**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC06-539**

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**MILFORD WADE BYRD,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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

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# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of a post-conviction motion after an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

“1PC-R” -- record on appeal of denial of first Rule 3.850 motion;

"2PC-R" -- record on appeal of denial of this second Rule 3.850 motion;

“Supp2PC-R” -- supplemental record on appeal of denial of this second Rule 3.850 motion;

“Def. Ex.” and “St. Ex.” –- exhibits entered during the evidentiary hearing on this second Rule 3.850 motion.

## REQUEST FOR ORAL ARGUMENT

Mr. Byrd has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr.

Byrd, through counsel, accordingly urges that the Court permit oral argument.

## REPLY TO THE STATE'S STATEMENT OF THE CASE AND FACTS

The State's Statement of the Case and Facts is inaccurate and contains false and/or misleading factual assertions. For example, when addressing the September 25, 2002, evidentiary proceeding, the State says in the answer brief:

> As a result of testimony of Mr. Endress regarding alleged improprieties by CCRC investigators to induce Mr. Endress to testify about the credibility of Byrd's co-defendant, Ronald Sullivan, the trial court extended the evidentiary hearing until November 21, 2002.

(Answer Brief at 6).

While Mr. Endress did testify regarding his contact with a CCRC investigator, Jeff Walsh, that portion of his testimony was not the basis of Mr. Byrd's request that the evidentiary hearing be left open so that follow up investigation could be conducted into new assertions made by Mr. Endress. In fact, Mr. Byrd called Mr. Walsh as a witness on September 25, 2002, to testify regarding the circumstances of his contact with Mr. Endress. There was no need for further investigation or additional testimony regarding Mr. Walsh's contact with Mr. Endress.[1]

[1] The State attempts in its answer brief to use Mr. Endress'

It was other aspects of Mr. Endress' testimony which were new and not previously known by Mr. Byrd's counsel that warranted the request to keep the evidentiary hearing open. As explained in Mr. Byrd's initial brief:

> While testifying in 2002, Endress provided new information that was favorable to Mr. Byrd and that had not been disclosed by the State previously. Endress testified that he had been questioned in late 1982 about a string of robberies (2PC-R1569). However, he invoked his right to remain silent. He understood, however, that there was something "like 13 robberies" and that Sullivan was a suspect in this series of robberies (2PC-R1568-69). Endress understood that no charges were filed against Sullivan

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testimony regarding his contact with Mr. Walsh to slime Mr. Byrd and his counsel:

> Endress essentially testified that the investigator put words in his mouth and attempted to have him sign an affidavit. (V11, 1577). Investigator Walsh was asked to relay an offer to Byrd to help him, in exchange for Byrd's agreement to exonerate Endress. Walsh returned a few days later to inform Endress that Byrd agreed to the deal. While Walsh denied attempting to broker a deal, his explanation for returning to see Endress in prison a few days after the initial meeting was highly suspect.

(Answer Brief at 43 n. 6.). In asserting that Mr. Walsh's explanation was "highly suspect", the State does not say who found it "highly suspect." Certainly, the circuit court did not indicate that Mr. Walsh's testimony was suspect. Instead, the State's representation seems to be wishful thinking that can be used to divert attention away from the State's contact with Mr. Endress, both prior to and after his testimony. See Letter dated October 15, 2002, from Mr. Endress to Norm Cannella asking him to contact the State in order to obtain benefit for his September 25, 2002, testimony (2PC-R1668).

> in these robberies in exchange for Sullivan's testimony (PC-R1569).
>
> Before Endress's trial, Sullivan told him he needed a lawyer and wrote to Endress's father asking for help getting a lawyer (2PC-R1571). Sullivan told Endress he was not going to testify against Endress, but then the day the trial was to start, Sullivan and the State agreed to a ten-year sentence in exchange for Sullivan's testimony (2PC-R1571-72).
>
> In 2002, Endress also testified that he learned in 2002 from his father that the State had offered him a 7-year prison sentence in exchange for his testimony against Byrd (2PC-R1573, 1575). He did not know about the offer when it was made, and it was rejected by his attorney and his father (2PC-R1573-74).
>
> After Mr. Endress' testimony was finished in the 2002 proceeding, Mr. Byrd's counsel informed the court that the testimony "opened up a whole lot of stuff" and asked for the opportunity to look into these matters. The request was granted. Thereafter, the State disclosed its files on armed robberies that occurred shortly before the murder of Debra Byrd in which Endress and Sullivan were identified as the perpetrators.

(Initial Brief at 6).[2] Despite the fact that Mr. Byrd laid out the circumstances surrounding his request to leave the evidentiary hearing open in his initial brief, the State does not address these circumstances and instead falsely represents that the evidentiary hearing was left open because of testimony

[2] When granting Mr. Byrd's request to leave the evidentiary hearing open, the court stated that counsel could review the day's testimony and provide further information to the court or file a motion for an additional hearing (2PC-R1588).

regarding a CCRC investigator.

In ignoring the real reason the evidentiary hearing was left open and asserting that instead it had something to do with allegations against a CCRC investigator, the State seeks to obscure the indisputable fact that Mr. Endress in his testimony revealed information that led to previously undisclosed evidence that was favorable to Mr. Byrd within the meaning of Brady v. Maryland, 373 U.S. 83 (1963).

On November 12, 2002, based upon the new information that Mr. Endress revealed while testifying, Mr. Byrd filed a motion requesting discovery regarding the newly disclosed information (2PC-R300-06). In light of Endress's testimony that police questioned him about being involved in 13 robberies with Sullivan, the motion requested discovery regarding the robberies (2PC-R302-03). The motion also requested discovery regarding the 7-year plea offer which Endress testified about and also as to Sullivan's attempt to sell his testimony to Endress and his family at the time of Endress's trial (2PC-R304-05). The court granted the motion and allowed 60 days for discovery (2PC-R1612). As a result, the State disclosed previously undisclosed files regarding other criminal cases involving Sullivan and Endress.

On June 9, 2003, Mr. Byrd filed an amended Rule 3.850 motion which included facts from the September 25, 2002, evidentiary hearing, as well as facts resulting from investigation of the 2002 evidence (2PC-R324-50). On December 16, 2003, the court heard argument regarding the need to reopen the evidentiary hearing (2PC-R1632). On December 18, 2003, the court entered an order allowing the presentation of additional evidence (2PC-R493).

Though the State makes one passing reference to the fact that Mr. Byrd amended his Rule 3.851 motion (Answer Brief at 6), it fails to acknowledge anywhere in the answer brief that Mr. Byrd's claims in the amended motion flowed from the information disclosed by Endress for the first time on September 25, 2002, when he took the stand and testified. This failure to acknowledge that Endress had not previously testified and had refused to speak to Mr. Byrd's collateral counsel until early 2002 and even then withheld a wealth of information until he took the stand in September of 2002, serves as the basis for the State's repeated assertion that Mr. Byrd's claims were not timely (Answer Brief at 40, 48). However, it was Endress' decision in early 2002 to speak to Mr. Byrd's counsel for the very first time and his subsequent willingness to take the

witness stand and testifying regarding matters that he had previously refused to discuss, that provided information that was previously unknown and unavailable.

In its statement of the case, the focus in the State's rendition of the facts is on whether there was or was not an agreement between Endress and the State when he took the stand in September of 2002. This focus completely misses and obscures the actual significance of Endress' efforts to barter with the State. He met with the prosecuting attorney and said he wanted consideration for his testimony, he wrote his lawyer after he testified and asked him to contact the State and try to get him consideration for his testimony which had been favorable to the State, and he had his wife repeatedly contacted the prosecutors in order to try to get consideration for his testimony which he believed had helped the State.

Clearly, Endress wanted out of prison and believed that the prosecutors in Mr. Byrd's case could assist him in his efforts to get out of prison. Endress had much to gain from providing testimony that assisted the State, just as Sullivan had much to gain from assisting the State to convict Mr. Byrd. In fact, Sullivan gained a great deal; he got probation for saying he participated in a murder. The point is that their interest in

obtaining their freedom should raise great doubt as to the accuracy of their testimony as to the events of October 13, 1981.

The State omits any reference to bar records that were introduced regarding Frank Johnson in its statement of the case.[3] The State does not address the fact that it acknowledged in circuit court in its written closing of May 10, 2004, that bar complaints had been filed against Mr. Johnson in 1988, prior to the 1989 evidentiary hearing at which Mr. Johnson was called to testify regarding his representation of Mr. Byrd. During those 1989 proceedings neither Frank Johnson, nor the State disclosed that bar grievances were pending against him alleging sanctionable misconduct.[4] Mr. Byrd was not apprised of the fact that Mr. Johnson had motive in his testimony to consider the impact of his testimony on the pending bar proceedings. Certainly, had Mr. Byrd or his collateral counsel known of the pending bar complaints, those pending complaints could have been

[3] These bar records were discussed by Mr. Byrd in his statement of the case and facts in his initial brief (Initial Brief at 41).

[4] When Mr. Johnson testified in 1989, he reported that all of his files and records concerning Mr. Byrd's case had been lost and were unavailable for Mr. Byrd's collateral counsel to review.

delved into as it related to Mr. Johnson's credibility, *i.e.* he had reason to recast events for fear of losing his bar license.

## ARGUMENT IN REPLY

### ARGUMENT I

As to Argument I of Mr. Byrd's initial brief, the State chooses to recast the argument and then completely ignore the decision by this Court upon which Mr. Byrd relied to argue that the claim is cognizable. In his initial brief, Mr. Byrd argued that his due process rights as discussed in Bradshaw v. Stumpf, 545 U.S. 175 (2005), were violated when the State took inconsistent positions as to Ronald Sullivan's credibility - at Mr. Byrd's trial the State premised its case upon Sullivan's testimony and vouched for his credibility, yet at Sullivan's probation revocation hearing the State maintained he was a liar who would present false testimony in order to avoid incarceration.

In his initial brief, Mr. Byrd acknowledged that the decision in Bradshaw v. Stumpf issued after Mr. Byrd's evidentiary hearing had concluded and after the parties had submitted their closing arguments:

> The decision in Stumpf issued on June 13, 2005. This was after the evidentiary hearing in Mr. Byrd's case had been concluded, this was after final written closing arguments in Mr. Byrd's case had been

> submitted, and this was after the trial judge had issued an order on February 8, 2005, instructing counsel to refrain from "filing any more motions while the Court deliberates on the pending Motion for Post Conviction Relief." (Supp2PC-R102).

(Initial Brief at 65).

After acknowledging this history, Mr. Byrd then argued that this Court had in Raleigh v. State, 932 So. 2d 1054, 1066 (Fla. 2006), recognized that a claim premised upon Bradshaw v. Stumpf could for the first time be raised in the course of an appeal from the denial of Rule 3.851 relief even if it had not been raised in circuit court:

> Moreover, this Court's decision in Raleigh issued on June 1, 2006, well after Mr. Byrd's case was already pending in this Court. It is in Raleigh that this Court recognized that a claim cognizable in Rule 3.851 proceedings had arisen under Stumpf. On the basis of the procedure followed in Raleigh which this Court found to be an acceptable means of raising a claim under Stumpf, Mr. Byrd submits that this claim is properly brought before the Court and that on the basis of the principle recognized in Stumpf and in Raleigh, Rule 3.851 relief is warranted.

(Initial Brief at 65-66). In making this argument, Mr. Byrd specifically noted:

> In Raleigh, the claim was raised on the basis of Stumpf while Mr. Raleigh's case was pending on an appeal from the denial of a Rule 3.851 motion. This claim was raised for the first time at oral argument after counsel had filed a notice of supplemental authority premised upon the decision in Stumpf. Presumably because Stumpf had not been available at the time the Rule 3.851 had been filed in circuit

> court, Mr. Raleigh was permitted to raise his claim premised upon that decision in the course of his appeal. Though this Court found the claim without merit in Raleigh, this Court did not question the manner in which the issue was brought before the Court.

(Initial Brief at 65).

In its answer brief, the State completely ignores this Court's decision in Raleigh and Mr. Byrd's reliance upon that decision. A look at the Table of Authorities set for in the answer brief demonstrates that the decision in Raleigh is not even cited, let alone addressed by the State in its brief.

Instead, the whole of the State's argument that this due process claim is procedurally barred is premised upon its assertion that Bradshaw v. Stumpf did not articulate a new rule:

> Byrd attempts to excuse his procedural default by arguing that his claim is based upon Bradshaw v. Stumpf, 545 U.S. 175 (2005) which was released after the evidentiary hearing in this case, but, before the court had issued its final order. (Appellant's Brief at 64). Appellant's position lacks any merit because Stumpf did not articulate a new rule of law relevant to any issue in this case. Indeed, the Court in Stumpf concluded that it was premature to rule on a due process claim relating to sentencing on the prosecution's taking inconsistent positions with regard to Stumpf and his codefendant. In his concurring opinion, Justice Thomas observed "[t]his Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based upon inconsistent theories." Stumpf, 545 U.S. at 190 (Thomas, concurring). Stumpf did not announce a new rule of law which would excuse his failure to raise this issue in a timely fashion.

(Answer Brief at 36).

The only place the State looked to see whether a claim premised upon Bradshaw v. Stumpf was cognizable in collateral proceedings in the Florida state courts was a concurring opinion in Bradshaw that represented the opinion of two justices of the United States Supreme Court. And a full reading of Justice Thomas' concurring opinion reveals that all that he was saying was that the Court had not and was not addressing the retroactivity issue. This hardly constitutes persuasive authority that Bradshaw does not warrant retroactive treatment or the claim presented by Mr. Byrd is not properly before this Court at this time.

Completely overlooked by the State in its answer brief is the recent decision by the United States Supreme Court in Danforth v. Minnesota, 128 S. Ct. 1029 (2008). There, the Supreme Court stated:

> The question in this case is whether [Teague v. Lane, 489 U.S. 288 (1989)] constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. We have never suggested that it does, and now hold that it does not.

128 S. Ct. at 1034. Under Danforth, it is clear that the place to look for determining what retroactive effect will be given to Bradshaw v. Stumpf in the state courts of Florida, is this Court

- the Florida Supreme Court.

Yet, the State did not look to this Court or its jurisprudence on this issue, even though Mr. Byrd specifically relied upon this Court's decision in Raleigh. The State did not address the fact that this Court considered the merits of a claim premised upon Bradshaw v. Stumpf, that was raised for the first time in the course of the oral argument before this Court when considering an appeal of the denial of Rule 3.851 relief. Raleigh v. State, 932 So. 2d at 1066 n. 18 ("Raleigh raised this claim at oral argument after filing a notice of supplemental authority.").

This Court considered the merits of Mr. Raleigh's claim under Bradshaw v. Stumpf that was raised for the first time while the appeal was pending, but after the conclusion of the briefing to this Court. In doing so, this Court treated the decision as retroactive[5] and the claim cognizable in Rule 3.851

[5] The State does not make any argument as to whether Bradshaw v. Stumpf should be applied to cases final before the decision issued under the retroactivity principles set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980). In Witt, this Court explained that the doctrine of finality must give way when fairness requires retroactive application. Witt, 387 So. 2d at 925. Given that this Court treated Bradshaw v. Stumpf controlling in Raleigh v. State, a conviction and sentence that was final long before Bradshaw issued, it is clear that this Court treated Bradshaw as retroactive.

proceedings. Relying on that precedent, Mr. Byrd included his Bradshaw v. Stumpf claim in his initial brief before this Court. But for this Court's decision in Raleigh, Mr. Byrd would have sought a relinquishment of jurisdiction in order to present the claim to the circuit court first. See Tompkins v. State, 894 So. 2d 857 (Fla. 2005).[6]

The United States Supreme Court has recognized that procedural bars employed by state courts are valid so long as those bars are regularly and consistently applied. Ford v. Georgia, 498 U.S. 411 (1991). A state is not free to apply such bars haphazardly creating "a trap for the unwary." Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975). Accordingly, Mr. Byrd should receive the same treatment of his Bradshaw v. Stumpf claim that Mr. Raleigh received - consideration of the claim on its merits.[7]

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[6] To the extent that this Court were to agree with the State's position, Mr. Byrd will have to file another Rule 3.851 motion under Tompkins when this appeal is concluded to obtain consideration of his claim premised upon Bradshaw v. Stumpf since this appeal was pending before the one year clock expired and thus the circuit court was left without jurisdiction to entertain the claim. Such an outcome will further delay resolution of Mr. Byrd's collateral challenges to his conviction and sentence of death.

[7] Oddly, the State includes within its "Issue I" a discussion of whether Mr. Byrd's argument is premised upon newly discovered facts or evidence which warrants merits consideration. However, quite clearly Argument I of the initial brief is premised upon the Bradshaw v. Stumpf and Raleigh v. State decisions. It is in

As to the merits of Mr. Byrd's claim, the State attempts to obfuscate:

> Byrd argues, **without any precedent to support him**, that since the State relied upon Sullivan's testimony, at least in part to convict Byrd (along with other evidence, including Byrd's confession), that the State somehow committed a due process violation when it subsequently sought to revoke Sullivan's probation based upon his commission of an unrelated drug offense. In the process of revoking his probation, **the prosecution, unremarkably, attacked the credibility of Sullivan**. However, the prosecutor never argued that Sullivan lied when he testified against Byrd and described Byrd's leading role in the murder.

(Answer Brief at 38)(emphasis added).[8]

First as to precedent, Mr. Byrd clearly and specifically

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Argument II of his initial brief that Mr. Byrd relies upon newly discovered facts and evidence. By placing this contention in the wrong portion of its answer brief, the State is able to camouflage its acknowledgment in footnote 4 of its answer brief that the circuit court addressed the merits of Mr. Byrd's Argument II which was premised upon newly discovered facts or evidence, even though when the answer brief specifically addresses Argument II, the State argues the matter is procedurally barred.

[8] In the last sentence of this quoted passage from the answer brief, the State indicates that it was Sullivan who offered testimony at Mr. Byrd's trial that described "Byrd's leading role in the murder." Conveniently elsewhere in its brief, the State ignores the fact that the only evidence of "Byrd's leading role in the murder" was from Sullivan. The statement Mr. Byrd gave the police indicated that he was not present when the murder occurred. This is significant because the sentencing order imposing a death sentence is premised upon Sullivan's veracity and the accuracy of his testimony as to "Byrd's leading role in the murder."

relied upon both Bradshaw v. Stumpf and Raleigh v. State. And at no time in its brief does the State address or even cite Raleigh v. State.

Second, the proceedings on Sullivan's probation revocation were in fact quite remarkable. The comments were so remarkable that Sullivan's attorney objected, calling the comments "[o]utrageous." Sullivan presented not only his own testimony, but other family members as well, to dispute the veracity of the State's law enforcement officers. In crossing Sullivan, the prosecutor in fact did argue that Sullivan lied at Mr. Byrd's trial when he asked Sullivan about what he told Frank Johnson, Mr. Byrd's lawyer:

> Q You are an admitted liar, are you not?
>
> MR. CURY: Objection. Outrageous.
>
> MR LOPEZ: I can prove that, Judge.
>
> THE COURT: Overruled.
>
> BY MR. LOPEZ:
>
> Q Did you not admit to Frank Johnson that you lied to the Tampa Police Department during the pendency of your murder [sic]?
>
> A I don't quite understand what you mean.
>
> Q Let me direct your attention, sir, to October, 1981, when you were arrested by the Tampa Police Department for the charge of first-degree murder. Do you remember that?

A Yes, sir.

Q Did you give the police a statement that night?

A Yes, sir.

Q Was that statement a lie?

A Parts of it.

Q Okay. You are admitted liar, are you not?

A As far as you look at it, I guess I am.

(Def. Ex. 12 at 122-23; Supp2PC-R468-69).

Sullivan's counsel at the revocation hearing not only objected to the prosecutor's questioning, calling it "[o]utrageous", he vigorously attempted to show in his re-direct how the State had relied upon Sullivan as a credible witness at Mr. Byrd's trial:

Q Did you take the stand to testify on behalf of the State in the one which Frank Johnson was questioning you on?

A Yes, sir.

Q Did the State vouch for you as a witness?

A Yes, sir.

Q Weren't you a critical witness in that trial?

A Yes, sir.

Q Did they call you a liar then when you took the stand –

A No.

Q – to send a man to the electric chair?

A No, sir.

Q They believed you then?

A Yes, sir.

Q You had conversations outside the courtroom with the State Attorney?

A Yes, sir, quite a few times.

Q They believed you then?

A Yes, sir.

Q They put you on the witness stand?

A Yes, sir.

Q Did they call you a liar when you were on the witness stand?

A No, sir.

(Def. Ex. 12 at 126; Supp2PC-R471). Clearly, Sullivan's counsel believed that the prosecutor was taking a position at the revocation hearing that was inconsistent with his position at Mr. Byrd's trial.[9]

[9] At Mr. Byrd's trial, the prosecutor argued:

> The first time we knew of what happened here is April 19th, when Ronald Sullivan, after being given probation, promised probation for truthful testimony, came and gave us a statement implicating Mr. Byrd in this homicide. If Mr. Sullivan had told Mr. Ober and myself, "I did it, guys, Wade Byrd didn't have anything to do with it," we would have been bound by those plea negotiations. He would have still received

Mr. Lopez, as the prosecuting attorney, argued for revocation of Sullivan's probation. Mr. Lopez stated that the testimony of Sullivan's family could be explained by one fact: "They do not want to see this young man go to prison." (Def. Ex. 12 at 128; Supp2PC-R473). The clear inference was that Sullivan and his family lied on the witness stand in order to keep him from going to jail.[10]

The State absolutely did take inconsistent positions in Mr. Byrd's trial and in Sullivan's revocation hearing within the meaning of the due process principles outlined in Bradshaw v. Stumpf and in Raleigh v. State. The State vouched for

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> probation. My point being, I don't think he has got any motive to come in here and purposely try to put somebody in prison or in the electric chair. He would have been given probation either way.
>
> If Mr. Sullivan was going to go lie to you, he was going to lie to us, would he admit putting his hands around the lady's neck and strangling her? It's not pleasant, I know that, but he admits participating in a first-degree murder.

(R1206-07).

[10] Subsequently, Sullivan testified against Endress at his trial and admitted that he had testified falsely at the revocation of probation hearing and that he got his family members to also testify falsely in order to vouch for his false testimony. Sullivan acknowledged that his false testimony and his family members false testimony was all presented in order to try to avoid being incarcerated.

Sullivan's credibility and told the jurors that they could believe Sullivan had testified truthfully.[11] Yet, the State's position at the revocation hearing was that Sullivan was a liar and that nothing he said could be believed. This flipflop isn't just a change in of opinion; it goes to the very integrity of the criminal process. It goes to the prosecutor's obligation to seek justice. Either Sullivan is worthy of belief and worthy of receiving probation on a murder charge in exchange for his testimony or he isn't worthy of belief and in fact will say or do anything to avoid incarceration. Premising a death sentence upon such testimony in light of the State's position at the revocation hearing violated due process under the principles

[11] The State in its answer brief suggests that Sullivan's testimony at Mr. Byrd's trial was inconsequential because of the other incriminating evidence, including Mr. Byrd's statement to law enforcement. But clearly, the very fact that the State gave Sullivan probation in order to secure his testimony against Mr. Byrd vividly demonstrates that the State was willing to pay an extremely high premium for the testimony because of concern that the case was weak without the testimony. The State assured the jury that the deal with Sullivan was necessary. It is also clear from a statement the prosecutor made to the judge at the revocation hearing that the judge had not wanted to agree to probation for Sullivan, but only did so because of the assurances provided by the prosecutors that it was necessary (Supp2PC-R473-74)("You had serious reservations about doing that due to the circumstances of that murder, but you did it because we asked you to"). Clearly, the State sold the deal with Sullivan at the time on the basis that it was necessary in order to obtain a conviction and sentence of death. To argue now that the testimony was inconsequential and unnecessary is just wrong.

outlined in Bradshaw v. Stumpf and Raleigh v. State. Relief is warranted.

**ARGUMENT II**

The State in addressing Mr. Byrd's Argument II launches a double barrel attack. It argues that the argument is procedurally barred claiming that there is nothing new, and it argues that the Mr. Byrd is really just trying to re-litigate his previous Brady, Giglio, and ineffective assistance of counsel claims (Answer Brief at 40). The State's arguments are erroneous both factually and legally.

**A. The New, Previously Unavailable Information**

Mr. Byrd's Argument II is premised upon new information that had been previously unavailable which when investigated led to new cognizable facts that supported Mr. Byrd's constitutional challenges to his conviction and sentence of death. The State argues that the entirety of Mr. Byrd's argument is procedurally barred and was so found by the circuit court:

> Byrd does not even acknowledge, much less attempt to overcome the clear procedural bar found by the trial court below.

(Answer Brief at 42).[12]

[12] The State's argument is premised upon Rule 3.851(d)(2)(A), which provides:

However as the State acknowledges later in the answer brief, the State's assertion that the circuit court found the entirety of Mr. Byrd's claim procedurally barred is simply not true:

> Finally, although the trial court did not address the timeliness of appellant's claim below, it is clear this claim could have been raised in Byrd's initial motion for post-conviction relief.

(Answer Brief at 48).[13] Thus as the State concedes in this quoted passage, the circuit court did not find as a matter of fact that Mr. Byrd's claim was untimely and therefore procedurally barred.[14] Stating this more directly, the circuit

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> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence[.]

[13] Again, it is clear that the State's argument that the claim is procedurally barred is premised upon Rule 3.851(d)(2)(A) and the assertion that Mr. Byrd' claim is untimely. According to the State, the facts which Mr. Byrd argues are new and were not previously available, could have been discovered sooner.

[14] By parsing the words and phrases employed, the State sidesteps actually saying what its argument is, *i.e.* that the circuit court erred in failing to find as a matter of fact that Mr. Byrd's claim was not premised upon new and previously unavailable information. But of course to so clearly and directly make its argument would mean having to argue that competent and substantial evidence did not support the circuit court's factual determination that the information gleaned from Endress in 2002 could not have been obtained before because Endress had refused to speak with Mr. Byrd's collateral counsel.

court accepted Mr. Byrd's claim as timely filed.

The record in fact demonstrates that Endress had refused to talk to Mr. Byrd's collateral counsel until early 2002. Thus, Mr. Byrd could not have ascertained what Endress had to say and what facts could be developed as a result, until 2002.

Moreover, contrary to what the State asserted in its answer brief, Mr. Byrd clearly explained to this Court in his initial brief what evidence in support of his constitutional claim he was able to obtain once Endress finally agreed to talk:

> In February of 2002, Mr. Byrd initially filed the pending motion to vacate after Endress for the first time agreed to speak to undersigned counsel's investigator. At that time, he indicated that Sullivan was a liar and that he had lied in his testimony against both Mr. Byrd and Endress. Endress explained that Sullivan's testimony during his (Endress's) trial was false; according to Endress, Sullivan's story, as told at Mr. Byrd's trial and again at Endress's trial, was simply false. Endress also explained that he has continually been advised not to talk to anyone about his conviction and/or sentence, and thus until February of 2002 refused to talk to anyone about the case. Endress also stated that he was offered a life sentence to testify against Mr. Byrd but refused, and the State tried to give him a death sentence.
>
> In September of 2002, Endress took the witness stand and testified. Endress testified that Sullivan was a liar who had lied to get benefit for himself. During his testimony, Endress indicated that when he was initially interrogated in October of 1981, law enforcement officers accused him of having committed a

number of robberies with Sullivan.[15] Endress indicated it would not surprise him if Sullivan had committed any or all of the 13 robberies.[16] Endress's testimony thus revealed new information for the first time that Sullivan got more consideration than he testified to.

Endress's testimony in this regard finds support in Det. McAllister's report that Det. Carter had gone to talk to Sullivan on December 17, 1981, about burglaries (Def. Ex. 16). It is also supported by the testimony of Francisco Garcia in his February 24, 2004, testimony that Endress had advised him while they were incarcerated together in early 1982 that the police were investigating him for "a few burglaries." Garcia indicated that this was "10, 15, 20. I am not sure." (2PC-R514).

However, the fact that law enforcement was investigating Endress and Sullivan for 13 robberies was of more significance than simply demonstrating Sullivan's testimony about the consideration he received was false. This undisclosed evidence provided corroboration of Mr. Byrd's defense that Sullivan and Endress robbed Debra Byrd as part of their pattern. After the robbery went awry and the police came looking for them, they each decided to try to shift culpability to Mr. Byrd by alleging that he put them up to killing his wife. At trial, the defense maintained that Sullivan and Endress had

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[15] In this regard, Endress stated, "I do remember that, you know, we were given a lot of robbery cases at that time. He and I - - I think both and - - or the robbery cases that he gotten were ones that they also gave me." (2PC-R1564). Endress testified that he "had seen [Sullivan] strong arm people before hisself [sic]. So I mean I wouldn't have put that passed him." (2PC-R1565).

[16] When Mr. Byrd alleged in 1989 collateral proceedings that "other uncharged crimes" were not pursued against Sullivan in return for his testimony, the trial prosecutors testified that they were unaware of any other uncharged crimes involving Sullivan (PC-R95, 143).

> committed the murder and that Mr. Byrd was not involved. The false and misleading testimony from Sullivan precluded the jury from knowing of Sullivan's and Endress's criminal activity that would have provided powerful support for the defense. Mary Jane Taylor's allegation that Endress forced his way into her residence at knife point and robbed her (Def. Ex. 13) and Benjamin Parry's allegation that Sullivan robbed him at gunpoint (Def. Ex. 14) provide corroboration of Mr. Byrd's defense at trial that Endress and Sullivan committed the murder and falsely tried to shift the blame to him. Ms. Taylor's description of Endress's actions toward her demonstrate a course of conduct by Endress that is parallel to his actions against Ms. Byrd as reported by Debra Williams and establishes a modus operandi.

(Initial Brief at 81-83).

Thus within the meaning of Rule 3.851(d)(2)(A), "the facts upon which the claim is predicated were unknown to the movant or his attorney" prior to Endress' decision in 2002 to start talking. There is competent and substantial evidence to support the circuit court's decision to treat the Rule 3.851 motion as timely filed.

**B. Cumulative Consideration of Previously Facts Supporting Constitutional Claims Required by this Court's Jurisprudence**

As to the State's argument that the circuit correctly refused to revisit any aspect of Mr. Byrd's claim that had been raised in his previous motion to vacate, the State ignores this Court's jurisprudence. The State, just like the circuit court, first goes awry in its failure to understand the difference

between a fact and a claim.

Under Rule 3.851(d)(2)(A), the issue of timeliness revolves around the existence of new "facts" that support the "claim". The rule does not require the claim to be new or previously unknown, but that the "facts" set forth in the motion upon which the claim is predicated must be new. When new "facts" are presented timely, the motion to vacate is properly before the court.

In Lightbourne v. State, 742 So. 2d 238 (Fla. 1999), this Court was presented with a case in which a previous motion to vacate had been litigated. In the previous motion, a Brady claim was presented based upon the State's failure to disclose favorable information regarding the State's relationship with two jailhouse informants and whether the informants had been recruited to act as State agents. See Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). After an evidentiary hearing was held and adverse ruling issued on Mr. Lightbourne's Brady claim, a new motion to vacate was filed in 1994 relying upon an affidavit from a witness (Emanuel) who Mr. Lightbourne alleged that he had been unable to previously find. Mr. Emanuel indicated in his affidavit that he had been approached by the State while incarcerated with Mr. Lightbourne about acting as an

agent for the State in order to obtain an incriminating statement from Mr. Lightbourne. Thus, Mr. Emanuel's affidavit was alleged by Mr. Lightbourne to constitute new facts, *i.e.* newly discovered evidence, that supported a previously presented and rejected claim.

This Court, after finding that Mr. Emanuel's affidavit was new because he could not have been previously discovered through the exercise of due diligence, explained the analysis to be used when evaluating the claim that the affidavit supported, a claim that had been previously considered and denied on the merits when the new evidence was unavailable. This Court clearly held that the new facts required revisiting the merits of the previously rejected claim. This was necessary to insure that the requisite cumulative analysis occurred:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision.**
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted,

> "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995).**

Lightbourne, 742 So. 2d at 247-248(emphasis added)(citations omitted). Accordingly, this Court held that a remand was necessary:

> We remand for an evidentiary hearing as to Emanuel's testimony and for the trial court to consider the cumulative effect of the post-trial evidence in evaluating the reliability and veracity of Chavers' and Carson's trial testimony in determining whether a new penalty phase hearing is required, either under Lightbourne's Brady or newly discovered evidence claims.

Lightbourne, 742 So. 2d at 249.

Mr. Byrd relied upon the decision in Lightbourne in his initial brief to argue that the circuit court's refused to fully evaluate all of the evidence supporting his claim, even evidence previously heard in connection with the prior Rule 3.850 motion:

> In Lightbourne v. State, 742 So. 238 (Fla. 1999), this Court, in explaining the analysis to be used when evaluating a successive motion for post-conviction relief, reiterated the need for a cumulative analysis. Accordingly, this Court cannot limit its consideration solely to the misconduct detailed above. Clearly, a

> cumulative analysis of all of the withheld evidence undermines confidence in the outcome of the trial and requires that this Court grant a new trial. In particular, the undisclosed exculpatory evidence causes confidence to be undermined in the reliability of the resulting death sentence. Rule 3.850 relief must issue.

Initial Brief at 89-90).[17]

Despite Mr. Byrd's reliance upon Lightbourne, the State asserts in its answer brief that he has made no attempt to justify why the previously rejected Brady/Giglio claim must be reconsidered and evaluated cumulatively with the new and previously unknown facts that support the Brady/Giglio claim (Answer Brief at 40, 42). Further, the State does not address, let alone cite, Lightbourne anywhere in the answer brief.[18]

Under Lightbourne and Roberts, a movant in a successor

[17] Lightbourne is not the only decision by this Court making it clear that previously rejected claims must be revisited where Rule 3.851(d) (2) (A) is satisfied, and new facts are prsent that support the previously rejected claim. This Court relied upon Lightbourne to reverse and remand the summary denial of a successive motion to vacate in Roberts v. State, 840 So. 2d 962, 972 (Fla. 2002) ("if the trial court determines on remand that Haines' testimony is credible [i.e. that the evidence is new], then the Brady claims raised in Roberts' first postconviction motion must be considered in a cumulative analysis"). Mr. Byrd also relief upon Roberts in his initial brief (Initial Brief at 95).

[18] An examination of the State's Table of Authorities shows that Lightbourne v. State does not appear anywhere in the answer brief. The same is true of Roberts v. State. It is not addressed in the answer brief.

motion to vacate must first meet the threshold set by Rule 3.851(d)(2)(A), and demonstrate that there is new and previously unavailable evidence that authorizes the filing of the claim. Once the threshold is met, this Court has made it very clear that the analysis of a Brady claim, a Strickland claim, and/or a newly discovered evidence claim must include consideration of the facts and evidence submitted in a previous motion in support of the claim or claims. All of the evidence from the trial and prior motions to vacate must be evaluated cumulatively to determine whether relief is warranted.

But because the State has ignored Mr. Byrd's reliance upon Lightbourne and Roberts, the analysis contained in the answer brief of Argument II is completely defective. It fails to conduct a cumulative analysis in which all of the evidence is considered in determining whether relief is warranted.[19]

[19] For example, the State asserts: "It is unclear why Byrd re-alleges his previously rejected claims regarding the prosecutor receiving money from his brother-in-law for a civil referral." (Answer Brief at 42 n. 5). It is the State's position that because this Court found in an earlier opinion that relief was not warranted on Mr. Byrd's previously presented claim that this was favorable evidence that the State failed to disclose, these facts cannot be considered now in determining whether the State complied with its due process obligations under Brady. However, the State's position is simply wrong. The State's failure to disclose information that could be used to impeach its decision to grant Sullivan immunity in order to secure his testimony against Byrd and thereby assist the prosecutor's brother-in-law

Instead the State urges precisely what this Court rejected in Lightbourne and Roberts, a piecemeal evaluation of only the new facts to determine whether confidence is undermined in the outcome. The State argues that the circuit court correctly refused to consider the evidence presented at the 1989 evidentiary hearing that supports Mr. Byrd's claim. Since it clear from the State's argument that it acknowledges that the circuit court refused to consider the evidence from the 1989 evidentiary hearing, the result here must be the same as in Lightbourne and Roberts. The denial of Mr. Byrd's motion to vacate must be reversed and the matter remanded for compliance with the dictates of this Court's precedent.

**C. What Constitutes Favorable Evidence**

When addressing evidence or information that Mr. Byrd asserted was favorable and withheld by the prosecution, the State repeatedly refuses to recognize the favorable nature of the withheld evidence and/or information. Apparently by refusing to see the favorable aspect of the withheld evidence and/or information, the State believes that it can convince this

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in his efforts to gain insurance proceeds is Brady material. It must be evaluated cumulatively with the other withheld evidence to determine whether confidence is undermined in the outcome of Mr. Byrd's trial and sentencing proceeding.

Court to affirm the denial of relief. However as matter of law, the State's stingy reading of the word favorable is in error.

An example of this is the State's arguments regarding Mr. Endress' testimony that he and Sullivan were facing "13 pending robbery" charges (Answer Brief at 47). The State's position is that for this to qualify as favorable information within the meaning of Brady, Mr. Byrd must establish "the existence of an agreement with the State to dispose of those charges in exchange for [Sullivan's] testimony against Byrd" (Answer Brief at 47). According to the State, "[t]hat Sullivan may have been investigated for, or implicated in, unrelated crimes does not constitute relevant impeachment material" (Answer Brief at 48).

The State's argument fails to cite or consider Davis v. Alaska, 415 U.S. 308 (1974), as to what constitutes impeachment that a defendant is entitled to present. There, the United States Supreme Court stated:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." Douglas v. Alabama, 380 U.S., at 419. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the

> defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. Alford v. United States, 282 U.S. 687 (1931), as well as of Green's possible concern that he might be a suspect in the investigation.

Davis, 415 U.S. at 317-18 (footnote omitted).

Throughout its argument, the State ignores the principle outlined in Davis and further amplified in Kyles v. Whitley, 514 U.S. 419 (1995). Under these cases, it isn't a matter of the defense proving an undisclosed agreement existed in order to impeach a State's witness. As a matter of constitutional law, the defense is entitled to present circumstances that it can argue affords a basis for an inference of bias or motive or a reason to curry favor with the State or law enforcement.[20] The Supreme Court in Kyles made it very clear that the materiality analysis of a Brady claim requires looking at the undisclosed information from the defenses perspective and how the defense could have used the information had its existence been disclosed.[21] Throughout the State's argument regarding Mr.

[20] In Kyles, 514 U.S. at 442 n. 13, the Supreme Court noted that the undisclosed Brady material "would have revealed at least two motives" for a witness to come forward to implicate Kyles in the murder, *i.e.* "[t]hese were additional reasons [for the individual] to ingratiate himself with the police".

[21] Throughout the materiality analysis that the United States Supreme Court conducted in Kyles, the Court considered how the

Byrd's claim under Brady, the State suggests that its proper to engage to determine whether the undisclosed information was favorable by looking at the suppressed information from the prosecutor's perspective, i.e. none of the suppressed information changes the prosecutor's opinion regarding the defendant's guilt, therefore it isn't material. But, the State clearly ignores Kyles, a case conspicuously absent from its answer brief.[22]

However, the fact that law enforcement was investigating Endress and Sullivan for 13 robberies was of more significance than simply whether Sullivan got a deal of those robberies. This undisclosed evidence provided corroboration of Mr. Byrd's defense that Sullivan and Endress robbed Debra Byrd as part of their pattern and course of conduct. After the robbery went awry and the police came looking for them, they each decided to try to shift culpability to Mr. Byrd by alleging that he put

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defense "could have" used the Brady material at trial, what "opportunities to attack" portions of the State's case, and what the defense "could have argued." 514 U.S. at 442 n. 13, 446, 447, 449.

[22] Not only was Kyles decided by the United States Supreme Court and thus the law of the land, the Florida Supreme Court has recognized that it is the touchstone of the materiality standard used to analyze Brady claims. *See* Lightbourne v. State, 742 So. 238 (Fla. 1999); Young v. State, 739 So.2d 553, 559 (Fla. 1999).

them up to killing his wife. At trial, the defense maintained that Sullivan and Endress had committed the murder and that Mr. Byrd was not involved. The false and misleading testimony from Sullivan precluded the jury from knowing of Sullivan's and Endress's criminal activity that would have provided powerful support for the defense. Mary Jane Taylor's allegation that Endress forced his way into her residence at knife point and robbed her (Def. Ex. 13) and Benjamin Parry's allegation that Sullivan robbed him at gunpoint (Def. Ex. 14) provide corroboration of Mr. Byrd's defense at trial that Endress and Sullivan committed the murder and falsely tried to shift the blame to him. Ms. Taylor's description of Endress's actions toward her demonstrate a course of conduct by Endress that is parallel to his actions against Ms. Byrd as reported by Debra Williams and establishes a modus operandi.

But there is still more significance to Endress' claim that there were 13 or so robberies that he and Sullivan were being investigated for. At that time of the 1989 hearing, evidence regarding the undisclosed December 17, 1981, police report written by Det. McAllister was presented.[23] This report

[23] The claim was presented in the alternative as either evidence of a Brady violation or evidence of ineffective assistance of counsel because the defense attorney, Frank Johnson, had lost

demonstrates that Hillsborough County Sheriff detectives spoke to Ronald Sullivan regarding "Burglarys" on December 17, 1981. Though "Burglarys" is clearly misspelled, the spelling clearly conveyed that more than one burglary was at issue. The State Attorney's Office was copied with the report. The report indicates that Mr. Sullivan discussed his knowledge of where Mr. Endress "trew" [sic] the gun," and that he wanted the homicide detective to know that "He could give us Wade and Indress [sic] really good." The report finally indicates that the homicide detective, Det. McAllister, was to "re-interview Sullivan in the near futher [sic]". Notice of this statement of Sullivan, the prime State's witness, was not included in the January 6, 1982, Notice of Discovery (R1728). This evidence completely impeached Sullivan's testimony that he had not advised the State before the deal with him was made as to whether he had anything to say that inculpated Mr. Byrd.[24]

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his trial file, and it could not be reviewed to ascertain definitively whether the police report was in defense counsel's possession. Either the State unreasonably failed to disclose or defense counsel unreasonable failed to present the evidence to the jury.

[24] Also presented in 1989 was the fact that Mr. Ober had referred Debra Byrd's sister to his brother-in-law for representation. As a result of the conviction of Mr. Byrd, Ms. Byrd's sister was able to obtain life insurance proceeds that otherwise would have gone to Mr. Byrd. Mr. Ober's brother-in-

Now, new evidence in the form of Endress' testimony sheds new light on this police report that was unavailable in 1989. Under Kyles v. Whitley, this new evidence must be evaluated cumulatively with the previously presented evidence. Endress revealed that he and Sullivan were suspects in approximately 13 other robberies. This evidence is consistent with the December 17, 1981, police report, and provides an indication of what Sullivan was being questioned about and why he was offering to be a witness against Mr. Byrd.[25] It makes the impeaching value of the police report even greater; it goes to Sullivan's motive, a matter that Mr. Byrd was entitled to delve into. Davis v. Alaska.

In order to get the whole picture, all of the undisclosed evidence must be evaluated cumulatively. This was not done in the circuit court. When proper cumulative consideration is

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law received a large contingency fee. Shortly thereafter, the brother-in-law gave Mr. Ober approximately 10 percent of the contingency fee. The fact that Mr. Ober's brother-in-law was representing Ms. Byrd's sister and stood to make a large fee if Mr. Byrd was convicted was not disclosed at the time of trial.

[25] The State argues that "[i]mpeachment of [Sullivan] on an uncharged collateral crime, has no bearing on the fairness of Byrd's trial." (Answer Brief at 50). However, that is simply not true where the witness is being investigated for the crime and the witness is aware that he is being investigated. Davis v. Alaska.

given, confidence is undermined in the conviction and even more so in the sentence of death.[26]

## CONCLUSION

In light of the foregoing arguments, Mr. Byrd requests that this Court reverse the lower court, vacate Mr. Byrd's conviction and death sentence and grant other relief as set forth in this brief.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Scott A. Browne, Assistant Attorney General, Office of Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, on August ___, 2008.

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of

[26] Again, the fact that the State gave Sullivan probation in exchange for his testimony against Mr. Byrd vividly demonstrates the extremely high premium paid for his testimony. The State clearly felt the case against Mr. Byrd was weak without Sullivan's testimony. The prosecutor had to convince the judge presiding over Sullivan's case that the deal was warranted because the judge had not wanted to agree to probation for Sullivan (Supp2PC-R473-74)("You had serious reservations about doing that due to the circumstances of that murder, but you did it because we asked you to").

Appellate Procedure.

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