IN THE SUPREME COURT OF FLORIDA

CASE NO. 11-2149

GROVER REED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. THE CIRCUIT COURT ERRED IN DENYING MR. REED'S NEWLY DISCOVERED EVIDENCE CLAIM WITHOUT AN EVIDENTIARY HEARING

In its Answer Brief, the State misrepresents Mr. Reed newly discovered evidence claim omitting any reference to the component of the claim resting on Brady v. Maryland, 373 U.S. 83 (1963). The State simply ignores the following paragraph from the Initial Brief:

> According to handwritten notes of a police officer who had investigated the Oermann murder (notes that had apparently been undisclosed at the time of trial), a witness named Edith Bosso was interviewed regarding her observations on the evening of February 27, 1986. When she was returning home from the dogtrack, she saw a black man walking in the neighborhood at about 6:30 PM. The man was walking towards Ortega Forest Drive. The man was in dark clothes and had something sticking out of his back pocket. She was not sure what the item was, but she did notice it "standing up" out of the pocket, not hanging down. She described this black man as tall and slender, about 6 feet tall.

(Initial Brief at 35).[1]

The State also ignores that Mr. Reed's argument set forth in his Initial Brief that Florida law requires his newly discovered evidence claim to be evaluated cumulatively with his previously presented Brady and ineffective assistance of counsel claims:

> Under this Court's case law, newly discovered evidence must be evaluated cumulatively with the other evidence that the jury did not hear due either to a *Brady/Giglio* violations

[1]In footnote 24 on page 20 of the Initial Brief, Mr. Reed wrote that the Edith Bosso handwritten "notes were undisclosed at the time of Reed's trial. Their existence was learned during collateral proceedings."

> or *Strickland*. And, according to *Smith v. State*, the analysis requires the cumulative consideration to follow the refinements in the law that have developed since the original *Brady/Giglio* and/or *Strickland* analyses were conducted.

(Initial Brief at 44).

By ignoring the nature of Mr. Reed's newly discovered evidence of a Brady violation, and by ignoring Florida law requiring the newly discovered evidence claim to be evaluated cumulative with his previously presented Brady and ineffective assistance of counsel claims, the State erroneously cites Clark v. State, 35 So. 3d 880, 891 (Fla. 2010), and Jones v. State, 709 So. 2d 512, 521 (Fla. 1998), as establishing the proper analysis.[2]

As explained in the Initial Brief, Mr. Reed's claim is premised upon newly discovered evidence of a Brady violation, coupled with the previously presented Brady and ineffective assistance of counsel must be evaluated cumulatively using the Brady materiality standard. This was most recently explained by this Court in Smith v. State, 75 So. 3d 205 (Fla. 2011), a case cited by Mr. Reed in his Initial Brief that is omitted from the State's Answer Brief. In Smith v. State, 75 So. 3d at 206, this Court directed the circuit court when evaluating a newly discovered evidence claim premised upon the FBI's

[2]Besides not setting forth the proper standard under Florida law for claims premised upon newly discovered evidence of a Brady violation or newly discovered evidence that must be evaluated cumulatively with previously presented Brady and/or ineffective assistance of counsel claims, both Clark and Jones involved appeals from the denial of newly discovered evidence claims following evidentiary development in which the standard of review was deferential.

renouncement of the comparative bullet-lead testimony of an FBI agent at Mr. Smith's trial, to employed the Brady materiality analysis used by the Eleventh Circuit in Smith v. Sec'y Dept. of Corrs., 572 F.3d 1327, 1348 (11th Cir. 2009).

Diligence

In the section of the Answer Brief entitled "Diligence," the State begins by once again relying upon Clark v. State, 35 So. 3d at 891-93. But of course as noted above, Clark was appeal to this Court after the circuit court had conducted an evidentiary hearing. As this Court stated in Clark:

> With respect to a trial court's ruling on a newly discovered evidence claim following an evidentiary hearing, as long as the court's findings are supported by competent, substantial evidence, a reviewing court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court," ....

Clark, 35 So. 2d at 891.

Here unlike in Clark, there has been no evidentiary hearing conducted on Mr. Reed's claim. Thus, the circuit court's diligence ruling is entitled to absolutely no deference and must be reviewed *de novo*. As a result, Clark is clearly distinguishable.

This Court recently issued an opinion in Nordelo v. State, – So. 3d – , 2012 WL 2036004 (Fla. June 7, 2012),[3] and reversed the summary denial of Rule 3.850 newly discovered evidence claim saying:

[3]Nordelo issued on June 7th two weeks before the State's Answer Brief was served and is not addressed in the Answer Brief.

> We have repeatedly held that "where no evidentiary hearing is held below, [the appellate court] must accept the *defendant's factual allegation to the extent they are not refuted by the record." Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999) (emphasis added). The district court misapplied this precedent when it failed to accept the factual allegations of the motion, including the affidavit, in determining if the motion was legally sufficient.

Nordelo, 2012 WL 2036004, at *8 (bracket material and italics in original).

As to Mr. Reed's diligence, the State ignores the fact that contrary to Florida law Mr. Reed was left without court-appointed registry for over 5 years. Register counsel, Anderson, was discharged as Mr. Reed's registry counsel in July of 2005. Even though the circuit court entered an order of discharge that was served on Anderson and upon the Department of Financial Services, it was not provided to Mr. Reed. Indeed, no one told Mr. Reed that he no longer had a court-appointed registry attorney. Anderson did not tell Mr. Reed. The circuit court did not tell Mr. Reed. The Department of Financial Services did not tell Mr. Reed. Opposing counsel for the State did not tell Mr. Reed.

The State also ignores the fact that Florida law precludes a Florida capital defendant from filing *pro se* pleadings because it requires capital defendants to be provided collateral counsel. Gordon v. State, 75 So. 3d 200 (Fla. 2011); Davis v. State, 789 So. 2d 978 (Fla. 2001). Thus, during the 5 plus year time period that he was without court-appointed registry counsel, Mr. Reed had no

access to the Florida state courts.

Rather than address the fact that Florida law was violated and Mr. Reed was left without court-appointed registry counsel for over 5 years and without knowledge that he was without registry counsel, the State refuses to accept the factual allegations made by Mr. Reed in his motion as true and injects new allegations not of record in an effort to get this Court to ignore the violation of state law that was countenanced by the circuit court, the Department of Financial Services and by the Attorney General's Office:

> Current registry counsel had no trouble filing this successive motion years later as he could have done years earlier. Current registry counsel McClain is also federal habeas counsel. By February 5, 2007, when Reed filed an amendment to his federal habeas petition raising this same claim of newly discovered evidence of innocence, current registry counsel was aware of the underlying facts that form the basis of this claim. *Reed v. McNeil*, 3:05-cv-00612 (Fla. M.D.). All that Mr. McClain had to do to discover that former registry counsel Chris Anderson had withdrawn was to make one phone call to Chris Anderson. Surely, reasonable habeas counsel would have contacted state postconviction counsel with these affidavits if for no other reason than to exhaust the federal claim of actual innocence in state court as required by the federal habeas statute. Current registry counsel should have contacted former registry counsel years earlier. Current registry counsel should have asked to be appointed by the state courts years earlier.

(Answer Brief at 10). This passage is riddled with false and/or misleading assertions of non-record matters on which no evidentiary development has been permitted.

First, the actual innocence claim made in the federal habeas petition is not the same claim presented in Rule 3.851 motion

that is the subject of this appeal.[4] The claim present here is a different one.

Second, for a number of years following the closure of CCRC-North, the State and the Department of Financial Services objected to the appointment of undersigned counsel to serve as registry counsel in any additional cases because of the cap contained in § 27.711 limiting the number of case in which one attorney could serve as a court-appointed registry attorney. Indeed in a Miami-Dade County capital case involving Michael Griffin, the State in 2011 successfully argued that undersigned counsel could not be appointed as registry counsel because of the cap contained in § 27.711.[5] Once again, the State's factual assertion that undersigned counsel would have no trouble in obtaining the registry appointment which first appeared in its Answer Brief is factually wrong. Moreover, the State completely ignores whether undersigned counsel could have ethically sought to take on more work during the time period at issue due to his crushing case load.

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[4]An actual innocence claim in federal habeas proceedings need not be exhaust and is merely a gateway claim used to overcome procedural bars. The claim presented in the Rule 3.851 motion that is the subject of this appeal is a claim premised upon newly discovered evidence of a Brady violation. At an evidentiary hearing, this could be developed more fully. This Court should not permit the State to slip some half-baked assertion like this to be thrown into an appellate brief when there has been no factual development and nothing in the record to support this erroneous assertion.

[5]In Michael Griffin's case, undersigned counsel was appointed to serve as Mr. Griffin's court-appointed counsel in federal habeas proceedings, just as he was appointed here in Mr. Reed's case.

Third, there is absolutely no evidence as to what a reasonable habeas counsel would or would not do because there has been no evidentiary hearing. Indeed, federal law does not authorize a court-appointed federal habeas counsel to act in state court proceedings. *See* Harbison v. Bell, 556 U.S. 180 (2009). Thus, court-appointed habeas counsel has no obligation to represent a habeas petitioner in state court absent a state court order of appointment.[6] Indeed for over 5 years, there was no court-appointed registry counsel charged with representing Mr. Reed in collateral proceedings in state court.[7]

[6]Certainly if the State wishes to maintain that "a reasonable habeas counsel would have contacted state postconviction counsel with these affidavits if for no other reason than to exhaust the federal claim of actual innocence in state court as required by the federal habeas statute," then an evidentiary hearing on what reasonable habeas counsel in light of his case load would do is required.

[7]This Court recently discussed court-appointed collateral counsel's diligence obligation in Waterhouse v. State, 82 So. 3d 84, 104 (Fla. 2011), and explained:

> Essentially, we must determine whether collateral counsel should be held to a different, higher standard of investigation than original trial counsel. Having considered the assertions of the State and Waterhouse, we conclude that collateral counsel should *not* be held to a higher standard. While pretrial resources are unquestionably limited, collateral counsel's resources are also not unlimited. Thus, requiring collateral counsel to verify every detail and contact every witness in a police report—even where the police report indicates that the witness has no useful information—would place an equally onerous burden on collateral counsel, with little chance of discovering helpful or useful information.

The question that arises is how can an attorney who is not

Fourth, the State makes a factual allegation that is not contained in that record that "[c]urrent registry counsel should have contacted former registry counsel years earlier." However, the truth of the matter is that undersigned counsel did have contact with Anderson in 2005, but was not told that he had been discharged as Mr. Reed's registry counsel. But at this point, there has been no evidentiary hearing development on Mr. Reed's factual allegations, and as a result, they must be accepted as true. Nordelo v. State.

Fifth, if any person or entity had an obligation to keep track of whether Mr. Reed had a court-appointed registry counsel, it was the State of Florida. *See* § 27.711. And the State should be estopped from complaining about Mr. Reed's failure to file during the 5 year period the State allowed him to sit on death row without a court-appointed registry attorney assigned to represent him in collateral proceedings in state court.

Prejudice standard

The State erroneously argues that Mr. Reed bears the burden of proving that the newly discovered Brady evidence would likely "produce an acquittal at retrial." (Answer Brief at 11). However as explained in Smith v. State, 75 So. 3d at 206, that is just not the law. The correct standard is whether all of the newly discovered evidence considered cumulatively with undisclosed Brady information

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court-appointed to serve as registry counsel for a capital defendant be held to any burden to act on behalf of an individual that he does not represent.

and/or unreasonably undiscovered and/or presented under Strickland undermines confidence in the reliability of the outcome of the trial. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); State v. Gunsby, 670 So. 2d 766 (Fla. 1996).[8] When the proper standard is employed, it is clear that an evidentiary hearing is required.

III. MR. REED'S PORTER V. MCCOLLUM CLAIM

In Mr. Reed's initial brief, he addressed this Court's decision in Walton v. State, 77 So.3d 639 (Fla. 2011). The State completely ignores Mr. Reed's arguments in this regard choosing not to address them.

The State's Answer Brief was served before the issuance of the recent decision from the Eleventh Circuit holding that in light of Porter v. McCollum, 130 S. Ct. 447 (2009), it is clear that this Court has been unreasonably applying Strickland v. Washington, 466 U.S. 668 (1984), for many years. Sochor v. Sec'y Dept. of Corrs., – F.3d – , 2012 WL 2401862 (11th Cir. June 27, 2012).

CONCLUSION

In light of the foregoing arguments, Mr. Reed requests that this Court reverse the lower court, vacate Mr. Reed's death sentences and grant other relief as set forth in this reply brief and in Mr. Reed's initial brief.

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[8]Contrary to the State's assertion in its Answer Brief, Mr. Reed's claim is not a federal habeas claim of actual innocence under Herrera v. Collins, 506 U.S. 390 (1993). Accordingly, Herrera which has never been adopted by this Court as Florida law does not govern Mr. Reed's Brady claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Charmaine M. Millsaps, Assistant Attorney General, Office of Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, on August 2, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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