IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,266

DAVID ROSS DELAP,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT DAVID ROSS DELAP

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PREFACE

In this brief, the appellant, David Ross Delap, who was the defendant in the criminal proceedings below, will be referred to as "the defendant."

References to the record in this brief are identical to those used in the defendant's motion for post-conviction relief. References to the transcript of the defendant's first trial will be designated by the abbreviation T.R., followed by a Roman numeral transcript volume reference and page number reference. References to the transcript of the defendant's retrial will be designated by the abbreviation T.T., followed by a page number reference.

The defendant's Motion for Post-Conviction Relief, which is the subject of this appeal, shall be referred to as "the Motion", followed by the appropriate page number reference.

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STATEMENT OF THE CASE AND FACTS

On February 27, 1976, in the Nineteenth Judicial Circuit in and for Okeechobee County, Florida, David Ross Delap was convicted of the murder of Paula Etheridge and sentenced to death. This Court reversed the conviction since the State failed to produce a complete trial transcript for appellate review.1/ Delap v. State, 350 So.2d 462 (Fla. 1977). On remand, venue was changed to the Ninth Judicial Circuit in and for Orange County, Florida. The defendant was tried in the Orange County Circuit Court before Judge Philip Nourse, convicted on one count of premeditated murder, and sentenced to death. The judgment of conviction and sentence of death were affirmed by this Court. Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984).

On December 19, 1985, the defendant filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the Orange County Circuit Court. This motion sought the vacation of the defendant's conviction

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1/ Although the State failed to produce a sufficient transcript of the trial for appellate review, transcripts of pretrial depositions, hearings and the trial testimony of the State's two key witnesses, Dr. Hampton Schofield and Lem Brumley, survived. These transcripts were available to the defendant's attorneys upon his retrial.

and sentence of death due to (1) a denial of effective assistance of counsel, (2) violation of the right to effective cross-examination of adverse witnesses guaranteed by the Sixth Amendment of the Constitution of the United States, and (3) violation of the defendant's right to due process arising from the prosecution's suppression of impeachment evidence bearing upon the credibility of the only witness at trial to testify concerning the defendant's alleged oral confession. The defendant's motion for post-conviction relief presented the facts and arguments to the trial court which are summarized below.

THE POINTS RAISED IN THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

A. The First Trial Testimony of Dr. Hampton Schofield

The prosecution's principal witnesses at trial were Dr. Hampton Schofield, the Okeechobee County Medical Examiner, and Lem Brumley, the State Attorney's Chief Investigator for the Nineteenth Judicial Circuit. Motion, at 8. These witnesses presented the only testimony at trial directly probative of the crucial issue of premeditation. In addition to their testimony at the trial which resulted in the defendant's current conviction and death sentence, both Dr. Schofield and Lem Brumley had testified at the defendant's previous trial. Brumley had also given other sworn written and oral pretrial

statements concerning the details of his investigation of the case and the defendant's alleged oral confession.

During the defendant's first trial, the prosecution proceeded upon a theory of felony murder and upon the theory that the defendant was guilty of premeditated murder. However, at the conclusion of this first trial, the trial court ruled that the evidence presented was insufficient to support a felony murder basis for conviction. Motion, at 7. And, upon remand of the case from this Court, the prosecution pursued only a premeditated murder theory. Motion, at 9.

At the first trial of the defendant, and when the prosecution was still proceeding upon both felony murder and premeditated murder theories, Dr. Schofield testified that based upon his autopsy and medical examination of the decedent, he was unable to establish any most probable cause of death. Thus, during the defendant's first trial, the State was unable to present the jury with any definite cause of the victim's death. Rather, Dr. Schofield offered two possible causes of death, either strangulation or a skull fracture. When asked whether he could narrow down the cause of death, the doctor replied, "I would rather not suggest that one [cause of death] was more prominent than the other." T.R. II 2965. Motion, at 8. At the defendant's first trial, Dr. Schofield also testified under oath:

(i) That the only injury he had located upon the body of the decedent was a small injury or fracture to the bone of the skull (T.R. II 2957);

(ii) That the injury to the skull of the decedent which he had been able to locate was a type of injury which was consistent with a fall from a moving vehicle upon hard pavement. (T.R. II 2964); 2/

(iii) That he had also noted a collection o blood consisting of two parallel markings on the side of the decedent's neck, which had caused him to consider strangulation as a probable cause of death, but that "I have considered the probable cause of death was by strangulation, but I have no

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2/ At Defendant's first trial Dr. Schofield had testified:

Q. Could it [the hairline skull fracture] have easily resulted from a fall from a moving vehicle and striking the head on the pavement?

A. It could have been caused by any such blow to the head, whether falling from such a situation as you suggest.

Q. Now, this was a hairline fracture?

A. They are usually leading off into a trail - like, somewhat irregular. It is not like a blow to the skull that is caused by an object such as a hammer.

Q. This would leave a crunching - type fracture as opposed to a hairline fracture?

A. It usually does, yes.

TR. II 2968.

At this same time, Dr. Schofield also testified that the small hairline fracture he had been able to observe could not have been caused by a man's fist. TR. II 2969.

findings to corroborate or sustain it." (T.R. II 2958 and 2960). 3/ Motion, at 8-9.

The defendant's motion for post-conviction relief which is the subject of this appeal pointed out that mysteriously, at some point before Delap's second trial, which the State tried solely upon a premeditated murder theory, the State's evidence concerning cause of death changed from an uncertain cause, but most likely a blow to the head consistent with a fall to pavement, to virtually certain death by strangulation. No explanation was offered by the State for this new realization -- the body was not exhumed and re-examined, no new experts reviewed the autopsy reports, and no new evidence was uncovered.

3/ And, in the very next sentence of his direct examination testimony, Dr. Schofield further diminished strangulation as a cause of death.

> Q. Doctor, would you give, then, as the probable cause of death?
>
> A I have considered the probable cause of death was by strangulation, but I have no findings to corroborate or sustain it. I have definitely considered that the blow to the head caused the fracture allowing blood to enter inside the head. In the case of Paula, it would be one or the other and it could be one without the other and with the findings of the other case [one in which Dr. Schofield observed a fall to pavement causing death, see T.R. II 2964] and this recent case, that is highly probable.

TR. II 2960.

However, the defendant's trial counsel did not seek any explanation of this important change in the evidence or take any action to refute or exclude this new and changed testimony, which first came to light at the defendant's retrial. Motion, at 9.

B. The Second Trial Testimony of Dr. Hampton Schofield

At the defendant's second trial, based upon the very same autopsy and medical examination testified to previously, Dr. Schofield, still the Okeechobee County Medical Examiner, asserted for the first time that he could "present a logical cause of death." T.T. 349. Reversing his previous sworn testimony, Dr. Schofield stated upon direct examination that his medical findings from the autopsy of Paula Etheridge were "consistent with strangulation" and that "this person must have been strangled." T.T. 350-351. In fact, Dr. Schofield went so far in recanting his earlier trial testimony as to conclude for the jury's edification that strangulation "presents itself time and time again as being the most prominent cause of death." T.T. 384. Motion, at 9-10.

Defense counsel made absolutely no effort on cross-examination of this crucial witness to cast doubt upon the credibility of this damaging testimony which was essential to the State's premeditated murder theory, by bringing before the jury Dr. Schofield's previous and inconsistent sworn testimony

concerning the cause of Paula Etheridge's death. The jury which convicted the defendant of premeditated murder and sentenced him to death consequently never knew that Dr. Schofield had previously testified under oath that, based upon the very same medical examination of the decedent, "I have considered the probable cause of death was by strangulation, but I have no findings to corroborate or sustain it . . ." T.R. II 2958 and 2960. Motion, at 10.

Moreover, following Dr. Schofield's new and damaging testimony concerning strangulation as the most prominent cause of death, defense counsel made no effort to adjourn the trial to obtain expert testimony to refute this new conclusion, to move for a mistrial, or to take any action at all based upon the prosecution's failure to reveal this changed expert opinion concerning cause of death prior to trial. Id.

C. Lem Brumley

At trial, the most important member of the prosecution team and the single most important witness against the defendant was Lem Brumley, the State Attorney's Chief Investigator for the Nineteenth Judicial Circuit. Brumley was in charge of the investigation of the case, personally interrogated and arrested the defendant, and participated in handling the State's handling of the case before and during trial. He was the only witness who ever testified that the defendant had allegedly confessed to deliberately strangling Paula Etheridge.

Lem Brumley twice testified at trial concerning the defendant's alleged oral confession concerning the death of Paula Etheridge. At Delap's first trial, Brumley testified that the defendant had confessed to turning his car off State Road 710, taking Paula Etheridge from the vehicle, and beating her to death with some unknown object picked up from the side of the road. At the second trial, over the objection of defense counsel, Brumley was allowed to remain seated at the prosecution table throughout trial after the rule for sequestration of witnesses had been invoked. Seated at counsel table, Brumley heard Dr. Schofield's changed testimony concerning the cause of death. After Dr. Schofield's testimony, Lem Brumley took the stand and asserted for the first time in the history of the case that the defendant had confessed to not only beating, but to strangling Paula Etheridge. For the very first time, Brumley stated the defendant confessed that he had "choked her . . . until she was dead." T.T. 795. Motion, at 10-11.

D. Lem Brumley's First Trial Testimony

In pretrial statements and during his first trial testimony about the details of the defendant's alleged oral confession made after hours of interrogation, Brumley testified consistently that the defendant allegedly confessed to killing Paula Etheridge by striking her on the head with some unknown object picked up from the side of the road. As Brumley

testified under oath at Delap's first trial, the alleged confession concerning the moment of Paula Etheridge's death came out this way:

> He [Delap] turned off into Rollison Road and went a distance of approximately a hundred yards and stopped on the side of the road. He got out of the car and picked up something on the side of the road and started beating her in the head. He seemed not to know how many times he had hit her, but that when he quit, he checked her and she was not breathing. He knew she was dead . . . .

(T.R. II 2990). Motion, at 11. (emphasis added).

E. Lem Brumley's Second Trial Testimony

At the outset of the defendant's second trial, the defense sought to exclude Lem Brumley from the courtroom under the rule for sequestration of witnesses. The prosecution successfully resisted Brumley's exclusion from the courtroom. The prosecution argued not only that Lem Brumley was a distinguished law enforcement officer of twenty-six years standing, but also that he had made multiple, earlier statements under oath concerning the matters about which he would testify. The following argument over this issue took place before the trial court:

> MR. SCHWARTZ [for defendant]: It would be very crucial and prejudicial to have him [Brumley] sitting and listening to all of the other witnesses and then come in and testify as to the matter that we are certain he is going to testify to.

> MR. STONE [for the State]: Well, Mr. Brumley's testimony is in a deposition and in a previous trial. Mr. Brumley is an experienced law enforcement officer of twenty-six years. Mr. Brumley is not going to change his testimony today because of what he hears in the courtroom.
>
> They [the defense] had the opportunity [to examine Brumley] as this man was under oath five or six times. He is not going to sit here and change his story at trial.

(T.T. 332 and 325). Motion, at 12-13.

Yet, in spite of this assurance given by the State Attorney, Lem Brumley did change his testimony at trial, and in a manner which conformed his testimony concerning the cause of Paula Etheridge's death to that of Dr. Hampton Schofield, who also changed his testimony on this matter. And, in spite of the prosecution's invitation to cross-examination, neither Brumley nor Schofield was cross-examined or impeached concerning his previous, different testimony.

At Delap's second trial, Lem Brumley's testimony about the defendant's alleged oral statements concerning the circumstances of Paula Etheridge's death changed in a crucial and material respect. As if taking a cue from Dr. Schofield's new opinion that strangulation "presents itself time and time again as the most likely cause of death," Brumley testified for the very first time that the defendant allegedly confessed to strangling Paula Etheridge and choking her to death. Brumley's

second trial testimony on this crucial feature of the prosecution's premeditated murder theory went as follows:

> He [Delap] turned left on Rollison Road, and went down the road about a hundred yards and stopped. He had continued holding her around the neck, and he stopped, and he got her out of the car and picked up something on the side of the road, and he didn't remember what it was, and he did commence to beat her in the head with this object. He said he was strangling and beating her. He said he didn't remember how many times he had hit her, but after several blows, he stopped, and he checked her, and she was dead.

(T.T. 741).

* * *

> Q. [By Mr. Stone] Did he say what he did then after he got around the overpass on State Road 70, what happened then?
>
> A. [By Mr. Brumley] Yes. He said that he continued on and she was fighting and kicking and was having trouble holding the car on the road . . . . As they come over the overpass and went on State Road 710, a short distance, there is a filling station there, and this car that contained the women and children had pulled off the road and stopped at the filling station. Also there was a semi-trailer that was in front of him at that time. He said he started to pass the truck, and she was still putting up a fight by that time. He fell back behind the truck. He said that at this point, he was at Raulerson Road, and he turned on Raulerson Road and drove aways down there and stopped the car; that he got her out; that he was still holding her; that he got her out of the car and that he started beating her in the head with something . . . .
>
> He said he beat her and choked her there until she was dead.

(2d T.T. 794-79) (emphasis added). Motion, at 11-12.

E. The Impact of the Changed Strangulation Testimony on the Trial and Subsequent Proceedings

The new testimony concerning the alleged strangulation death of Paula Etheridge from Dr. Hampton Schofield and Lem Brumley affected all of the subsequent proceedings in which the defendant was convicted of premeditated murder and sentenced to death. Although defense counsel made no attempt to impeach Dr. Schofield and Brumley concerning the allegation that Paula Etheridge had been strangled, the defendant's attorneys were clearly aware of the importance of this testimony to the State's premeditated murder theory and demand for the death penalty. In fact, defense counsel chose to remind the jury of the importance of the strangulation testimony in final argument:

> Also, we have to look at the cause of death in determining whether first degree murder occurred, because the cause of death is probative in most instances of whether or not premeditation occurred. In other words, if we are talking about the layman's term of strangulation as a cause of death, I submit that would be probative of first degree murder, because in order to put the hand around the neck, or as we were talking about a ligature of some kind, a string or rope, and tighten it, I would submit that requires some kind of reflection that you actually are going to do something until the person doesn't respond any more.

(T.T. 937-38). Motion, at 13.

The members of the jury, during their deliberations in the guilt phase of the trial, requested that the testimony of only one witness be read back to them. That witness was Lem

Brumley. Moreover, the jury did not want to hear all of Brumley's testimony, but only the portion in which he had described the defendant's alleged oral confession. T.T. 1034-44. Motion, at 14.

In imposing the death penalty upon the defendant, the trial court based that sentence in part upon a finding of the statutory aggravating factor that the murder was extremely cruel, heinous and atrocious. This Court then affirmed this result based upon the strangulation death testimony of Dr. Schofield and Lem Brumley:

> Evidence of the victim's kidnapping, her struggle, her pleas for help, and the extremely cruel beating and strangulation death supports the finding that the murder was extremely cruel, heinous, and atrocious.

Delap v. State, 440 So.2d 1242, 1257 (Fla. 1983), cert. denied, ___U.S. ____, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984). (emphasis added). Motion, at 14.

F. The Failure of the Defendant's Trial Attorneys to Present Any Cohesive Defense to the Charge of Premeditated, Strangulation Murder.

In spite of the fact that Delap's trial attorneys were clearly aware of the devastating impact of the strangulation testimony of Brumley and Dr. Schofield on the life and death issue of premeditation, and even expressed this awareness to the jury, no expert medical testimony was presented on Delap's behalf to demonstrate the absence of evidence to support

Schofield's altered conclusion that Paula Etheridge's death had been caused by strangulation. Defense counsel did not present to the jury the fact that Dr. Schofield had previously testified that he had made no observations in his medical examination to corroborate or sustain a finding of strangulation. Upon being confronted with this new medical conclusion as to the cause of Paula Etheridge's death, Delap's attorneys did not even make an attempt to have the trial recessed to obtain any expert rebuttal testimony. Motion, at 15.

In fact, no witnesses or evidence at all were presented upon Delap's behalf at trial. Thus, Delap's attorney's were depending exclusively on cross-examination as the means for creating reasonable doubt concerning the State's case in the minds of the members of the jury. Id.

During trial, the defendant expressed concern and surprise to his attorneys that Dr. Schofield and Lem Brumley had changed their previous testimony to include statements that Paula Etheridge had died of strangulation and that he had allegedly confessed to strangling and choking her to death. The defendant repeatedly asked his attorneys to use the previous trial testimony of these witnesses to show the jury the discrepancies in their statements concerning the cause of Paula Etheridge's death. The defendant's trial counsel responded to these requests by advising their client that each trial was separate and that testimony from the first trial could not be used in the second trial. Motion, at 16-17.

Delap also asked his attorneys to permit him to take the stand and testify concerning the circumstances of Paula Etheridge's death. Delap's attorneys refused to countenance this request, and Delap reluctantly acceded to their advice. As a result, the jury never heard Delap's version of events which supported a finding that Paula Etheridge died accidentally and was not killed with premeditation. And, because Delap's attorneys failed to effectively cross-examine and impeach the strangulation testimony of Dr. Schofield and Lem Brumley, the jury also never knew of the inconsistencies and embellishments in that testimony, which became the crucial link in the prosecution's premeditated murder theory. Motion, at 17.

When the transcript of the defendant's trial is read as a whole, it is apparent that defense counsel did not offer any coherent theory of the case or line of defense which could be understood and evaluated by the jury. No explanation for Paula Etheridge's death was given to rebut Schofield's and Brumley's testimony, which had been presented to the jury without any serious challenge on cross-examination. No expert medical testimony was presented to show that Dr. Schofield had no basis from which to conclude that Paula Etheridge had been strangled to death or to change his prior opinion as to cause of death. This error was compounded by a failure to conduct effective cross-examination of Brumley and Schofield which would have laid bare the glaring inconsistencies in their testimony on cause of death and impeached their credibility. Id.

During his first trial, Delap testified that Paula Etheridge died when she fell from his car when it swerved from State Road 710 a main artery, onto a country road:

> She just started raving all over the place and as I was coming over the bridge, I remember looking over at her and I just - - I don't know if I was going on the bridge or not and my door flew open, I seen her try to jump out and I was going about seventy then at least.
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> * * *
>
> I turned off on 710, I was leaving the traffic and I figured I'd pull on the side of the road and Rollison Road came into sight and I decided just to pull off on Rollison Road. But I didn't, I was so messed up at that time I didn't really slow down the car and I turned on Rollison Road and I hit the gravel there and I started sliding and the door flung open and she fell out. And I stopped right there, right around the corner and got out and walked around the car where she was, she was messed up pretty bad, rolling around on the dirt, messed her up.
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> * * *
>
> Yes, I tried to help her up, she said something, she said don't move me or something. Leave me here, something like that. I said, I told her I couldn't leave her, that she would bleed to death, she was bleeding all over.
>
> * * *
>
> I got to the end of the road and she quieted down on 70, she quieted down and I checked her and stopped there at the end of 70 and checked and she was dead then. It scared me, I didn't know what to do. I mean being in prison one time, I was on parole and was afraid of what might happen. I didn't mean to do it, I didn't realize that to slow down she would not fall out.

(T.R. III 3188-89). Motion, at 15-16.

Delap's testimony at his first trial about the circumstances of Paula Etheridge's death is consistent with that of Walpole truck driver Willie Kelly, the last person to see the defendant's automobile. Kelly testified that on June 30, 1975, he observed an automobile matching the general description of the defendant's rapidly approach his truck and trailer. Kelly observed that a hand was thrust underneath the passenger door. (T.T. 507-08). He saw the car make a turn, and the passenger-side door came open. He also saw the driver leave the vehicle and walk around to the passenger side. (T.T. 509). Kelly testified that he did not see anyone else leave or fall out of the automobile, although he admitted that he was in such a position from his moving truck that he could not have seen someone fall from the car. (T.T. 515). 4/ Motion, at 3 and 16.

The defendant's testimony is also consistent with Dr. Schofield's first trial testimony about the hairline fracture he had observed. Yet, the defendant's attorneys insisted that he not testify, and none of this evidence was tied together and presented to the jury.

The motion for post-conviction relief filed below contended that the errors and omissions of defense counsel

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4/ Of course, this testimony of a disinterested eyewitness is also inconsistent with that of Lem Brumley, who testified that the defendant told him (a) that he was still fighting with the victim when his car approached and attempted to pass Kelly's semi-trailer; (b) that he fell back behind the truck and turned down Raulerson Road; and (c) that he stopped the car somewhere on Raulerson road and got out of the vehicle while he was still holding the victim. See page 11, infra. Defense counsel failed to tie up and point out these inconsistences in Brumley's testimony to the jury.

described above were so serious as to undermine confidence in correctness and fairness of the defendant's conviction of premeditated murder and death sentence and hence represented a denial of effective assistance of counsel under the standards articulated by the Supreme Court of the United States in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984). The defendant's motion further contended that these same facts established a denial of the defendant's right under the Confrontation Clause of the Sixth Amendment to effective cross-examination of crucial adverse witness pursuant to the holdings of Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

G. The Prosecution's Withholding of Impeachment Evidence Bearing Upon the Credibility of Lem Brumley

The defendant's motion for post-conviction relief also raised as a ground for a new trial the prosecution's failure to disclose the criminal activities of its chief witness, Lem Brumley, and of his consequent potential bias and interest in shaping testimony to insure that the defendant was convicted of premeditated murder.

At trial, the defense made no attempt to discredit Brumley's character or the motives for his testimony concerning the defendant's alleged confession. The prosecution relied heavily upon Brumley's long experience and reputation for credibility within the criminal justice system to permit him to remain in the courtroom and at the prosecution table throughout

trial as an exception to the sequestration rule. Motion, at 18-21.

Subsequent to the defendant's trial and conviction, on November 2, 1981, a federal information charged Brumley with participation in a narcotics smuggling conspiracy which was stated to have occurred before October 1, 1977 through July 31, 1981, the same time frame as Delap's trial. Motion, at 21, and Exhibit "A". On February 19, 1982, Brumley pled guilty to the charges against him, became a witness for the prosecution against his fellow co-conspirators, and was sentenced to a three-year term in federal prison. Motion, at 21-22, and Exhibit "B".

The defendant was not aware of Lem Brumley's associations and activities, since the prosecution never provided any information concerning these matters. Motion, at 22. The defendant's motion for post-conviction relief contended that since Brumley, as a key member of the prosecution team, was perfectly aware of his own criminal activities as a "mole" in the law enforcement community for a drug smuggling ring, his knowledge was imputed to the State Attorney. The prosecution consequently had an obligation to disclose the facts about Brumley's activities to defense counsel, since it constituted impeaching evidence whose disclosure and use during an effective cross-examination of Brumley probably would have resulted in the defendant not receiving a sentence of death for premeditated murder. The defendant's motion for post-conviction relief

contended that the prosecution's failure to disclose this information represented a violation of due process of law under the doctrine of Brady v. Maryland, 373 U.S. 83, 84 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Id.

The trial judge denied the defendant's motion for post-conviction relief summarily. The order denying the motion did not state a single reason for the decision. There were no references to the record supporting the denial of the relief sought by the defendant. No hearing of any kind was granted on the motion.

SUMMARY OF ARGUMENT

The defendant's motion for post-conviction relief is legally sufficient to state a claim for relief based upon denial of effective assistance of counsel, violation of the right to effective cross-examination of adverse witnesses and the prosecution's illegal suppression of material impeachment evidence. The trial court's summary denial of defendant's motion, without any sort of hearing at all, and without a statement of a single reason for the denial, is therefore a clear violation of Rule 3.850 which by itself would suffice to remand the case below for an evidentiary hearing. However, since the constitutional violations demonstrated in the motion for post-conviction relief are of such a basic, presumptively prejudicial nature, the defendant's conviction and sentence

should more appropriately be vacated, and this cause remanded for a new trial.

At trial, the two most crucial prosecution witnesses, medical examiner Dr. Hampton Schofield and the State Attorney's chief investigator, Lem Brumley, changed their prior sworn testimony to include for the first time in the history of the case statements that Paula Etheridge must have been strangled and that the defendant had confessed to choking her to death. This was the only evidence probative of premeditation in the prosecution's case against the defendant.

In spite of the importance of this testimony, the attorneys for the defendant failed to cross-examine or to impeach either Dr. Schofield or Lem Brumley concerning their previous and different sworn testimony, thereby causing irreparable prejudice to the defendant. This failure by the defendant's attorneys constitutes the denial of effective assistance of counsel and of the right to effective cross-examination of adverse witnesses guaranteed under the Sixth Amendment to the Constitution of the United States.

Upon becoming aware of the changed testimony of Dr. Schofield and chief investigator Brumley, the defendant's attorneys compounded their failure to conduct an adequate, effective cross-examination of these witnesses by failing to seek a mistrial or even a new trial due to the State's failure to advise the defense of the new testimony in advance of trial. In fact, the defendant's attorneys failed even to seek a recess

of the trial to permit evaluation of the new testimony and the retention of experts to review the basis for Dr. Schofield's changed theory about the cause of Paul Etheridge's death. Indeed, since no witnesses at all were presented on the defendant's behalf during the guilt phase of trial, the failure of the attorneys representing the defendant to conduct an adequate, effective examination of the key prosecution witnesses becomes even more significant and prejudicial.

At trial, the most important member of the prosecution team and the single most important witness against Delap was the State Attorney's chief investigator, Lem Brumley. Over defense objection, Brumley was allowed to remain seated at the counsel table throughout trial and therefore heard Dr. Schofield's changed testimony concerning the cause of Paula Etheridge's death and was prepared to modify his own testimony concerning the contents of the defendant's alleged oral confession accordingly.

Subsequent to trial, Brumley was indicted for participation in a narcotics smuggling conspiracy, convicted and sentenced to a federal prison term. Under the Brady doctrine, knowledge of Brumley's illegal activities is imputed to the prosecution, regardless of any actual knowledge of these facts by the prosecuting attorneys. The prosecution had a constitutional obligation to provide this information to the defendant's attorneys, since it was material to establishing that Brumley had a motive and interest in testifying in a manner

meant to ensure the death sentence avidly sought by the State to enhance his "crime fighter" reputation and thereby improve his chances for reduced sentence if caught and convicted for his criminal activity. Indeed, Brumley successfully used his success as a apprenhander of criminals to win a reduced sentence and early release from prison.

The State's failure to reveal information concerning Brumley's drug-smuggling activity and his unusual motivation to testify in a manner meant to convict Delap of premeditated murder constitutes a denial of due process of law and requires the vacation of defendant's conviction and sentence. Had this information been provided to the defense and used in an effective cross-examination of Brumley, the jury would most likely have discounted his rendition of Delap's alleged oral confession, and the defendant would not have been convicted of premeditated murder and sentenced to death.

ARGUMENT

Introduction: The Issue of the Legal Sufficiency of Defendant's Motion for Post-Conviction Relief

The defendant's motion for post-conviction relief was summarily denied by the trial court. No hearing at all was conducted upon the motion, much less any evidentiary hearing. The trial court entered a cursory order denying the motion, which stated no reason for the denial. The order did not mention or attach any portion of the files and records, which, in the trial court's opinion, showed conclusively that the

defendant was not entitled to relief. Consequently, one can only assume that the trial court based its denial upon a finding that the motion was legally insufficient on its face.5/

The motion for post-conviction relief filed below, however, was legally sufficient on its face. The motion satisfied all of the technical and pleading requirements of Rule 3.850 of the Florida Rules of Criminal Procedure. It also stated prima facie grounds for relief predicated upon the denial of the defendant's Sixth Amendment right to effective assistance of counsel, the right to effectuate cross-examination of adverse witnesses and his constitutionally protected right to due process of law arising from the prosecution's suppression of crucial impeachment evidence bearing upon the credibility and truth-telling capacity of the State's star witness at trial.

The law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the appellant is entitled to no relief. See O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984); Riley v. State, 433 So.2d 976 (Fla. 1983); Dempo v. State, 416 So.2d 808 (Fla. 1982); LeDuc v. State, 415 So.2d 721 (Fla. 1982).

5/ Fla. R. Crim. P. 3.850 provides in relevant part:

> If the motion and files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the order.

Rule 9.140 of the Florida Rules of Appellate Procedure also provides that where a motion for post-conviction relief is denied without a hearing, the order shall be reversed and the cause remanded for an evidentiary hearing, unless the record shows conclusively that the appellant is entitled to no relief. See Thames v. State, 454 So.2d 1061 (Fla. 4th DCA 1984). However, the record in this case shows that the denial of the defendant's rights to effective assistance of counsel and due process of law, whether considered singly or collectively, were of such a dimension as to be presumptively prejudicial to the defendant. Consequently, this Court should vacate the defendant's conviction and death sentence and remand this case for a new trial.

The Defendant's Motion for Post-Conviction Relief Was Legally Sufficient to State a Case for Relief Based Upon Denial of Effective Assistance of Counsel and the Right to Effective Cross-Examination of Adverse Witnesses

The errors and omissions of defense counsel which form the basis for the defendant's claim of ineffective assistance of counsel are of a particularly serious nature when viewed in the overall context of this case. The State's only two witnesses to testify on the issues of cause of death and premeditation, Dr. Hampton Schofield and Lem Brumley, inexplicably changed or embellished prior sworn testimony to support a new prosecution theory that the defendant had strangled Paula Etheridge to death. Notwithstanding the importance of this testimony and

that the issue of premeditation was one of life and death for the defendant, neither of these two witnesses was challenged on cross-examination with their previous inconsistent testimony.

That previous testimony established that the Okeechobee Medical Examiner had confessed that he had no observed basis to corroborate or sustain a finding that Paula Etheridge had died by strangulation. That previous testimony would have also established that despite the fact that Lem Brumley had, as was stressed by State Attorney Robert Stone, testified in a deposition and in a previous trial and had been under oath "five or six times" before his second trial appearance, he had never at any time mentioned in the entire history of the case that the defendant had confessed to strangling Paula Etheridge. The failure of defense counsel to impeach and attack the crucial testimony of the two most important witnesses in a premeditated murder case was ineffective assistance of counsel, and more. This failure also infringed the defendant's constitutional right to effective cross-examination of the witnesses against him. The conviction and death sentence entered below therefore bear the taint of constitutional error of the first magnitude.

The Sixth Amendment standards for determining the merits of a claim that a criminal defendant has been denied effective assistance of counsel have been set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2054, 80 L.Ed.2d 674 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to

> require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant in the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a break-down in the adversary process that renders the result unreliable.

See also Porter v. State, 478 So.2d 33, 35 (Fla. 1985).

The Supreme Court of the United States in Strickland v. Washington, supra, also provided guidelines for determining whether a criminal defendant had satisfied each of the criteria for establishing the absence of effective assistance of counsel. As to the first criterion in the two-part test, in considering whether defense counsel's performance was deficient, a court must have before it identified acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The Court must then determine whether in light of all of the circumstances, the acts or omissions identified by the defendant were outside the range of professionally competent assistance, or, phrased more precisely, whether counsel's conduct was not "within the range of competence demanded of attorneys in criminal cases." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064-66, 80 L.Ed.2d 674 (1984).

The second part of the test for a denial of the right to effect assistance of counsel protected by the Six Amendment involves the determination of whether the identified deficiencies in counsel's performance had been prejudicial to the defense. However, under the standard of Strickland v. Washington, a defendant is not required to show that counsel's deficient conduct more likely than not altered the outcome in the case. Id. at 2068. Rather, to establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. See also Wilson v. Wainwright, 474 So.2d 1162, 1163-64 (Fla. 1985). Moreover,

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating factors did not warrant death.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).

Additionally, prejudice is also presumed in certain Sixth Amendment contexts. It has long been recognized that there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Id., 104 S.Ct. at 2067; United States v. Cronic, 466 U.S. 688, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 674 (1984).6/ Since the motion and record demonstrates that the defendant was, at least constructively, denied the assistance of counsel at the most crucial portions of his trial, this case should be remanded by this Court for a new trial.

Defendant's motion for post-conviction relief amply demonstrates both that trial counsel committed serious errors and omissions outside the range of professionally competent

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6/ Examples of circumstances in which prejudice should be presumed mentioned in Cronic include the following: Denial of a right to speedy trial (Flanagan v. United States, 465 U.S. ____, 104 S.Ct. 1051, ____ L.Ed.2d ____ (1984), compelling defendant to appear at trial in prison garb (Estelle v. Smith, 425 U.S. 501, 504, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976)); pervasive influence of news media upon courtroom (Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975)); denial of Sixth Amendment right of cross-examination (Bruton v. United States, 391 U.S. 123, 136-37, 88 S.Ct. 1620, 1628, 20 L.Ed.2d 476 (1968)); pervasive influence of news media upon trial (Sheppard v. Maxwell, 384 U.S. 333, 351-52, 86 S.Ct. 1507, 1516-1517, 16 L.Ed.2d 600 (1966)); jury determination of both voluntariness of a confession and its truthfulness (Jackson v. Denno, 378 U.S. 368, 389-391, 84 S.Ct. 1774, 1787-1788, 12 L.Ed.2d 908 (1964)); confession induced through threat of mob violence (Payne v. Arkansas, 356 U.S. 560, 567-68, 78 S.Ct. 844, 849-50, 2 L.Ed.2d 975 (1956)); trial by judge who had interest in outcome (In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed.2d 942 (1955)). The Cronic court also indicated that the situation presented by the instant case, ineffective assistance of counsel amounting to a total denial of the right to counsel at trial, would also be presumptively prejudicial. 104 S.Ct. at 2044-2046, 2044 n.11.

assistance, and that, within a reasonable probability, the result of the proceeding below might have been different absent these errors and omissions.

Dr. Hampton Schofield and Lem Brumley were, without any doubt at all, the two most important witnesses for the State against the defendant. Dr. Schofield presented the only testimony and evidence in the case concerning the cause of death as supposedly revealed through the techniques of medical science. Lem Brumley was the only witness to testify that the defendant had confessed orally to the murder of Paula Etheridge. Brumley, through changed and embellished testimony, put the words into the defendant's mouth that he had allegedly admitted to choking Paula Etheridge to death. The record leaves no doubt at all that this crucial new addition to Brumley's trial testimony was made to corroborate and conform to Dr. Schofield's new strangulation cause of death theory. Both of these witnesses were allowed to change their testimony concerning cause of death and without challenge or impeachment or cross-examination with their earlier, different statements. This was a serious dereliction of duty by defense counsel at trial, which totally deprived the defendant of his constitutional right to effective assistance of counsel and to effective cross-examination of the witnesses against him. See United States v. Tucker, 716 F.2d 576, 585-86, 593 (9th Cir. 1983).

The motion for post-conviction relief at issue showed that the errors and omissions of the defendant's counsel

precluded the jury from independently judging the merits of the case. Indeed, the jury was totally denied the chance to judge the credibility of the State's two most key witnesses and indeed the only witnesses who offered testimony on the life and death issue of premeditation. Adequate, effective cross-examination of witnesses is "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347(1974). It is undeniable that relevant prior inconsistent statements, made under oath by prosecution witnesses, were never presented to the jury. The jury certainly should have been entitled to have that information presented in order to make an informed judgment as to the weight to place on the witnesses' testimony. United States v. Tucker, 716 F.2d 576, 593 (9th Cir.1983); Davis v. Alaska, 415 U.S. 308, 94 S.Ct.1105, 1111, 39 L.Ed.2d 347(1974).

Due to defense counsel's unprofessional errors, the jury that found the defendant guilty of premeditated murder and recommended the ultimate penalty of death in the electric chair never knew that Dr. Hampton Schofield had earlier testified, "I have considered the probable cause of death was by strangulation, but I have no findings to corroborate or sustain it." The jury never knew that Lem Brumley, despite multiple and exhaustive earlier descriptions of the defendant's alleged oral confession, had never previously testified or mentioned that the defendant had confessed to strangling the victim to death.

Indeed, this Court was not aware of any of these facts, either, when it affirmed the imposition of the supreme penalty upon the defendant. Such a situation can only be described as a shocking miscarriage of justice arising from a total breakdown in the adversary process.

Did the failure of defense counsel to impeach the new strangulation testimony revealed by witnesses Schofield and Brumley prejudice the defense to the extent contemplated under the standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984)? The answer is unequivocally yes. The motion for post-conviction relief and record in this case establish resulting prejudice as a dead certainty, much less the "reasonable probability" required to find a Sixth Amendment violation:

1. At the very outset of trial, defense counsel stressed his awareness of the prejudicial impact of altered testimony from Lem Brumley in seeking Brumley's exclusion from the courtroom during the testimony of other witnesses.

2. Lem Brumley was the only trial witness to testify concerning the defendant's alleged oral confession. Brumley was the only witness who testified that the defendant had confessed to strangling Paula Etheridge.

3. Dr. Schofield was the only witness who gave expert medical testimony concerning the cause of Paula Etheridge's death. He was the only witness who gave the jury a medical opinion that Paula Etheridge "must have been strangled."

4. The testimony of these two witnesses was not cumulative with that of any other evidence or testimony adduced at trial. It stood alone, unchallenged and unimpeached. The prosecution would not have had much of a premeditated murder case without this crucial testimony.

5. The changed strangulation testimony of witnesses Schofield and Brumley buttressed and corroborated each other. This changed testimony made the State's entire premeditated murder case smoothly consistent.

6. Defense counsel stressed to the jury on final argument that a finding of the cause of death "is probative in most instances of whether or not premeditation occurred" and that strangulation was probative of first degree murder.

7. The jury asked that the single portion of Lem Brumley's trial testimony concerning the details of the defendant's alleged oral confession be reread to them during their deliberations. The jury did not ask that any other portion of testimony be reread to them. Obviously, the jury listened to and considered this testimony intently during their deliberations. If the jury had concluded that Brumley lied about the defendant confessing to choking Paula Etheridge to death, what would they have concluded about the truth of his other statements and testimony about the defendant's alleged confession?

8. This Court, in affirming the sentence of death upon the defendant, ruled that the evidence presented at trial of the victim's strangulation death supported a finding of the

critical aggravating factor that the murder was extremely cruel, heinous and atrocious. Delap v. State, 440 So.2d 1242, 1257 (Fla. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984). The only evidence of the victim's "strangulation death" in the trial record of course came from the mouths of Dr. Hampton Schofield and Lem Brumley. This Court has consistently ruled that murder by strangulation is necessarily heinous, atrocious and cruel due to the nature of the suffering imposed and the victim's awareness of impending death, thus justifying a sentence of death in the electric chair. Doyle v. State, 460 So.2d 353, 357 (Fla. 1984); Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); Alvord v. State, 332 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). The case law reveals that this is a virtual per se rule established by this Court, permitting a trial judge to find a crucial aggravating factor to support a death sentence.

The prejudicial impact of the unchallenged strangulation testimony of witnesses Schofield and Brumley is consequently demonstrable in each and every phase of the judicial proceedings in which the defendant was condemned to death.

Since Strickland v. Washington, supra, was decided, this Court has had occasion to find ineffective assistance of counsel amounting to a Sixth Amendment violation arising out of an attorney's failure to adequately handle the life and death

issue of premeditation in a first degree murder case. In Wilson v. Wainwright, 474 so.2d 1162 (Fla. 1985), this Court found that appellate counsel for a death penalty defendant had deprived his client of effective assistance of counsel by failing to raise or discuss the sufficiency of the evidence to support the jury's findings of premeditation in two alleged murders. This Court described the effect of this error by counsel in the following terms:

> The decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case. If, in fact, the evidence does not support premeditation, petitioner was improperly convicted of first degree murder and death is an illegal sentence. To have failed to raise so fundamental an issue is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome.

Id. at 1164. Accord United States v. Tucker, 716 F.2d 576, 586 (9th Cir. 1983).

There is no difference in the fundamental importance of the issue of premeditation found by this Court in Wilson v. Wainwright, supra, and the crucial nature of that same issue here. Nor is there any substantive difference between the prejudicial impact upon a death penalty defendant of the blunders of appellate counsel in Wilson v. Wainwright and the prejudice arising from counsel's failure to cross-examine the State's only two premeditation witnesses with their prior inconsistent statements in this case. Moreover, the motion for

post-conviction relief in this case conclusively establishes not only a deprivation of the defendant's Sixth Amendment right to effective assistance of counsel, but also a violation of his Sixth Amendment right to effective cross-examination of the crucial witnesses against him. See Delaware v. Van Arsdall, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____, 54 U.S.L.W. 4347, 4350 (Decided April 7, 1986); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Finally, it is settled that the type of breakdown in the adversarial process that implicates the Sixth Amendment can either be some specific error and omission or it may involve counsel's performance as a whole. United States v. Cronic, 466 U.S. 668, 104 S.Ct. 2039, 2046 n.20, 80 L.Ed.2d 674 (1984). The deficient performance of defense counsel in this case implicates the Sixth Amendment both in the specific case of a failure to impeach key witnesses with previous testimony and an overall failure to present any coherent defense at all to the State's charge of premeditated murder.

Defense counsel put no witnesses on the stand to testify for the defendat during the guilt phase of the trial. The defense did not even request a Richardson hearing to deal with the new strangulation testimony of either Schofield or Brumley, which was revealed for the first time at trial. See Richardson v. State, 246 So.2d 771 (Fla. 1971).

The defense relied solely upon cross-examination of the State's witnesses to create a reasonable doubt in the minds of the jurors concerning the truth of the State's premeditated

murder case. Thus, no coherent explanation for the cause of Paula Etheridge's death was presented to the state's new strangulation theory which appeared for the first time at trial.

The motion for post-conviction relief points out that the defendant urged his attorneys to at least permit him to testify, as he had done previously at trial, to his account of Paula Etheridge's unintended, accidental death when she fell from his moving vehicle. However, defense counsel refused to countenance this request, and the defendant reluctantly accepted the advice of the professionals who were supposed to know better, to his lasting prejudice.

The jury therefore did not hear Delap's version of events and did not have the opportunity to learn how that testimony was corroborated by the testimony of semi-truck driver Willie Kelly, apparently the last person who saw Delap's car on the day of the incident in question, and who testified that he saw Delap's car slew from the main road and stop, causing the passenger-side door to come open.

Thus, the overall failure of the defendant's attorneys to present any coherent defense at all during trial underscores and highlights the egregious specific errors of counsel which also mandate the finding of a Sixth Amendment violation on this appeal.

The Supreme Court of the United States has held:

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the

> means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most precious, for it affects his ability to assert any other right he may have."

United States v. Cronic, 466 U.S. 668, 104 S.Ct. 2039, 2043-44 80 L. Ed.2d 674 (1984). (footnotes omitted).

The performance of defense counsel demonstrated in the motion for post-conviction relief and record in this case was so deficient and inadequate that, in effect, the defendant was not provided with assistance of counsel. Id., 104 S.Ct. at 2044 n.11. The denial of this basic constitutional right is presumptively prejudicial to the defendant. Hence, the defendant is entitled to a new trial with the effective assistance of counsel, much less to an evidentiary hearing on his motion for post-conviction relief. Id., 104 S.Ct. 2046-47. This Court simply cannot have confidence in the correctness and fairness in the result of the trial below as this matter now stands. Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985).

The Defendant's Motion for Post-Conviction Relief Was Legally Sufficient to State a Case for Relief Based Upon the Prosecution's Withholding of Material Impeachment Evidence.

The defendant's motion for post-conviction relief also stated a prima facie case for relief based upon the prosecution's withholding of crucial impeachment evidence concerning the credibility of its star witness, Lem Brumley.

The United States Supreme Court held in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) that "the suppression by the prosecution of evidence favorable to an accusal upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id., 83 S.Ct. 1196-97. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) subsequently extended the Brady doctrine to the suppression of evidence useful for impeachment purposes "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence.'"

In order to establish a violation of the Brady doctrine, a defendant must show (1) the prosecution suppressed evidence; (2) the suppressed evidence was favorable to the accused; and (3) the evidence was material. E.g., United States v. Blasco, 802 F.2d 1315, 1327 (11th Cir.), cert. denied., 464 U.S. 914 (1983); Ogle v. Estelle, 641 F.2d 1122 (5th Cir. 1981). All of these elements are satisfied in this case.

1. The Prosecution Withheld Evidence.

It has been recognized that a violation of the Brady doctrine occurs "[w]here the prosecutor fails to disclose purely impeaching evidence not concerning a substantive issue, in the absence of a specific defense request." United States v. Anderson, 574 F.2d 1347, 1353 (5th Cir. 1978); United States v. Walker, 720 F.2d 1527, 1535 n.5 - 1536 n. 5 (11th Cir. 1983), cert. denied, ____U.S. ____, 104 S.Ct. 1615 (1984).

The suppressed impeaching evidence in this case goes directly to the credibility and truth-telling capacity of the State Attorney's Chief Investigator and employee, Lem Brumley. Subsequent to the defendant's conviction and death sentence, which was based largely upon Brumley's description of the defendant's alleged oral confession, Brumley was charged by the federal authorities with participation in an illegal narcotics smuggling conspiracy which occurred prior to October 1, 1977 through July 31, 1981. The documents attached as exhibits to the defendant's motion for post-conviction relief reveal that Brumley pled guilty to the charge's against him, received a three year prison term, and turned into a witness against his co-conspirators. The prosecution failed to reveal the fact that Brumley was engaged in drug smuggling to the defense prior to the defendant's trial. Clearly, Brumley was a member of the "prosecution team" which prosecuted the defendant, and his own knowledge of these criminal activities is therefore imputed to the State and should have been revealed to the defense prior to trial. Clearly, the facts concerning Brumley's activities as a "mole" in the law enforcement apparatus for a narcotics smuggling ring was crucial impeachment evidence casting doubt upon his credibility and truth-telling capacity.

To establish that the prosecution suppressed evidence in violation of the Brady doctrine, the defendant need not establish that the particular attorneys prosecuting the case knew of Brumley's illegal activities prior to or at the time of trial. It is enough that a member of the "prosecution team,"

which the law defines to include both investigative and prosecutorial personnel (which obviously includes chief investigator - star witness Lem Brumley in this case) was aware of the suppressed evidence. Thus, in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the government's principal witness testified that he had not been provided with immunity from prosecution in return for his testimony. After trial, it was learned that a government attorney, other than the attorney who tried the case, had made such a promise. The Supreme Court of the United States ruled that the attorney's knowledge of the promise was, nevertheless, imputed to the prosecution. Failure of the prosecutor to disclose the knowledge inputed to him was consequently a due process violation.

In United States v. Antone, 603 F.2d 566 (5th Cir. 1979), the court applied the Giglio holding and relied upon the close cooperation between state and federal officials to impute the state investigators' knowledge of false testimony to the federal prosecutor. Moreover, the A.B.A. Standards for Criminal Justice, Discovery and Procedure Before Trial, which were a principal basis for the Supreme Court's ruling in Giglio v. United States, have also been relied upon in United States v. Diecidue, 448 F.Supp. 1011 (M.D. Fla. 1978), rev'd in part on other grounds, 603 F.2d 535 (5th Cir. 1979), a case which is instructive on the law which must be applied to the instant situation. The A.B.A Standards provide:

> The prosecuting attorney's obligations under this section extend to material and

> information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.

Id., 448 F.Supp. at 1017.

In Diecidue, the court reviewed and interpreted the prevailing case law and concluded that "the prosecutor is charged with the knowledge of any investigative member of the prosecution team who actually testifies in the case." Id. at 1017. (emphasis added). See also Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1977). See also Calley v.Callaway, 519 F.2d 184, 223 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976). (Brady holds "that there is an obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession or accessible to it in the interests of inherent fairness.")

This Court has also held that evidence withheld by state agents, such as law enforcement personnel, shall be imputed to the prosecution for purposes of establishing a due process violation. E.g., Antone v. State, 355 So.2d 777 (Fla. 1978), conviction aff'd on later appeal, 382 So.2d 1205 (Fla.), cert. denied, 449 U.S. 913, 101 S.Ct. 787, 66 L.Ed.2d 141 (1980). The Court of Appeal, Fourth District has restated the Florida law on this point as follows:

> Florida courts have uniformly held that a police agency's refusal to disclose materials is imputed to the prosecution, even when the prosecution has demanded that the subsidiary

> agency disclose the information and the police agency has refused to do so. In short, information within the possession of the police is considered to be in the possession of the prosecution. Antone v. State, 355 So.2d 777 (Fla. 1978); State v. Lowe, 398 So.2d 962, 963 n.1 (Fla. 4th DCA 1981) (Sheriff's office's fault imputed to State Attorney's Office); Hutchinson v. State, 397 So.2d 1001 (Fla. 1st DCA 1981). See also State v. Del Gauidio, 445 So.2d 605 (Fla. 3d DCA), review denied, 453 So.2d 45 (Fla. 1984) (State Attorney is responsible for evidence which is being withheld by other state agents, such as law enforcement officers, and is charged with constructive knowledge and possession thereof for discovery purposes).

State v. Alfonso, 479 1119, 1121 (Fla. 4th DCA 1985).

Application of the foregoing principles of law to the facts of this case confirm that knowledge of the suppressed impeachment evidence, Brumley's support of narcotics smuggling activities, was constructively in the State's possession. Brumley was the most important member of the "prosecution team", who was in charge of the investigation of the case against the defendant, personally interrogated and arrested the defendant, assisted the State Attorney with pretrial discovery and during trial, and who was also the key witness against the defendant at trial. Indeed, Brumley was the State Attorney's right-hand employee, not a representative of some distant or remote police agency. It is certainly no exaggeration to describe Brumley as the single most important member of the prosecution team which handled this case. Brumley's possession of material impeachment evidence is consequently imputed to the prosecution.

The Withheld Evidence Was Favorable to the Accused.

The suppressed evidence concerning Lem Brumley, the chief witness against Delap, would have been favorable to the defendant and would have affected the outcome of the trial if it had been revealed. The defendant did not attempt to make any serious attack upon Brumley's credibility or possible interest in testifying falsely at trial. Indeed, Brumley's credibility as a law enforcement officer of twenty-six years experience seemed impenetrable. Of course, during trial, Brumley did mysteriously and conveniently recall new and additional facts concerning Delap's alleged oral confession, which changed his prior sworn testimony to coincide with the changed testimony of medical examiner Dr. Schofield as to the cause of Paula Etheridge's death. It cannot be overlooked that this is a death penalty case. Brumley's testimony was not trivial or unimportant. Upon his words turned the issue of life or death for the defendant.

Brumley's trial testimony was obviously altered to come into perfect harmony with a "refined" prosecution case against the defendant upon retrial. However, if the facts of Brumley's illegal activities had been revealed by the prosecution, the defendant would have been able, through effective cross-examination, to discredit Brumley's testimony by establishing that he had more than a usual interest in ensuring Delap's conviction. As an experienced law enforcement officer, Brumley knew that his own potential sentence, if he was apprehended for his crime, would be reduced if mitigating

factors could be shown. Brumley knew that an impressive record as a "crime stopper" could serve this purpose. Therefore, anticipating the need to establish mitigating factors for possible future use, Brumley was directly benefited by Delap's conviction of premeditated murder, which was so badly desired by his superior, the State Attorney for the Nineteenth Judicial Circuit.

His calculated efforts were well rewarded. Out of a potential fifteen year sentence, Brumley only received a three-year prison term for participating in a narcotics smuggling conspiracy. Moreover, that sentence was subsequently reduced to two years based in part upon Brumley's "success" as a police officer. 7/ Had Brumley's unusual bias and interest in testifying in a manner designed to ensure Delap's conviction of first degree murder been known, his account of the details of the defendant's alleged confession would most likely have been rejected by the jury. This would most certainly have been true if the jury had also learned that Brumley's important eleventh-hour additions to the story of the defendant's alleged oral confession, which would also have been brought out in an effective cross-examination of this witness.

7/ Brumnley's knowledge of the usefulness of cooperation with the government is again demonstrated in that he took a plea, agreed to testify and obtained a reduced sentence. Even after receiving a reduced sentence for his crimes, Brumley used his leverage as a law enforcement officer to receive an early release. Indeed, as noted in correspondence from the United States Attorney's Office addressed to the Probation and Parole Office endorsing Brumely's early release, "he [] contributed his many talents as an effective law enforcement officer in the war against crime." See Motion, Exhibit C.

The Evidence Withheld by the Prosecution Was Material.

The third and final requirement for establishing a Brady violation requires a showing that the suppressed or omitted evidence was material. Prior to the decision of the United States Supreme Court last year in United States v. Bagley, ____ U.S. _____, 105 S.Ct. 3375, _____L.Ed.2d _____(1985), courts had applied varying thresholds for determining materiality which depended upon the facts of a given violation of the Brady rule. The standards for materiality thus varied, for example, according to whether (1) the prosecutor had not disclosed information despite a specific defense request; (2) the prosecutor had not disclosed information regardless of a general request or no request at all for all exculpatory information; (3) the prosecutor had actual or constructive knowledge that a conviction was based on false evidence. Id., 105 S.Ct. 3381-3383. Indeed, this type of violation - dependent approach was also taken by the former Fifth and Eleventh Circuits in defining the test for materiality where the prosecution had failed to disclose purely impeaching evidence not concerning a substantive issue, in the absence of a specific defense request. See United States v. Anderson, 574 F.2d 1347, 1353 (5th Cir. 1978).

However, in Bagley, the United States Supreme Court rejected varying tests to determine the materiality of suppressed evidence under the Brady doctrine in favor of a uniform standard based upon the test for determining prejudice

arising from ineffective assistance of counsel established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> [I]n Strickland v. Washington, ____U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at _____, 104 S.Ct., at 2068. the Strickland Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Ibid.
>
> We find the Strickland formulation of the Agers [United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)] test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is only material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, _____U.S. ____, 105 S.Ct. 3375, 3383-3384, _____L.Ed.2d____ (1985).

Neither the United States Supreme Court nor this Court has yet had occasion to determine the materiality standard for suppressed evidence in the context of the particular type of Brady violation involved in this case. Yet, it appears certain from a reading of the holdings in Strickland v. Washington and United States v. Bagley, supra, that a due process violation must be found when the prosecution, through any means, causes the suppression of any evidence which "within a reasonable

probability" might have affected the outcome of a criminal proceeding in favor of the defendant.8/

The suppression by the prosecution of the evidence of Lem Brumley's life and activities as a "mole" engaged in narcotics smuggling from within the law enforcement establishment is certainly sufficient to undermine confidence in either the correctness or the fairness of the result in the defendant's trial. Brumley's testimony concerning Delap's confession was the hub of the State's case. Like a magician pulling a rabbit out of a hat, the State pulled Brumley's new description of the defendant's confession out of thin air, and just in time to conform to the changed testimony of Dr. Schofield concerning he probable cause of Paula Etheridge's death. Clearly, if the defendant had been able to use the facts of Brumley's smuggling activity and his special bias and interest in ensuring his conviction of the specific charge desired by the State Attorney, Brumley's testimony about the details of the defendant's oral confession would have been discounted, and the defendant would not have been convicted of premeditated murder. This is especially true if the jury was also aware that Brumley had not ever previously testified that the defendant had allegedly confessed to strangling and choking

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8/ Significantly, in Bagley, the Supreme Court of the United States reemphasized its rejection of constitutionally difference treatment for impeachment and exculpatory evidence. Id., 105 S.Ct., at 3380-3381.

the victim to death. The record confirms that Lem Brumley was a bad cop, with a demonstrated, prolonged capacity for duplicity, and who probably perjured himself during the defendant's trial. The State's Brady violation therefore also entitles the defendant to a new trial, or at least to an evidentiary hearing upon his motion for post-conviction relief.

CONCLUSION

The trial court violated Rule 3.850 of the Florida Rules of Criminal Procedure by failing to conduct an evidentiary hearing on the defendant's motion. That motion was legally sufficient to state viable claims for relief. At the very least, the defendant should have been granted an evidentiary hearing on his motion. However, in this case, the record before the Court amply confirms that the deprivation of fundamental constitutional rights during the trial below was so inherently prejudicial that incurring further cost in litigating their effect in the trial court would be compounding waste upon injustice. We therefore suggest that this Court vacate the defendant's conviction and sentence and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by mail this 21st day of April, 1986 to Joan Fowler Rossin, Assistant Attorney General, Attorney for Appellee, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.

By: Gerry S. Gibson