IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1700

DAVID M. DEREN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

*** ***

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

*** ***

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Introduction

The petitioner, David Deren ("Deren" or "petitioner"), requests that this Court quash the decision of the Fourth District in *Deren v. State*, 962 So. 2d 385 (Fla.4th DCA 2007).

Deren and co-defendant Nathan Stewart were tried jointly by jury upon charges arising from a bar altercation with Jerry Fitzpatrick, the bar's bouncer. The hotly contested issue at the trial was: Who was the aggressor? Two months prior to the trial, the prosecutor received a letter from the bar's worker's compensation carrier revealing that as of that date, the insurer had paid to Fitzpatrick nearly $24,000 in lost wages and medical expenses as a result of the bar fight. The letter also stated that the claim remained open and Fitzpatrick's benefits were ongoing. The prosecutor not only concealed the letter from the defense, she also asserted in her closing argument to the jury that no state witness had a stake in outcome of the case. After Deren was convicted of a lesser offense, the prosecutor disclosed the letter to the defense.

Deren moved for a new trial based upon *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), arguing that the letter was improperly suppressed by the prosecutor and that the accrued benefits constituted

impeachment evidence showing Fitzpatrick's financial incentive to testify that he was not the aggressor. (Fitzpatrick would not be entitled to any benefits as the aggressor in the bar fight.) The trial judge agreed that the prosecutor improperly concealed the letter but refused to grant Deren a new trial on the ground that the payments to Fitzpatrick were not material. Deren appealed to the Fourth District, raising the *Brady* violation, coupled with a claim of prosecutorial misconduct based upon the prosecutor's argument to the jury. Deren also challenged the trial court's denial of his motion for production of Fitzpatrick's drug rehabilitation records.

The Fourth District found that the prosecutor improperly concealed the insurer's letter. Nevertheless, the Fourth District affirmed based upon its finding that Deren's counsel could have obtained the information contained in the letter through reasonable diligence. The Fourth District did not address the materiality of the concealed payments to Fitzpatrick, the prosecutor's closing argument, or the drug records issue. This Court granted review.

Volumes one and two of the record on appeal filed in the Fourth District are consecutively paginated from 1-309 and are designated by the symbol "R". The symbol "T" designates the trial transcripts which are consecutively paginated from 1-698 and contained in volumes three through six of the record on appeal.

The Trial

The amended information charged that on December 21, 2004, Deren and Stewart committed: aggravated battery with a deadly weapon, namely, a barstool; disorderly conduct; and battery. (R. 32-33). Deren invoked discovery pursuant to Fla. R. Crim. P. 3.220 on December 28, 2004. (R. 9-11). The jury trial commenced in March of 2006.

The State's Case

The alleged victim and the State's star witness, Fitzpatrick, testified that he is a professional bouncer who provides security in night clubs and bars. (T. 151). Fitzpatrick stated that he has been involved in 500 bar fights. He is accomplished in various martial arts including tae kwon do, isshinryu, aikido, jujitsu, kung fu, and tai chi. (T. 152, 166). Fitzpatrick is 5'10" tall, weighs 200 pounds, trains in a gym, and bench presses 250 pounds. (T. 183-84).

On the night in question, Fitzpatrick was the bouncer in a bar where Deren and Stewart were patrons who were conversing and having beer. Fitzpatrick decided that the two were intoxicated because Stewart was leaning too closely to people while talking with them and Deren fell from his barstool. (T. 153).[1]

[1] State witness Dominique Steffen, an employee of the bar, described the behavior of Deren and Stewart as "joking around with each other" (T. 55) and "play fighting." (T. 56). She described the bar floor as "extremely slippery" (T. 59).

Fitzpatrick told Deren and Stewart to leave the bar. Stewart responded that he would like to finish his beer before leaving. (T. 174).

The bartender served Deren and Stewart another round of drinks. Fitzpatrick acknowledged that the bar's policy was not to serve anyone who appeared to be inebriated. (T. 168-69). Fitzpatrick told them again to leave. According to Fitzpatrick, Stewart became verbally aggressive. Fitzpatrick believed that Stewart was going to pick up his drink and hit him with it. Based solely upon that belief, Fitzpatrick grabbed Stewart under his arms, dragged him to the front exit door, and attempted to shove him out the door. But the door was locked and the two bounced off the door. Fitzpatrick wrestled Stewart to the floor. Fitzpatrick claimed that while he was fighting Stewart, he was hit by Deren on the head four times with a barstool. (T. 153-56; 183). Fitzpatrick punched Deren in the face approximately four times, breaking Deren's nose and causing blood to gush. Fitzpatrick then grabbed Stewart by the chin and threw him to the floor . (T. 157-58; 182). Fitzpatrick stated that Dominique Steffen asked Deren to step outside and Deren complied. (T. 158).[2] Stewart was pinned on the floor under Fitzpatrick until police arrived. (T. 104, 158).

[2] Steffen, all of 102 pounds, testified that she had no problem getting Deren to exit the bar. (T. 57, 60, 78-9, 81).

Fitzpatrick claimed that as a result of the fight, he suffered dizziness, nausea, and confusion. (T. 160). He took an overdose of Dilaudid but attributed that to his confusion. (T. 161). Also, just days after the incident, Fitzpatrick consumed Percocet and a strong alcohol drink known as a "Jager bomb". (T. 179-80). Fitzpatrick thereafter admitted himself into a drug rehabilitation clinic. (T. 162). Fitzpatrick acknowledged that he also consumed Percocets on the day of the incident. (T. 178). He further testified that all of the State's witnesses to the fight are his friends. (T. 180).

The first police officer on the scene, Melvin Barbre, testified that upon arrival, he observed Fitzpatrick lying on top of an individual who was pinned to the ground and trying to get out from underneath. (T. 102-04). The officer knew Fitzpatrick but did not know Deren or Stewart. After conducting interviews at the scene, the officer arrested Deren and Stewart. (T. 104-06). The officer testified that Stewart and Deren were so injured that the jail would not admit them so the officer took them to a hospital. (T. 113). Fitzpatrick was also taken to a hospital. The officer also testified that as Fitzpatrick was leaving the scene for the hospital, he blew kisses at Deren. (T. 116).

Sean DeVito testified that he worked for the bar as a bartender but on this night, he was socializing with a friend at the bar when he heard Fitzpatrick approach

Deren and Stewart. DeVito heard Fitzpatrick say to Deren and Stewart that the bar was getting ready to close, that the two were loud, and it was time for them to leave. DeVito described the conversation as "a normal thing." (T. 235, 246-49, 255-56). But then, according to DeVito, it "escalated" when Fitzpatrick grabbed Stewart. (T. 236). According to DeVito, while Fitzpatrick fought Stewart, Deren threw a barstool at Fitzpatrick. (T. 236). A brawl ensued and there was much blood. DeVito grabbed "one of them" and tried to calm things down. DeVito was slammed against the wall and they both fell to the floor. (T. 237). A waitress took Deren outside. The fight continued between Fitzpatrick and Stewart. (T 238; 243). DeVito never saw Deren or anyone else repeatedly strike Fitzpatrick with a barstool. (T. 246).

Nicole Guyon, the bar manager, testified that Deren and Stewart were bickering and knocked over a barstool. Fitzpatrick asked the two to leave. (T. 275-77). Thereafter, a barstool was either thrown at Fitzpatrick or someone struck him with one. (T. 278). Guyon confirmed the bar's policy not to serve intoxicated patrons. She stated that if someone was falling down from intoxication, that person would not be served. (T. 297).

Amanda Vaughn, the bartender for the outside bar, was getting off work when she observed the fight already in progress. She testified that Deren threw a

barstool at Fitzpatrick. (T. 310, 313, 316).

Dr. Hal Tobias, a neurologist, treated Fitzpatrick for headaches and neck and back pain. (T. 124-26). The doctor was provided by The Hartford Insurance Company (the worker's compensation carrier for the bar). (T. 143-44).

The Case for the Defense

Deren testified that he was conversing and having drinks with Stewart when Fitzpatrick told Stewart that the bar was going to close and it was time for them to leave. Stewart responded that he would leave in a few minutes after finishing his beer. (T. 357). At that time, neither Deren nor Stewart had fallen off a barstool. Rather, when Deren had earlier returned from the bathroom, he stepped on the edge of the barstool to sit on it and it toppled over. (T. 354).

Stewart had ordered a last round of drinks before Fitzpatrick first approached. (T. 357). When Fitzpatrick returned and threatened that this was the last time he would tell them to leave, Stewart responded that if it was closing time, he should be telling the other patrons to leave as well. Stewart had his hand on his glass of beer when he was grabbed by Fitzpatrick. The glass of beer was knocked out of Stewart's hand. Stewart was not threatening Fitzpatrick with the glass. Stewart asked Fitzpatrick what he thought he was doing. Fitzpatrick twisted Stewart's arm behind his back, lifted him off the floor and forced him to the exit

door. (T. 358-60, 367).

Stewart was slammed to the floor and Fitzpatrick was on top. (T. 361). Because Fitzpatrick was physically dominating Stewart, Deren came to Stewart's defense by attempting to push Fitzpatrick from Stewart. DeVito joined the fray by putting Deren in a headlock from behind which left Deren vulnerable to Fitzpatrick who took advantage by punching Deren in the face multiple times and breaking his nose. (T. 362-64). Deren struggled to escape DeVito by pushing him into a wall. Deren denied striking anyone with a barstool. (T. 367, 390). Deren testified that he is 5'8" tall and weighs 150 pounds. (T. 344).

Stewart also testified. Stewart stated that the first time Fitzpatrick approached him, there was no aggression. Stewart simply told Fitzpatrick that they would leave after he finished his beer. (T. 427). The second time Fitzpatrick approached, however, his tone was threatening. When Stewart answered that he would leave in 30 seconds in order to finish his beer, Fitzpatrick turned violent. (T. 428). Fitzpatrick grabbed and yanked Stewart's arm, spilling Stewart's drink all over his shirt. When Stewart asked what Fitzpatrick thought he was doing, Fitzpatrick placed Stewart in a choke hold and dragged him toward the door. (T. 429, 438-39). Fitzpatrick attempted to shove Stewart out the door but the door was locked and they bounced off it. Stewart was losing oxygen and starting to pass out from

Fitzpatrick's choke hold. Stewart fought to escape and the two exchanged blows. (T. 431, 439). But Fitzpatrick pinned Stewart on the floor. Stewart was being punched when Deren came to his defense by punching and kneeing Fitzpatrick. (T. 433, 439-40). Stewart suffered numerous injuries before the fight ended. (T. 434-36).

John Larson testified that he was in the bar with Deren and Stewart immediately before the fight commenced. According to Larson, neither Deren nor Stewart was inebriated, falling down, knocking heads, bothering anyone, or obnoxious. (T. 410-11). Larson left the bar just as it was starting to clear out. (T. 411).

Samuel Berkowitz testified that he was conversing with Deren and Stewart before the fight. Berkowitz stated that neither Deren or Stewart was drunk or causing anyone a problem. (T. 416-17). Berkowitz was outside the bar in his vehicle in the parking lot on the telephone when the police arrived. (T. 417-18, 421).

The Prosecutor's Closing Argument

In her closing argument to the jury, the prosecutor made the following assertion:

> The people [*i.e.*, the prosecution witnesses] that came in here and testified don't have any stake in this. They don't have any reason to come in here and tell you something unless it is the truth.

(T. 526).

The Verdict and Sentence

The jury acquitted Deren of aggravated battery with a barstool as charged in count one, but found Deren guilty of the lesser included offense of battery. Deren was also found guilty of disorderly conduct as charged in count two and guilty of battery as charged in count three. (T. 591).[3] In a separate proceeding held immediately after the verdict was announced, the jury determined that Deren had a previous case where he entered a plea to a withheld adjudication. (T. 621). By statute, that "non-conviction" constituted a prior conviction for the purpose of elevating count three to a felony. *See* § 784.03(2), Florida Statutes. Deren was sentenced to incarceration for nine months followed by probation for four years. (R. 252).

The *Brady* Violation and Motion for New Trial

After the verdict, the prosecutor sent a fax to defense counsel. Her fax cover sheet asked whether defense counsel objected to restitution. (R. 221). The letter that accompanied the cover sheet was dated January 27, 2006 (two months prior to the commencement of trial) and was from The Hartford Insurance Company to the prosecutor. The letter stated the following:

[3] The jury returned the same verdict as to Stewart. (R. 591).

January 27, 2006

Linda Bach, Asst State Atty
State Attorney Office
100 East Ocean Blvd
Stuart, FL 34994

RE: Claim Number: YKV/01391
Injured Worker: Jerry Fitzpatrick
Employer: Barret Enterprises
Date of Loss: 12/21/04

Dear Ms. Bach:

This letter will confirm my conversation with your office today. The Hartford is the workers' compensation carrier for Barret Enterprises and is paying medical and lost wages benefits on behalf of Jerry Fitzpatrick due to injuries suffered as a result of this assault.

At this time I am requesting that you petition the judge, when appropriate, to include an order for restitution of damages during the sentencing phase of the criminal case. As of this date The Hartford has paid $20,956.47 in medical and $2,946.84 in lost wages. Mr. Fitzpatrick's claim is still open and we continue to pay benefits.

If you need for us to provide documentation of these damages I can do that at any time. Also, I would appreciate your contacting me to provide additional information regarding what expectations we may have regarding the court ordering the restitution if he is convicted.

Thank you very much for your assistance in this matter. I can be reached at 877-673-9222 ext. 25461.

Sincerely,
/s Eric Harbinson
Subrogation Specialist

(R. 222). The letter was never previously disclosed to the defense.[4]

Deren moved for a new trial arguing that pursuant to *Brady* and the Florida discovery rules, the letter should have been disclosed upon its receipt by the prosecutor two months prior to trial because it constituted critical impeachment evidence against Fitzpatrick who would not be entitled to any benefits as the aggressor. (T. 628-31). At the hearing on the motion for new trial, defense counsel represented that he would have cross-examined Fitzpatrick about the nearly $24,000 in benefits that had accrued as of the date of the letter. (T. 629). In opposition to the motion for new trial, the prosecutor summarized her position as follows: "I don't think that this letter would make any difference whatsoever." (R. 632).

The trial judge denied the motion for new trial in a written order. (R. 225-233). The judge stated: "To be sure, the State should have provided this letter in discovery." (R. 226). However, the judge concluded that the prosecutor's concealment of the letter did not undermine confidence in the outcome of the trial. (R. 227-28).

Deren's Direct Appeal to the Fourth District

Deren appealed to the Fourth District and sought a new trial based upon the

[4] One of the prosecutor's pretrial supplemental discovery responses was served upon the defense after she received the letter. But the letter was not disclosed in that response or at any other time prior to the verdict. (R. 164-73).

following two pertinent claims: first, he was denied due process of law as a result of the concealment of the insurance company's letter coupled with the prosecutor's closing argument to the jury; second, the trial court reversibly erred in denying his motion for production of Fitzpatrick's drug rehabilitation records. *See* 4th DCA Initial Brief of Appellant.[5]

In its answer brief in response to the claimed *Brady* violation, the State argued that " ... the letter was not relevant to the guilt phase of the trial and its absence did not undermine the fairness of the trial." (4th DCA Answer Brief of Appellee at 18). The State did not claim that Deren's trial counsel could have discovered the accrued benefits through due diligence. As to Deren's claim of prosecutorial misconduct, the State argued that the prosecutor's closing argument to the jury was "proper" and "could not have had any impact on the outcome of the trial." *Id*. at 25. The State also defended the trial court's refusal to order disclosure of Fitzpatrick's medical records. *Id*. at 26-28.

The Decision of the Fourth District

The Fourth District affirmed Deren's convictions. The Fourth District agreed with Deren and the trial judge that the prosecutor's concealment was improper. *See Deren*, 962 So. 2d at 386. ("We find that ... the State erred in failing

[5] Stewart separately appealed to the Fourth District. His appeal was dismissed upon his untimely death. *See Stewart v. State,* 4D06-2040.

to provide the letter to defense counsel ..."). However, the Fourth District reasoned that the suppression of the accrued benefits to Fitzpatrick did not require reversal for the following two reasons:

> First, although Deren did not know the total of Fitzpatrick's insurance payments, defense counsel admitted at trial that he was aware there was a worker's compensation claim. While defense counsel cross-examined Fitzpatrick about the claim,[6] he did not question Fitzpatrick about the amount of money he received or the value of his benefits.
>
> Second, Deren possessed all of Fitzpatrick's medical records. These records, though they do not contain billing information, give an accurate portrayal of what treatments Fitzpatrick received. Deren's counsel admitted he did not depose any doctors on the amount of the treatments' costs or pursue the matter any further. We find Deren should reasonably have known that, as Fitzpatrick received his injuries while at work, he mostly [sic] likely received worker's compensation.

Id. The Fourth District did not address the materiality of the suppressed evidence, the prosecutor's closing argument, or the medical records issue.

SUMMARY OF THE ARGUMENTS

I. The *Brady* Violation

Deren was charged with offenses arising from a bar fight with Fitzpatrick, the bar's bouncer. Deren and Fitzpatrick each contended that the other was the aggressor. Shortly before the commencement of the jury trial, the prosecutor

[6] In its answer brief, the State asserted that such cross examination took place. 4th DCA Answer Brief of Appellee at 21. In his reply brief, Deren pointed out that no such cross-examination took place. 4th DCA Reply Brief of Appellant at 3-4.

received a letter from the bar's insurance company. The letter stated that the insurer paid more than $24,000 in worker's compensation benefits to Fitzpatrick as of that date and that the claim was ongoing. Because Fitzpatrick would not be entitled to those benefits as the aggressor in the fight,[7] the letter disclosed a significant financial incentive for Fitzpatrick to testify for the State and constituted impeachment evidence. However, in violation of her constitutional duty under *Brady* to disclose such evidence to the defense, the prosecutor concealed the letter. To make matters worse, the prosecutor also asserted to the jury in her closing argument that no State witness had a stake in the outcome of the case. Deren was convicted on a lesser charge. Only after the conviction did the prosecutor disclose the letter to Deren's counsel.

Deren moved for a new trial based upon the *Brady* violation. The trial judge agreed with Deren that the prosecutor's concealment of the evidence violated *Brady*, but denied the motion for a new trial on the ground that the payments to Fitzpatrick were not material.

[7] As a matter of law, Fitzpatrick would not be entitled to any of these payments as the aggressor in the bar fight. *See* § 440.91(3), Florida Statutes ("No compensation shall be payable if the injury was occasioned primarily by ... the willful intention of the employee to injure or kill himself, herself, or another."). *See also 391st Bomb Group v. Robbins*, 654 So. 2d 1200, 1202 (Fla.1st DCA 1995) ("[T]he aggressor in an admittedly work-connected fight cannot recover compensation.").

Deren appealed to the Fourth District and claimed a violation of due process based upon the *Brady* violation coupled with the prosecutorial misconduct in closing argument. The Fourth District found that the prosecutor improperly withheld the letter. Nevertheless, without addressing the materiality of the letter or the prosecutor's closing argument, the Fourth District affirmed, finding *sua sponte* that Deren's counsel should have discovered the suppressed evidence through "due diligence."

The decision of the Fourth District should be quashed. The Fourth District failed to apply the proper test as required by decisions of this Court such as *Floyd v. State*, 902 So. 2d 775 (Fla.2005) and *Young v. State*, 739 So. 2d 553, 557 (Fla.1999). Those cases hold that the test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant is of such a nature and weight that confidence in the outcome of the trial is undermined. Here, the prosecutor had in her actual possession *Brady* material that impeached her star witness. The concealment of such evidence by a prosecutor must not be tolerated or excused. A criminal trial is not a game where the prosecutor can hide material evidence and it is up to defense counsel to suspect it exists and thereafter try to find it. Deren's counsel was not aware of the letter or the amount of payments that had accrued as of the time of trial. Nor did defense counsel have equal access to the letter or its contents. When the proper test from

this Court's decisions is applied, Deren's conviction cannot stand because there cannot be confidence in the verdict due to the suppression of material impeachment evidence in an extremely close case where the credibility of the witnesses was the key issue.

The due process violation resulting from the prosecutor's concealment is compounded by her misconduct in closing argument to the jury. Similarly in *Garcia v. State*, 622 So. 2d 1325 (Fla.1993), the prosecutor's concealment of evidence in violation of *Brady* was accompanied by a portrayal of the facts to the jury by the prosecutor that was contradicted by the concealed evidence. This Court held that the concealment, coupled with the prosecutorial misconduct, denied the defendant his due process right to a fair hearing. In Deren's case as well, the prosecutor's assertion to the jury that no state witness had a stake in the outcome of the case was flatly contradicted by the financial benefits to her key witness that she concealed. Such concealment coupled with the false closing argument requires a new trial. *Garcia, supra*.

Furthermore, the "due diligence" rationale of the Fourth District's affirmance is deeply flawed. Although the prosecution is not considered to have suppressed evidence if such evidence was already known to the defense, such is not the case here. The defense was unaware of the amount of the accrued financial benefits and did not have equal access to the letter. Moreover, it is error to place upon a

defendant a "due diligence" requirement to discover suppressed evidence which is material in that the evidence tends to negate the guilt of the accused or tends to negate the punishment. *Archer v. State*, 934 So. 2d 1187 (Fla.2006). Here, the Fourth District effectively negated *Brady* by replacing the prosecutor's duty of disclosure with a defendant's obligation to seek and find. The decision of the Fourth District is incompatible with the due process protections ensured by *Brady*.

II. Fitzpatrick's Drug Rehabilitation Records

The prosecutor also successfully opposed Deren's motion seeking the drug rehabilitation facility records of Fitzpatrick. Fitzpatrick was regularly consuming powerful prescription pain killers well before, and during, the bar fight at issue. Fitzpatrick entered a drug rehabilitation program after the bar fight. But for more than two years *preceding* the bar fight, he had been consuming a powerful pain killer. Deren's counsel correctly predicted in his motion that at trial, the prosecutor would inform the jury of Fitzpatrick's addiction and treatment, attribute same to the bar fight, and contend that the drug use both corroborated and proved that Fitzpatrick suffered serious bodily injury from the fight. Thus, Fitzpatrick's records from the drug program were relevant to: determining whether he developed an addiction prior to the bar fight; distinguishing his preexisting conditions from those alleged to be the result of the fight; and ascertaining whether his drug addiction affected his perception of events at the time they were taking place. The trial judge

denied Deren's motion to produce. That ruling constitutes reversible error.

Fitzpatrick's drug records are relevant to his ability to recount the details of the bar fight and to impeaching his claim that his drug overdose, drug addiction, and use of pain medications arose from the bar fight. At the very least, the trial judge should have reviewed the records *in camera*.

As noted, the Fourth District affirmed without specifically addressing this issue. This Court is requested to exercise its discretion to review this issue, especially in the event a new trial is ordered based upon the *Brady* violation, at which trial Deren would seek to rely upon the records in further support of his defense.

ARGUMENT

I.

THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE: TWO MONTHS PRIOR TO THE COMMENCEMENT OF THE PETITIONER'S TRIAL ON CHARGES ARISING FROM AN ALTERCATION WITH THE ALLEGED VICTIM, THE PROSECUTOR RECEIVED A LETTER FROM THE HARTFORD INSURANCE COMPANY DISCLOSING BENEFITS PAID AS OF THAT DATE TO THE VICTIM AS A RESULT OF THE ALTERCATION; THE WITNESS WAS NOT ENTITLED TO THE BENEFITS IF HE WAS SHOWN TO BE THE AGGRESSOR IN THE ALTERCATION; THE QUESTION OF WHO WAS THE AGGRESSOR WAS THE CRITICAL CREDIBILITY ISSUE FOR THE JURY; THE PROSECUTOR FALSELY CLAIMED TO THE JURY IN HER CLOSING ARGUMENT THAT NO STATE WITNESS HAD A STAKE IN THE OUTCOME OF THE CASE; AND THE PROSECUTOR CONCEALED THE LETTER FROM THE DEFENSE

UNTIL AFTER THE PETITIONER WAS CONVICTED ON A LESSER CHARGE.

A. The Due Process Requirements of *Brady*

In *Floyd*, this Court reiterated the rule of *Brady v. Maryland*, *supra*, that the "suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. at 778 (quoting *Brady*, 373 U.S. at 87). This Court further noted that "the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)"[8] and that the prosecutor's duty to disclose "encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)." *Floyd*, 902 So. 2d at 778.[9]

Thus, "[g]enerally, for a *Brady* violation to exist, the defendant must establish the following: '(1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or

[8] The prosecutor's duty of disclosure under *Brady* is codified in the discovery provisions of the Florida Rules of Criminal Procedure and continues throughout the case. *See* Fla. R. Crim. P. 3.220(b)(4), (j).

[9] The determination whether a *Brady* violation has occurred "is subject to

inadvertently suppressed the evidence; and (3) the defendant was prejudiced." *Overton v. State*, 2007 WL 4191990, *17, 32 Fla. L. Weekly S775 (Fla. November 29, 2007) (quoting *Allen v. State*, 854 So. 2d 1255, 1259 (Fla.2003)).

"[T]he State is not considered to have suppressed evidence if such evidence was already known to the defense." *Archer v. State*, 934 So. 2d 1187, 1202 (Fla.2006).[10] However, "... there is no 'due diligence' requirement in the *Brady* test...". *Id*. at 1203. Thus, it is error to place upon a defendant a "due diligence" requirement to discover suppressed material. "[A] defendant is not required to compel production of favorable evidence which is material, in that the evidence tends to negate the guilt of the accused or tends to negate the punishment." *Id*. "The defendant's duty to exercise due diligence in reviewing *Brady* material applies only after the State discloses it." *Allen*, 854 So. 2d at 1255.

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independent appellate review." *Floyd*, 902 So. 2d at 780.

[10] *See also Riechmann v. State*, 966 So. 2d 298, 308 (Fla.2007)("'[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense ... had the information.'") (quoting *Provenzano v. State*, 616 So. 2d 428, 430 (Fla.1993)) (citing in turn *Hegwood v. State*, 575 So. 2d 170, 172 (Fla.1991); *James v. State*, 453 So. 2d 786, 790 (Fla.1984)). *See also Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla.2000) (noting that although the so-called "due diligence" requirement was absent from the Supreme Court's formulation of the *Brady* test in *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), "it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.").

"Prejudice exists if the suppressed evidence was material." *Overton, supra*. "[E]vidence is material if a reasonable probability exists that disclosure of the suppressed evidence would have led to a different result at the proceeding." *Id*. (citing *Strickler*, 527 U.S. at 280; *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A reasonable probability exists if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290.

B. This Court's Test for Assessing a Postconviction *Brady-Bagley* Claim

In *Floyd* and *Young*, this Court held that in reviewing a postconviction *Brady-Bagley* claim based upon the State's failure to have disclosed evidence that was in its possession, the focus is upon the materiality of the evidence concealed:

> [A]lthough 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 the 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.

Floyd, 902 So. 2d at 778 (quoting *Young*, 739 So. 2d at 559). *Accord*, *Rogers v. State*, 782 So. 2d 373 (Fla.2001).

C. Application of the Proper Test

It is not disputed that a mere two months prior to Deren's trial, the prosecutor possessed, but concealed from the defense, a letter from the bar's insurer stating that as a result of the bar fight at issue, it was paying Fitzpatrick, on a continuing basis, worker's compensation benefits in the form of wages and medical expenses, and that as of the date of the letter, the accrued benefits totaled nearly $24,000. Nor is it disputed that the prosecutor had an obligation under *Brady* and Fla. R. Crim. P. 3.220 to disclose the accrued benefits to defense counsel, as found by both the trial judge and the Fourth District. Furthermore, it is not disputed Fitzpatrick would not be entitled to any benefits as the aggressor in the bar fight.[11] Under such undisputed facts, this Court's decisions in *Floyd* and *Young* required that the Fourth District, in reviewing the claimed *Brady* violation in Deren's direct appeal, focus upon whether the benefits received by Fitzpatrick that were disclosed to and concealed by the prosecutor were of such a nature and weight that confidence in the outcome of the trial was undermined. However, the Fourth District failed to follow this Court's precedents.

The facts of this case conclusively establish that the prosecutor's

[11] See footnote 7 citing § 440.91(3), Florida Statutes and *391st Bomb Group v. Robbins, supra*. Under the same authorities, the insurer would be entitled to seek from Fitzpatrick a return of benefits paid if Deren were acquitted upon the defense that Fitzpatrick was the aggressor.

concealment of the accrued benefits from the defense indeed undermines confidence in the verdict. The credibility of Fitzpatrick was pivotal to the prosecution's case. The jury was entitled to know any fact that could have a significant bearing upon how his testimony should be weighed. Even without knowledge of the payments to Fitzpatrick as of the date of trial and his continuing financial stake in the outcome of the case, the jury found Deren guilty of the lesser offense of battery, thereby rejecting that portion of Fitzpatrick's testimony that Deren struck him four times over the head with a barstool, a claim that gave rise to the main accusation of aggravated battery with a deadly weapon. With knowledge of the monies received by Fitzpatrick as of the time of trial and the additional knowledge that he stood to lose ongoing financial compensation and forfeit benefits already received if found to be the aggressor in the bar fight, the jurors could have reasonably rejected his testimony outright and acquitted Deren of all offenses.

In *Gorham v. State*, 597 So. 2d 782, 785 (Fla.1992), this Court vacated the defendant's conviction for first degree murder and sentence of death where the prosecutor suppressed the confidential police informant status of its key witness. Such evidence, this Court opined, must be deemed material based upon the same principle regarding the truthfulness of a witness's testimony that concerned the United States Supreme Court in *Napue v. Illinois*, 360 U.S. 264, 268-69, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) wherein the Court stated: "'The jury's estimate of the

truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Gorham*, 597 So. 2d at 785 (quoting *Napue*, 360 U.S. at 269, 79 S.Ct. at 1177). Thus, this Court ruled in *Gorham* that the withheld evidence was material under *Brady* because the witness' credibility could have been attacked by a showing of his status as an informant.

Similarly here, the suppressed letter was material under *Brady*. Fitzpatrick's credibility was subject to attack by a showing to the jury that he was paid nearly $24,000, and that those benefits, along with future ongoing benefits, would be lost if he was the aggressor in the bar fight as claimed by the defense. Moreover, Fitzpatrick would be subject to owing to the insurer the $24,000 paid if found to be the aggressor in the fight.

Even in civil cases, in order to assess a witness's motive, bias and credibility, this Court has held that the trier of fact is entitled to know if the witness has a financial stake in the outcome of the case. *See e.g., Allstate Insurance Co. v. Boecher*, 733 So. 2d 993, 997 (Fla.1999). In criminal cases, the requirement for disclosure of evidence of a witness's bias, whether owing to financial or other motives, is greater due to the constitutional imperatives. *See Brown v. State*, 424 So. 2d 950, 955 (Fla.1st DCA 1983) ("The right to elicit facts tending to show bias

or prejudice becomes even more important to a defendant in a criminal case ... where the jury must know of any improper motives of a prosecuting witness in determining that witness' credibility.") In criminal cases, the restriction of the right to expose a witness's bias or motive also implicates the Sixth Amendment right to full and fair cross-examination. *See Lewis v. State*, 591 So. 2d 922, 923 (Fla.1991) (citing *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 483, 102 L.Ed.2d 513 (1988) for the proposition that the exposure of a witness' motivation for testifying is a proper and important function of the constitutionally protected right of cross-examination)). Consequently, the prosecutor's suppression of evidence in this case not only violated Deren's rights under due process of law, but also his Sixth Amendment right to expose to the jury Fitzpatrick's bias and motive to be untruthful.

In sum, the evidence possessed and concealed by the prosecutor was material under *Brady* and therefore a new trial is warranted pursuant to *Floyd*, *Young*, and *Rogers*.

D. The Prosecutor's Additional Misconduct in Closing Argument

In her closing statement to the jury, the prosecutor asserted the following: "The people [*i.e.*, the prosecution witnesses] that came in here and testified don't have any stake in this. They don't have any reason to come in here and tell you something unless it is the truth." (T. 526). At the time she made this statement, the

prosecutor had in her actual possession the insurer's letter disclosing the payments to Fitzpatrick, her star witness. Because Fitzpatrick would not be entitled to those payments as the aggressor in the bar fight, the prosecutor's statement to the jury was false -- or at the very least, highly misleading -- because Fitzpatrick did indeed have a stake in the outcome of the case, namely, a financial incentive to maintain that he was not the aggressor.

Where a prosecutor's concealment of evidence in violation of *Brady* is accompanied by a portrayal of the facts to the jury by the prosecutor that is contradicted by the very evidence the prosecutor is concealing, such prosecutorial misconduct denies a defendant due process of law as this Court held in *Garcia, supra*. In that case, the defendant claimed during police interrogation that the shootings in question were committed by Joe Perez, also known as Urbano Ribas. The prosecution, in opening and closing statements to the jury, argued that Perez was non-existent, was not the same person as Ribas, and that Garcia was attributing to this fictional person the shootings that Garcia himself committed. However, after his conviction and death sentence, Garcia learned from a public records request that the prosecution had concealed from the defense a statement given to the police by the person who turned Ribas over to the police on the night of the shootings. That statement directly contradicted the prosecutor's arguments to the jury by showing that Ribas identified himself to police as Perez. This Court held that the

State's concealment of the statement violated *Brady* and was material to the penalty phase, for it would have contradicted the State's argument that Perez did not exist and that whatever acts Garcia attributed to Perez in his statement to police were in fact Garcia's own acts. In vacating the death penalty and ordering a new sentencing hearing, this Court factored in the prosecutorial impropriety that occurred during the prosecutor's opening and closing statements:

> Garcia claims ... that the withholding of the ... statement when coupled with the State's opening and closing arguments constituted prosecutorial misconduct that deprived Garcia of a fair trial. ***We note that while the State is free to argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts.*** In the present case, there is simply insufficient evidence in the record to sustain the State's argument that Joe Perez was a nonexistent person created by Garcia during questioning. The available evidence shows otherwise - that Perez was a common alias for Urbano Ribas.
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> ***
>
> For the State prosecutorial team to argue on this record that Joe Perez was a nonexistent person created by Garcia during questioning constitutes an impropriety sufficiently egregious to taint the jury recommendation. Once again, we are compelled to reiterate the need for propriety, particularly where the death penalty is involved:
>
> > Nonetheless, we are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. As a Court, we are constitutionally charged not only with appellate review but also "to regulate ... the discipline of persons admitted" to the practice of law.

> This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office.

Garcia, 622 So. 2d at 1332 (emphasis supplied) (*quoting Bertolotti v. State*, 476 So. 2d 130, 133 (Fla.1985)). The reasoning of *Garcia* applies here. The prosecutor subverted the truth-seeking function of the trial by seeking and obtaining a conviction based upon a false portrayal of the facts to the jurors. By all objective accounts, the trial was a swearing contest that was too close to call -- as evidenced in large 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. Under such circumstances, a new trial serves both the interests of due process of law and justice.[12] *See also Craig v.*

[12] The United States Supreme Court has held that it is a denial of due process for a prosecutor to deliberately mislead a jury in closing argument about a witness's incentive to testify. *See Giglio v. United States*, 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *see also Napue*, 360 U.S. at 268-69. In *Routly v. State*, 590 So. 2d 397 (Fla.1991), this Court explained: "'The thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury.'" *Routly*, 590 So. 2d at 400 (quoting *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir.1983)). Here, the prosecutor's misleading closing argument is no less condemnable than if she had allowed Fitzpatrick to falsely testify that he had

State, 685 So. 2d 1224 (Fla.1997); *Marrow v. State*, 483 So. 2d 17, 20 (Fla.2d DCA 1985) (finding *Brady* violation in State's suppression of tentative promise of leniency to key prosecution witness whose credibility was at issue and noting that the error was *compounded* by the prosecutor's failure to correct that witness's testimony that he had not previously discussed the case with law enforcement officials).[13]

E. The Fourth District's Misapplication of Due Diligence

Rather than follow the dictates of this Court as explained in *Floyd*, *Rogers*, *Young*, and *Garcia*, the Fourth District focused its entire attention upon Deren's trial counsel, ruling that with reasonable diligence, he could have obtained the evidence contained in the insurer's letter to the prosecutor. As noted, that focus conflicts with *Floyd*, *Young* and *Rogers* because the concealed letter was in the

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no stake in the outcome of the case. *See also Armour v. Salisbury*, 492 F.2d 1032, 1037 (6th Cir.1974) (noting that "the basic tenet of *Giglio* does not depend on whether misleading information was given to the jury in the form of a closing argument by a prosecutor rather than through the testimony of a witness.").

[13] In *Craig*, this Court found a *Giglio* violation occurred where the prosecutor misled the jury in adducing testimony and making a closing argument on a matter bearing upon the credibility of a codefendant, Schmidt. In particular, the prosecutor conveyed to the jury, at the penalty phase of a capital case, that Schmidt would never be released from prison. However, the prosecutor knew, while the defense and jury did not, that Schmidt, who testified against Craig, had already been granted work release. This Court held that the prosecutor's misrepresentations were material to the outcome as "they affected the jury's view of Schmidt's credibility" as well as the disparity of sentencing between the defendants. *Id* at 1228.

actual possession of the prosecutor and not equally accessible to the defense. Furthermore, the Fourth District misapplied the "due diligence" obligations of defense counsel in the *Brady* context.

As previously stated in n.10, in *Occhicone*, this Court noted that although the "due diligence" requirement was absent from the Supreme Court's formulation of the *Brady* test in *Strickler*, "it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *Id*. at 1042. In *Occhicone*, the defendant claimed that the prosecution withheld the names of material witnesses. In upholding the trial court's summary denial of the claim, this Court observed that the defendant conceded that the witnesses were with him during the hours before the crimes. Moreover, several of them testified at the trial.

The issue of due diligence in the *Brady* context arose again in *Maharaj v. State*, 778 So. 2d 944 (Fla.2001), where the defendant claimed that the prosecution violated *Brady* by failing to disclose evidence from the victims' briefcase. This Court agreed with the trial court's rejection of the claim, noting that the evidence was neither material nor withheld. Citing the "due diligence" requirement and *Occhicone*, this Court further remarked that the defense was aware of the evidence before and during trial, knew it had been returned to the victims' family, but chose

not to seek its production.

The case at bar is clearly distinguishable from cases such as *Occhicone* and *Maharaj*. Here, the insurance company's letter was in the actual possession of the prosecutor just prior to trial. The "due diligence" obligation of Deren's counsel would only have been triggered upon disclosure of the letter by the prosecutor. *See Allen*, 854 So. 2d at 1259 ("The defendant's duty to exercise due diligence in reviewing *Brady* material applies only after the State discloses it."). At the point when the prosecutor came into possession of the letter, defense counsel had no idea that there were accrued benefits of nearly $24,000. It is true that during pretrial discovery, defense counsel was aware of the worker's compensation claim by Fitzpatrick. But it by no means follows that defense counsel thereby knew that significant payments would be made to Fitzpatrick by the time of trial, much less that the prosecution was in possession of and concealing such evidence. *Cf. Allen*, 854 So. 2d at 1259 ("Here, the State itself retained possession of the hair analysis, and while Allen was aware that the State was conducting such an analysis, he was never informed of the results."). *See also Strickler*, 527 U.S. at 285, 119 S.Ct. at 1950 (rejecting prosecution's claim that "diligent counsel" could have obtained a court order to obtain police records that had been suppressed by the prosecution: "Although it is true that petitioner's lawyers - both at trial and in post-trial proceedings - must have known that [the witness in question] had had multiple

interviews with the police, it by no means follows that they would have known that records pertaining to those interviews, or that the notes that [the witness] sent to the detective, existed and had been suppressed."). And certainly defense counsel is under no obligation to suspect nefarious conduct by the State and pursue an investigation for impeachment evidence based upon such suspicion. *Cf. Strickler*, 527 U.S. at 286, 119 S.Ct. at 1951 (rejecting the prosecution's claim that state prisoner seeking federal habeas relief for *Brady* violation procedurally defaulted by not first seeking a state court order allowing discovery of the police files that were suppressed by the prosecution: "Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review. Nor, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support.").[14]

The Fourth District deemed it significant that Deren's counsel possessed Fitzpatrick's medical records, thereby placing counsel on notice that "... as Fitzpatrick received his injuries while at work, he mostly [sic] likely received worker's compensation." *Deren*, 962 So. 2d at 386. But as the Fourth District itself

[14] Prior to the trial, Deren's counsel sought discovery regarding the worker's compensation claim through a subpoena (see supplemental record, 4th DCA) and telephone calls to the insurer. (T. 628). No information was ever provided by the insurer to the defense and there was no reason or obligation for the matter to be pursued. By contrast, of course, the prosecutor's receipt of the insurance evidence triggered her obligation to disclose to the defense.

noted, those records contained no financial information. *Id*. Moreover, because those medical records predated the insurer's letter to the prosecutor, they could not have possibly made the defense aware of the amount of payments to Fitzpatrick that accrued as of two months prior to trial, the date of the letter to the prosecutor. The medical records are analogous to the hair analysis in *Allen* in that while Deren was aware that there was a worker's compensation claim, he was not aware of the results, which were in the actual possession of the State.

Additionally, pretrial discovery in Deren's case (such as Fitzpatrick's medical records or discovery deposition) is designed primarily to inform the defense of the State's case. As this Court explained in *State v. Lopez*, 33 Fla. L. Weekly S22 (Fla. January 10, 2008): "... Florida Rule of Criminal Procedure 3.220(h) [concerning discovery depositions] was not designed as an opportunity to engage in adversarial testing of the evidence against the defendant, nor is the rule customarily used for the purpose of cross-examination. Instead, the rule is used to learn what the testimony will be and attempt to limit it." Thus, the Fourth District erred in making the leap that through such discovery the prosecutor was relieved of its obligation to disclose material impeachment evidence as to Fitzpatrick in the possession of the State. Finally, even if defense counsel had launched an investigation into the insurance claim during the discovery process, due to the nature of the paid claims, the amounts would be changing over time and were only

fixed at $24,000 two months before trial.

It is significant that the suppressed evidence in this case was in the prosecutor's actual possession. As noted, this Court stated in *Archer* that where *Brady* material is in the prosecutor's possession, "a defendant is not required to compel [its] production ...". *Accord, Allen, surpa.* By contrast, where evidence is not in the possession of the prosecutor, or the defense is aware of the evidence and has equal access to it, a defendant who suffers an adverse verdict is not entitled to a new trial under *Brady*. In such a case, the defendant cannot establish that the evidence was suppressed by the prosecutor, which is the distinguishing factor in each of the "due diligence" decisions cited by the Fourth District: *Freeman v. State*, 761 So. 2d 1055 (Fla.2000) (rejecting claim that prosecutor concealed witness's statement that defendant did not intend to kill victim where: prosecutor listed the witness in discovery responses with notation about her statement; defendant himself listed the witness in his reciprocal discovery; and defendant could have discovered any further details about the statement simply by deposing her); *Provenzano, supra* (rejecting claimed suppression by prosecutor of psychiatric report, jail records, and doctor's notes where: defense counsel knew of the report which was readily available; the jail records were readily available to

defense counsel; and the doctor's notes were available upon request)[15]; *Roberts v. State*, 568 So. 2d 1255 (Fla.1990) (no improper suppression of evidence regarding defendant's alcohol or drug use prior to the offense because the defendant himself knew whether he had been drinking or taking drugs and also would have been aware of those who may have witnessed same); *James v. State*, 453 So. 2d 786 (Fla.1984) (no improper suppression of photograph belonging to juvenile, which was original identified by witness as being of perpetrator of offense, where photograph was equally if not more accessible to defense than to prosecutor and materiality was merely a possibility); *United States v. Prior*, 546 F.2d 1254 (5th Cir.1977) (no breach of prosecutorial duty to disclose copy of allegedly exculpatory letter where copy had been sent to defendant and letter was, at most, slightly impeaching of prosecution witness and only as to collateral matter introduced by defendant on cross-examination).

But here, the prosecutor's duty to disclose arose immediately upon her receipt of the letter from the insurer before trial. However, the prosecutor chose not only to conceal the letter until after obtaining a conviction, she obtained the conviction based upon an obfuscation of the suppressed facts in her closing

[15] Unlike *Provenzano*, where the medical records were the defendant's and under the defendant's control, the medical bills and records here were the victim's and were privileged and not disclosed.

argument to the jury. Such egregious due process violations severely prejudiced Deren's right to a fair trial and are directly attributable to the prosecutor, not defense counsel.

In short, where a prosecutor is in actual possession of evidence that is either exculpatory or impeachment, conceals the evidence, and at a postconviction proceeding the evidence is determined to be material, then consistent with *Floyd* and *Young*, a due process violation results that requires a new trial or hearing without regard to whether defense counsel could have found the evidence through some means other than by the constitutionally mandated disclosure by the prosecutor. The rule of *Floyd* and *Young* is far more simple and workable than the approach of the Fourth District which entails speculative factual inquiries into what defense counsel could have done and might have uncovered. Also under the Fourth District's reasoning, a prosecutor would have an escape hatch from the consequences of *Brady* violations simply by claiming that through means of Florida's liberal discovery rules in criminal cases, defense counsel could have learned about the suppressed evidence. But as this Court stated in *Craig*, 685 So. 2d at 1229, a criminal case "is not a game where the prosecution can declare, 'It's for me to know and for you to find out.'"

Furthermore, taken to its logical conclusion, the decision of the Fourth District would also eviscerate the prosecutor's obligation under *Giglio* to disclose

favorable treatment bestowed upon any of its witnesses. For example, suppose Fitzpatrick had a pending criminal case and that there was no promise made by the prosecutor as to its outcome. Suppose further that two months prior to Deren's trial the prosecutor dismissed the charge against Fitzpatrick in exchange for his testimony against Deren and concealed the dismissal from the defense. Under the reasoning of the Fourth District, the prosecutor's failure to disclose would be excused because Deren's counsel was on notice of Fitzpatrick's pending criminal case and through "reasonable diligence" could have discovered that it was dismissed. Clearly, the due process obligations of prosecutors under *Giglio* and *Brady* must not be so vitiated.

F. No Harmless Error

The deprivation of due process in this case cannot be deemed harmless error. The trial was a swearing contest among several witnesses as to whether Fitzpatrick was the aggressor and whether Deren properly came to the defense of Stewart. The erroneous suppression of the letter by the prosecutor does not constitute harmless error, much less harmless error beyond a reasonable doubt, *see State v. DiGuilio*, 491 So. 2d 1129 (Fla.1986), because the letter would have impeached Fitzpatrick, the prosecution's key witness, in a criminal trial that turned upon the credibility of conflicting witnesses. *See Shaw v. State*, 831 So. 2d 772, 774 (Fla.4th DCA 2002) ("where the evidence is based solely on the credibility of

conflicting witnesses, the refusal to permit defendant to adduce such evidence cannot be deemed harmless."). Nor can the improper closing argument be deemed harmless error for the same reasons.

The closeness of the case is further demonstrated by the jury's acquittal of Deren upon the charge of aggravated battery. As noted, that charge was based upon Fitzpatrick's claim that Deren struck him with a deadly weapon, namely, a barstool. Obviously, the jurors did not believe all of Fitzpatrick's testimony, as evidenced by that acquittal. However, the jury apparently believed enough of Fitzpatrick's version to find Deren guilty of battery and disorderly conduct. Had the jury been apprised that Fitzpatrick not only received payments but continued to have a $24,000financial stake in the outcome of the case, one or more jurors could easily have voted not guilty of battery and not guilty of disorderly conduct. In such a case, a new trial must be ordered. As this Court stated in *Floyd*:

> [T]he *Brady* evidence elicited below, including impeachment evidence of the jailhouse informant, could have been persuasive for the defense when weighed against the State's case, especially when considered in the light of the heavy burden upon the State to prove guilt in a criminal case beyond any reasonable doubt and the legal requirement that the jury's verdict be unanimous. *In effect, this means that only one juror finding reasonable doubt would change the outcome.*

Floyd, 902 So. 2d at 785 (emphasis supplied).

"The State, as the beneficiary of the error, has the burden to show that the error was harmless [beyond a reasonable doubt]." *Lopez, supra*. The State cannot

meet that burden on this record.

II.

THE TRIAL COURT ERRED IN DENYING DEREN'S MOTION FOR THE PRODUCTION OF THE MEDICAL RECORDS OF THE ALLEGED VICTIM WHERE THE RECORDS WERE DIRECTLY RELEVANT TO THE VICTIM'S DRUG USE AT THE TIME OF THE BAR FIGHT IN QUESTION AND HIS ABILITY TO PERCEIVE AND RECALL THE EVENT, AND DIRECTLY RELEVANT TO IMPEACHMENT OF THE VICTIM'S CLAIMS THAT HIS DRUG ABUSE AND MENTAL PROBLEMS WERE CAUSED BY THE BAR FIGHT.

Prior to trial, Deren filed a motion for production of the medical records of the alleged victim, Fitzpatrick. (R. 109-11). The motion averred that upon pretrial deposition, Fitzpatrick testified that he entered a drug rehabilitation program after the bar fight due to an addiction to pain killers that resulted from the injuries he sustained from the bar fight. However, the defense obtained copies of 32 prescriptions showing that for more than two years *preceding* the bar fight, Fitzpatrick had been obtaining a powerful pain killer, Percocet,[16] in substantial amounts and increasing dosages. (R. 113-44). The motion alleged that the prosecution intended to inform the jury of Fitzpatrick's addiction and treatment, attribute same to the bar fight, and also contend that the drug use and drug abuse treatment both corroborated and proved that Fitzpatrick suffered serious bodily

[16] Percocet, a Schedule II controlled substance. *See* § 893.03(2)(a)1o, Florida Statutes. This drug is a narcotic prescribed for pain, must not be taken with other narcotics, is habit forming and has addictive qualities. *Powers v. Thobhani,* 903 So. 2d 275, 277 nn.2&4 (Fla.4th DCA 2005).

injury. The motion for production stated that Fitzpatrick's medical records from the drug program were relevant to: determining whether he developed an addiction prior to the bar fight; distinguishing his preexisting conditions from those alleged to be the result of the fight; and ascertaining whether his drug addiction affected his perception of events at the time they were taking place. (R. 111-12). The defense had sought the records directly from the drug program but the program responded that a court order was required. (R. 147). The trial judge denied the motion. (R. 148).

The defense renewed the motion to produce when, as predicted in the motion, the prosecutor conducted a line of inquiry of Fitzpatrick designed to persuade the jury that his drug problems were the result of the bar fight. In particular, the prosecutor's questions and Fitzpatrick's answers sought to prove that he developed symptoms as a result of the bar fight which led to memory loss which in turn led to a drug overdose which in turn required that he enter a drug treatment program. (T. 161-62). The trial judge denied the renewed motion on the ground that the probative value of the medical records was outweighed by the danger of prejudice. (T. 214).

Evidentiary rulings by a trial court are reviewed for an abuse of discretion. *Fitzpatrick v. State*, 900 So. 2d 495, 514-15 (Fla.2000). Section 90.402, Florida Statutes, provides that all relevant evidence is admissible except as provided by

law. "Relevant evidence is defined as 'evidence tending to prove or disprove a material fact' [but] ... '[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.'" *Sliney v. State*, 944 So. 2d 270, 286 (Fla.2000). "Unfair prejudice" has been described as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Brown v. State*, 719 So. 2d 882, 885 (Fla.1998). "In performing the balancing test to determine if the unfair prejudice outweighs the probative value of the evidence, the trial court should consider the need for the evidence, the tendency of the evidence to suggest an emotional basis for the verdict, the chain of inference from the evidence necessary to establish the material fact, and the effectiveness of a limiting instruction." *McDuffie v. State*, 2007 WL 4124241, 32 Fla. L. Weekly S763 (Fla. November 21, 2007).

In *Hebel v. State*, 765 So. 2d 143 (Fla.2d DCA 2000), the defendant was convicted of sexual battery of his then spouse, P.H.C. The events of the alleged incident were disputed by the parties. The defense learned during discovery that P.H.C. had been examined by a doctor. The defense moved to examine the medical records. The trial judge denied the motion. At trial, P.H.C. testified that she bled vaginally for one or two weeks following the incident. The defense contended that the medical records might have contained impeachment evidence on the vaginal

bleeding testimony. The Second District ruled that the trial judge should have allowed discovery of the doctor's records. The court could "discern no reason why the defense should have been precluded from obtaining these records, which might very well have provided relevant information concerning P.H.C.'s condition in the time immediately after the trauma." *Hebel*, 765 So. 2d at 147.

Similarly here, Fitzpatrick's drug program records would have exposed relevant information concerning his condition during the times relevant to the incident. Evidence of a witness's drug use for the purpose of impeachment is permitted where it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony. *Edwards v. State*, 548 So. 2d 656 (Fla.1989); *Hammett v. State*, 908 So. 2d 595 (Fla.2d DCA 2005). Fitzpatrick testified that he was taking Percocets on the day of the incident. (T. 178). The denial of access to Fitzpatrick's records improperly denied the defense the opportunity to impeach his version of events based upon the influence the drugs had upon his ability to perceive properly the events in question as they took place as well as his ability to accurately recall those events.

The records were also directly relevant to impeaching Fitzpatrick's claim that his drug overdose, addiction, and injuries were attributable to the bar fight, and to impeach the prosecution's contention to the jury that the drug usage proved serious bodily injury. The record reveals strong reason to suspect that Fitzpatrick had a

drug problem prior to the incident. Clearly, the drug program records were directly relevant to that important issue.

The prosecutor took unfair advantage of the ruling preventing the defense access to the records. Upon her direct examination of Fitpatrick, the jury heard that although he overdosed on pain killers, the blame was placed upon the mental problems that resulted from the bar fight. His explanation for checking himself into a drug rehabilitation facility was to ensure that he did not take too many pain killers again. (T. 162). This testimony was adduced after the defense was denied access to the records. Deren's counsel immediately objected and requested an adjournment prior to his cross-examination, renewing the defense motion to obtain Fitzpatrick's records from the rehabilitation facility in order to show that Fitzpatrick was simply a drug addict and that his claimed ailments, contrary to his direct examination, were not attributable to the bar fight. (T. 162-63). The prosecutor vigorously opposed the motion to produce. (T. 212). The judge ruled in favor of the State and denied the motion, finding that the probative value of the records sought were outweighed by their danger of prejudice and confusion. (T. 214).

The trial judge's finding is without any support in the trial record. Evidence is excludable under § 90.403, Florida Statutes, if the probative value is substantially outweighed by the danger of unfair prejudice. As then Judge Pariente stated in her opinion in *State v. Tagner*, 673 So. 2d 57 (Fla.4th DCA 1996):

> This involves a balancing test which must be performed by the trial court in the exercise of its discretion with the proviso that:
>
> > Certainly, most evidence that is admitted will be prejudicial to the party against whom it is offered. Section 90.403 does not bar this evidence; it is directed at evidence which inflames the jury or appeals improperly to the jury's emotions.

Id. at 60 (quoting 1 C. Ehrhardt, *Florida Evidence*, § 403.1 at 100-03 (2d ed 1984)). Thus, in *Tagner*, it was held that the trial court erred in excluding evidence of illegal drugs offered against a defendant in a DUI prosecution because "the fact that evidence of illegal drugs may prejudice some prospective jurors is not in itself sufficient reason to exclude the evidence." *Id*.

Here, there is no reason to believe that impeachment of Fitzpatrick with his drug rehabilitation records would prejudice jurors; and even if it did, that reason is insufficient for denying the defense access to the records. *Id*. The drug rehabilitation records were simply to be used to impeach Fitzpatrick on the narrow but highly significant issue of Fitzpatrick's credibility. There is nothing unduly confusing about such impeachment.

The prosecutor used the ruling as both a sword and shield in the manner found condemnable in *Romero v. State*, 901 So. 2d 260 (Fla.4th DCA 2005) ("The state is prohibited from preventing the defense from introducing evidence to the jury and then using the absence of that evidence to strengthen its case for guilt."). Here,

the prosecutor contended that Fitzpatrick's drug use, addiction and symptoms were the result of the bar fight, while at the same time preventing access by the defense to the evidence that could have proved otherwise. Moreover, the prosecution suffered no such restriction in its cross-examination of the defendants. Rather, the prosecution was afforded free rein to employ for impeachment purposes medical records of the defendant. *See e.g.*, T. 392 (prosecutor's attempted impeachment of Deren with his medical records). As the saying goes, what's sauce for the goose is sauce for the gander. Additionally, the denial of access to the records effectively denied Deren his constitutional right to present evidence and impeach witnesses in violation of the Sixth Amendment to the Constitution of the United States. *Shaw, supra*.

It cannot be contended that the error was harmless, much less harmless beyond a reasonable doubt. *See DiGuilio, supra*. This case turned upon the credibility of Fitzpatrick and the other witnesses and was hotly contested. As such, the error was prejudicial. *See e.g., Jackson v. State*, 933 So. 2d 1180, 1183 (Fla.4th DCA 2006) (erroneous burden-shifting comment by prosecutor could not be deemed harmless beyond a reasonable doubt ".. where the case boiled down to a credibility contest...").

At the very least, the defense is entitled to an *in camera* review of the records particularly where, as here, the holder of the records indicated that disclosure would

take place upon the issuance of a court order. *See Scurry v. State*, 701 So. 2d 587 (Fla.2d DCA 1997) (defendant was entitled to compel production of victim's Department of Health and Rehabilitative Services records for court to conduct in camera review to determine whether records contained information necessary to defense, particularly where counsel for HRS offered records for judicial review). *See also State, Department of Health and Rehabilitative Services v. Lopez*, 604 So. 2d 2 (Fla.4th DCA 1992) (denying petition for writ of certiorari to review trial court's order that, based upon *Brady*, granted criminal defendant's motion for *in camera* review of juvenile's records).

CONCLUSION

Based upon either Point I or Point II or both, Deren respectfully requests that this Court quash the decision below, and reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was mailed to Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Fl 33401, this _____ day of January, 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted in Times New Roman 14-point font.

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PAUL MORRIS