IN THE SUPREME COURT OF FLORIDA

CASE NO. SC99-67

STATE OF FLORIDA

Appellee,

v.

JOHN B. VINING

Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT FOR ORANGE COUNTY,
STATE OF FLORIDA

APPELLANT'S REPLY BRIEF

TERRI L. BACKHUS
Florida Bar No. 0946427
Backhus & Izakowitz, P.A.

Post Office Box 3294
303 South Westland Ave.
Tampa, FL 33601-3294

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Vining's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. After holding an evidentiary hearing on very limited issues, the circuit court denied relief on Mr. Vining's convictions.

The following symbols will be used to designate references to the record in the instant causes:

"R." – record on direct appeal to this Court;

"PC-R."- record on 3.850 appeal to this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Art. V, Sec.12(b) Florida Constitution 3

ARGUMENT IN REPLY

ARGUMENT I

THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS[1]

The State insists that Mr. Vining is improperly "cloak[ing]" his Gardner v Florida, 430 U.S. 349 (1977) violation as an ineffective assistance of counsel claim. See, State's Answer at page 33. However, the Court's direct appeal opinion in Vining v. State, 637 So. 2d 921, 927 (Fla. 1994) plainly points out all of the instances in which defense counsel should have been on notice that Judge Baker was conducting his own investigation. In each of these instances, counsel ineffectively failed to object.

This Court failed to consider the Gardner claim on direct appeal because "we find that this issue is waived for purposes of appellate review as defense counsel never objected to the court's consideration of this material." Vining v. State, 637 So. 2d 921, 927 (Fla. 1994). In its brief on direct appeal, the State conceded that defense counsel failed to object to the judge's actions. See, Appellee's Brief at page 14 ("No objection to the viewing of such materials was ever raised below by defense counsel at the penalty phase, sentencing, or

[1]Because the ineffective assistance of counsel claims and Gardner claim share common issues and argument, Mr. Vining has combined the claims for the purposes of reply.

any time prior thereto"); Id at 15 ("The letters of the trial judge and the record demonstrate clear knowledge on the part of defense counsel of the judge's undertaking").

Mr. Vining's case was the trial judge's first and only death penalty case that had proceeded completely through sentencing phase (PC-R. 123). In his Initial Brief, Mr. Vining cited to cases in which Judge Baker had been the subject of contentious writs and motions for his conduct. See, Rollins v. Baker, 683 So. 2d 1138 (5th DCA 1996) (on writ of prohibition ex parte communications between judge and wife's counsel, together with judge's comments at motion to compel hearing were sufficient to create a well-grounded fear of lack of impartiality); Time-Warner Entertainment Company v. Baker, 647 So. 2d 1070 (5th DCA 1994)(judge had complied with requirements for discussing case with expert when he gave notice to the parties and afforded a reasonable opportunity to respond. See also, dissent by Judge Dauksch with opinion); Lowman v. Baker, 595 So. 2d 1121 (5th DCA 1992)(on a petition for writ of prohibition while denied on appeal dissenting opinion by Judge Dauksch "It is obvious to me that the circuit judge who is requested to recuse himself is personally affronted by the actions of the lawyer for the petitioners. That circumstance gives an appearance of less-than-objective

attitude by the judge toward the lawyer which may affect the petitioners and their perception of the judge's fairness.").

Despite warnings by various courts, Judge Baker intends to continue, without apology, his *ex parte* investigations.[2] Currently pending before this Court is a Notice of Formal Charges filed by the Florida Judicial Qualifications Commission in Inquiry Concerning A Judge, No. 00-319, SC00-2510. This notice was filed by a vote of at least five members of the Judicial Qualifications Commission that probable cause was found under Rule 6 of the Rules of Florida Judicial Qualifications Commission, as revised and Article V, Section 12(b) of the Florida Constitution. See, Attachment A.

In December, 2000, the Judicial Qualifications Commission instituted formal proceedings against Judge Baker for his conduct in the Universal Business Systems, Inc. v. Disney Vacation Club Management, Corp. 2000 WL 905248 (Fla. 5th DCA 2000). In that case, Judge Baker consulted without disclosure to counsel or the litigants that he made inquiries of several

---

[2]In a February 4, 2001, *Orlando Sentinel* article Judge Baker is quoted as saying: "The lawyers are not interested in the judge having a full and complete and accurate understanding of the subject. They're interested in the judge seeing it their way." "Do you say a judge is bound and limited to what he or she sees in the courtroom? That's nonsense because it means the dumbest judge is the best, it exalts ignorance. It exalts subordination. It's saying judges should act dumb and stay dumb." See Attachment B.

computer consultants and experts concerning issues at trial. As a result of his "research," he reduced a jury award of damages to a nominal amount.[3] The disclosures to counsel were made for the first time in a memorandum explaining the reduction of damages.

On appeal, the Fifth District Court of Appeals reversed Judge Baker's ruling in part because he had improperly considered information gleaned from *ex parte* communications in reaching his decision to override the jury's verdict.

In the Notice of Formal Charges, the Judicial Qualifications Commission cites violations of Canons 1, 2, and 3 of the Code of Judicial Conduct and suggests that Judge Baker's conduct "impair[s] the confidence of the citizens of this state in the integrity of the judicial system and as a judge, constitutes conduct unbecoming a member of the judiciary. If found guilty, Judge Baker could be determined to be unfit to hold the office of a judge or warrant discipline including removal from office and discipline as an

---

[3]Judge Baker did the same thing in Mr. Vining's case. He refused to find the non-statutory mitigating factor that Mr. Vining was a good father based on an extra-record deposition of one of Mr. Vining's family members. He also used Det. Ferguson's deposition and the Seminole County Probate records to support his finding of the aggravating circumstances and ultimately sentencing Mr. Vining to death. Judge Baker's conduct here is more egregious than cutting a jury's award in a civil case.

attorney. See, Inquiry Concerning A Judge, No. 00319, SC00-2510. Fortunately, this is a civil case that only involves the loss of money. In Mr. Vining's case, it can result in the loss of his life.

Like the Universal Business Systems case, Judge Baker went even further in Mr. Vining's case. Judge Baker consulted outside experts (Dr. Steve Jordan, Dr. Hegert), read depositions not entered into evidence by the parties, asked for and received the only copy of an autopsy report on the victim, travelled to the crime scene for a viewing, asked to review the Seminole County probate records of the victim, and even went so far as to rely on his prior experiences with self-hypnosis. In granting a post-conviction motion to disqualify, Judge Baker angrily insisted that he did nothing wrong in relying on evidence not presented at trial.

> ...Having granted the motion, I strongly take issue with premise of the motion for disqualification that favors a less informed or uninformed judiciary.
>
> One of the most common and recurring criticisms of our American legal system is that we claim to exalt juries and rely on jurors to make the hard, heavy decisions, but whatever we lawyers and judges say, our rules and conduct show we do not trust juries. Mark Twain wrote (in Roughing It, chapter 48) that jury trials place a "premium on ignorance and perjury." As he saw it, in court witnesses are sworn to "tell the truth, the whole truth and nothing but the truth," but lawyers and judges apply rules to testimony for the sole purpose of

preventing witnesses from following that oath.

> Although few have been as sardonic as Twain about it, there can be no doubt it is the purpose of rules of evidence to keep evidence away from juries (see, e.g., Fla. Stat. 90.402 and 403). By all accounts, rules of evidence were developed out of the fear that jurors cannot consider and weigh ordinary sources of information, such as the character of parties, prior crimes, privileged information and hearsay, and still reach a fair verdict.

(PC-R. 813-14).

The judge then went on in his order granting disqualification to admit that he had conducted an outside investigation but insisted that he had informed defense counsel of his investigation in open court (PC-R. 817-821). He then admonished counsel for making a motion to disqualify:

> Counsel for defendant Vining is making the same claim for attorneys in capital cases–that attorneys are there to police the judge and keep the judge from pursuing any independent research and investigation, even when the judge fully discloses what he or she is doing. That is an awesome arrogation of power to attorneys over judges in these extremely serious cases. Such policing of judges by attorneys is wholly unprecedented and totally unworkable, besides being contrary to the pursuit of knowledge and information as needed to help judges make appropriate judicial decisions.

(PC-R. 821).

Regardless of Judge Baker’s disdain for the rules of evidence and procedure, the fact remains the judge was still charged with following the law. That means he was restricted in

considering that evidence which was presented at trial and the evidence that was adversarily tested by both parties. That did not occur here. As a result, Judge Baker acted as a second prosecutor to convict Mr. Vining.

Incredibly, the State contends that Judge Baker did not conduct an independent *ex parte* investigation into the facts of the case. However the sentencing order and letters written to counsel after the sentencing phase were clearly evidence that Judge Baker was having *ex parte* consultations with experts and retrieving extra-record material.[4] He admitted as much at the evidentiary hearing. The State also suggests that the Judge's conduct was acceptable because Judge Baker testified that he "did not want to overlook anything that might make the case more clear and his decision more appropriate" (R. 2575, 2622, Defense exhibit 7 and 8).

Regardless of the his motives, this is the same conduct Judge Baker has been admonished about before. Most attorneys would have objected as the civil lawyers did in the above cases. In Mr. Vining's case, defense counsel testified that

---

[4]The penalty phase occurred on March 7, 1990. The letter informing counsel of Judge Baker's reading of all the depositions, contacting Dr. Hegert to get the autopsy report not introduced at trial, driving to the crime scene, and getting the victim's probate records was written on March 14, 1990.

she did not know the extent of Judge Baker's investigation until the trial was over. In fact, Ms. Cashman testified to what she would have done had she known about the independent fact investigation of Judge Baker:

> Q. Would you have taken some kind of further action?
>
> MS. CASHMAN: Yes. I would have objected to the Judge going outside the record. It's a Gardner violation under the law. I would have needed to know what exactly he had read and viewed and done. I would have done additional research on it during the trial. I would have spoken with Kelly, probably gone back and talked to Mr. Durocher, my boss or our chief assistant, Mr. Lorincz, on a number of issues in the case. Would go back to the office and bounce it off other senior attorneys and get ideas and talk about what's the best way to handle the issue, what's the best way to preserve the issue, you know, what needs to be done, what sort of record needs to be made and then made a decision based on what information I had, what was best for my client and best for the case.
>
> Q. But because of the Judge's late discloser [sic], you didn't have that opportunity?
>
> MS. CASHMAN: **You can't object to something that's already happened**. As I stated previously, you know, we have a contemporaneous objection, we're all in - - because I wasn't given notice and the opportunity to be heard before it happened, all I could do was make sure that the letter was made part of the file, and it could be addressed on appeal.

(PC-R. 189-190)(emphasis added).

The State mischaracterizes the tenor of the defense attorney's testimony at the evidentiary hearing. Ms. Cashman and Mr.

Sims never testified that they did not object to Judge Baker's investigation because it was in their best interest to keep him on the case. State's Answer Brief at page 37-38.

To support this argument the State relies on a letter from Lou Lorincz, the Chief Assistant at the Public Defender's Office at the time of trial as proof that the defense attorneys would not recuse Judge Baker despite his misdeeds. This is misleading.

Counsel filed a motion to strike the letter from consideration by the Court because it was never properly authenticated or relevant to the issues on which Mr. Vining was granted a hearing. See, Reply to State's Post-Hearing Memorandum. The State relied on its exhibit 16, a letter from Louis Lorincz, the chief assistant public defender to Ms. Cashman that discusses a **pre-trial** Interstate Agreement on Detainers issue. This was **before** any information about the Judge Baker's extra-curricular activities could possibly have been discovered.

Contrary to the State's Answer Brief, Mr. Lorincz was **not** a member of the defense team nor was he privy to all of the facts of Mr. Vining's case. More importantly, the letter dealt with pre-trial matters on a Interstate Agreement on Detainers. It had **nothing** to do with the defense team's

decisions or Judge Baker's *ex parte* investigation.

As counsel argued at the close of the evidentiary hearing, not only was the use of this exhibit a blatant misrepresentation of the record, but it was an attempt to persuade the lower court of facts that were not properly in evidence. State's exhibit 16 was never authenticated by any witness at the evidentiary hearing.

At the evidentiary hearing, undersigned counsel objected twice to the admission of this letter because it was irrelevant to the hearing issues. Judge Bronson agreed and twice sustained the objections. It was irrelevant then and is irrelevant now. It is still unknown why the letter was allowed into evidence at the close of the hearing over counsel's objection.[5]

Neither Ms. Cashman nor Mr. Sims testified that they discussed recusing Judge Baker at any time during trial. Neither said that they would have kept Judge Baker had they known about his extra-record investigation. The State has

[5]Postconviction counsel asked to strike State's exhibit 16 because it was erroneously allowed into evidence at the close of the hearing without authentication. Counsel forewarned the lower court that if the inadmissible letter was not stricken, the State will continue to use this improperly admitted piece of evidence against Mr. Vining when he was unable to challenge the authenticity of the document. Apparently, counsel's fears have been realized. This document should be stricken from the record as irrelevant and inadmissible.

improperly taken Mr. Sims' statement that the judge was receptive out of context and suggested that the defense attorneys would not have recused Judge Baker if they had known about his extra-record investigation. Neither attorney said this and the State can point to no record citation to support its blatant attempt to distort the facts.

Even if defense counsel had testified that they would not have recused Judge Baker, the decision would have been unreasonable based on the testimony of expert witness, Chandler Muller. The State argues that Mr. Muller's testimony cannot be relied upon by this Court because general opinions by another attorney unfamiliar with the case or defense strategy should merit even less weight than an attorney who admits that he was ineffective. See, State's Answer Brief at page 44. However, postconviction counsel was not allowed to ask questions of Mr. Muller about the specifics of Mr. Vining's case. His testimony was offered to show the community standards of attorney performance in 1990 in Orange County. It was the Assistant State Attorney who asked Mr. Muller about the specifics of Mr. Vining's case, not the defense.

Judge Bronson ruled his testimony admissible and considered it. The State offered nothing to rebut Mr.

Muller's conclusions. Therefore, his testimony is properly considered by this Court.

Mr. Muller testified that a decision not to recuse a judge who conducted an independent investigation of the facts would have been below community standards for reasonably competent counsel in 1990.

> THE COURT[Judge Bronson]: ...Could I just find out from you personally if you are aware of any situations like this in which a judge in a case of this magnitude was complained about or accusations were made that he or she was conducting independent investigation which would have undermined the integrity of the trial?
>
> MR. MULLER: Judge, I'm not specifically aware of a specific case, but I'm aware where a lawyer was confronted with anything that would be an ex parte introduction of evidence that fundamentally would be something lawyers should have objected to and moved to strikes [sic] and move to recuse.

(PC-R. 303-304).

During cross-examination, Mr. Muller testified to the prejudicial effect of Judge Baker's impermissible conduct on the jury.

> MR. LERNER: Now, you're talking about you gave an answer and I didn't write it down verbatim, I'm not a fast writer, but you said something about unless there was a crucible where the material testified to, cross examination referring to outside information, the jury verdict is unreliable?
>
> MR. MULLER: Yes.
>
> MR. LERNER: That would only be if that information actually made it to the jury, is that correct?

> MR. MULLER: No, the information might not make it to the jury. For example, you could have a case where a court has proffer during trial of an alleged eye witness to a crime and the court rules that person could testify because they have not been hypnotically induced, and then the court could make a comment, by the way, I know about this, and proceed to talk about things that were the product of the court's own investigation.
>
> If the lawyer at that point did not move for mistrial or move to strike that, by omission the jury would get unreliable information, because the lawyer, for example, if the judge let that witness testify, may not have cross examined a witness about relax and recall as opposed to hypnosis, and that type of thing, and the jury may never have heard of it.
>
> MR. LERNER: You know the comment on the record that would be reviewed is part of the issue being considered?
>
> MR. MULLER: I guess in your hypothetical, if the court made that on the record and the lawyer did not move for a mistrial at that point, training would have dictated any reasonably competent lawyer would have done that, and if a lawyer didn't do that, that would be outside the training.
>
> (PC-R. 309-310).

In addition to Judge Baker's *ex parte* investigation, defense counsel failed to cross examine the witnesses on the fact that they had been "relaxed and recalled." The issue of whether or not the witnesses had been hypnotized was hotly-contested issue. The trial judge, relying on his own experience with hypnosis, denied the defense motion to suppress the post-hypnotic identifications by the witnesses

(R. 1781). Trial counsel did not object to the judge's consideration of extra-record information nor did they attempt to impeach the witnesses on the fact that they had been "relaxed and recalled." Ms. Cashman felt that she was not allowed to impeach the witnesses on the fact that they had been relaxed to enhance their testimony (PC-R. 348-349). However, nothing in the record on appeal reflects that Judge Baker forbade defense counsel from cross-examining the State's key witnesses on the fact that they had been "relaxed" by the Orange County Sheriff's Department hypnotist. The State concedes this fact at page 43 of its Answer Brief. However, the State does not believe this omission was prejudicial, even though Mr. Vining's jury never knew that the alleged eye witnesses, who were the only people who placed Mr. Vining with the victim, had been subjected to a "relax and recall" session complete with Chevault's Pendulum.

Mr. Muller's unrebutted testimony proved the prejudice that Mr. Vining suffered from defense counsel's failure to object and the trial court's interference in considering information that was not before the jury. According to the testimony of Chandler Muller, the expert capital educator and litigator, these omissions fell below the community standards for reasonable attorney performance in 1990.

The fact remains that neither defense counsel testified to any strategy or tactic for not recusing Judge Baker, nor did defense counsel have any tactical reason for failing to cross-examine the key state's witnesses on their "relaxation" sessions.

The State suggests that there is no prejudice to Mr. Vining because the jury did not see the improper autopsy report and probate records that Judge Baker read. The State also argues that the unauthenticated letter from Chief Assistant Lorincz stating not to recuse Judge Baker because of a pre-trial Interstate Agreement Against Detainer issue proves the defense attorneys would not move to recuse Judge Baker because he was a favorable judge.

This is a simplistic view. Ms. Cashman testified that she would have objected and moved to recuse the judge had she know about his misdeeds **contemporaneously** with his *ex parte* investigation. Ms. Cashman testified that she was not aware of the March 1st and March 14th letters until after penalty phase had been concluded.[6] By then, trial counsel suggested it was too late to object because penalty phase was concluded.

---

[6]If the court finds that trial counsel should have known that Judge Baker was conducting an extensive *ex parte* investigation, then counsel was ineffective for failing to object.

Neither defense attorney testified that Lou Lorincz was a member of the team nor was he privy to the issues in Mr. Vining's case after the trial started.

More importantly, Judge Baker relied on the extra-record material to sentence Mr. Vining to death and to rebut mitigating evidence when no such evidence had been presented in open court. This is the essence of ineffective assistance of counsel and a Gardner violation. This Court has already held on direct appeal that the Gardner error was not properly preserved because of counsel's failure to object. Mr. Muller testified that it was below community standards in 1990 for the attorneys not to object. Judge Bronson clearly did not understand the dictates of Strickland v. Washington, 466 U.S. 668 (1984) and relied wholesale on the State's Post-hearing Memorandum.

Mr. Vining is entitled to a new trial. See, Porter v. State,
400 So. 2d 5 (Fla. 1981).

ARGUMENT II

THE BRADY CLAIM

Contrary to the State's argument, the evidence adduced at Mr. Vining's evidentiary hearing is material and proves his innocence. The State relies primarily on Strickler v. Greene,

522 U.S. 263 (1999) to suggest that Mr. Vining has not proved his claim. But if each step of the Strickler test is examined, it is obviously met by the evidence presented at Mr. Vining's evidentiary hearing.

Strickler espouses a three-part test of a Brady violation. The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. Strickler v. Greene, 527 U.S. 263 (1999).

A. The evidence was suppressed by the State;

At the evidentiary hearing, the State conceded that it did not disclose prosecutor's notes that indicate the victim did not have any "loose diamonds" in her possession on the day of the crime. It did not disclose an exculpatory FBI lab report that showed no match between polyester fibers found on the victim and the defendant's car. It did not disclose prosecutor's notes that show a time discrepancy in the victim's disappearance from the nail salon. It did not disclose the statement from Kevin Donner that he was not paying attention to the suspect at the time he was appraising the diamond. There was no suggestion that these statements and reports had been supplied to the defense. Therefore, one

prong of the three-part test has been conceded by the State.

B. The evidence was favorable to Mr. Vining;

1. Detective notes on Ms. Ward.

At the evidentiary hearing, Mr. Vining proved that the prosecutors failed to disclose exculpatory evidence that was material and could have been used to impeach the key state witnesses testimony regarding the motive diamond and the descriptions and identifications of Mr. Vining.

> Q: In your estimation, who were the critical state's witnesses in this case?
>
> MR. SIMS: Well, I cannot tell you names. I've not looked at a file on this case since 1990.
>
> I do know that there were these relax and refreshed eyewitnesses that were critical, I believe two in a jewelry store where Georgia had been earlier and where this Mr. Williams had been. So they were eyewitnesses that had been, I think, refreshed.
>
> There was circumstantial evidence in the way of the Cadillac that had burned and phone calls and the selling of a diamond some days after the death of Georgia.
>
> Q: So would any evidence that impeached the credibility of these particular witnesses have been important for you to get?
>
> MR. SIMS: **Absolutely.**
>
> Q: And would you have considered that exculpatory evidence that was beneficial to your defense and at least would have assisted in your impeachment of the state's case?
>
> MR. SIMS: **Anything that didn't - - anything that**

> **said I'm not sure I thought was so important in this case because we had an eyewitness who in my mind wasn't a very good eyewitness anyway because of the way they had gotten that information up. And specifically with respect to the gentleman who had been examining the diamond on that day and I think I did the cross of that individual.**

(PC-R. 48-49)(emphasis added).

This information was obviously beneficial to the defense.

The State argues at page 22 that defense counsel should have known that Ms. Ward was referring to the fact that there were no loose stones. However, Ms. Ward's statement to police does not indicate that there were "no loose stones" in the victim's possession. Ms. Ward said:

> It was two, it was two rings that he was interesting in purchasing...

State's Exhibit 5. No where in her statement does she say there were no loose stones. She only referred to the two rings that the suspect was interested in.

At the evidentiary hearing, Mr. Sims was testified that hypothetically he could have guessed from Ms. Ward's vague answer that the victim had no loose stones. But, under Brady he does not have to guess what the State withholds from the defense.

The State withheld the only plain statement of the witness that there were no loose stones.

Had Mr. Sims been in possession of this first statement

to police, he would have used it as impeachment.

Q: Do you recall what the significance of that [diamond evidence] was?

MR. SIMS: Well, shortly after the disappearance of Ms. Caruso, a diamond was sold by Mr. Vining. And although no one had ever done an actual diagram of the diamond that I believe Georgia was selling on behalf of this diamond shop down on Park Avenue, Columbia Jewelers, nobody had actually done a diagram per se but somebody was looking at that diamond saying, well, it seems very similar. They couldn't say it was exact is my understanding, my belief, my remembrance. And that was a loose stone.

And I remember that - - that that stone from Columbia Jewelers was a, I thought a pretty devastating link in a chain. But I never thought that they really proved that was the same diamond.

Q: All right. So any evidence that you had that showed that Ms. Ward,[sic] in fact, did not possess any loose diamonds on the day she disappeared?

MR. SIMS: ....I never had any evidence that Ms. Caruso didn't have any loose diamonds on the day in question.

Q: And do you recall whether or not the only diamonds that supposedly were examined by Mr. Donner were loose diamonds or diamonds that were mounted in rings?

MR. SIMS: Everything mounted, everything was mounted is what Donner had examined.

Q: So there was a question regarding whether or not she, in fact, possessed loose stones on the day that she disappeared?

MR. SIMS: Right.

Q: Would this not have been helpful to you in impeaching the credibility of Ms. Ward if she testified contrary to that?

MR. SIMS: Yes. If she testified contrary.

(PC-R. 54-55).

Contrary to Detective Nazarchuk's notes, Ms. Ward testified at trial that the victim did have "some loose stones" on the date of the crime (R. 1021). Either Detective Nazarchuk or Ms. Ward was lying on the witness stand. Either way, Mr. Vining is prejudiced and entitled to relief.

The withheld information in the police notes was the only affirmative statement that Ms. Ward had said there were no loose stones. Contrary to the State's argument, the Winter Park statement was not an affirmative statement that the victim had no loose stones. If Ms. Ward's statement were true, then the motive diamond was not in the victim's possession. No loose diamonds. No motive. However, Mr. Vining was denied the opportunity to examine Joann Ward about her observations because the state did not disclose this exculpatory information.

Contrary to the State's assertion, Mr. Sims testified that he would have used the information to impeach the credibility of the state's witnesses. The issue of the motive diamond was **the key issue** at trial.

Even after the State rested its case, Judge Baker still questioned the State's evidence. The judge asked to see the

victim's probate records from Seminole County to help make the State's case "more clear." (R. 2622; PC-R. 141). The records for Seminole County inventoried the jewelry that Ms. Caruso had consigned to her at the time she disappeared. The judge was trying to determine if the victim had loose stones in her possession on the date of the crime. She was the only witness who could have caused the judge to investigate (PC-R. 147).

The State's assertion that the motive for the crime was not the loose stone that was sold by Mr. Vining, but that the motive was "all the jewelry she had." State's Answer Brief at page 24. No record citation is included for this argument because it does not exist in the record on appeal nor was it proved at the evidentiary hearing. In fact, the failure of the State to link Mr. Vining to the 6.03 carat ring and the 3.5 carat ring was a weakness in its case. It was a weakness because there was no evidence Mr. Vining ever had possession of these items. The State's argument is a fiction created to cover up its failure to turn over favorable evidence to the defense. Under Brady, Kyles or Strickler, the State **must** disclose evidence favorable to the defense. It does not matter what fairy tale the State weaves around the issue, it still had a duty to disclose.

2. Detective notes on Mr. Donner.

The State's misconduct also extended to statements made by Mr. Donner, the gemologist who examined the jewelry brought into his shop by Ms. Caruso. Mr. Donner testified that Mr. Vining was the man with the victim on the day that she disappeared. He identified Mr. Vining from photographs before the trial and again in court.

Contrary to his trial testimony, Mr. Donner's initial statement to Detective Nazarchuk was that he was not "paying attention" to the victim and the suspect because he was examining the diamonds in a back room. He was one of the witnesses who had been "relaxed and recalled" in order to enhance his ability to identify Mr. Vining. Any evidence that rebutted Mr. Donner's ability to observe the victim and suspect was important to the defense. At the evidentiary hearing, Mr. Sims testified:

> Q. ....Do you recall having access to that particular note during your preparation for Mr. Donner's cross-examination?
>
> MR. SIMS: No.
>
> Q. Do you recall that there was an issue as to...the attentiveness that he was showing towards the suspect when he came in the door, would that have assisted you in your cross-examination of that witness?
>
> MR. SIMS: Yes, Ma'am.
>
> Q. Would that have assisted you in impeaching his credibility regarding any descriptions that he

may have subsequently given?

MR. SIMS: Yes.

Q. And if you recall, was this contrary to what his testimony was at trial?

MR. SIMS: I believe, and you may need to refresh me, I don't know, I believe the testimony was that, oh, I saw this individual and I asked, isn't it true that your job there was to evaluate the diamonds, that's what you were busy doing in the back room, you were evaluating diamonds.

And I believe the fellow said, no, but the door was open and I was watching him. And this note that says guy more interested in diamond and didn't pay much attention, in back with rings, would have been important in those two areas for two reasons, I think on that one, I could very well ask Mr. Donner and perhaps object to, I don't know, isn't it true that you told Detective Nazarchuk you were more interested in the diamonds and you were in back with the rings or certainly we could have called Nazurchuk back to the stand and said or actually got that out of Nazarchuk in cross-examination, isn't it true that Mr. Donner told you he was more interested in the diamonds.

***

Q. Okay. And would the note that was not given to you have helped in impeaching his testimony at trial?

MR. SIMS: Yes, Ma'am.

Q. And if you will look further in there that you did ask some questions concerning the attentiveness of Mr. Donner during the examination but did you have any hard evidence on which to impeach him?

MR. SIMS: I was unaware of any hard evidence that said anything different than - - I mean, nothing that I could show this witness to say isn't it true...

> - - you were more interested in the diamond, you were in the back with the rings, you never mentioned that you could see him the whole time while you did your work.

(PC-R. 49-52).

The State conveniently ignores the context in which this impeachment evidence could have been offered at trial. Before hypnosis, Mr. Donner viewed only an Identi-Kit of a possible suspect. Mr. Donner did not look at any photographs of the suspect until after hypnosis. In his deposition, post-hypnosis, he magically remembered another time that he might have seen the suspect weeks before the crime outside a jewelry store (Deposition of Kevin Donner, R. 2891).

At trial, Mr. Donner identifies Mr. Vining as the suspect. This identification was only made after he was hypnotized by the Orange County Sheriff's Office (R. 1156). Contrary to the Brady evidence that has now been disclosed, Mr. Donner told the jury at trial that he was able to see the suspect "during the whole time." "He was visible at all times; both of them were." (R. 1158-59). Defense counsel had nothing to impeach him with except inferences. The only hard evidence against him was withheld by the state. The State's interpretation of Strickler and Brady evidence was incorrect. Any Brady evidence that merely tends to impeach a critical state witness is clearly material. See, Smith v. Wainwright,

741 F. 2d 1248, 1256 (11th Cir. 1984); Brown v. Wainwright, 785 F. 2d 1457, 1465 (11th Cir. 1986). Judge Bronson misunderstood this prong of the test and was not familiar enough with the facts of the case to realize it.

3. The withheld FBI Crime Lab Report.

The State discounts the value of the FBI report that says a polyester fiber found on the victim's blouse did not match the polyester fiber found on the suspect or in his automobile. The State speculates that it was not clear that the challenged report was withheld from the defense. See, State's Answer Brief at page 26-27. These assertions are contrary to the evidence taken at the evidentiary hearing.

Both defense attorneys testified that they had not seen the FBI report (PC-R. 225, 355). The State cites an excerpt from Detective Nazarchuk's second deposition where he testifies about an FDLE report that says a fiber was sent to the FBI and came back inconclusive.

If defense counsel was given twelve pages of FDLE reports and a one page report from the FBI crime lab, it does not prove that it is the same report. The State failed to make that connection at the evidentiary hearing. There were many hair and fibers recovered at the crime scene. The State's argument is nothing more than a request to "take their word

for it" that the reports referenced by Det. Nazarchuk's deposition are Defense Exhibit 4.

Judge Bronson found that even though the FBI report showed negative results matching a fiber from the victim to Mr. Vining it was not significant because the victim lay in a deserted area for several weeks before her body was recovered. That is an argument the State could have made at trial had they turned over the report. However, Mr. Vining was not given the opportunity to present evidence that did not match his case because the State withheld it. This is the definition of exculpatory evidence. Judge Bronson did not understand the meaning of Brady. When the evidence did not point to Mr. Vining, it was exculpatory.

Contrary to the lower court's conclusion, the defense attorneys testified that the information was material, and would have cast the outcome of the case in serious doubt. See, Kyles v. Whitley.

In addition, there is no indication in the lower court's order that it did a cumulative analysis of this claim. The State's reliance on Middleton v. Evatt is misplaced. Middleton deals with an ineffective assistance of counsel claim that did not even address Brady.

The Middleton court specifically held that a cumulative

analysis is required under Kyles v. Whitley because the Kyles court erroneously addressed each claim separately.

Judge Bronson's analysis in Mr. Vining's case is more akin to Kyles than the Middleton case. Under Florida law, the lower court was required to consider the cumulative effect of the State's misconduct. Judge Bronson did not do that here.

C. Mr. Vining was prejudiced by the State's misconduct;

In his order denying relief on this claim, Judge Bronson found that even if Ms. Ward's testimony was severely impeached or even eliminated, other witnesses (Donner, Piantieri, Ryan and Jones) established that Mr. Vining was in possession of the diamond. Not only is this contrary to the record but the State's argument is speculation.

Pianteri testified that she consigned a loose stone diamond to Mark Ryan. Her testimony doesn't prove that the victim had the diamond on the date of the crime nor that it was even the same diamond that was examined by Kevin Donner. Ms. Pianteri could not testify that Mr. Vining had possession of the diamond she consigned to Mark Ryan. The same was true of Mark Ryan who, in turn, consigned the diamond to Ms. Caruso. He could not prove the evidentiary link between Ms. Caruso and the diamond on the date of the crime or a link between the diamond and Mr. Vining. Mr. Jones could only

testify that he bought a common yellow diamond of 1.13 carat weight from Mr. Vining. He could not connect that diamond to Ms. Caruso or to Ryan and Pianteri. The only common link was Kevin Donner, the person who purportedly examined the diamond that was ultimately cut down to 1.13 carats. It was his testimony that was highly suspect because he admitted in another statement that he was not paying attention to the suspect or Ms. Caruso. Without Joann Ward's testimony linking the loose stones with Ms. Caruso on the day of the crime, there was no other evidentiary link.

The withheld statements of Ms. Ward and Mr. Donner were so critical and material to the defense. Defense counsel armed with this impeachment evidence could have created a reasonable doubt in the jury's mind.

In the end, the jury never knew the victim had no loose stones with her on the day of the crime. They did not know the FBI could not match hair and fibers from the victim to Mr. Vining or his automobile. They did not know Mr. Donner gave a statement where he said he was not paying attention to the victim and suspect. They did not know that the times of the victim's departure from the hair salon were questionable.

This withheld information, in addition to the ineffective assistance of counsel in not informing them that the

eyewitnesses had been “relaxed and recalled,” and defense counsel’s failure to object to Judge Baker’s independent investigation of the case entitled Mr. Vining to a new trial. Anything less would be a fundamental miscarriage of justice.

CONCLUSION

Mr. Vining is innocent and submits that relief is warranted in the form of a new trial. At a minimum, an evidentiary hearing should be ordered on the claims he was not afforded an opportunity to present evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant’s Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 5, 2001.

CERTIFICATE OF COMPLIANCE

This brief is submitted in New Courier typeface in 12 point type.

_____
TERRI L. BACKHUS
Fla. Bar No. 0946427

Backhus & Izakowitz, P.A.
P.O. Box 3294
303 South Westland Avenue
Tampa, FL 33601-3294
(813) 259-4424

cc:

Mr. Robert Landry
Assistant Attorney General
2002 N. Lois, Ste. 700
Tampa, FL 33607