IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-761

LOWER TRIBUNAL No. 89-495

MARK ALLEN GERALDS,

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. GERALDS' CLAIM THAT HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

A. Brady v. Maryland, 373 U.S. 83 (1963).

1. Suppression[1]

The State argues that Mr. Geralds has not shown that any evidence was suppressed by the prosecution. See Answer at 38-47. Like the lower court's order, the State's argument is not supported by the record and ignores the trial prosecutor's testimony at the evidentiary hearing. At the evidentiary hearing, the trial prosecutor, Joe Grammer, testified that he did not have any of Investigator Jimmerson's[2] handwritten notes (PC-R. 2303)("The handwritten notes, I don't believe I've seen those before and then it would be difficult for me to disclose them."). Thus, the trial prosecutor admitted that Defense

[1]The State fails to address the suppression of Defense Exhibits 11, 16, 23, 28 and 32.

[2]Panama City Police Investigator Jimmerson was the lead detective in the Tressa Pettibone homicide investigation.

Exhibits 1, 7, 11, 13, 16, 23 and 28 had not been disclosed to the defense. The trial prosecutor did not consider his failure to disclose as the suppression of evidence since he had not seen or had possession of the notes prior to the postconviction proceedings (PC-R. 2303).

However, the prosecutor's understanding of what suppression or non-disclosure meant pursuant to Brady was simply in error. In Strickler v. Greene, 527 U.S. 263, 281 (1999), the United States Supreme Court reiterated that the State has an absolute duty to learn of any favorable evidence known to individuals acting on the government's behalf. See also, Kyles v. Whitley, 514 U.S. 419, 438 (1995)(holding that the Brady rule also encompasses evidence "known only to police investigators and not to the prosecutor."). And, this Court has held that suppression, in terms of the Brady analysis, includes creation and/or possession of notes and documents by law enforcement and not the prosecutor. See Rogers v. State, 782 So. 2d 373, 381 (Fla. 2001).

Therefore, based on the prosecutor's admission at the evidentiary hearing, Defense Exhibits 1, 7, 11, 13, 16, 23 and 28 were not disclosed to the defense.

Likewise, the prosecutor also testified at Mr. Geralds'

evidentiary hearing that he did not disclose any of the FDLE Analysts' notes relating to their testing and analysis. See Def. Exs. 31, 32 and 34.[3] In response to questions about the disclosure of FDLE analysts' notes the trial prosecutor stated:

Q: Were there any notes –

A: This kind of notes, no.

Q: – about testing and analysis and conclusions?

A: I don't believe so.

(PC-R. 2701). Therefore, based on the prosecutor's admission at the evidentiary hearing, Defense Exhibits 31, 32 and 34 were not disclosed to the defense. (Id.). Though the lower court did not address Defense Exhibits 31, 32 and 34 in its order, based on the trial prosecutor's testimony and the caselaw, Mr. Geralds has shown that the documents were suppressed. See Kyles v. Whitley, 514 U.S. 419, 438 (1995).

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[3]The State incorrectly identifies Defense Exhibit 34 as an FDLE report. See Answer at p.44-5, n. 3. It is not. Defense Exhibit 34 is the handwritten notes by FDLE Analyst Smith. The notes concern the testing and analysis performed on the hair and fibers found at the crime scene. According to the notes, "several" hairs were removed from the left hand of the victim. See Def. Ex. 34. The State's assertion as to Defense Exhibits 31 and 34 – the handwritten FDLE analysts' notes, that "Geralds failed to present testimony or any other evidence that the State failed to disclose that evidence to the defense" is a blatantly false representation to this Court. Id. The trial prosecutor specifically testified that these notes were not disclosed (PC-

Likewise, the prosecutor also testified at Mr. Geralds' evidentiary hearing that he did not disclose the records regarding Danford's criminal record. See Def. Exs. 8 and 10. The trial prosecutor testified that he had never seen the information about Danford's criminal record before Mr. Geralds' postconviction proceedings commenced:

> Q: Whenever Mr. Danford made that statement as to not having a record, were you aware of the cases that I showed you from the clerk's office?
>
> A: No. I doubt if we ever ran a rap sheet on him. But we may have. But, again, if we had been aware of that we would have seen that he had no, didn't have a record. But I don't recall, I don't recall before today ever seeing anything about driving a vehicle on the sand dune or failure to record a transaction as a pawn broker or this – well, actually before today. But after you got the files or after CCR got the files I saw this, the 1990 case where Bill Lewis was involved. But that was the first time I saw that, as well.
>
> Q: But as far as the other two cases involving failure to record?
>
> A: I don't recall ever seeing those before just now when you handed them to me.

(PC-R. 2253). Therefore, based on the prosecutor's admission at the evidentiary hearing, Defense Exhibits 8 and 10, and the information contained therein were not disclosed to the defense. (Id.). Contrary to the lower court's order and the State's

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R. 2701).

argument, Mr. Geralds has shown that the information was suppressed.[4] See Kyles v. Whitley, 514 U.S. 419, 438 (1995).

As to Defense Exhibit 25, the photograph of a shoe print at the crime scene, like the lower court, the State argues that if the photograph was "available" to Mr. Geralds, it was not suppressed. See Answer at 40. However, availability of evidence is not the equivalent of disclosure. In Strickler v. Greene, 527 U.S. 263, 281 (1999), the Supreme Court found items to have been suppressed and a Brady violation to have resulted when the prosecution failed to turn over exculpatory evidence, even though employing an "open file policy". The Supreme Court made clear that it is reasonable for defense counsel to rely on the "presumption that the prosecutor would fully perform his duty to disclose all exculpatory evidence." Id. at 284. Thus, based on the trial prosecutor's testimony that he did disclose the photograph and Strickler, Mr. Geralds has shown that the photograph was suppressed.

To sum up, the trial prosecutor testified that Defense Exhibits 1, 7, 8, 10, 11, 13, 16, 23, 25, 28, 31, 32 and 34 were not disclosed.

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[4]The State does not address whether Defense Exhibit 10 was suppressed. Rather the State only argues that it is not

As to Defense Exhibits 20 and 36,[5] the State argued that Mr. Geralds had not established that the reports were not disclosed. See Answer at 39, 44-5, n. 3. Defense Exhibits 20 and 36 were FDLE reports authored by Analyst Ziegler and Smith, respectively. As the State concedes neither report appears on the detailed discovery responses filed whenever the prosecutor turned over discovery.[6] See R. 2242-7, 2263, 2267, 2275-80, 2283-93, 2325, 2331, 2335-7. However, the State argues that because the analysts' names were provided through discovery and because a submittal form was disclosed that indicated evidence had been submitted for analysis that the reports were not suppressed. See Answer at 39. However, providing the analysts' names and/or transmittal forms showing the submission of evidence for testing is not the equivalent of disclosing the reports from the analysis, including the conclusions of the analysts. Thus, contrary to the State's argument, the reports were suppressed.

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material. See Answer at 42-43.

[5]Mr. Geralds' pleads his allegations concerning Defense Exhibits 20 and 36 in the alternative. Should this Court find that the reports were disclosed, then trial counsel was ineffective in failing to present the results of the hair and serological analysis. The State does not address the reports in the context of ineffective assistance of counsel other than to say that they were disclosed.

[6]And, neither report was found in trial counsel's file.

2. Materiality and Prejudice[7]

The United States Supreme Court has held that the materiality inquiry is not a "sufficiency of the evidence" test. The burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 120 S.Ct. 1495 (2000); Kyles v. Whitley, 514 U.S. 419, 434 (1995). The United States Supreme Court has held:

> A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Id.

And, in assessing the prejudice of the suppressed documents and the evidence obtained in light of the information, the State, like the lower court addresses each exhibit. See Answer at 38-45. However, in Kyles v. Whitley, 514 U.S. 419, 437 (1995), the United States Supreme Court held that the state's

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[7]The State fails to address the materiality or prejudice of Defense Exhibits 1, 7, 11, 16, 20, 23, 28 and 32 and the evidence that the suppressed documents lead postconviction counsel to develop.

disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, **not on the evidence considered item by item**. (Emphasis added).

In Mr. Geralds' case undoubtedly evidence that would have impeached the State's theory of the case and allowed the defense to "attack the reliability of the investigation", Kyles, 514 U.S. at 446, was material and places the whole case in a new light.

As to the undisclosed documents and evidence therefrom concerning another individual being responsible for the crime, such evidence certainly undermines confidence in the verdict. The undisclosed notes indicated that "most of Bay County knew [Mr. Pettibone] was out of town". See Def. Ex. 16. Thus, Mr. Geralds was not the only individual who was aware that Mr. Pettibone was out of town.[8] More importantly, blood was found on a handkerchief found at the crime scene that did not match Mr. Geralds, the victim or anyone in the victim's family (see Def. Exs. 20 and 28); hair found in the victim's left hand matched neither the victim[9] nor Mr. Geralds (see Def. Ex. 34 and 36); and

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[8]Indeed, the victim specifically told Mr. Geralds that she would be traveling to meet her husband in the near future.

[9]The only way trial counsel would have learned that the

a shoe impression was photographed at the scene that was dissimilar to the Nike shoe impression (see Def. Ex 25, PC-R. 2492)[10]. The undisclosed forensic evidence was certainly significant due to the condition of the victim and the crime scene (PC-R. 2496), and suggested that someone other than Mr. Geralds was present at the crime scene and involved in a struggle with the victim.

In addition, the evidence surrounding the identification of the herringbone necklace and red Bucci sunglasses were important pieces of the prosecution's theory that the items linked Mr.

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hairs found around the victim and in her hand was not her own was to have been provided the handwritten notes made during the hair analysis by the FDLE analyst. Though Mr. Geralds contends that the analyst's report was not disclosed, the report does not comment as to the comparison of the unknown hairs to the victim's known hairs. In order to obtain such information it is necessary to read the descriptions of the unknown hair and the standards which is only contained in the analyst's notes. See Def. Ex. 34.

[10]The State briefly addressed the materiality of Defense Exhibit 25 claiming that "at most, [it] merely reflects that Geralds did not act alone." See Answer at 40. However, the forensic evidence not only included another individual as being at the crime scene but excluded Mr. Geralds. There was no physical evidence linking Mr. Geralds to being present at the crime scene. No hair, fibers, blood or fingerprints that matched Mr. Geralds in the victim's home or car. Since the victim and her assailant struggled it is significant that someone else's hair, blood and fingerprints were found at the scene. And, obviously the evidence would have a significant impact on Mr. Geralds' culpability in the crime both at the guilt phase and the penalty phase.

Geralds' to the crime. However, reviewing the evidence presented at the evidentiary hearing it is clear that the suppressed evidence causes the State's theory as to Mr. Geralds' possession of this evidence to be undermined. Defense Exhibit 1 is an itemized list of jewelry that was compiled on February 15, 1989, before Mr. Geralds' became a suspect in the crimes, during Detective Jimmerson's interview with the Pettibone family. The family provided a description of missing items from the house. The herringbone necklace that was subsequently located at the pawn shop was not included on the list, though a description and drawing of another herringbone necklace was listed. See Defense Exhibit 1. The descriptions of the items were not contained in any police report. Likewise, the Bucci sunglasses were not included in the original list of missing items.[11] The obvious import of the document is that trial counsel could have impeached the witnesses who testified that the herringbone necklace recovered from the pawn shop and the red Bucci sunglasses belonged to the victim and were missing from the

[11]The sunglasses were added to the list after Mr. Geralds had become a suspect and law enforcement had obtained the sunglasses from Vicky Ward.

home.[12]

Furthermore, Defense Exhibit 7 is Detective Jimmerson's handwritten note from his interview with Tony Swoboda which occurred three days before the trial. Swoboda corroborated Mr. Geralds' statement that he (Mr. Geralds) had purchased a herringbone necklace from Swoboda "under the table". Though Mr. Geralds maintained that he did not pawn a necklace on the day of the crimes, certainly it would have been crucial to show the jury that if they believed Danford, then the necklace belonged to Mr. Geralds and was not taken from the victim's home.[13] The trial prosecutor conceded that Swoboda's testimony concerning the sale of the necklace would have explained Mr. Geralds' alleged comments to Danford as to the value of the necklace (See PC-R. 2245, 2347).

As to the veracity of whether Mr. Geralds ever did pawn a necklace at Danford's pawn shop, the documents concerning

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[12]At trial, the victim's husband and daughter testified about the necklace and sunglasses.

[13]Trial counsel was aware of Swoboda because he was a listed as a potential State witness. The note introduced as Defense Exhibit 5 was taken during an interview with Mr. Geralds in which Mr. Geralds informed his counsel about Mr. Swoboda. Defense counsel did not know that Swoboda had been questioned by law enforcement or that he reported that the sale had been "under the table". See Def. Ex. 7.

Danford's criminal history (see Def. Ex. 8 and 10), would have impeached Danford's testimony that he received a herringbone chain from Mr. Geralds and shown that he was simply not a credible witness. Likewise, Def. Ex. 11 is a handwritten note that indicated that the pawn ticket that lead law enforcement to the pawn shop was not discovered until almost a week after Danford came forward.[14]

The State argues that Mr. Geralds has not proven that Danford received a "deal" for his cooperation or that any "arrangement" existed. See Answer at 43. However, the undisclosed information concerning Danford's criminal history would have been useful to impeach his credibility; to show that he committed perjury during his deposition; and would have provided powerful information for the jury to consider as to Danford's motives for testifying, i.e., the charges against

[14]Contrary to the State's assertion, Mr. Geralds does deny that he pawned a necklace on the day of the crime. See Answer at 43. Indeed, as to the discovery of the pawn ticket in Mr. Geralds' wallet, Mr. Geralds has introduced evidence showing that a wallet was not even in his possession at the time he was arrested; his driver's license had been suspended and taken away from him at the time he allegedly gave it to Danford; and notes by law enforcement indicate that the pawn ticket was discovered on March 8, 1989, seven days after taking the victim's family members to Danford's pawn shop to identify the herringbone chain (Def. Exs. 11 and 46).

Danford's were dropped before Mr. Geralds' trial.[15] See Def. Ex. 8 and 10).

Finally, since defense counsel attempted to point the finger at Pelton any information concerning his alibi or lack of an alibi would have been important to the defense. See Def Ex. 13. We now know that despite what Detective Jimmerson told the jury, Pelton, had freedom to "come and go" at work and no one could be sure that he was at work on the day of the crime (PC-R. 2328). And, that Pelton would have had access to the plastic ties used to restrain the victim through his work (PC-R. 2330).[16]

The evidence presented at Mr. Gerald's postconviction hearing demonstrates that much material and exculpatory evidence was suppressed by the prosecution. The undisclosed evidence would have provided trial counsel the opportunity to demonstrate that someone other that Mr. Geralds entered the victim's home, struggled with her and killed her. In addition, the only evidence linking Mr. Geralds to the items taken from the victim's home, i.e., the herringbone necklace recovered from the

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[15]Also, interestingly, Danford was charged with multiple counts of "failure to record transaction [as a] pawnbroker", yet his testimony in Mr. Geralds' case revolved around his recording of the alleged transaction between he and Mr. Geralds.

[16]There also may have been plastic ties at the victim's

pawn shop and the Bucci sunglasses could have been effectively impeached. The undisclosed evidence places Mr. Geralds case in a whole new light and undermines confidence in the verdict.

Likewise, though the State failed to address the impact of the evidence as to the penalty phase, as the State conceded, at a minimum, the evidence suggests that someone other than Mr. Geralds was also present at the crime scene. Due to the fact that hair was found in the victim's left hand and blood on the handkerchief, that was present after a struggle occurred that did not match the victim or Mr. Geralds, it is clear that another individual struggled with the victim.

In Lockett v. Ohio,

438 U.S. 586 (1978)Woodson v. North Carolina,

428 U.S. 280 (1976)

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residence. See Def. Ex. 16.

[17]In restating Mr. Geralds' claim, the State incorrectly characterizes the claim as "ineffective assistance of counsel during the penalty phase of his trial . . .". Answer at 48. However, upon further reading the State does in fact respond to Mr. Geralds' claim that he was denied effective assistance of counsel at the guilt phase of his capital trial.

The State devotes most of its answer to the prejudice aspect of Mr. Geralds' claim. The State ignores this Court's characterization of the evidence against Mr. Geralds as being "entirely circumstantial, Geralds v. State, 601 So. 2d 1157, 1158 (Fla. 1992), and argues that due to the "uncontroverted evidence . . . tying a direct nexus between Geralds and the murder of Tressa Pettibone" that prejudice cannot be demonstrated. See Answer at 51, 53. The "uncontroverted evidence" according to the State includes: the herringbone necklace identified by the victim's family members as belonging to Mrs. Pettibone and testing positively for blood that was consistent with Mrs. Pettibone's blood that Danford testified was pawned by Mr. Geralds; the red Bucci sunglasses that Mr. Geralds gave Vicky Ward that were identified by the victim's family as belonging to Mrs. Pettibone; the shoeprints at the crime scene were a similar size and tread pattern to sneakers that were owned by Mr. Geralds; and a bag of electrical ties found in Mr. Geralds' car "were made by the exact company whose electrical ties were found at the crime scene." See Answer at 52. Then the State cursorily argues: "Geralds lists various physical items that he contends counsel was ineffective for failing to undermine State's case. This evidence does not,

however, exonerate Geralds." Answer at 53.

Initially, in response to the State's argument, it is important to note that Mr. Geralds need not produce evidence that exonerates him. Such a standard is contrary to the standard as set forth by the United States Supreme Court. Rather, to establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984).

Furthermore, the evidence presented by Mr. Geralds diminishes the strength of the State's evidence as well as establishes that someone other than Mr. Geralds was present at the crime scene and struggled with the victim. Blood, hair and fingerprints were all found in close proximity to the victim that matched neither Mr. Geralds nor the victim. Indeed, the victim had hair in her left hand that did not match Mr. Geralds. See Def. Exs. 34 and 36. Finger and palmprints were located around the victim's body as well as on items that were handled by the perpetrator of the crime. See Def. Exs. 26 and 31. The finger and palmprints did not match Mr. Geralds or any members

of the victim's family. Id. Mr. James testified that the evidence was forensically relevant to the investigation of the crime (PC-R. 2495).

Likewise, no forensic evidence collected from the victim's car was linked to Mr. Geralds. Though the State ignores the testimony, Mr. James testified that due to the quantity of blood at the crime scene it was likely that the perpetrator would have had blood on his clothing (PC-R. 2494), and thus, there should have been blood in the car and on Mr. Geralds. In fact, those that had contact with Mr. Geralds shortly after the crime occurred did not notice any blood or anything that indicated that he had been in a struggle (PC-R. 2223-4; Def. Ex. 6[18]). Undoubtedly, the evidence undermines confidence in the outcome.

As set forth in Mr. Geralds' initial brief, much evidence could have been developed and presented by trial counsel that would have weakened the prosecution's case simply by using the

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[18]The State argues that Mr. Geralds has not put on any evidence that his grandfather would have provided testimony as to his appearance. See Answer at 54. First, Mr. Freeman was questioned by law enforcement and asked to provide a description of Mr. Geralds' appearance the day he arrived to use his grandfather's shower. See Def. Ex. 6. Mr. Freeman did not describe any blood or evidence that his grandson had been in a struggle. Second, the State ignores Sheila Freeman's postconviction testimony about her observations of Mr. Geralds' appearance shortly after the crime. See PC-R. 2223-4.

information contained in the police reports. See Initial Brief p. 47-57.

And, as to the State's "uncontroverted evidence" linking Mr. Geralds to the crime, the evidence contained in the reports, notes and depositions could have been effectively utilized to diminish the value of the evidence. For example, as to the electrical ties that were used to restrain the victim and were also found in Mr. Geralds' car. Trial counsel could have presented evidence to the jury that such ties were commonly used among individuals involved in the construction industry, like Mr. Geralds, Mr. Pettibone[19] and Mr. Pelton. See Def. Exs. 12, 16. In fact, Dave Meadows testified that the type of tie was used to bind cables (PC-R. 2330).

As to the identification of the red Bucci sunglasses[20], contrary to the State's argument, there were several

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[19]Mr. Pettibone told law enforcement that he may have had some electrical ties at his home at the time of the crime, but he believed they were shorter than the ones used to restrain Mrs. Pettibone. See Def. Ex. 16.

[20]It is important to note, that Vicky Ward could not recall whether Mr. Geralds gave her the sunglasses before February 1, 1989, the date of the crime (R. 1685). However, Ward did recall that Mr. Geralds was simply replacing a pair of bluish Bucci sunglasses that Ms. Ward had borrowed from him, but since she preferred red, he exchanged them for her (R. 1686). These facts are inconsistent with the inference that the red pair of Bucci

inconsistencies from the witnesses statements to law enforcement and their trial testimony. First, originally, none of the Pettibones reported the sunglasses missing. See Def. Ex. 1. It was not until after law enforcement collected the sunglasses from Ward did the family report them missing. Id. Upon being asked about sunglasses, the victim's family could only say that "possibly" a pair of sunglasses could be missing. Second, the pre-trial statements make clear that the sunglasses were never positively identified as the victim's (Def. Exs. 4, 19).

Likewise, the identification of the herringbone necklace was similarly flawed. Mr. Geralds told trial counsel that Tony Swoboda had sold him a herringbone necklace. See Def. Ex. 5. When interviewed by law enforcement three days before trial, Swoboda confirmed Mr. Geralds statement and added that he had sold it to Mr. Geralds “under the table” (Def. Ex. 7). At the evidentiary hearing, Swoboda testified that he knew Mr. Geralds and that he had fixed a couple of pieces of jewelry for him over the years and sold him a gold herringbone necklace (PC-R. 2546). Swoboda sold Mr. Geralds the chain several months before the crimes at issue (PC-R. 2547).

In addition, the chain was not contained on the list of

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sunglasses came from the Pettibone home.

items that were missing from the Pettibone home. A different herringbone necklace was identified as being missing.

And, the evidence surrounding the discovery of the herringbone chain is also suspicious. Mr. Geralds property did not contain a wallet when he was arrested (Def. Ex. 46); the pawn ticket that led the police to the discovery of the chain was recovered from Mr. Geralds' wallet on March 8, 1989 – seven days after the victim's family members were taken to the pawn shop to view the chain (Def Ex. 11). Trial counsel could have not only challenged the identification of the necklace, but also that Mr. Geralds pawned it at all.

Finally, the "uncontroverted evidence" of the shoe impressions at the scene being similar to Mr. Geralds Nike sneakers was anything but "uncontroverted". There were no class or wear characteristics identified in the shoe impressions that matched Mr. Geralds (R. 1728). And, trial counsel possessed a police report that noted that there were similar shoeprints located in the Pettibone carport with a substance that looked like dry paint making the impression to those shoe prints in the Pettibone home (Def. Ex. 15).

As to the deficient performance prong of Mr. Geralds ineffective assistance of counsel claim, the State argues that

Mr. Geralds' trial counsel cannot be faulted for failing to "develop certain evidence", "impeach certain witnesses" and "make certain objections". See Answer at 54. However, these are exactly the type of errors and omissions for which trial counsel can be faulted. See Sims v. State, 967 So. 2d 148, 154 (Fla. 2007)(holding that failure to challenge and object to canine-alert evidence was deficient); Gunsby v. State, 670 So. 2d 920, 924 (Fla. 1994)(finding trial counsel's performance was deficient for failing to discover evidence "undermin[ing] the credibility of several key witnesses", and "other inconsistencies [] between the testimony presented at the rule 3.850 hearing and the testimony presented at trial").

In addition, the State argues that "simply reviewing a cold trial record to determine what questions might have been asked is an inappropriate basis for a (sic) ineffective assistance of counsel claim." However, Mr. Geralds has presented more than the speculation of what might have been asked or presented based on a cold trial record. Mr. Geralds has presented a plethora of evidence that could have been presented by trial counsel to undermine the State's theory of the case and present more reasonable doubt to the jury.

Finally, like the lower court, the State relies on trial

counsel's closing argument to argue that his performance was not deficient. See Answer at 55. Thus, like the lower court, the State apparently ignored the fact that the closing argument relied on to deny Mr. Geralds' guilt phase claim was made during the closing argument of Mr. Geralds' re-sentencing proceeding. So, it makes no sense to rely on an argument that occurred after the guilt phase, at a different proceeding to argue that Mr. Geralds trial counsel was not deficient.

Trial counsel failed to develop and present much exculpatory evidence that would have diminished the circumstantial evidence produced by the State. The unpresented, readily available and exculpatory evidence undermines confidence in the outcome of the jury's verdict. Mr. Geralds is entitled to relief.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. GERALDS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE DURING HIS RE-SENTENCING PROCEEDINGS IN VIOLATION OF MR. GERALDS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In responding to Mr. Geralds' claim, the State primarily focuses on the mental health aspect of the claim. See Answer at 57-60. The crux of the State's argument is essentially that because Mr. Beller's diagnosis did not change, Mr. Geralds cannot prove his claim. See Answer at 58, 60.

Contrary to the State's argument, while Mr. Beller's diagnosis may not have significantly changed, his diagnosis was supported by the necessary collateral information that an adequate mental health evaluation encompasses. Indeed, Mr. Beller learned much more than "a few things" during his postconviction evaluation of Mr. Geralds.[21] And, though the State ignores it, after an adequate evaluation, Mr. Beller would have testified to the presence of statutory mental health mitigation as well as other non-statutory mental health mitigators.

At the re-sentencing proceeding, Mr. Beller testified that the only background information he received came directly from Mr. Geralds (R2. 755-6). His testimony was scant and provided little detail about the major mental illness from which Mr. Geralds suffered. On cross-examination, the prosecutor capitalized on the inadequate evaluation that consisted of limited testing and a few brief meetings with Mr. Geralds. See R2. 755-6. The trial court effectively disregarded Mr. Beller's

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[21]The State minimizes the importance of the information concerning Mr. Geralds' maternal aunt having been diagnosed with and treated for mental illness as well as other family member's struggle with mental illness. See Answer at 58. However, as Mr. Beller explained, mental health professionals believe that it is critical to know about a family's inter-generational mental

testimony (R2. 375).

At the evidentiary hearing, Mr. Beller admitted that his evaluation had been completely inadequate (PC-R. 2567-8). Mr. Beller explained that after conducting an adequate evaluation he could support and explain his diagnosis of Mr. Geralds and the impact Mr. Geralds' mental illness had on his day-to-day functioning, including around the time of the crime. See PC-R. 2567-80.

As to the other mitigation presented by Mr. Geralds, the State simply states that it is the same as the evidence presented by Mr. Beller. See Answer at 61. While some of the witnesses met with Mr. Beller and provided him with information, their testimony was not the same as that presented by Mr. Beller. The postconviction witnesses told the story of Mr. Geralds' life. See Initial Brief p. 68-9. The witnesses' testimony establishes recognized non-statutory mitigation that is qualitatively and quantitatively different than that presented at his re-sentencing proceeding. Trial counsel failed to investigate and present this readily available mitigation.

Finally, the State raises issues that are simply irrelevant to the analysis of Mr. Geralds' claim. For example, the fact

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health illnesses and treatment (PC-R. 2567).

that a different mental health expert evaluated Mr. Geralds in 1989 (see Answer at 59), has no bearing on what actions his trial counsel took to investigate and prepare for Mr. Geralds' re-sentencing proceeding. Additionally, it does not matter that trial counsel sought to hire an investigator. See Answer at 59. The fact is that no investigator was ever hired to assist trial counsel.

Trial counsel was woefully ineffective in investigating and preparing for the re-sentencing proceeding. Had trial counsel effectively prepared he could have presented much mitigation on Mr. Geralds' behalf, including the statutory mental health mitigators. Mr. Geralds is entitled to relief.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. GERALDS' CLAIM THAT NEWLY DISCOVERED EVIDENCE OF A CONFLICT OF INTEREST VIOLATED HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In responding to Mr. Geralds' claim, the State avers: "Geralds relies upon the proceedings in an unrelated case for the proposition that the testimony of Dr. Laurdison was impeachable." Answer at 61. Based on the State's opening sentence it is clear that the State entirely misses the point of Mr. Geralds claim.[22] Therefore, to clarify Mr. Geralds' claim it is that the recently disclosed evidence of how Dr. Laurdison was retained to testify in Mr. Geralds' re-sentencing proceedings establishes a newly discovered evidence claim of a conflict of interest.

Thus, Mr. Geralds is not relying on the proceedings in an unrelated case as the State would suggest. See Answer at 61. Mr. Geralds is relying on the testimony and evidence presented at his postconviction evidentiary hearing. Michael Stone was a capital defense attorney in the late 1980s and early 1990s for the Office of the Public Defender in Panama City. During his employ, Mr. Stone learned of an agreement between his office and

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[22]Likewise, the State's penultimate paragraph regarding the claim concerns the error that Mr. Geralds raised on direct appeal, i.e., that the trial court erred in allowing Dr. Laurdison to testify based on the reports and testimony of Dr. Sybers. See Answer at 64. The argument raised on direct appeal is unrelated to the argument raised in postconviction. The State's suggestion otherwise demonstrates a misunderstanding of Mr. Geralds' claim.

the prosecutor's office – the same prosecutor's office representing the State in the prosecution of Mr. Geralds (PC-R. 2414). Contrary to the State's position it is quite appropriate to rely on Mr. Stone's testimony to support Mr. Geralds' claim.[23] Based on Mr. Stone's testimony, Mr. Geralds is entitled to relief.

ARGUMENT V

MR. GERALDS WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DUE TO THE LOWER COURT'S ADVERSE RULING DURING THE POSTCONVICTION PROCESS.

Initially, the State suggests that Mr. Geralds' claim is procedurally barred because it was "not made part of the evidentiary hearing." See Answer at 64-5, n. 10. As authority for such an absurd proclamation the State cites to Ziegler v. State, 967 So. 2d 125, 129 n.1 (Fla. 2007). However, a review of Ziegler makes clear that that the holding is irrelevant to the facts at issue in Mr. Geralds' case. In Ziegler, a successor capital defendant raised a claim of newly discovered evidence concerning the results of DNA testing. Id. at 127. The defendant argued that in evaluating the evidence the trial court should have considered previous claims even though those claims

[23]The State fails to explain how it is "inappropriate" to rely on the information possessed by Mr. Stone to establish Mr.

had been determined to be procedurally barred. This Court held that the trial court was not required to reconsider procedurally barred claims or evidence that did not qualify as newly discovered and cited Jones v. State, 709 So. 2d 512, 521 n.7 (Fla. 1998).

The procedural posture and facts surrounding the circumstances of Mr. Geralds' filing supplements to his Rule 3.851 motion are completely distinct from the procedural posture and facts in Ziegler. Mr. Geralds filed two supplements to his pending Rule 3.851 motion when it was discovered that the State of Florida had not disclosed all of the records to which he was entitled and had requested under Fla. R. Crim. P. 3.852. Thus, Mr. Geralds was not a successor and was not raising claims of newly discovered evidence. The circumstances present here are similar to the circumstances in Ventura v. State, 673 So. 2d 479 (Fla. 1996). In Ventura, this Court held: "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act.

The State does concede that Mr. Geralds' supplemental

Geralds' claim. See Answer at 62.

motions "dovetailed with his earlier clams (sic)", yet, the State fails to address the fact that Mr. Geralds was prejudiced by the State of Florida's non-disclosure of records to which he was entitled.

The State reiterates the lower court's flawed reasoning that Mr. Geralds was required to essentially prove his claims through his pleadings. See Answer at 67. However, the lower court used the incorrect standard in determining whether an evidentiary hearing was required. The standard for whether an evidentiary hearing is whether the files and records conclusively show that Mr. Geralds was not entitled to relief. Lemon v. State, 498 So. 2d 923 (Fla. 1986). The allegations contained in Mr. Geralds supplemental Rule 3.851 motions were not refuted by the files and records.[24] Therefore, he was entitled to an evidentiary hearing.

As to Mr. Geralds second supplemental 3.851 motion, the State addresses the allegations concerning the evidence that an individual named Warren Cash committed the crime. See Answer at 68. However, the State argues that the State is not required to

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[24]The State does not address any of the specific facts that were set forth in Mr. Geralds Initial Brief concerning his first supplemental 3.851 motion. Therefore, Mr. Geralds will rely on the arguments as set forth in his Initial Brief. See Initial

disclose every piece of evidence regarding other suspects. Id. And, the State also suggest: "If law enforcement stopped pursuing other leads once Geralds became a suspect, this was appropriate; he was responsible for the crime." Id.

First, Warren Cash was a viable suspect in the case as reflected by law enforcement's desire to investigate the lead. For no apparent reason the investigation of Cash was ended. Indeed, the investigation was ended after law enforcement realized that Cash lied to them about his alibi for the day of the murder. The information about Cash was certainly relevant and exculpatory to Mr. Geralds.

Furthermore, just because Mr. Geralds became a suspect did not mean that he was guilty of crime. By that logic, anyone who was a suspect in the case is guilty of the crime. In addition, law enforcement halted the investigation of Cash before Mr. Geralds became a suspect. The State's argument is nonsensical.

The State also points to the "significant inculpatory evidence tying Geralds to the very brutal murder of Tressa Pettibone . . .", in order to argue that the lower court's order should be affirmed. However, again Mr. Geralds' raised a Brady claim, and thus, the proper analysis does not require Mr.

Brief at 75-7.

Geralds to demonstrate that he is innocent or to disprove any inculpatory evidence. The United States Supreme Court has held: "One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

The State briefly addresses Mr. Geralds' argument that his claim that trial counsel was ineffective in his handling of the re-sentencing proceeding and failing to object to improper prosecutorial misconduct. See Answer Brief at 69-70. However, again the State seems to miss the point. The State avers:

> Geralds raises an argument that Adams was ineffective during the resentencing hearing because he allowed Investigator Jimmerson to testify "inaccurately." He concedes however, that no objection was raised to Jimmerson's testimony. The Florida Supreme Court has routinely recognized that absent fundamental error, a claim which has not been objected to, is not preserved, and therefore, may not be raised on appeal."

See Answer at 69, n. 12 (citations omitted). But, that is exactly Mr. Geralds' claim – that his trial counsel was ineffective for failing to object and correct the inaccurate testimony heard by the jury. Mr. Geralds was entitled to an

evidentiary hearing to demonstrate that a trial attorney's who fails to object and correct inaccurate testimony acts unreasonably and is ineffective.

Mr. Geralds was entitled to an evidentiary hearing on his summarily denied claims.[25]

[25]The State did not address the lower court's denial of Mr. Geralds' newly discovered evidence claim concerning Dr. Laurdison's false testimony in Orme and the prosecutor's knowledge of the falsity. Obviously, Dr. Laurdison's credibility was at issue in Mr. Geralds' case. Any evidence tending to show that he committed perjury and colluded with the prosecution to deceive defense counsel should have been disclosed to Mr. Geralds' trial counsel. Likewise the State did not address Mr. Geralds' claims that he was denied due process by the lower court denying his motion to depose Bob Willoghby, or that Mr. Geralds access to public records was improperly denied. Therefore, Mr. Geralds relies on his argument as set forth in his Initial Brief. See Initial Brief at 95-9.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, MARK ALLEN GERALDS, urges this Court to reverse the lower court's order and grant him Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by first class mail, postage prepaid, to Ronald Lathan, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Fl 32399-1050, on April 23rd, 2008.

CERTIFICATION OF TYPE SIZE AND STYLE

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