CASE NO. SC00-2366

LLOYD DUEST,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R1. ___" - Record on appeal to this Court in 1985 direct appeal;

"PC-R. ___" - Record on appeal to this Court from 1990 denial of the Motion to Vacate Judgment and Sentence;

"R2. ___" - Record on appeal to this Court from 2000 re-imposition of sentence of death;

"T2 ___" - Transcript of re-sentencing proceedings;

"TS2 ___" - Supplemental transcripts.

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

REQUEST FOR ORAL ARGUMENT

Mr. Duest, through counsel, respectfully repeats his request that the Court permit oral argument.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

REPLY TO STATE'S STATEMENT OF THE CASE

Mr. Duest continues to rely upon the Statement of the Case contained in the Initial Brief. However, a few brief points should be made regarding the Statement of the Case in the Answer Brief. First, the Answer Brief does not at any point refer to the record from the original direct appeal. Thus, it appears that the State did not consider that record in any way in preparing its Answer Brief.

Additionally, the Answer Brief misstates the record, particularly as to the testimony of Dr. Wright, the medical examiner. In order to emphasize the amount of blood that Dr. Wright estimated was present in Mr. Pope's bed, the State asserts, "Dr. Wright testified that the amount of blood found on the victim's bed equated to approximately 1/5 of Mr. Pope's blood volume" (Answer Brief at 2). Dr. Wright did make this estimation based upon his examination of crime scene photographs. However, he explained that this "was seven hundred and fifty m.l. or about the amount of a bottle of wine" (T2. 383). He agreed "that would not have been enough to kill the person" (T2. 383). Dr. Wright pointed out that Mr. Pope left the bed and traversed the bedroom to get to the bathroom. Dr. Wright could find only "one drop" of blood in the presumptive pathway. That one drop was on Mr. Pope's clothing at the foot of the bed (T2. 390). Accordingly, Dr. Wright concluded that a conscious Mr. Pope stopped the blood flow before leaving the bed (T2. 391).

> And then when he was in the bathroom he went to get the toilet paper and he took his finger off of it and it started spurting out again and then he moved around in various places, even toward the back of the tub over there. And whenever he takes his hand off, it would start spurting again.

(T2. 392).

The Answer Brief also states, “Dr. Wright testified [in 1983] that Mr. Pope died within five minutes after the attack, now his opinion is that it may have taken between 15 and 20 minutes for Mr. Pope to die" (Answer Brief at 3). The State misrepresents the record in this regard.[1] Dr. Wright testified in 1998:

> Mr. Pope looked actually quite a bit younger than his stated age of 60, whatever, and he had good coronary arteries and of the other things that you can kind of look at. So it’s that variable that makes it difficult to know. Under ordinary circumstances I would expect a person to be conscious and about for a matter of 15 or 20 minutes after they received that kind of injury.
>
> Q. 15 to 20 minutes?
>
> A. Sure, and then actually you see they will loose consciousness, then they will be alive for a little while after that and that’s probably another five or ten minutes.

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[1]At one point, the State represents "Mr. Pope was alive when the wounds were inflicted, and was conscious for a matter of minutes after being stabbed in the heart" (Answer Brief at 2). In fact, Dr. Wright agreed with the prosecutor’s statements that "Mr. Pope was alive during the infliction of these wounds until he finally passed out" and that this was "a matter of **many** minutes" (T2. 365)(emphasis added). The State’s deletion of the word "many" substantially alters the import of Dr. Wright’s testimony. Moreover, Dr. Wright opined that despite his injuries "there’s an outrageously high probability" that Mr. Pope would have survived had he called for help (T2. 393).

(T2. 388).

As to his 1983 testimony, Dr. Wright testified in 1998 that in 1983 he had indicated that Mr. Pope may have died within ten to fifteen seconds:

> Q. Is that your opinion?
>
> A. No, not now, I don't think it was then. I think I was giving whoever was asking the questions at the time of the absolute, absolute lowest possibility under any circumstances that would be loss of blood pressure immediately from the heart.
>
> Q. It would have been ten to fifteen?
>
> A. Right.
>
> Q. Then you also said, but no more than five minutes, is that correct?
>
> A. That is what I testified to back then.
>
> Q. That was January 13th, 1993, correct?
>
> A. Approximately, I don't remember the exact date, I forgot that.
>
> Q. Well, no more than five minutes, that was 1-13-93?
>
> A. Right.
>
> Q. Excuse me, '83, correct?
>
> A. Yes.
>
> Q. Today which is 10-12-98, we are talking fifteen to twenty minutes, correct?
>
> A. Yeah, maybe even more. I mean, part of that he's unconscious. I mean, we are talking about conscious behavior, I could probably go up to half an hour, in that, he would still have at least the threat pulse [sic] pulse or E.K.G. of being alive.

(T2. 405-06).

The State represents that "Dr. Wright opined that it was

difficult to determine how long a person could have survived, but said he could have lived if he called for help within the first five minutes after the attack" (Answer Brief at 3). In fact, Dr. Wright's testimony was stronger in this regard:

> Q. Okay, that had he lived that long it is your conclusion that had he picked up the phone and telephoned rescue or police that he certainly would have received treatment that would have saved his life, is that correct?
> A. Sure, if he had done that during the first five minutes. There's really just no [doubt], he would have done fine and this his - - as you go further down the line ten, fifteen minutes it raises the possibility that he could not be resuscitated but he's not going to cross over 50/50 until pretty late, that in that time period, that is a 50/50 chance of being successfully resuscitated.

(T2. 406-07).

ARGUMENT IN REPLY

ARGUMENT I

The State advances three contentions in response to Mr. Duest's Brady/Giglio claim contained in Argument I of the Initial Brief. First, the State maintains that the Eleventh Circuit decision denying Mr. Duest a new trial while granting a resentencing is law of the case depriving this Court of jurisdiction to consider Mr. Duest's challenge to the validity of his conviction in light of newly disclosed exculpatory evidence (Answer Brief at 12-13). Second, the State argues that Mr. Duest's Brady/Giglio claim was not preserved when Mr. Duest failed to object to Dr. Wright's testimony during the resentencing, but instead impeached Dr. Wright with his prior testimony (Answer Brief at 13). Third, the State argues that

Mr. Duest's Brady/Giglio claim is meritless because Mr. Duest's counsel impeached Dr. Wright during the resentencing with evidence that allegedly was undisclosed (Answer Brief at 14).

A. The Mandate Rule.

The State first argues:

> Under the "mandate rule," an inferior court has no power or authority to deviate from the mandate issued by an appellate court, as the mandate rule is a more powerful version of the "law-of-the-case doctrine", which prevents lower courts from reconsidering issues that have already been decided.

Answer Brief at 12. According to the State, the decision of the Eleventh Circuit (a higher appellate court under the State's theory) rejecting Mr. Duest's arguments in favor of a new trial binds this Court, precluding consideration of Mr. Duest's claim that he should be granted a new trial and divesting this Court of jurisdiction to hear that claim (Answer Brief at 13).

The State's premise that this Court is "an inferior court" or "lower court" in relationship to the Eleventh Circuit is wrong. For example, this Court has refused to recognize the decision in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), as binding. Combs v. State, 525 So.2d 853 (Fla. 1988); Tompkins v. Dugger, 549 So.2d 1370, 1372 n.5 (Fla. 1989). The fallacy of the State's argument can be seen in a number of capital cases in which the Eleventh Circuit denied federal habeas relief and issued a mandate, but in

which this Court later ordered evidentiary hearings on previously undisclosed evidence.[2] This Court has made it clear that when a capital defendant presents constitutional claims based upon evidence that was not available to the defendant during prior litigation in state and federal court, the resulting claim will be considered, unimpeded by any Eleventh Circuit denial of federal habeas relief and issuance of a mandate.

Just as this Court had jurisdiction to consider the subsequent Brady/Giglio claims premised upon previously undisclosed evidence in Roberts, Scott, and Lightbourne, so too this Court has jurisdiction to entertain Mr. Duest's claim that the State failed to disclose that it had presented false and misleading testimony at his 1983 trial. This is because, as the record clearly establishes, the State did not disclose the fact that false and misleading testimony had been presented in 1983 until the middle of the 1998 resentencing.

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[2] *Compare* Roberts v. Singletary, 29 F.3d 1474 (11th Cir. 1994) (denying new trial and resentencing), *with* Roberts v. State, 678 So.2d 1232 (Fla. 1996) (remanding for evidentiary hearing on previously undisclosed evidence of Brady/Giglio violation); *compare* Scott v. Dugger, 891 F.2d 800 (11th Cir. 1989) (denying new trial and resentencing) *with* Scott v. State, 657 So.2d 1129 (Fla. 1995) (remanding for evidentiary hearing on previously undisclosed evidence of Brady/Giglio violation); *compare* Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987) (denying new trial and resentencing) *with* Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989) (remanding for evidentiary hearing on previously undisclosed evidence of Brady/Giglio violation); *compare* Mills v. Singletary, 161 F.3d 1273 (11th Cir. 1998) (denying new trial and resentencing) *with* State v. Mills, 788 So.2d 249 (Fla. 2001) (affirming grant of resentencing based on newly discovered evidence).

B. Contention of Failure to Object to Testimony.

After arguing the Florida state courts are without jurisdiction to entertain Mr. Duest's Brady claim, the State makes a 180 degree turn and argues that Mr. Duest failed to object at his resentencing to Dr. Wright's testimony, but elected to impeach Dr. Wright with his 1983 testimony (Answer Brief at 13-14). The State is wrong again.

1. No election occurred.

First, the State seems to have the sequence of events confused. Dr. Wright was called by the State as the first witness at the resentencing on October 7, 1998 (T2. 335). At the conclusion of the direct examination, proceedings were recessed for a long weekend (T2. 370). When the proceedings resumed on October 12, 1998, Mr. Duest's counsel began his cross-examination (T2. 378).[3] During the cross-examination, the discrepancy between Dr. Wright's 1983 testimony and his 1998 testimony became more and more pronounced. The discrepancy was to Mr. Duest's benefit, as it mitigated the brutality of the murder. Mr. Duest's counsel clearly sought to elicit details of the surprisingly helpful testimony (T2.

[3]During the long weekend recess, the Matthew Shephard homicide occurred in Wyoming and captured national attention (T2. 377). Matthew Shephard was a gay college student found tied to a fence outside of Laramie, Wyoming. It was after the weekend recess that Dr. Wright during the cross-examination first explained why he believed that Mr. Pope did not call for help, "these kinds of people when something like this happens, not necessarily just getting robbed or injured, they don't call the police very much" (T2. 393).

381-90).

At one point, counsel asked if Dr. Wright had "thought about" the case more during the long weekend recess (T2. 390). In context, counsel was trying to understand Dr. Wright's comment that he had not previously understood the significance of the absence of blood between the bed and the bathroom (T2. 390). Dr. Wright responded that he had not looked at the files since the redirect in 1983, but indicated his changed opinion pre-dated the direct examination in 1998.

Mr. Duest's counsel continued to elicit from Dr. Wright more details concerning his opinion, which though different from his 1983 testimony was much more favorable to Mr. Duest (T2. 390-98). Then, counsel turned to Dr. Wright's statement on direct that a wound on the arm may have been "defensive" in nature. As to this statement, counsel sought to elicit the fact that Dr. Wright testified in 1983 that there were no defensive wounds (T2. 398). After acknowledging that he had so testified in 1983, Dr. Wright stated that "when I read my deposition over and had an opportunity to look at all of those photographs, I realized that I was incorrect" (T2. 399-400). Dr. Wright then volunteered why his conclusions in 1983 had been incorrect:

> And the reason for that was the fact that, again, it kind of, I was deposed about 11 months after the death of Mr. Pope in doing the autopsy and I did not unfortunately have available to me the scene photographs because for reasons either that they didn't turn out or that they had been misfiled or whatever. I didn't have the scene photographs.

(T2. 400).

Until Dr. Wright took the stand at the resentencing, neither Mr. Duest nor his counsel were aware that he would reveal that his 1983 testimony was "incorrect." Nor were they advised that Dr. Wright attributed his "incorrect" testimony to a failure to review crime scene photographs. The Answer Brief erroneously characterizes counsel's cross-examination as an election to impeach Dr. Wright instead of objecting to the Brady/Giglio violation arising from the presentation of false or misleading testimony in 1983. Counsel cross-examined Dr. Wright. Only in the course of that cross-examination did Dr. Wright reveal that his 1983 testimony had been "incorrect."

2. The constitutional error occurred in 1983.

Second, the State does not grasp that the constitutional problem revealed by Dr. Wright's 1998 testimony occurred at the 1983 trial when the State failed to disclose that Dr. Wright's testimony was "incorrect", i.e. false or misleading. The evidence of the Brady/Giglio error was revealed during the cross-examination at the resentencing in 1998. Under Rule 3.850, Mr. Duest has until a year after his judgment and sentence of death become final to raise constitutional challenges. At this point, Mr. Duest's judgment and sentence have not yet become final. Nevertheless, Mr. Duest has attempted to raise the issue anyway.

3. Mr. Duest has raised the issue.

Mr. Duest did address the newly disclosed evidence in the trial court in his sentencing memorandum filed in February of 1999:

> First, the State introduced new evidence in 1998 which directly contradicted and refuted evidence presented in 1983. This new evidence is particularly significant in reference to the CCP aggravator, which requires heightened premeditation. **The new evidence** does not support the requisite heightened premediation and **even calls into question the presence of simple premeditation**.
>
> * * *
>
> The State has asserted that the evidence of premeditated murder establishes the aggravator of CCP. In fact that was the basis of the 1983 finding; simple premeditation was accepted as establishing CCP (actually simply having a plan to rob was the basis for this finding). There is now in 1999 both a legal and factual problem with the State's assertion. First, the factual problem arises from the 1998 testimony of the medical examiner, Dr. Wright. Mr. Duest recognizes that his 1983 conviction of first degree premeditated murder was not overturned by the Eleventh Circuit's decision. However, the evidence presented by the State at the 1998 resentencing was different in a significant and material way. In 1983, Dr. Wright testified that Mr. Pope died within a minute of receiving his injuries. In 1998, Dr. Wright testified that Mr. Pope did not die rapidly; in fact, he would have survived had he called for help. Dr. Wright stated that Mr. Pope survived for as long as thirty (30) minutes after he was injured. His 1998 testimony was based upon evidence of Mr. Pope's movements after he received his injuries. Dr. Wright could tell that Mr. Pope exited his bedroom on his own power and went into the bathroom in attempt to attend to his injuries. Dr. Wright opined that had Mr. Pope called for help within the first ten (10) minutes, he certainly would have survived. The significance of this change in testimony as to the CCP aggravator is that the assailant obviously left Mr. Pope alive and physically able to move and seek help.
>
> * * *

> The new facts that came out from the medical examiner's testimony in 1998 establish that the State with these new, uncontested facts cannot establish CCP beyond a reasonable doubt. It is the State's burden to prove the aggravator beyond a reasonable doubt. "[T]o satisfy the burden of proof, the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). The fact that Mr. Pope was neither dead nor immobilized when his assailant left his house is inconsistent with an execution, contract murder or witness elimination killing. It is in fact inconsistent with any intent to kill because Mr. Pope was not dead and according to the medical examiner was left with the power to save himself by calling for help. It is much more consistent with a "rash and spontaneous killing evidenced [by] no analytical thinking, no conscious and well-developed plan to kill." Mahn, 714 So. 2d at 398. See Besaraba v. State, 656 So. 2d 441, 444-45 (Fla. 1995).

(R2. 356, 357, 358)(emphasis added).

Before this Court on May 9, 2001, Mr. Duest submitted a Motion for Relinquishment and/or Stay, in which he stated:

> At the 1998 resentencing Dr. Wright acknowledged his prior testimony, but indicated that it was in error. His testimony in 1998 was that upon reviewing his files and notes he discovered that the victim in that case had survived between fifteen and thirty minutes (RS-T. 405-06). He further opined for the first time that the victim would have survived if he had called 911. The fact that Dr. Wright testified that his original testimony in the Duest case was wrong is evidence which in and of itself warrants Rule 3.850 proceedings as to the continued validity of Mr. Duest's conviction. This evidence serious undermines the State case for premeditation. His assailant left Mr. Pope with the ability to save himself by calling 911. This fact is inconsistent with a premeditated intent to kill.

(Motion for Relinquishment at 4). Accordingly, Mr. Duest

asked:

> WHEREFORE, Lloyd Duest requests that the Court grant a relinquishment in this cause to permit Rule 3.850 proceedings regarding Mr. Duest's conviction to be entertained and for the disclosure of favorable evidence within the meaning of Brady by the State.

(Motion for Relinquishment at 12).

The State responded and objected to Mr. Duest's request. The State explained its understanding of Mr. Duest's motion:

> Appellant now asks this Court to relinquish jurisdiction of the direct appeal so that he can file a rule 3.850 post-conviction motion attacking his first-degree murder conviction. As grounds therefor, Appellant alleges that there is "newly discovered evidence" in this case warranting a 3.850 motion. Specifically, he argues that Dr. Wright, the medical examiner, acknowledged at the re-sentencing hearing that his testimony at Appellant's trial was wrong. According to Appellant, Dr. Wright testified at Appellant's trial that the victim died somewhere between fifteen seconds and five minutes after being stabbed, but at the re-sentencing hearing testified that the victim survived between fifteen to thirty minutes and would have survived if he had called 911. Appellant contends that this "newly discovered evidence" seriously undermines the State's case for premeditation, thereby entitling him to relinquishment for a 3.850 motion.

(State Response to Appellant's Motion for Relinquishment at 1-2). The State opposed the motion, saying:

> Because the alleged "newly discovered" does not apply to premeditation, Appellant is procedurally barred from raising another attack, in a successive 3.850 motion, upon the sufficiency of the premeditation evidence.

(State Response to Appellant's Motion for Relinquishment at 3).

On June 18, 2001, this Court denied Mr. Duest's motion

for relinquishment. Accordingly, Mr. Duest has raised the issue in his Initial Brief.

C. Merits of Brady/Giglio Claim.

The State argues in its brief:

> The fact that Dr. Wright changed his testimony is not a Brady violation, considering the fact that Duest was prepared to impeach him with the 1983 deposition.

(Answer Brief at 14-15). Thus, the "fact that Dr. Wright changed his testimony" is not contested. Instead, the State contends that Mr. Duest's opportunity to cross-examine Dr. Wright in 1998 somehow cured the error that occurred in 1983 when the jury that convicted Mr. Duest of first degree murder was provided false and misleading testimony.

The State's position is ludicrous. Mr. Duest argued in his Initial Brief that "it was not until the State called its first witness, Dr. Wright, that it revealed to Mr. Duest that Dr. Wright's testimony at the 1983 trial was 'incorrect'" (Initial Brief at 51). Mr. Duest specifically argued that cumulative consideration of all the undisclosed Brady material put the case "into an entirely new light. Confidence is undermined in the guilt determination" (Initial Brief at 61). Presentation of Dr. Wright's changed testimony at the resentencing could not possible cure the constitutional error occurring at the guilt determination.[4]

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[4]As discussed in Argument III of the Initial Brief, Mr. Duest was precluded at the resentencing from contesting his guilt or the guilt determination made in 1983.

As to whether the guilt determination can be questioned in light of Dr. Wright's disclosure that his prior testimony was "incorrect," the State argues, "Duest has already been convicted of the murder and that conviction is law of the case" (Answer Brief at 19). Of course, every capital defendant who has obtained a new trial from this Court because of a Brady violation "ha[d] already been convicted of the murder." The fact that this Court nonetheless grants new trials repudiates the State argument that a "conviction is law of the case" precluding consideration of whether a Brady violation warrants a new trial. See Cardona v. State, ___ So.2d ___, 27 Fla. L. Weekly S673 (Fla. July 11, 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

Finally, as to the cumulative consideration required by the United States Supreme Court's decision in Kyles v. Whitley, 514 U.S. 419 (1995), the State argues cumulative consideration of undisclosed Brady material previously found not to undermine confidence in the outcome of the guilt phase determination is "procedurally barred as it has been fully litigated and found to be irrelevant to Duest's alibi claim" (Answer Brief at 20).[5] This Court specifically rejected this

[5]The State erroneously describes the decision as a determination that the undisclosed bus ticket was

argument in Lightbourne v. State, 742 So.2d 238 (Fla. 1999).

The State argues:

> Moreover, even if this court were to consider that it took Pope fifteen to twenty minutes to die, cumulatively with the bus ticket, such evidence does not undermine the conviction because the fact that Duest traveled from Boston to Florida 49 days after the murder is remains irrelevant and has absolutely no connection to how long it took for Mr. Pope to die.

(Answer Brief at 20).

The State's argument overlooks the import of Kyles v. Whitley. In conducting cumulative consideration of the Brady material, the analysis must look to the undisclosed evidence and how trial counsel may have used the evidence to undermine the State's case.

Here, Mr. Duest maintained his innocence at trial and presented eleven witnesses in support of his claim that he was in Massachusetts during President's Day weekend, 1982. The jury was presented with a credibility battle: should it believe the State's witnesses who identified Mr. Duest as "Danny," the person they partied with in Fort Lauderdale that weekend, or should it believe the defense witnesses, who

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"irrelevant". The Eleventh Circuit rejected the claim because it concluded that nondisclosure alone did not create a "reasonable probability" of a different outcome of the guilty verdict. Duest v. Singletary, 967 F.2d 472, 479 (11th Cir. 1992). The bus ticket corroborated the testimony of Mr. Duest's parents. More importantly, it corroborated the statement Mr. Duest made at the time of his arrest. And it impeached testimony from police officers that no evidence could be found to verify Mr. Duest's statement. The bus ticket was clearly relevant.

testified Mr. Duest was in Massachusetts that same weekend.

Undeniably, the bus ticket reflecting travel from Boston to Miami in April of 1982 was not disclosed. The bus ticket could have been used to corroborate the testimony of Mr. Duest's parents that they placed him on a bus in Boston in early April of 1982. It could have corroborated Mr. Duest's statement to the police at the time of his arrest that he had just arrived in Fort Lauderdale days before. The State introduced that statement and proceeded to present testimony that law enforcement could not find any evidence to corroborate Mr. Duest's story in order to portray Mr. Duest as a liar. The bus ticket would have demonstrated that Mr. Duest had in fact been truthful when he said he had just arrived in town the week before via a Trailways bus. Certainly, the State's possession of the bus ticket impeaches the credibility of law enforcement and reliability of its investigation. Kyles, 514 U.S. at 446 ("the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation").

Even though the Eleventh Circuit concluded that the bus ticket alone did not establish a reasonable probability of a different outcome, the undisclosed evidence that Dr. Wright's testimony was false and misleading when considered along with the bus ticket does cause the tipping point to be reached now. Confidence must be undermined in the outcome.

Dr. Wright, the State's medical examiner and undeniably a State agent, explained that his "incorrect" testimony was due to his failure to have access to the crime scene photographs. This constituted evidence of an unreliable investigation by law enforcement. Combined with the State's claim that no corroboration existed of Mr. Duest's claim to have arrived in Fort Lauderdale on a bus in April, it clearly establishes "that the police had been guilty of negligence." Kyles, 514 U.S. at 447. It undercuts the reliability of the entire police investigation.

Moreover, Dr. Wright's 1998 testimony changed the dynamics of the homicide. Dr. Wright acknowledged that Mr. Pope had the means to save himself. The question arose as to why he failed to get help. Certainly, defense counsel armed with this testimony during the guilt phase proceeding could have advanced the argument that a perfectly plausible explanation was that Mr. Pope was stabbed in the course of a domestic confrontation. Mr. Pope was living with David Shifflett who was "approximately forty years younger than Mr. Pope" (T2. 577), and who "used drugs and was not required to pay rent" (T2. 578). Yet, Mr. Pope was at a bar leaving with another man, who was also much younger than himself. Mr. Shifflett claimed to have arrived home at 6:15 p.m. and notice that the front door was open and that Mr. Pope's car was gone (T2. 413, 429). However, he failed to discover anything awry until another friend arrived at 8:00 p.m. (T2. 419). With a

witness then present, Mr. Shifflet suddenly noticed that a light was on in Mr. Pope's bathroom and his bed was covered with blood (T2. 419). At that point, he called the police. When the police arrived, they noticed that the clothes dryer was running and clothes were inside it (R1. 474). Mr. Shifflet was also able to report that a jewelry box was missing (R1. 422).

Dr. Wright's description of Mr. Pope's behavior would have been consistent with an argument that Mr. Pope was stabbed in the course of fight produced by jealousy or other emotion. See Carpenter v. State, 785 So.2d 1182 (Fla. 2001). Of course, an innocent Mr. Duest was not in a position to know who actually killed Mr. Pope. His counsel was forced to examine the available evidence and draw inferences as to who could have possibly stabbed Mr. Pope. The available evidence in 1998 permitted dramatically different inferences than the "incorrect" evidence presented by the State in 1983.

Dr. Wright's description of Mr. Pope's reluctance to save himself also means that the assailant knew he left Mr. Pope injured, but alive and conscious. It provides insight into the assailant's mind, as well as Mr. Pope's. In so doing, it changes the profile of the assailant. An assailant who knowingly left Mr. Pope alive and conscious is different than the assailant described by Dr. Wright's "incorrect" testimony in 1983 who finished off Mr. Pope before leaving.

ARGUMENT II

In Argument II of the Initial Brief, Mr. Duest contended that the trial court erred when it refused to order the State to provide the criminal records of the State's witnesses. As to this Argument, the State initially notes that the issue is reviewed under an abuse of discretion standard. Second, the State responds that the State has no obligation to provide criminal records unless and until the accused proves that he has exercised diligence in attempting to obtain the criminal records from another source. Third, the State maintains that Mr. Duest did not preserve this issue for appellate review. Finally, the State asserts that the 4th DCA has recently held that the State cannot be required to turn over the criminal records of witnesses if the criminal record was generated by a non-state agency that provides the State with the information pursuant to a confidentiality agreement.

A. Standard of Review.

Mr. Duest disagrees with the State's contention that the circuit court's denial of Mr. Duest's motion for the production of the criminal histories of the State's witnesses is subject to the abuse of discretion standard of review. The motion was premised upon Mr. Duest's federal constitutional "right to a fair trial" (R2. 104). It sought to have the prosecutor obtain such records and provide them to the defense. The circuit court denied the motion indicating that disclosure would be ordered only if Mr. Duest had some specific reason to believe that a particular witness had a

criminal record (T2. 123). The circuit court placed upon Mr. Duest an initial burden of proof. Mr. Duest challenges that legal determination. Legal determinations are reviewable *de novo*. Stephens v. State, 748 So.2d 1028, 1034 (Fla. 1999)(appellate courts have an "obligation to independently review questions of fact and law of constitutional magnitude"). Accordingly, this Court must review *de novo* the trial judge's legal determination that a capital defendant is not entitled to obtain criminal histories from the State unless he already has some evidence that the witness has a criminal history.

B. Diligence.

The State argues, "[t]his claim is meritless as the State is not required to provide such records unless Duest has shown that he exercised due diligence to obtain the records from another source, yet was unsuccessful" (Answer Brief at 21). The State relies upon Medina v. State, 466 So.2d 1046 (Fla. 1985), for the proposition that "Duest bears the initial burden of trying to discover such evidence and the State is not required to prepare the defense's case" (Answer Brief at 21). However, this Court in Medina actually said:

> The court granted the motion to the extent of information contained in the state's files, but properly held that the defense has the initial burden of trying to discover such evidence and that the state is not required to prepare the defense's case.

Medina, 466 So.2d at 1049. Here, the trial court did not

order the State to disclose any criminal records in its file.

Moreover, since the decision in Medina, the United States Supreme Court has made it clear that the prosecutor's obligation to disclose evidence impeaching State witnesses is not dependent upon defense counsel's diligence in attempting to unearth the impeachment from another source. In Strickler v. Greene, 527 U.S. 263, 287-288 (1999), the Supreme Court specifically delineated the "three components of a true Brady violation." They are: 1)"The evidence at issue must be favorable to the accused;" 2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and 3) "prejudice must have ensued." The State's duty to disclose exculpatory evidence is applicable even though there has been no request by the defendant. Strickler, 527 U.S. at 280. The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Id. at 281. "It is irrelevant whether the prosecutor or police is responsible for the nondisclosure; it is enough that the State itself fails to disclose." Garcia v. State, 622 So.2d 1325, 1330 (Fla. 1993). "The State is charged with constructive knowledge and possession of evidence withheld by other state agents, including law enforcement officers." Jones v. State, 709 So.2d 512, 520 (Fla. 1998).

Here, the prosecutor maintained that "the State of Florida is not Big Brother" (TS2. 121). He suggested that defense counsel could ask the State witnesses if they had

criminal records. Judge Lebow denied Mr. Duest's motion saying, "if you had some reason to believe that a certain witness had a criminal, you know, has committed some criminal offense and that there's a record, I will order the State to give it to you" (TS2. 123). Accordingly, the motion was "[d]enied without prejudice" (TS2. 124). The prosecutor's assertion and Judge Lebow's ruling that Mr. Duest must first learn a witness's criminal history from another source before he can obtain it from the State were simply wrong under Strickler. State v. Gunsby, 670 So.2d 920, 923 (Fla. 1996)("no question exists that Brady violations occurred when the State failed to disclose the criminal records of two key witnesses").

Moreover, defense counsel faced certain obstacles in ascertaining whether the State's witnesses had criminal records. As the prosecutor acknowledged, four of his witnesses were deceased. Accordingly, the State was presenting their 1983 testimony, which would be read to the 1998 penalty phase jury (TS2. 122). Judge Lebow responded that the time to inquire of those four witness about their criminal records was when they testified in 1983 (TS2. 123). She announced that any criminal record of the deceased witnesses after their 1983 testimony, "that doesn't come in" (TS2. 122). Thus, the State was relieved of any obligation to "learn of [ ] favorable evidence" that was in the form of a criminal history of its witnesses, and turn it over.

Strickler. This was error.

C. Preservation.

The State argues that this issue "was not preserved for appellate review as the trial court denied the motion without prejudice" (Answer Brief at 21). However, the State's argument ignores the fact that the judge relieved the State of its obligation to learn of evidence potentially impeaching its witnesses and to disclose it, until such time as defense counsel learned of the potential impeachment through another source. Though the judge stated, "[d]enied without prejudice" (TS2. 124), she in fact imposed upon defense counsel the burden to learn of the evidence from another source before she would grant the defense's motion to compel the State to ascertain the criminal records of its witnesses and disclose those records to the defense. The judge's ruling violated due process. Strickler; Gunsby.

D. State v. Wright.

The State suggests that the decision in State v. Wright, 803 So.2d 793 (Fla. 4th DCA 2001), supports Judge Lebow's ruling. However, the issue in Wright arose after the trial judge had granted a defense motion to compel disclosure of criminal records of the 100 witnesses listed by the State. As the 4th DCA explained:

> We further note that the trial court granted the defendants' motion to compel disclosure of criminal records of all 100 listed witnesses, notwithstanding

> the state's notification that it only intended to call 30 of those witnesses.

State v. Wright, 803 So.2d at 794.

In the course of quashing the order requiring the State to obtain and disclose the criminal histories of all 100 of the state's civilian witnesses, the 4th DCA indicated that "the defendants/respondents offered no authority to refute the state's claim that it is prohibited from disseminating the NCIC information." Wright, 803 So.2d at 795. However, Mr. Duest does offer such authority: the Supreme Court decision in Strickler and this Court's decision in Gunsby. The constitutional obligation imposed upon a prosecuting attorney trumps statutory and contractual provisions.

ARGUMENT III

All of the State's arguments regarding this issue flow from a fundamental misunderstanding of Mr. Duest's argument. Mr. Duest argued at resentencing and in this appeal that he should have been allowed to present evidence challenging the robbery aggravator. At his original trial, Mr. Duest was convicted only of premeditated first-degree murder. He was not charged with or convicted of robbery. At the resentencing, therefore, the State was required to prove the robbery beyond a reasonable doubt. The State sought to meet this burden by presenting witnesses who identified Mr. Duest as the person who was with the victim before his death and who had the victim's property after his death. Mr. Duest had a

state and federal constitutional right to challenge the accuracy of these witnesses' identification of him and to present evidence showing he was not involved in a robbery.

However, according to the State, Mr. Duest "was improperly attempting to prove that if he was not in Fort Lauderdale at the time of the robbery, then he was also not guilty of the murder" (Answer Brief at 24-25). Based upon this flawed premise, the State then argues that Mr. Duest was not entitled to present evidence challenging the robbery aggravator because such evidence amounted to "improper lingering doubt evidence" (Answer Brief at 25).

The State's misunderstanding of the issue first leads it to posit an improper standard of review for the claim. According to the State, this issue should be reviewed for an abuse of discretion because "there is no constitutional right to present 'lingering doubt' evidence" (Answer Brief at 25). To the contrary, Mr. Duest's claim is based upon his state and federal constitutional rights to confrontation and to present a defense (See Initial Brief at 68-72). Under Florida law, an appellate court must independently review mixed questions of law and fact of constitutional magnitude, giving deference only to the trial court's factfindings. Connor v. State, 803 So. 2d 598, 607-08 (Fla. 2001); Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999). Since the question of whether Mr. Duest was denied his rights to confrontation and to present a defense is a constitutional issue, this *de novo* standard of

review applies. As the Answer Brief demonstrates, there are no factual disputes regarding this issue. Thus, this Court must review the constitutional question of law *de novo*.

The State's misunderstanding of the issue next leads it to rely upon Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992), to argue that Mr. Duest "was not precluded from arguing that a robbery did not occur, he was only precluded from presenting evidence to show that he did not commit the murder" (Answer Brief at 26). The State's reliance upon Waterhouse is misplaced.

Waterhouse in fact demonstrates that Mr. Duest was denied his rights to confrontation and to present a defense. At trial, Mr. Waterhouse was convicted of felony murder, with sexual battery as the underlying felony. Waterhouse v. State, 429 So. 2d 301, 307 (Fla. 1983). On appeal from the resentencing, this Court stated Mr. Waterhouse was arguing that "the trial court directed a verdict against him on the issue of the sexual battery by refusing to allow evidence on the issue of guilt of the murder." Waterhouse, 596 So. 2d at 1015 (emphasis added). The Court rejected this argument because "Waterhouse was not precluded from challenging the State's evidence that a sexual battery occurred or from presenting evidence that a sexual battery did not occur." Id.

Therefore, unlike Mr. Duest, Mr. Waterhouse had been convicted of felony murder which included the felony upon

which the State sought to base an aggravating factor at resentencing. Mr. Duest was convicted of premeditated murder, not felony murder, and was not convicted of robbery. Further, even though Mr. Waterhouse could not challenge his felony murder conviction at resentencing, this Court stated that it *was* permissible for Mr. Waterhouse to challenge the sexual battery. Under the reasoning of Waterhouse, the resentencing court erred in precluding Mr. Duest from challenging the robbery aggravator.

The State's conceptual difficulty with Mr. Duest's claim probably arises from the fact that the evidence Mr. Duest sought to present to challenge the robbery aggravator was also evidence that Mr. Duest was not in Fort Lauderdale at the time of the murder. If the proffered evidence were of a different kind--for example, evidence that nothing was taken from the victim--which did not also implicate the murder, the evidence would obviously be admissible. Waterhouse. However, the fact that the evidence could be seen as also implicating the murder conviction does not affect the analysis of the constitutional issue that Mr. Duest had a right to confront the evidence of robbery and to present a defense to the robbery.

Mr. Duest was not attempting to present evidence of lingering doubt, but was simply attempting to challenge the State's evidence that he committed a robbery. To prove the robbery, the State presented witnesses who identified Mr. Duest as the person who was with the victim before his death

and who had the victim's property after his death. Mr. Duest had a constitutional right to contest these witnesses' identification of him through whatever questions he could raise about the accuracy of their identifications and whatever evidence he could present that he was not involved in a robbery.

ARGUMENT V

Mr. Duest argued in his Initial Brief that the resentencing court erred in failing to instruct the jury regarding statutory mitigating factors upon which some evidence had been presented and in giving the jury an instruction on the cold, calculated and premeditated aggravating factor for which no evidence existed.

As to the court's failure to instruct on statutory mitigating factors, the State argues, "Only where a defendant has presented evidence regarding a statutory mitigator, such as extreme mental or emotional disturbance, should the trial judge read the applicable instructions to the jury" (Answer Brief at 30, citing Geralds v. State, 674 So. 2d 96, 101 (Fla. 1996); Bryant v. State, 601 So. 2d 529, 533 (Fla. 1992)). This general proposition of law is correct, but the State then proceeds to argue essentially that since the statutory mitigators were not proved, the resentencing court did not err in failing to instruct on them (Answer Brief at 30-34). This argument is incorrect as a matter of law.

A criminal defendant is "entitled to have the jury

instructed on the rules of law applicable to his theory of defense *if there is any evidence* to support such instructions." Hooper v. State, 476 So. 2d 1253, 1256 (Fla. 1985) (emphasis added). In the context of instructions on statutory mitigating factors, "where a defendant has produced *any evidence* to support giving instructions on such mitigating factors, the trial judge should read the applicable instructions to the jury." Bryant v. State, 601 So. 2d 529, 533 (Fla. 1992) (footnote omitted) (emphasis added). An instruction "is required on all mitigating circumstances 'for which evidence has been presented' and a request is made." Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990), quoting Fla.Std.Jury Instr. (Crim.) at 80.

The requirement to provide instructions on statutory mitigating factors does not depend upon whether the factors are proved, as the State's argument suggests, but upon whether *any evidence* supports giving the instruction. Thus, in Stewart, this Court held that the trial court should have instructed on the statutory factor of substantially impaired capacity based upon evidence of the defendant's alcohol and drug history, even though the mental health expert testified that the defendant was not "substantially" impaired. 558 So. 2d at 420 ("Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment"). In Bryant, this Court held that the trial court should have instructed on the

statutory factor of extreme mental or emotional disturbance based upon evidence of the defendant's longstanding emotional problems. In Smith v. State, 492 So. 2d 1063, 1067 (Fla. 1986), the Court held that the trial court erred in failing to instruct on the substantially impaired capacity and extreme emotional disturbance statutory mitigators because "[t]here was . . . some evidence, however slight, that Smith had smoked marijuana on the night of the murder."

In Mr. Duest's case, the judge's sentencing order makes clear that there was "some" evidence supporting the statutory mitigating factors. The judge discussed this evidence in the sentencing order, but ultimately concluded that the factors were not proved (R2. 396-97). The fact that there was evidence for the judge to discuss in the sentencing order establishes that there was "some" or "any" evidence requiring the requested instructions on the statutory mitigating factors.

As to Mr. Duest's argument that the lower court erred in instructing the jury on "cold, calculated and premeditated," the State argues that "competent, credible evidence" supported giving this instruction (Answer Brief at 34-35). This evidence, according to the State, consisted of "facts show[ing] that Duest deliberately and repeatedly stabbed Mr. Pope while he lay helpless in his bed without any justification. Specifically, Dr. Wright testified that Mr. Pope was alive while the multiple stab wounds were inflicted

and he was lying in his bed" (Answer Brief at 35). The only "facts" in this summary are Dr. Wright's testimony that Mr. Pope was alive when he was stabbed, that Mr. Pope was stabbed multiple times, and that Mr. Pope was lying in his bed. None of these facts comes close to supporting an instruction on "cold, calculated and premeditated," as it has been defined by this Court. See Jackson v. State, 648 So. 2d 85 (Fla. 1994). Further, the State omits mention of the facts showing that Mr. Pope was *alive and conscious* when his assailant left. The fact that the assailant left Mr. Pope alive and conscious forecloses even an inference of any intent to kill, much less the heightened premeditation required to estabish this aggravator.

The judge's sentencing order further establishes that there was no record support for instructing the jury on cold, calculated and premeditated. The sentencing order discusses *no* facts which might even arguably support this aggravator, but simply finds it not established (R2. 396).

The State argues that Omelus v. State, 584 So. 2d 563 (Fla. 1991), does not support Mr. Duest's claim that the trial court erred in instructing on cold, calculated and premeditated because Omelus is factually distinguishable (Answer Brief at 35-36). However, the principle of Omelus does support Mr. Duest's claim. That principle is that a jury should not be instructed upon an aggravating factor for which there is no record support, as is the situation in Mr. Duest's

case.

ARGUMENT VI

Mr. Duest argued that his rights under the Eighth Amendment were violated when the trial court refused to allow his mental health expert to testify as to her findings regarding mitigating factors. The State erroneously argues that this issue should be reviewed for an abuse of discretion (Answer Brief at 36). Because this issue presents a constitutional question, it should be reviewed *de novo*. Connor v. State, 803 So. 2d 598, 607-08 (Fla. 2001); Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999).

ARGUMENT VIII

Mr. Duest argued that the trial court failed to conduct an independent weighing of aggravating and mitigating circumstances when the court gave great weight to the jury's death recommendation. The State argues, "This claim is wholly without merit, as Duest fails to cite to any precedent to support his argument" (Answer Brief at 42). Mr. Duest continues to rely upon the argument and citations presented in his Initial Brief.

However, the State's citations point up an inconsistency in this Court's caselaw and merit some discussion. The State cites several cases which indicate that a death recommendation is entitled to great weight (Answer Brief at 42, citing Grossman v. State, 525 So. 2d 833, 846 (Fla. 1988); King v. State, 623 So. 2d 486, 489 (Fla. 1993); Pangburn v. State, 661

So. 2d 1182, 1188 (Fla. 1995)). Grossman does say that a death recommendation is entitled to great weight. King says, "even though a jury determination is entitled to great weight, 'the judge is required to make an independent determination, based on the aggravating and mitigating factors." King, 623 So. 2d at 489, quoting Grossman, 525 So. 2d at 840. Pangburn makes the generic statement quoted in the Answer Brief. The State also quotes White v. State, 616 So. 2d 21, 25 (Fla. 1993), as stating that it is illogical for "great weight" to mean one thing regarding a life recommendation and another thing regarding a death recommendation. That statement is from the trial court's sentencing order and was not made by this Court.

Grossman, King and Pangburn show an inconsistency in the Court's caselaw because the Court has also said that trial judges should apply different analyses to life recommendations and death recommendations (Initial Brief at 92-93, 94). This Court has reversed a death sentence when the trial court gave "undue weight" to a jury's death recommendation. Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980). This Court has explained that under Florida's capital sentencing statute, the trial judge "determines the sentence to be imposed guided by, but not bound by, the findings of the jury." State v.Dixon, 283 So. 2d 1, 8 (Fla. 1973).

The problem with these various statements regarding how the jury recommendation factors into the judge's sentencing

decision is that when the judge is guided by or gives great weight to a jury's death recommendation, the judge is not making an independent decision, as is required by the statute. No matter how much weight a judge gives to a death recommendation, giving a death recommendation any weight removes the judge's independent decision-making, which is contrary to the statute and which is what occurred in Mr. Duest's case.

ARGUMENT XI

Mr. Duest argued under Apprendi v. New Jersey, 530 U.S. 466 (2000), that his death sentence violates the Sixth Amendment because the elements of capital murder were not determined by the jury. Since Mr. Duest's Initial Brief was filed, the United States Supreme Court decided Ring v. Arizona, 122 S. Ct. 2428 (2002), holding that Apprendi applies to capital sentencing and overruling Walton v. Arizona, 497 U.S. 639 (1990). Ring fully supports Mr. Duest's argument. Since this Court is presently considering the impact of Ring, Mr. Duest will not more fully explicate its impact here.

Mr. Duest does take issue with a number of the State's arguments. The State argues that Apprendi does not apply to capital sentencing (Answer Brief at 54-55), but Ring has held otherwise. The State argues that a conviction of first-degree murder in Florida renders the defendant eligible for a death sentence (Answer Brief at 55-57). This argument ignores the difference between "form" and "effect" explained in Apprendi,

530 U.S. at 482-83, and Ring, 122 S. Ct. 2440-41. The dispositive point is that a Florida defendant convicted of first-degree murder is not eligible for a death sentence until additional findings are made. If sentence were to be imposed immediately upon conviction of first-degree murder, the only sentence which could even be *considered* is life imprisonment.

The State incorrectly argues that Mr. Duest was sentenced under the 1999 version of the capital sentencing statute (Answer Brief at 57-58). Mr. Duest was required to be and was sentenced under the statute in effect at the time of the crime.

The State argues that Florida's capital sentencing statute determines death eligibility at the guilt/innocence phase (Answer Brief at 58-59). The State never explains what fact is found at the guilt/innocence phase which renders a defendant eligible for death, but simply asserts the bare argument that this is so. Again, based simply upon a conviction for first-degree murder, the only sentence which can be *considered* is life imprisonment.

The State argues that Apprendi does not help Mr. Duest because one of the aggravating factors upon which the trial judge relied was a prior felony conviction and "is outside any possible reach of the Apprendi decision" (Answer Brief at 60). The State does not cite to, but is apparently relying upon Almendarez-Torres v. United States, 523 U.S. 224 (1998). However, Almendarez-Torres does not survive Apprendi and Ring.

See Apprendi, 530 U.S. at 489 & n.15; Id., 530 U.S. at 520-21 (Thomas, J., concurring). Further, Apprendi specifically restricted Almendarez-Torres to its "unique facts."

CONCLUSION

For the reasons stated in this brief and in his Initial Brief, Mr. Duest respectfully urges the Court to vacate his conviction and order a new trial as to Argument I. As to the remaining arguments, he asks that his death sentence be vacated and his case remanded for a new sentencing proceeding.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief has been furnished by United States Mail, first-class postage prepaid, to Melanie Ann Dale and Celia A.

Terenzio, Assistant Attorneys General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401, on September __, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Reply Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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