IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1700

Fourth District Case No. 4D06-2039

DAVID M. DEREN,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The petitioner, David M. Deren ["Petitioner"], and a co-defendant, Nathan Stewart, were patrons at the Stuart Ale House. The Ale House's bouncer, Jerry Fitzpatrick, told them to leave and an altercation ensued. The Petitioner was charged with various offenses and tried by jury. The jury found the Petitioner guilty of battery as a lesser included offense, as well as disorderly conduct and felony battery. (App. 1-2).

After the trial but before sentencing, the prosecutor disclosed for the first time that for months prior to the trial, she was in possession of a letter from the Ale House's insurance provider, The Hartford Company. The letter detailed that The Hartford was paying Fitzpatrick for lost wages and medical bills. (App. 1-2).

The Petitioner moved for a new trial on the ground that the prosecutor's suppression of the letter resulted in a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (prosecution's suppression of favorable evidence violates a defendant's due process rights under the Fourteenth Amendment) and *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (holding that regardless of request by defendant, favorable evidence is material, and constitutional error results from its suppression by the prosecutor, if there is a reasonable probability that the result of the proceedings would have been different had the evidence been disclosed). The Petitioner's

counsel argued that the letter established Fitzpatrick's financial motive to testify as he did because, as a matter of statutory law, he would not be entitled to any money from The Hartford as the aggressor in the bar fight. *See* § 440.09(3), Florida Statutes (2007) (providing in pertinent part that "[c]ompensation is not payable if the injury was occasioned ... by the willful intention of the employee to injure ... another."). The Petitioner's counsel contended that the suppression of the letter denied him the opportunities to impeach Fitzpatrick, demonstrate Fitzpatrick's bias to the jury, and establish Fitzpatrick's financial stake in the outcome of the case. The motion for new trial was denied by the trial judge and the Petitioner appealed to the Fourth District. (App. 1-2).

The Fourth District found that the prosecutor "erred in failing to provide the letter to defense counsel ...". (App. 2). However, the Fourth District ruled that "this failure did not result in a *Brady* violation requiring reversal." (App. 2). The Fourth District reasoned that through "due diligence" the Petitioner's counsel could have discovered the payments, such as through cross-examination of Fitzpatrick. (App. 2). The Fourth District further found that the Petitioner's counsel, having received medical records in discovery, "should reasonably have known that, as Fitzpatrick received his injuries while at work, he most likely received worker's compensation." (App. 3).

SUMMARY OF ARGUMENT

The decision of the Fourth District is in express and direct conflict with the cited decisions of this Court on the same question of law. Those decisions of this Court hold that although defendants in criminal cases have the right to pretrial discovery and that their counsel are expected to exercise "due diligence" in the discovery process, the focus of a *Brady* violation in a postconviction backward-looking analysis is whether the evidence suppressed by the State is of such a nature and weight that confidence in the outcome of the trial is undermined.

The Fourth District agreed with the Petitioner that the prosecutor improperly suppressed the evidence. However, in direct and express conflict with the decisions of this Court, the Fourth District completely failed to apply the correct test. The Fourth District should have determined whether the suppressed evidence (that the State's star witness was receiving insurance proceeds that were dependent upon his claim that he was not the aggressor in the bar fight for which the Petitioner was being prosecuted) was of such a nature and weight that confidence in the outcome of the trial was undermined.

Also in conflict with the cited decisions of this Court, the Fourth District improperly placed the burden of discovering the suppressed evidence upon the Petitioner's counsel, thereby exonerating the prosecutor and excusing the prosecutor's improper suppression.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN *FLOYD v. STATE*, 902 So. 2d 775 (Fla.2005), *ROGERS v. STATE*, 782 So. 2d 373 (Fla.2001), AND *YOUNG v. STATE*, 739 So. 2d 553 (Fla.1999) ON THE SAME QUESTION OF LAW.

In this case, the Fourth District found that the State improperly suppressed evidence that its star witness was being paid worker's compensation proceeds that he would not have been eligible for as a matter of statutory law if he were the aggressor in the bar fight for which the Petitioner was being prosecuted. The State withheld the evidence for months until after the Petitioner was convicted by a jury. The Fourth District found that the State improperly suppressed the evidence. However, the court "excused" the violation reasoning that Petitioner's counsel either should have discovered the payments to the witness through cross-examination or should "reasonably have known" that the witness "most likely received worker's compensation" because the bar fight took place at the witness's place of employment. (App. 2-3).

The Fourth District engaged in no analysis whatsoever concerning whether the wrongful suppression of the evidence by the State undermined confidence in the outcome of the case. Consequently, the Fourth District's decision is in express and direct conflict with this Court's decisions in *Floyd v. State*, 902 So. 2d 775 (Fla.2005), *Rogers v. State*, 782 So. 2d 373 (Fla.2001), and *Young v. State*, 739 So.

2d 553 (Fla.1999) on the same question of law. These decisions hold as follows:

> [Although] defendants have the right to pretrial discovery under our Rules of Criminal Procedure, and thus there is an obligation upon defendant to exercise due diligence pretrial to obtain information ... the focus in postconviction *Brady-Bagley* analysis is ultimately the nature and weight of undisclosed information. The ultimate test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.

Rogers, 782 So. 2d at 377 (*quoting Young*, 739 So. 2d at 559). *Accord*, *Floyd*, 902 So. 2d at 784 (e.s.).

In direct and express conflict with these decisions of this Court on the same question of law, the Fourth District failed to address, much less apply, the correct test for adjudicating the State's unconstitutional suppression of evidence favorable to the accused. The Fourth District did not at all consider the nature and weight of the evidence improperly suppressed by the State. The prosecutor's postconviction disclosure should have been reviewed by the Fourth District according to the above-quoted tests promulgated by this Court in the decisions cited for conflict.

The Fourth District not only disregarded this Court's tests, but also resolved the case against the Petitioner with a different and conflicting test that places the burden of discovering suppressed *Brady* evidence upon the defendant's counsel, thereby providing another basis for this Court's exercise of jurisdiction.

WHY THE COURT SHOULD EXERCISE ITS DISCRETION AND ENTERTAIN THE CASE ON THE MERITS SHOULD IT FIND IT HAS JURISDICTION[1]

This case presents issues of constitutional dimension that are worthy of resolution by this Court.

First, the decision of the Fourth District raises significant questions for prosecutors and defense attorneys directly implicating their duties and obligations pursuant to the discovery rules in Florida criminal cases, including the State's duties of disclosure and the defense attorney's duty to exercise due diligence.

Second, the Fourth District's view of the scope of defense counsel's due diligence obligations raises serious questions about the parameters of the Sixth Amendment right to effective assistance of counsel. The Fourth District ruled that Petitioner's counsel did not exercise "due diligence" even though the State was required to disclose the evidence in question and even though Petitioner's counsel sought records from The Hartford but received none. According to the Fourth District, the defense attorney, who acted in good faith reliance upon the prosecutor's duty to disclose, is blamed and the Petitioner is offered no relief for

[1] *See* Fla. R. App. P. 9.120(d), Committee Notes (1977 Amendment) (authorizing in the petitioner's jurisdictional brief a short statement of why this Court "... should exercise its discretion and entertain the case on the merits if it finds it does not have certiorari jurisdiction.").

the resulting unfair trial. However, the decisions of this Court cited for conflict suggest that it was the prosecutor in this case who should be charged with lack of due diligence for her violation of *Brady* and the consequent denial of the Petitioner's right to due process of law.

Finally, the merits are also worthy of review because by all objective accounts the trial was a swearing contest that was too close to call -- as evidenced in part by the jury's verdict of guilt of a lesser included offense even without the suppressed evidence -- thereby raising the very real specter that the unconstitutional conduct of the prosecutor resulted in, or at the very least contributed to, a miscarriage of justice.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court grant review of the decision of the Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was mailed to Laura Fisher Zabora, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, and Robert James Watson, Esq., 3601 SE Ocean Blvd, Suite 4, Stuart, FL 34996, this _____ day of September, 2007.

_____
PAUL MORRIS

CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements of Fla. R. App. P. 9.210.

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PAUL MORRIS