IN THE SUPREME COURT OF FLORIDA

LLOYD DUEST,

Appellant,

vs. **Case Number SC07-162**

STATE OF FLORIDA,

Appellee._____/

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

INITIAL BRIEF OF APPELLANT

TODD G. SCHER
Fla. Bar. No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, FL 33140
(305) 861-9252

COUNSEL FOR APPELLANT

" PRELIMINARY STATEMENT

Mr. Duest appeals the circuit court's denial of relief on his Rule 3.851 motion following a limited evidentiary hearing.

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

"R.___." -Record on direct appeal to this Court;

"PCR__." -Record in instant appeal;

"PCR-T___" -Transcripts of proceedings below in postconviction proceedings.

All other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Duest, through counsel, respectfully requests that the Court permit oral argument. This is capital case and the resolution of this appeal will determine if Mr. Duest will live or die. This Court has not hesitated to grant oral argument in cases under the identical procedural posture.

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PROCEDURAL HISTORY

The Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida, entered the judgment of conviction and sentence of death at issue.

Mr. Duest was originally tried, convicted, and sentenced to death in 1983. On direct appeal, this Court affirmed the convictions and death sentence. *Duest v. State*, 462 So. 2d 446 (Fla. 1985).

Subsequently, Mr. Duest sought postconviction relief in a Rule 3.850 motion. After conducting an evidentiary hearing, the lower court denied relief, and this Court affirmed. *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990).

Mr. Duest thereafter sought federal habeas corpus relief. After the federal district court denied relief, the Eleventh Circuit Court of Appeals granted Mr. Duest a resentencing but affirmed the denial of relief as to the claims relating to the guilt phase of his capital trial. *Duest v. Singletary*, 967 F. 2d 472 (11th Cir. 1992). Subsequently, the United States Supreme Court granted certiorari on petition by the State of Florida and remanded the case back to the Eleventh Circuit for further consideration of the harmless error standard it had employed in granting Mr. Duest sentencing relief. *Singletary v. Duest*, 507 U.S. 1048 (1993). On remand, the Eleventh Circuit re-affirmed its earlier grant of relief as to the sentencing issues. *Duest v. Singletary*, 997 F. 2d 1336 (11th Cir. 1993).

Mr. Duest's re-sentencing proceeding thereafter took place in the circuit court, which, after considering the jury's recommended death sentence by a vote of 10-2, imposed the death penalty on Mr. Duest. This Court affirmed. *Duest v. State*, 855 So. 2d 33 (Fla. 2003). In his direct appeal, Mr. Duest raised the following issues: (1) Mr. Duest was deprived of his rights to due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments because either the State failed to disclose evidence which was material and exculpatory in nature and/or presented misleading evidence; (2) Mr. Duest was deprived of his rights to due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments when the circuit court ruled that the State had no obligation to disclose the out-of-state criminal records of state witnesses until Mr. Duest presented evidence that a certain witness had committed some criminal offense; (3) Mr. Duest was denied his right to present a defense and to confront witnesses against him when the circuit court precluded presentation of evidence regarding the facts of the case or impeachment of identifying witnesses; (4) the trial court impermissibly prohibited Mr. Duest from introducing relevant mitigating evidence and refused to instruct the jury that residual doubt constituted a mitigating circumstance; (5) the trial court erroneously refused to instruct the jury on the statutory mitigating circumstances and erroneously instructed the jury on the cold, calculated, and premeditated aggravating circumstance; (6) the court erroneously precluded the defense mental health expert from testifying to her

findings that mitigating circumstances were present; (7) the trial court erred in permitting the State to elicit from the defense mental health expert Mr. Duest's entire criminal history; (8) the court failed to conduct an independent weighing of the aggravating and mitigating circumstances; (9) proportionality; and (11) Florida law deprived Mr. Duest of his Sixth Amendment right to have all elements of his crime submitted to a full and fair jury trial.

The United States Supreme Court denied certiorari review on April 19, 2004. *Duest v. Florida*, 541 U.S. 993 (2004).

On or about April 14, 2005, Mr. Duest, through registry-appointed counsel, filed a motion for postconviction relief, with attachments, pursuant to Fla. R. Crim. P. 3.851 (PCR1-70). In his motion, Mr. Duest raised the following claims for relief: (1) Mr. Duest should be permitted to amend his motion following an in camera inspection by the circuit court of public records exempted from disclosure by the State Attorney's Office; (2) the State has failed to comply with ongoing obligation to disclose information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and the State should be ordered to disclose to Mr. Duest any and all information in its possession with respect to witness polygraphs; (3) Mr. Duest was deprived of his right to a reliable adversarial testing at the guilt phase of his capital trial, his right to due process under the Fourteenth Amendment, as well as his rights under the Fifth, Sixth, and Eighth Amendments, because the State failed to

disclose material exculpatory evidence and/or presented misleading evidence, and newly discovered evidence entitled him to a new guilt phase; (4) Mr. Duest was denied a reliable adversarial testing at his capital resentencing proceeding, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; (5) *Ring v. Arizona* established that the State was precluded from using Mr. Duest's 1987 prior conviction as an aggravating circumstance, as the conviction did not exist at the time of the offense.

On May 6, 2005, the circuit court ordered the State to file its response (PCR71), which it did file on or about June 14, 2005 (PCR73-280). A case management conference was conducted on September 9, 2005 (PCR-T32-66). On September 13, 2005, the lower court issued an order to the parties requesting the parties to file a memorandum "outlining their respective claims and responses." The parties thereafter filed their respective memoranda (PCR301-310) (State's Memorandum); (PCR311-318) (Defendant's Memorandum).

On November 30, 2005, the lower court entered its order following the case management conference (PCR398-406). The court summarily denied all of Mr. Duest's claims with the exception of a portion of Claim 3 ("For further clarification, the evidentiary hearing as granted, is on the sole issue of counsel's alleged ineffective assistance of counsel as it related to Dr. Wright's change in testimony") (PCR406). The limited evidentiary hearing took place on June 9, 2006

(PCR-T84-128).

On June 13, 2006, Mr. Duest filed a supplement to his Rule 3.851 motion, raising one supplemental claim for relief: (1) Due Process was violated under *Bradshaw v. Stumpf*, 125 S.Ct. 2398 (2005), by the State's use of inconsistent theories as to the victim's manner of death at both the original guilt phase proceedings and at the resentencing proceeding (PCR334-339). By order of court, the parties filed their post-evidentiary hearing memoranda on October 26, 2006 (PCR344-358) (Defendant's Memorandum); (PCR359-387) (State's Memorandum).

On December 21, 2006, the lower court entered its order denying Mr. Duest's Rule 3.851 motion and the supplemental claim thereto (PCR388-397). A timely notice of appeal was filed (PCR437-38), and this Initial Brief follows.

SUMMARY OF THE ARGUMENTS

1. Mr. Duest was denied a reliable adversarial testing at the guilt and resentencing phases of his capital trial due to the combined effects of various constitutional violations including the "changed" testimony of medical examiner Dr. Wright, which constituted a *Brady* violation, new violations of *Brady* which surfaced during the instant collateral proceedings and which also affect the reliability of the guilt verdict, and ineffective assistance of resentencing counsel. The lower court erred in failing to grant an evidentiary hearing on these claims (save one sub-claim on which a hearing was granted), in its rulings, both procedural and substantive, and in refusing to conduct a cumulative analysis of the *Brady* information that the guilt phase jury did not know about because it was improperly withheld by the State. As a result of the combined effect of the various constitutional violations alleged, Mr. Duest is entitled to a new guilt phase, a new sentencing proceeding, or, at a minimum, an evidentiary hearing as mandated by the new Rule 3.851.

2. The lower court erred in summarily denying Mr. Duest's allegations of ineffective assistance of counsel at his capital resentencing phase. Mr. Duest identified this claim as one requiring factual development, and the lower court was without authority to deny a hearing in the face of the mandatory evidentiary

hearing provided for in the new Rule 3.851. Because the two issues raised both required factual development, and were not procedurally barred, the lower court erred in denying these issues, and reversal for an evidentiary hearing is warranted.

ARGUMENT I

MR. DUEST WAS DENIED A RELIABLE ADVERSARIAL TESTING AT THE GUILT PHASE OF HIS CAPITAL TRIAL AND THE RESENTENCING PHASE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE LOWER COURT ERRED IN SUMMARILY DENYING VARIOUS ISSUES ATTENDANT TO THIS CLAIM.

A. Introduction.

In his Rule 3.851 motion, Mr. Duest alleged that he was deprived of his right to a reliable adversarial testing at the guilt phase of his capital trial, his right to due process under the Fourteenth Amendment, as well as his rights under the Fifth, Sixth, and Eighth Amendments because the State failed to disclose material exculpatory evidence and/or presented misleading evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny (PCR10 *et. seq.*). Moreover, a newly-discovered evidence component was alleged, as well as a claim of ineffective assistance of counsel at the resentencing phase pursuant to *Strickland v.*

Washington, 466 U.S. 668 (1984) (*Id*.).[1]

During his first Rule 3.850 proceedings, Mr. Duest had alleged that he had been denied an adequate adversarial testing at the guilt phase of his capital trial in that the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), failed to disclose a bus ticket that was seized from Mr. Duest which reflected travel from Boston to Miami in early April, 1982. In addressing this claim, this Court concluded that Mr. Duest had established that the State failed to disclose this information to defense counsel at the time of trial. *Duest v. Dugger*, 555 So. 2d 849, 850 (Fla. 1990).[2] This Court, as well as the Eleventh Circuit Court of Appeals, concluded, however, that confidence was not undermined by the State's failure to disclose the exculpatory information. *Id*. at 850-51; *Duest v. Singletary*, 967 F. 2d 472, 478-79 (11th Cir. 1992). It is thus in the context of the previous conclusions by the courts that Mr. Duest's current claims must be assessed.

B. *Brady* Violations.

1. Dr. Wright's Changed Testimony.

Dr. Ronald Wright, the medical examiner who was involved in conducting

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[1]The *Strickland* component, which related to Mr. Duest's resentencing proceeding, was the only aspect of Mr. Duest's Rule 3.851 motion upon which an evidentiary hearing was granted.

the autopsy of Mr. Pope, the victim in the instant case, testified at both Mr. Duest's original trial in 1983 and at the resentencing proceeding in 1998. However, Dr. Wright's testimony at the 1998 resentencing proceeding constituted a complete about-face on numerous issues relating to the death of Mr. Pope. Indeed, at the 1998 resentencing, Dr. Wright admitted that his testimony at Mr. Duest's capital guilt phase in 1983 was "incorrect" (T2. 399-400).

As noted by this Court in its direct appeal decision arising from Mr. Duest's resentencing, Dr. Wright's testimony at the 1983 was materially different from his testimony at the 1998 resentencing proceeding:

> In his 1983 testimony at deposition and trial in this case, Dr. Wright testified that the victim was initially attacked both on his bed and in the bathroom, and died soon after a final blow in the bathroom, and that death would have occurred from ten to fifteen seconds to no more than five minutes after the stab wound to the right side of the heart. After reviewing the evidence, including crime-scene photographs, Dr. Wright testified at the 1998 penalty phase that the evidence showed that the stab wounds were inflicted only in the bedroom and that the victim then made his way to the bathroom, where he collapsed and died. Dr. Wright also testified in the new penalty phase that the victim was alive and conscious for fifteen minutes or longer after the attack and might not have died from his injuries had he promptly

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[2]The Eleventh Circuit Court of Appeals also addressed the *Brady* claim, but, presuming that the State had failed to disclose the information, addressed only the materiality prong. *Duest v. Singletary*, 967 F. 2d 472, 478-79 (11th Cir. 1992).

> telephoned for emergency medical help. Duest claims that this change in testimony shows that the assailant left the victim alive and therefore calls into question the intent to kill, requiring a new trial on his guilt of first-degree murder.

Duest, 855 So. 2d at 39.

Review of Dr. Wright's 1983 testimony indeed bears out this Court's findings above. In 1983, Dr. Wright testified that he conducted an autopsy on Mr. Pope at about 9:30 PM on February 15, 1982 (R1-913). He determined that Mr. Pope had been dead for at least four hours, and concluded that he "died of multiple stab wounds" (R1-905, 913). He also testified (erroneously) that Mr. Pope died somewhere between fifteen seconds and five minutes after being stabbed (T2. 404-06). Dr. Wright further indicated in 1983 that Mr. Pope's body was found in the bathroom and that the laceration on the back of his head was "consistent with the individual having fallen after being stabbed to death" (R1-910). In 1983, the sentencing judge relied on Dr. Wright's testimony to find that Mr. Pope was stabbed in the bedroom and in the bathroom (R1-1834). On direct appeal, this Court rejected Mr. Duest's challenge to the sufficiency of the evidence to support premeditation, concluding that "there was sufficient circumstantial evidence to sustain defendant's conviction of premeditated murder." *Duest v. State*, 462 So. 2d

446 (Fla. 1985).[3]

In his Rule 3.851 motion, Mr. Duest alleged that Dr. Wright's new testimony established that a *Brady* violation occurred at the original guilt phase of his capital trial, as well as at the resentencing. Insofar as the discovery by the State of Dr. Wright's "changed" testimony, the chronology of events, buttressed by documents disclosed by the State pursuant to Fla. R. Crim. P.3.852 during the instant postconviction proceedings, is necessary for a complete understanding of this issue.

Dr. Wright was the first witness to testify at the resentencing; his direct examination took place on Wednesday, October 7, 1998 (T2-334). After the conclusion of his direct examination, a recess was taken until the following Monday, October 12, 1998 (T2-373). At no time prior to Dr. Wright's testimony, either on direct or cross examination, did the prosecutor inform defense counsel of Dr. Wright's "changed" testimony. Nor can the State claim that it was unaware of Dr. Wright's changed testimony; notes discovered in the documents provided by the State Attorney's Office pursuant to Rule 3.852 revealed that there were clearly

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[3]Unbeknownst to either Mr. Duest or this Court, the State had in its possession a 1982 memorandum from Assistant State Attorney Richard Garfield, who prosecuted Mr. Duest's original trial and sentencing, which states that "[t]he case is borderline on sufficiency of evidence, which is totally circumstantial" (PCR13).

discussions between the prosecutor and Dr. Wright about his "new" testimony and, in fact, Dr. Wright provided a handwritten "script" to the prosecutor containing questions he should ask, even going to far as to note that some of the question "could get you a mistrial" (PCR-63).[4] Indeed, Dr. Wright's script offered to the prosecutor various versions of what the "last question" should be in descending order of the level of objectionable nature of the question; the "least objectionable" question in Dr. Wright's script reads as follows: "Dr. Based upon your examination of the scene + body do you have an opinion based on reasonable medical certainty whether any of the wounds caused him to stay bleeding in the bed?" (PCR-64). Dr. Wright then wrote "Opinion is No nothing" (*Id*.). When one compares the prosecutor's last question he posed to Dr. Wright, *see* T2-370 ("Doctor, based upon your examination at the scene and of the body, do you have an opinion based upon a reasonable degree of medical certainty whether any of the wounds caused him to stay bleeding in the bed"), it could not be clearer that the prosecutor knew in advance what Dr. Wright's "new" testimony was going to be

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The State's failure to disclose this memorandum was raised below in Mr. Duest's Rule 3.851 motion, and this argument will be addressed *infra*.

[4]The prosecutor clearly knew something was going on regarding Dr. Wright's testimony. On October 6, 1998, the day prior to Dr. Wright's testimony, the prosecutor requested that his investigator pick up Dr. Wright's file (PCR-66). The file was picked up by the investigator and given to the prosecutor on October 7, the very day that Dr. Wright testified (PCR-68).

because he was in fact reading from the script provided to him by Dr. Wright.[5]

a. The Evidentiary Hearing.

The lower court granted a limited evidentiary hearing on whether counsel at Mr. Duest's resentencing, Carlos Llorente, rendered ineffective assistance of counsel for failing to adequately object and request a *Richardson*[6] hearing with regard to Dr. Ronald Wright's change in testimony at Mr. Duest's resentencing proceeding . The court also noted that, insofar as Mr. Duest's Rule 3.851 motion alleged Dr. Wright's testimony as newly discovered evidence, that claim was "subsumed by the necessity of evidentiary development."

Mr. Duest's resentencing counsel, Carlos Llorente, was the only witness to testify at the evidentiary hearing. After explaining his legal experience (PCR-T. 92), Mr. Llorente testified that he had been appointed to represent Mr. Duest at his resentencing proceeding in approximately 1994, and the resentencing took place four (4) years later in 1998 (*Id*. at 93). Mr. Duest's case was the first and only case he had worked on where he had been appointed solely for the purpose of conducting a capital resentencing (*Id*. at 93-94). Shortly after Mr. Duest was

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[5]Dr. Wright's "explanation" to the jury that the reason for his "new" version was attributable to the fact that he did not have the crime scene photographs when he was originally deposed in 1983 (T2-400). Of course, Dr. Wright was personally at the crime scene and made his own observations of the scene.

[6]*See Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

resentenced to death, Mr. Llorente ceased his work in criminal defense work (*Id*. at 94).

Mr. Llorente recalled that Dr. Wright was the medical examiner at the time of the alleged offense, and, during the course of the State's case at Mr. Duest's resentencing, he became aware that Dr. Wright's testimony differed from his testimony at Mr. Duest's original guilt phase in 1983 (*Id*. at 94). While he had no independent recollection of having reviewed Dr. Wright's original deposition taken before the guilt phase proceeding, he was "sure" he reviewed it because he reviewed all of the documents pertaining to Mr. Duest's case, including those pertaining to the original guilt phase (*Id*. at 96-97). Mr. Llorente could not pinpoint the exact time when he was aware that Dr. Wright had changed his testimony, for example, whether he knew Dr. Wright was going to be changing his testimony before the resentencing itself, or whether it was during the actual direct examination itself (*Id*. at 97). It was "obvious," however, that Dr. Wright had changed his testimony between the time of the original guilt phase and the time of Mr. Duest's resentencing (*Id*. at 98). He had no recollection of seeking to or actually deposing Dr. Wright prior to the resentencing (*Id*.).[7]

[7]The court file does not contain any notice of deposition, nor has the State ever contended that Dr. Wright was re-deposed prior to Mr. Duest's resentencing proceeding.

Mr. Llorente was aware of what a *Richardson* violation was:

> [i]f you feel that evidence has been withheld, or there's a *Brady* violation, you would ask for a *Richardson* inquiry. The Court would then decide whether or not it rises to the level of an evidentiary hearing, and may hold an evidentiary hearing on the issue.

(*Id*. at 98-99). There were various sanctions available if the court were to find a *Richardson* violation, including a mistrial and the striking of the witness from the party committing the *Richardson* violation (*Id*. at 99). In Mr. Llorente's experience, he had never seen a case being dismissed or a witness struck because of a *Richardson* violation (*Id*.).

In Mr. Llorente's view, Dr. Wright's changed testimony "certainly should have been disclosed by the state as a change in testimony" and "would expect" the state to have informed the defense of any exculpatory information (*Id*.). At no time prior to the resentencing did Mr. Llorente receive any discovery notice, memorandum, or any communication from the prosecutor that Dr. Wright's testimony was going to be different from that which he gave at Mr. Duest's original guilt phase (*Id*. at 99-100). He had no recollection of whether it ever occurred to him to make a *Richardson* objection at Mr. Duest's evidentiary hearing (*Id*. at 100).

On cross-examination, Mr. Llorente agreed that Dr. Wright had been deposed in January, 1983, by Evan Baron, who represented Mr. Duest in his guilt

phase and original penalty phase in 1983 (*Id*. at 101). In that deposition, Dr. Wright was questioned about how long the victim could have stayed on his feet and how long it took for the victim to die (*Id*. at 102-03). It did not appear, however, that Mr. Baron asked Dr. Wright at the original guilt phase how long it took for the victim to die (*Id*. at 103-04). Mr. Llorente also agreed that, at Mr. Duest's resentencing, there was an exchange during voir dire when the prosecutor informed the Court and the parties that Dr. Wright would testify that it took between two to five minutes for the victim to die, which was the time that Dr. Wright had testified to in his 1983 deposition (*Id*. at 105). Mr. Llorente was also shown transcripts of Mr. Duest's resentencing, when Dr. Wright, on direct examination, testified that the victim would have taken "many minutes" to die, although Dr. Wright did not give any specific number of minutes (*Id*. at 108). It was on cross-examination, however, that Mr. Llorente agreed with the State that Dr. Wright "testified inconsistently" with his 1983 deposition (*Id*. at 111-12). Mr. Llorente acknowledged impeaching Dr. Wright with his 1983 deposition, and Dr. Wright, at the resentencing, testified that his prior testimony about the victim living a short period of time was wrong (*Id*. at 112-13). In fact, Mr. Llorente agreed with the State that Dr. Wright, at the resentencing, repeatedly admitted that he had made inconsistent statements regarding how long it would have taken for the victim to die (*Id*. at 113-15).

After agreeing with the State that he attempted to use Dr. Wright's changed testimony to the defense advantage at the resentencing, Mr. Llorente acknowledged, critically, that "it would have been better to have it at the guilt phase, instead of the penalty phase" (*Id*. at 115-16). Mr. Llorente agreed with the State that "if in fact the victim had survived, for as long as Dr. Wright now said, he could have done something to perhaps assist himself in surviving" (*Id*. at 116), and that the victim could have survived if he had sought help (*Id*.).

On redirect, Mr. Llorente explained that new information, or evidence giving rise to a discovery violation, could arise during a witness' cross-examination as opposed to just during a direct examination (*Id*. at 123). It does not make it any less of a discovery violation of the information arises on cross examination as opposed to direct examination (*Id*.). With regard to his earlier testimony about the fact that Dr. Wright's changed testimony would have been important for the guilt phase, Mr. Llorente explained:

> A The issue of whether Mr. Pope had lived would have been better addressed at the guilt phase, in the sense that, I think I argued that there was again, in the penalty phase, I argued that there was no intent to kill, or that was a mitigating factor, there was no intent to kill.
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> It could have been more of a factual scenario, had it come up at the guilt phase.
>
> But, I mean, that was foregone, it was in the past, you couldn't come back to the guilt phase of this particular case.

> And that's basically it.
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> It's just, it would have been more helpful, the issue of the changed testimony, and the way it was handled with impeachment, would have been a lot more helpful at the guilt phase, than in the penalty phase, where the issues are just mitigating factors, the aggravating factors, and so forth.
>
> Q That's because the victim living 15 to 20 minutes would have been more of an issue as to premeditation, which is in the guilt phase?
>
> A That's correct.

(*Id*.. at 124).

b. The Lower Court's Order.

The lower court denied Mr. Duest's claim, concluding that he was not entitled to any relief as to his resentencing. The lower court did not, however, make any findings with respect to the gravamen of Mr. Duest's claim, that is, that Dr. Wright's "new" or "changed" testimony warranted an evidentiary hearing as to the effects of same on the *guilt* phase of his capital trial.[8] Mr. Duest submits that, given that an evidentiary hearing was granted on the limited issue of Dr. Wright's testimony at the resentencing, it was an abuse of discretion to deny an evidentiary

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[8]The lower court did briefly address Mr. Duest's argument that he was entitled to a new trial when it addressed the "newly discovered evidence" aspect of Dr. Wright's testimony, as set forth *infra*. However, the court did not grant an

hearing as to the effects of this information on the *guilt* phase.

With regard to the issue as it pertained to the resentencing, namely the *Brady* aspect and the allegations of ineffective assistance of resentencing counsel, the lower court made the following conclusions:

> This Court finds that Dr. Wright's change in testimony was not [a] *Brady* violation[]. The Defendant has not established through evidence presented at the evidentiary hearing, that he was prejudiced by the alleged suppression of Dr. Wright's change in testimony. Carlos Llorente, Esq., Defendant's trial counsel at the 1998 re-sentencing proceedings, recognized the discrepancy between Dr. Wright's 1983 and 1998 testimony and was able [to] use the 1983 deposition to thoroughly impeach Dr. Wright (PPP. T. 401-405). Arguendo, even if the defense had been aware of Dr. Wright's revised opinions prior to the new penalty phase, this Court finds that it is unlikely there would have been a different result in the outcome of the proceedings. The Defendant did not lose his opportunity to take advantage of the change in testimony to impeach Dr. Wright and to attack his credibility before the jury. Furthermore, Dr. Wright's revised opinions regarding where in the house the stab wounds occurred and the length of time it took the victim to die did not alter or affect the crucial fact that Mr. Pope was alive and conscious when he received the multiple stab wounds and that he lived at least several minutes before he died from these wounds. The State's argument was not inconsistent regarding its theory that the Defendant intended to inflict wounds which caused Dr. [sic] Pope's death.
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> The Defendant further claimed that Carlos Llorente was ineffective for failing to (a) object to the alleged *Brady* violation, (b) request a *Richardson* hearing, and (c) introduce Dr. Wright's 1983

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evidentiary hearing on this claim and, in fact, concluded that the "newly discovered evidence" aspect of the claim was procedurally barred (PCR395).

deposition into evidence once the change in testimony was discovered (Defendant's motion at 15). Even if the Defendant had established that Dr. Wright's change in testimony was *Brady* material, this Court finds that after a full review of the evidence and testimony presented at the evidentiary hearing in addition to the record before this Court, the Defendant has not met his burden under *Strickland v. Washington*, 466 U.S. 668 (1984) that Mr. Llorente provided ineffective assistance of counsel for failing to adequately object to the change in testimony, to request a *Richardson* hearing, and to introduce Dr. Wright's 1983 deposition into evidence once the change in testimony was discovered.

To establish a claim of ineffective assistance of counsel, the Defendant must meet the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a two-prong analysis, first, counsel's performance must have been deficient, and second, that such deficiency must undermine the confidence in the outcome of the proceedings. *See also Davis v. State*, 875 So. 2d 359, 365 (Fla. 2003); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 420 (2000). The Court finds that Defendant' s claim fails on both *Strickland* prongs.

At the evidentiary hearing, Mr. Llorente stated that he did not receive any discovery notice, memorandum, or communication from the prosecutor that Dr. Wright's testimony would differ from his 1983 testimony (T. 16-17). The first time Dr. Wright testified inconsistently with his 1983 deposition testimony regarding the length of time it took Mr. Pope to die was during cross examination (T. 28). Mr. Llorente was well acquainted with the record when confronted with the unexpected change in testimony (T. 28). Although Mr. Llorente could not recall why he did not object or request a *Richardson* hearing, he testified that he knew what a *Richardon* violation was and that he used the discrepancies in Dr. Wright's testimony to impeach Dr. Wright's credibility before the jury (T. 15, 17). Mr. Llorente further testified that based on his experience it was unlikely the trial court would have granted any sanctions for the alleged *Brady* violation (T. 16).

Under the first prong of *Strickland*, deficient performance is conduct on the part of counsel that is "outside the broad range of

> competent performance under prevailing professional norms." *Philmore v. State*, 937 So. 2d 578 (Fla. 2006). The Defendant's counsel thoroughly investigated the case and was well acquainted with the record when he was confronted with the unexpected change in testimony. While Mr. Llorente could not recall why he did not seek a *Richardson* hearing, it is clear, based on his knowledge of the available remedy, that he made a strategic and reasonable decision to use the change in testimony to impeach Dr. Wright. Mr. Llorente used the inconsistencies in Dr. Wright's testimony several times to attach Dr. Wright's credibility and elicited multiple admissions from Dr. Wright that he made some mistakes. Strategic decisions do not constitute ineffective assistance of counsel where counsel has explored all other avenues. *Chandler v. State*, 848 So. 2d 1031, 1045 (Fla. 2003). Moreover, when evaluating a *Strickland* claim, hindsight is not favored nor is what another attorney might have done. *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995). This Court finds that the Defendant has failed to establish that Mr. Llorente's decision to use the change in Dr. Wright's testimony to impeach him rather than to object and request a *Richardson* hearing was deficient performance. *See Philmore*, 937 So. 2d at 586-7.
>
> This Court also finds that the Defendant failed to establish that counsel's alleged deficiencies in performance undermined the confidence in the outcome of the proceedings as required under the prejudice prong of *Strickland*. This Court finds no reasonable probability exists that Mr. Llorente's failure to object, to request a *Richardson* hearing, or to admit the 1983 testimony into evidence would have affected the outcome of the penalty phase proceeding or that the penalty phase proceeding was made unreliable or that a different result would have occurred. *See Wainwright v. State*, 896 So. 2d 695 (Fla. 2004). Dr. Wright's revised opinions did not alter or case any reasonable doubt about the facts and evidence that Mr. Pope was alive and conscious when he received the multiple stab wounds and that he lived at least several minutes before he died form these wounds or that the aggravators would not have been established or the mitigators would have outweighed the aggravators in this case.

(PCR. at 392-394) (footnote omitted).

Insofar as the newly-discovered evidence claim as it related to Mr. Duest's resentencing, the lower court reached the following conclusions:

> The Defendant claimed that Dr. Wright's changed testimony at the 1998 re-sentencing proceeding constituted "newly discovered evidence" which undermined confidence in the outcome of the 199 penalty phase. Although this evidence came to light in 1998, the Defendant did not file a claim until 2005. The Defendant had one year from the time that he discovered the "newly discovered evidence" to file a successive postconviction motion. *Glock v. Moore*, 776 So. 2d 243, 251 (Fla. 2001) (holding that a claim of newly discovered evidence in capital cases must be brought within one year of the date the evidence was discovered or could have been discovered through due diligence). This Court finds the Defendant's claim is untimely and procedurally barred. *See Swafford v. State*, 828 So. 2d 966, 978 (Fla. 2002).
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> Additionally, "newly discovered evidence" is evidence that existed at the time of trial, but was unknown by the trial court, the defendant and his counsel, and could not have been discovered by the defendant or his counsel with the exercise of due diligence. *Wright v. State*, 857 So. 2d 861 (Fla. 2003). In the instant case, Mr. Llorente, the Defendant's counsel, impeached Dr. Wright during the penalty phase proceeding regarding his revised opinions during cross-examination. The evidence of Dr. Wright's revised opinions was known by all parties during that proceeding. Therefore, the Court finds that Dr. Wright's revised opinions are not "newly discovered evidence." *See Miller v. State*, 926 So. 2d 1243, 1258 (Fla. 2006).
>
> Furthermore, "newly discovered evidence" must be of such a nature that it would probably produce an acquittal on retrial. *McLin v. State*, 827 So. 2d 948 (Fla. 2002) (quoting *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991)). In this case, the Defendant has not established that Dr. Wright's changed testimony would have produced an acquittal on retrial. This Court finds that the material elements of Dr. Wright's testimony would have had no impact on the Defendant's intent to kill or the Heinous, Atrocious and Cruel (HAC) aggravator in this case. The Florida Supreme Court has already found that there

> was sufficient circumstantial evidence to support premeditation. *Duest v. State*, 462 So. 2d 446 (Fla. 1985). Therefore, this Court finds that as to the remainder of Claim III[] for which this evidentiary hearing was held, Mr. Llorente was not ineffective and the Defendant is not entitled to a new trial or a new penalty phase proceeding.

(PCR. at 395-96) (footnote omitted).

c. Mr. Duest is Entitled to Relief; At a Minimum, Further Evidentiary Development is Warranted.

As noted above and in his Rule 3.851 motion, Mr. Duest alleged constitutional violations with regard to Dr. Wright's changed testimony, and asserted that such violations warranted an evidentiary hearing and, thereafter, that a new guilt phase and a new sentencing proceeding were warranted. The lower court, however, failed to grant an evidentiary hearing on the guilt-phase aspects of the claim regarding Dr. Wright,[9] and failed to properly analyze the issue as it related to the resentencing proceeding. After conducting the requisite *de novo* review, *see Stephens v. State*, 748 So. 2d 1029 (Fla. 1999), this Court should reverse and remand for, at a minimum, an evidentiary hearing on this and the other

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[9]As explained in later sections of this Argument, Mr. Duest's Rule 3.851 motion alleged even more *Brady* violations affecting the original guilt phase. These allegations, too, were not subjected to any evidentiary development, nor did the lower court conduct any cumulative analysis of the various *Brady* allegations as to the guilt phase. *See* PCR403 ("The Defendant also raised a cumulative evidence analysis argument . . . This Court finds that a cumulative evidence analysis is not warranted, as each of the individual arguments presented by the Defendant

guilt-phase issues (discussed in detail *infra*).

As Mr. Llorente acknowledged at the evidentiary hearing, Dr. Wright's changed testimony would have been significant information in terms of defending Mr. Duest at the guilt phase of his trial. Yet, without a tactical or strategic reason, Mr. Llorente failed to object, raise a *Richardson* violation, preserve this issue for appeal, and/or seek to have Mr. Duest's guilt phase re-opened in light of what he acknowledged was significant information undermining the reliability of the murder conviction. Under either an ineffective assistance of counsel analysis, a newly-discovered evidence analysis, or a *Brady* analysis, Mr. Duest submits that the outcome of his guilt phase is unreliable and that a new trial is warranted.

Dr. Ronald Wright testified at Mr. Duest's original guilt phase and at the resentencing before this Court in 1998. However, his 1998 resentencing testimony constituted a complete about-face on numerous issues relationg to the death of the victim. Indeed, at the 1998 proceeding, Dr. Wright admitted that his testimony at Mr. Duest's 1983 guilt phase was "incorrect" (T2. 399-400). That Dr. Wright's 1998 testimony was new and materially different from his 1983 testimony is not a matter of dispute. This Court noted the stark differences in the testimony, *see Duest v. State*, 855 So. 2d 33, 39 (Fla. 2003), and the State, through its questions to

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(excluding the sub-issue relating to the change in Dr. Wright's testimony) are either without merit or procedurally barred").

Mr. Llorente at the evidentiary hearing, also acknowledged that Dr. Wright's resentencing testimony was different from his 1983 testimony (T. at 28-30).[10] In light of Dr. Wright's changed testimony, Mr. Llorente's failure to object, request a *Richardson* hearing, or otherwise seek to vacate Mr. Duest's guilt phase conviction constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984).

Mr. Duest maintains that the State had an obligation to disclose to the defense the fact that Dr. Wright had materially and significantly changed his testimony from his previous opinions, *see Scipio v. State*, 928 So. 2d 1138 (Fla. 2006), and that the State's failure violated its duties under *Brady*. However, the lower court's case management order explicitly prohibited Mr. Duest from presenting any evidence on the *Brady* aspects of this claim, limiting the hearing to the "sole issue of counsel's alleged ineffective assistance of counsel as it related to Dr. Wright's change in testimony" and to the "newly discovered evidence claim regarding Dr. Wright's alleged changed testimony"(PCR403, 406). Thus, the

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[10]Through its questioning of Mr. Llorente at the evidentiary hearing, it appears that the State's position is that a *Brady* or *Richardson* violation could not have occurred in this case because the inconsistencies in Dr. Wright's testimony did not come about until cross-examination. However, as Mr. Llorente acknowledged and as the law establishes, a discovery violation can occur whether the violation occurs when a witness is testifying on direct or cross examination. *See Stimus v. State*, 886 So. 2d 996 (5th DCA 2004).

allegations set forth in Mr. Duest's Rule 3.851 as to the State's knowledge, *prior* to the resentencing, that Dr. Wright's testimony was significantly different from his 1983 opinions, must be taken as true (*See* PCR. at 13-15). While the lower court, in its final order denying this claim, remarked that it did not prohibit Mr. Duest from offering any evidence on the *Brady* aspect of the claim because, in the lower court's view, "[t]he existence of a *Brady* violation is inextricably intertwined with the Defendant's claim for ineffective assistance of counsel based upon Dr. Wright's change in testimony" (PCR. at 392 n.5), the lower court's after-the-fact remark does not alter its earlier order, an order which Mr. Duest was following when preparing for and presenting evidence at the evidentiary hearing. In that order, issued after the Case Management hearing, the lower court *explicitly* stated that the hearing was limited to the following issue:

> ORDERED AND ADJUDGED that as to Claim III, the issue raised regarding Dr. Wright's alleged change in testimony requires an evidentiary hearing. The remainder of the sub-claims in **Claim III** are **DENIED**. As set forth above, this Court will hold its decision on the merits of the issue relating to Dr. Wright's testimony in abeyance until after the evidentiary hearing. For further clarification, the evidentiary hearing as granted is **on the sole issue of counsel's alleged ineffectiveness of counsel as it related to Dr. Wright's change in testimony.**

(Attachment B at 9) (emphasis in original). That the court, in hindsight, attempted to change its ruling to suggest that the guilt-phase *Brady* aspect of the claim was "intertwined" with the ineffectiveness issue as it related to resentencing counsel

simply reflects that the court had a fundamental misunderstanding of the two issues. The gravamen of Mr. Duest's claim was that he was entitled to a new *guilt phase,* an issue that was, in large part if not totally, overlooked by the circuit court.

Mr. Duest submits that he should be entitled to a new guilt phase, a new sentencing phase, and to a further evidentiary hearing as to the guilt phase issues presented below. There can be no serious question that, had Mr. Duest's guilt phase jury been apprised of Dr. Wright's "new" opinion, there is more than a reasonable probability that the outcome would have been different. The complete about-face between Dr. Wright's 1983 opinion and his 1998 opinion is highly exculpatory in that it changed entirely the dynamics of how the homicide occurred. In 1998, Dr. Wright acknowledged that the victim had the means to save himself. The question arose as to why he failed to get help. Certainly, reasonably competent defense counsel, armed with this testimony during the guilt phase, could have advanced the argument at the guilt phase that a perfectly plausible explanation was that the victim had been stabbed in the course of a domestic confrontation. The victim was living with David Schifflett, who was approximately forty (40) years younger than the victim (T2-577), and who "used drugs and was not required to pay rent" (T2-578). Yet the victim was at a bar leaving with another man, who was also much younger than the victim. Mr. Schifflett claimed to have arrived at home at 6:15 PM when he noticed that the

front door was open and that the victim's car was gone (T2-413, 429). However, he failed to discover anything awry until another friend arrived at 8:00 PM (T2-419). With a witness then present, Mr. Schifflett suddenly noticed that a light was on in the victim's bathroom and his bed was covered with blood (T2-419). At that point, he called the police. When the police arrived, they noticed that the clothes dryer was running and clothes were inside (R1-474). Mr. Schifflett was also able to report that a jewelry box was missing (R1-422).

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

Dr. Wright's 1998 description of the victim's reluctance to save himself also means that the assailant knew he left the victim injured, but alive and conscious. It provides insight into the assailant's mind, as well as the victim's. In doing so, it changes the profile of the assailant and how the jury would evaluate him in terms

of his culpability. An assailant who knowingly left the victim alive and conscious is qualitatively different than an assailant described by Dr. Wright's 1983 testimony, an assailant who finished off the victim before leaving. Hence, Dr. Wright's 1998 testimony differed from his 1983 testimony in that the latter testimony seriously undermined, if not destroyed, the State's case for premeditated murder.[11] According to Dr. Wright, the assailant left the victim alive and with the power to call 911. Had the victim done do, "he would have done fine," as Dr. Wright testified in 1998 (T2-406). This fact is entirely inconsistent with an intent to kill, an element of premeditation.

Undoubtedly, Dr. Wright's new testimony was exculpatory and should have been disclosed to Mr. Duest. The 1998 testimony revealed either shocking evidence of an incompetent and negligent investigation in 1983 by Dr. Wright's failure to review crime scene photographs in order to arrive at correct conclusions, or that Dr. Wright was simply an incompetent medical examiner. The party that bears responsibility for either of these scenarios is the State of Florida. *See Correll v. State*, 698 So. 2d 522, 525 (Fla. 1997) (Shaw, J., concurring in result only) ("The State in a criminal trial assumes a heavy responsibility in vouching for an expert's

[11]Notably, the lower court, in its sentencing order at Mr. Duest's resentencing, made a finding that Mr. Duest lacked the intent to kill, but afforded it very little weight in terms of weighing aggravation and mitigation (R2-399).

credentials, for if the State is duped along with everybody else, the consequences can be dire. In the present case, if Bunker's testimony had played a more decisive role in the guilt phase, the State's failure to verify Bunker's credentials could well have resulted in an entire capital trial being thrown out years after the crime had grown stale"). Because Dr. Wright's 1998 testimony can be said to put Mr. Duest's case in a whole different light as to undermine confidence in the verdict, a new trial is warranted. The 1998 testimony negates the presence of an intent to kill. This in turn would have supported a defense contention that the homicide was the result of an emotionally-charged encounter and/or one involving the usage of drugs or alcohol. Such possibilities significantly alter the profile of the assailant because the picture of the assailant's motive and intent are completely changed. *See Rogers v. State*, 782 So. 2d 373, 385 (Fla. 2001) ("courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case").

In the alternative, under the test set forth in *Jones v. State*, 591 So. 2d 911 (Fla. 1992), Dr. Wright's testimony should be considered newly discovered evidence warranting a new guilt phase trial. Under the *Jones* standard, "the newly discovered evidence must be of such nature that it would probably produce an

acquittal on retrial." *Id*. at 915.[12] For all the reasons set forth above, Mr. Duest submits that the *Jones* test is satisfied. Had the guilt phase jury known that the medical examiner's testimony would be as it was presented at the 1998 proceeding, there is more than a reasonable probability of an acquittal on retrial on the charge of premeditated murder; at the least, it would reasonably have affected the State's ability to convince a jury beyond a reasonable doubt that the murder was premeditated, thus lessening Mr. Duest's culpability and resulting in a conviction for a lesser offense than first-degree premeditated murder.

Insofar as the lower court did address the "newly discovered evidence" aspect of the claim, the lower court erred in concluding that the claim was procedurally barred and untimely because it was "discovered" in1998 but not raised until 2005 (PCR. at 395). Notably, when determining whether an

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[12]Although the lower court, in its Case Management order, indicated a refusal to consider the cumulative effect of the other errors set forth in Mr. Duest's motion, Mr. Duest nonetheless submits that the court was required to consider the other information not known by the jury in considering whether Mr. Duest is entitled to relief. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999).

evidentiary hearing was warranted on the issue of Dr. Wright's changed testimony, the lower court reached the completely opposite conclusion:

> The Defendant further argued that newly discovered evidence entitled him to a new guilt phase trial (Defendant's Motion p.10). Specifically, the Defendant claimed that *Brady* violations occurred in (1) the alleged change in Dr. Wright's testimony, (2) the alleged failure to disclose the "Garfield memorandum," and (3) the polygraph evidence. The Defendant also argued that this Court should consider a cumulative effect argument. Additionally, the Defendant argued that this Court should treat the testimony of Dr. Wright as "newly discovered evidence." (Defendant's Motion p.28).
>
> The State counter-argued that all of the Defendant's claims are procedurally barred, lack merit and should be summarily denied (State's Response p.20). As to the Defendant's first argument (1), the State maintained that any issues regarding Dr. Wright's testimony regarding the penalty phase are barred.
>
> Having thoroughly reviewed the record, motions, responses, supplemental authority, case law and the Florida Supreme Court's prior decision in the instant case, ***this Court finds that it does not agree with the State that the sub-issue regarding Dr. Wright's alleged change in testimony is procedurally barred.***

(PCR401-02) (emphasis added). The court went on to note that Mr. Duest had first raised this issue in his 1999 sentencing memorandum, and that this Court had affirmed on direct appeal without prejudice for Mr. Duest to raise the issue in a Rule 3.850 motion (*Id*.). The trial court was correct in its first order and incorrect in its subsequent order; this claim is not procedurally barred, and the lower court

erred in reaching this conclusion.[13]

2. The Garfield Memorandum.

In addition to the aforementioned *Brady* violations with regard to the original guilt phase, Mr. Duest alleged below that a document heretofore undisclosed by the State was also wrongfully withheld from the defense at the time of trial, during Mr. Duest's prior state and federal collateral proceedings, and at the resentencing proceeding in 1998. This document was discovered Mr. Duest's collateral counsel from the materials disclosed by the State Attorney's Office pursuant to Fla. R. Crim. P. 3.852.

The document in question is a memorandum authored by Assistant State

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[13]The lower court also erred in refusing to conduct a cumulative analysis of the information relating to Dr. Wright, the other *Brady* allegations raised in Mr. Duest's Rule 3.851 motion, and the information that this Court, on direct appeal, found to have been suppressed. This issue will be addressed later in this Argument, following Mr. Duest's discussion of the additional *Brady* allegations raised below in connection with his request for an evidentiary hearing as to the reliability of the guilt phase.

Attorney Richard Garfield, who prosecuted Mr. Duest's original trial and sentencing in 1983. In this memorandum, Mr. Garfield makes the following critical statement:

> The case is borderline on sufficiency of evidence, which is totally circumstantial.

(PCR-70). The exculpatory nature of this document, reflecting the State's own acknowledgement that its case against Mr. Duest was "borderline" on "sufficiency of evidence," is self-evident.

a. The Lower Court's Order.

The lower court summarily denied this sub-claim, ruling that the elements of *Brady* had not been satisfied because the "statement at issue was the opinion of an attorney, and therefore not discoverable" (PCR. 402) (citing *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994); Fla. R. Crim. P. 3.220(g)). The lower court erred in its legal conclusion and in denying this claim without an evidentiary hearing.[14]

It is well-settled that *Brady* requires the State to disclose any exculpatory "information" in its possession. *Young v. State*, 739 So. 2d 553 (Fla. 1999); *Rogers v. State*, 782 So. 2d 373, 385 (Fla. 2001). It matters not that the "information"withheld might not have been subject to disclosure under Fla. R.

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[14]Again, the lower court's failure to conduct a cumulative analysis of any of the *Brady* information alleged in this case will be addressed later in this Argument.

Crim. P. 3.220, because the State still has an obligation to disclose, as this Court held in *Young*. *Young,* 739 So. 2d at 559 ("The State argues that the notes fit the description of attorney work product and thus were exempt from pretrial discovery under Florida Rule of Criminal Procedure 3.220(g)(1).[] We reject the State's argument. First, we again make plain that the obligation exists even if such a document is work product or exempt from the public records law.") (footnote omitted). To the extent that the case cited by the lower court – *Williamson* – can be read to establish otherwise, Mr. Duest submits that *Young*, which post-dates *Williamson* by several years and considers the effect of intervening *Brady* decisions from the Supreme Court,[15] controls the instant issue.

A memorandum from the very prosecutor who tried this case acknowledging that the case against Mr. Duest was "borderline" on "sufficiency of evidence" is precisely the kind of "information" that should have been disclosed to Mr. Duest prior to his guilt phase, as it would have provided ammunition with which not only to cross-examine witnesses but also to question the good faith of the State's prosecution for first-degree capital murder and provide counsel with strong support of his argument on his motion for judgment of acquittal.

Critically, the existence of this memorandum also calls into question the

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[15]*See Kyles v. Whitley*, 514 U.S. 419 (1995).

good faith of the State over the years of defending against Mr. Duest's various legal challenges. For example, on direct appeal, Mr. Duest did raise a challenge to the sufficiency of the evidence against him. *Duest*, 462 So. 2d at 448-49. In his state and federal collateral challenges, Mr. Duest raised challenges to the validity of his conviction, notably due to the singular and combined effects of ineffective assistance of counsel and a *Brady* violation. At the behest of the State, these courts, including this Court, rejected Mr. Duest's arguments because of the purported strength of the case against him at trial. *Duest v. Dugger*, 555 So. 2d 849, 850-51 (Fla. 1990); *Duest v. Singletary*, 967 F. 2d 472, 478 (11th Cir. 1992).

Had the State disclosed this memorandum from Mr. Garfield, there would have been concrete proof in this record of the State's own lack of confidence in the strength of the case against Mr. Duest and would have provided powerful support for Mr. Duest's previous arguments. The State's failure to disclose this memorandum not only deprived Mr. Duest and the guilt phase jury of compelling exculpatory information, it also raises questions about the good faith of the State's longstanding efforts to defeat Mr. Duest's legal challenges over the years. Reversal is warranted.

3. The Polygraph Evidence.

In his Rule 3.851 motion, Mr. Duest further alleged that, included in the materials disclosed by the State Attorney's Office pursuant to Fla. R. Crim. P.

3.852 during the postconviction proceedings, was a handwritten notebook from the law enforcement officers who were investigating the death of Mr. Pope and Mr. Duest's involvement in same, as well as an investigative continuation report authored by lead detective Paul Lauria of the Broward Sheriff's Office.[16]

Upon careful inspection of these handwritten notes and investigative report, Mr. Duest's collateral counsel discovered entries reflecting the law enforcement-adminstered polygraph to witnesses (PCR-41-42). As reflected in these documents, which were attached to Mr. Duest's Rule 3.851 motion, the notes first reflect an entry that states "polygraph" followed by the name "David" with the word "unusual" written afterwards.[17] The second entry relating to polygraph examinations does not refer to a particular person, it simply says "2-16-82 5 PM Polygraph by Raoul [illegible] Passed." According to Detective Lauria's investigative report, however, it is clear that these handwritten entries refer to a polygraph administered to David Shifflett:

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[16]The facts underlying this sub-claim were raised in two separate, yet related, claims in Mr. Duest's Rule 3.851 motion. In Claim II of the motion, Mr. Duest alleged that the State was continuing to dishonor its obligations under *Brady* and *Scott v. Butterworth*, 734 So. 2d 391 (Fla. 1999), in failing to disclose additional materials relating to the Shifflett polygraph (PCR. at 6-9). In Claim III, Mr. Duest alleged the withholding of the Shifflett information as a *Brady* claim with regard to the guilt phase of his capital trial.

[17]One of the key prosecution witnesses against Mr. Duest was an individual named David Shifflett, who was Mr. Pope's roommate and who was the first person to contact the police after arriving home and observing that something was wrong.

> At 5:00 PM, February 16, 1982, David Shifflett was given a polygraph test by Rauel Vincel, of the Broward Sheriff's Office Polygraph Unite, at the Lauderhill Substation. At the conclusion of the test, this writer was advised by Deputy Vincel that there was no indication[18] in the polygraph administered including the key questions whether or not Shifflett participated in, set up, or actually murdered the deceased, John Pope.

(PCR-44-45). The date of Feburary 16, 1982, is significant, for it is a day after the discovery of Mr. Pope's body. As of February 16, 1982, law enforcement had already begun its investigation into Mr. Pope's death and had interviewed a number of potential witnesses. Obviously, and as reflected by these heretofore undisclosed handwritten entries and Lauria's heretofore undisclosed report, included in law enforcement's investigation was the administration of polygraph examinations to at least Mr. Shifflett.

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[18]Above the typewritten word "indication" there is a handwritten word "deception."

In his Rule 3.851 motion, Mr. Duest further alleged that these notes and police report were never disclosed to Mr. Duest prior to trial, his prior collateral proceedings, or his resentencing proceeding (PCR. 22-23). Moreover, as he alleged, it appears from Detective Lauria's pretrial deposition that defense counsel for Mr. Duest was affirmatively misled. In his deposition, Lauria discusses his contact with David Shifflett, but never discusses the fact that he had a polygraph administered to him (PCR. at 47-61). And, after defense counsel questioned Lauria at the deposition about the efforts he undertook in the investigation, the final question he posed to Lauria was "Is there anything further that you did on this case?" to which Lauria replied "Not that I can think of" (PCR. at 61). Under these circumstances, defense counsel more than reasonably relied on Lauria's representations, under oath, and certainly had no notice that Lauria had arranged for a polygraph of Shifflett (or any other witnesses for that matter). The State also failed to disclose this fact in pretrial discovery. In fact, in its discovery response, the State wrote "At this time the State is unaware of any evidence which falls within the purview of *Brady v. Maryland*, Fl .R.Cr.P. 3.220(a)(2)" (R1-1712).[19]

It is now known, more than twenty years later, that the State did in fact

[19]It is now known, of course, that this statement was incorrect, as the State did fail to disclose the bus ticket that had been the subject of Mr. Duest's prior Rule 3.850 proceedings as a *Brady* violation.

administer polygraph examinations to at least one witness in this case. What remains to be disclosed, however, is (1) which witnesses aside from Shifflett were given polygraph examinations, (2) the results of those polygraph examinations, (3) and the actual polygraph reports, including any and all witness statements given prior to and during the actual polygraph examination.

Unfortunately, the Broward County State Attorney's Office has a track record of failing to disclose the fact that prosecution witnesses were polygraphed and the reports generated from polygraph examinations. In 1992, the Eleventh Circuit Court of Appeals reversed the conviction of Sonia Jacobs due to the fact that the State failed to disclose the fact that the only eyewitness to testify that Ms. Jacobs fired the first shot submitted himself to a polygraph prior to trial. *See Jacobs v. Singletary*, 952 F. 2d 1282 (11th Cir. 1992). In the report prepared by the polygrapher, it was revealed that the witness made conflicting statements made by the witness to the polygrapher about whether Ms. Jacobs fired a gun at all. Because the statements made by the witness to the polygrapher "directly contradicted" and "significantly clashed" with the testimony at trial, the Eleventh Circuit found that *Brady* had been violated. *Id*. at 1288.

At the case management hearing, Mr. Duest's counsel contended that the allegations were sufficient to warrant, at a minimum, an evidentiary hearing:

MR. SCHER: And I submit that, well, the allegations are that,

you know, obviously this was withheld from not only trial counsel but from collateral counsel throughout the previous 3.850 proceedings, throughout the federal habeas proceedeings. At this point those allegations are, I believe, would require an evidentiary hearing, certainly possibly even further discovery to the extent that there are additional witnesses that were polygraphed, that all was disclosed as stated in the motion, was a police report and some pages from a notebook from the lead detective in the case indicating that one of the witnesses, David Schifflett, was polygraphed and apparently passed, according at least to the police report that was disclosed, and the police report that was disclosed, which is exhibit B to the 3.851 motion here, was also not disclosed prior to trial. And that police report also references the polygraph given to Mr. Shifflett.

What remains to be disclosed, however, is any polygraph report, what the questions were that were asked of this particular individual and what his answers were. All that's known is that he passed. And, of course, when you are given a polygraph, as we all know who do this type of work, you are given a pre-interview during a polygraph, you often are asked a series of questions, respond with certain answers, and sometimes those answers do reflect certain inconsistencies and later statements and so I still have not received any polygraph report with respect to this polygraph, so that's claim two.

* * *

. . . I want to point out with regard to Mr. Shifflett that he did, in fact, testify, of course, at the original guilt phase, at the guilt phase, and also his testimony was read, I believe, to the jury at the re-sentencing.

This Court, in fact, relied upon Mr. Shifflett's testimony, among others, to find one of the aggravating circumstances, and that's on page 5 of your sentencing order. And I also want to make clear, or clarify that the claim is not that, the fact that he passed the polygraph would be admissible. My complaint in claim two is that I'm still waiting for the polygraph report that has all of the questions and answers. I certainly would agree that the results of a polygraph would be [not] be admissible certainly without a stipulation. The big

> question that remains is what were the questions and what were the answers. That, in fact, was one of the issues that was addressed by the Jacobs' opinion from the 11th Circuit that I cited in the motion where they talk about the fact that it is the responses that are given during a polygraph examination that form the basis in that case for finding that Brady had been violated or warranting a new trial in that particular care. So there's that aspect to claim three.

(PCR-T. at 36-38; 43-44).

In denying this claim without an evidentiary hearing, the lower court concluded that this claim was procedurally barred and insufficiently pled (PCR. at 403). The court failed to explain how the basis of this ruling or how this sub-claim was procedurally barred or insufficiently pled. As Mr. Duest alleged in his Rule 3.851 motion, the documents at issue were disclosed for the first time in the instant postconviction proceedings. They were not, as he alleged, ever disclosed prior to trial, his first Rule 3.850 and habeas proceedings, or his resentencing. The lower court's procedural bar ruling is erroneous and is due to be reversed, as is the conclusory statement that the allegations were "insufficiently pled."

As noted earlier, Mr. Duest did raise this issue in two separate, yet related, claims in his Rule 3.851 motion. In addressing this issue as part of Claim II, the lower court likewise denied the claim without an evidentiary hearing, concluding simply that "the Defendant has not satisfied the requirements set forth by the United States Supreme Court in *Brady* and its progeny" (PCR. 400). Further, the court found that Mr. Duest had not proved that the evidence was favorable (either

because it was exculpatory or impeaching), that it had been suppressed by the State, either wilfully or inadvertently, and Mr. Duest had been "prejudiced by the alleged suppression of this evidence" (*Id*.). However, overlooked by the lower court was that, under the rule applicable to this case, an evidentiary hearing was mandated "on claims listed by the defendant as requiring a factual determination." Fla. R. Crim. P. 3.851 (f)(5)(A)(i). This claim was one of those listed by Mr. Duest as requiring factual determination, and the lower court erred in its summary denial.

C. Relief is Warranted after the Requisite Cumulative Consideration.

As noted earlier, the lower court affirmatively acknowledged that it was not going to conduct a cumulative analysis in Mr. Duest's case, writing that such an analysis was not warranted because "each of the individual arguments presented by the Defendant (excluding the sub-issue relating to the change in Dr. Wright's testimony) are either without merit or procedurally barred" (PCR. 403). Even after the evidentiary hearing, the lower court, in its final order, did not conduct a cumulative analysis. This is error.

In assessing whether Mr. Duest was and is entitled to relief based on the various *Brady* allegations he alleged, the court was required to conduct a cumulative analysis of not only the new violations but those raised in Mr. Duest's

prior collateral proceedings. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999). Thus, in conducting the requisite cumulative analysis of the *Brady* materials, the lower court was required to look to the all of the undisclosed evidence, including the bus ticket that has already found to have been suppressed by the State at trial, and how trial counsel may have used the evidence to undermine the State's case.

In reviewing the cumulative impact of the evidence suppressed by the State in this case, it is paramount to note that Mr. Duest maintained his innocence at trial and presented eleven witnesses in support of his claim that he was in Massachusetts during President's Day weekend of 1982. The jury was thus presented with a credibility battle: should it believe the State's witnesses who identified Mr. Duest as "Danny," the person they partied with in Ft. Lauderdale that weekend, or should it believe the defense witnesses, who testified that Mr. Duest was in Massachusetts that same weekend.

Undeniably, the bus ticket that was the subject of Mr. Duest's prior collateral proceedings reflecting travel from Boston to Miami in April, 1982, was not disclosed. This bus ticket could have been used to corroborate the testimony of Mr. Duest's parents that they placed him on a bus in Boston in early April of 1982. Indeed, the Eleventh Circuit acknowledged this fact. *Duest*, 967 F. 2d at 479 ("Admittedly, the existence of the ticket serves to corroborate the testimony of

Duest's parents that they put him on a Ft. Lauderdale-bound bus on April 5"). Critically, and perhaps even more importantly, it would also have provided the jury with corroboration of Mr. Duest's statement to the police at the time of his arrest that he had just arrived in Ft. Lauderdale days before.[20] From the moment of his arrest, Mr. Duest maintained that he had traveled to Florida via a Trailways bus which departed Boston on April 5, 1982, almost two months after the offense. He further maintained that at the time of his arrest, he had a bus ticket in his possession. Throughout pretrial discovery, when the defense attempted ascertain the existence of such a ticket, the State denied any knowledge of any personal property seized from Mr. Duest (Deposition of Rene Robes, July 15, 1982 at p.18) ("Q: And was anything of his personal property taken into evidence that you felt was important? A: Just for safekeeping"); *id*. at p.19 ("Q: You don't have any other personal belongings within your custody? A: No").

At the trial, the State introduced Mr. Duest's statement and proceeded to present testimony that law enforcement could not find any evidence to corroborate Mr. Duest's story in order to portray him as a liar (R1-887-88; 895). The prosecutor also, in closing argument, focused on the absence of physical evidence to support Mr. Duest's statement that he left Boston for Florida on April 5, 1982,

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[20]Mr. Duest was not arrested until April 18, 1982.

and suggested that Mr. Duest's mother had taken Mr. Duest to the bus station in early February and not on April 5 (R1-1403, 1405). The existence of the bus ticket would have demonstrated that Mr. Duest had in fact been truthful when he told law enforcement that he had just arrived in town the week before via a Trailways bus. Certainly, the State's possession of the bus ticket impeaches the credibility of law enforcement and the reliability of its investigation. *Kyles*, 514 U.S. at 446 ("the defense could have examined the police to good effect on their knowledge of Beanie's statements and so could have attacked the reliability of the investigation").

Under these circumstances, the cumulative effect of the withheld evidence undermines confidence in the outcome of Mr. Duest's conviction. The State managed to rebut Mr. Duest's alibi defense by presenting testimony that officers had in fact investigated whether Mr. Duest traveled to Florida in April 5, 1982. This testimony no doubt left the jury with the clear impression that the investigation had proved fruitless and that Mr. Duest was a liar. This was contrary to the facts known to the State, which unquestionably had in its possession the bus ticket establishing that Mr. Duest indeed traveled to Florida on April 5, 1982.

Moreover, as now known, the homicide did not happen the way it was portrayed at trial. Mr. Pope simply did not keel over when the assailant inflicted the last wound. Rather, he was left alone with injuries that were not life

threatening if help was sought. Mr. Pope was left alive with the ability to move about on his own power. And he did. This new revelation demonstrates a woefully inadequate investigation by law enforcement. It changes the potential profile of the assailant and alters the picture as to the intent and motivation of the assailant. The case is put into an entirely new light, and, as such, confidence is undermined in the outcome under the requisite cumulative analysis.

ARGUMENT II

MR. DUEST WAS DENIED A RELIABLE ADVERSARIAL TESTING AT HIS CAPITAL RESENTENCING PROCEEDING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE LOWER COURT ERRED IN SUMMARILY DENYING THIS CLAIM WITHOUT AN EVIDENTIARY HEARING.

In considering whether a Rule 3.850 movant is entitled to present evidence in support of his constitutional claims, his factual allegations "must" be accepted as true. rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." Patton v. State, 784 So. 2d 380 (Fla. 2000)*Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Strickland v. Washington*, 466 U.S. 668 (1984)*State v. Lewis*, 838 So. 2d 1102, 1112 (Fla. 2002). If there is a reasonable probability of a different outcome, prejudice is established. Mr. Duest submits

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[21]*See Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[22]Shortly before the penalty phase, counsel moved for a continuance when it was clear that many of the out-of-state witnesses would be unavailable to testify at the penalty phase. The court ultimately denied the continuance, ruling that any witnesses who were not available to testify before the jury could testify at the *Spencer* hearing.

[23]The resentencing proceedings before the jury took place in October, 1998.

that, under the circumstances of this case, he has made out a prima facie showing of a *Strickland* violation, and the lower court was without authority to deny an evidentiary hearing in the face of the mandatory language of Fla. R. Crim. P. 3.851 (f)(5)(A)(i) **.** Reversal for an evidentiary hearing is warranted.

CONCLUSION

The foregoing authorities, the trial record, and evidentiary hearing testimony, in conjunction with the allegations on which Mr. Duest did not get a full and fair hearing, show that a new trial and/or resentencing are warranted Accordingly, Mr. Duest requests that his conviction and sentence of death be vacated and/or any other relief which this Court may deem just and proper.

CERTIFICATE OF FONT

I hereby certify that this Initial brief was typed in New Times Roman font, 14 pt. type.

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[24]The lower court's finding of a procedural bar as to this sub-claim is unexplained and, more importantly, the State never asserted a bar to this sub-claim (PCR. 113-120).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Initial Brief has been furnished by United States Mail, first class postage prepaid to Celia Terenzio, Assistant Attorney General,1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, on this 26th day of December, 2007.

TODD G. SCHER
Fla. Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue #15-B
Miami Beach, FL 33140
(305) 861-9252 (Tel)
(305) 861-9253 (Fax)