

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[17]The State also asserts that Mr. Wright did not present any argument to Judge Nichols regarding the State's presentation of false testimony at the 1988 evidentiary hearing. However, Mr. Wright's counsel addressed the change in his Taylor Douglas' testimony in his closing argument on December 8, 1997 (PC-R2. 1027-28). Assistant State Attorney Fox responded in his closing, by asserting that Douglas had not previously indicated that the polygraph was the basis for the exclusion of Jackson and Strickland as suspect, "there was indications that the police ruled him out not simply because he had passed the polygraph" (PC-R2. 1088). In reply, Mr. Wright's counsel stated, "the evidence was that according to Taylor Douglas, Strickland and Jackson were ruled out because they passed polygraph examinations" (PC-R2. 1097).

if law enforcement testify falsely absent specific and clear reliance on the false statement by the finder of fact. However, that is not the position that United States Supreme Court has adopted. See Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). The presentation of false testimony requires a reversal unless the State proves the error harmless beyond a reasonable doubt. Strickler v. Greene, 527 U.S. 263, 298-99 (1999)(Souter, J., concurring in part and dissenting in part). The State has made no effort to demonstrate that its presentation of false testimony in the course of the 1988 evidentiary hearing was harmless beyond a reasonable doubt.[18] Accordingly, the resulting determination by Judge Perry must be revisited.

C. Previously undisclosed exculpatory evidence.

The State chooses to not address the fact that full Chapter

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[18]The State does point out that "Wright also took and passed a polygraph, however, he very obviously was not excluded as a suspect." Answer Brief at 42 n.7. However, Mr. Wright was dropped as a suspect when he passed the polygraph. It was only when Charles Westberry asserted two months later that Mr. Wright had confessed to him that Mr. Wright again became a suspect and was charged with the murder.

The State also asserts, "[t]hat the passage of a polygraph was the main thing the witnesses asked in 1988 recalled five years after trial does not mean that it was the sole or only basis for excluding them at the time." Answer Brief at 42. Of course, the fact that the State has never been able to come up with a basis for excluding Jackson and Strickland that is not rebutted by the police reports and testimony presented in circuit court has to be evidence which supports Mr. Wright's claim that he was denied an adequate adversarial testing and that confidence is undermined in the outcome. The State has no evidence establishing that Jackson and Strickland did not commit this murder.

119 compliance had not occurred at the time of the 1988 evidentiary hearing.[19] In circuit court, this failure was not contested after the forty (40) public records depositions were conducted. Accordingly, the new evidence must evaluated cumulatively with the evidence presented in 1988. Jennings v. State, 782 So.2d at 861 ("the cumulative effect of the Brady violations does not establish Brady materiality").

D. Cumulative consideration.

The State contends that any evidence presented at the 1988 cannot "provide a basis for relief herein." Answer Brief at 43. This contention flies squarely in the face of this Court's precedent requiring cumulatively evaluation of all undisclosed exculpatory evidence. Jennings v. State, 782 So.2d at 861; Lightbourne v. State, 742 So.2d at 247. When new exculpatory evidence is disclosed by the State in post-conviction, cumulative consideration must be given to any previously litigated Brady evidence to determine whether all of the undisclosed exculpatory

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[19]The previously undisclosed evidence includes the police report indicating that Officer Walter Perkins had previously falsified a police report and was fired because he was "untrustworthy." This undisclosed evidence would have caste a new light on Officer Perkins' trial testimony and his role in arresting Mr. Wright and gathering evidence against him. This newly disclosed evidence further underscores the importance of the evidence that Officer Perkins had threatened Jody Wright's mother, promising to make her sorry she had those boys.

The previously undisclosed evidence also includes numerous police reports detailing violent misconduct committed by Henry Jackson, and police reports regarding Connie Ray Israel, Bobby Hackney, and Clayton Hughes. All of this was discussed more extensively in the Initial Brief and not addressed at all in the Answer Brief.

evidence cumulatively undermines confidence in the outcome of the trial.[20]

E. Brady material includes conclusions and inferences.

The State asserts, "The State submits that conclusions that could be drawn from evidence, or the lack of evidence, are not covered by Brady." Answer Brief at 43. However, this Court's jurisprudence indicates that the question is whether the State possessed exculpatory "information" that it did not reveal to the defendant.[21] Young v. State, 739 So.2d at 553. If it did and it did not disclose this information, a new trial is warranted where confidence is undermined in the outcome of the trial. In making this determination "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So.2d at 385. This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. 446. Information regarding "coaching"

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[20]The State makes the assertion that the error in excluding Kathy Waters should be disregarded because the testimony "could have hurt Wright just as much, if not more than, it would have helped him." Answer Brief at 47. The State's position is a stretch given that the trial judge described the testimony as almost "tailor-made" to assist Mr. Wright. Kathy Waters testimony would have corroborated Mr. Wright's version of the events and impeached Mr. Westberry's, in the credibility battle.

[21]The undisclosed information does not have to be in the form of admissible evidence. Rogers v. State, 782 So.2d at 383 n.11.

of State witnesses is Brady material because it gives the defense a tool to argue against the witness' credibility. Rogers v. State, 782 So.2d at 384.

F. The burden of proof under Brady.

As Mr. Wright noted in his Initial Brief at 62, Judge Nichols held that in order to prevail on his claim that he did not receive a constitutionally adequate adversarial testing, Mr. Wright had to prove "that the result of the trial would have been different" (PC-R2. 1139). The State responds, "Collateral counsel's claim that Judge Nichols employed the wrong standard when he held 'it was Mr. Wright's burden to use previously undisclosed evidence to prove that the result of the trial would have been different' is obviously incorrect in light of the plain language of Jennings to the contrary." Answer Brief at 44 n.9.

This Court explained the proper standard when it ordered a new trial because of a Brady violation in Rogers v. State, 782 So.2d at 385. There, this Court found "the cumulative effect of the suppression of the materials discussed above indeed undermines confidence in the outcome of the trial." Because of that finding, a new trial was ordered. Judge Nichols did not employ that standard in Mr. Wright's case.

G. Other things.

The State argues, "to prevail, Wright has to show not only a probability of a different result, but 'other things.'" Answer

Brief at 45.[22] The State says "[a]mong those 'other things' is the requirement that Wright show that the undisclosed evidence could not have been found by Wright's counsel had he/she exercised due diligence." Answer Brief at 45. For this, the State provides no case citation.[23]

In fact, the United States Supreme Court granted certiorari review in Strickler v. Greene, 527 U.S. 263 (1999), to decide whether trial counsel's due diligence was an element to be proved in order to obtain relief for a Brady violation. The Supreme Court indicated that trial counsel's diligence was not an element of a Brady claim, as this Court noted in Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000). See Hoffman v. State, Case No. SC94072, — So.2d — (Fla. July 5, 2001)(Strickler "squarely placed the burden on the State to disclose to the defendant all information in its possession that is exculpatory" Slip at 10). Judge Nichols erred in his legal analysis.

ARGUMENT II

The State chooses to ignore the uncontested evidence presented in circuit court that Freddie Williams was a bonded deputy sheriff in Putnam County, precisely what Howard Pearl

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[22]This Court has not held that the defendant who establishes that the State withheld exculpatory evidence must prove "a probability of a different result." Rogers v. State.

[23]Neither does the State address the case citations presented in the Initial Brief indicating that Judge Nichols erroneously held Mr. Wright to prove due diligence of trial counsel as an element of a Brady claim.

testified would be a problem. The State in its closing argument below conceded that Freddie Williams was a special deputy sheriff in Putnam County. The State also relies on James Gibson's testimony that was not presented to Judge Nichols in this case, but is mentioned in opinions of this Court in other cases. Answer Brief at 55-56. The State having chosen not to present that testimony waived reliance on such testimony.

For the reasons stated in this brief and in the Initial Brief, this Court should vacate Judge Nichols decision.

ARGUMENT III

The State asserts "at the time of the 1997 evidentiary hearing, Wright had known about the 'Judge Perry as Special Deputy' issue for nearly **five years**." Answer Brief at 58 (bold in original). That is correct. But, the State overlooks that Mr. Wright filed an amended 3.850 within two months of learning of the claim. And when he learned of Judge Perry's ill-health in 1994, he filed a motion seeking permission to depose Judge Perry (PC-R2. 615). The motion was heard and Judge Nichols took it under advisement and never rule on the motion, thereby precluding Mr. Wright from obtaining Judge Perry's testimony on relevant matters (PC-R2. 662). The State's claim "[t]here is no claim that he attempted to make a more detailed inquiry on the subject, but was precluded therefrom" is simply not true. That is precisely what happened.

The State ignores undersigned counsel's claim that when he

read the Initial Brief in Randall Scott Jones' appeal filed April 5, 2001, he learned for the first time that a former Putnam County prosecutor, Robert McLeod. had testified in February of 2000 that Judge Perry had a standard practice of ex parte contact with the State. Since no State actor ever disclosed previously disclosed this to Mr. Wright, it has now been raised in a timely fashion. For the reasons stated herein and in the Initial Brief, Judge Nichols order should be vacated, the death sentence vacated, and the 1989 order declared void.

CONCLUSION

Mr. Wright simply does not have space to address all the matters set forth in the Answer Brief that warrant comment. Accordingly, he must rely upon the arguments contained in the Initial Brief.

For the reasons stated herein and in the Initial Brief, Mr. Wright respectfully urges the Court to reverse the lower court's denial of Rule 3.850, vacate his sentence of death, and grant him a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Judy Taylor Rush, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118.

CERTIFICATE OF COMPLIANCE AS TO TYPE SIZE AND STYLE

I HEREBY CERTIFY that this Amended Reply Brief of Appellant complies with the font requirements of Fla. R. App. Pro. 9.210(a)(2) typed in Courier, 12 point type, not proportionally spaced, this date, November 20, 2001.

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