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 REPLY 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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Jerry Layne Rogers has steadfastly maintained that he was wrongly accused of committing the Winn-Dixie robbery and murder with Thomas McDermid. But at trial he was unable to point to McDermid's likely accomplice because the State had withheld evidence that identified the most plausible suspect: George William Cope. Cope (unlike Rogers) matched the heights of the Winn-Dixie robbers, "resembled Rogers in visage" (State Br. at 74), had been overheard talking about his role in the Winn-Dixie murder, and had committed other armed robberies with McDermid around the same time.

Likewise, the State withheld evidence that directly impeached McDermid, the State's key witness. Rogers has maintained that McDermid falsely accused him of the Winn-Dixie murder in order to secure an extraordinarily favorable plea bargain, and to avoid a potential death sentence himself. The withheld evidence would have devastated McDermid's testimony and the case against Rogers.

The evidence that the State withheld was crucial to Rogers's core defenses, and thus represents a glaring violation of Brady v. Maryland, 373 U.S. 83 (1963). The State's opposition brief offers no effective excuse for that violation.

I. ROGERS'S BRADY CLAIM WAS INCLUDED IN HIS ORIGINAL RULE 3.850 MOTION AND IS NOT PROCEDURALLY BARRED

The State acknowledges (p. 3 & n.6) that the Rule 3.850 motion filed by Rogers in January 1990 "complied with the 2-year time limit of then Fla. R. Crim. P. 3.851." That Rule 3.850 motion included the same claim that Rogers advances here -- that the State withheld material, exculpatory evidence in violation of

Rogers's Brady rights under the Fifth, Sixth and Fourteenth Amendments. See State Br. at 3 n.7 ("Rogers' post-conviction claims in circuit court [included] . . . 3) state withheld exculpatory evidence").

In February 1990, Rogers filed a supplement to his January 1990 Rule 3.850 motion, which elaborated on the factual allegations supporting the earlier filed Brady claim. That February 1990 supplement included the same core factual allegations that Rogers advances on this appeal.[1/]

The Brady claim and other claims included in Rogers's 1990 Rule 3.850 motion were the subject of evidentiary hearings in 1990 and 1991. The State made no allegation of procedural bar as to Rogers's Brady claim, either in the trial court or on appeal to this Court. But this Court never reached the merits of the Brady claim on that earlier appeal because it remanded for a new hearing because the trial judge erroneously denied a recusal motion. Rogers v. State, 630 So. 2d 513, 516 (Fla. 1993).

In August 1996, Rogers filed an Amendment and Supplement to the 1990 Rule 3.850 motion.[2/] That Amendment and Supplement (p. 8) specifically stated that "[t]his motion amends

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1/ Pertinent passages from the January 1990 Rule 3.850 motion and February 1990 supplement are at Exhibits A and B to this brief. Each of the Brady allegations advanced on this appeal is included in the February 1990 supplement. See Exhibit B.

2/ The State (pp. 5-6 & n.10) criticizes Rogers's counsel for filing the Amendment and Supplement a week before the August 1996 evidentiary hearing. But after Rogers presented his evidence in August 1996, the State did not present its evidence until April 1997. Thus, the State had more than a half-year after the filing of the Amendment and Supplement to prepare its case.

the Prior Motion's Brady claim" as previously filed in 1990. It also added several new claims that are not at issue on appeal.

This Court has held squarely that the limitations period of Rule 3.851 (two years in this case) "does not preclude the enlargement of issues raised in a timely filed first motion for postconviction relief." Brown v. State, 596 So. 2d 1026, 1027 (Fla. 1992). Thus, "a timely [Rule 3.850] motion may be amended after expiration of the limitations period." Rivet v. State, 618 So. 2d 377, 378 (Fla. 5th DCA 1993). Accord McConn v. State, 708 So. 2d 308, 310 (Fla. 2d DCA 1998) (en banc) (a supplement "filed beyond the two-year time limitation" is permitted "on an issue initially raised in a timely first motion for postconviction relief").

Here, as the State concedes, Rogers's Brady claim was timely filed in January 1990. The later amendments in February 1990 and August 1996 added factual detail to that same legal claim. Under this Court's holding in Brown, these later factual supplements to the timely filed January 1990 Brady claim are not precluded by the limitations period of Rule 3.851 and are not subject to procedural bar.[3/]

The State bases its procedural bar argument (pp. 43-44) on a statement by counsel, during the evidentiary hearing, that

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[3/] The State quotes (p. 43) the trial court's statement that it "appears . . . that the State's argument" of procedural bar "has merit" as to claims newly filed in the August 1996 Rule 3.850 Amendment and Supplement that were "not related to the claims" previously adjudicated in 1990. This observation has nothing to do with the Brady claim that was raised and adjudicated in 1990 and that does relate back to the 1990 Rule 3.850 motion.

Rogers "intend[ed] to proceed only on the claims that have been filed in the amended motion." The State (p. 45 & n.29) distorts this comment into a concession that Rogers supposedly "waive[d] all matters raised in [the] 1990 motions." But that is clearly not what counsel said or intended. The statement quoted by the State advised that Rogers was "proceed[ing] only on the claims" presented in the amended motion -- and one of those was the Brady claim that was originally raised in the 1990 motion and supplement. Counsel never said or suggested that Rogers was waiving that earlier filed Brady claim.

To the contrary, the entire purpose of the evidentiary hearing was to adjudicate the claims advanced in the August 1996 Amendment and Supplement, including the Brady claim first raised by Rogers in 1990. Given that the Amendment and Supplement specifically states that it "amends the Prior Motion's Brady claim," the State is flatly wrong in asserting that Rogers somehow waived that previously filed claim.

II. THE EVIDENCE WITHHELD BY THE STATE WAS CRITICAL TO THE DEFENSE

The fundamental defense in this case was that Rogers had been falsely accused by Thomas McDermid, that Rogers was 100 miles away from St. Augustine at the time of the Winn-Dixie robbery and murder, and that someone else committed this crime with McDermid. See Initial Br. at 8. Rogers had a substantial alibi based on the testimony of several witnesses and hospital records showing that he was nowhere near St. Augustine on the

night of the Winn-Dixie murder.[4/] Rogers, whose height is 5'4", also had substantial eyewitness testimony that McDermid (at 5'8" tall) was the shorter of the two robbers. And aside from the self-interested McDermid, the only witness who even placed Rogers at the scene gave testimony so flawed that the State conceded she was "probably mistaken." See page 21 & note 24, infra. Far from being immaterial, as the State contends (pp. 52-59), the withheld Brady evidence would have dramatically strengthened the defense by allowing Rogers to identify a specific alternative suspect and to impeach McDermid with specific, demonstrable falsehoods.

The following sections address each category of withheld Brady material separately. But this Brady claim must be assessed based on the cumulative adverse effect of the "suppressed evidence considered collectively, not item by item."

[4/] Rogers testified that he was at a family cookout at his home in Winter Park, roughly 100 miles from St. Augustine, on the night of the Winn-Dixie murder. Trial Tr. 7762-63, 7766. Three other witnesses similarly testified to this. Trial Tr. 7638-39, 7730-31, 7882, 7906. Rogers and others said that he took his daughter to the hospital in Orlando later that same night, which was confirmed by hospital records. Trial Tr. 7625, 7643, 7767. Rogers explained that he had rented a car for McDermid that day because McDermid had a bodyguard business and needed the car. Trial Tr. 7803-04. Rogers also testified that the gun used in the robbery had been stolen from his house before the Winn-Dixie murder, and that McDermid had access to his guns. Trial Tr. 7734-36. While the State claims (p. 16 n.18) that the corroborating testimony of Rogers's mother-in-law, Maxine Arzberger, was impeached at trial, in fact she testified consistently at trial and in her deposition that she had been at a cookout at Rogers's house with the guests that other witnesses recalled, though she could not remember the date. Trial Tr. 7882, 7906. The State is also wrong in its suggestion (p. 16 n.18) that Steve Young's testimony undermined Rogers's alibi. The evidence indicated that Young was not at the cookout and could not have known who was there. Trial Tr. 7638-39, 7730, 7979.

Kyles v. Whitley, 514 U.S. 419, 436 (1995). In addition, contrary to the State's suggestion (p. 69) that Rogers must show a "deliberate withholding," Brady claims have nothing to do with the "good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. The sole issue is the effect of the withheld evidence on the defense. United States v. Agurs, 427 U.S. 97, 110 & n.17 (1976); Kyles, 514 U.S. at 434-37.[5/]

A. Evidence that Implicated Cope in the Winn-Dixie Murder

The record in this case contains substantial evidence that the buck-toothed McDermid, at 5'8", was the shorter of the two Winn-Dixie robbers:

- Ketsy Day Supinger, the Winn-Dixie cashier, testified that the robber who confronted her at the cash register was about 5'8" tall and had irregular teeth. Trial Tr. 6224, 6250.[6/] Supinger testified that the other robber was noticeably taller than that buck-toothed robber. Trial Tr. 6222, 6283.

[5/] The State makes no serious argument that it lacked possession of the materials withheld from Rogers. All of the documents at issue were ultimately produced by the State, years after Rogers's trial, in response to Chapter 119 requests. And the "State is charged with constructive knowledge and possession of evidence withheld by other state agents, including law enforcement officers." Jones v. State, 709 So. 2d 512, 520 (Fla. 1998); accord Gorham v. State, 597 So. 2d 782, 784 (Fla. 1992); Antone v. State, 355 So. 2d 777, 778 (Fla. 1978); Griffin v. State, 598 So. 2d 254, 256 (Fla. 1st DCA 1992). Furthermore, in this case the individuals directly involved in prosecuting and investigating the Winn-Dixie murder had actual possession of each category of Brady material at issue on this appeal. See Initial Br. at 52-53.

[6/] This point was confirmed by McDermid, who testified that he confronted Supinger at her cash register. Trial Tr. 6538-39.

- The police "Be On the Lookout" report for the Winn-Dixie murder listed one suspect as 5'7" to 5'8" in height, with "noticeable buck teeth," and the other suspect as taller by one or two inches. R.O.A. 392.[7/]
- Joel Bennett, who is 5'5½", described two suspicious men he had seen immediately before the Winn-Dixie robbery: "one was a little taller than myself" with "possible buck teeth," and the other was "several inches taller" than the buck-toothed man. R.O.A. 394 (emphasis added).[8/]

Cope, at a height of 6', fits these descriptions of the second robber who was taller than the buck-toothed, 5'8" McDermid. Rogers -- who at 5'4" is markedly shorter than McDermid -- clearly does not. While the descriptions differ slightly in their estimates of the robbers' heights, all are consistent in the key fact that the second robber was taller than the buck-toothed robber. Rogers, an unusually short man, would

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[7/] The State claims (pp. 63, 73) that this second suspect, described as "stocky built/solid muscular," could not be Cope. But the State relies (pp. 55, 73) on an FDLE Report that contains information from September 1975 (see R.O.A. 368) and on a witness's testimony (p. 22) about Cope's appearance in the early 1970s, when Cope was only a teenager. Cope had gained weight by early 1982 when the Winn-Dixie murder occurred: an arrest report from February 1982 listed him as 6' tall and 175 pounds. R.O.A. 2985. Moreover, Supinger testified that the Winn-Dixie robbers were wearing bulky coats that would have disguised their weights. Trial Tr. 6249, 6313.

[8/] Bennett, who saw the suspects without masks in broad daylight, later picked McDermid from a photo lineup but never identified Rogers as one of the robbers. Trial Tr. 4863, 7317, 7320, 7328. His description of the robbers was that "the shorter one was heavyer [sic] built than the taller one" (R.O.A. 394), which matches precisely with McDermid and Cope.

never be described as taller than McDermid, while Cope clearly fits these descriptions of the taller second robber.

What the defense lacked at trial was the ability to give a name to the taller second robber. Cope's identity was wholly unknown to the defense until information linking him to the Winn-Dixie crimes emerged in Chapter 119 requests years after trial. R.O.A. 4275 (Tr. 143), R.O.A. 4278 (Tr. 464-65).[9/]

1. The Confidential Informants' Reports Implicated Cope in the Winn-Dixie Murder

The State withheld evidence (from a police report on the investigation of a Pantry Pride robbery) that a confidential informant had "forwarded the name of Billie Cope" to the police after the informant had "overheard a conversation" and was "led to believe" that Cope and others "may have been involved in the robbery/murder of the Winn-Dixie manager in Augustine." See Initial Br. at 11. Further, after this report from the confidential informant, records about Cope were sent "to Sgt. Nicklo in St. Augustine," who was "working the [Winn-Dixie] robbery/murder there." Id.

[9/] In denying the Rule 3.850 motion, the trial court never gave separate consideration to these withheld Cope-related materials. Instead, the court discussed as a group what it called the "Cope documents," which included various police reports, the second McDermid confession, and the McDermid coaching tape. R.O.A. 4069. The trial court thus overlooked that the withheld Cope-related materials are entirely separate from the materials that could have been used to impeach McDermid. The trial court's finding, quoted by the State (p. 50), that the Brady materials "would have cut both ways at trial" has nothing to do with these Cope-related materials. Information about Cope could only have assisted the defense.

The State's response (p. 53) focuses on the facts of the Pantry Pride investigation.[10] But this completely misses the point. The importance of this Brady material has nothing to do with the facts of the Pantry Pride robbery. Rather, its significance lies in the fact that it linked Cope to the Winn-Dixie murder.

As for the State's suggestion (pp. 48, 60) that the confidential informant's report was "speculative" or "preliminary," nothing in the report even remotely supports that characterization. To the contrary, as a result of this informant's report, the police sent records on Cope to the detectives investigating the Winn-Dixie murder and put Cope under surveillance. R.O.A. 360.[11] More fundamentally, this critical lead to Cope cannot be dismissed as "speculative" when it would have identified a highly likely alternative suspect who matched the description of the second Winn-Dixie robber and had committed other armed robberies with McDermid during this very same time period. Far from being "speculative," the identification of Cope -- standing alone -- would have fundamentally altered the defense and the course of trial.

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[10] The State claims (p. 53) that Rogers fits the description of one of the Pantry Pride robbers, but he was never linked to the Pantry Pride robbery in any way. The police reports from the Pantry Pride investigation identify Cope as a "strong lead" in the case and never mention Rogers. R.O.A. 359.

[11] In addition, a police report on another armed robbery committed by McDermid and Cope stated that there was a "source who had given [the police] confidential information pertaining to robberies committed by George William Cope." Initial Br. at 16.

The Court need look no further than this single confidential informant's report to conclude that the State improperly withheld Cope's name from the defense. But the withheld police files also include a second confidential informant's report that "he was with Cope & another" who were "talking about 23 & 5" and were "going to do" those crimes. R.O.A. 502; see Initial Br. at 13. Elsewhere in those same police reports, the number "5" is used as a code for the Winn-Dixie robbery. R.O.A. 496. While the State (p. 54) dismisses Rogers's reading of these notes as conjecture, their significance is confirmed by the very next page of these same police reports -- which lists Cope's name and description, and the name of the Winn-Dixie supervisor who was the key police contact for the investigation. See Initial Br. at 13-14.[12/]

2. The Withheld Materials Identifying Cope as McDermid's Accomplice Would Have Led to Admissible Evidence and Were Highly Material to the Defense

The State argues (pp. 51-52, 70-71) that the police reports implicating Cope in the Winn-Dixie murder are "hearsay" and cannot support a Brady claim. It contends that, unless these police reports themselves are admissible evidence, they could not create a "reasonable probability" of a different outcome.

[12/] The State notes (p. 74) that Cope worked the day of the Winn-Dixie robbery and murder. But Cope's work records for the day show that he worked from 8:00 a.m. to 5:00 p.m. R.O.A. 376. The Winn-Dixie robbery and murder took place at approximately 9:00 p.m., Trial Tr. 6209, hours after Cope had gotten off work. Significantly, Cope did not return to work for nine full days after the murder. R.O.A. 376-77, 389.

That contention rests on a fundamental misreading of Brady law. By their very nature, many Brady claims involve police reports or other withheld materials that are not, themselves, directly admissible into evidence. The most obvious example is a withheld police report stating that someone other than the defendant committed the crime. This is the heart of what Brady stands for, but the suppressed police report itself may not be directly admissible into evidence.[13/] Many cases have therefore recognized that withheld information, even if not itself admissible, can be material under Brady if its disclosure would have led to admissible substantive or impeachment evidence.

For instance, in Sellers v. Estelle, 651 F.2d 1074, 1077 n.6 (5th Cir. 1981), the court held that Brady applied to withheld police reports that were themselves inadmissible, because had those records been disclosed the defendant "may have been able to produce witnesses whose testimony or written statements may have been admissible." Similarly, in Martinez v. Wainwright, 621 F.2d 184, 188 (5th Cir. 1980), the court held that a withheld rap sheet required reversal under Brady, even though the rap sheet was inadmissible, because its disclosure "would have provided the defense the ability to contact the appropriate penal facilities to acquire an official record which would have been admissible." Brady thus applies "if the

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[13/] In fact, under Florida law, because police reports are typically not admissible in evidence, see Fla. Stat. § 90.803(8), the State's argument would suggest that withheld police reports could never give rise to a Brady violation no matter how exculpatory their content. This is clearly not the law.

suppressed information is itself admissible evidence or would have led to admissible evidence." Spaziano v. Singletary, 36 F.3d 1028, 1044 (11th Cir. 1994) (emphasis added).[14/]

In Jones v. State, 709 So. 2d 512, 519 (Fla. 1998), a defendant who had confessed to the murder of a police officer claimed that Brady had been violated by the suppression of information concerning the arresting officers' poor reputation and "prior dissimilar acts of misconduct." Because such evidence was not admissible, the Court held there was no "reasonable probability" of a different outcome had the information been disclosed. Id. Unlike this case, in Jones no argument was even made that disclosure of this withheld information would have led to other admissible evidence.

The situation is entirely different here. Even if the withheld police reports of the confidential informants' statements were not themselves admissible as evidence, they clearly would have led to admissible evidence. Had these police reports been disclosed, Rogers could have presented the following evidence at trial:

- Cope could have been called to testify about his involvement in the Winn-Dixie murder, his role in this

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[14/] Accord, e.g., United States v. Cuffie, 80 F.3d 514, 518 n.2 (D.C. Cir. 1996) (inadmissible evidence is material and subject to disclosure if it "would . . . have led to admissible evidence"); United States v. Kennedy, 890 F.2d 1056, 1059-60 (9th Cir. 1989) ("[t]o be material under Brady, undisclosed information or evidence acquired through that information must be admissible"); United States v. Wigoda, 521 F.2d 1221, 1227 (7th Cir. 1975) (inadmissible statements that lead to admissible evidence can be "material in the Brady sense").

and other armed robberies committed with McDermid, and what he had said in the conversation overheard by the confidential informant.

- The other participants in that overheard conversation (see Initial Br. at 11), or the confidential informant himself, could have been called to testify about what Cope said. This testimony would be admissible as impeachment evidence if Cope denied any involvement in the Winn-Dixie murder. Fla. Stat. §§ 90.608(1), 90.614. Or, if Cope asserted his Fifth Amendment rights and thereby became unavailable as a witness, see Fla. Stat. § 90.804(1)(a), this testimony would have been admissible as a statement against interest if sufficiently corroborated. Id. § 90.804(2)(c).[15/]
- Sergeant Nicklo, the St. Augustine police officer responsible for investigating Winn-Dixie, could have been asked at trial whether he was aware of another suspect who fit the robbers' descriptions far better than Rogers. If Nicklo said "no," he could have been impeached with documents showing that he had received information about Cope in connection with his

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[15/] For example, in Perry v. State, 675 So. 2d 976, 980 (Fla. 4th DCA 1996), a third party's hearsay statement that she had committed a murder was properly admitted to exonerate the defendant, under Fla. Stat. § 90.804(2)(c), because the third party had invoked her privilege against self-incrimination, the statement subjected her to criminal liability, and it was corroborated by other evidence pointing to her guilt.

investigation. R.O.A. 360-61; Initial Br. at 11.[16/] Alternatively, Nicklo could have been asked to testify about the reasons Cope was a suspect.

Entirely apart from the specifics of the overheard conversation, or what Nicklo did with it, there is a more fundamental point: the defense was completely unaware of Cope. R.O.A. 4275 (Tr. 143); R.O.A. 4278 (Tr. 464-65). Had the defense received these police reports, and with them Cope's name, it would have been led directly to Cope's police records. See R.O.A. 4275 (Tr. 145-46). Those records would have disclosed overwhelming evidence that Cope had committed two other similar armed robberies with McDermid, one a month before and the other less than a month after Winn-Dixie:

- The defense could have presented evidence from five eyewitnesses who had identified Cope as McDermid's accomplice in the armed robbery of a Publix grocery store in Ormond Beach, a month before Winn-Dixie. See Initial Br. at 15-17. The evidence would have included testimony from Jerome Chapman, who had been kicked and threatened by Cope, saw Cope without a mask, and "started shaking" when shown Cope's photo because he was so certain of his identification. Id. at 16.[17/]

[16/] See Kyles, 514 U.S. at 445 (withheld information "would have raised opportunities to attack . . . the thoroughness and even the good faith of the investigation").

[17/] The State (p. 55) completely ignores the overwhelmingly strong Chapman identification, and suggests instead that three other eyewitnesses to the Ormond Beach Publix armed robbery were (continued...)

- The defense also could have presented two eyewitnesses who had identified Cope as McDermid's accomplice in the robbery of a Long John Silver's restaurant in Daytona, less than a month after Winn-Dixie. One of those witnesses, Donna Bentley Mixon, testified at the Rule 3.850 evidentiary hearing in 1996 and renewed her positive identification of Cope, some 15 years later. See id. at 19-21.
- Evidence of these Cope-McDermid robberies would have been admissible as substantive evidence to support Rogers's claim of mistaken identity.[18] This evidence would have shown that McDermid had another partner who (a) had committed other armed robberies with McDermid around the same time as Winn-Dixie and (b) "resembled Rogers in visage" (State Br. at 74) but (c) fit the

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[17] (...continued)
"not positive" in their identification of Cope. But all three in fact did identify Cope. See Initial Br. at 17. The description of "one of the robbers" as 5'8" and "stocky" (State Br. at 55) is surely a reference to McDermid -- who confessed to the robbery -- and does not undermine the overwhelming force of Chapman's identification and the other positive identifications of Cope. While the case against Cope was ultimately nolle prossed, this does not mean, as the State asserts (p. 74), that Cope was "incorrectly arrested." Though the prosecution decided for whatever reason not to prosecute Cope, the eyewitness testimony implicating him was clear and conclusive.

[18] "Fundamental standards of relevancy . . . require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged." United States v. Crosby 75 F.3d 1343, 1347 (9th Cir. 1996) (quotations omitted). Thus, "an accused may show his or her innocence by proof of the guilt of another." Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990) (adopting standard of Moreno v. State, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982)).

height of the second Winn-Dixie robber in a way that Rogers clearly did not.

- These Cope-McDermid armed robberies also would have been admissible as substantive evidence to rebut the State's Williams rule evidence in this case. See pages 16-21, infra.
- Evidence of these Cope-McDermid robberies also would have been admissible to impeach McDermid if he had denied committing them with Cope.[19/]
- Knowing Cope's identity, the defense also could have located other witnesses to testify about the Cope-McDermid criminal partnership.[20/] Rogers presented several witnesses at the Rule 3.850 evidentiary hearing who testified about Cope's involvement in the Winn-Dixie murder and his criminal dealings with McDermid. See Initial Br. at 41-43; State Br. at 25, 29-30.

3. The Cope-McDermid Armed Robberies Would Have Entirely Undermined the State's Other-Crimes Evidence

A fundamental element of the State's case against Rogers consisted of evidence from two other armed robberies that was admitted as substantive proof of Rogers's guilt in this case

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[19/] Evidence contradicting McDermid's testimony on these other crimes would not be barred as evidence on a collateral matter because it was "relevant to a particular issue" -- as discussed in text -- and therefore would be independently "admissible irregardless of [its] impeachment value." Gelabert v. State, 407 So. 2d 1007, 1010 (Fla. 5th DCA 1981). See also page 24 note 28, infra.

[20/] This evidence again would be admissible in support of Rogers's claim of mistaken identity. See note 18, supra.

under the rule of Williams v. State, 110 So. 2d 654 (Fla. 1959).[21] These prior convictions (involving armed robberies of a Daniel's Market in Orlando and a Publix in Winter Park) were again based on the self-interested accusations and testimony of McDermid, who claimed that he and Rogers had committed these other robberies and provided extensive testimony at trial describing them.[22]

The prosecutor's closing argument placed heavy reliance on these other robberies as overwhelming if not conclusive proof of guilt: "if he [Rogers] was his [McDermid's] partner in the Daniel's case and his partner in the Publix, [he] was Mr. McDermid's partner in the Winn-Dixie robbery." Trial Tr. 8104. The prosecutor argued specifically (Trial Tr. 8102-04) that the "similar facts" of these prior convictions proved that Rogers must have committed Winn-Dixie as well:

- "The robberies were both committed by two individuals."
- "They were both white males."

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[21] On direct appeal, this Court sustained the introduction of this Williams rule evidence. Rogers v. State, 511 So. 2d 526, 531-32 (Fla. 1987).

[22] It is particularly troubling that McDermid was Rogers's accuser and the State's key witness in all of the prosecutions of Rogers -- the prior armed-robbery convictions and this murder case. Rogers had never been in trouble with the law until McDermid accused him of committing a series of armed robberies. McDermid had a powerful incentive to lie -- to avoid a potential death sentence -- and received an exceptionally favorable plea bargain in exchange for testimony against Rogers. See Initial Br. at 5-6; note 25, infra. Testimony at the Rule 3.850 evidentiary hearing indicated that McDermid had told others of his plan to set up Rogers to shield Cope: Cope "was in jail and he [McDermid] had to get [Cope] out because [Cope] could put him on death row." R.O.A. 4280 (Tr. 775).

- "They were armed with . . . semi-automatic handguns in each case."
- In "each of the robberies one of the individuals went to the office area to get the money in the office area while the other robber went to . . . get the money from the checkout."
- "Both of the robbers in each of the three cases wore stocking masks over their head."
- "In each of the robberies they carried cloth pillowcase type sacks to carry whatever money they were able to get from inside the store."
- "In each of the robberies the people in the store were ordered to get down on the floor."

Those "similar facts" are also presented by the two armed robberies committed by Cope and McDermid within a month's time of Winn-Dixie. In particular, the Ormond Beach Publix armed robbery -- where Cope was identified by five eyewitnesses (pages 14-15, supra) -- included all of the "similar facts" listed by the prosecutor's closing argument in this case: it was carried out by "two individuals," "both white males," armed with "semi-automatic handguns," who "wore stocking masks over their head" and carried "cloth pillowcase type sacks." R.O.A. 2264, 2266. The "people in the store were ordered to get down on the floor," while one robber "went to get the money from the checkout" and the other "went to the office area." R.O.A. 2266, 2282, 2287, 2292, 2294. Likewise, in the Long John Silver's armed robbery, "both [robbers] were white males," they were "armed with semi-automatic handguns," they "wore stocking masks over their head" and they had "cloth pillowcase type sacks" for the money. R.O.A. 2297-2302.

Thus, had the defense known of Cope, it could have proven that the same fact pattern was presented by robberies committed by McDermid and Cope within a month's time of Winn-Dixie. These Cope-McDermid robberies could have precluded the introduction of Williams rule evidence altogether.[23] At a minimum, they would have defeated the inference that Rogers "must have" committed the Winn-Dixie robbery due to the "similar facts" of other crimes, because these facts were fully consistent with robberies committed by McDermid and Cope.

In sum, these Cope-McDermid robberies would have devastated the prosecution's reliance on other crimes as proof of Rogers's guilt in Winn-Dixie. Yet, because Cope's name was withheld from the defense, the prosecutor was able to stress in closing argument that Rogers had never identified anyone else who could plausibly have committed this "series of robberies" with McDermid: "There has been no testimony introduced or identified by anyone [else] of a participation in any of the robberies." Trial Tr. 8102, 8115.

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[23] The trial court admitted the Williams rule evidence in this case based on its finding that there was "a close, well-connected chain of similar facts" between the prior robberies and the Winn-Dixie case. Trial Tr. 2994 (pretrial order). If the trial court had been presented with two alternative sets of robberies, two for which Rogers had been convicted and two others involving Cope, its ruling may well have been entirely different on whether there was a "close, well-connected chain" of facts involving Rogers. In Rivera, 561 So. 2d at 539, this Court sustained the introduction of Williams rule evidence because the prior crimes at issue established "a sufficiently unique pattern of criminal activity" to justify their admission. The Cope-McDermid robberies would have shown that the similarities on which the prosecution relied here were not "sufficiently unique" to be probative.

The prosecutor also relied heavily on the timing of the robberies for which Rogers had been convicted as supposed proof that Rogers must be guilty of the Winn-Dixie murder:

> "Now, there is something else important about those robberies, that is the timing. The Daniels robbery was in October, 1981, the Publix robbery was April 7, 1982, the Winn-Dixie robbery was January 4, 1982. The Daniels robbery was three months before David Eugene Smith was killed in St. Augustine. The Publix robbery was three months after David Eugene Smith was killed in St. Augustine. They were partners before the St. Augustine robbery and partners after the St. Augustine robbery, partners when the St. Augustine robbery took place." Trial Tr. 8104 (emphasis added).

This was indeed the prosecutor's final point in his rebuttal closing argument:

> "Daniels and Publix is to prove identity. This whole case boils down to identification. . . . Mr. Rogers was Mr. McDermid's partner at the date of those robberies, October of '81, April of '82. They were partners three months before the murder of David Eugene Smith. They were partners three months after. They were partners at the time of the murder of David Eugene Smith." Trial Tr. 8233 (emphases added).

This line of argument, the last point hammered home by the prosecutor in rebuttal closing, undoubtedly played a huge role in the jury's deliberations. And the argument would have been completely discredited if the prosecution had disclosed Cope's name to the defense. The defense could then have shown similar robberies committed by Cope and McDermid one month before and less than one month after Winn-Dixie. Two armed robberies committed within one month of Winn-Dixie, by McDermid and a different accomplice who matched the physical descriptions of the second Winn-Dixie robber, would have totally undermined the

prosecution's reliance on robberies three months before and after Winn-Dixie as proof of Rogers's guilt.

B. Evidence that McDermid Had Falsely Accused Rogers of Other Crimes

The State does not dispute that McDermid was the central, critical witness in its prosecution of Rogers. See Initial Br. at 5. If McDermid's testimony had been disbelieved, the jury could not plausibly have convicted Rogers of the Winn-Dixie murder. Aside from McDermid's self-serving testimony, the only other witness who even placed Rogers at the scene was Ketsy Day Supinger, the Winn-Dixie cashier. Her identification was so fundamentally flawed that even the prosecutor conceded in closing argument that it was "probably mistaken" and "confused."[24/]

Evidence that would have impeached McDermid is clearly Brady material and subject to disclosure. Initial Br. at 49; page 34 & note 38, infra. Yet the State withheld a sworn

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[24/] Trial Tr. 8092, 8108. Supinger testified that she could identify only the robber who held a gun on her at the cash register, and that the other robber, wearing a stocking mask and 25 feet away, "was so far away, I couldn't see him clear." Trial Tr. 6290. She knew only that the second robber was taller than the one at the cash register. Trial Tr. 6290. As Supinger testified, the reason she could identify the buck-toothed robber at the cash register -- through his stocking mask -- was that he held a gun at her head, stood 12 to 18 inches away, and repeatedly barked commands at her. Trial Tr. 6215-18. McDermid himself testified (and the State argued in closing) that he was the robber at the cash register. Trial Tr. 6538-39, 8092. Yet Supinger identified Rogers at trial as the robber who had confronted her at the cash register. The State was thus left to argue that Supinger was "probably mistaken" in identifying Rogers as the robber at the cash register, that she was "confused," and that she had really meant that Rogers was the robber at the other end of the store. Trial Tr. 8092-93, 8108. The State never pursued this theory with Supinger, and her testimony was clear and emphatic that she could not identify the second robber.

confession by McDermid that contained demonstrably false statements accusing Rogers of a series of armed robberies with McDermid. See Initial Br. at 22-23. In particular, McDermid's withheld confession accused Rogers of being his accomplice in the Ormond Beach Publix and South Daytona Long John Silver's robberies, discussed immediately above. As already noted (pages 14-15), the evidence conclusively showed that those two robberies were committed by McDermid and Cope, not Rogers.

McDermid's false accusation of Rogers as his accomplice in these two similar armed robberies would have had tremendous impeachment value. The withheld second confession would have shown that McDermid had flatly lied about his accomplice in two armed robberies committed within a month's time of Winn-Dixie. With those lies exposed, Rogers would have been able to deal a devastating blow to McDermid's credibility. This was conclusive proof that McDermid was making false accusations against Rogers. And it would have created the unmistakable inference that McDermid had lied about his accomplice in three crimes committed in December 1981 and January 1982, including Winn-Dixie, and that he was falsely accusing Rogers to shield Cope.[25/]

[25/] McDermid had a powerful incentive to falsely accuse Rogers and to shield Cope. If McDermid was the shooter in Winn-Dixie, and Cope had played a lesser role, McDermid clearly faced a risk of being convicted himself for capital murder and sentenced to death. Testimony at the Rule 3.850 evidentiary hearing indicated that McDermid had set up Rogers because Cope had information that "could put him [McDermid] on death row." R.O.A. 4280 (Tr. 775). The U.S. Supreme Court confronted a comparable situation in Kyles: "Beanie's statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder." 514 U.S. at 445.

More specifically, had these false accusations been disclosed, the defense could have asked McDermid on cross-examination if he had accused Rogers of committing the Ormond Beach Publix or Long John Silver's robberies. When McDermid acknowledged this accusation, the defense would have been permitted under Fla. Stat. § 90.608(1)(e) to introduce "proof by other witnesses that material facts are not as testified to by the witness being impeached."[26/] This would include the many eyewitnesses (see pages 14-15, supra) who would have testified that Cope, not Rogers, had committed these robberies with McDermid.

The same point also applies to other false accusations made by McDermid in his second, withheld confession. The defense was never made aware that McDermid had falsely accused Rogers of committing a whole series of armed robberies with McDermid -- including a Wendy's robbery where police records showed that McDermid's accomplice was black;[27/] a Kash 'n' Karry robbery where the suspects' heights fit McDermid and Cope, and not

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[26/] Evidence that Cope had committed these other crimes was also admissible as substantive evidence, for the reasons discussed above (pages 15-16), and therefore would not be barred as evidence on a collateral matter (see page 16 note 19, supra).

[27/] The State emphasizes (p. 57) that the police reports for this Wendy's robbery referred to the "latest robbery," and thus suggests that Rogers may have overlooked records for an earlier Wendy's robbery. But Rogers made a Chapter 119 request for all records of any robbery at this Wendy's restaurant during the time frame specified in McDermid's second confession. R.O.A. 754-56. These records are the only ones the State produced. The State has never suggested that there are, in fact, any records of any other robbery at this Wendy's, and it did not introduce any such records at the evidentiary hearing.

Rogers; a Pizza Hut robbery where the second robber was definitively identified as someone other than Rogers; a Thrifty Scott robbery where McDermid's partner was described as Hispanic and an eyewitness identified someone other than Rogers as the second robber; another Long John Silver's robbery where the second robber was described as several inches taller than McDermid; a robbery of a different Wendy's where the robbers were described as the same height and having the appearance of brothers; and a John's Family Market robbery where both robbers were described as 5'10" (a half-foot taller than Rogers). See Initial Br. at 25-33. Rogers thus could have proven that McDermid had lied in accusing him of a whole series of armed robberies.[28/]

The State misses the point entirely when it argues (p. 68) that Rogers could have easily deposed McDermid and therefore did not need McDermid's second confession to learn the facts of these crimes. It is not the facts of these crimes that would have impeached McDermid. Rather, the false accusations themselves were the critical impeachment evidence.[29/]

[28/] Evidence from other crimes, to prove that McDermid's allegations were false, would have been admissible for impeachment as "facts which discredit a witness by pointing out the witness' bias, corruption, or lack of competency." Gelabert, 407 So. 2d at 1010. Also, such evidence would be admissible as substantive evidence controverting the prosecution's argument (Trial Tr. 8102) that McDermid and Rogers had engaged in a whole "series of robberies." Thus, the proof that McDermid's accusations were false would not be barred by the rule against evidence on a collateral matter. See id.

[29/] Furthermore, the State blocked the defense's efforts to secure discovery in Winn-Dixie about McDermid's other crimes.

(continued...)

For this reason, it is a completely inadequate answer for the State to say (pp. 66-68), as did the trial court, that information about McDermid's other crimes was "available" to Rogers or could have been the subject of Chapter 119 requests.[30/] It is also irrelevant whether McDermid's first and second lists were "basically" the same (State Br. 68). The mere fact that McDermid had committed other crimes would not have given rise to impeachment; Rogers needed the false accusations themselves.

The State is also wrong in claiming (p. 12) that questioning about these false accusations would have "opened the door" to testimony by McDermid about other crimes he had accused Rogers of committing. "It is well settled that a witness's prior consistent statements are generally inadmissible to corroborate that witness's testimony." Jackson v. State, 498 So. 2d 906, 909

[29/] (...continued)
During a deposition of Flynn Edmonson, the prosecution's lead investigator, Rogers asked whether Edmonson had "ever investigated any other crimes associated with either myself or with Thomas McDermid in the course of investigating this particular crime." Trial Tr. 681 (Edmonson dep.). The prosecutor instructed Edmonson not to answer "because there's still ongoing investigation" of those other crimes. Id. at 682. Moreover, contrary to the State's suggestion (p. 14) that Rogers never deposed McDermid, in fact Rogers deposed McDermid several times in preparation for his armed robbery trials.

[30/] Moreover, to the extent this information was a part of other ongoing criminal investigations, Rogers could not have obtained it through Chapter 119 requests. See Ragsdale v. State, No. 89,657, slip op. at 4 (Fla. Oct. 15, 1998) (Chapter 119 bars disclosure of information relating to an ongoing criminal investigation, although such information must be disclosed to a criminal defendant if it is Brady material).

(Fla. 1986).[31] Thus, following cross-examination of McDermid as to these false accusations, the State could not have sought to rehabilitate McDermid with testimony about other accusations involving other crimes. By exposing McDermid's false accusations, in other words, the defense would not have "opened the door" to testimony about other crimes McDermid claimed to have committed with Rogers. It would simply have been able to prove that McDermid was a liar.

C. Evidence that the Prosecution Coached and Changed McDermid's Testimony to Avoid Contradiction

The State also withheld a lengthy tape-recorded interview between McDermid and the prosecution, in which McDermid was repeatedly coached on the testimony of two eyewitnesses, Hagan and Sapp, who had seen McDermid running away from the Winn-Dixie after the shooting. See Initial Br. at 33-39. The testimony of these eyewitnesses presented two important problems for McDermid's credibility. First, they were certain they had seen McDermid run past them on a motel landing, go down the adjacent stairs, get into the driver's seat of a parked car, and drive off -- but McDermid claimed that he had lain on the car's rear floorboard, and that Rogers had driven away. See id. at 35-

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[31] Accord Rodriguez v. State, 609 So. 2d 493, 499-500 (Fla. 1992). McDermid's other accusations against Rogers would not have been admissible as prior consistent statements offered under Fla. Stat. § 90.801(2)(b) "to rebut an express or implied charge . . . of improper influence, motive or recent fabrication" because all of McDermid's accusations against Rogers occurred after he had the motivation to lie. As made clear in Jackson, 498 So. 2d at 909, prior consistent statements are not admissible to rebut a charge of bias or fabrication unless made "before . . . the alleged motive to falsify had arisen."

37. Second, they were sure that the getaway car had been parked in the first space next to the stairwell, yet McDermid began the conversation by insisting that the car had not been parked there. Id. at 37.

The tape reveals that the prosecution carefully sought to reconcile what McDermid would say at trial with the testimony of these eyewitnesses. On the location of the getaway car, the tape demonstrates that McDermid changed his story to fit what the eyewitnesses said. McDermid began by saying very clearly that "we didn't want to park right next to the stairwell and decided to park a couple [of spaces] down." Id. He explained that he wanted to be able to see both sides of the car "without the stairwell being in the way" and that "[n]ot being parked too close to the office too was another thing I had in mind." Id. In response, Detective Edmonson emphasized that the eyewitnesses were "pretty adamant it was space number 1." He urged that "it would probably be a better idea if it [the car] was parked in the first spot." Id. McDermid then altered his story in response: "I mean like you said we might have parked in the first one." Id. at 38.

The State is therefore flatly mistaken in saying (p. 75) that McDermid merely "stuck with what happened." Contrary to McDermid's insistence, early in the tape recording, that the car was not parked next to the stairs, he said something entirely different at trial: Q: "Your car was parked how many parking places down from the stairs? A: . . . It's the one next to the stairs right here." Trial Tr. 6547. Without the tape,

the defense had no opportunity to reveal that McDermid changed his testimony on this point as a result of the State's coaching.

The tape also reflects the prosecution's concern that McDermid's testimony about the getaway car driver would be contradicted by the testimony of Hagan and Sapp: "But then what they say is not consistent with what you've told us because they say they saw that guy [with the buck teeth] get in the driver's side and start the car up and leave immediately. That's what we're trying to . . . reconcile. . . . That's our problem." Initial Br. at 35. After an extended discussion, prosecutor Whiteman floated a suggestion: "Maybe ah maybe you got in the car and . . . they missed seeing you get in the car . . . and Rogers was so close behind you that he got in . . . the driver's seat and, you know they confused the two of you as he's getting into the seat and driving away." Id. McDermid took the suggestion: "He wasn't that far behind me. I'll say that." Id. (emphasis added).

This was an important point -- for if McDermid had driven the car, as the eyewitnesses insisted, it clearly implied that he was the second robber out of the store and had committed the murder.[32/] It also would have cast broader doubt on whether

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[32/] For this reason, McDermid had obvious incentives to portray Rogers as the shooter who drove the getaway car, and to describe himself as the less culpable robber who played no role in the shooting. Ronald Heath testified at the Rule 3.850 evidentiary hearing that McDermid had acknowledged shooting the Winn-Dixie manager. R.O.A. 4282 (Tr. 998). Matthew Armitage testified that McDermid wanted to set up Rogers in order to protect himself from Cope, who could "put [McDermid] on death row." R.O.A. 4280 (Tr. 775). The inference that McDermid committed the murder is

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McDermid was telling the truth. Through the coaching reflected on the withheld tape, the prosecution sought to counter the inference that McDermid had done the shooting by developing McDermid's testimony that Rogers was close behind him as they ran away from the Winn-Dixie. McDermid indeed testified to this point at trial, just as he had said he would. Trial Tr. 6552.

The prosecution then relied on this point in cross-examining Hagan and Sapp. As to both, the prosecution elicited a concession that it was "possible" that a second man could have been following closely on the heels of the buck-toothed man they had seen, and that it was "possible" the person who drove the car away was that second man rather than McDermid. See Trial Tr. 7410, 7433-34. The prosecutor then argued in closing that Hagen and Sapp had seen "the second individual, Mr. Rogers, coming down in back of Mr. McDermid, and that is why when they saw him get in the car, they saw him get in the driver's side and drive off." Trial Tr. 8120-21.

This reconciliation of McDermid's testimony with the eyewitness accounts of Sapp and Hagan was possible only through the careful coordination reflected on the withheld tape. That coaching led to the factual agreement as to what McDermid would say -- "He wasn't that far behind me. I'll say that." With the

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[32]/(...continued)
buttressed by Supinger's trial testimony that the shorter robber was the last to leave the store. Trial Tr. 6222-23. She was sure that the robber who confronted her at the cash register was shorter, and McDermid himself testified that he was the robber at the cash register. See page 21 note 24, supra. The State's theory was that the last robber to leave the store shot David Smith. Trial Tr. 8119-21, 8137-38.

tape recording, the defense thus could have exposed that McDermid had been carefully coached to address what was otherwise a glaring inconsistency between his story and that of two disinterested eyewitnesses.

The State's argument (p. 62) that the tape was "not exculpatory" misunderstands the requirements of Brady. The tape would have impeached McDermid's trial testimony, and impeachment evidence is treated equivalently to exculpatory evidence under Brady. See Kyles, 514 U.S. at 433 (there is no "difference between exculpatory and impeachment evidence for Brady purposes"). The State is also wrong when it asserts (p. 62) that "there was no information on the tape that was not otherwise available to Rogers." The defense had no way of knowing how McDermid had been coached -- and how he had changed his testimony about the location of the getaway car -- without having access to this tape. See id. at 444 ("the evolution over time of a given eyewitness's description can be fatal to its reliability").

D. Evidence that a State Witness Lied About His Eligibility for a Reward

At the Winn-Dixie trial, as proof of Rogers's prior convictions, the State presented the testimony of Steve Hepburn, who claimed to have written down the license number of the getaway truck in the Daniel's Market robbery. Rogers vigorously disputed that his truck was involved (Trial Tr. 7809, 8171-73), and Hepburn's testimony thus was important to the State's proof of this prior crime. The Winn-Dixie prosecutor emphasized Hepburn's testimony in his closing argument: "Steve Hepburn, the

man that got the tag number used in the Daniels' robbery . . . Recall the testimony of Stephen Hepburn as to him observing the tag number." Trial Tr. 8109, 8111.

The State withheld direct evidence of Hepburn's bias and incentive to testify adversely to Rogers. Unknown to the defense, Hepburn and his wife had written letters before he testified seeking to line up his eligibility for reward money that Winn-Dixie had offered. See Initial Br. at 39-41. This evidence clearly could have been used to impeach Hepburn, by showing a powerful potential bias. See Gorham v. State, 597 So. 2d 782, 784 (Fla. 1992) (Brady violation where the State failed to disclose that a confidential informant was paid $10 for her testimony).

The State claims in response (pp. 64-65) that Hepburn testified truthfully at trial, and therefore that this correspondence over the reward is immaterial. As support for this untenable position, the State relies on an exchange when Hepburn was asked whether his testimony "helps you to become available for a portion of a reward." Hepburn replied: "I am not aware of that." Trial Tr. 6932. This testimony was surely false, for the Hepburns had in fact already been corresponding with Winn-Dixie representatives and the prosecutors to make sure that they would receive the reward if Rogers were convicted.[33/]

[33/] The withheld correspondence shows that, at the Hepburns' request, prosecutors wrote to Winn-Dixie officials in the summer of 1983 to inform them about the Hepburns and their potential eligibility for the reward. R.O.A. 2361-62, 2364, 2366. In September 1983, before her husband testified in the Winn-Dixie (continued...)

But more importantly, the State misses the point in focusing on whether Hepburn's answer to this single question was literally accurate (though it was not). Without the correspondence showing Hepburn's incentive to lie, the defense had no tools to impeach Hepburn on this issue. Had the reward-related correspondence been disclosed, the defense would not have been forced to accept Hepburn's evasive answer to the single question quoted above. Rather, the defense could have brought out, clearly and specifically, using documentary evidence, that Hepburn was not only well aware of the reward money but had taken affirmative steps to position himself to receive it.[34/]

As matters emerged at trial, the jury had no information that Hepburn had in fact been angling to secure a reward for his testimony. He could have been thoroughly impeached on this issue.[35/]

[33/](...continued)
trial, Mrs. Hepburn wrote to Winn-Dixie and asked for information about "what is going on in the trial of these two guys." Her letter stressed that there "is a reward for these men, [and] we helped them get arrested." R.O.A. 2840 (emphasis added). The State argues (p. 65) that Hepburn did not "know if he would receive a reward," but this is no answer at all: the correspondence demonstrates that Hepburn knew he was eligible for the reward, and that he was angling to get it. Of course, the reward was not actually payable until Rogers was convicted -- and thus Hepburn could not "know" he would receive the reward until then. That is the very point of this impeachment evidence.

[34/] Such evidence would have been admissible under Fla. Stat. § 90.608(2) to show the witness's bias.

[35/] The State also suggests (p. 64) that these withheld letters cannot be Brady material because they were in the files of the prosecutor for the Ninth Judicial Circuit. But that is clearly not the law. See page 6 note 5, supra.

III. THE CUMULATIVE EFFECT OF THE WITHHELD BRADY MATERIAL ENTITLES ROGERS TO A NEW TRIAL

Under Kyles, the significance of suppressed Brady evidence must be "considered collectively, not item by item." 514 U.S. at 436. The cumulative impact of the withheld evidence in this case is overwhelming. Without it, the defense was deprived of the ability to identify a highly likely alternative suspect who resembled Rogers, who fit the heights of the Winn-Dixie robbers in a way that Rogers did not, and who had committed two other armed robberies with McDermid within a month's time of Winn-Dixie. The defense was also deprived of the ability to demonstrate that McDermid -- the State's key witness -- had made a whole series of false accusations against Rogers, including several robberies committed by McDermid and Cope.[36/]

These withheld Brady materials would have devastated the State's case had they been disclosed. They would have (a) identified a very credible alternative suspect, (b) wiped out the inferences that the State sought to draw from the Williams rule evidence, and (c) fatally undermined the credibility of the State's lead witness. Each principal pillar of the State's case would have been badly compromised if not destroyed.

[36/] The State (p. 75) makes the bizarre assertion that "perhaps the best argument" for denial of this Brady claim is Rogers's answer to a question at the Rule 3.850 evidentiary hearing as to "how many people identified you at Winn Dixie." Rogers answered by saying, "Just Ketsey [Supinger] and McDermid . . . , that was it other than myself." Rogers was clearly answering as to those who had identified him at the Winn-Dixie trial. He was pro se counsel, and in that capacity identified himself to the jury. This comment has nothing to do with the merits of Rogers's Brady claim or his defense of mistaken identity.

In Kyles, the U.S. Supreme Court held that reversal was required under Brady where the prosecution withheld evidence that tended to show that someone else had in fact committed the crime at issue. 514 U.S. at 441-54.[37] And in Gorham, this Court reversed a conviction under Brady because the State had withheld evidence that would have impeached its "star witness." 597 So. 2d at 784-85.[38]

This case involves both (1) the situation that required reversal in Kyles and (2) the situation that required reversal in Gorham. The withheld materials pointed directly to an alternative suspect who was unknown to the defense, and the withheld materials would have allowed for devastating impeachment of the State's critical witness. Either one of these factors

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[37] See also Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 829 (10th Cir. 1981) (reversing conviction under Brady based on withheld police records that implicated a different suspect); 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 (Brady required reversal where the prosecution withheld police records of a third party's statements admitting to the crime); Frierson v. State, 677 So. 2d 381, 382 (Fla. 4th DCA 1996), review denied, 689 So. 2d 1072 (Fla. 1997) (reversing conviction under Brady 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").

[38] See also State v. Parker, 23 Fla. L. Weekly S439, S441 (Fla. Sept. 4, 1998) (Brady violation where information was withheld that "would have assisted in impeaching the testimony" of the State's key witness); Roman v. State, 528 So. 2d 1169, 1171 (Fla. 1988) (reversal under Brady where the State withheld prior inconsistent witness statements that could have been used for impeachment and to bolster the theory of the defense); Marrow v. State, 483 So. 2d 17, 20 (Fla. 2d DCA 1985) (withheld evidence that could have been used to impeach the State's main witness required reversal under Brady).

would be enough under Kyles or Gorham to require reversal. Here, the combination of both makes this an overwhelming case for reversal under Brady. Rogers received a fundamentally unfair trial because the State withheld the information needed to mount an adequate defense.[39/]

CONCLUSION

For the reasons stated here and in our opening brief, Rogers's conviction should be reversed because of a violation of his federal constitutional rights under the standard of Brady v. Maryland.

Respectfully submitted,

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39/ "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434.