IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-454

DERRICK TYRONE SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page numbers following the abbreviations:

"R1.___."	-Record on direct appeal following the 1983 trial;
"R2__."	-Record on direct appeal following the 1990 retrial;
"PC-R__."	-Current record on appeal from 2002 post-conviction hearing;
"D-Ex.__."	-Defense exhibits entered at the 2002 evidentiary hearing and made a part of the post-conviction record on appeal. Given the length of a number of the exhibits, reference will often include citation to the bate stamped page number in the form of "bsp __". The bate stamped page numbers were placed upon documents received from the State Attorney's Office pursuant to public records requests. Within the exhibits, the bate stamped pages do not necessarily appear in order.
"S-Ex.__."	-State exhibits entered at the 2002 evidentiary hearing and made part of the post-conviction record on appeal.

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

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INTRODUCTION

In its Answer Brief, the State employs several strategies to deflect attention away from the serious prosecutorial misconduct that occurred in its prosecution of Mr. Smith. First, to counter the revelation that significant Brady material was withheld from the defense regarding Derrick Johnson, Melvin Jones and David McGruder, the State suddenly seeks to focus attention on Priscilla Walker and her testimony that Mr. Smith told her he "shot a cracker in the back."[1] (Answer Brief at 2, 32, 33, 57). The State's reliance on Walker completely ignores the facts that significant Brady material was withheld as to Walker, that Mr. Smith was precluded from eliciting the full scope of the withheld impeachment at the evidentiary hearing, and that the State

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[1]The State chooses to ignore a problematic aspect of Priscilla Walker's testimony. Walker testified that Mr. Smith told her that "he dropped the gun where the scene took place at" (R2. 1021). When this Court affirmed Mr. Smith's conviction, it denied Mr. Smith's challenge to the introduction of evidence concerning a robbery alleged to have been committed by Mr. Smith "twelve hours after the homicide" because "he possessed the same gun in both offenses." Smith v. State, 641 So. 2d 1319 (Fla. 1994). Obviously, this Court did not put much credence in Walker's story that Mr. Smith no longer possessed the gun when the robbery occurred.

Interestingly, the undisclosed "Investigative Report" dated August 5, 1986, reveals that Walker had originally stated that before the subsequent robbery, "Smith told her he had thrown the gun away (did not say where) and made the comment that the rain would wash the fingerprints off of it" (D-Ex. 4, bsp 3343).

failed to correct Walker's false and/or misleading testimony in her deposition and at trial in violation of due process.

Second, the State attempts to dilute the significance of the prosecutor's note that he had learned from Derrick Johnson that Melvin Jones had "showed D.J. [a] map and said he would help D.J. at trial" (D-Ex. 8), by including in its references to this note the phrase "NEVER together" (Answer Brief at 5, 11, 33).[2] This phrase actually appears before the note's discussion of the July 11th meeting--almost as a caption. The text of the note belies any claim that Melvin Jones and Derrick Johnson were "NEVER together," indicating as it does a place and time that the two were together. The State's persistent insertion of this phrase, which the record establishes was not factually correct, can only be for the purpose of creating ambiguity where there is none.

Finally, the State relies upon Derrick Johnson's testimony at the evidentiary hearing as by itself defeating Mr. Smith's claim that the withheld impeachment or the uncorrected false testimony prejudiced the defense. The State seems to believe that Johnson's efforts to explain it away has to be accepted as true. However, it is Johnson's credibility

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[2]The words actually written are "NEVER to GATHER - " (D-Ex 8). The State assumes that the author meant "NEVER together".

before Mr. Smith's jury that is at stake, along with the credibility of Melvin Jones and David McGruder. Johnson's efforts to vouch for his own credibility is of no consequences as to the real issue: did Mr. Smith receive a constitutionally adequate advocate at his trial?

REPLY TO APPELLEE'S STATEMENT OF THE CASE AND FACTS

A. Priscilla Walker

In its Statement of the Case and Facts, the State makes it first mention Priscilla Walker, saying:

> In addition, as the trial court's sentencing order noted, not only did Melvin Jones witness the shooting, but "[a] little later that morning, the Defendant [Smith] stated to Priscilla Walker that he "shot a cracker in the back." (R2. V2/231).

Answer Brief at 2 (footnote omitted). Left out of the State's brief is the full "Priscilla Walker" story.[3]

Ms. Walker and her boyfriend, James Marshall, were called as witnesses by the State at Mr. Smith's second trial. She did claim that Mr. Smith had told her that he had shot someone

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[3]In her testimony, Walker said that Derrick Smith arrived at her residence at 314 Royal Street South "[b]etween twelve and one" (R2. 1020). In an undisclosed "Investigative Report," it is reported that Walker told the state attorney investigator that "Smith stayed at their house for several hours and believes he left around five in the morning" (D-Ex. 4, bsp 3343).

According to the evidence, Jeffrey Songer was shot at approximately 12:43 AM at 31st Street and Fairfield Ave. South (R2. 751). According to an undisclosed "Synopsis", Nellie Mae Dixon testified before the assistant state attorney that Derrick Smith was at her residence (1635 Court Ave. South) at 1:20 AM asking to see her daughter Angela (D-Ex. 10, bsp 390).

(R2. 1020).[4] In a brief cross-examination, she was accused of disliking Mr. Smith (R2. 1023). During the re-direct, the State responded to an objection to one of its questions, saying:

> [PROSECUTOR]: Judge, I think it's proper redirect, in that he was getting into the question of whether or not she was lying because she doesn't like him.

(R2. 1024).

In Claim I of his Rule 3.850 motion, Mr. Smith asserted:

> Walker and Matthews did not testify in the first trial, they were never called. The reason they were not called at the first trial, according to these witnesses and the State, is because they did not provide this information at the time the shooting was being investigated. Walker and Matthews claim that, although the police searched their house for

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[4]The State's brief does not make mention of James Matthews, whose testimony was a bit vague:

> Q. Did he tell you who it was he might have shot?
>
> A. Not immediately.
>
> Q. Well, what did he say then?
>
> A. That he might have shot someone.
>
> Q. You said "not immediately." Did you keep talking about this was Derrick Smith?
>
> A. I don't remember the whole conversation.
>
> Q. Pardon? I'm having a hard time hearing you.
>
> A. I don't remember the whole conversation.

(R2. 1030).

> Mr. Smith at the time, they were never asked any questions that would elicit this information.

(PC-R. 1597). Mr. Smith then alleged:

> Walker and Matthews did not testify truthfully. Under oath, Walker stated that the police came to her house only once around the time of the shooting, and they never asked her about the shooting. Mr. Smith can establish that this testimony was false. Mr. Smith can also establish that Walker and Matthews were questioned at that time about any knowledge they may have had.

(PC-R. 1597-98). Mr. Smith further alleged:

> Mr. Smith can also establish that Walker lied about these facts in her deposition (while under oath) and that the State knew she had lied but failed to correct her. Even if defense counsel was ineffective for failing to expose these lies, the State still had an independent duty to correct the false testimony.

(PC-R. 1598).

The circuit court specifically denied an evidentiary hearing on this aspect of Claim I of the Rule 3.850 motion:

> Defendant claimed that trial counsel failed to impeach Priscilla Walker and James Matthews during trial to show that they lied in their deposition testimony about whether the police talked to them about the shooting during the initial investigation. In his motion, Defendant argued that other unnamed witnesses could testify that Ms. Walker and Mr. Matthews were questioned during the initial investigation about any knowledge they may have possessed. Defendant also claimed that the State permitted Ms. Walker to testify falsely during her deposition that the police came to her house only once at the time of the shooting and the police never asked her about the shooting.
>
> In its Response, the State argued that Defendant is

> not entitled to relief. Upon review, this Court agrees based upon reasons similar to those expressed in A.1) above. Here, Defendant claimed he has "other" unidentified witnesses whose testimonies would have contradicted the testimonies of Ms. Walker and Mr. Matthews. *See Defendant's Motion, p. 31.* Neither in his postconviction motion nor at the Huff hearing did Defendant identify the witnesses or elaborate on the witness' testimony. Based on Asay, this claim is denied. See Asay v. State, 769 So. 2d 974 (Fla. 2000).
>
> This Court further notes that, assuming arguendo that trial counsel had a basis for impeaching Ms. Walker and Mr. Matthews, Defendant failed to show that he was prejudiced. Given the weight of the evidence presented at trial, this Court finds that had trial counsel impeached Ms. Walker and Mr. Matthews with evidence showing that the police questioned them, the jury's verdict would not have differed.

(PC-R. 2989).

After the circuit court ruled that it would not hear evidence on this aspect of Claim I, Mr. Smith repeatedly asked the circuit court to reconsider. First on January 18, 2002, he filed a motion for rehearing and/or reconsideration (PC-R. 3254). In this motion, he cited Gaskin v. State, 737 So. 2d 509 (Fla. 1999), as holding that a Rule 3.850 movant was not required to provide the names of witnesses supporting the motion within the motion (PC-R. 3255). Mr. Smith specifically asked the court to reconsider its ruling as to Walker and

Matthews (PC-R. 3262).[5]

On February 12, 2002, the circuit court entered an order denying reconsideration of its position regarding Walker and Matthews (PC-R. 3296). The circuit explained that it continued to rely upon Asay, but that it additionally found a failure "to prove the prejudice prong" (PC-R. 3298).[6]

Thereafter on March 13, 2002, Mr. Smith filed a supplemental amended motion to vacate (PC-R. 3309). In this document, Mr. Smith provided a specific list of names of witnesses that he intended to call regarding Walker and Matthews (PC-R. 3337). Reference was also made to investigative reports by a state attorney investigator named Scott Hopkins (PC-R. 3338). Mr. Smith also again alleged that Walker had testified falsely and that the State failed to correct it (PC-R. 3351).

On May 2, 2002, the circuit entered an order addressing

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[5]Mr. Smith pointed out that he sought not just to present live witnesses to support his claim, but that he also had documentary evidence showing "that Walker and Matthews lied regarding how many times they were initially contacted by the police, as well as the extent of the police questioning when they were contacted" (PC-R. 3263).

[6]The circuit court's decision to grant an evidentiary hearing on other aspects of Mr. Smith's claim that the State withheld Brady material and that he received ineffective assistance of counsel demonstrates that when the circuit court found a failure "to prove the prejudice prong", the circuit court did not engage in a cumulative analysis.

Mr. Smith's supplemental motion (PC-R. 3431). In this order, the circuit court found that the portions of the supplemental motion addressing Walker and Matthews were not authorized and would not be considered (PC-R. 3435).[7]

At the evidentiary hearing, Mr. Smith introduced a number of exhibits without objection that contained material from the State Attorney's files that had not been provided to Mr. Smith's trial attorney. Defense Exhibit No. 3 (D-Ex. 3) was one such exhibit and Defense Exhibit No. 4 (D-Ex. 4) was another such exhibit, both introduced without objection.[8]

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[7]In the Answer Brief, the State asserts, "On May 10, 2002, the trial court granted, in part, the defendant's supplements and, therefore, expanded the scope of the evidentiary hearing." Answer Brief at 53. Apparently, the State in preparing its brief failed to read the order and see that the limitations previously placed upon the scope of the hearing were in fact retained.

[8]D-Ex. 3 contained a number of undisclosed police reports concerning the investigation into the Songer homicide. One police report included therein was dated March 23, 1983. In this handwritten report, it was revealed that Officer Kewin learned on March 23rd that Derrick Smith "might be staying at 314 Royal S/S. The res of James Matthews and Priscilla Walker." D-Ex. 3, bsp 4717. The report subsequently stated, "Writer along with Sgt. Sanders went to 314 Royal S/S + found that a Det. had already been to the house **and they gave no info**." D-Ex. 3, bsp 4717.

D-Ex. 4 contained a number of undisclosed documents. Some were "Synopses" of sworn statements given pursuant to a state attorney subpoena; some were "Investigative Reports" summarizing statements given to Scott Hopkins, a state attorney investigator. All of the documents included in Defense Exhibit No. 4 concerned Priscilla Walker and James Matthews, and interviews conducted in the summer of 1988. The

Investigative Report dated August 5, 1988, detailed an interview of Ardessa Davis who said, "Priscilla Walker had told her previously that Smith had come to her house the night of the murder, however, Priscilla would not tell anybody what Smith said, if anything." (D-Ex. 4, bsp 3341). The report then indicated that Priscilla Walker was interviewed and detailed a statement that she provided. The report noted, "Writer asked Priscilla why they did not tell the police that Smith had told them that he just shot the cab driver and Priscilla responded by stating the police didn't ask. Priscilla stated all the police wanted to know was where he was" (D-Ex 4, bsp 3343). In this report, there was no indication that Walker said that Smith used the word "cracker."

Also in D-Ex 4 is a "Synopsis" of Walker's undisclosed sworn statement of August 10, 1988, in which she stated that "The only person that she has told the statements to is Sheila, and all she told Sheila was that Rerun told her he'd shot the man. – Also told her mother" (D-Ex. 4, bsp 3344). The "Synopsis" observed:

> She has never made any statements to the police about Smith. She indicated the police did come by her residence either before or after the shooting, she is not sure exactly when, but it could have been a week either way, and asked to see Smith, and she advised them that he was not there. They did not ask her any questions about statements he may have made or any knowledge of the murder.

(D-Ex. 4, bsp 3344).

An "Investigative Report" dated August 10, 1988, concerned an interview of James Matthews. It provided:

> Matthews stated the following day, which would been a full 24 to 36 hours after the murder, the police came by his house looking for Smith. Matthews stated they asked if they could search the house, which he gave them permission to do. **Matthews could not recall whether he lied to the police with regards to the above conversation with Smith** or if they failed to ask him anything other than where he was.

When Mr. Smith tried to ask Richard Sanders, his trial counsel, about Walker and Matthews and what information the State had disclosed concerning them, the State objected:

> MR. MARTIN: Judge, when we first began this hearing, you suggested to all parties to identify the specific issues which the Court has granted an evidentiary hearing, and I realize that Mr. Sanders is going to be involved in probably all but two of them. Where I'm having - - I'm stretching my imagination to try and figure out what issue this line of questioning goes regarding Priscilla Walker and James Matthews because this Court specifically denied an evidentiary hearing regarding this issue, and so I don't know how to make an objection other than just relevant. It's not relevant to what you asked us to be here on.

(PC-R. 4928).

When Mr. Smith's collateral counsel responded that the evidence went to "[b]oth Brady and ineffective assistance of counsel" (PC-R. 4929), the presiding judge stated:

> But how about the point that Mr. Martin raises that this particular line of questioning regarding these individuals was previously specifically raised as a Brady issue in the motion and specifically addressed by me and specifically denied as far as a basis for the evidentiary hearing?

(PC-R. 4929-30). Mr. Smith's collateral counsel replied:

(D-Ex. 4, bsp 3935)(emphasis added). The reports further indicated that after the interview, Mr. Hopkins contacted Detective Rossi in order to obtain any police reports "reflecting that Matthews and Walker were interviewed" (D-Ex 4, bsp 3935).

> Then, I would ask your Honor to either - - to reconsider or at least to let me proffer and - - and allow me to ask you to reconsider in a memo after we're done because this is sort of my only opportunity to make the record not only for yourself, but for any court that reviews the proceeding in the future, your Honor.

(PC-R. 4930).

The court then indicated that if it accepted that argument that the effort expended in writing the order specifically addressing the issue and denying it would have been wasted:

> I think I've got to be bound by the law of the case which is the order that set forth specifically what we were going to be doing here over the next four days.

(PC-R. 4930). When Mr. Smith's collateral counsel asked the court to nonetheless let him proffer the evidence, he was asked, "Why wouldn't the fact that I denied the written argument with a written ruling preserve that issue for you for appellate review?" (PC-R. 4931). Counsel answered that he did not want to run any risk of creating "procedural bars." The court then said:

> Okay. Thank you. Let me be clear. I think that now twice you've raised the issue, twice I'm denying it. I think I'm accepting all responsibility now, Mr. McClain.

(PC-R. 4931). Accordingly, Mr. Smith's counsel was precluded from presenting evidence to support his claim that Walker and Matthews were not truthful in their testimony, that the State

failed to correct the untruthful testimony, and that the State failed to disclose Brady material regarding these individuals that was in the State's possession.

B. "Never Together"

As to the handwritten note by the 1983 prosecutor, Tom Hogan, the State represents that "[o]n September 15, 1983, Tom Hogan, the original prosecutor in this case, requested an internal CID investigation into whether Melvin Jones 'has had any extensive contact with or shared a cell' with Derrick Johnson" (Answer Brief at 5). In fact, the note is quite clear that the request was made "9/12/83" (D-Ex. 8).[9] The CID form requested the information by September 19, 1983, when Hogan was scheduled to meet with Derrick Johnson.

The requested CID investigation was conducted on September 15 by John Osmond. Beneath the typed investigation request appears the handwritten response still legible even though the words were crossed out. In handwriting that Hogan testified was not his (PC-R. 4860A) appear the words "they were together 7-6 to 7-18 in D-3 at max see attached sheets" (D-Ex. 8).[10]

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[9]September 12, 1983, was the day that Mr. Hogan's secretary wrote him a note saying, "Tom: Your visit with Melvin Jones has been changed to 1:30 instead of 1:00 today" (D-Ex. 14).

[10]The attached sheets show that Melvin Jones and Derrick Johnson were both housed at "JAPC" beginning July 6, 1983. On

Beneath the crossed out handwritten note appears the handwritten notation that Hogan testified was written by him (PC-R. 4860A). This notation does begin with the phrase "NEVER to GATHER" (D-Ex. 4). It then sets forth what on its face is a statement made by Johnson: "D.J. says 1st time he ever saw Melvin Jones 7-11-83 in holding cell before prelim - Melvin showed D.J. map and said he would help D.J. at trial" (D-Ex. 8). Thus, Johnson's statement recorded in the notation belies the phrase "NEVER together." According to Johnson's admission to Hogan, he and Jones were together on at least one occasion.

C. Derrick Johnson

The State asserts in its Statement of the Case that:

> Hogan recalled that Johnson was terrified at being approached by someone who was unfamiliar to him but who knew details of his case. Hogan also recalled that when approached, Derrick Johnson said nothing to this inmate, Melvin Jones.

(Answer Brief at 5). Actually, this is a misleading statement, if not a false one. During the State's cross, Hogan testified:

> Q. I believe Mr. McClain said and the map was shown to Jones, and if I heard that incorrectly, great, but I want to make sure the record's clear, your notes are reflecting that Derrick Johnson indicated that he was there and Jones showed him a map?
>
> A. That is correct.

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that date Johnson was moved there from "JAMX" where Mr. Smith was being housed in "D-3" commencing July 6, 1983.

> Q. All right. There's no indication whatsoever that Derrick Johnson provided any information to Melvin Jones; is there?
>
> A. That is correct.

(PC-R. 4896). In re-direct, Hogan testified:

> Q. Is there any indication that Mr. Johnson did not provide information to Mr. Jones during - -
>
> A. There's no indication in that memo.

(PC-R. 4897). Then, in the State's re-cross Hogan testified:

> Q. What is it that you are aware of, Mr. Hogan, that suggests that Derrick Johnson provided no information to Melvin Jones?
>
> A. My memory of this from my note here was that Derrick Johnson had been scared by the fact that someone in this case, Mr. Jones approached him about --
> about the pending litigation and that he didn't say anything to Mr. Jones at all and that he had somehow contacted either myself or Detective San Marco about --
> or through his attorney, I remember that there was a concern that somebody had approached him and trying [sic] talk to him about the case and that's why it's [sic] says this is the first time he ever saw Melvin Jones.

(PC-R. 4897). In further redirect, Hogan testified regarding the statement he remembered indicating that Johnson was concerned:

> Q. Do you recall whether that statement was made, then, to [sic] from Derrick Johnson?
>
> A. I don't recall it was made to me, but I recall it coming from Detective San Marco or though his attorney or both.

(PC-R. 4898).

Vague memories of a statement by someone that Johnson was concerned about a stranger approaching him hardly constitute proof that Johnson did not know Melvin Jones and was "terrified" when Jones approached him (Answer Brief at 5). Moreover, the record demonstrates that, contrary to the State's assertion, Johnson and Jones had connections with each other.

Octavia Jones testified in a deposition on August 5, 1983, and again at Mr. Smith's first trial that she worked with Derrick Johnson's mother (R1. 469).[11] As a result, Octavia got to know Derrick Johnson (R1. 473). The day after the homicide, she saw Johnson at her place of employment. According to Octavia, Johnson proceeded to confide in her and Herbert Sanders that he was involved in the homicide (R1. 474-75).[12]

During Melvin Jones's deposition on September 26, 1983, he

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[11]Octavia Jones, who did not testify at Mr. Smith's retrial, was served with a state attorney subpoena and compelled to provide a sworn statement on May 17, 1983 (D-Ex. 10, bsp 4697).

[12]Herbert Sanders was the individual who a confidential informant advised the police possessed information about the shooting (D-Ex. 2, 4928). According to the undisclosed police report when he was interviewed, Sanders said Johnson merely claimed to have "overheard individuals telling him that they had been involved in the attempt[ed] robbery homicide of the vic[tim]." (Id.). Sanders specifically denied that Johnson had ever indicated that he was involved in the homicide or that he requested any assistance to get out of town. After talking to Sanders, the police then picked up Johnson.

revealed that he had known Octavia Jones all his life. She was his niece (R1. 782). Thus, a witness who claimed that Johnson had confessed the murder to her in March,[13] was Melvin Jones' niece.[14] Melvin Jones did not need to speak directly to Derrick Johnson – he had a niece who worked with Johnson's mother.

In its Statement of the Case, the State relies upon the testimony of Derrick Johnson at the evidentiary hearing. The State asserts that "Johnson had not known Jones prior to that encounter and was so concerned when Jones approached him about his case that Johnson asked to be moved from the holding cell"

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[13]She claimed that Johnson confessed his involvement in the murder to both herself and Herbert Sanders; but in undisclosed statements, Sanders maintained that such a confession did not occur (D-Ex. 2, bsp 4928). Of course, Octavia Jones came forward as a witness who corroborated Johnson's story at a time when a police report indicated that "it still appears to be up in the air as to who the actual shooter is" (D-Ex. 3, bsp 4805-06). Her statements constituted needed corroboration for Johnson.

[14]Melvin Jones testified in a September 26, 1983, deposition that he had not talked to Octavia "since I have been locked up" (R1. 782). But in the same deposition, Jones stated that although "I have seen [Derrick Johnson] on the streets a couple of times," he had not talked to him: "[n]o, I haven't." (R1. 781). Jones further swore that he had "[n]ever been incarcerated in the same place" with Johnson (R1. 780). These latter statements made about Johnson are now known to be false and demonstrate a willingness to prevaricate.

(Answer Brief at 5).[15] The State ignores the fact that Melvin Jones testified during his September 26, 1983, deposition as follows:

> Q Do you know Derrick Johnson?
>
> A I know - - yes, I do.
>
> Q You do know Derrick Johnson? How long have you known Derrick?
>
> A I didn't know him as Derrick Johnson.
>
> Q How did you know him?
>
> A Then they called him New York on the street.
>
> Q How long had you known him?
>
> A Well, personally, like me and you sitting here talking. I don't know him that well.
>
> Q Okay, but how long had you known him, if you knew him at all?
>
> A I'd say I have seen him on the streets a couple of times, but that's about it.

(R1. 780-81).[16]

The State sets forth in its Statement of the Case, "Johnson explained that he was being truthful in his trial testimony, when the defense asked if he had ever discussed the case with Melvin Jones, because he did not consider their brief

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[15]There is no corroboration from any other source for Johnson's self-serving claims in this regard.

[16]Moreover, Derrick Johnson acknowledged his friendship with Octavia Jones, Melvin's niece (R1. 1493).

encounter in the holding cell to be a discussion when Jones did all the talking" (Answer Brief at 5-6). The State neglects the following portion of Derrick Johnson's testimony at the evidentiary hearing:

> Q And did you have any conversations with that individual [Melvin Jones]?
>
> A Yes, we did. **We had a very brief conversation**.
>
> Q What was that?
>
> A This gentleman approached me, state who he was. Showed me the map that he had of the crime scene and asked me what was my position what was I going to do regarding the case **and I told him at that time I didn't know**. He started inquiring asking me some more questions, I became very uncomfortable, I asked to be moved.

(PC-R. 5359)(emphasis added). According to Johnson's own testimony, he had a "conversation" with Jones and he responded to Jones' questions.[17]

The State completely ignores the fact that Johnson's testimony that Melvin Jones spoke to him conflicted with Jones' testimony. Jones denied any "contact" with Johnson (R1. 1682)

[17]During his testimony at Mr. Smith's first trial, Johnson indicated he first became aware of Jones when the prosecutor visited him in late October of 1983 (R1. 1539). Yet, the prosecutor's undisclosed handwritten note shows that the prosecutor spoke with Johnson about Jones on September 19th about the July 11th "conversation" with Jones (D-Ex. 8).

and denied any "conversation with Mr. Johnson" (R1. 1693).[18]

REPLY ARGUMENT I

A. The Brady claim

1. Standard of Review

The State never specifically acknowledges in its Answer Brief that of the three elements of a Brady violation only the third is really at issue in Mr. Smith's case. The undisclosed evidence at issue was favorable to Mr. Smith, and the favorable evidence was in the State's possession and not disclosed to Mr. Smith.[19] Thus, the real issue before this Court is materiality, i.e. whether confidence is undermined in the

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[18]In his pre-trial deposition, Melvin Jones also denied ever talking to Derrick Johnson ("Q Talk to him? A No, I haven't") (R1. 781). Jones further swore that he had "[n]ever been incarcerated in the same place" with Johnson (R1. 780).

[19]The circuit court found that D-Ex. 8 (the note reporting that Johnson had advised the prosecutor of his July 11th meeting with Jones) was favorable evidence that had not been disclosed. As to the undisclosed police reports (D-Ex. 2,3) the court made the legal ruling that "CCRC has not proven that the 'Millerizing' of these police reports was legally impermissible" (PC-R. 4095). As to the undisclosed note that Jones was afraid that he would be charged with sexually abusing his daughter, the court made the legal ruling that "CCRC has not shown that the State was legally obligated to disclose this handwritten note" (PC-R. 4096). As to the State Attorney's Synopsis of sworn statements of witnesses (D-Ex. 10), the court again made the legal ruling that "CCRC fails to meet its burden showing that defense counsel was entitled to disclosure of this internal investigatory report" (PC-R. 4096). Nevertheless, the court did find that D-Ex. 10 contained "favorable" information that went undisclosed (PC-R. 4097).

reliability of the outcome of a trial conducted in the absence of disclosure of the favorable evidence.

The State also fails to recognize the proper standard of review of the "prejudice" component of a Brady claim. The State asserts that "this Court applies a mixed standard of review" to Brady claims, "deferring to the factual findings made by the trial court." (Answer Brief at 12). Though that may be true as to the Brady claim as a whole, it is not true as to the "prejudice" component.[20] Recently, this Court explained:

> [T]he determination of whether a Brady violation has occurred is subject to independent appellate review. See Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002); Way v. State, 760 So. 2d 903, 913 (Fla. 2000) ("Although reviewing courts must give deference to the trial court's findings of historical fact, the ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent appellate review.").

Floyd v. State, 2005 Fla. LEXIS 545, *9 (Fla. 2005). Thus, this Court independently reviews the "prejudice" component of a

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[20]Nor is it the correct standard for reviewing the legal issue of whether "Millerizing" of police reports satisfies Brady such that there is no duty to disclose information over and above that which has been "Millerized." Nor is it the correct standard for reviewing the legal issue of whether a "Synopsis" of sworn statements to a prosecuting attorney pursuant to a state attorney subpoena are subject to disclosure under Brady. Such legal issues require *de novo* review.

Brady claim, i.e. it conducts a *de novo* review.[21]

The State also fails to acknowledged that the "prejudice" component of a Brady claim requires cumulative consideration of all the undisclosed favorable evidence. In the Brady context, the United States Supreme Court and this Court have explained that the "prejudice" evaluation of the withheld evidence must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995); Young v. State, 739 So.2d 553, 559 Fla. 1999). At no point in the State's Answer Brief does the State address this requirement of collective consideration of the withheld evidence. Instead, the State goes through the withheld evidence item by item and argues that prejudice is not established by any one item that it failed to disclose.[22]

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[21]The State's thirteen page quotation of the circuit court's order reflects the State's failure to understand what an independent appellate review is. *De novo* literally means "of new." Thus, this Court must conduct its own independent review of the "prejudice" component and of the legal rulings made by the circuit court regarding whether Brady may impose a duty to disclose information that has been "Millerized" and a duty to disclose favorable information contained in a "Synopsis" of sworn testimony taken pursuant to a state attorney subpoena.

[22]Despite the fact that Mr. Smith argued in his Initial Brief that the circuit court failed to "conduct any real cumulative analysis of the prejudice arising from the non-disclosures" (Initial Brief at 53), the State does not address the matter in its brief. The State does not argue that the circuit court did conduct a cumulative analysis (but of

In fact ultimately, the State engages in argument that is the opposite of cumulative analysis. When arguing that the failure to disclose each individual piece of favorable information was not prejudicial, the State relies upon other evidence in the record without regard to undisclosed impeachment of that evidence. For example, when arguing that the failure to disclose the July 11th meeting was not prejudicial, the State relies upon McGruder's testimony, saying, "According to David McGruder, the cook at the Hogley Wogley Bar-B-Q, the darker, shorter individual (the same man who had used the telephone) was the man who got in the back seat of the taxicab" (Answer Brief at 33).[23] This reliance is

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course, such an argument would be belied by the record). Instead, the State merely focuses on the length of the circuit court order, describing it as "meticulous" and "painstakingly" prepared (Answer Brief at 28), as if a legally erroneous order can be affirmed so long as it was "meticulous" or "painstakingly" prepared.

[23]The State also repeatedly relies upon Priscilla Walker's testimony at Mr. Smith's 1991 trial that Mr. Smith told her he shot a "cracker" (Answer Brief at 32, 33). Of course, Mr. Smith pled that the State failed to disclose evidence impeaching Walker's testimony and that the withheld evidence could now be used to establish that Walker lied in her testimony. At the State's urging, the circuit court denied Mr. Smith an opportunity to present this evidence. In so doing the circuit court did not conduct a cumulative analysis of the cumulative prejudicial effect, and the circuit court precluded Mr. Smith from making a proffer of the evidence supporting his allegation that Walker's testimony was false. Given that regarding a motion to vacate, the factual allegations asserted in the motion must be accepted as true

in total disregard of the undisclosed evidence that McGruder, contrary to his trial testimony, did not to pick out a photograph of Derrick Smith as the "shorter, darker individual," and that his estimate of the "shorter, darker individual['s]" weight was off by somewhere between 40 and 70 pounds.[24]

2. The Undisclosed Contact Between Jones and Johnson

The handwritten note (D-Ex. 8) by the 1983 prosecutor, Tom Hogan, summarizing Johnson's statement regarding his July 11th meeting with Melvin Jones was not disclosed to the defense. It is beyond question that D-Ex. 8 contained information that was favorable to the defense. The only question is whether the "prejudice" component, i.e. the materiality standard, was met.

In its answer brief, the State mounts an argument that failure to disclose was not prejudicial because Johnson was

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for purposes of determining whether an evidentiary hearing is required, Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d. 1364 (Fla. 1989), it would seem that at this juncture the refusal to grant an evidentiary hearing as to Walker requires this Court to accept the factual allegation as true in conducting the requisite cumulative analysis. Thus, the State's reliance upon Walker's testimony in its argument that Mr. Smith has not shown prejudice is inappropriate.

[24]At different times, McGruder is reported to have given two different weight estimates, one 40 pounds less than Mr. Smith's weight, and the other 70 pounds less.

called as a witness at the evidentiary hearing and testified that he shared no information with Jones and that his trial testimony was truthful.[25] According to the State, this Court must credit Johnson's testimony at the evidentiary hearing that when he had been asked if he had a discussion with Jones, he answered truthfully when he responding "no" because he, Johnson, had not said anything to Jones.[26] However, this argument overlooks the law as to how the prejudice analysis is to be conducted. In Young v. State, 739 So. 2d at 559, this Court explained:

> However, we have also recognized, as again made clear

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[25]The State argues that "Johnson's testimony, identifying Smith as the shooter, has never waivered" (Answer Brief at 33). Of course, it did not matter in Michael Mordenti's case that he never waivered from his claim of innocence; a jury nonetheless convicted him and this Court affirmed on appeal. Mordenti v. State, 630 So. 2d 1080 (Fla. 1994). This Court has never held that if a criminal defendant never waivers from a self-serving story, then he must be telling the truth. Yet, this is precisely the premise of the State's argument: since the criminal defendant, Johnson, has consistently told his self-serving story that Derrick Smith was with him and fired the fatal shot, well then it must be true. If this Court accepts this ridiculous premise as valid, then the prison gates are going to need to be opened wide to let out all those criminal defendants who "ha[ve] never waivered" in their protestations of innocence.

[26]The State's reliance upon Johnson's narrow parsing of the word "discuss" collapses when it is noted that in his evidentiary hearing testimony, Johnson describes his encounter with Jones as a "conversation" in which Jones asked questions and Johnson answered--"I told him at that time I didn't know" (PC-R. 5359).

> by the quoted portions of the United States Supreme Court in Kyles, that the focus in postconviction Brady-Bagley analysis is ultimately the nature and weight of undisclosed information. The ultimate test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.

Thus, the analysis is "backward-looking"--backward to the trial. The Court considers the undisclosed evidence and then looks back to the trial and evaluates whether the undisclosed information "is of such a nature and weight that confidence in the outcome of the trial is undermined." This Court does not look at the testimony of the witness who was not impeached because impeachment was not disclosed to see what he now has to say about the impeachment. Certainly, this Court did not engage in such analysis in Mordenti v. State, 894 So. 2d 161 (Fla. 2004). There, as here, the State at the evidentiary hearing called the witness (Gail Mordenti) who was subject to impeachment by virtue of the withheld information. This Court in determining that a new trial was warranted never once looked to Gail's evidentiary hearing testimony to determine whether she had an answer for the impeachment that the jury could have

found credible.[27] **It is not for this Court at this point to address whether Johnson is or is not credible. That is for the jury** to do if this Court finds the cumulative effect of the non-disclosures undermines confidence in the outcome of Mr. Smith's trial.[28]

The State quotes the following passage from the circuit court order, as in essence its own argument:

> The fact of the matter is that the jury already heard testimony and argument indicating Melvin Jones and Derrick Johnson were not credible witnesses, that each had prior felony offenses, and that each had criminal charges pending at the time of the defendant's retrial. That defense counsel could have inquired about a possible meeting in the holding cell where these individuals may have conspired to pin the

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[27]In Kyles v. Whitley, 514 U.S. at 449, the United States Supreme Court made this very point:

> JUSTICE SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 471-472. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

[28]In arguing that Mr. Smith has not shown prejudice from the failure to disclose information regarding the July 11th meeting, the State never addresses the fact that the July 11th meeting impeached not just Johnson, but also Melvin Jones' testimony in his September 26, 1983, deposition that he had not talked to Derrick Johnson ("[n]o, I haven't.") (R1. 781). Jones further swore that he had "[n]ever been incarcerated in the same place" with Johnson (R1. 780). These statements made about Johnson are now known to be false.

> charges on the defendant is not materially different from that which was argued to the jury. **It was already evident to the jury that both Melvin Jones and Derrick Johnson had much to gain in avoiding a first-degree murder charge, and in pinning the homicide on the defendant**.

(Answer Brief at 32)(emphasis added).[29] Yet, this passage and the State's argument based upon it stand in clear conflict with Mordenti v. State. There, the jury had heard the defense argue that Gail Mordenti Milligan was not a credible witness. The jury heard that she was getting immunity for her testimony that she hired a hitman to kill Thelma Royston. It was evident to the jury that Gail Mordenti Milligan had much to gain in "pinning the homicide on the defendant." Yet, this Court found that the undisclosed impeachment would have boosted the defense attack on her credibility by providing evidence to support counsel's argument. Mordenti v. State, 894 So. 2d at 171-74. The qualitative difference between a mere argument that two witnesses "conspired to pin charges on the defendant" and actual evidence that provides a factual basis for such an argument is much bigger than either the State or the circuit court have recognized.

Finally as to the July 11th meeting, the State does not address the undisclosed meeting in a cumulative context. It

[29]The jury was in fact in the dark as to what Jones had to gain. The jury did not know that Jones was a suspect.

argues against a finding of prejudice in isolation without addressing the impact of the failure to disclose the additional favorable evidence that went undisclosed. The State's analysis clearly does not comport with constitutional jurisprudence. Kyles; Young.

3. Undisclosed Police Reports

Even though the circuit court concluded that Mr. Smith had failed to demonstrate a duty to disclose favorable information over and above that disclosed in the "Millerizing" process, the State does not defend this aspect of the circuit court's order.[30] In this regard, the State represents that it "is not unmindful of this Court's recent decision in Floyd v. State, 2005 Fla. LEXIS 545 (Fla. 2005), addressing 'Millerized' police reports" (Answer Brief at 35). Despite recognizing the recent decision in Floyd, the State never actually states the obvious: Brady trumps Miller v. State, 360 So. 2d 46 (Fla. 2d DCA 1978), and requires broader disclosure than necessarily occurs in the "Millerizing" process. The circuit court's contrary conclusion was in error.[31]

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[30]Apparently, a "meticulous" and "painstakingly" drafted order can nonetheless contain undefendable legal errors.

[31]It is significant to recognize that because the circuit court was in error in its conclusion that the State was not obligated to disclose the police reports, no cumulative analysis was conducted by the circuit court of the favorable

a. Jones was a suspect in the murder

In light of Floyd, the State turns to a prejudice analysis of the various bits of favorable information contained in the redacted or undisclosed police reports. First, the State addresses the information that Melvin Jones was "initially mentioned as [a] possible suspect on the first day of the police investigation" (D-Ex. 2, bsp 4945).[32] In arguing against materiality of this information, the State relies on the fact that Mr. Smith "was identified by Mr. McGruder as the same man who got into the back seat of the taxicab" (Answer Brief at 37). Not only is this a false statement (McGruder did not identify Mr. Smith in the courtroom as the man who got in the backseat of the taxicab), but the State ignores the undisclosed information that revealed that McGruder failed to even pick out a photograph of Mr. Smith, as well as McGruder's

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evidence contained in the undisclosed police reports.

[32]The State does cite to Wright v. State, 857 So. 2d 861 (Fla. 2003), for the proposition that there is no a duty to disclose all of the State's investigative work regarding other potential suspect regardless of its relevancy or materiality. However, Wright and the cases cited therein did not involve a testifying eyewitness who the defense did not know had been a suspect in the homicide. The fact that Jones was a suspect goes to his motive and reasons for testifying that someone else committed the homicide. Moreover, the fact that there is no indication that the police interviewed Jones regarding the murder at the time that he was listed as a suspect impeaches the reliability of law enforcement's investigation. Kyles.

descriptions of the individual that included weight estimates of the person that were between 40 and 70 pounds less than Mr. Smith's weight at the time.

The State's analysis is clearly not cumulative as required by Kyles and Young. The fact that the State finds it necessary to rely upon evidence that is clearly refuted by the other undisclosed favorable evidence is indicative of the extreme prejudice that actually occurred.[33]

b. Mellow Jones was interviewed twice

Despite the fact that Melvin Jones and Mellow Jones testified that only one police officer came to the residence the night of the homicide, an undisclosed police report shows that a second neighborhood canvas was conducted at 8:00 AM, long after Mellow Jones testified that Melvin Jones had told her about witnessing the shooting. Yet, the police report shows that Mellow Jones gave the police officer no information regarding Melvin Jones' alleged observations. As to this, the State merely says, "[t]he disclosure that police canvasses of the neighborhood twice received negative results from Mellow Jones would have provided little or no impeachment" (Answer

[33]The State also relied upon Derrick Johnson's testimony without reference to either the undisclosed impeachment of Johnson, or the questions the circuit court noted regarding his credibility. This too ignores the need to cumulatively analyze the materiality of the undisclosed favorable evidence.

Brief at 40). The State's position simply ignores the obvious. Melvin Jones claimed to have witnessed the shooting and claimed to be testifying against Mr. Smith because he wanted to do the right thing. Yet, neither he nor his wife told the police about what he had seen when the police came and asked if anyone had seen or heard anything. This would suggest Jones' testimony was false.[34]

4. Jones' undisclosed fear of sexual assault charges

As to the prosecutor's handwritten note reflecting a phone call from Melvin Jones to Mr. Smith's prosecutor prior to the second trial in which Jones expresses his fear that his daughter may bring sexual assault charges against him, the State argues that the circuit court correctly ruled that there was no duty to disclose this expressed fear of possible criminal charges. The State's position flies squarely in the face of Davis v. Alaska, 415 U.S. 308 (1974).[35]

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[34]The prejudicial impact of this non-disclosure must be considered cumulatively, along with Jones' false testimony that he never spoke to Johnson, along with the fact that Jones was an initial suspect, along with the fact that Johnson and Jones had a July 11th meeting, and along with the fact that McGruder never identified a photo of Mr. Smith and in fact described an individual getting in the back seat of the cab who weighed between 40 and 70 pound less than what Mr. Smith weighed at the time.

[35]Davis v. Alaska was cited in the Initial Brief and ignored by the State. It holds that a defendant is entitled to cross-examine a State's witnesses about any reasons the

Jones' obvious effort to cash in on the State's desire to call him at a re-trial is clear evidence of his motives and constitutes impeachment. The prejudice from the failure to disclose this information must be evaluated cumulatively with the other undisclosed information. The cumulative nature of the Brady materiality standard is ignored by the State.

5. Synopsis of Statements Pursuant to State Attorney Subpoena

The State prepared a number of documents entitled "Synopsis" in which sworn testimony give to the prosecutor pursuant to a State Attorney Subpoena was memorialized. As to these documents, the State notes that "the Circuit Court found, first of all, that CCRC failed to meet its burden showing that defense counsel was entitled to disclosure of this internal investigatory report" (Answer Brief at 42). Astoundingly, the State defends the ruling saying, "[t]he prosecutor's notes, impressions, or inferences from investigations are not Brady material and, therefore, are not subject to disclosure" (Answer Brief at 42). The State's argument is simply wrong. Exculpatory or favorable information contained in the prosecutor's notes must be disclosed if it is material to the

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witness may have for currying favor with the State. This obviously includes not only the pendency of formally filed charges, but also possible future charges that the witness fears.

case.

The United States Supreme Court in Kyles v. Whitley clearly recognized that the State is obligated to disclose exculpatory or favorable information contained in a prosecutor's notes from a witness interview. In the factual recitation, the Supreme Court stated:

> After the mistrial, **the chief trial prosecutor, Cliff Strider, interviewed Beanie**. See App. 258-262 (notes of interview). **Strider's notes show that Beanie again changed important elements of his story**. He said that he went with Kyle to retrieve Kyle's car from the Schwegmann's lot on Thursday, the day of the murder, at some time between 5 and 7:30 p.m., not on Friday, at 9 p.m., as he said in his second and third statements. (Indeed, in his second statement, Beanie said that he had not seen Kyles at all on Thursday. *Id*., at 249-250.) He also said, for the first time, that when they had picked up the car they were accompanied not only by Johnny Burns but also by Kevin Black, who had testified for the defense at the first trial. Beanie now claimed that after getting Kyles's car they went to Black's house, retrieved a number of bags of groceries, a child's potty, and a brown purse, all of which they took to Kyle's apartment. Beanie also stated that on the Sunday after the murder he had been at Kyle's apartment two separate times. Notwithstanding the many inconsistencies and variations among Beanie's statements, **neither Strider's notes nor any of the other notes** and transcripts were given to the defense.

Kyles v. Whitley, 514 U.S. at 429-30 (emphasis added). Based on these and other non-disclosures by the State, a new trial was ordered. Thus, a prosecutor's notes of an interview of a witness conducted in preparation for trial are not protected

from disclosure under a work product argument.

After Kyles, this Court ruled similarly. In Young v. State, 739 So. 2d 553 (Fla. 1999), this Court addressed a claim that the State unlawfully withheld

> **state attorney notes** concerning Brinker's initial interview as to his hearing gunshots at the time of the murder; **state attorney notes** concerning a statement by a Dr. Roth concerning his hearing gunshots at the time of the murder; **state attorney notes** concerning regarding an initial interview with witness Hessemer; and **state attorney notes** regarding interviews with State witnesses at a firearms shooting range.

Young v. State, 739 So.2d at 555 (emphasis added). In Young, the State argued that "the notes fit the definition of attorney work product and thus were exempt from pretrial discovery under Florida Rule of Criminal Procedure 3.220(g)(1)." However, this Court "reject[ed] the State's argument." Young v. State, 739 So. 2d at 559. This Court concluded that "the state attorney notes of witness interviews were [ ] Brady material." Id. As a result, prejudice was found and Mr. Young's sentence of death was vacated.[36] The State's argument in its brief neglects to address either Kyles or Young or Mordenti on this point.

The State alternatively argues that no prejudice arose

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[36]Similarly, this Court found in Mordenti v. State, 894 So. 2d at 173-76, that a prosecutor's handwritten notes of interviews of several witnesses contained favorable information that the prosecutor had been obligated to disclose to the defense.

from the failure to disclose the undisclosed impeachment of McGruder. In this regard, the State quotes from the circuit court's order: "[g]iven the doubt McGruder expressed, and the inconsistencies in his testimony, which the jury heard, the court cannot find that the undisclosed evidence - def. Ex. 10 - undermined confidence in the guilty verdict" (Answer Brief at 44).[37] Yet despite relying upon "the doubt McGruder expressed, and the inconsistencies in his testimony" to argue that the failure to disclose additional impeachment of McGruder was not prejudicial, elsewhere in its brief the State relies upon the fact that Smith "was identified by Mr. McGruder as the same man who got into the backseat of the taxicab" as demonstrating the undisclosed impeachment evidence of Jones and Johnson was not prejudicial (Answer Brief at 37). The State's logic is faulty, and clearly Mr. Smith was prejudiced by the non-disclosures.[38]

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[37]Of course, the circuit court limited its consideration of the impeachment of McGruder to that contained in D-Ex. 10, wherein it was revealed that contrary to his testimony, McGruder failed to pick out Mr. Smith's photograph. Police reports introduced in D-Ex. 2 & 3 contained additional impeachment. There, it is revealed that McGruder estimated "the shorter, darker man" to weigh 140 pounds, while Mr. Smith actually weighed 205 pounds. The circuit court's prejudice analysis did not include consideration of these undisclosed police reports.

[38]The State also argues that the presence of Mr. Smith's fingerprint on the payphone that McGruder says he saw the 5'8", 140 pound man use renders the undisclosed impeachment of McGruder insignificant. The State argument overlooks the fact

6. Cumulative Consideration

At no point did either the circuit court or the State in its brief cumulatively consider all of the undisclosed favorable information.[39] The undisclosed items when considered cumulatively cast a whole new light on the case, warranting a new trial.

B. Giglio Violation

A prosecutor must not knowingly rely on **false impressions** to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957)(due process principles of the United States Constitution

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that Derrick Johnson testified that two phone calls were made to the cab company, the second by Johnson (R2. 1180). The State also ignores the fact that law enforcement observed at least "five separate fingerprints" on the payphone (R1. 1428); the fingerprint examiner testified that there were "seven lifts" (R1. 1458). However, only one of those prints was found to match Mr. Smith, while no match with Johnson was found (R1. 1428, 1459).

There were "eleven to twelve" lifts from the taxicab. None of those prints were found to match Mr. Smith (R1. 1458-59). Under the State's logic, that would seem to exclude Mr. Smith from having been the individual McGruder saw get into the cab.

[39]The State does quote one line from the circuit court's order wherein it was stated "Together, def. Ex. 8 and def. Ex. 10, had they been disclosed, would not have 'put the whole case in such a different light as to undermine confidence in the verdict'" (Answer Brief at 44). That one sentence is neither an adequate cumulative analysis of all of the undisclosed favorable information nor a compelling prejudice analysis, anymore than the circuit court analyses in Mordenti or Floyd. As in those cases, this Court's independent review must result in a new trial.

were violated where a prosecutor deliberately "gave the jury the **false impression** that [witness's] relationship with [defendant's] wife was nothing more than casual friendship"). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993).[40] The State's whole argument as to the Giglio violation is premised upon an assumption that the testimony in question has to be shown to be flat out false. However, that is not the law.[41] The issue is whether the State deliberately misled the jury, the defense and/or the judge. Here, State witnesses affirmatively misled the defense and the jury regarding the contact between them and the State knew the testimony was misleading. The State also misled the jury

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[40]This Court has stated, "[t]ruth is critical in the operation of our judicial system." Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001).

[41]Due process is violated where the testimony in question "taken as a whole, **gave the jury the false impression** that [a witness'] relationship with petitioner's wife was nothing more than casual friendship. This testimony was elicited by the prosecutor who knew of the illicit intercourse between [the witness] and petitioner's wife." Alcorta v. Texas, 365 U.S. at 31 (emphasis added). As has been explained elsewhere, "[t]he term 'false evidence' includes the 'introduction of specific misleading evidence important to the prosecution's case in chief . . . .' Donnelly v. DeChristoforo, 416 U.S. 637, 638 (1974)." Troedell v. Wainwright, 667 F. Supp. 1456 (S.D. Fla 1986).

regarding the consideration that Jones was receiving for his testimony.[42]

[42]The State argues that "False evidence is material if it undermines confidence in the outcome. Rose v. State, 774 So. 2d 629, 634 (Fla. 2000)" (Answer Brief at 51). This Court has specifically ruled that the quoted language in Rose was in error, and that the State must prove Giglio error harmless beyond a reasonable doubt or else a new trial is required:

> We recede from Rose and Trepal [v. State, 846 So. 2d 405, 425 (Fla. 2003)] to the extent that they stand for the incorrect legal principle that the "materiality" prongs of Brady and Giglio are the same.

Guzman v. State, 28 Fla. L. Weekly S829, 2003 Fla. LEXIS 1993 *16 (Fla. 2003). This Court proceeded to explain, "[t]he State as beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Id. at *18.

REPLY ARGUMENT II

Mr. Smith was denied an evidentiary hearing on many of his allegations including the specific allegation that the State withheld favorable information regarding Priscilla Walker and James Matthews, and knowingly presented their false or misleading testimony. When Mr. Smith tried to present the evidence at the evidentiary hearing, the court sustained the State's objection. When he tried to proffer the evidence, the court precluded a proffer. In its brief, the State falsely argues the trial court "ultimately expanded the scope of the evidentiary hearing in response to Smith's request" (Answer Brief at 53). This false assertion is designed to deny Mr. Smith the opportunity to ever present the wealth of evidence that he possesses that Walker's testimony at Mr. Smith's retrial was a complete fabrication. This Court cannot condone the State's conduct in this regard and preclude Mr. Smith from presenting his Brady/Gigio challenge to the testimony the State obtained from Walker and Matthews.[43]

CONCLUSION

For all of the foregoing reasons and those stated in Mr. Smith's Initial Brief, this Court should vacate the circuit

[43]As to Mr. Smith's other arguments, he must rely upon the arguments in his Initial Brief due to the Court's page limitations.

court’s order denying Mr. Smith’s Rule 3.850 motion and order a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Katherine Blanco, Assistant Attorney General, 3507 Frontage Road, Suite 200, Tampa, FL 33607, on June 29, 2005.

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This is to certify that this Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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