IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-146

LOWER COURT CASE NO. CF90-224-2A1-XX

DAVID JOSEPH PITTMAN

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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RESPONSE TO REQUEST THAT "INTRODUCTION" BE STRICKEN

On page "v" of the answer brief,[1] the State includes a paragraph that requests that Mr. Pittman's 17-page introduction "be stricken" (Answer Brief). In this request, the State uses labels to belittle the introduction, referring to it as a "convoluted defense account" which "ignores" the circuit court order and that it is a "skewed"

[1]Given that this Court imposes page limitations on briefs, it has become accepted practice to use roman numerals to number the preliminary pages that include the table of contents and table of authorities. This is because the page limitation applies to the substantive portion of the brief. For reason that are far from clear, counsel for the State has chosen to include in the non-substantive portion of the brief a request to strike Mr. Pittman's seventeen (17) page introduction of his initial brief.

Normally, motions to strike a portion of a brief are filed in a separate pleading which is entitled: Motion to Strike. This Court has rules for the filing and submission of motions to this Court. These rules are designed to insure that both parties are fairly and properly placed upon notice that a request to strike has been made with the Court and that the parties are then insured an opportunity to be heard on the motion before the Court makes a determination.

When noticed that a motion to strike a portion of a brief is filed, the parties are in a position to ask for tolling of the briefing schedule while this Court considers whether to grant or deny the motion. Certainly if the Court strikes a brief or a portion of a brief, the parties are entitled to know before submission of briefs that remain to be filed. For example, if this Court were to grant the State's request to excise 17 pages of the 100 page initial brief, Mr. Pittman would certainly wish to amend the initial brief and use those extra pages in some fashion in order to present his case and the reasons why he should prevail in this appeal.

By virtue of the manner in which the State has chosen to ignore the rules of appellate procedure and to ask to strike a portion of Mr. Pittman's initial brief in a paragraph buried in the supposedly unsubstantial preliminary pages of the answer brief, the State's disregard for the basic tenets of due process is clear. Fair and proper notice which provide for an appropriate opportunity to be heard from the State's point of view are merely slogans that warrant nothing more than lip service. This can be seen, not just from the State's buried request to strike a portion of the initial brief, but from the entire history of Mr. Pittman's case and the manner in which exculpatory evidence was and has been hidden.

collection of Mr. Pittman's "distorted and self-serving conclusions of fact and law.[2] The State asserts that the introduction is "replete with impermissible argument," yet cites to not one single example. Ultimately, the State concludes that the introduction is in reality "an unauthorized and impermissible re-argument and should be stricken." For this assertion, the State cites Rule 9.120(b), Florida Rules of Appellate Procedure. Though this rule does list the items that shall be included in a brief, it does not contain a list of what shall not be included in a brief.

Undersigned counsel has included an "Introduction" in virtually all initial briefs that he has filed with this Court in the past fifteen years. At no time has this Court indicated that the absence of the word "introduction" from the list of items to be included in a brief precluded the inclusion of an "introduction" in an initial brief.[3] Counsel can point to cases in which this Court agreed with

[2]The State's need to resort to labeling and name calling demonstrates an inability to dispute Mr. Pittman's assertions on their merit. What occurred is pretty simple and straightforward. In order to convict an innocent Mr. Pittman, the State had to overcome the fact that the time line for the crime made it impossible for Mr. Pittman to have committed the three murders and set the fire in the small amount of time that he was alone. The State thus needed to send a jailhouse informant in to get next to Mr. Pittman and either gather evidence or invent statements attributable to Mr. Pittman in order to get a conviction. For this to work, it was incumbent on the State to withhold exculpatory evidence from the defense.

[3]Counsel has received calls from this Court's clerk's office when an initial brief that has been submitted has failed to comply with the rules. On one occasion counsel was called and told he neglected to include a summary of the argument. Another time, he was called and advised that "the preliminary statement" should be viewed as substantive and appearing on a page that counted toward the 100 page limit. Counsel has been called when an initial brief has exceeded

his position and reversed the circuit court. Rivera v. State, 995 So. 2d 191 (Fla. 2008); Floyd v. State, 902 So. 2d 775 (Fla. 2005); Mordenti v. State, 894 So. 2d 161 (Fla. 2004). And in each of those cases, counsel had included an "Introduction."

But, the State does not really stand on an argument that an "introduction" is impermissible. This can be seen when the State suddenly asserts "Pittman's 'Introduction' is, in reality, an unauthorized and impermissible re-argument and should be stricken." (Answer Brief at v). Since Rule 9.210(b) specifically requires an initial brief to include "Argument with regard to each issue including the applicable appellate standard of review," the State's complaint thus is not about whether an introduction is permissible, but seems to concern whether a party can argue his position more than once. It appears that the State's ultimate position is bottomed on an objection to redundancy; it is merely a matter of whether the State gets a shot at editing Mr. Pittman's initial brief. Given the redundancy that appears within the State's answer brief, Mr. Pittman is entitled to notice as to whether redundancy is a proper objection and a valid means to seek to strike portions of an opposing party's brief which otherwise conforms to the page limits set by this Court.[4]

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the 100 page limit because the last word in the "conclusion" extended on to page 101. Clearly, the clerk's office checks briefs when they are submitted to insure that the briefs comply with Rule 9.120(b).

[4]If parties may object to redundancy found in the opposing party's brief and have it excised, it may take a considerably longer period of time to complete the briefing process while the opposing parties are allowed an opportunity to edit their opponents' briefs.

REPLY TO STATEMENT OF THE CASE AND FACTS

Clearly, the State's counsel is quite taken with the circuit court order which is the subject of this appeal. The quote taken from the order fills up forty-one (41) pages of the ninety-five (95) page answer brief.[5] But of course, the circuit court's order is the subject of this appeal. It is not self-authenticating.

Recently in another appeal involving undersigned counsel, the State quoted extensively from a long circuit court order in order to convince this Court to affirm. Smith v. State, 931 So. 2d 790 (Fla. 2006). There as well, the State cited the length of the circuit court order as a basis for showering it with praise and labeling it as well-reasoned.[6] However, the Eleventh Circuit recently found that neither the long circuit court order, nor this Court's lengthy opinion affirming, properly understood and properly applied well-established federal law, *i.e.* Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. Smith v. Secretary, Dept. of Corr., 572 F.3d 1327 (11th Cir. 2009).

[5]The portion of the circuit court order quoted here is a section that purports to be a summary of the testimony and evidence presented during the evidentiary proceedings that occurred over the course of a year. It does not purport to be factual findings, but merely a summary of the evidence presented by the parties. As such, it is entitled to no more deference than a summary compiled by one of the parties, given that the court record and properly compiled transcripts are the official records of the testimony and the evidence presented in circuit court.

[6]Here, the State also resorts to labeling as a substitute for real analysis. The State describes the circuit court's order as containing "[t]he trial court's comprehensive analysis" (Answer Brief at 45).

Thus, the question is not whether the circuit court wrote a long order that can be extensively quoted in the State's brief. The question in this appeal is whether the circuit court properly understood and properly applied the law, in particular Brady v. Maryland, as well as State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

ARGUMENT IN REPLY

A. Carl Hughes

The State in addressing Mr. Pittman's Brady claim as to Carl Hughes demonstrates a tenuous understanding of its obligations under Brady and a steadfast determination not to understand Mr. Pittman's claim. Carl Hughes' ex-wife, Kathie Anders, was called by Mr. Pittman to testify at the evidentiary hearing conducted in circuit court in 2006. The State presented no witnesses to contest her testimony. In fact, her testimony went unchallenged.

Anders' testimony established that when she was married to Carl Hughes in 1990, she was in danger of criminal prosecution when Mr. Hughes was arrested on federal and state charges and incarcerated. At the time, she was the sole custodian of their three young children. The State placed her under surveillance. In fact, the State went so far as to polygraph her (PC-R. 3545, 3549). The State does not dispute these facts which were known by the State at the time of Mr. Pittman's trial, but which were unknown by Mr. Pittman and his counsel. Quite simply, these facts alone constitute Brady material because they gave Carl Hughes a previously unknown reason to curry

favor with the State. Smith, 572 F.3d at 1343.

The State argues that the results of a polygraph examination are inadmissible. In making this argument, the State ignores the fact that the results of the polygraph of Ms. Anders are unknown. They were not presented in circuit court.[7] All that was presented was the fact that a polygraph was administered.[8] And in fact it is the administration of the polygraph examination that is important. It is evidence that law enforcement suspected Ms. Anders of wrongdoing or wanted Mr. Hughes and Ms. Anders to believe that it suspected Ms. Anders of wrongdoing. Ms. Anders' testimony shows that the State did take menacing steps towards her. This evidence demonstrates that Carl Hughes had good reason to be afraid for his wife and the welfare of his three young children. As a result, he had good reason to wish to curry favor with the State.[9] Smith, 572 F.3d at 1343. Ms. Anders'

[7]Ms. Anders merely testified that she remembered being given a polygraph examination (PC-R. 3545, 3549). There was no indication that she was provided the results of the examination. Mr. Pittman has never been provided with any report concerning this polygraph examination, and the State chose not to introduce any additional evidence regarding the polygraph examination. Thus, the results of the polygraph are unknown.

[8]Ms. Anders testified that she was interviewed by the prosecutor on her husband's case, David Bergdoll (PC-R. 3545). Bergdoll asked her "to come in and they asked me, you know, how I paid the bills and financial things like that" (PC-R. 3549). A polygraph examination was even administered (PC-R. 3549). She found the experience very frightening (PC-R. 3549).

[9]Ms. Anders' testimony established that Hughes had reason that was undisclosed to Mr. Pittman and unknown to the jury, to curry favor with the State in order to protect his wife. In failing to understand the significance of Ms. Anders' testimony, the State fails to cite or address Davis v. Alaska, 415 U.S. 308 (1974). There, the United States Supreme Court stated:

testimony revealed that Hughes lied at Mr. Pittman's trial when he claimed to have no incentive to gather evidence against Mr. Pittman and testify for the State.

But Ms. Anders in her testimony did not stop there. She testified that her husband, Carl Hughes, told her "that he was trying to keep me from being arrested along with him and that he had been asked by FDLE to obtain information regarding this case that had been in the newspapers, which, in fact, was Mr. Pittman's case" (PC-R. 3542). In order to protect her and their three young children, Hughes said, "He was to - - the way it was told to me is that he was to gather information for them by way of befriending Mr. Pittman while they were both incarcerated" (PC-R. 3543). Thus according to Ms. Anders, Hughes was sent in as an agent for the State to obtain evidence from

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> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." Douglas v. Alabama, 380 U.S., at 419. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. Alford v. United States, 282 U.S. 687 (1931), as well as of Green's possible concern that he might be a suspect in the investigation.

Davis, 415 U.S. at 317-18 (footnote omitted).

Mr. Pittman which could be used at his criminal trial. Had it been disclosed that Mr. Hughes was a state agent, it would have been more than mere impeachment. It would have rendered Mr. Hughes' testimony inadmissible at Mr. Pittman's trial. Maine v. Moulton, 474 U.S. 159 (1985).

In response to Ms. Anders' testimony at the 2006 evidentiary hearing, the State did nothing. It did not call Carl Hughes. It did not call the FDLE agent, Randy Dey, who Ms. Anders indicated was the FDLE agent to whom she passed messages from Mr. Hughes. Ms. Anders testimony went uncontested.[10] Absolutely no evidence was presented by the State to contest, counter or rebut any of her testimony.[11]

The circuit court in its order denying Mr. Pittman any relief did not find Ms. Anders incredible. Indeed, the circuit court seemed to accept her testimony, but ruled that it would have been inadmissible at Mr. Pittman's trial: Even if "the undisclosed evidence regarding Ms. Anders had some impeachment value, the Court finds that the Defendant has not shown any reasonable probability that this information weakens the case against the Defendant so as to give

[10]When the trial prosecutor, Hardy Pickard, took the stand, he conceded that there may have been potential criminal charges that Mr. Hughes' prosecutor was considering pursuing against Ms. Anders ("I guess that's conceivable, but I don't recall it" (PC-R. 3897). Similarly, Mr. Pickard was unable to recall whether Mr. Hughes advised him of his concern about protecting his wife ("I mean, that's certainly possible he could - - at some point he could have mentioned that and I don't recall it" (PC-R. 3897).

[11]When asked if she had a clear recollection of this, Ms. Anders responded: "Absolutely, that I know, because it involved me specifically being arrested, so, yes, I do" (PC-R. 3549).

rise to a reasonable doubt as to his culpability or might led to a different verdict" (PC-R. 5386).[12] Now on appeal, the State adopts the circuit court's legally erroneous conclusions.

Nowhere in the circuit court order and nowhere in the State's answer brief is there any discussion of trial counsel's testimony that Ms. Anders's testimony would have caused him to challenge Mr. Hughes' testimony as inadmissible because he was a state agent who was sent into the jail for the purpose of gathering evidence against Mr. Pittman (PC-R. 4177).[13] At a motion to suppress hearing, Ms. Anders' testimony would have been admissible. At a minimum, Mr. Hughes could have been asked whether he told Ms. Anders that he was being required to gather evidence against Mr. Pittman, and if it was in order to protect her from criminal charges and to insure that she would be able to continue to take care of their three young children. If he denied making such a statement, Ms. Anders would have been able to take the

[12]As is discussed *infra*, the circuit court applied the wrong legal standard. When it has been established that favorable evidence in the State's possession was not disclosed to the defense, the standard for determining whether the undisclosed evidence was material and a new trial is warranted does not require that the defense show that the undisclosed information would have given rise to a reasonable doubt. It must merely be shown that confidence is undermined in the reliability of the outcome of the proceeding in which the information was withheld from the defense. Kyles v. Whitley, 514 U.S. 419, 439 (1995).

[13]In his closing argument in the circuit court, Mr. Pittman noted that his trial attorney, Robert Norgard, had testified at the 2006 evidentiary hearing that had he been aware of what Ms. Anders revealed in her testimony, he would have among others things "pursued the evidence as demonstrating that 'law enforcement had gone to [Hughes] and requested that he try to get information' as indicating that Hughes was an agent within the meaning of the Fifth and Sixth Amendment" (3/16/07 Closing argument at 19).

stand and testify as to contact with Mr. Hughes and FDLE Agent Randy Dey and to explain that her efforts to help gather information regarding Mr. Pittman for her husband were to insure that she was not arrested on criminal charges. Her testimony would establish that Mr. Hughes was a state agent when he allegedly spoke to Mr. Pittman and his testimony regarding what he claimed Mr. Pittman said would be rendered inadmissible under the Fifth and Sixth Amendments. Maine v. Moulton, 474 U.S. 159 (1985). Without Carl Hughes' testimony, the State would not have been able to obtain a conviction given the fact that it was impossible for Mr. Pittman to have committed the three murders and set the fire in the time period that he was left alone without a witness present.

Besides ignoring the impact of Ms. Anders' compelling testimony on the issue of the admissibility of Carl Hughes' testimony, the State asserts, as the circuit court did, that Ms. Anders' testimony would not have been admissible at Mr. Pittman's trial. The State first argues that "Pittman has not shown that any confidential hearsay statements Hughes allegedly made to his wife were not privileged, and, therefore, even admissible" (Answer Brief at 56)(emphasis in original). The State cites §90.504, Florida Statutes and Bolin v. State, 793 So. 2d 894 (Fla. 2001). However, the State ignores the fact that Ms. Anders was called as a witness in 2006 and did testify without anyone invoking the spousal privilege. According to §90.504 the privilege gives a spouse a privilege to prevent confidential communications to his or her spouse from being disclosed. At this

point, the communication between Ms. Anders and her husband at the time, Carl Hughes, is no longer confidential. It has been presented in open court without objection. The State certainly did not call Carl Hughes to invoke the privilege. At this point, there is no longer a privilege as to those communications discussed by Ms. Anders in her testimony to invoke. Mordenti v. State, 982 So. 2d 710 (Fla. 2nd DCA 2008).

Moreover, the State demonstrates in its answer brief that here unlike the situation in Bolin, Carl Hughes testified at Mr. Pittman's trial about his communications with his wife, Kathie Anders. In attempting to argue that Ms. Anders' testimony did not demonstrate that Brady material had been withheld, the State asserts:

> First of all, the defense knew, at the time of trial, that Hughes initiated contact with FDLE Agent Randy Dey via Hughes' (then) wife, Kathie. At trial, both Randy Dey and Hughes addressed the initial contact by Hughes' wife.

(Answer Brief at 56). Clearly under Bolin, Hughes' testimony concerning his communication with Ms. Anders waived the privilege; he specifically testified concerning conversations he had with Ms. Anders regarding Mr. Pittman's case.[14]

Moreover, the State's argument that because the defense knew of Mr. Hughes' wife, Kathie Anders, there can be no Brady violation, is legally in error. Citing to Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000)(Answer Brief at 56), the State makes the flawed argument that

[14]Moreover, the United States Supreme Court has made it clear that privileged information loses it privileged status if known by the State and it constitutes favorable information under Brady. Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

as to individuals whose names are known by the defense, there can be no Brady violation as to information possessed by that witness which was not disclosed by the State. First, this principle attributed to Occhicone simply does not appear in that opinion. Instead, this Court stated there that: "a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant". Occhicone, 768 So. 2d at 1042. There is no mention in the actual quote of the defense' knowledge of a witness' name as defeating a Brady claim.

Certainly, the United States Supreme Court has clearly found Brady violations as to the State's failure to disclose information concerning or possessed by a witness whose name was known by the defense. In Brady v. Maryland, 373 U.S. 83 (1963), itself, the defense was aware of the identity of the co-defendant. However, it was not advised of a statement made by the co-defendant. In Kyles v. Whitley, 514 U.S. 419 (1995), the withheld information concerned or was possessed by witnesses known by the defense. However, the defense was not advised of statements made by a number of these individuals and/or information known by these witnesses.

This Court has also found Brady violations warranted a new trial or a new penalty phase even though the withheld information concerned or was known by a witness whose identity was known by the defense. Mordenti v. State, 894 So.2d 161 (Fla. 2004) (information

known by the State's central witness was not disclosed); Young v. State, 739 So.2d 553 (Fla. 1999) (statements made by known witnesses to the prosecuting attorney and recorded in handwritten notes were not disclosed); Roman v. State, 528 So.2d 1169 (Fla. 1988) (a statement made by a known witness to law enforcement was not disclosed). The State's position that, because the defense knew that Carl Hughes had a wife who he mentioned in his testimony, there can be no Brady violation as to favorable information that was known by the wife, is meritless, given the wealth of case law on point and directly to the contrary.[15]

As to the State's argument that Ms. Anders testimony was entirely inadmissible hearsay, there are two legal error in this argument. First, Ms. Anders' testimony in 2006 included favorable information that was known by her and that was clearly not hearsay. She testified that she was interviewed by the prosecutor from her husband's case, David Bergdoll (PC-R. 3545). Bergdoll asked her "to

[15]The State's alternative contention also fails to withstand scrutiny. According to the State, there could be no Brady violation because there is no evidence that the State was aware of an argument between Mr. Hughes and his wife and thus not in a position to know that Mr. Hughes had told her that he was acting as a state agent to get evidence against Mr. Pittman in order to protect her (Answer Brief at 56). The Brady claim is not that the State failed to advise Mr. Pittman that Carl Hughes and his wife had a verbal argument. The Brady claim is premised upon the previously unknown facts revealed by Ms. Anders, *i.e.* that she was questioned by the prosecutor handling Mr. Hughes' case, that she was placed under surveillance, that she was given a polygraph, that she was terrified that she would be charged criminally as part of the case against Mr. Hughes, and that Mr. Hughes in order to shield her was sent in to gather information that could be used against Mr. Pittman.

come in and they asked me, you know, how I paid the bills and financial things like that" (PC-R. 3549). A polygraph examination was even administered (PC-R. 3549). She found the experience very frightening (PC-R. 3549). She also testified that she had three young children from her marriage to Carl Hughes and that she was the sole caretaker following her husband's arrest. These facts that Ms. Anders' testified to establish that Carl Hughes had reason to curry favor with the State and demonstrated that he was untruthful when he said otherwise in his testimony before the jury, and for that reason this information possessed by Ms. Anders and known to the State was favorable to Mr. Pittman.

Second, as to those statements made by Mr. Hughes to her that she testified about in 2006, rules of evidence sometimes have to bend to the Sixth Amendment right to present a defense. Chambers v. Mississippi, 410 U.S. 284 (1973); Mordenti v. State, 982 So. 2d 710 (Fla. 2nd DCA 2008). It seems entirely implausible that the United States Constitution would permit the State to send a state agent into the jail in order to gather evidence against a criminal defendant in violation of the Sixth Amendment, cover up the constitutional deprivation, and then be allowed to successfully preclude the one witness willing to come clean about what occurred from testifying as to what occurred.

Moreover, as the United States Supreme Court explained in Kyles v. Whitley, 514 U.S. at 446, the is another way that

undoubtedly Mr. Pittman could have used the information, a way that was not considered by the circuit court when it denied relief to Mr. Pittman and that is not addressed by the State in the answer brief. As was explained in Kyles:

> Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.
>
> Kyles, 514 U.S. at 446. Thus, the defense could have crossed-examined Mr. Hughes regarding his statements to Ms. Anders that

he was working for the State to gather evidence against Mr. Pittman. After all, Mr. Hughes as the State has pointed out mentioned in his testimony that he had talked to Ms. Anders about Mr. Pittman's case and passed messages regarding the case through her to Agent Dey. Had the defense known that she was aware that Mr. Hughes was working for the State to save her, this line of inquiry would have been pursued. Even if the defense had merely been advised of the threat of criminal charges against Ms. Anders, the questioning of her by the prosecutor in Mr. Hughes' case, and her submission to a polygraph examination, undoubtedly she would have been questioned by the defense. The defense would have learned of the statements made by Mr. Hughes and he would have been cross-examined about his representation to her that he was working for the State to gather evidence against Mr. Pittman for to protect her and his three young children.

Once the defense would have known the information and been in a position to cross Mr. Hughes about his statements to Ms. Anders, Mr. Hughes would either have to confirm that he had made such a statement or deny it. If the later route was chosen, then Ms. Anders would have been able to testify as to Mr. Hughes' representation to her that he was working for the State to gather evidence against Mr. Pittman to protect her and his three young children.

Thus as in Kyles, the undisclosed information regarding Ms. Anders would have directly lead to the jury learning that Mr. Hughes told Ms. Anders that he was working with the State to gather evidence against Mr. Pittman. Contrary to the circuit court's analysis the information would have reached the jury. Depending on whether Mr. Hughes acknowledged telling his wife that he was working for the State, 1) his testimony would have been inadmissible, 2) he would have been caught in a lie when Ms. Anders took the stand and refuted his denial of making such a statement, or 3) he would have revealed himself to be a manipulative cad willing to lie to his wife in order to obtain from her money, loyalty and whatever else he could get from her.

In its answer, the State does acknowledge the third scenario, while suggesting that the other two scenarios weren't possible. The State takes the position that the third scenario was at most what could be done with the evidence by the

defense: "At most, Hughes' exaggerated attempt to make his wife feel indebted to him, assuming it occurred, is scarcely more than Hughes' self-serving bluster when juxtaposed against her steadfast denial of any wrongdoing" (Answer Brief at 57).[16]

Within this contention, the State tries to whitewash some facts. If Mr. Hughes told his wife that he was working for the State to get evidence against Mr. Pittman and then he told the jury that the statement made to his wife was incorrect, he would be telling the jury that he lied to his wife. The characterization by the State that it would have only been "bluster" or "an exaggerated attempt to make his wife feel indebted" misrepresents what Mr. Hughes would have had to admit in a denial of the veracity of his statement to his wife. He would have to admit to lying to his wife. The defense attorney would have been able to pound him with this. He would have been able to force Mr. Hughes to acknowledge that while in jail he was telling his wife lies in order not just "to make her feel indebted", but to manipulate her and serve his will. Completely ignored by the State

[16]Though Ms. Anders was questioned by the prosecutor who was handling the criminal case against Mr. Hughes, though she was placed under surveillance, and though she was given a polygraph, the State now seems to suggest "her steadfast denial of any wrongdoing" means that she was innocent and never in danger of being criminally charged. This is strange given that Mr. Pittman has always steadfastly maintained his innocence, but according to the State, his steadfast denials have not been enough to precluded the State from pressing criminal charges against him and in fact obtaining convictions. Ms. Anders' "steadfast denial of wrongdoing" is simply not relevant to whether she was in danger of being prosecuted and/or whether Mr. Hughes was led by law enforcement to believe that she was in order to get him to act as a State agent in helping the State to build a case against Mr. Pittman.

is the fact that this would have been an actual demonstration of what the defense was trying to show the jury, that Carl Hughes was a liar who would lie whenever he believed that the lie would advance his interest.

With the withheld information, the defense would have had the tools to present the jury with two options. Either Mr. Hughes was lying when he denied his statement to his wife that he was working for the State, or he had lied to his wife because he thought he could get some benefit out it. Either way, the defense would have had the ability to show that Mr. Hughes was a liar who was only interested in advancing his own agenda. And along the way, the defense would have revealed that contrary to Mr. Hughes' denials that he had anything to gain from testifying against Mr. Pittman, he did in fact have reason to curry favor with the State. He was wanting to insure that his wife was not arrested and was able to continue to be the caretaker of his three young children.[17]

[17]The State makes the assertion that "the trial record confirms that any purported 'deal' to Hughes was addressed, at length, on direct and cross-examination at trial" (Answer Brief at 56). Either the State simply does not understand the claim or it does not want to understand. Ms. Anders' 2006 testimony revealed that she was terrified that she might be criminally charged and that in order to protect her, Mr. Hughes acted as a state agent to gather information that could be used to prosecute Mr. Pittman. This evidence shows that Mr. Hughes lied during the direct and cross-examination. He did have something to gain from his testimony - insuring that his wife would not been arrested and would be able to continue to care for their three young children.

So the undisclosed information demonstrates that Mr. Hughes was not truthful in his testimony before the jury during the direct and cross-examination. By demonstrating that Mr. Hughes was not truthful and was seeking to hide information from the jury, the

But the main thrust of the State's argument as to Carl Hughes is its four-page single space summary of what "defense counsel, Mr. Norgard emphasized" in attacking Mr. Hughes' credibility (Answer Brief at 50-54). It seems that the State's position is that because Mr. Norgard viewed Mr. Hughes as the most important witness in the case, and as the witness he felt the greatest need to challenge on credibility grounds, the undisclosed information that shows that at a minimum Carl Hughes is a liar who tells self-serving lies somehow would not have mattered.

Contrary to the State's legally erroneous argument, it is not a question of whether the defense at trial tried to impeach Mr. Hughes. It is a question of whether Mr. Hughes was successfully impeached and the jury did not credit his testimony and rely upon his testimony in convicting Mr. Pittman.[18]

The fact that defense counsel vigorously sought to discredit Mr. Hughes is in fact evidence of how central Mr. Hughes'

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new and previously undisclosed information contained in Ms. Anders' testimony would have been very powerful and would have been seized upon by the defense to destroy Mr. Hughes' credibility.

[18]In fact, the Florida Supreme Court has demonstrated how materiality is more readily shown when it involves a witness subjected to heavy impeachment that the jury nonetheless believed at trial. In Mordenti v. State, the witness in question was Mr. Mordenti's ex-wife, and she had been subject to vigorous attack and a wealth of impeaching information. So when it was learned in post-conviction that additional impeachment was withheld from the defense, materiality was readily and easily established because the additional, but suppressed, impeachment may have pushed the witness' credibility past the tipping point.

credibility was to the State's case.[19] If the jury did not believe Mr. Hughes, there would have been no conviction in light of the impossible time line that required Mr. Pittman to have walked from his father's to the victims',[20] gain consensual access to the home,[21] speak with Bonnie Knowles for some amount of time trying to convince her to have sex, become angry when she refused, kill Bonnie by stabbing her eight times, kill Mr. Knowles by stabbing five times, kill Mrs. Knowles by stabbing her three times, put a tire under Bonnie's bed, locate and remove the key to Bonnie's car, locate an accelerant, spread the accellerant throughout the house, set the fire, drive away in Bonnie's car, park the car at some distance from the Pittman residence (about 1/10 of a mile) and return to his father's home in less than one hour, between 2:30 AM and 3:30 AM. Moreover, the fire had to be set at such a time that it was burning brightly enough to be visible in the night sky at 3:10 AM when David Hess testified that he saw the red light from the fire about two miles away (R. 1144-46, 1152).[22] This means that the murders had to have been completed, the

[19]It also clearly put the State on notice that any impeachment of Carl Hughes in its possession was favorable to the defense and thus should be turned over.

[20]According to testimony from police officers, it was one half mile from Mr. Pittman's father's house to the Knowles' residence (R. 2179). The police officer indicated that it took 13 minutes to walk that distancing when walking briskly.

[21]Though convicting Mr. Pittman of the murders, the jury acquitted him of burglary (R. 5108-11, 5113-14).

[22]From his examinations of the bodies, the medical examiner found that all three of the victims were dead and no longer breathing by the time

tire put under the bed, the car key found, the accelerant spread and the fire started a sufficient amount of time before 3:10 AM that the fire was big enough to cause the sky to glow red and be visible a couple of miles away.

The State's way of overcoming the defense's argument that it wasn't possible was to rely on Carl Hughes who claimed Mr. Pittman admitted in some detail that he did it.[23] That was why the defense fought so hard to discredit Mr. Hughes. However, the conviction demonstrates that the effort was unsuccessful. That does not mean that the impeachment that would have been provided if the defense had known the information that Ms. Anders testified to in 2006 would not have mattered. Where the jury believed a witness, despite numerous challenges to his or her credibility, the credibility has more than likely been cracked. Though the credibility remained intact enough for the jury to convict, it was nonetheless more susceptible to collapse if the additional impeachment revealed by Ms. Anders had been available.[24] It is very much akin to ice covering a pond having been

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the fire was started (R. 1539). He also indicated that it may have taken five minutes for Mrs. Knowles to succumb as a result of her injuries.

[23]In his rebuttal closing, the prosecutor argued that to accept defense counsel's argument and to acquit Mr. Pittman, the jury would have to conclude that "Carl Hughes, the inmate who testified as to Mr. Pittman's statements that he made, he's lying" (R. 4130).

[24]Just as the State and the circuit court have ignored a cumulative materiality analysis of Brady material, the State has also ignored the cumulative effect that impeachment has on a witness' credibility. By underscoring those reasons the jury heard for not crediting either Hughes or Pounds, the State has demonstrated that though the jury

weakened and cracked from use by skaters. The more cracked the ice from those who trek across it, the more likely the next to venture upon the ice further stressing it will cause it to break and collapse under the additional weight.[25]

In addition to the information revealed by Ms. Anders, the State also withheld from the defense the fact that Mr. Hughes was interviewed by law enforcement on July 6, 1990.[26] Since the defense was unaware of this interview, defense counsel was deprived of the opportunity to impeach Mr. Hughes when he claimed that he had limited contact with the State. The defense wanted to suggest that Mr. Hughes concocted his story over time, adding details as he learned them from interviews with law enforcement. So knowing of the July 6th interview, just ten days after the first interview when Mr. Hughes provided absolutely no details as to what Mr. Pittman had supposedly said, would have been extremely helpful to show that Mr. Hughes had ample opportunity to learn details of the crime in order to manufacture his story that Mr. Pittman confessed. Indeed, the handwritten notes of Detective Cosper from that interview included

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ultimately believed Hughes and Pounds over David Pittman, additional impeachment could easily have pushed their credibility past the tipping point completely flipping the result.

[25]As it was, the jury had lengthy deliberations over the course of two days before returning a guilty verdict (R. 4124).

[26]In the depositions that he took of Detective Cosper, Agent Dey, and Carl Hughes, trial counsel was told that there was an interview on June 26, 1990, and that the second interview was the taped statement taken on September 11, 1990 (PC-R. 4163-66). No mention was made of an interview on July 6, 1990.

the notation: "Real off on time of occurrence" (PC-RE. 866-67). In its answer brief, the State fails to recognize the fact that Agent Dey, Detective Cosper and Carl Hughes, all failed to advise trial counsel of the July 6th interview as impeachment in and of itself. Clearly, the State was hiding the existence of the interview. But more importantly, the very fact that there was a July 6th interview provided Mr. Hughes with an opportunity to learn more about Mr. Pittman's case and to mold his story to make it feasible. The notation that he was "[r]eal off on time of the occurrence" demonstrates that it was a concocted work in progress. Certainly, had trial counsel been aware of that interview, that is what he would have argued to the jury.

As a matter of constitutional law, the defense is entitled to present circumstances that it can argue afford a basis for an inference of bias or motive.[27] Kyles made it very clear that the materiality analysis of a Brady claim requires looking at the undisclosed information from the defense's perspective and how the defense could have used the information had its existence been disclosed.[28] The State has failed, just as the circuit court failed,

[27]In Kyles, 514 U.S. at 442 n. 13, the Supreme Court noted that the undisclosed Brady material "would have revealed at least two motives" for a witness to come forward to implicate Kyles in the murder, *i.e.* "[t]hese were additional reasons [for the individual] to ingratiate himself with the police".

[28]Throughout the materiality analysis that the United States Supreme Court conducted in Kyles, the Court considered how the defense "could have" used the Brady material at trial, what "opportunities to attack" portions of the State's case, and what the defense "could have

to consider the withheld material from the defense's point of view and consider how the defense could have used the withheld information.[29]

Evidence must be considered cumulatively to determine whether confidence in the verdict has been compromised, but specific evidence that may be critical to a particular defense is heavily weighted. Cone v. Bell, 129 S.Ct. 1769, 1773 and 1783 (2009). If such specific evidence is withheld from the defense, even if it is of small quantity, the defense is effectively crippled. See id. at 1783. In Cone, for instance, trial counsel attempted to argue the specific defense that after the defendant's honorable service in Vietnam, he began using drugs to cope with the long©term trauma caused by war, and that eventually, his long©term drug abuse led to "amphetamine psychosis" and the crimes for which he was charged. Id. at 1772©73. In the State's closing argument, the prosecutor declared that this specific defense was "baloney." Id. at 1772, 1774. He made the declaration even though his office possessed several undisclosed statements, which described the defendant as "wild©eyed," looking around in a "frenzied manner," and a "drug user / heavy drug user." Id. at 1777 (emphasis added). If the State had produced the witness statements and police bulletins as it was constitutionally mandated to do, defendant's trial counsel would not have been forced to put on a crippled defense. Id. at 1783. Each statement strengthened the specific defense in Cone. Id. at 1773.

As to the withheld information regarding Carl Hughes, the State fails to cumulatively evaluate the withheld information, information that was precisely the type of information that would have further supported the defense's attack on Carl Hughes' credibility.

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argued." 514 U.S. at 442 n. 13, 446, 447, 449.

[29]In circuit court, the State relied upon the trial prosecutor's testimony that he had seen no basis for disclosing the information. The trial prosecutor testified that his obligation under Brady was to engage in the materiality analysis by looking at the suppressed information from the prosecutor's perspective, *i.e.* if none of the suppressed information changes the prosecutor's opinion regarding the defendant's guilt, it isn't material. This is simply contrary to Brady and its progeny.

There is a certainly a reasonable probability that Mr. Hughes would have been found to be a state agent, and as a result, his testimony would have been inadmissible. There is also a reasonable probability that, even if allowed to testify, the withheld information could have been used to convince the jury not to accept Mr. Hughes' testimony. If either Mr. Hughes' testimony was ruled inadmissible or if the jury did not accept Mr. Hughes' testimony as true, there would have been no conviction.[30]

B. Other aspects of the Brady claim

Just as the State failed to understand Mr. Pittman's claim as to Carl Hughes and ignored the principles laid down by Brady and its progeny, the State does the same when addressing the other aspects of Mr. Pittman's Brady claim. What is most troubling about the State's answer brief and what was troubling about the testimony of the trial prosecutor, Hardy Pickard, is the State's resistance to Brady and its progeny.

The United States Supreme Court has written under the American system a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

[30]Mr. Pittman does not have to prove that it is more likely than not that the he would not have been convicted had the withheld information been disclosed. But, it is clear that without Mr. Hughes' testimony Mr. Pittman would not have been convicted.

Berger v. United States, 295 U.S. 78, 88 (1935). When it comes to the government withholding evidence from criminal defendants, the U.S. Supreme Court has made clear that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly." Brady v. Maryland, 373 U.S. at 87. It is axiomatic that the prosecution's suppression of favorable evidence violates due process. Cone v. Bell, --- U.S. ---, 129 S. Ct. 1769 (2009); Kyles v. Whitley, 514 U.S. 419 (1995).

The U.S. Supreme Court has long recognized that the prosecutor's obligation is not just to win. The prosecution cannot, by itself, determine the truth. See Kyles, 514 U.S. at 440. The prosecution cannot assume the validity of its own theory of the crime is the whole truth and ignore exculpatory evidence that undermines that theory. Id. Failure to disclose exculpatory information to a defendant precludes the defense from conducting a "reasonable and diligent investigation" as mandated by McCleskey v. Zant, 499 U.S. 467 (1991); Strickler v. Greene, 527 U.S. 263, 287 (1999).

> An incomplete response to a . . . request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that this evidence does not exist. In reliance on this missing representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.

United States v. Bagley, 473 U.S. 667, 682 (1985). Any impediment to the defense's investigation that results from the State's failure to turn over exculpatory evidence unfairly skews the fact-finder in the prosecution's favor, which prevents a finding of the whole truth and violates the defendant's right to a fair trial. United States v. Agurs, 427 U.S. 97, 108 (1976).

Prosecutorial misconduct is "a corruption of the truth-seeking function of the trial process." Bagley, 473 U.S. at 681. The truth-seeking function that is demanded of court proceedings obligates the prosecution to produce favorable evidence to the defense. Cone, 129 S.Ct. at 1782.[31] "For though the attorney for the sovereign must prosecute the accused with earnestness and vigor he must always be faithful to his client's overriding interest that justice shall be done." Agurs, 427 U.S. at 110.

Justice demands that the State engage solely in legitimate means to bring about and maintain a just conviction; improper methods calculated to produce and protect wrongful convictions cannot exist in just system. Cone, 129 S.Ct. at 1782.

Individual prosecutors have a duty to learn of any favorable evidence discovered or generated by others acting on the prosecution's behalf, including police investigators. Kyles, 514 U.S. at 437. Undoubtedly, police will mistakenly fail to turn over

[31] "Truth is critical in the operation of our judicial system." Florida Bar v. Feinberg, 760 So. 2d 933, 939 (Fla. 2001).

evidence to the defense, but the duty to learn of favorable evidence applies to all prosecutors regardless of situation. Id. at 438; Bagley, 473 U.S. at 682-83. The State's good or bad intentions in withholding evidence are irrelevant, making any implied defense of mistake equally irrelevant. Id. Because the prosecution alone can know what to disclose, the State "must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." Kyles, 514 U.S. at 437. Accidental nondisclosures demonstrate a strong need for procedures and regulations for the prosecutorial office. Kyles, 514 U.S. at 438. Such procedures foster necessary communication between a prosecutor and his investigative team such that no relevant information goes overlooked. Id. Because the constitutional duty to disclose exculpatory evidence ultimately falls to the individual prosecutor of a case, a prudent prosecutor would err on the side of disclosure when in doubt. Id. at 439; Agurs, 427 U.S. at 108.

Because the purpose of the criminal justice system is to ensure fairness and truth, the prosecutor cannot escape his constitutional duty even when he is not aware of the suppressed or missing information. Kyles, 514 U.S. at 440. "Any argument for excusing a prosecutor from disclosing what he does not happen to know boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's

obligation to ensure fair trials." Id. at 438. While the prosecutor is free to form his own opinion as to what happened, any prosecutorial misconduct employed to support his theory defeats the "truth-seeking function" of the proceedings in court and is unacceptable. Cone, 129 S.Ct. at 1782; Bagley, 473 U.S. at 681.

Contrary to the testimony of Hardy Pickard at the evidentiary hearing below and contrary to the State's answer brief, the prosecutor is supposed to be able to recognize what information there is in law enforcement's possession that may be useful or helpful to the defense in some way. It is not a matter of whether the information establishes that the defendant is innocent, and only then must it be disclosed. It is whether the information helps the defense by in some fashion hurting the State's case.

The problem that is revealed in this case and numerous cases before it is that prosecutors want to win their cases, and in wanting to win they refuse to see that evidence which impeaches their case is favorable to the defense even if it does not show that the defendant is innocent. Under Brady prosecutors must come to recognize that information that is inconvenient for the State and which accordingly the State wants to sidestep must be helpful to the defense. In planning and preparing for trial, any evidence or information which is unhelpful to the State is probably helpful to the defense. Contrary to the competitive American spirit that winning is the ultimate goal, prosecutors must recognize that any evidence or

information that is some sort of an obstacle to winning should be turned over the defense. This requires a willingness on the part of prosecutors to make it harder on themselves to actual win the case.

Not only do prosecutors repeatedly sidestep this basic tenet,[32] they also fail in their obligation to recognize that information that may appear neutral to them may in the hands of the defense attorney suddenly be used very effectively against the State. In evaluating whether information is favorable to the defense and must be disclosed, the question is whether the defense attorney would see the information as favorable and useful to the defense. If so, disclosure is mandated.

What has clearly happened over the years despite reversal because of Brady error in Mordenti v. State, Young v. State, Roman v. State, and numerous other cases, is that no matter how egregious the behavior, prosecutors know that the State's counsel on appeal will argue that the prosecutor's conduct did not violate due process, or the defense counsel was not diligent,[33] or that the evidence of guilt

[32]Prosecutors frequently do as Mr. Pickard did in his testimony and wear blinders refusing to see that evidence that is not useful to the State or which may in fact be harmful, would in fact be useful to the defense. Prosecutors also frequently argue as Mr. Pickard did when he was on the witness stand that he has no obligation to do the defense attorney's job for him; he should not be expected to review all of the information that the State possesses and look for information that the defense attorney wants. However, as the U.S. Supreme Court has repeatedly explained that is exactly what is required by due process.

[33]An example of this appears in the answer brief when the State argues that favorable information contained in the confidential PSI in David Pounds criminal case which the State possessed did not have to be provided because the defense counsel should have filed a motion to

was so overwhelming that the failure to disclose favorable evidence did not undermine confidence in the outcome.[34] The result is that many prosecutors view the problem as not residing with themselves, but with the appellate courts that every once in while refuse to accept the smorgasbord of excuses offered by the State's appellate counsel. As a result, in so many cases only lip service has been paid to Brady and its progeny. Until this Court more definitively demonstrates the meaning of Brady, and the consequence of failing to give honor to it, this Court will continue to see case after case where the meaning and import of Brady is ignored or sidestepped.

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unseal the confidential PSI. Even though trial counsel would have had no basis to ask for the PSI to be unsealed, even though there is no reason to believe that the PSI would have been unsealed, the failure to ask to have the PSI unsealed demonstrates a lack of diligence.

On this, the State argues "Brady does not require the prosecutor to obtain and disclose evidence which is available to the defense from other sources. Pittman did not show that defense counsel could not have obtained the otherwise confidential records through the exercise of due diligence; therefore, the trial court found no Brady violation" (Answer Brief at 66).

However, U.S. Supreme Court law clearly rejects the State's position. The affirmative obligation to disclose cannot be transferred to the defense through a diligence requirement. Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). The prosecutor's constitutional obligation is not discharged simply because the prosecutor thought the defense should have been aware of exculpatory information. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). In Strickler, the Supreme Court made it clear that defense counsel's diligence is not an element of a Brady claim.

The U.S. Supreme Court has clearly stated, "[t]he prudent prosecutor will resolve doubtful questions in favor of disclosure." United States v. Agurs, 427 U.S. 97, 108 (1976). "[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." Kyles v. Whitley, 514 U.S. 419, 439 (1995).

[34]Certainly in Mordenti, Young, and Roman, the State's representative before this Court would never acknowledge any misconduct occurred.

C. Carlos Battle and the other newly discovered evidence

Here, it is undisputed that Barbara Knowles told Carlos Battle that her daughter witnessed her grandmother's murder. The prosecutor conceded in his testimony that if that statement is true and Cindy Pittman was in the house at the time of the murders, then Mr. Pittman did not commit the murders. It is astounding that the State simply wants to ignore this new evidence as insignificant. The State had Barbara Knowles in the hallway at the July 27, 2007, evidentiary hearing, but chose to not put her on the stand to address Carlos Battle's testimony. That speaks volumes. A new trial is required.

CONCLUSION

In light of the foregoing arguments, Mr. Pittman requests that this Court reverse the lower court, vacate Mr. Pittman's conviction and/or death sentence and grant other relief as set forth in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Candance Sabella, Assistant Attorney General, Office of Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, on September 17, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font

requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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