IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2866

JOEL DALE WRIGHT,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

MARTIN J. MCCLAIN
Special Assistant CCRC-South
Florida Bar No. 0754773
9701 Shore Rd. Apt. 1-D
Brooklyn, NY 11209

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3RD AVE., SUITE 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR MR. WRIGHT

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REPLY AS TO CLAIM I

A. Introduction.

The State fails to meaningfully discuss Mr. Wright's assertion that it has an obligation to comply with due process in the course of a direct appeal. The State's discussion is limited to describing Mr. Wright's assertions as "wholly inappropriate" because "the underlying substantive issues . . . were presented by his counsel on appeal" (Answer at 3).[1] The State argues that Mr. Wright seeks "an improper relitigation of an issue upon which this Court has already ruled" (Answer at 4).

However, Mr. Wright has asserted that just as habeas proceedings are the proper means for seeking to challenge the adequacy of appellate counsel's advocacy on direct appeal, habeas proceedings must be the proper vehicle for challenging the conduct of the State during the direct appeal. See Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Here, Mr. Wright

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[1]The absurdity of the State's position can best be understood by analogy to the more usual context in which Brady and Giglio claims arise. At trial, it is very common for Brady claims to involve the suppression of evidence impeaching a State's witness who was subject to cross-examination. Rogers v. State, 782 So.2d 373 (Fla. 2001). However, the fact that the trial attorney did challenge the witness as incredible does not preclude the presentation of a meritorious Brady or Giglio claim if and when it is discovered that additional impeachment was suppressed by the State. Kyles v. Whitley, 514 U.S. 419 (1995).

asserts that information vital to this Court's resolution of Mr. Wright's direct appeal was withheld from this Court by the State. The resulting question that must be answered is whether the principles enunciated in Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), apply during a direct appeal.[2] Must the State's representative comply with the dictates of Brady and Giglio while arguing on direct appeal before this Court? If so, then habeas proceedings must be the appropriate vehicle for vindicating a breach of the State's direct appeal obligation.[3]

The analysis of Brady and Giglio claims, of necessity requires revisiting previously presented contentions in order to determine whether the information withheld from this Court during the direct appeal, impacted the resolution of the appeal. Here, Mr. Wright has been denied a new trial because

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[2]This Court has previously held that the Brady obligation continues on into post-conviction. Roberts v. Butterworth, 668 So.2d 580 (Fla. 1996); Johnson v. Butterworth, 713 So.2d 985 (Fla. 1998).

[3]It has long been recognized that ineffective assistance claims and Brady claims are parallel claims. See State v. Gunsby, 670 So.2d 920 (1996). Since habeas proceedings are the recognized vehicle for asserting ineffective assistance of counsel in a direct appeal, logic dictates that it is the appropriate vehicle for asserting that the State's representative did not comply with his or her due process obligation during the direct appeal.

pertinent information was not disclosed by the State during the direct appeal in violation of due process. Given that this information was withheld from this Court by the State during the direct appeal, reconsideration of the issues that were impacted by the State's breach of due process is required.

B. Direct Appeal Confrontation Clause Claim.

In Point I of Mr. Wright's initial brief on direct appeal, Mr. Wright argued that the trial judge had committed reversible error in limiting his right to cross-examine various witnesses called by the State (Initial Brief on Direct Appeal at 10). One of the witnesses specifically discussed in the argument raised on direct appeal was Charles Westberry. One of Mr. Wright's contentions as to Westberry was that Mr. Wright was precluded from asking Westberry whether his scrap metal business was criminal in nature in order to explore "the motive of the State's chief prosecution witness" (R. 2190). In the initial brief to this Court, Mr. Wright argued "Appellant further submits that such testimony was proper to demonstrate that Westberry's testimony was influenced by the hope that his illegal activity, known by the police and the prosecutor, would not result in charges being filed if Westberry testified favorable to the State" (Initial Brief at

15).

As to Mr. Wright's current claim that the State withheld pertinent information from this Court during the direct appeal, the entirety of the State's argument comes down to:

> Moreover, Wright's claim that had the State told this Court of the unestablished possibility that Mr. Westberry was afraid he might go to prison for the scrap metal thefts if he did not testify against Wright that revelation would have required this Court to grant a new trial is wholly without merit. The little additional value of this alleged impeachment evidence would not have affected the outcome of the appeal.

(Answer at 7).[4] The State in its desperate attempt to preserve the conviction tainted by serious Brady and Giglio violations completely overlooks the implications of the withheld information.[5] It was not just Charles Westberry who

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[4]The State does at one point assert that Mr. Wright's "specific complaint against the State is that it did not tell this Court that the judge had ruled the theft evidence inadmissible thereby 'preclud[ing] the jury from knowing of the prison term Westberry was afraid that he faced . . . .' Petition at 13)" (Answer at 6). However, the State misstated Mr. Wright's claim. Mr. Wright asserted "that **Judge Perry's ruling precluded the jury from knowing** of the prison term Westberry was afraid that he faced **but for the good graces of Mr. Dunning**" (Petition at 13)(emphasis added). The State's mangled quote completely misrepresents Mr. Wright's contention is his Petition.

[5]The State's assertion that Westberry' fear of criminal prosecution for the criminal scrap metal business was an "unestablished possibility" is simply contrary to the record. Westberry has testified under oath that he was "scared of getting into trouble about this" (PC-R1. 645). Moreover, what the State failed to disclose was the fact that the trial prosecutor, Mr Dunning, gave Westberry "a limited grant of

was at risk of criminal prosecution, but his wife, Paige Westberry, as well. This fear was present at the time of his discussion with Paige when Westberry told her that Mr. Wright had told someone else that Westberry had been stealing property (R. 2473). At that moment in time, Charles Westberry had reason to fear criminal prosecution. The jury did not know that. And it was at that moment in time that Mr. Westberry first claimed that he had something on Mr. Wright. The undisclosed fact that Charles Westberry in fact received immunity for the scrap metal business is proof of his fear of criminal prosecution.

In fact in his closing argument, the prosecutor asked the jury to consider Westberry's possible motives in testifying against Mr. Wright:

> I ask you to ask yourself the ultimate question: Why is Charles Westberry going to submit himself to criminal prosecution so that he can also submit his friend to criminal prosecution?
>
> **What's so dastardly did Jody Wright do to Charles Westberry to make him do that?**
>
> **What testimony have you had that there was anything so dastardly done by Jody Wright to Charles Westberry? None. Nothing.**
>
> The biggest hint you got was when Paige Westberry testified for the Defense that her husband said that this Defendant was getting in the way of

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immunity" (PC-R1. 756). Furthermore under Davis v. Alaska, 415 U.S. 308 (1974), the ability to confront a witness about matters that may suggest a motive is not dependent upon establishing that the witness will concede that his motive is as suggested.

him and a friend, Doc Ryster.

(R. 2726)(emphasis added). Yet, that very prosecuting attorney knew of the criminal nature of the scrap metal business and had provided Charles Westberry with immunity. This prosecuting attorney knew that Mr. Wright was part of and hence aware of the criminal nature of the scrap metal business. The prosecutor knew that Westberry had reason to be afraid if Mr. Wright spilled the beans about the business.[6] Neither Mr. Wright nor his counsel were advised of the immunity for the illegal scrap metal business, nor was this Court advised while evaluating Mr. Wright's argument of error under Davis v. Alaska.

The State says that **"Wright's complaint appears to be that the State did not present and argue his appeal for him"** (Answer at 6)(emphasis added). That understanding is in error. Mr. Wright's complaint is that the State hid evidence from Mr. Wright, his counsel and this Court. As a result, he was deprived of a full and fair appeal. Full disclosure would have revealed a clear violation of the Confrontation Clause under Davis v. Alaska, 415 U.S. 308 (1974). Reversal would have been required.

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[6]In fact, Westberry indicated to Paige that he believed that Mr. Wright had been talking and making trouble (R. 2473).

C. Direct Appeal Challenge to the Introduction of Mr. Wright's Invocation of Silence.

Mr. Wright argued in his Petition that the State violated due process when it falsely asserted in the direct appeal that Mr. Wright had not preserved a challenge to the admission of Deputy Perkins' testimony regarding his conversation with Mr. Wright. The record in fact demonstrates that Mr. Wright moved in limine to exclude the testimony. When the testimony was presented, counsel did neglect to object. However, he subsequently asked for leave to make the objection (R. 2415). Without objection, leave was granted to renew the objection to exclude Deputy Perkins' testimony.

The State describes Mr. Wright's claim, that the State's false argument in its Answer Brief on direct appeal prejudiced him, as "outrageous" (Answer at 9, n. 1). The State's position is that this Court's independent review would have cured any error arising from the State's false argument.[7]

In Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985), this Court stated:

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[7]Actually, the State downplays the blatant misrepresentation made by the State in the direct appeal. The State now says that on direct appeal the State merely asserted "that the objection came too late to preserve" (Answer at 9, n. 1). However, the State on direct appeal falsely argued "[n]o objection was made at trial to the testimony of this witness" (Direct Appeal Answer Brief at 26). The argument was not that the objection was late; the argument was that it never happened at all.

> The role of an advocated in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. **However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate**. It is the unique role of that advocate to discover and highlight possible error and present it to the court, both in writing and orally, in such manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation.

Wilson, 474 So.2d at 1165 (emphasis added). This Court made very clear that its independent review did not relieve the parties of their constitutional obligations to insure an adequate adversarial testing. Here, neither party advised the Court that the assertion in the State's Answer Brief asserting a procedural bar was wrong.[8] The adversarial process failed.

The State argues that the objection that counsel made

[8]Interestingly, the State very carefully does not defend the words that were written in the State's Answer Brief on direct appeal that no objection had been made at all. The State position simply boils down to a claim that surely this Court figured out that the State's Answer Brief was wrong without being so advised by either party.

with leave of the trial court and without an objection by the State did not preserve the issue (Answer at 11). Oddly, the State maintains that the tardy objection made by Mr. Wright, that the State did not object to, did not preserve the matter for appeal, even though the judge permitted the objection and denied it on the merits. The State seems to be unaware of its obligation to make contemporaneous objections. This Court has explicitly stated, "Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State." Cannady v. State, 620 So.2d 165, 170 (Fla. 1993).[9] The State's action constituted an abandonment of its procedural bar argument.

The State then asserts that this Court nonetheless "rejected" the merits of the underlying claim (Answer at 10). Absent from this contention is a citation to the direct appeal opinion. This because in the direct appeal opinion there is no plain statement of the basis of this Court's denial of Mr. Wright's claim that Deputy Perkins was permitted to comment

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[9]The State also cites State v. Gaines, 770 So.2d 1221, 1227 (Fla. 2000). In Gaines, this Court recognized that the trial court was vested with broad discretion to consider motions to suppress that were not preserved by the filing of the motion pre-trial. This would seem to support Mr. Wright's contention that, when counsel asked for leave of the court to make his motion to suppress in a tardy fashion and leave was granted without objection, the State waived any objection to the tardiness of the motion and the trial court's decision to excuse counsel's tardiness was binding.

upon Mr. Wright's invocation of silence. All this Court stated was "[w]e reject each of appellant's contentions and find only the issues relating to the exclusion of Waters' testimony and the admissibility of the Williams rule evidence merit discussion." Wright v. State, 473 So.2d 1277, 1279 (Fla. 1985).

Further, the State chooses in its Answer not to address the application of Long v. State, 517 So.2d 664 (Fla. 1987), and Waterhouse v. State, 429 So.2d 301 (Fla. 1983), both cited in the Petition. This seems to tacitly acknowledge that Mr. Wright's statement was in fact an invocation of his right to silence.

REPLY AS TO CLAIM II

B. Failure to Raise on Appeal the Prosecutor's Knowing Presentation of False Argument to Mr. Wright's Jury.

In his Petition, Mr. Wright argued that appellate counsel was ineffective in failing to raise a challenge to the prosecutions "deliberate deception of court and jury" (Petition at 24). Mr. Wright relied upon numerous decisions by the United States Supreme Court imposing upon prosecutor's the obligation to refrain from the knowing presentation of false or misleading argument. In its Answer, the State does not address any of the United States Supreme Court cases cited

by Mr. Wright.[10] The State obviously prefers to ignore the constitutional underpinnings to Mr. Wright's underlying claim.[11]

2. The Glass Jar.

In his Petition, Mr. Wright argued that it appellate counsel should have challenged the trial prosecutor's argument that the glass money jar that Charlotte Martinez testified had been in Mr. Wright's possession may have been the one Westberry claimed Mr. Wright took from Ms. Smith. The State responds by asserting, "the evidence supports the inference that the glass money jar was that taken from Ms. Smith; however, **in making sure he did not violate any ethical rules**,

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[10]The decisions cited by Mr. Wright included: Mooney v. Holohan, 294 U.S. 103 (1935); Berger v. United States, 295 U.S. 78 (1935); Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972); Gray v. Netherland, 518 U.S. 152 (1996).

[11]Instead the State cites decisions from this Court involving qualitatively different prosecutorial comment. Rogers v. State, 783 So.2d 980, 1003 (Fla. 2001)(at issue were the prosecutor's comments during the penalty phase regarding her father's participation in Desert Storm); Sims v. State, 681 So.2d 1112 (Fla. 1996)(at issue were the prosecutor's comments referring to the defendant as a liar); Ford v. State, 802 So.2d 1121, 1132 (Fla. 2001)(at issue were prosecutor's comments misstating the law and disparaging mitigation and sympathy); Thomas v. State, 748 So.2d 970, 984 (Fla. 1999)(at issue were prosecutor's comments regarding defense counsel's dislike of police and solicitous treatment of his client). These cases simply are not relevant to an argument that the prosecutor deliberately presented false or misleading evidence and argument to the jury in order to obtain a conviction.

the prosecutor argued that it might or might not be the same jar" (Answer at 20)(emphasis added).[12]

The simple fact that the prosecutor made this effort to "not violate any ethical rules" reflects the fact that the prosecutor knew that the glass money jar did not come from Ms. Smith's resident, but was in fact a Wright family heirloom. The record demonstrates that the parties investigated the origins of the glass jar when it surfaced. After conducting an investigation, the prosecutor decided to not call Charlotte Martinez and to not present the glass jar. It was only after the defense decided to present the glass jar full of money to demonstrate that Mr. Wright had no need to steal from Ms. Smith and only after the defense neglected to present the evidence that the jar was Wright family heirloom, that Mr. Dunning seized upon the evidence to present an argument that he knew was false or misleading.

In Alcorta v. Texas, 355 U.S. at 31, the Supreme Court found a due process violation saying, "[i]t cannot seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury [a] false impression". That holding applies

[12]The State's contention ignores the limitations imposed by the United States Supreme Court's jurisprudence. A prosecutor is not permitted to knowingly make a false argument even if the defense counsel has failed to present the evidence necessary to prove the argument is false.

here. The State's feeble arguments that the prosecutor did not technically lie and that the evidence before the jury did not prove the argument was false overlook the reality that the prosecutor knowingly created a false impression in order to bolster the credibility of Charles Westberry so that he could win the case.

3. The Time of Death.

As to Mr. Dunning's misrepresentations of the medical examiner's conclusions regarding the time of death, the State asserts, "[t]he State is entitle to present its view of the evidence, including reasonable inferences therefrom, to the jury at argument" (Answer at 23). However, the United States Supreme
Court has made crystal clear that the prosecutor is not free to knowingly create a false impression. Alcorta v. Texas.

4. Right-handed Assailant.

As to the prosecutor's false argument regarding Dr. Latimer's testimony regarding the assailant being right-handed, the State asserts, "[i]t appears that in going over this evidence, the prosecutor misspoke when relating what hand the doctor thought the murderer used if he was standing in front of Ms. Smith when he stabbed her" (Answer at 25). This is a concession that the prosecutor's argument was in fact

false.

The State then argues that there is no evidence that the prosecutor's false argument was intentionally false (Answer at 25). The prosecutor just happened to have misrepresented the medical examiner's conclusion so as not to exclude Mr. Wright as the killer. The fact that the misrepresentation was to the prosecutor's advantage as he tried to win the case is circumstantial evidence of his intent. Just as in a criminal prosecution, intent can be inferred. Here, the prosecutor's false argument was on one of the defense's best arguments that Mr. Wright was not the killer. Moreover, the prosecutor's false statements as to other matters and his willful withhold of

exculpatory evidence provides ample circumstantial evidence that Mr. Dunning was only concerned with winning a conviction.[13]

5. Latent Prints.

As to the prosecutor's misstatement that "there were only two people that were not eliminated" (R. 2711) as a source of fingerprints in Ms. Smith's house, the State argues that if

[13]The State also seems to suggest that the prosecutor's false argument was harmless because surely the jury could have figured it out. However, the State's argument overlooks the fact that the jury sought a read back of Patricia Lasko's testimony and included in that request an indication that it wanted to hear Dr. Latimer's testimony again (R. 2907).

the jury had been paying attention it would not have been misled by this argument (Answer at 27). This overlooks the fact the United States Supreme Court has imposed a duty upon the prosecutor to not intentional create false impressions. Here, that is what the prosecutor did, time and time again.

6. Foreign Head and Pubic Hairs.

As to the prosecutor's misrepresentation of Patricia Lasko's findings regarding the foreign head hairs on the dress that Ms. Smith was wearing at the time of her death, the State does not dispute that the argument was false or misleading. Instead, the State argues that it was not important because trial counsel failed to advise the jury of the significance of foreign head hairs on Ms. Smith's dress that did not come from Mr. Wright (Answer at 29). The State's argument seems to underscore the prejudice from the false and/or misleading argument. Under Alcorta v. Texas, the State deliberately created a false impression that the defense failed to combat. Clearer error is hard to imagine, particularly when all of the false and/or misleading prosecutorial comments are considered cumulatively.[14]

[14]The State engages in a personal attack upon undersigned counsel in a footnote at the end of its argument on this claim (Answer at 31, n. 8). The State asserts that the arguments made on Mr. Wright's behalf "against the State's representatives are outrageous!" The State asks for sanctions against undersigned counsel.

CONCLUSION

For the reasons stated herein and in his Petition, Mr. Wright respectfully requests that this Court grant a new trial.[15]

I HEREBY CERTIFY that a true copy of the foregoing Petition for Habeas Corpus has been furnished by United States Mail, first

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For undersigned counsel, it is outrageous that Mr. Wright, a man that undersigned counsel is convinced is innocent, has been forced to remained on death row for over 18 years for a crime he did not commit. In this case, there is no real question that exculpatory evidence was withheld from the defense and thus not heard by the jury. Moreover, trial counsel acknowledged that he provided inferior representation. Mr. Wright did not receive an adequate adversarial testing at trial or on appeal. Yet, he remains on death row.

[15]The page limitations do not permit Mr. Wright to address all of the misrepresentations of fact and law contained in the Answer. For matters not address in this Reply, he relies upon the Petition and the record to refute the State's arguments.

class postage prepaid, to Judy Taylor Rush, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on March 22, 2002.

MARTIN J. MCCLAIN
Special Assistant CCRC-South
Florida Bar No. 0754773
9701 Shore Rd. Apt. 1-D
Brooklyn, NY 11209
(718) 748-2332

OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL FOR THE
SOUTHERN REGION
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

Counsel for Mr. Wright

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Courier 12 font.

MARTIN J. MCCLAIN