IN THE SUPREME COURT OF FLORIDA

JERRY LAYNE ROGERS, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. 91,044 On Appeal from the Circuit Court for the Seventh Judicial Circuit in and for St. John's County, Florida

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM THE DENIAL OF A MOTION TO VACATE
SET ASIDE OR CORRECT SENTENCE
PURSUANT TO FLA. R. CRIM. P. 3.850

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INTRODUCTION

Jerry Layne Rogers was tried as Thomas McDermid's accomplice in the murder of a Winn-Dixie store employee during an attempted robbery in St. Augustine, Florida, in 1982. Proceeding without counsel, and based principally on McDermid's self-interested testimony, Rogers was convicted and sentenced to death. Rogers is entitled to a new trial in this case because of fundamental violations of Brady v. Maryland, 373 U.S. 83 (1963).

In clear violation of Brady, the State failed to provide Rogers with exculpatory evidence indicating that George William ("Billy") Cope was McDermid's accomplice in the Winn-Dixie robbery and murder. In particular, the State failed to disclose two documents that, by themselves, would have altered the course of the trial: a statement by Cope that he planned to commit the Winn-Dixie robbery, and a later statement by a confidential informant who had heard Cope admit his involvement in the Winn-Dixie murder. The State also failed to turn over reams of documents establishing that Cope and McDermid were long-time robbery partners.

The State also failed to provide dozens of documents demonstrating that McDermid lied about critical aspects of the Winn-Dixie murder and other robberies in which he had implicated Rogers. Rogers could have used these documents to destroy the credibility of McDermid, by far the most important of the State's witnesses. The failure to produce materials that identified another participant in the robbery-murder, or

that would have impeached the testimony of the State's key witness, was a fundamental violation of the State's constitutional obligations under Brady.

Furthermore, Rogers has recently discovered new evidence that independently establishes that Cope was McDermid's accomplice in the Winn-Dixie attempted robbery and murder. Two witnesses have recently provided testimony implicating Cope as McDermid's accomplice in the Winn-Dixie robbery and murder.

STATEMENT OF THE CASE

Procedural History

Rogers was convicted of the Winn-Dixie murder and sentenced to death by a St. Augustine jury in October 1984. On direct appeal, this Court affirmed the conviction and sentence, although it rejected three of the five aggravating factors found by the jury in support of the death sentence. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). The United States Supreme Court denied Rogers's petition for certiorari. Rogers v. Florida, 484 U.S. 1020 (1988).

In 1990, the Office of the Capital Collateral Representative ("CCR") began an investigation into Rogers's conviction. Pursuant to Fla. Code Chapter 119, CCR requested numerous records from Florida police departments and other State agencies related to Rogers's case. The records obtained revealed that the State had in its possession at and before the time of trial a large body of exculpatory evidence

favorable to Rogers -- evidence that the State withheld from Rogers despite two pre-trial requests for the production of all exculpatory evidence. R.O.A. 4275 (Tr. 85-86).

Citing the exculpatory evidence produced by the State in response to CCR's Chapter 119 requests, in 1991 Rogers, represented by CCR, filed a motion to vacate his conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850. The Circuit Court denied the Rule 3.850 motion, but this Court reversed and remanded the case for an evidentiary hearing, on the basis that the trial judge had erred in denying CCR's motion for recusal. Rogers v. State, 630 So. 2d 513 (Fla. 1993).

On remand, the Circuit Court, Seventh Judicial Circuit, in and for St. John's County (Nichols, J.), held a hearing on Rogers's 3.850 motion. After five days of testimony, the court admitted all exhibits offered by Rogers as proof that the State had failed to disclose exculpatory evidence in its possession, as required under Brady v. Maryland, 373 U.S. 83 (1963). Following the hearing, the court issued a written decision denying Rogers's claims on the merits. State v. Rogers, No. CF-83-1440 (Fla. 7th Cir. Ct. June 20, 1997) (Slip Op.) (Appendix A).

Rogers filed a timely notice of appeal to this Court. This Court has jurisdiction over an appeal from the

denial of a Rule 3.850 motion in a death penalty case pursuant to Art. V, Section 3(b)(1), of the Florida Constitution.[1]

The State's Case

The evidence at trial established that two men armed with guns had sought to rob a Winn-Dixie grocery store in St. Augustine on the night of January 4, 1982. Both men were wearing stocking masks. One of the men confronted the cashier, Ketsy Day Suppinger, and demanded that she hand over money from the cash register. The other man went to the store office area. Trial Tr. 6213.[2] When Ms. Suppinger was unable to open the register drawer, the robbers fled without taking any money. They were pursued outside by Mr. Smith. One of the robbers confronted and fatally shot Mr. Smith. Eyewitnesses saw McDermid running from the Winn Dixie parking lot seconds after the shooting with "one hand in his jacket." Trial Tr. 7381-83, 7419-24. McDermid was then observed entering the getaway car, by himself, and driving away. Trial

[1] Rogers represented himself at trial. Aside from the claims raised on this appeal, in 1996 Rogers filed in this Court an original petition for writ of habeas corpus, which alleged that Rogers was denied his right to the effective assistance of counsel on direct appeal. The habeas corpus petition argued that Rogers was permitted to proceed pro se in violation of Fla. R. Crim. P. 3.111 and the standards enunciated in Faretta v. California, 422 U.S. 806 (1975), and that his lawyer's failure to raise these arguments on direct appeal deprived Rogers of his right to the effective assistance of counsel. This Court denied the habeas corpus petition. Rogers v. Singletary, 698 So. 2d 1178 (1997).

[2] Citations to the trial transcript ("Trial Tr.") refer to the page of the Record on Appeal filed with this Court on Rogers's direct appeal.

Tr. 7424-26. Other than McDermid, no witness testified as to the actions of the second robber after leaving the Winn Dixie.

The State's case at trial rested chiefly, if not entirely, on the testimony of Thomas McDermid, who admitted to being one of the Winn-Dixie robbers. The State obtained McDermid's testimony through an exceptionally generous plea bargain. Before trial, McDermid had confessed to the Winn-Dixie robbery-murder as well as over thirty other armed robberies and more than a dozen other miscellaneous crimes. McDermid eventually claimed that Rogers had committed roughly 35 robberies with him, including the Winn-Dixie robbery and murder.[3/] R.O.A. 341-49. In exchange for McDermid's cooperation against Rogers, the State offered the following terms: no prosecution for the Winn-Dixie murder and a total of 20 years for all other crimes, with a mandatory term of only 6 years.[4/]

[3/] Before McDermid accused him of participating in a series of armed robberies, Rogers had never been arrested and indeed had never been accused of a crime. McDermid was then called on by the State to be the key witness against Rogers in several different prosecutions for armed robbery. Two of those prior convictions, based on McDermid's testimony, were then used as substantive evidence to support McDermid's accusations of Rogers in the Winn-Dixie case at issue here. Thus, the State built a series of prosecutions of Rogers largely if not entirely on the testimony of a single, self-interested witness who stood to gain enormously through his testimony against Rogers. Newly developed evidence, discussed below, pp. 41-43, strongly suggests that McDermid deliberately undertook to "set up" Rogers to protect George Cope and others who had assisted him in this series of robberies, who might otherwise have identified McDermid as the shooter in the Winn-Dixie murder.

[4/] McDermid was released from prison on March 21, 1990, after
(continued...)

Without McDermid's testimony, the State could not have convicted Rogers. At trial, McDermid was the sole source of the most damaging testimony against Rogers.[5] McDermid alone testified that Rogers had shot the Winn-Dixie manager. McDermid was the only witness who testified about the shooting. McDermid alone placed the murder weapon in Rogers's hands. McDermid alone testified about many of the details of the Winn-Dixie robbery -- including how he and (allegedly) Rogers travelled to St. Augustine, prepared for the robbery, and fled the scene after the crime. McDermid alone claimed that Rogers had admitted to the shooting. Indeed, except for the flawed testimony of Ms. Suppinger, the cashier, only McDermid testified that Rogers was anywhere near St. Augustine on the day of the crime.

At trial, Ms. Suppinger purported to identify Rogers as one of the men who had robbed the Winn-Dixie store. But her identification of Rogers was so fraught with inconsistencies that even the State conceded in closing argument that Ms. Suppinger was confused and mistaken about the bulk of her testimony. Trial Tr. 8092.

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[4](...continued)
having served a term of approximately 8 years.

[5] For more than a year prior to the Winn Dixie robbery, McDermid had worked for Rogers in the carpentry business. However, Rogers eventually fired McDermid due to gross misconduct on the job, and afterwards their relationship became bitter and hostile. Trial Tr. 7743, 7746, 7750, 7752-53.

Ms. Suppinger testified that the robber who confronted her at the register was about 5'8" tall and had irregular teeth, which were noticeable even through the robber's mask. Trial Tr. 6224, 6250. She testified that the second robber was noticeably taller than the "buck-toothed" robber. McDermid is 5'8" tall and has prominent buck teeth.[6/] Rogers, who is 5'4", is significantly shorter. R.O.A. 4275 (Tr. 120).[7/] Thus, Ms. Suppinger's descriptions of the robbers placed McDermid as the robber who confronted her at the cash register. Indeed, McDermid himself testified that he, not Rogers, confronted Ms. Suppinger at the cash register. Trial Tr. 6538-39. However, at trial, Ms. Suppinger identified Rogers as the person who had confronted her during the robbery. Faced with these contradictions, it is not surprising that the State conceded in closing argument that much of Ms. Suppinger's testimony was "probably mistaken." Trial Tr. 8092.[8/]

[6/] McDermid's State-prepared post-sentence investigation states that he is 5'8". R.O.A. 2703. McDermid testified at trial that he was "called Bugs Bunny" in school. Trial Tr. 6589.

[7/] The Record on Appeal does not provide pagination for each specific page of the Rule 3.850 Hearing transcript. The citations to the Record on Appeal that refer to the Hearing transcript note in parentheses the page of the Hearing transcript on which the referenced testimony appears.

[8/] Ms. Suppinger's testimony has further problems. When shown a photo of Rogers soon after the robbery, she stated that she did not recognize him. Trial Tr. 6251, 6279, 6288-89. It was only months later -- following a deposition in which Rogers was identified by the State Attorney in the presence of Ms. Suppinger -- that Ms. Suppinger claimed for the first time that she could (continued...)

The Defense Case at Trial

The overarching theory of Rogers's defense was that he had been misidentified as McDermid's partner and that, in fact, someone other than Rogers was the true accomplice. However, Rogers could not develop this defense effectively at trial because he lacked any evidence pointing the jury to the true culprit: the State withheld evidence that specifically implicated "Billy" Cope as McDermid's accomplice in the Winn-Dixie robbery and murder, and never gave Rogers the information by which he could have developed the facts to show that Cope had actually committed this crime. Rogers was never told about Cope, a long-time accomplice of McDermid's in many crimes.

At trial, Rogers presented an alibi defense. Several witnesses placed him at a family cook-out in Orlando on the night of the Winn-Dixie robbery and killing. Later that same night, he was at a hospital in Orlando (about 100 miles from St. Augustine, Trial Tr. 6633), taking care of his sick daughter.

Rogers presented evidence at trial based on the police reports following the Winn-Dixie shooting. All of those reports, including the official "Be on the Lookout" ("BOLO") report, identified a 5'8" buck-toothed robber (McDermid) and a second robber who actually was several inches

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[8] (...continued)
identify Rogers as one of the robbers. Trial Tr. 6337-38.

taller. R.O.A. 392. Rogers argued to the jury that he -- at 5'4" -- could not possibly fit the description of the second robber. But Rogers was not provided with the exculpatory evidence from the police files that would have allowed him to identify for the jury a suspect who fit the physical description of the second robber.

EVIDENCE WITHHELD FROM THE DEFENSE AT TRIAL

The physical descriptions of the two Winn-Dixie robbers indicated that the buck-toothed McDermid, at 5'8" in height, was the shorter of the two robbers, and that his accomplice was several inches taller. The State had in its possession evidence that directly implicated George William ("Billy") Cope in the robbery and murder. Cope's height is 6'0", and thus (unlike the 5'4" Rogers) perfectly matched the physical description of the second robber. R.O.A. 2418; R.O.A. 4281 (Tr. 805-10). Specifically, the State withheld evidence from the defense that Cope had twice confessed his involvement in the Winn-Dixie robbery and murder. The State also withheld evidence that Cope has been arrested as McDermid's partner in two other robberies with an identical modus operandi, and that Cope had been implicated as McDermid's partner in numerous other robberies. This was, in short, exculpatory evidence that fit together precisely with the physical evidence and with the defense's theory that

someone other than Rogers had been McDermid's accomplice in the Winn-Dixie crimes.[9]

Aside from the evidence that identified and implicated another participant in the robbery and murder, the State also withheld evidence that would have impeached the testimony of McDermid, its critical witness. And the State also withheld evidence that would have called into question the credibility of other key prosecution witnesses.[10]

A. Evidence That Implicated George Cope

1. Police Records -- Pantry Pride Robbery, Jacksonville

The Pantry Pride restaurant in Jacksonville was robbed on December 9, 1981 by two men. McDermid claimed that he and Rogers committed this robbery. The Pantry Pride police reports contradict McDermid's assertion, since they identify Cope as a primary suspect in that robbery. But more importantly, those records specifically identify Cope as a possible suspect in the Winn-Dixie robbery and murder. The reports contain the following statement:

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[9] At the time of Rogers's evidentiary hearing, Cope was wanted on an outstanding warrant and was a fugitive from justice. Despite a substantial investigation, Rogers was unable to locate Cope in order to present him at the Rule 3.850 hearing. R.O.A. 4283 (Tr. 1166). The State has also failed to locate and arrest Cope on the outstanding warrant. R.O.A. 4283 (Tr. 1167-68).

[10] All of the police records and other documentary materials discussed below were submitted by Rogers in support of his Rule 3.850 motion. The trial court admitted all of these records during the evidentiary hearing on the Rule 3.850 motion. R.O.A. 4283 (Tr. 1249-59).

> The 2nd lead in this case is information developed at the Beaches area on suspects named: George William Cope (WM, DOB: 1/11/57), Carolyn Woods (BF, DOB: 5/11/46), and Dennis L. Herrmann (WM). A confidential informant reported that he overheard a conversation with these subjects in a bar at the Beaches area that they were possibly involved or he was led to believe that they may have been involved <u>in the robbery/murder of the Winn-Dixie manager in Augustine, Florida</u> that occurred after this robbery occurred. The subject forwarded the name of <u>Billie Cope</u> to this office.
>
> . . . .
>
> The writer requested records on all these people from the Ohio police and instead of sending them to me, <u>they sent them to Sgt. Nicklo in St. Augustine, Florida, who is working the robbery/murder there [i.e., Winn-Dixie].</u> The writer is still trying to get this information from the Ohio police or Sgt. Nicklo, but as of this date, has been unsuccessful in getting it.

R.O.A. 360-61 (emphasis added); <u>see also</u> R.O.A. 4275 (Tr. 140-42); R.O.A. 4275 (Tr. 114-15).

These police records thus directly support Rogers's principal defense that someone else was McDermid's accomplice in the Winn-Dixie robbery-murder. The records reflect that the police had focused on Cope as a prime suspect in the Winn-Dixie case, since records about Cope had been forwarded to the police investigator "working the robbery murder" of a Winn-Dixie. Moreover, these records indicate that Cope had been overheard in a conversation indicating that he had "been involved in the robbery/murder of the Winn-Dixie manager."

In addition, these Pantry Pride reports buttress the testimony of the newly discovered witnesses, <u>see</u> pp. 41-43,

infra, describing the friendship between Cope and McDermid, and detailing their criminal activities together.

These Pantry Pride reports also verify that the St. Augustine police department (the department responsible for investigating the Winn-Dixie crimes) was well aware of the suspicions surrounding Cope. The reports indicate that Sergeant Nicklo, who played a critical role in investigating the Winn-Dixie case, received the criminal information about Cope from Ohio.

2. Police Records -- Duval County

Rogers did not know of Cope, and had never heard his name, until Cope's name appeared in documents secured by CCR's Chapter 119 requests years after Rogers's trial. R.O.A. 4278 (Tr. 464-65). In response to one such Chapter 119 demand, Rogers received over one hundred pages of investigative materials on Cope, from the Duval County sheriff's office, dating from the period of the Winn-Dixie investigation. These records further demonstrate that Cope was a prime suspect in the Winn-Dixie crimes and other robberies committed by McDermid.

(1) Two pages of undated, handwritten notes from the Duval County police records contain the following notation:

> Billy Cope (George William Cope)
> 5'8" - 24 - 165 - Brn. Brn.

> CI [Confidential Informant] says he was with Cope and another when they were talking about 23 & 5, going to do.

R.O.A. 502 (emphasis added); see also R.O.A. 4275 (Tr. 140-41).[11] Specifically, these police reports discuss Cope's expressed intent "to do" two specific crimes, written in police shorthand ("23 & 5"). R.O.A. 502. This shorthand -- particularly the number "5" -- corresponds to the shorthand used in another section of the same notes to denote the Winn-Dixie robbery and murder. R.O.A. 496.

The meaning of these reports is clear: Cope and "another" were overheard talking about certain robberies. In fact, one of the robberies that Cope was "going to do" was the Winn-Dixie. This information would have greatly bolstered Rogers's defense that he was not McDermid's accomplice.

(2) The same Duval County police records contain yet another link between Cope and the Winn-Dixie case. On the page immediately following the note about Cope's planning of the robberies, there appears a list of the names and descriptions of Cope, Carolyn Woods (Cope's girlfriend) and Clifton Gray (Wood's brother). Below that list, Cope's name is repeated, and then there appears the notation "Don Blakle, Winn-Dixie Sy." R.O.A. 503. Bob Blakely -- a Winn-Dixie supervisor -- was the key contact person with the police

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[11] Police reports variously describe Cope as between 5'8" and 6'. Cope's official Florida Law Enforcement Record ("FLER") describes him as 6' tall. R.O.A. 2418. The State does not dispute the FLER description. R.O.A. 4281 (Tr. 809-10).

concerning the Winn-Dixie robbery-murder. See R.O.A. 709-16. These notes thus reflect a clear linkage in the police records between Cope and the Winn-Dixie robbery and murder.

(3) A six-page set of investigative notes is also contained within these Duval County police records. On page three appears the following notation:

> Seminole Co. - Publix
> 11 Jan. 82 - 7:30 PM,
> Cope, blond-male

R.O.A. 519. Two pages later in the same set of notes, there appears the following notation:

> Publix -- 3 Dec., 81 -- $7,000 (Cope)

R.O.A. 521.

In his statements to the police, McDermid had claimed that he and Rogers had robbed Publix stores on December 3, 1981 and January 11, 1982. However, these records indicate that the police believed that Cope, not Rogers, had committed these two robberies with McDermid. Indeed, Cope was identified by five eyewitnesses as one of the men who robbed a Publix store in Ormond Beach on December 3, 1981, as discussed next.[12/]

[12/] The police records obtained from Duval County Sheriff's Office and the St. Augustine Police Department also reveal three additional arrests of Cope in the St. Augustine / Jacksonville area: (i) a September 25, 1975, arrest for carrying a concealed weapon, R.O.A. 507, (ii) a June 9, 1982, arrest for battery and resisting arrest, R.O.A. 3613, and (iii) a July 20, 1982, arrest
(continued...)

3. **Police Records -- Publix Supermarket Robbery, Ormond Beach**

The Publix Supermarket was robbed on December 3, 1981 -- one month before the Winn-Dixie robbery -- by two men armed with guns. McDermid claimed that he and Rogers committed that robbery. R.O.A. 344. However, the Publix police records -- not provided to Rogers until years after his trial -- contain five eyewitness statements that identify Cope as one of the robbers. Because these identifications of Cope are so powerful, substantial portions of the Publix police reports are quoted below:

> On 2-3-82 at approximately 2:00PM I received information and a photo of a suspect that may have been one of the suspects that robbed the Publix Food store on 12-3-82 (this information was obtained from Det. A. Legg) of this dept. He obtained same from a Robbery Intelligence Meeting on the morning of 2-3-82. (meeting was in Long wood, Fla.
>
> The photo was of a W/M George William Cope DOB: 1-11-57. (Black and White photo)
>
> I took this photo along with 5 other (Black and White photos) and placed them into a 6-photo line-up. (for names Etc., See Line up Info)
>
> I called the assistant manager that was working on the night of the robbery Mr. James R. Chapman PH# 788-3297.
>
> . . . .

[12] (...continued) for DWI and carrying a concealed weapon, R.O.A. 3613. These reports further demonstrate that Cope was known to the local police and that he carried weapons and was violent.

[He] picked out photo #3 [Cope]. This being the photo of the suspect that Det. Legg had given me earlier and the one that I had placed into the folder.

He was asked if he was sure and he stated to me twice WITHOUT A DOUBT, THIS IS THE SUBJECT THAT ROBBED THE STORE ON 12-3-81.

Mr. Chapman was so sure that after he told me that it was #3, he started shaking. (NOTE as stated in the original report this subject [Cope] was to have cocked his weapon and pointed at Mr. Chapmans head) Also this subject kicked Mr. Chapman.

I further asked Mr. Chapman how on the night of the robbery did he see the subject, he stated as the subject was walking out after robbing the store he took off his stocking mask thus giving Mr. Chapman a view of his face.

. . . .

There I met with Lorene and Dorene Fallan, these being two witnesses from Ormond Beach. They met me there and they were given this line up to look at. Lorene Fallan age 18, did pick out subject #3 as the subject that she had observed on the night of the Robbery, This subject being George William Cope.

. . . .

This writer . . . had called Det. Sanders and advised him that a positive identification was made in reference to William Cope. Once we were at the Duval County S.D. in the Robbery Div., Sgt. J.E. Tabbot, in the Intelligence Unit, who was involved into the investigation, advised that they had a source who had given them confidential information pertaining to robberies committed by George William Cope

. . . .

On 2-9-82 I called an employee Anthony Crawford, to look at 12 pictures that were in a photo line-up, after this subject looked at all the pictures he advised that subject #2 (this being George William Cope) was one of the subject that he observed rob the Store on 12-03-82.

> On 2-10-82 3 other subjects were called in to look at the same photos
>
> 1) Kelly Mason (employee)
> 2) Cheryl Marks (employee)
> 3) Loreen Fallan (customer)
>
> All of the above could not be positive but they all stated that if they were to have picked any one of the photos it would be subject marked #2 (this being George William Cope.) as the subject that they had observed in the store on the night of the robbery.

R.O.A. 410-17 (emphasis added); see also R.O.A. 4275 (Tr. 124-26); R.O.A. 4276 (Tr. 201).[13]

The powerful, indeed overwhelming, eyewitness identifications contained in these police reports show that Cope was McDermid's accomplice in the Ormond Beach Publix robbery. This proves that McDermid lied when he claimed that Rogers had committed that robbery with him.

Moreover, if this information had been disclosed to the defense, Rogers would have been able to show a very similar modus operandi between the Publix and Winn-Dixie robberies, which occurred within a month of each other. Each involved a large grocery store, each was committed at night, each involved two armed robbers who wore stocking masks, and in each case McDermid had confessed to being one of the robbers.

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[13] The reports also contain witness descriptions of the get-away car used by the Publix robbers. Although the descriptions are vague, the car was identified as a blue, two-door model from "about 1978." R.O.A. 2264. The police reports from another Cope robbery indicate that, at about the time of this Publix robbery, Cope and his live-in girlfriend drove a blue, 2-door 1974 Cadillac. R.O.A. 502.

The witness identifications of Cope reflected in the Publix police records are far stronger than the single witness "identification" of Rogers in the Winn-Dixie trial -- an identification so fraught with inconsistencies that even the State was forced to concede its weakness. See pp. 6-8, supra. In particular, store manager Chapman's identification of Cope leaves no room for doubt. Mr. Chapman and Ms. Fallan saw Cope after he had removed his mask, and Mr. Chapman was so sure that Cope was the robber that he started to shake when shown Cope's photo.

These Publix police reports also would have provided Rogers with important information supportive of the defense that Cope was McDermid's accomplice in the Winn-Dixie robbery-murder just a month later. They contain Cope's employment records, which verify that he was not working at the time of either the Publix robbery or the Winn-Dixie murder. R.O.A. 2390-94; R.O.A. 4278 (Tr. 437-38). Cope thus had the opportunity to commit both crimes, and, as explained below, p. 21, infra, he had the motive. In addition, these records indicate that Cope had an extensive criminal record with over 10 offenses, including theft, breaking and entering, strong-arm robbery, unlawful discharge of firearm, and drug abuse. R.O.A. 524; see also R.O.A. 4275 (Tr. 137).

The reports also indicate that, while Cope was under arrest for this robbery, the investigators for the Ormond Beach Publix robbery attended a regional meeting of other

investigators from throughout the North Florida region. Investigators from the St. Augustine police -- who were responsible for the Winn-Dixie investigation -- were present and exchanged information about this and other robberies with the Ormond Beach police. R.O.A. 410. Thus, there can be no doubt that the St. Augustine police department was well aware that Cope had been arrested for this crime -- a crime which McDermid claimed to have committed with Rogers.[14/]

4. Police Records -- Long John Silver's Robbery, South Daytona

The Long John Silver's ("LJS") restaurant was robbed by two armed men on January 28, 1982 -- less than a month after the Winn-Dixie robbery. McDermid confessed to this crime and claimed that Rogers was his accomplice. However, of the two positive eyewitness identifications contained in the police reports, both identify Cope. R.O.A. 477. Rogers is not identified as a suspect in this case. The LJS police records state:

> I contacted Jackie Britton & showed her the Photo Lineup of (12) men 6 matching one suspect & 6 matching the other.
>
> Ms. Britton positively I D suspect #2, George William Cope WM DOB 1-11/57 & stated that suspect

[14/] The meeting took place after Rogers and McDermid had been arrested and their photos were distributed to the various police departments. Yet, based on the records provided to Rogers, no witness to the Publix robbery ever identified Rogers, or recanted his or her identification of Cope as McDermid's accomplice. See R.O.A. 396-435.

> #5, James Ronald Wright, W/M 8/1/61 looked very familiar.
>
> On 2-9-82, at Approx. 1730 hr I contacted Donna Bentley at Long John Silvers and she positively ID suspect #2, George William Cope W/M DOB 1/11/57, but could not ID the other subject."

R.O.A. 477 (emphasis added).

Also, statements from multiple witnesses in these records show that the LJS robbers' heights were in the range of 5'8" to 5'10". R.O.A. 448, 450, 453. Cope and McDermid match these descriptions. Rogers does not.

These positive eyewitness identifications contained in the police report show that Cope was McDermid's accomplice in the LJS robbery, thus impeaching McDermid's claim that Rogers committed this robbery. Donna Bentley Mixon, who identified Cope as one of the LJS robbers in 1981, was called to testify at Rogers's Rule 3.850 evidentiary hearing in 1996. Although 15 years had elapsed since the crime, Mixon positively identified a picture of Cope as the man who robbed the Long John Silver's. R.O.A. 4280 (Tr. 707-08). Ms. Mixon's testimony -- clear and convincing even 15 years after the crime -- is but one example of the testimony that Rogers could have offered at trial had he known about Cope and his criminal partnership with McDermid.

After his arrest for this robbery, Cope filed with the court a list of defense witnesses that included the names of James Wright and Carolyn Woods. Mr. Wright, Cope's sidekick and co-worker, was arrested on January 25, 1982 when

a large quantity of drugs (over 100 quaaludes) was found at his residence. R.O.A. 483. Cope himself had a record for drug-related offenses. R.O.A. 524. Cope's drug history, together with his friend's drug arrest near the time of the Winn-Dixie robbery, could have been used by Rogers to establish a possible motive for Cope's robberies: the financial demands of drug use or drug dealing.[15/]

5. **Police Records -- St. Augustine, Theft by Cope**

Cope was arrested for a theft in St. Augustine (the location of the Winn-Dixie robbery and murder) on November 10, 1981, less than two months before the Winn-Dixie crimes. These records further demonstrate Cope's criminal behavior, and his familiarity with the St. Augustine area. The records also note that Cope was accompanied by another white man during this shoplifting incident. Although the records do not name the accomplice, the physical description is consistent with McDermid. R.O.A. 529.

6. **Police Records -- Jacksonville, Criminal Mischief by Cope**

Cope was detained by the police for criminal mischief in Jacksonville Beach on January 6, 1982, two days after the Winn-Dixie robbery. Cope was detained by the police because he had smashed in the windshield of a car driven by

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[15/] Cope was declared indigent by the court subsequent to his arrest in the LJS case. R.O.A. 526.

his girlfriend, Carolyn Woods.[16] R.O.A. 542. These records demonstrate that Cope had violent tendencies, and that he was frequenting the area around St. Augustine at the time of the Winn-Dixie murder. (Jacksonville Beach is less than 30 miles from St. Augustine. R.O.A. 3217.)

B. <u>Evidence That Impeached Thomas McDermid</u>

In addition to the Cope documents, the State also failed to disclose dozens of documents that would have called into grave question the veracity of McDermid's testimony against Rogers. These withheld documents include: (i) a second confession by McDermid in which he claimed that Rogers was his accomplice in more than 30 robberies; (ii) numerous police reports showing definitively that Rogers was <u>not</u> McDermid's accomplice in a number of robberies, and that McDermid had repeatedly and falsely identified Rogers as his accomplice; and (iii) police reports showing that McDermid had lied about other important aspects of his criminal activities.

With this body of evidence, Rogers could have mounted a withering attack on McDermid's credibility. This evidence would not only have greatly weakened McDermid's credibility generally, but specifically it would have demonstrated that McDermid had consistently lied about the

[16] These records also support the testimony of Mathew Armitage, one of the newly discovered witnesses, <u>see</u> pp. 41-43, <u>infra</u>, that Cope spent time with Carolyn Woods. The police reports of the Jacksonville Pantry Pride robbery also establish that Cope and Woods were close acquaintances. R.O.A. 350, 360.

most critical fact at Rogers's trial -- the identity of McDermid's partner in crime.

1. **The Second McDermid Confession**

By the time of the Winn-Dixie trial in November 1984, McDermid had provided the police with two written confessions. The first was made in August 1983. The second, which the State did not turn over to Rogers, was from January 1984.[17/] In the first confession, McDermid confessed to 35 armed robberies as well as a number of shoplifting and other crimes, but included few details and made no mention whatsoever of Rogers as his accomplice.

The second confession was different from the first in three respects. First, McDermid stated in the later confession, for the first time, that Rogers was his accomplice in all 35 armed robberies. Second, the later confession contained minute details about each robbery (including approximate dates and times for each robbery). See R.O.A. 344. The first confession, in contrast, contained only a listing of the robberies and the amounts taken; no dates or other details were given. Third, the later confession contained no mention of the shoplifting and other crimes mentioned in the first confession.

[17/] Each of the eight pages of the second confession is initialed by Flynn Edmonson, a key investigator in the Winn-Dixie case. R.O.A. 341-48.

The two confessions demonstrate that McDermid told two different stories about his crime spree on two different occasions. The important differences between the confessions described above, together with numerous inconsistencies between the second confession and the underlying police records, could have been used by Rogers to weaken greatly McDermid's credibility.

The details in the second confession -- dates, times, locations, activity during the robberies -- would have allowed Rogers to identify and expose numerous specific, concrete lies told by McDermid. McDermid's lies are demonstrated by a comparison of his description of the robberies in the second confession with facts drawn from police reports about those robberies -- reports that Rogers obtained years after trial, after CCR had secured the second confession through its Chapter 119 requests. Without the second confession, Rogers could never have identified the many demonstrable falsehoods in McDermid's claims -- and, particularly, could never have exposed McDermid's bald-faced lies about Rogers's involvement in a long string of robberies.

2. <u>Police Records -- Wendy's Robbery, Orlando</u>

In his second confession, McDermid claimed that Rogers was his partner in the robbery of a Wendy's restaurant in Orlando. R.O.A. 344. However, witness statements show that the robbery was committed by a white male, about 5'9" tall, and a black male, about 6' tall. R.O.A. 544; R.O.A.

4276 (Tr. 162-64). The description of the white robber matches McDermid; and McDermid admitted committing the crime. The description of McDermid's accomplice (a 6' black male) could hardly be more different than Rogers, a 5'4" white male. The bottom line: McDermid clearly lied when he claimed that Rogers was his accomplice.

The reports also demonstrate McDermid's propensity for violence during his robberies ("The W/M suspect . . . . struck Levison in the back of the neck."). R.O.A. 545. Rogers could have used this and other incidents of McDermid's violent behavior (described below in this Section) to impeach McDermid's claim at trial that Rogers, not he, was the violent partner in their purported criminal alliance. See R.O.A. 4276 (Tr. 165).

3. Police Records -- Publix Robbery, Ormond Beach

McDermid claimed in his second confession that Rogers was his partner in the Ormond Beach Publix robbery, discussed above, pp. 15-19. However, as already described, no fewer than five eyewitnesses identified Cope as McDermid's partner at Ormond Beach -- including two who saw Cope at close range without a mask. Again, Rogers could have used this information, combined with McDermid's second confession, to demonstrate that McDermid had falsely identified Rogers as his robbery partner.

4. Police Records -- Long John Silver's Robbery, South Daytona

In his second confession, McDermid claimed that Rogers was his partner in the robbery of a Long John Silver's restaurant. Once again however, eyewitnesses identified Cope as McDermid's partner. As described above, pp. 19-21, Cope was positively identified by two witnesses as one of the perpetrators of this robbery. Indeed, one of those witnesses -- Donna Mixon -- was so certain of her identification that she was able to identify Cope as one of the robbers some 15 years later, during the Rule 3.850 evidentiary hearing.

Had Rogers known of this information at trial, it would have proved invaluable. Combined with McDermid's second confession, Rogers could have shown beyond any question that McDermid had falsely identified him as his partner, at a minimum, in the robberies of the Orlando Wendy's, the Ormond Beach Publix, and the South Daytona Long John Silver's robberies.[18/]

Rogers could then have sought to establish the same pattern for the Winn-Dixie robbery: that McDermid was once again lying about the identify of his partner. This strategy would have been reinforced by the compelling evidence that pointed to Cope as one of the Winn-Dixie robbers -- evidence that was withheld from the defense.

[18/] In addition, Cope is implicated by police records as one of the robbers of the Seminole County Publix supermarket on January 11, 1982. R.O.A. 519. Again, McDermid falsely claimed that he committed this robbery with Rogers.

5. Police Records -- Kash 'n' Karry Robbery, Temple Terrace

In his second confession, McDermid claimed that Rogers was his partner in the robbery of a Kash 'n' Karry store in Temple Terrace on November 11, 1981. R.O.A. 343. But the descriptions of the robbers found in the police records for this crime do not match Rogers.

One suspect is described as between 5'8" and 5'9", and the other as between 5'9" to 6' in height. R.O.A. 561. These descriptions match McDermid and Cope, but not Rogers. Rogers's photo was shown to many of the Kash 'n' Karry witnesses, but no one identified him as one of the robbers. R.O.A. 573. Cope's photo was not shown to anyone. See R.O.A. 557-77.

Beyond the specifics of this crime, the police records for this case also indicate that "McDermid had also admitted to three supermarkets robberies in Tampa during the same period and an armored car robbery in Pinellas County." R.O.A. 575. However, in both purportedly "complete" confessions, McDermid acknowledged only one robbery of a supermarket in the Tampa area (Publix -- 11-24-81), and never mentioned an armored car robbery. McDermid was never prosecuted for any Tampa-area robberies or for any armored-car robbery. Again, the police reports show that McDermid lied about his criminal activities.

Had Rogers been given this information at trial, he could have used it not only to impeach McDermid but also to question McDermid's motive for cooperating with the State.

6. Police Records -- Pizza Hut Robbery, Deland

McDermid claimed that he and Rogers robbed a Pizza Hut in Deland on February 18, 1982. R.O.A. 346. However, once again, the police records contradict McDermid's story. A Pizza Hut employee positively identified James Delia as one of the two robbers. R.O.A. 580. The police reports state that "[t]he description of James Delia matches the subject at the Pizza Hut identified by the employee." The police also determined that Delia had a substantial criminal record. R.O.A. 580.

Moreover, the robbers in this case were both described as being the same height. R.O.A. 579. Because McDermid is at least four inches taller than Rogers, the physical descriptions do not match Rogers.

At the time of this robbery in February 1982, Cope was in jail for the Ormond Beach Publix robbery. Had Rogers been given this information at trial, he could have demonstrated that: (a) McDermid used more than one accomplice in his robbery spree (contrary to what McDermid falsely claimed), and (b) McDermid once again lied about the identity of his partner in crime.

7. Police Records -- Wendy's Robbery, Deland

McDermid claimed that he and Rogers robbed a Wendy's in Deland on January 21, 1982. R.O.A. 347. Rogers does not fit eyewitness descriptions of the robbers. But again, in the police reports, the witnesses identified McDermid as suspect #1 ("approximately 5'8" to 5'9", had very crooked teeth"). The witnesses then described suspect #2 as also about 5'8" or 5'9", and stated that he looked "like he was a brother of subject #1." R.O.A. 583. Neither McDermid nor the State has ever claimed that Rogers looks anything like McDermid. Furthermore, while the height of the first suspect, and the crooked teeth, accurately describe McDermid, the description of the second suspect as being 5'8" or 5'9" does not match the much-shorter Rogers.

Rogers could have used these reports to bolster his theory that McDermid had several different accomplices -- including possibly Tom's brother, Billy McDermid, as well as Cope -- during his spree of more than 30 robberies. At trial, Rogers suggested that Billy McDermid may have been one of Tom McDermid's robbery partners, but he lacked any evidence -- such as the Deland Wendy's police reports -- to bolster his argument.

Aside from his second omnibus confession, McDermid also provided the police with a detailed affidavit describing the circumstances of this particular robbery. That affidavit

was not provided to Rogers. And the police reports contradict important aspects of McDermid's affidavit.

For example, McDermid stated in his affidavit that Rogers confronted the store manager and took money from the manager's office and the cash registers. R.O.A. 586. In fact, the eyewitnesses stated that it was the robber with "very crooked teeth" (McDermid's most striking characteristic) who confronted the manager and took the money from the office and the cash registers. R.O.A. 583.

The reports also showed McDermid's violent nature in carrying out his robberies. After the manager had given up the money, the robber with the crooked teeth "called the manager an asshole" and "hit him over the head with the gun." R.O.A. 583. This report provides yet more proof of McDermid's violent nature, and further contradicts McDermid's effort to portray himself as a non-violent participant in these robberies.

8. Police Records -- Thrifty Scott Foods Robbery, Orlando

The Thrifty Scott Foods store in Orlando was robbed by two white men on September 30, 1981. The reports state that McDermid approached the store manager, Mr. Weatherholt, and demanded money. Although Weatherholt complied, the robber "hit him in the right side with the gun and stated `don't give me any shit just give me the money.'" R.O.A. 589. Weatherholt readily identified McDermid as the man who hit

him. R.O.A. 603. In contrast, when shown a photo line-up of Rogers, neither Weatherholt nor anyone else in the store recognized him as one of the robbers. See R.O.A. 588-607.

In his second confession, McDermid said that they used Rogers's green and white pickup truck for this robbery. Yet a witness saw the robbers get into a brown Plymouth Fury and drive away. R.O.A. 600.

These reports would have given Rogers still more evidence of McDermid's dishonesty and his violent tendencies.

9. Police Records -- John's Family Market Robbery, Ormond Beach

McDermid claimed that he and Rogers committed a robbery of the John's Family Market on October 8, 1981. R.O.A. 342. The police reports for this robbery are notable for three reasons. First, the reports contradict McDermid's identification of Rogers as his accomplice. The official "BOLO" for this crime lists both robbers as 5'10". R.O.A. 622. Rogers, a full half-foot shorter, simply does not fit the description of the John's Family Market suspects.

Second, the Ormond Beach police sent these police reports to Flynn Edmonson (the Winn-Dixie prosecutor's investigator), demonstrating once again that the Winn-Dixie prosecution was well aware of numerous police documents that contradicted McDermid's confessions. R.O.A. 611.

Third, the police reports indicate that McDermid lied about the getaway from this robbery in a manner that

paralleled his testimony about the getaway in the Winn-Dixie trial. In a January 6, 1984, affidavit to Flynn Edmonson (not provided to Rogers), McDermid claimed that he and Rogers ran to the getaway car after the John's Family Market robbery. He stated that he "got into the back seat and lay down on the floor board and Jerry drove off." R.O.A. 609. This is identical to the description that McDermid gave of the getaway in Winn-Dixie. Trial Tr. 6551-52.

But again, McDermid's story is contradicted by the police records. According to the reports for the John's Family Market robbery, witnesses saw both suspects sitting upright in the getaway car as it left the crime scene. R.O.A. 615. Had the John's Family Market reports been provided to Rogers, he could have used them to develop the theme that McDermid had similarly lied about the getaway in Winn-Dixie.[19/]

[19/] This is more than a technical detail. McDermid's testimony in the Winn-Dixie trial about how he ran to the getaway car was critical to his claim that he did not shoot the Winn-Dixie store manager. McDermid testified that he was well ahead of Rogers as they ran to the getaway car and that he heard gun shots from behind him as he was approaching the car. Trial Tr. 6549-50. McDermid claimed that he lay down in the back seat of the car, that Rogers arrived several seconds later and that Rogers got into the driver's seat and drove off. Trial Tr. 6551-52. McDermid's testimony on this issue was critical because it was the only direct evidence that McDermid's partner -- and not McDermid himself -- was the shooter.

At the Winn-Dixie trial, two witnesses contradicted McDermid's story. They testified that they saw McDermid -- not Rogers or anyone else -- run to the car, get in the driver's seat and drive away. Trial Tr. 7384, 7424-26. Had Rogers been provided with the John's Family Market reports, he could have shown that McDermid lied in the same way about precisely the same facts in the John's Family Market robbery. Such evidence would have brought into question McDermid's testimony about a central

(continued...)

10. **Taped Evidence of Coached Testimony**

The State also failed to disclose to Rogers a tape, which Mr. Rogers later obtained through Chapter 119 requests, of the State's preparation of McDermid for his testimony at trial. The tape revealed substantial coaching of McDermid. In several instances, this amounted to supplying McDermid with trial testimony to conform his story to the testimony of other witnesses, which thereby smoothed over glaring inconsistencies in the State's case. The tape also demonstrates that the State was well aware of Rogers's principal defense: that someone other Rogers was McDermid's accomplice at the Winn Dixie robbery-murder.

In one passage on the tape, the lead investigator, Flynn Edmonson, and the prosecutor, John Whiteman, discussed problems with the McDermid's testimony and the need to "reconcile" his testimony with that of other witnesses.

> Edmonson: Alright, now after the shooting and you run up and went down the hall
>
> . . . .
>
> McDermid: I got in the car. I looked around, I got down on the floorboard and within five seconds he [McDermid's partner] was right there.
>
> . . . .

---

[19] (...continued)
fact of the Winn-Dixie crime: the identify of the shooter.

McDermid: and you know, he [McDermid's partner] just got in the front seat, and whatever, and started the car and up and left.

. . . .

Whiteman: Well, let me tell you what, what we're, why we're asking these questions. Ah we talked to two guys [Troy Hagan and Karl Sapp] yesterday who say that they were leaving the restaurant area of the Holiday Inn and walking in that parking lot that would be on the side away from the Winn Dixie, back to their room.

. . . .

McDermid: Okay.

Whiteman: They walked up the stairwell, when they got to the top of the stairwell and started to head towards their room, this guy came running through the breezeway. He had his right hand stuck in his coat, he had his left hand on his side and they couldn't see whether he had something in his left hand or not. It spooked one of these two men because of hearing the shots and this guy was running like a bat out of hell apparently

. . . .

They immediately you know got in the room, looked out the window and they watched as this guy apparently open the trunk, shut the trunk, got in the driver's side of the car and then drove off. Um, sped off - said he went fast . . . . They lost site of him as he headed through the parking lot. <u>The bad thing is that is that they describe him in much the way that someone would describe you as far as height, build, and hair. And they say that the person they saw had you know protruding teeth, or buck teeth. Which, which leads us to believe that perhaps they saw you.</u>

McDermid: Yes indeed.

Whiteman: <u>But then what they say is not consistent with what you've told us because they say</u>

they saw that guy get in the driver's side and start the car up and leave immediately. That's what we're trying to ah reconcile. That's why we're brainstorming, more or less to see, to ah . . . .

Edmonson: That's our problem. If they, apparently identified you, now, they're good, clean-cut American boys and I don't see why they should ah fabricate anything.

. . . .

Whiteman: Then they say you got right in the car and drove off. Now maybe they're mistaken, or or maybe ah maybe you got in the car and and when and they missed seeing you get in the car -- and Rogers was so close behind you that he got in -- in the driver's seat and, you know they confused the two of you as he's getting into the seat and driving away.

McDermid: He wasn't that far behind me. I'll say that.

Whiteman: But they are you know they're saying that they didn't see a second person go down those stairs and from their vantage point, they be hard pressed not to see that.

McDermid: But I was definitely in the car.

Whiteman: Yeah

. . . .

Whiteman: I guess the only explanation is that but -- but you don't remember seeing these people at all.

McDermid: I don't remember seein' nobody, not if I was coming from that direction. That was before I laid down.

Whiteman: You couldn't have missed these guys. You know the person who ran by them probably came within two or three feet of the guy.

McDermid: Yeah

. . . .

> Whiteman: The best thing, is the thing they identify with what more or less you look like and they don't see anything that looks like Rogers.

R.O.A. 673-684.

This portion of the tape reveals the State trying -- in their own words -- to "reconcile" McDermid's story with the testimony of two eyewitnesses. In order to establish that he was not the shooter, McDermid claimed: (i) that he reached the getaway car first and then lay down in the back seat, and (ii) that his partner lagged behind, shot the store manager, and then got into the driver's seat and drove away. Trial Tr. 6545-52. The tape reveals Whiteman and Edmonson trying to reconcile McDermid's story with that of two eyewitnesses who stated that they saw McDermid -- and only McDermid -- run to the getaway car, get into the driver's seat and drive away.

In another passage on the tape, Whiteman and Edmonson urged McDermid to change his story about where the getaway car was parked.

> Whiteman: Okay, so would it [the getaway car] be in the first parking spot, second, third or where would it be? If you remember.
>
> McDermid: It would be somewhere in those first five. Ah, I remember we didn't want to park right next to the stairwell [the first spot] and decided to park a couple down so I could look on both sides you know what I mean, without the stairwell being in the way. . . . Not being parked too close to the office too was another thing I had in mind.

R.O.A. 657-58.

In these passages, McDermid stated that the getaway car was parked <u>not</u> in the first spot but several spaces down. Moreover, he provided specific reasons for not parking in the first spot next to the stairwell (<u>i.e.</u>, they wanted a view of the parking area unobstructed by the stairwell, and did not want to be too close to the hotel office).

> Edmonson: Well, I think that there could be maybe there's a problem, ah, of where you parked. They're pretty adamant it was space number 1. And they're adamant the person they saw on the stairwell [McDermid] was the guy that got in the car and drove off . . . .
>
> Edmonson: <u>Well, I think it would probably be a better idea if it was parked in the first spot.</u>
>
> McDermid: <u>What now?</u>
>
> Edmonson: <u>I, I would think that you would have probably parked in the first space.</u>
>
> Whiteman: <u>Its quicker. You would be on the step quicker too I guess, but</u>
>
> McDermid: <u>That's another thing. I mean like you said we might have parked in the first one.</u>

R.O.A. 685-87.

McDermid finally got the message: the State wanted him to change his story and testify that he parked in the first space. McDermid did exactly that. At trial, he testified that the getaway car was parked in the first spot, next to the stairwell. Trial Tr. 6547-48. Had the State

produced this evidence at trial, Rogers could have impeached McDermid by showing the degree to which the State had coached McDermid and fine-tuned his testimony to overcome inconsistencies between his testimony and that of defense witnesses.

Later on in the conversation, the State indicates that it knew exactly what Rogers's defense at trial would be.

> Edmonson: Well, we hope so. Is there anything else that you can think of that ah we should know. Because I know its been a long time and sometimes we forget that you don't think about it until after it doesn't count anymore but we need all the assistance we can get.
>
> Whiteman: But they're gonna, he -- he's going to theorize again that it was, ah you and somebody else.
>
> Edmonson: Probably Billy
>
> Whiteman: Either your brother or one of the McMannus brothers or something along that line, but it wasn't him. And, ah he's gonna to, you know, he's going to build on the fact that no one's ever identified Jerry Rogers any in any -- in this case at all.
>
> . . . .
>
> McDermid: Why do you think he'd argue that when he says he's innocent in all this.
>
> . . . .
>
> Whiteman: You know, they can argue that they're mistaken and that he wasn't involved in Orlando ones anyways. But you know even that, even so that doesn't mean that he did the one here in St. Augustine because Tom - because Tom McDermid could have other partners. . . .

R.O.A. 689-91.

By their own words, the State knew exactly what Rogers's defense would be: "[Rogers] is going to theorize . . . that it was you [McDermid] and somebody else" who committed the Winn-Dixie robbery and murder. Furthermore, the State knew of scores of documents identifying George Cope as the "somebody else." Despite this knowledge, the State chose to withhold from Rogers precisely those documents that would have allowed him to put on a successful defense by identifying Cope as McDermid's true partner.

C. **Evidence of Other Witness's Bias**

The final category of exculpatory evidence that the State failed to disclose to Rogers before trial was a set of correspondence between a prosecution witness, Steve Hepburn, the prosecution, and representatives of Winn-Dixie. These letters related to a $10,000 reward that had been offered by Winn-Dixie for the conviction of the perpetrators of the robbery and murder. Steve Hepburn testified at Rogers's trial about the facts involving another robbery supposedly committed by Rogers and McDermid. He identified Rogers's car, by its license plate number, as the one used by the robbers in that separate incident. Trial Tr. 6919.[20]

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[20] Rogers testified that McDermid had borrowed his truck for the period before, during, and after this robbery. Trial Tr. 7772-74.

Under questioning by the defense at trial, Hepburn denied in his trial testimony that the conviction of Rogers would make him eligible for the reward offered by Winn-Dixie. Trial Tr. 6932. But correspondence withheld by the State contradicted Hepburn's testimony.

The first letter was from Mr. and Mrs. Hepburn to State Attorney Cocchiarella, asking him to assist them in securing the reward money. The second letter was from Mr. Cocchiarella to Winn-Dixie, asking that it provide the award to the Hepburns. The third letter was Winn-Dixie's response, to Mr. Cocchiarella, indicating that the Hepburns would receive the reward upon conviction of the perpetrator. And the final letter was sent by the Hepburns to Winn-Dixie, with a copy to James Whiteman, the prosecutor in Rogers's case, inquiring about the reward. The Hepburns did in fact receive the reward money from Winn-Dixie after Rogers was convicted. R.O.A. 709-16; R.O.A. 4276 (Tr. 202).

The State's failure to provide the defense with this evidence of Hepburn's potential bias precluded Rogers from using it to impeach Hepburn's testimony at trial. When Hepburn was asked whether his information about the car's license plate, which he had not reported when investigators first asked, made him eligible for a reward, he denied knowledge of such eligibility. Trial Tr. 6932. Had Rogers possessed these letters, he could have shown that Mr. Hepburn had testified falsely as to his knowledge of the reward and

that he had a financial incentive to fabricate testimony that could help convict Rogers for the Winn-Dixie crimes. R.O.A. 4276 (Tr. 205); Trial Tr. 6932.

NEWLY DISCOVERED EVIDENCE

In his Rule 3.850 motion and during the 1996 evidentiary hearing on the motion, Rogers presented three new witnesses who testified that McDermid and Cope had a criminal relationship. First, Roger Wimmer, the husband of Rogers's former wife, testified that McDermid and Cope regularly sold drugs together as early as 1973 or 1974. R.O.A. 4279 (Tr. 552). Wimmer did not know that Cope's relationship with McDermid was relevant to Rogers's case until 1996, when investigator brought a photo pack to show Wimmer's wife. R.O.A. 4279 (Tr. 594). He then reviewed the photos, along with his wife, and independently identified pictures of Cope, McDermid, and Rogers. R.O.A. 4279 (Tr. 596-97). Consequently, it was simple coincidence that led to the discovery of Wimmer's testimony connecting Cope with McDermid. See R.O.A. 4279 (Tr. 627).

Rogers also presented testimony from two other witnesses at the 3.850 hearing who corroborated the evidence (a) that Cope was, in fact, McDermid's accomplice, and (b) that McDermid had falsely implicated Rogers in the Winn-Dixie crimes. These witnesses also provided independent evidence of Rogers's innocence of the Winn-Dixie crimes. First, Mathew Armitage testified that McDermid had told him that he had

committed several robberies with George William Cope, and on one occasion had observed McDermid and Cope rob a store. R.O.A. 4280 (Tr. 743, 763). Armitage also testified that McDermid had told him that Cope could put him (McDermid) on death row because of their involvement in the Winn-Dixie crimes. R.O.A. 4280 (Tr. 775).

A second witness, Ronald Heath, also testified at the Rule 3.850 hearing that McDermid had told him a number of things that implicated Cope and McDermid, and exonerated Rogers. First, McDermid told Heath he had agreed to implicate Rogers in exchange for a shorter prison sentence. R.O.A. 4282 (Tr. 995). McDermid also expressed to Heath his relief that Cope was in jail for another offense and that the police did not otherwise know about Cope's involvement in the Winn-Dixie crimes, because Cope could potentially tell the whole story of McDermid's fabricated account of the Winn-Dixie crimes. R.O.A. 4282 (Tr. 1100).

Heath also testified about several details of the crimes that McDermid had conveyed to him. For example, McDermid told Heath that Rogers had rented the car used in the Winn-Dixie robbery, but had not known how McDermid planned to use it because McDermid lied to Rogers. R.O.A. 4282 (Tr. 988-89). McDermid also admitted to Heath that he had shot someone during the Winn-Dixie crimes, R.O.A. 4282 (Tr. 990), but that he had planned to fabricate a story that had Rogers shooting

the victim as part of his agreement with police, R.O.A. 4282 (Tr. 996).

The newly discovered evidence adds further strength to Rogers's argument that he was erroneously convicted of the Winn-Dixie crimes. Post-trial statements by McDermid that Cope, not Rogers, committed the Winn-Dixie robbery with McDermid are important corroboration of the defense that Rogers could have presented at trial if he had been provided with the exculpatory evidence from the State's files. This new evidence specifically corroborates Rogers's Brady evidence, which indicates that Cope committed the crime with McDermid and that McDermid testified falsely in order to reduce his sentence. The new evidence thus reinforces the weight of the exculpatory evidence withheld by the State.

SUMMARY OF ARGUMENT

The State violated its fundamental constitutional obligation under Brady v. Maryland, 373 U.S. 83 (1963), to provide the defense with exculpatory evidence in its possession that Rogers could have used to establish his innocence. Specifically, the State possessed critical documents showing that there was an alternate suspect -- George William Cope -- who had admitted his involvement in the Winn-Dixie murder to two separate confidential informants, matched witness descriptions of McDermid's accomplice, and was considered by police to be a suspect in the crime. The State also had extensive evidence that would have directly impeached the testimony of McDermid, its critical witness against Rogers.

Had the State disclosed this information to Rogers prior to his trial, there is a strong likelihood, if not near certainty, that he would have been acquitted. Standing alone, the materials identifying Cope as the real perpetrator -- which match eyewitnesses' physical descriptions of the robbers -- fatally undermine confidence in the outcome of Rogers's trial. Yet the Cope-related materials must also be considered together with impeachment evidence that would have vividly demonstrated that the linchpin of the State's case, McDermid, was simply not credible. The State's suppression of this vital information critically handicapped Rogers's ability to prepare and present an effective defense, and deprived him of

a fair trial. Under these circumstances, the Constitution requires that Rogers receive a new trial. The lower court's ruling to the contrary is based on a flawed reading and application of Brady and its Florida and federal progeny, and should be reversed.

ARGUMENT

I. THIS COURT REVIEWS THE CIRCUIT COURT'S DECISION DE NOVO FOR ERRORS OF LAW AND MISAPPLICATION OF LAW TO FACT, AND MAY AFFIRM FACTUAL FINDINGS ONLY IF SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

Florida appellate courts conduct plenary review of questions of law. Coleman v. Florida Ins. Guar. Ass'n, 517 So. 2d 686, 690 (Fla. 1988); Florida Game & Freshwater Fish Comm'n v. Dockery, 676 So. 2d 471, 474 (Fla. 1st DCA 1996). Likewise, the application by a lower court of law to fact is reviewed de novo. Foley Lumber Co. v. Koester, 61 So. 2d 634, 640 (Fla. 1952) ("Where the lower court misapprehends the legal effect of the evidence as an entirety, the findings of the court should not be sustained."); Dockery, 676 So. 2d at 474; State v. Baldwin, 686 So. 2d 682, 684 (Fla. 1st DCA 1996). If the trial court has properly applied the correct law, then the reviewing court may affirm only if the lower court's factual conclusions are supported by competent substantial evidence. Blanco v. State, 702 So. 2d 1250 (Fla. 1997).

The determination whether evidence suppressed in violation of Brady v. Maryland, 373 U.S. 83 (1963), had a

reasonable probability of changing the outcome at trial is a mixed question of law and fact, which is subject to de novo review. Hays v. Alabama, 85 F.3d 1492, 1498 (11th Cir. 1996), cert. denied, 117 S. Ct. 1262 (1997); Kennedy v. Herring, 54 F.3d 678, 682 (11th Cir. 1995). See also United States v. Noriega, 117 F.3d 1206, 1218 (11th Cir. 1997) ("[U]nderlying determinations regarding prosecutorial misconduct involve mixed questions of law and fact."), petition for cert. filed, (U.S. Dec. 31, 1997) (No. 97-7331). Moreover, the United States Supreme Court has held that Brady violations involve mixed questions of law and fact that require plenary appellate review. See United States v. Bagley, 473 U.S. 667, 682 (1985) (adopting materiality test set forth in Strickland v. Washington, 466 U.S. 668, 698 (1985), which reviewed de novo materiality of counsel's ineffective assistance as mixed question of law and fact). See also Kyles v. Whitley, 514 U.S. 419, 422 (1995) (reviewing courts' "`duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.'" (quoting Burger v. Kemp, 483 U.S. 776, 785 (1987))). Consequently, while this Court may accept the Circuit Court's factual conclusions where they are supported with competent substantial evidence, it must review de novo the lower court's application of the necessary elements of the Brady claim to those facts.

II. THE STATE DEPRIVED ROGERS OF A FAIR TRIAL AND VIOLATED HIS DUE PROCESS RIGHTS UNDER BRADY v. MARYLAND BY FAILING TO PRODUCE SIGNIFICANT EXCULPATORY EVIDENCE IN ITS POSSESSION AT THE TIME OF HIS TRIAL.

The Constitution requires that the State disclose to a defendant favorable evidence in its possession that is material to guilt or punishment. Brady, 373 U.S. at 87. When the State, as here, fails to comply with this basic constitutional obligation, it deprives the defendant of a fair trial and denies him due process. Id. Even if the State's failure is inadvertent and in good faith, the tainted conviction and sentence cannot stand. Id.

Under Florida's application of these bedrock principles, Rogers must receive a new trial if he establishes:

> (1) that the State possessed evidence favorable to the defendant (including impeachment evidence; (2) that the defendant does not possess the favorable evidence, nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991) (per curiam) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir.), cert. denied, 493 U.S. 932 (1989)). See also Mills v. State, 684 So. 2d 801, 805-06 (Fla. 1996) (per curiam) (citing Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)). Rogers's Brady claim readily meets all four of these Hegwood requirements.

A. The State Possessed Highly Favorable Evidence that Rogers Could Have Used to Identify an Alternative Suspect and Impeach the Credibility of Pivotal Prosecution Witnesses.

1. The Evidence that the State Suppressed was Highly Favorable.

Under the first prong of Florida's Brady test, Rogers must show that the information the State failed to disclose would have been favorable to his defense. Information that an accused can use to establish the guilt of an alternate suspect is undeniably favorable and runs to the core of Brady's disclosure obligations. See Kyles v. Whitley, 514 U.S. 419, 432 (1995) (eyewitness statements to police describing an assailant as 5'4" or 5'5" and of medium build were clearly favorable to an accused who was 6' tall and thin, particularly when the description matched an alternate suspect); Sellers v. Estelle, 651 F.2d 1074, 1077-78 (5th Cir. Unit A July 1981) (statements in police records by a third person admitting to others that he shot an officer were clearly exculpatory and hence favorable to the person accused of that murder), cert. denied, 455 U.S. 927 (1982). See also Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 829-851 (10th Cir.) (nondisclosed evidence implicating a different suspect undermined court's confidence in a guilty verdict), cert. denied, 516 U.S. 905 (1995). Evidence that someone other than the defendant committed the crime is thus at the core of the State's Brady obligation.

Similarly, information that a defendant could use to impeach key witnesses, is also unquestionably "favorable" and within the scope of the State's Brady obligation. As the Supreme Court has stated, "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within th[e] general rule [of Brady]." Giglio v. United States, 405 U.S. 150, 154 (1972) (internal citations and punctuation omitted). See also Kyles, 514 U.S. at 445 ("[T]he effective impeachment of one eyewitness can call for a new trial . . . ."); Gorham v. State, 597 So. 2d 782, 785 (Fla. 1992) ("`[T]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . .'") (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

In this case, the withheld documents constitute classic Brady materials of the precise types that the State was obligated to disclose to the defense. Most obviously, the Cope-related documents expressly identify an alternate suspect for the Winn-Dixie robbery and murder. These include the Jacksonville and Duval County police records with the statements from two confidential informants about Cope's involvement in the Winn-Dixie murder. Also, police records from the Ormond Beach Publix and South Daytona Long John Silver's robberies include statements of numerous witnesses

linking Cope to comparable crimes that McDermid had admitted committing. See pp. 15-19, 19-21, supra.

Furthermore, the State withheld documents that would have directly undermined the credibility of the State's star witness. These documents would have demonstrated that McDermid had lied repeatedly about Rogers's involvement in other crimes. These include the Orlando Wendy's police reports, showing that McDermid's accomplice there was black and could not have been Rogers, and the Ormond Beach Publix and South Daytona Long John Silver's police records that showed Cope was McDermid's accomplice. These records directly contradict McDermid's second confession, where he falsely accused Rogers of committing these crimes. See pp. 23-28, supra.

Similarly, the State withheld documents that established the potential bias of another witness, and showed he had lied about his awareness of a reward associated with his testimony against Rogers. See pp. 39-41, supra.

All of these documents would have been of immense assistance to Rogers at trial. Without this information, he struggled to identify McDermid's true accomplice in the robbery and murder. And he lacked the tools to prove that McDermid was not telling the truth. The cumulative force of

this favorable and exculpatory evidence is sufficient to warrant a new trial, as addressed in the section below.[21]

2. The Withheld Exculpatory and Impeachment Evidence Was in the State's Possession at the Time of Trial.

The State's constitutional disclosure obligations under Brady extend to any and all favorable evidence in its "possession." Both Florida and federal courts have interpreted the concept of possession quite expansively. See Kyles, 514 U.S. at 437 (the prosecutor has "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); Gorham, 597 So. 2d at 784 (the prosecutor "is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers"). See also McMillian v. Johnson, 88 F.3d 1554, 1569 (11th Cir.) (evidence attributable to prosecution even if the police hide the evidence from the prosecutor), modified in part on other grounds, 101 F.3d 1363 (11th Cir. 1996); Ross v. Hopper, 716 F.2d 1528, 1534 (11th Cir. 1983) (all evidence obtained by law enforcement in the course of an investigation is attributed to

[21] The circuit court's opinion does not explicitly address whether the voluminous Brady materials presented are "favorable" to the defense. On one occasion, the court notes in passing that the Cope documents "would have cut both ways at trial." Slip Op. at 2. However, it is difficult to imagine how evidence linking George Cope to the Winn-Dixie murder would not have been overwhelmingly favorable to Rogers.

the prosecutor), vacated in part as to other issues and reaff'd as to Brady holding, 756 F.2d 1483 (11th Cir. 1985).[22]

The case law thus makes clear that, in any circumstances, materials in the possession of other Florida police departments or other prosecutors' offices could be deemed to be in the "possession" of the St. Augustine police force and those who prosecuted this case. But here, the Court need not reach the outer boundaries of these definitions, because the very agencies (and individuals) prosecuting and investigating the Winn-Dixie case -- the St. Augustine police and the St. John's County District Attorney's Office -- had actual possession of at least the following materials: (1) the Pantry Pride police report containing Cope's admission that he committed the Winn-Dixie crimes, pp. 10-12, supra; (2) the second McDermid confession with Detective Edmonson's initials on each page, pp. 23-25, supra; (3) the McDermid coaching tape, pp. 33-39, supra; (4) St. Augustine police records implicating Cope (who had been identified as a suspect in the Winn-Dixie case) in various offenses in the St.

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[22] Indeed, Florida courts have only rarely held that the State has not been in "possession" of favorable information for Brady purposes. In Breedlove v. State, this Court held that the State was not in constructive possession of the personal knowledge of several detectives' own criminal activities, because they were privileged by the right against self-incrimination from disclosing the information. 580 So. 2d 605 (Fla. 1991), post-conviction relief granted on other grounds, 595 So. 2d 8 (Fla. 1992). No such extraordinary circumstance exists here. To the contrary, as the case law cited reveals, the instant facts present a classic case of the State's possession of Brady materials.

Augustine area, p. 21, supra; (5) the police records from the Ormond Beach Publix in which Cope was identified as McDermid's accomplice by five witnesses, and which was discussed at a regional law-enforcement meeting, pp. 15-19, supra; and (6) the Hepburn letters inquiring about the $10,000 reward, which the State Attorney's office itself drafted and received, pp. 39-41, supra. This evidence -- which alone would have been sufficient to create a reasonable doubt in the minds of the jurors as to the identity of McDermid's accomplice, and which would have led Rogers to other exculpatory evidence held by other State agencies -- was indisputably in the prosecution's hands.

Moreover, the State's obligation to produce favorable information extends far beyond evidence in the actual possession of the investigating prosecutor and police. Information obtained by other Florida law enforcement entities is also in the possession of the State for Brady purposes and must be actively sought out by the prosecutor and disclosed to the accused. As this Court stated in Antone v. State: "[j]ust as there is no distinction between different prosecutorial offices within the executive branch of the United States government for purposes of a Brady violation, there is no distinction between corresponding departments of the executive branch of Florida's government for the same purpose." 355 So. 2d 777, 778 (Fla. 1978) (per curiam). See also United States v. Thornton, 1 F.3d 149, 158 (3d Cir.) ("The prosecutors have

an obligation to make a thorough inquiry of all enforcement agencies that had a potential connection with the witnesses."), cert. denied, 510 U.S. 982 (1993); Williams v. Whitley, 940 F.2d 132, 133 (5th Cir. 1991) (State must discover and disclose information "readily available to it").[23]

Here, every piece of Brady evidence at issue was in the possession of a Florida law enforcement entity. Under established Florida law, this alone is sufficient to impute possession of all the Brady materials to the prosecution in this case.

Furthermore, at Rogers's evidentiary hearing, the State did not present a single piece of evidence disputing that it possessed any of the Brady documents. It did not present anyone to deny the State's knowledge of the Cope materials or the other police records. In particular, although he was present at the hearing, the State did not call Flynn Edmonson. As the lead investigator on the Winn-Dixie robbery and murder, Edmonson would almost certainly have had considerable knowledge of the contents of the State's files.

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[23] Accord Martinez v. Wainwright, 621 F.2d 184, 186 (5th Cir. 1980) (prosecutor must produce victim's rap sheet even if in possession of another government agency); State v. Coney, 294 So. 2d 82, 86 (Fla. 1973) (deeming the State Attorney in constructive possession of FBI records that it could have obtained from Washington, D.C., through a federal-state information-sharing agreement).

In short, the State has all but conceded that it possessed, or was aware of, all of the Brady materials at issue in this appeal.

Moreover, these Brady documents reveal substantial cooperation and sharing of information between the law enforcement officials investigating the Winn-Dixie case, and those investigating other robberies by Cope and McDermid. For example, the Jacksonville police were in communication with Sergeant Nicklo in St. Augustine regarding the Pantry Pride robbery, and their discovery that Cope had admitted to an informant that he committed the Winn-Dixie murder. See pp. 10-12, supra. St. John's County detective Flynn Edmonson contacted the Temple Terrace police regarding the Kash 'n' Karry robbery. St. Augustine and Ormond Beach police exchanged information about the Ormond Beach robbery, in which Cope had been positively identified by five witnesses. And the St. Augustine police attended a regional law enforcement meeting soon after the Winn-Dixie robbery/murder in order to discuss with police from surrounding areas the recent string of robberies, including those at the Winn-Dixie and the Ormond Beach Publix. R.O.A. 418.

Thus, in these circumstances, there is a particularly strong case for treating these Brady materials as being within the State's actual or constructive possession. See Smith, 50 F.3d at 825 n.36 ("Clearly, if the prosecution had actual knowledge that several arms of the State were

involved in the investigation of a particular case, then the knowledge of those arms is imputed to the prosecution."); United States v. Antone, 603 F.2d 566, 569-70 (5th Cir. 1979) (imputing possession of information in hands of state investigators to federal prosecutors where the two had communicated and cooperated regarding the investigation); Griffin v. State, 598 So. 2d 254, 256 (Fla. 1st DCA 1992) (State had constructive possession of information possessed by naval officer working in conjunction with local police).

In the face of these pertinent facts and legal precedent, the trial court's ruling that the police reports "of various and sundry jurisdictions" were not in the State's possession, Slip Op. at 3, is gravely in error. First, the court failed to acknowledge the potent exculpatory evidence that was physically in the hands of the St. Augustine police and the St. John's County District Attorney's Office. Second, the court ignored the information that St. Augustine and St. John's police and prosecutors learned through specific communications with other Florida and federal law enforcement agencies. Third, the court overlooked clear Florida case law holding that prosecutors are deemed to be in constructive possession of records held in other Florida jurisdictions, as here. Fourth, the court's reliance on the proposition that the records were nominally related to different crimes is also inconsistent with Florida precedent. See Frierson v. State, 677 So. 2d 381, 382 (Fla. 4th DCA 1996) (reversing conviction

because the State failed to disclose information about a separate crime that "bore a striking similarity to the events surrounding the crime in trial, and thus provided evidence that defendant's claim of mistaken identity had merit."), review denied, 689 So. 2d 1072 (Fla. 1997).[24/]

B. The Brady Materials in the State's Possession Were Neither Known Nor Available to Rogers.

The State's failure to disclose favorable material in its possession can only be excused where the defendant already knows of the evidence or could obtain it with "reasonable diligence." Mills v. State, 684 So. 2d at 805; United States v. Valera, 845 F.2d 923, 927-28 (11th Cir. 1988), cert. denied, 490 U.S. 1046 (1989). This commonsense rule prevents a defendant from challenging the State's failure to turn over information that the defendant knew about. However, where neither the defendant nor his lawyer, if he has one, knows about the existence or potential existence of the favorable information before trial, they cannot be expected to have made an effort to obtain its production. United States v. Spagnoulo, 960 F.2d 990, 994 (11th Cir. 1992).[25/] Indeed,

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[24/] The trial court, Slip Op. at 3, cited Perry v. State, 395 So. 2d 170 (Fla. 1980). But that case does not even address the issue of possession under Brady. Rather, the investigative reports at issue in that case were clearly in the State's possession, but the defendant made no showing whatsoever that they contained any favorable or exculpatory information. Id. at 173.

[25/] For example, Brady claims have failed when the defendant had learned of a witness's immunity agreement in a deposition before (continued...)

requiring a defendant to conduct a full-scale investigation to parallel the State's, and to pursue leads that seem relevant only in hindsight, would turn Brady's disclosure obligation on its head.

Here, Rogers possessed no inkling of the existence of these materials prior to his trial, and could not reasonably have been expected to have obtained them. First, he had never heard of George William Cope until years after trial. R.O.A. 4278 (Tr. 464-65). Second, he specifically asked the State for all exculpatory materials, and they were not provided. Third, as described in detail above, the relevant materials were uniquely in the possession of the State Attorney and various police departments. Rogers had no way of knowing, for example, that the police suspected Cope of the Winn-Dixie crimes and had learned from a confidential informant that Cope actually admitted to committing the Winn-

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[25/](...continued)
trial and then challenged the State's failure to disclose the actual agreement, Routly v. State, 590 So. 2d 397, 399 (Fla. 1991); or when a witness's criminal record was either known to the defendant or "as accessible to the defense as it was to the State," Melendez v. State, 612 So. 2d 1366, 1368 (Fla. 1992), cert. denied, 510 U.S. 934 (1993); or when the defendant knew about certain impeachment evidence, even though he did not know about the exact details of the evidence, Francis v. State, 473 So. 2d 672, 675 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986). Nowhere in the record is there any suggestion that Rogers knew of concrete "leads" like those in other cases where defendants were found not to have exercised due diligence in pursuing information. As discussed further in the text, in the absence of such leads, there simply is no burden on a defendant under Florida case law to conduct a speculative investigation of the sort that would have been necessary to discover the materials at issue.

Dixie crimes, or that McDermid had given police a second detailed (and fabricated) confession.

Where, as here, a defendant has taken the extra step of propounding discovery requests to the State and has not received full responses, courts uniformly hold that the defendant exercised reasonable diligence in pursuing exculpatory information. See, e.g., Arango v. State, 467 So. 2d 692 (Fla.) (State's failure to turn over a gun found near crime scene violated Brady where defendant asked for "any physical evidence or witness statements which corroborate the Defendant's statements"), vacated, 474 U.S. 806 (1985), judgment reinstated, 497 So. 2d 1161 (Fla. 1986) (per curiam); Boshears v. State, 511 So. 2d 721 (Fla. 1st DCA 1987) (State violated Brady when it told the defendant about the investigating officer who interviewed a key witness but failed to turn over officer's report).

Rogers received none of this exculpatory material from the State until CCR filed a series of Chapter 119 requests between 1989 and 1991. Notwithstanding his specific discovery requests for exculpatory information, and his filing of subsequent motions to compel, these clearly exculpatory materials were withheld. R.O.A. 4287 (Tr. 166-67, 172). Accordingly, the State cannot escape its constitutional obligation to disclose favorable information, which it both possessed and knew or should have known related to the case at

hand, by claiming that Rogers somehow should have discovered the information himself.

The trial court's ruling that Rogers should or could have discovered all of this information by deposing McDermid ignores reality. First, the court overlooked that Rogers had no reason to depose McDermid about Cope, because Rogers had never heard of Cope and had never been provided with the documents that would have brought Cope to his attention. Second, notwithstanding the Court's statement that Rogers "never once deposed McDermid in preparation for trial," Slip Op. at 3, Rogers did depose McDermid several times in other cases and discovered none of the information challenged here. See Trial Tr. 7023-39. Third, without the second confession, Rogers had no reason to depose McDermid further or pursue information regarding the crimes listed in McDermid's first confession. Only the second confession implicated Rogers as McDermid's alleged accomplice in the other crimes. Only with the second confession, which the State withheld, did it become clear that McDermid was lying not only about the Winn-Dixie crime but also about other matters that Rogers could investigate. The false accusations in the second confession were critical to Rogers's ability to impeach McDermid's testimony that Rogers was his partner in this and other crimes. There was nothing comparable in the first confession.

Perhaps most astonishing is the lower court's assertion that the McDermid coaching tape contains information

that Rogers should somehow have discovered. Slip Op. at 3. Nowhere does the Court explain how it would expect Rogers to know that the State's lead investigator and prosecutor engaged in an extensive coaching session with the State's star witness. Even if McDermid were to volunteer in a deposition that he discussed his testimony with the prosecution, such an admission could not possibly match the force of a tape of the prosecution rehearsing specific points with McDermid. The tape would have shown that McDermid's testimony was fabricated, in a way that Rogers could not plausibly have established without the tape.

C. The State Suppressed the Favorable Evidence in its Possession.

The State's obligation to disclose favorable evidence in its possession turns on the nature of the evidence, and need not be triggered by any request from a defendant. That is, the State has an affirmative obligation to disclose evidence that otherwise satisfies the Brady standards, whether or not a defendant requests such evidence. See Kyles, 514 U.S. at 433 (the government must disclose qualifying evidence "regardless of request"). When the State fails to satisfy that affirmative obligation, it has "suppressed" evidence.

Here, there is no dispute that the State failed to turn over the challenged materials until long after Rogers's trial. The State's suppression is particularly egregious

because Rogers submitted explicit discovery requests to the State pursuant to Brady covering the exculpatory and impeachment information at issue, as discussed further in the following section.[26]

D. The Suppressed Brady Documents Are Material, Because There is, at the Very Least, a Reasonable Probability that Rogers Would Not be on Death Row if the State Had Made Such Materials Available to Rogers to Defend Himself.

Rogers need not prove that the suppressed evidence would more likely than not have led to his acquittal. Kyles, 514 U.S. at 433-34. Rather, he need demonstrate only that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. (quoting Bagley, 473 U.S. at 682 (opinion of Blackmun, J.), and Bagley, 473 U.S. at 685 (opinion of White, J.)). When the State's suppression of evidence "undermines confidence in the outcome of the trial," the tainted verdict cannot stand. Bagley, 473 U.S. at 678.

The impact that the Brady materials might have had on Rogers's trial should be assessed from cumulative effect of

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[26] All of the exculpatory evidence discussed in this brief was requested by Rogers and his counsel prior to trial. Rogers made a specific request for all evidence that "tends to negate the guilt" of the defendant, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and a similar request was made by the public defender lending help to Rogers. R.O.A. 4275 (Tr. 85-86). Neither Rogers nor his standby attorney had any of the evidence discovered by CCR at the time of trial. E.g., R.O.A. 4275 (Tr. 112-13) (relating to Rogers's non-possession of detailed list of confessions); R.O.A. 4278 (Tr. 464) (lawyer's testimony that he'd not heard of Cope prior to trial). Nor did the State disclose this evidence to Rogers.

the evidence. Kyles, 514 U.S. at 441. That is, the Court should not consider the significance of each individual document in isolation, but rather should assess the importance of the suppressed materials taken together. Id. In addition, the Court should consider not only how the State's suppression of favorable information deprived Rogers of directly relevant evidence of his innocence, but also how it handicapped his ability to investigate and discover other exculpatory evidence. See Sellers, 651 F.2d at 1077 n.6 (highlighting the importance of other evidence that Brady materials could have led to). See also Bagley, 473 U.S. at 683 (noting relevance of "any adverse effect" that failure to produce Brady materials "might have had on the preparation or presentation of the defendant's case").[27/]

The materials that the State failed to disclose here to Rogers are bedrock Brady materials, of the sort that many courts have held require the granting of a new trial. As described above, the materials fall into three general categories: the Cope documents, the McDermid impeachment

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[27/] For example, if Rogers had been given the materials identifying George Cope at the time of his trial, he might have discovered additional evidence like that he later discovered from Armitage, Heath, and Wimmer. The new evidence Rogers did ultimately discover further establishes the criminal connection between McDermid and Cope already established by the Brady materials. Under State v. Gunsby, such newly discovered evidence must be considered in conjunction with the Brady materials. 670 So. 2d 920, 924 (Fla. 1996) (per curiam) (citations omitted). In this case, the Brady evidence alone is more than sufficient to require a new trial. Nevertheless, the newly discovered evidence provides an additional basis for granting relief.

documents, and the Hepburn impeachment documents. Either the Cope documents or the McDermid documents, standing alone, could have devastated the State's already weak case against Rogers. The cumulative effect of the three categories of suppressed materials is overwhelming.

The Cope documents (consisting entirely of police records from various Florida law enforcement agencies) demonstrate that, unbeknownst to Rogers, the State was pursuing another suspect -- George William Cope -- for the Winn-Dixie crimes and other armed robberies involving McDermid. These documents reveal that:

- Cope had admitted to a confidential informant that he participated in the Winn-Dixie crimes. The St. Augustine police knew this. See p. 19, _supra_;
- Cope and another suspect had declared their intention to commit the Winn-Dixie robbery. The State also knew this. See p. 13, _supra_;
- Cope -- unlike Rogers -- closely matches the physical description by eyewitnesses of McDermid's accomplice in the Winn-Dixie robbery and murder. Yet Rogers could not have known this, because he had never heard of Cope until years after the trial. See pp. 7-8, 62 n.26, _supra_;
- Seven witnesses identified Cope as one of the two perpetrators in a series of robberies that McDermid claimed to have committed with Rogers, establishing an undisputable criminal connection between Cope and McDermid. See pp. 15-19, 19-21, _supra_;
- Cope was, in fact, arrested several times in the months before and after the Winn-Dixie crimes for robberies and other criminal conduct in the St. Augustine area. These other arrests demonstrated a pattern of criminal conduct, placed Cope in the area, and established his familiarity with the area. See p. 21, _supra_;

- Cope had the opportunity and motive to commit the Winn-Dixie crimes and other robberies. See pp. 18, 21, supra; and

- Cope was a principal suspect in the Winn-Dixie crimes as well as other robberies involving McDermid. See pp. 10-21, supra.

If the State had fulfilled its obligations under Brady, Rogers could have presented to the jury a logical and convincing argument that McDermid's true accomplice in the Winn-Dixie robbery and murder was George Cope. Thus, the Cope documents would have provided overwhelming support for Rogers's primary defense at trial: that someone else was McDermid's accomplice for the Winn-Dixie crimes. This evidence would have been particularly compelling given that Cope's height matched precisely with the eyewitness descriptions of the two robbers, who had described the second robber as taller than the buck-toothed McDermid. Rogers, at 5'4", was much shorter than McDermid. But because the State withheld this vital exculpatory evidence, Rogers was never given the critical opportunity to demonstrate the identity of that taller robber. Furthermore, had Rogers known that George Cope was likely McDermid's accomplice, he could have conducted his own investigation to find other evidence linking Cope to McDermid and the Winn-Dixie crimes, such as the information he later discovered from Heath, Armitage, and Wimmer, see pp. 41-43, supra.[28]

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[28] The new evidence presented by Armitage, Heath, and Wimmer
(continued...)

There cannot be more material evidence under Brady than that pointing to a prime alternative suspect -- especially one who had admitted his involvement in the very crime at issue to confidential informants, who matches eyewitness descriptions of the assailant, and whom the State itself had specifically considered to be a suspect. See Kyles, 514 U.S. at 451-54 (requiring new trial in part because state failed to disclose eyewitness statements identifying an assailant who did not match the accused's description); Smith, 50 F.3d at 829-35 (nondisclosed evidence implicating a different suspect undermined court's confidence in guilty verdict); Stano v. Dugger, 901 F.2d 898, 903 (11th Cir. 1990) (suppressed evidence that would have substantially strengthened the defense strategy at trial is "material" for Brady purposes); Sellers, 651 F.2d at 1077-78 (suppressing admissions by individual other than accused that such individual committed the crime violates accused's due process rights); Frierson v. State, 677 So. 2d at 382 (reversing

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[28/] (...continued)
corroborates the Brady materials and indicates further that George Cope committed the Winn-Dixie robbery and murder with McDermid. For example, Mathew Armitage testified that McDermid had told him that he had committed several robberies with George William Cope, R.O.A. 4280 (Tr. 743-44, 762-63), and that Cope could put him (McDermid) on death row because of their involvement in the Winn-Dixie crimes. R.O.A. 4280 (Tr. 775). Ronald Heath testified that McDermid had told him that he (McDermid) had agreed to implicate Rogers in exchange for a shorter prison sentence, R.O.A. 4282 (Tr. 995), and that McDermid was happy that Cope was in jail for another offense and that the police did not otherwise know about his involvement in the Winn-Dixie crimes, R.O.A. 4282 (Tr. 1100). Roger Wimmer further linked McDermid and Cope. R.O.A. 4279 (Tr. 552).

conviction because the State failed to disclose information about a separate crime that "bore a striking similarity to the events surrounding the crime in trial, and thus provided evidence that defendant's claim of mistaken identity had merit").

The second category of Brady materials demonstrates beyond any doubt that McDermid lied repeatedly in describing his crime spree and in identifying Rogers as his accomplice. With these documents, Rogers could have shown that:

- McDermid falsely implicated Rogers as his accomplice in numerous robberies to which McDermid had confessed. This included one in which witnesses identified McDermid's accomplice as black, two in which multiple witnesses positively identified Cope as McDermid's accomplice, one in which police records identify Cope as McDermid's accomplice, and three in which witness descriptions of the second assailant match Cope and not Rogers. See pp. 23-28, supra;

- McDermid provided changing accounts of various robberies in different confessions he gave to police. See pp. 23-25, supra;

- McDermid lied about key details of various robberies in an attempt to link Rogers falsely to those crimes. See pp. 23-28, supra;

- McDermid lied about other key details of crimes. See pp. 31-32, supra;

- McDermid was coached by the prosecution how to "reconcile" contradictions between his testimony and that of key defense witnesses. See pp. 33-39, supra.

Put mildly, these materials would have substantially undermined McDermid's credibility at trial. There was no more important witness for the State. Without McDermid, the State

would have been left with just one eyewitness -- the concededly confused Suppinger -- and very limited circumstantial evidence. The jury could not have convicted if it disbelieved McDermid. See p. 6, supra. And his credibility was ripe for challenge given the generous plea bargain he received in exchange for his testimony. Yet, without the McDermid impeachment materials, Rogers was acutely handicapped in his ability to impeach McDermid. With these highly favorable materials, he could have shattered McDermid's credibility.[29/]

As with the Cope documents, the State's failure to disclose this powerful evidence that the State's principal witness was lying violates the central precepts of Brady. See, e.g., Kyles, 514 U.S. at 443-44 & 443 n.14 (changing statements of key witness could have been used to impeach and raise implication that prosecution coached the witness); id.

[29/] The State argued in the Rule 3.850 hearing that Rogers would not have wanted to admit the helpful collateral-crime evidence because he might somehow have opened the door to potentially unhelpful police documents from other crimes. The State is mistaken for three reasons. First, the most potent Brady evidence -- the two admissions by Cope that he was involved in the Winn-Dixie murder and the other evidence linking Cope to the Winn-Dixie murder -- has nothing to do with collateral crimes and would not even raise the issue of opening the door to collateral-crime evidence against Rogers. Second, it is well established that impeaching a witness with his lies does not open the door to rehabilitating that witness with allegedly true statements. As this Court has held, "It is well settled that witnesses' prior consistent statements are generally unavailable to corroborate that witness's testimony." Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986). Third, Rogers could have used only those documents from other crimes where he could establish definitively that Cope or another person was McDermid's robbery partner.

(implication of coaching could have fueled a "withering cross-examination"); Giglio, 405 U.S. at 154-55 (evidence that could have been used to impeach government's main witness); Stano, 901 F.2d at 903 (evidence that can impeach linchpin of prosecution's case is material); Roman v. State, 528 So. 2d 1169, 1171 (Fla. 1988) (prior inconsistent witness statements that could have been used to impeach and bolster theory of defense); Marrow v. State, 483 So. 2d 17, 20 (Fla. 2d DCA 1985) (evidence that could have impeached main government witness).

The third and final category of Brady materials demonstrates that another important State witness -- Steve Hepburn -- lied when he denied on the witness stand that he knew he would receive a $10,000 reward for his testimony if Rogers were convicted. As with the McDermid impeachment documents, these Hepburn impeachment documents are classic Brady materials, which Rogers could have used to undermine the credibility of an important prosecution witness. See, e.g., Kyles, 514 U.S. at 442 n.13 (possibility of reward that could have been used to impeach witness); Bagley, 473 U.S. at 683 (same); Gorham, 597 So. 2d at 784-85 (sustaining Brady claim based on failure to disclose financial incentives of witness).

Viewed independently, each category of evidence the State withheld from Rogers undermines confidence in the

accuracy and fairness of Rogers's conviction and sentence.[30] The State's failure to disclose the Cope documents alone -- direct evidence implicating someone else in the crime, which was in the possession of the primary investigator for the State Attorney -- constitutes compelling grounds to require a new trial. Together, the cumulative effect of all of the suppressed Brady materials demonstrates quite conclusively that, had they been disclosed to Rogers prior to trial, there is more than a reasonable probability that the outcome of the trial would have been different.

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[30] Indeed, in the face of the Brady materials, the State's already weak case for Rogers's involvement in the Winn-Dixie crimes would have been reduced to a few pieces of highly circumstantial evidence that Rogers could have readily dismissed. The State introduced evidence showing that Rogers rented the car used by McDermid in the Winn-Dixie robbery. Rogers admitted from the outset that he rented the car, but consistently testified that he immediately turned the car over to McDermid who had asked Rogers to rent the car for him. Trial Tr. 7759-60. Other than McDermid, the State offered no evidence to dispute Rogers's testimony on the rental car. The State also introduced ballistics evidence showing that the bullets used in the murder could have come from a gun of the type that Rogers owned. However, Rogers presented evidence that McDermid had access to and frequently borrowed his guns. Trial Tr. 7734-36. Neither McDermid nor the State disputed McDermid's access to and frequent use of Rogers's guns.

CONCLUSION

For the foregoing reasons this Court should vacate Rogers's conviction and sentence and order the State to conduct a new trial or release Rogers from its custody.

Respectfully submitted,

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