IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-929

DENNIS SOCHOR,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF APPELLANT

RACHEL DAY
Assistant CCRC-South
Florida Bar No. 0068535

JASON KRUSZKA
Staff Attorney
Florida Bar No. 0072566

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
1 East Broward Blvd., Suite 444
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPLY

REPLY TO STATE'S ANSWER TO ARGUMENTS I AND II

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. SOCHOR'S SUCCESSIVE RULE 3.851 MOTION WITHOUT HOLDING A CASE MANAGEMENT CONFERENCE AND EVIDENTIARY HEARING GIVEN THAT THE EVIDENCE IS ADMISSIBLE AS SUBSTANTIVE AND IMPEACHMENT EVIDENCE, THE EVIDENCE IS PROBATIVE OF THE MATERIAL ISSUE OF CULPABILITY, WAS SUPPRESSED BY THE STATE, WAS UNDISCOVERABLE EVEN WITH THE EXERCISE OF DUE DILIGENCE, AND WOULD PROBABLY PRODUCE AN ACQUITTAL OF FIRST-DEGREE MURDER AT RETRIAL.

In its Answer Brief, the State argues that the lower court's failure to hold a case management conference and conduct an evidentiary hearing was proper. Specifically, the State argues that evidence was not suppressed by the State, that it was discoverable by the exercise of due diligence and therefore untimely, is hearsay, not probative of any material issue at trial, and failure to hold a case management conference was harmless error. (Answer Brief at 6). This Reply will address the State's *Brady*[1] arguments and newly discovered evidence arguments in turn.

Brady v. Maryland

A *Brady* violation occurs when the State (including law enforcement) either willfully or inadvertently fails to disclose exculpatory or impeachment evidence to the defense and this failure prejudices the defendant. The exculpatory and

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

impeachment evidence here is Gary Sochor's confession to Marvin Droste that he was "more responsible than anyone else" for the victim's death. Mr. Droste's declaration clearly states that he contacted the Broward County Sheriff's Office (BSO) with the intent to convey this information. However, even though he spoke with someone at the department and provided contact information, he was never contacted. This was a complete failure on the part of BSO. Assuming there was no bad faith, it was the result of a failure to document and follow up. Ineptitude cannot now be used as a defense against a finding of suppression. The State defends this ineptitude by arguing that law enforcement was unaware of the contents of Mr. Droste's "tip" and therefore isn't responsible for it. (Answer Brief at 11).

However, this response ignores the fact that BSO's own inaction and indifference is the reason they were "unaware" of the contents of the tip. If the court acquiesces to what the State is arguing it would render the requirement to disclose *Brady* material meaningless. Law enforcement could simply choose to not document and follow up on potential exculpatory information, claim ignorance, and then use that ignorance as both a shield and a sword in future litigation. Even if the suppression was unknowing it was still suppression of exculpatory information. In this instance ignorance should not be a permissible defense.

The State disputes that this information is exculpatory, arguing that it doesn't expose Gary Sochor to criminal liability and isn't a confession. (Answer Brief at

10). This argument ignores the content of Gary Sochor's statement and the criminal liability that it entails. Even if a death is accidental criminal liability can attach in the form of involuntary manslaughter. Gary Sochor confesses that the death was accidental and that he was the person most responsible for the death. To frame this statement as anything other than a confession is disingenuous.

Newly Discovered Evidence

The State also contends that the instant claim is merely a repackaging of a prior claim raised in the Defendant's second successive 3.851 postconviction motion and thus doesn't qualify as newly discovered evidence. (Answer Brief at 20). The prior newly discovered evidence claim was predicated on Gary Sochor's confession to a man named Eric Butt. Mr. Butt's former mother-in-law Lynn Winter overheard Mr. Butt disclose this information. While the instant claim may be "consistent with the theme" of the prior claim insofar as they both deal with confessions Gary Sochor made, they aren't identical claims. The instant claim consists of a new witness, a new declaration, and a new statement. In short, new evidence.

The State argues that this newly discovered evidence is untimely because it was known to the defense and could have been raised earlier. (Answer Brief at 8). The State cites the fact that Marvin Droste was a witness for the defense in the litigation of the Defendant's prior motion for postconviction relief. (Answer Brief at 8). What the State glosses over is the fact that Mr. Droste was called solely as a

mitigation witness to speak about the Defendant's drug use. This information was directed toward the penalty phase, not the guilt phase. There has been no argument made, and no proof offered, that at the time of the postconviction hearing in 1999 the defense was aware of the information contained in Mr. Droste's declaration that is currently at issue. Instead, the State suggests that because Mr. Droste was a penalty phase witness that his knowledge of information relating to the guilt phase was discoverable with due diligence. This suggestion is completely unreasonable. Absent Mr. Droste proactively offering this information to the defense there is no scenario in which it would have been discovered through due diligence. Mr. Droste did offer this information in 2015. This newly discovered evidence claim was raised within one year of acquiring the declaration. Therefore this claim is timely.

The State raises the additional objection that the newly discovered evidence is hearsay, and therefore would be inadmissible at a retrial. (Answer Brief at 5). The State is incorrect because the defense could defeat a hearsay objection in two ways. First, the statement may be admissible as a Declaration Against Interest (*see* Fla. Stat. §90.804(2)(c)(2017)). This exception to the hearsay rule requires that the declarant be unavailable. If the declarant is available, the statement may still be admissible pursuant to the Due Process Clause. The trial court would have to consider the constitutional impact of failing to allow the Defendant to present this evidence at any new trial. The United States Supreme Court has emphasized that

while state and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials, that:

> This latitude has limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or the Confrontation clause of the Sixth Amendment, the Constitution gives criminal defendants a meaningful opportunity to present a complete defense. This right is abrogated by evidence rules that infringe upon a weighty interest of the accused and are "arbitrary or disproportionate to the purpose they are designed to serve."

Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citations omitted). The *Holmes* opinion refers to a number of cases in which such constitutional violations required that state evidence rules be stricken. (See e.g. *Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973)).

Even if the trial court were to deem Mr. Droste's statement inadmissible hearsay, it would still be admissible as impeachment evidence against Gary Sochor. The State essentially concedes this point but incorrectly argues that this impeachment evidence isn't probative of any material issue and wouldn't produce an acquittal on retrial. (Answer Brief at 14).

A newly discovered evidence claim has been a permissible avenue for litigating the question of relative culpability between two participants of a crime. (See e.g. *Marquard v. State*, 850 So.2d 417 (Fla. 2002); *Stein v. State*, 995 So.2d 329 (Fla. 2008)). Of particular relevance in the instant case, "[w]hen a codefendant

(or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate." *Larzelere v. State,* 676 So.2d 394, 406 (Fla. 1996).

Gary Sochor's statement would be probative of the guilt phase question of culpability. Gary Sochor clearly says in his confession that Patti Gifford's death was an accident and that he was the person most responsible for it. This calls the Defendant's first-degree murder conviction directly into question. At a retrial the potential for an acquittal on a first-degree murder charge is very real. At the original trial Gary Sochor was the State's star witness. In order for the jury to convict the Defendant of first-degree murder they had to believe the testimony of Gary Sochor. Damaging Gary Sochor's credibility and discrediting his testimony with impeachment evidence would be extremely powerful and would have a great impact on a potential jury's verdict.

Gary Sochor's statement would also have implications at a new penalty phase. First, since the evidence code is relaxed at a penalty phase, all of the State's arguments regarding admissibility would carry less weight. Second, evidence of Gary Sochor's increased involvement would be a mitigating circumstance in favor of the Defendant. Given the unanimity requirement that would be in place for any new penalty phase, there is a strong likelihood that the Defendant would receive a life sentence.

As discussed above, this newly discovered evidence would be admissible as both substantive and impeachment evidence during the guilt phase and penalty phase of a retrial. The evidence was previously unknown to the Defendant and was undiscoverable even through the exercise of due diligence. It is also of such a nature that it would probably produce an acquittal of first-degree murder on retrial. Contrary to the State's assertions this evidence satisfies the *Jones* standard and the circuit court errored in failing to hold a case management conference and evidentiary hearing. (See *Jones v. State*, 709 So.2d 512 (Fla. 1998)).

The failure to hold a case management conference is fundamental error that goes to the very heart of the judicial process and amounts to a denial of due process. In *Huff v. State* this Court reiterated that "[t]he essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993) (quoting *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990)). This Court concluded that Huff was denied due process of law because the circuit court did not give him a reasonable opportunity to be heard. That same situation exists in this case.

CONCLUSION AND RELIEF SOUGHT

In light of the foregoing arguments, Mr. Sochor submits that he is entitled to have the lower court's order reversed and his case remanded to the circuit court for an evidentiary hearing on his claims. Based on his claims for relief, Mr. Sochor is entitled to a new trial and/or sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401, this 4th day of October, 2017.

/s/ Rachel Day
RACHEL DAY
Assistant CCRC-South
Florida Bar No. 0068535

JASON KRUSZKA
Staff Attorney
Florida Bar No. 0072566

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
1 East Broward Blvd., Suite 444
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR APPELLANT

CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

/s/ Rachel Day
RACHEL DAY
Florida Bar No. 0068535