IN THE SUPREME COURT OF FLORIDA

LLOYD DUEST,

Appellant,

vs. **Case Number SC07-162**

STATE OF FLORIDA,

Appellee.
_____/

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

REPLY BRIEF OF APPELLANT

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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. Further Evidentiary Development is Warranted.

In his Initial Brief, Mr. Duest contended that the lower court impermissibly restricted his ability to present evidence on various aspects of his claim for relief. In response, the State contends that the record "completely belies" this assertion (Answer Brief at 24), and argues that "the substance of the *Brady* claim was an obvious component of the *Strickland* claim" on which the lower court did grant an evidentiary hearing (Answer Brief at 25 n.5).[1] Mr. Duest disagrees with the State's view of the record and the lower court's rulings with regard to the narrow scope of the evidentiary hearing that was granted.

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[1] *See Brady v. Maryland*, 373 U.S. 83 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984).

The lower court's case management order explicitly prohibited Mr. Duest from presenting any evidence on the *Brady* aspects of his claim as it related to both the resentencing phase and the original guilt phase, 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 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.**

That the lower 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 and is equally ignored in large part by the State's Answer Brief.

B. Mr. Duest is Entitled to an Evidentiary Hearing as to the Reliability of the Guilt Phase.[2]

The State devotes a mere footnote to addressing the lower court's failure to meaningfully address Mr. Duest's claim for relief as it relates to the guilt phase, merely noting that the lower court "also rejected Appellant's claim that the alleged

withholding of Wright's testimony entitled him to a new guilt phase proceeding as well" (Answer Brief at 35) (citing to PCR391 at n.3). In this reference to the record, the lower court, in a footnote, merely stated that it found that "[f]or the reasons set forth in this order, . . . there were no errors which would warrant a new trial for the Defendant on either of these issues" (PCR391 n.3). However, with one brief exception, nowhere else in the lower court's order did it address Mr. Duest's allegations regarding Dr. Wright's changed testimony as it related to the *guilt phase*. The one exception occurred when the lower court addressed the "newly discovered evidence" aspect of the claim; in so addressing this claim, the lower court concluded that the claim was procedurally barred and untimely because it was "discovered" in 1998 but not raised until 2005 (PCR. at 395). However, as noted in his Initial Brief, when determining whether an 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

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[2]Mr. Duest relies on his Initial Brief with regard to the issues relating to Dr. Wright and the resentencing proceeding.

> 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*.). Thus, the only arguable reference by the lower court to the fact that Mr. Duest was also leveling a challenge to the original guilt phase was its erroneous conclusion that the "newly discovered evidence" aspect of the claim

was procedurally barred. At no time did the lower court meaningfully address the *Brady* or other aspects of this claim relating to Mr. Duest's original guilt phase.[3]

Despite the fact that the lower court essentially ignored the guilt phase aspect of this claim and failed to afford Mr. Duest an evidentiary hearing on this claim, the State chides Mr. Duest for failing to "explain away" the "overwhelming evidence in support of premeditated murder" (Answer Brief at 36), contending first that Mr. Duest "never challenged the sufficiency of the evidence of premeditation at the guilt phase" (Answer Brief at 39). As this Court's direct appeal decision amply demonstrates, the State's contention that Mr. Duest has "never" challenged the sufficiency of the evidence of premeditation is patently incorrect. *Duest v.*

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[3]One sentence in the lower court's order arguable addresses the newly discovered evidence test relating to the guilt phase. At the end of its discussion of the newly discovered evidence aspect of the claim, and after erroneously concluding that the claim was procedurally barred, the lower court wrote that the "material elements of Dr. Wright's testimony would have had no impact on the Defendant's intent to kill . . . " (PCR395). This conclusion is as mystifying as it is baseless, particularly given the fact that the same circuit court, when sentencing Mr. Duest to death at his resentencing proceeding, made a finding of fact that Mr. Duest lacked the intent to kill, but afforded it very little weight in terms of weighing aggravation and mitigation (R2-399). The lower court's Rule 3.851 order, finding that Dr. Wright's testimony would have had "no impact" on Mr. Duest's intent to kill, is utterly at odds with the same court's earlier factual finding at the resentencing. These contradictory findings by the lower court further points to the need for an evidentiary hearing as to the guilt phase aspects of this claim.

State, 462 So. 2d 446 (Fla. 1985) ("there was sufficient circumstantial evidence to sustain defendant's conviction of premeditated murder"). In making this assertion on appeal, the State also apparently overlooks its response to Mr. Duest's Rule 3.851 motion, in which it stated that "Duest previously challenged the sufficiency of the State's premeditation evidence on his direct appeal from the first degree murder conviction . . . (PCR100).[4]

The State also claims that "[t]here was no claim presented in these proceedings that guilt phase counsel was ineffective for failing to present this claim at trial" (Answer Brief at 39 n.9). The State is engaging in circular reasoning and does not appear to comprehend that Mr. Duest's claim is that Dr.

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[4]The State contends that the issue of premeditation was not a contested issue at the guilt phase (Answer Brief at 39-40), as if somehow this fact were germane to a *Brady* claim. Of course, the defense was unaware at the time of the guilt phase that Dr. Wright conducted an incompetent and negligent investigation in 1983 by his failure to review crime scene photographs in order to arrive at correct conclusions, or that he was simply an incompetent medical examiner. Had Mr. Duest been afforded an evidentiary hearing, he would have been in a position to put on the testimony of guilt phase counsel to explain how this information would have altered the defense strategy on the issue of challenging the State's case for premeditation. *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").

Wright's "changed" and "incorrect" testimony at the resentencing constituted a *Brady* violation as to the original guilt phase. *See, e.g. Kyles v. Whitley*, 514 U.S. 419, 447 (1995) (*Brady* encompasses information that can establish, or give rise to inference, that the "police had been guilty of negligence" in the investigation). Mr. Duest did not make an allegation that guilt phase counsel was ineffective for failing to "present" Dr. Wright's "changed" or "incorrect" evidence at the guilt phase because, as should be obvious, the evidence did not exist at the time. Indeed, the State conceded as much below. *See* PCR103 (State's Response to Rule 3.851 Motion) ("In reality, Wright's 1998 testimony did not exist at the guilt phase in 1983. Therefore, there was no "new" evidence to be discovered"). Mr. Duest would surely have been chastised by the State and the lower court for alleging that guilt phase counsel should have presented evidence that was not in existence at the time. What Mr. Duest did allege, and continues to allege, is that this evidence was new *Brady* material that affects the reliability of the guilt phase in this case, particularly given that the State has already been held to have withheld evidence from the defense at the original guilt phase. *See Duest v. Dugger*, 555 So. 2d 849, 850 (Fla. 1990); *Duest v. Singletary*, 967 F. 2d 478-79 (11th Cir. 1992).

The State's sole reliance on the alleged "overwhelming evidence" does nothing to refute Mr. Duest's entitlement to an evidentiary hearing on this issue. Moreover, the alleged "overwhelming" nature of the evidence is not the proper test to evaluate a *Brady* claim. A *Brady* violation is established when:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Prejudice is established where confidence in the reliability of the conviction is undermined as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. In order to prove a violation of *Brady*, Mr. Duest must establish that the State possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment," and that the evidence was "material." *United States v. Bagley*, 473 U.S. 667 (1985). Evidence is "material" and a new trial is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-34. As this Court has explained, "[a] showing of materiality `does not require demonstration by a preponderance that disclosure of the suppressed evidence

would have ultimately resulted in the defendant's acquittal." *Cardona v. State*, 826 So. 2d 968, 973 (Fla. 2002) (quotations and citations omitted). Rather:

> [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether `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. (quotations and citations omitted). "It is the net effect of the evidence that must be assessed." *Way v. State*, 760 So. 2d 903, 913 (Fla. 2000).

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.

A. Counsel's Unreasonable Decision to Present Dr. Fleming.

The State continues to urge that this claim is procedurally barred because "it has been fully and finally litigated on [direct] appeal" (Answer Brief at 58). The State is incorrect. On direct appeal, Mr. Duest raised, and this Court addressed, a claim that the trial court erred in allowing the State to elicit testimony from Dr. Fleming identifying Mr. Duest's prior offenses after the witness stated that she considered the convictions in formulating her opinions. *Duest v. State*, 855 So. 2d 33, 49 (Fla. 2003). This is not the "same" claim, as the State contended and the lower court found, that Mr. Duest raised in his Rule 3.851 motion. Although the underlying facts of the claim were also involved in the direct due process challenge raised on direct appeal, this does not mean that the ineffective assistance of counsel claim raised below is procedurally barred or that Mr. Duest is "recasting" the same

claim in a different manner (Answer Brief at 58). This Court has addressed a nearly identical issue, rejecting the same argument raised by the State in Mr. Duest's case:

> The trial court concluded that this claim was procedurally barred because it either was, or could have been, raised on direct appeal. This was error. Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and–of necessity–have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant thus has little choice: As a rule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal. Thus, the trial court erred in concluding that Bruno's claim was procedurally barred.

Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001) (footnotes omitted).

Here, Mr. Duest, in his Rule 3.851 motion, raised a claim of ineffective assistance of counsel regarding counsel's unreasonable decision to present the testimony of Dr. Fleming. Although some of the underlying facts of this claim were also involved in the due process challenge raised on direct appeal, as the *Bruno* Court found, this does not mean that the subsequent ineffectiveness claim is barred. For reasons stated by the Court in *Bruno*, the lower court erred in relying

on the State's assertion of a procedural bar. Since the lower court reached no alternative holding on this issue, reversal is warranted for the evidentiary hearing mandated under Fla. R. Crim. P. 3.851 (f)(5)(A)(I**).**

The State relies on *Valle v. State*, 705 So. 2d 1331, 1336 n.6 (Fla. 1997), and *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995), as being "directly on point" with the procedural posture of Mr. Duest's case (Answer Brief at 59). First, the Court's decision in *Bruno* post-dates any conflicting language in *Valle* and *Harvey*. But more importantly, the State mis-apprehends the claim raised by Mr. Duest on direct appeal as opposed to the one raised below. That this Court, on direct appeal, held that the trial court did not err in allowing the State to elicit testimony from Dr. Fleming identifying Mr. Duest's prior offenses, does not conclusively refute Mr. Duest's present claim, nor is it the same claim that Mr. Duest is raising now, to wit, that resentencing counsel was ineffective in that he made an unreasonable decision to present Dr. Fleming's testimony *in toto*. The two claims, although involving the testimony of Dr. Fleming, are not the same. Thus, the procedural bar ruling of the lower court is due to be reversed, and an evidentiary hearing should be ordered.

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.

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 3d day of July, 2008.

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