IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

Appellant, CASE NUMBER NO. 80,176

vs.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

APPELLANT'S REPLY BRIEF

Dennis H. Tracey, III
John Houston Pope
Davis, Markel & Edwards, P.C.
100 Park Avenue
New York, New York 10017
Telephone: (212) 685-8000

Attorneys for the Appellant.

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Appellant hereby replies to the State's Answer Brief in this appeal from the summary denial of four claims and the denial after hearing of a fifth claim asserted pursuant to Fla. R. Crim. P. 3.850.

Argument

I.

CLAIM V IS NOT PROCEDURALLY BARRED AND SHOULD BE REMANDED FOR A HEARING ON ITS MERITS

In its Answer Brief the State has, for the first time in these proceedings, stated a position in opposition to Claim V. The State asserts: (1) the claim is nothing more than a different argument to relitigate an issue already decided; (2) the claim could have been discovered earlier through greater diligence on counsel's part; (3) the claim was asserted more than two years after the discovery of the facts which underlie it; and (4) the claim is too incredible to adjudicate. These arguments are without either legal or factual support.

Claim V rests on new factual allegations uncovered for the first time in 1989. These allegations, which concern the

Valium intoxication of a juror and the trial judge's role in that intoxication, do not repeat or overlap with any facts that formed the basis for claims previously presented. (The prior claims -- which appear in appendices A and B of appellant's Initial Brief -- concerned pressure exerted between juror members, certain improper contacts, and alcohol intoxication.) The State errs, then, in describing Claim V as a new argument for an old issue. The facts are new; as this Court recognized in Sireci (discussed in appellant's Initial Brief at 18), the prior litigation of different facts -- even if those facts fall loosely under the same theory for relief as the new facts -- cannot bar the present litigation. Indeed, the State, like the Circuit Court, has yet to explain how Claim V has been previously adjudicated or to point to any part of the files and records that show this to be the case.

The State's second argument -- that counsel could have uncovered the facts earlier through due diligence -- is pure fantasy. The jurors could not be contacted because of the more-than-sixteen-year-old gag order. Appellant could not contact the doctor involved; even to this date his or her identity is not known. The fact is the trial judge did not tell anyone at the time and did not elicit any information on the subject during the limited post-trial inquiry into juror misconduct that he alone controlled. The State does not explain how, consistent in the ethical obligations governing attorneys and judges, appellant could have learned anything from Judge Paul. Given that

appellant has previously litigated allegations that challenge the judge's integrity, is beyond reason to assume that he would voluntarily cooperate, particularly on an issue that calls his handling of the trial into doubt. The information came to light when a television reporter spoke to the jurors; this demonstrates that the bar on interviewing the jury has kept this claim out of appellate's reach until a third party's intervention.[1]

Claim V was asserted in a timely fashion. The facts forming the basis for relief were put forward within two years of their discovery, in the Amended Motion to Vacate Judgment and Sentence (see R. 463-64), filed on October 20, 1989. By its terms, Rule 3.850 requires no more than a statement of the facts that form the basis for relief. The restatement of these facts as a separate claim in the Second Amended Motion does not alter the date upon which they were first asserted. Moreover, the trial court exercised its sound discretion to hold appellant's 3.850 proceedings in abeyance during the pendency of his resentencing and its appeal. See Tafero v. State, 524 So. 2d 987, 988 (Fla. 1987). Any time intervening between the Amended Motion and the Second Amended Motion is accordingly excluded from

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[1] Contrary to the State's assertion, the testimony of the jurors would not necessarily be inadmissible hearsay. Juror Brickel can testify directly concerning her ingestion of Valium and any of the other jurors can testify about their observations, such as the arrival of the drug to the jury room and its ingestion by Juror Brickel.

the Rule's time limits.[2]

The State's fourth argument deserves no more than brief mention. The State does not dispute that the factual allegations of Claim V, if proven to be true, entitle appellant to a new trial. Under the express terms of Rule 3.850, appellant is entitled to a evidentiary hearing under such circumstances. Any argument over the merits of the claim is properly made only at the evidentiary hearing that this Court should order upon remand.

II.

CLAIMS I THROUGH IV ARE NEITHER UNTIMELY OR PROCEDURALLY BARRED

The State's defense of the Circuit Court rulings on Claims I, II, III and IV focuses on whether appellant exercised "due diligence" in discovering the facts when he actually did and the materiality of certain parts of Claims I and II. The State did not argue materiality in the court below and should not be permitted to raise it for the first time on appeal.[3]

While the State argues "due diligence," it offers no

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[2] The Court also may find in appellant's favor by holding that amendments to a timely filed Rule 3.850 motion are timely without regard to how the claim would be viewed standing alone. This issue was expressly left open in Brown v. State, 596 So. 2d 1026, 1028 (Fla. 1992). The State can make out no prejudice stemming from the amendment since it was on notice of the underlying facts within the Rule's time limits. The finality concerns underlying the time limitations are not implicated since no part of the Rule 3.850 motion was adjudicated during the intervening time.

[3] A reply brief is too abbreviated a forum to properly air the issues; if the Court should desire to hear argument on the materiality of the allegations, appellant requests an order directing separate briefing.

definition, working or otherwise, of the concept. As appellant argued initially, the Circuit Court's ruling imposes obligations inconsistent with reason or sound public policy. Due diligence is a concept with an established meaning; it should be applied with an eye directed toward that meaning. The definition of the term states that it is

> Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

Black's Law Dictionary 457 (6th ed.) (emphasis added). Due diligence is a less exacting standard than "extraordinary diligence" or "great diligence". Id.

Because due diligence must be measured contextually, it cannot be applied without regard for appellant's indigency after trial and for the complexity of the criminal case prosecuted against him. Cf. Franklin v. Franklin, 573 So. 2d 401, 403 (Fla. 3d DCA 1991) (party's illiteracy and ignorance of legal remedies considered in measuring due diligence). The degree of investigation that satisfies the requirement of due diligence must be evaluated in the light of appellant's limited resources, the many avenues of investigation over which counsel had to spread those resources, and the circumstances surrounding each prior 3.850 motion (such as the time constraints imposed by the presence of an active death warrant at the time of his second 3.850 motion in 1986). Given these constraints, the record reflects a remarkable degree of diligence by appellant and his

counsel, more than enough to satisfy Rule 3.850.

A. Claim III

The Circuit Court erred in two ways in finding Claim III procedurally defaulted. First, the Court imposed a greater obligation on appellant than "due diligence" requires. Appellant demonstrated this in his Initial Brief and the State has offered no response. Instead, the State has argued in defense of the Circuit Court's second error, speculation that further investigation would have found Bulled and Beverly and learned of the claim from them.

The State proposes that further investigation by appellant sometime after trial and some unspecified later date would have uncovered the facts upon Claim III relies. In support of this proposition, the State suggests that Mr. Bulled could have been found by returning to his last known address and making inquiry of his whereabouts. The State further suggests that Mr. Beverly was always there for the finding. These assertions are sheer speculation.[4]

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[4] This Court has implicitly rejected this kind of speculation in the context of the "Pearl issue" raised in Harich v. State, 542 So. 2d 980 (Fla. 1989). The dissenting justice complained that the failure to disclose the claim was not explained. id. at 982 (Overton, J., dissenting). The trial court on remand found that the claim could have been discovered earlier because Pearl's affiliation as a deputy sheriff was widely known. See Harich v. State, 573 So. 2d 303, 305-06 (Fla. 1990) (quoting trial court opinion). This Court, however, affirmed on the merits and did not mention any procedural default. Additionally, this Court has granted an evidentiary hearing on the merits in every subsequent instance in which a "Pearl issue" has been raised. E.g., Quince v. State, 592 So. 2d 669, 670-71 (Fla. 1992); Wright v. State, 581 So. 2d 882, 886 (Fla. 1991); Herring v. State, 580 So. 2d 135, 139 (Fla. 1991).

As the State concedes, appellant's trial counsel looked for Mr. Bulled in 1976 and learned he had been deported to England. According to trial counsel, that placed him out of useful reach. (R. 235-36.) No one had any reason to suppose that Mr. Bulled would return to the United States. Appellant had limited resources; chasing after a witness in England without any notion of his potential testimony seems, as a matter of logic, a waste of time better spent. It was accordingly reasonable under the circumstances not to retrace the steps taken in 1976 to locate a witness who was known to be unavailable. It is improper to undermine that judgment by the use of hindsight.

Mr. Beverly's presence in Orange County was of little importance until shortly before the hearing in 1992. Mr. Beverly was reluctant to testify; he refused to do so when first contacted by appellant's attorneys (see R. 90-91, 682-84, 686-87) and he said that he decided to testify only after his mother died in 1992 (R. 88, 96). Any argument that counsel should have found Beverly earlier is answered by his statement that he was unwilling to testify on the matter until after his mother's death. See McCallum v. State, 559 So. 2d 233, 235 (Fla. 5th DCA 1990). Moreover, Mr. Beverly testified that his mother told him that she turned away persons who were looking for him. (R. 88-89, 183.) The Circuit Court erred in striking this testimony -- the ruling is not defended by the State -- and his testimony

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To impose a procedural default on the basis of the Circuit Court's speculation about witness availability is contrary to Harich and its progeny.

about her state of mind shows that he was not simply "available" to be found. The evidence strongly supports the conclusion that any attempt to contact Mr. Beverly would have been rebuffed by his mother.

Whether appellant's trial counsel suspected that the bullet may have been planted is immaterial. The State presented testimony at trial that the bullet was found by an inmate search. Counsel's reliance on the integrity of the officer who swore an oath of truthfulness is not unreasonable absent evidence to the contrary. See First Fed. Sav. & Loan Ass'n of Wis. v. Dade Fed. Sav. & Loan Ass'n, 403 So. 2d 1097, 1100 (Fla. 5th DCA 1981) (due diligence does not "require that an aggrieved party have proceeded from the outset as though he was dealing with thieves"). "The requirement of due diligence . . . is not a legal absolute . . . . A party is not required to anticipate false testimony from the opposing party and is therefore not required to discover evidence which would refute the false testimony." Roberts v. Allstate Ins. Co., 457 So. 2d 1148, 1150 (Fla. 3d DCA 1984). Under the circumstances, counsel acted reasonably in relying on the state's false testimony until Mr. Bulled came forward in 1989.

Due diligence has never been defined to require a polling of every potential witness of the events. See Fox v. State, 568 N.E.2d 1006, 1008 (Ind. 1991); Francis v. State, 544 N.E.2d 1385, 1387 (Ind. 1989). As a matter of policy, the gloss placed on the requirement by the Circuit Court is excessive and

unwise. Many prisoners who file 3.850 motions have no counsel or outside assistance; even capital defendants with representation rely on volunteer counsel or CCR. The Circuit Court's standard may deter volunteer counsel from taking assignments, may create clearly unjust forfeitures, or may saddle counties with the expense of hiring investigators to track down every lead and whim of indigent defendants.

Finally, appellant properly argued that the procedural default could be excused on grounds of ineffective assistance of counsel. The State argues that this argument was not raised below and that post-conviction proceedings do not implicate a federal constitutional right to counsel. The argument is properly raised here because it responds to the new standard of diligence imposed by the Circuit Court. The ineffectiveness claim is valid in post-conviction proceedings in this instance because: (1) post-conviction proceedings were the first opportunity in which a claim could be presented and therefore, as the functional equivalent of the first appeal, the federal right to counsel attached, cf. Coleman v. Thompson, 111 S.Ct. 2546, 2567-68 (1991); Breedlove v. State, 595 So. 2d 8, 11 (Fla. 1992); (2) state law recognizes a right to counsel for inmates under a sentence of death, see, e.g., § 27.7001, Fla. Stat.; and (3) the diligence standard itself presupposes that appellant was entitled to outside assistance to investigate his claim. Thus, the Court should excuse any procedural default as did the federal court in

Agan v. Singletary.[5]

B. Claims I and II

The State does not -- because it cannot -- dispute that appellant's counsel reviewed the State Attorney's files in 1982 and did not find any of the materials that form the basis of Claims I and II. Nor does the State express any doubt that estoppel applies to its undisputed misconduct. Instead, the State challenges why the files were not reviewed for a second time until April of 1987. This misses the point. Appellant satisfied his obligation of due diligence when the files were reviewed in 1982. See First Fed. Sav. & Loan of Wis., 403 So. 2d at 1101; cf. Barker v. Rust Eng'g Co., 428 So. 2d 391, 394 (La. 1983) (counsel acted with due diligence in relying on opposing counsel's assurance that all responsive information had been disclosed, even though counsel could have moved to compel). When or why the suppressed materials were subsequently discovered is irrelevant; estoppel applies against the State because it engaged in misconduct that delayed the discovery of the materials.[6]

The State also makes reference to three specific pieces

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[5] The Court can alternatively reach the same result by holding that the Circuit Court's expansive concept of due diligence does not apply retroactively. Cf. Adams v. State, 543 So. 2d 1244, 1247 (Fla. 1989).

[6] If this Court finds any relevance in the circumstances under which the materials ultimately were discovered, the issue should be remanded for further factual development, not denied on the bare record. (Full factual development would show that the timing of the discovery of the evidence coincides with the entry of present counsel into the case and a concomitant full review of all available materials.) Appellant's allegations are sufficient to avoid summary adjudication.

of suppressed information that it believes are defaulted for separate reasons. Regarding the Frye report, appellant properly litigated his discovery objections at trial and the State's misconduct barred litigation in any prior post-conviction motion.[7] Regarding the Smith interview, knowledge that Smith had been contacted by the Orange County Sheriff's Office does not logically impute knowledge of any interview notes or tape; counsel properly requested all materials and the failure to turnover any tape can be reasonably assumed by defense counsel to be a representation that no such materials exist. Regarding the Thompson report, it is timely for the reasons stated in Part I (concerning Claim V) and, as part of a motion filed before July 1, 1989, is not subject to the Adams rule.[8]

C. Claim IV

The State gives only summary consideration to Claim IV, without addressing appellant's arguments. The pattern of misconduct derives solely because fresh evidence gives new significance to facts previously urged as a basis for relief. (The pattern-and-practice argument in appellant's first 3.850

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[7] The State describes the Frye report at one point at merely as investigator's impressions that are not subject to discovery, citing Spaziano v. State, 570 So. 2d 289 (Fla. 1990). While this is a new argument on appeal, it also is incorrect. The factual statements of witness which Frye recorded appear in those notes but not in any other discovery materials. The notes are properly discoverable under Brady and Bagley. See Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988); Boshears v. State, 511 So. 2d 721 (Fla. 1st DCA 1987).

[8] It also is timely for the reasons stated in footnote 6 of appellant's Initial Brief. The state has not responded to the textual analysis of Rule 3.850 set forth therein.

motion, by contrast, was rejected for merely recasting misconduct that was all known at the time of direct appeal.) As the analogy to the continuing violation doctrine illustrates, the whole is greater than the sum of its parts. Accordingly, if any of the other claims are not defaulted and untimely, Claim IV should be heard and all of the State's misconduct and neglect should be examined.

III.

THE CIRCUIT COURT ERRONEOUSLY DENIED CLAIM III ON THE MERITS

Contrary to the State's assertion, appellant seeks neither a reweighing of evidence or a substitution of this Court's judgment for a sound reading of the evidence. Rather, appellant asks that the Court test the adequacy of the proceedings below and whether the Circuit Court's determination can survive scrutiny under the substantial evidence test. The determination on the merits below must be reassessed because it is the flawed result of an inadequate hearing and it is not supported by substantial evidence.

Regarding the opportunity to fully and fairly litigate Claim III, it is undisputed that the Circuit Court constricted the process of discovery and the presentation of evidence to the limited issue of the circumstances of the discovery of the bullet in a citrus grove on January 12, 1976. Appellant was not permitted even the most elementary "general impeachment" discovery, such as an investigation into corruption on the part of the officers involved, or the most basic corroboration of

Messrs. Bulled and Beverly, such as proof that Felton Thomas did not go to the citrus grove on December 24, 1975, as he claimed. Moreover, it is undisputed that the Circuit Court adjudicated the claim alone, without hearing the pervasive pattern of misconduct alleged throughout the Second Amended Motion. The State wrongly seeks to exude that evidence by arguing the procedural default of those facts as separate claims. The evidence should be heard, however, without regard to its ability to support relief as independent claims. It shows that the persons accused of fabricating the citrus grove bullet were engaged in a pervasive policy and practice of manipulation. Proof of that fact strengthens the inference from the existing evidence that the circumstances of the citrus grove bullet reflect the fabrication of evidence against appellant.

The State reiterates various testimony about Mr. Bulled's alleged bias against Orange County while selectively omitting the testimony -- cited in appellant's Initial Brief -- showing Bulled's discrimination between those persons who wronged him personally and the remaining law enforcement community. In reality, the State draws out the testimony showing Bulled's reluctance to testify for fear of retaliation, traditionally a sign of reliability, not bias.

The State also attempts to create inconsistencies in Mr. Beverly's testimony to support the claim of "poor memory." In fact, each discrepancy is inconsequential; Beverly clearly testified to the substance of the misconduct -- the planting of

the bullet in the sifter, the conversations among correctional officers on the subject of fabricating evidence (also mentioned by Bulled), and the presence of the plainclothes individual (also mentioned by Bulled). It has yet to be explained what motive Beverly has for telling anything but the truth and how it is that his supposed "poor memory" detracts from his clear recollection of the planting of evidence. The Circuit Court has not a whit of evidence to rest its off-handed rejection of his testimony.[9]

The State incredibly argues that it did not actively conceal the identity of the inmate-trustys until the last moment before trial. Yet those witnesses were not on any witness list and defense counsel was forced to hold three separate depositions over the course of a month to get a complete set of names and last known addresses. The facts speak for themselves.

The State further supposes that no documentary evidence cast a pale over the citrus grove bullet, citing the colloquy between the Assistant State Attorney and Alton Evans in which an explanation for the three day gap in the bullet's custody was hypothesized. Mr. Evans admitted he had no recollection that the hypothetical explanation applies to the citrus grove bullet (R. 140, 143-44) and his testimony at trial (TT at 1341-42) is

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[9] The State reveals its position in its unprofessional swipe that the Circuit Court was justified in rejecting "sixteen-year old recollections arrived at after discussions with Zeigler's attorneys." Answer Brief at 20. The State implies misconduct by appellant's attorneys without a scintilla of evidence to support its assertion. The papers of this Court are no place for the State to lodge a baseless charge against the integrity of opposing counsel. The desperation of this tactic speaks volumes concerning the merits of the State's defenses.

consistent with a document (D. Exh. No. 1) that states that he first received the bullet three days after it was allegedly found. The State has not accounted for the missing three days.

In short, the record does not support the Circuit Court's rationale for disbelieving the witnesses and it provides affirmative reasons to question the trial testimony of the responsible law enforcement officer. The Circuit Court's decision to prefer the cold record of that trial testimony without personally evaluating the officer's credibility is not supported by substantial evidence and therefore must be reversed.

CONCLUSION

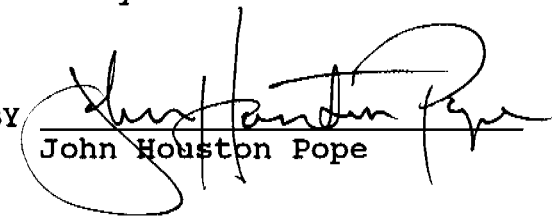
For the reasons stated herein and in appellant's Initial Brief, relief should be granted in the forms stated in the conclusion to the Initial Brief.

Dated: January 15, 1993

Respectfully submitted,

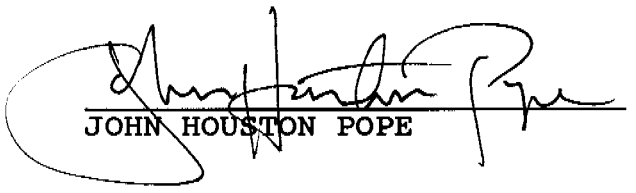
Dennis H. Tracey, III
John Houston Pope
Davis, Markel & Edwards, P.C.
100 Park Avenue
New York, New York 10017
Telephone: (212) 685-8000

Attorneys for the Defendant.

BY 
John Houston Pope

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail to Kellie A. Nielan, Assistant Attorney General, 210 N. Palmetto, Suite 447, Daytona Beach, FL 32115, this 15th day of January 1993.



JOHN HOUSTON POPE