IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,038

WILLIE MITCHELL, JR.,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, CRIMINAL DIVISION, IN AND FOR HILLSBOROUGH COUNTY,

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INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The instant appeal is taken from the Circuit Court's guilt phase denial of Mr. Mitchell's motion to vacate the judgment filed pursuant to Fla. R. Crim. P. Rule 3.850. The Circuit Court vacated Mr. Mitchell's sentence of death, but denied guilt phase relief. The Honorable Harry Lee Coe, III, found deficient performance occurred at both phases of Mr. Mitchell's trial, but concluded Mr. Mitchell had only been prejudiced at the penalty phase. This brief is limited to a discussion Mr. Mitchell's guilt phase claims which were denied by the Circuit Court. The State has cross-appealed the Circuit Court's grant of a resentencing. Presumably the State in its brief will set forth its claims of error and Mr. Mitchell will thereafter respond.

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

"R" -- Record on Direct Appeal to this Court;

"PC" -- Record on Appeal of the postconviction motion;

Unless otherwise noted, all references to exhibits are to defense exhibits introduced at the 3.850 hearing. All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be entirely appropriate in this case given the seriousness of the claims and the issues raised here. Mr. Mitchell, through counsel, respectfully urges the Court to permit oral argument.

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STATEMENT OF THE CASE

In the early morning hours of May 1, 1986, Elizabeth Oates was awakened by James Bivens, her god-brother, who informed her that an individual was lying outside and was "hurt." Bivens, who is a black male transvestite prostitute, told Ms. Oates that he had just been dropped off by a "date" (R. 42, 46).[1] Ms. Oates looked out of her window, but did not see Bivens' friend, but saw somebody lying in the parking lot (PC 803). Bivens asked Oates for some money. Oates then left to call the police. Upon Ms. Oates return to her house after calling the police, Bivens had left (R. 47).[2] In response to Ms. Oates call, the police found the body of Walter Shonyo. He had been killed by approximately 110 stab wounds. The fly of his pants was open and his pants were pulled down below the waist. Shonyo's pickup truck was later found parked approximately 1200 feet away from his body.

After hearing about the murder, Annie Harden, Willie Mitchell's cousin, contacted the Tampa Police Department during the early morning hours of May 2, 1986, and advised the police that she believed that Willie Mitchell may have committed the murder, (PC 845). On May 2, 1986, the police interviewed Annie Harden and other family members, Gloria, Jessie, and Regina Harden, all of whom

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[1]There was considerable amount of information about Mr. Bivens which did not reach the jury. Bivens was a male transvestite prostitute who operated in the area of the murder who once violently resisted arrest by biting the police officer in a manner similar to that in which the murder victim was bitten (PC 30, Exhs. 2, 3, 4, 5, 6). Bivens conducted his prostitution activities exclusively with white males in their vehicles. Bivens frequently did not reveal his real gender until after sexual activity was initiated. Bivens was armed with a knife during sexual encounters (Exh. 5). This was crucial information in light of the fact the victim, a white male, found by Bivens had prior to his death engaged in anal sexual activity and was stabbed to death.

[2]Bivens did not stay around to talk to the police. In fact Bivens was not located by the State until "shortly before the trial" (PC 39). So after telling Ms. Oates about the body, Bivens took off and was not found by the State until the trial six months later. Defense counsel was taken by surprise when Bivens showed up at trial (PC 38). Bivens, the person who defense counsel was suggesting was the most likely suspect was not deposed in advance of trial. In fact he was never talked to by defense counsel prior to his appearance at trial.

felt animosity towards Mr. Mitchell. A search of the Harden Residence, where Willie Mitchell was staying, and the surrounding neighborhood was conducted. The police recovered, among other things, a knife with a broken handle and a Seiko watch, both of which had been seen in Mitchell's possession, and a shirt matching the description of the shirt Mitchell had been seen wearing on May 1 (PC 800-10, 814).[3] Mr. Mitchell was arrested for murder and robbery the same day at the Harden residence.

Mr. Mitchell was charged by indictment with first degree murder and armed robbery on May 14, 1986 in the Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County. Silvio Lufriu was appointed to represent Mr. Mitchell. A jury trial was conducted on November 3-7, 1986.

The defense conceded that Mr. Mitchell had burglarized the victim's unoccupied truck and stole tools and other items in order to sell in effort to get money to purchase more crack cocaine. The defense asserted innocence as to

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[3]The shirt recovered was a "men's pullover white/blue shirt," (PC 810). The shirt matched the descriptions given by Jessie and Regina Laverne Harden to the police (PC 875-76). Annie and Gloria testified at trial that Mitchell's shirt was black (R. 79, 89). Gloria later recanted her trial testimony regarding the shirt. She testified at the 3.850 hearing, "It [Mitchell's shirt] was not soaked with blood, ... There was blood, drips of blood on his shirt. The face, around the mouth, he had a busted lip and he had blood like dripping out of his mouth, . . . The shirt was either white or light blue" (PC 299).

Gloria also testified at the hearing her prior statements that the shirt was soaked with blood had been suggested to her and to her mother (PC 300). "I told them there was blood on the shirt. I didn't tell nobody it was soaked in blood," (PC 303). She was convinced by police and Mr. Benito, "because you [Mr. Benito] told me that the shirt was soaked in blood and that the evidence you had found outside my house that night was Willie Mitchell's, and you also told me the teeth print on the man was Willie Mitchell's teeth print, so I was convinced that Willie Mitchell was the murderer." (PC 304). The shirt was white or light blue (PC 304). "It was no black shirt," (PC 307). "If the shirt was black, I wouldn't be able to see the blood," (PC 308). . . . He wasn't soaked in blood," (PC 309). "His lip was bleeding up top. Like little drips of blood, like somebody sprinkled water, . . not enough to be stuck to his skin." "It wasn't a black shirt; if it was a black shirt then I couldn't tell whether it was blood or sweat," (PC 310). "He was wearing blue and white Pro Wings from Pearl Shoe Store," (PC 313); "Told the police that," (PC 313). Benito represented to her the knife was found behind her house and that it was the murder weapon (PC 314). "He convinced me" (PC 314).

the charge of murder. The evidence of Mr. Mitchell's guilt of the murder was entirely circumstantial. The theory of defense was that the victim was killed during a homosexual rage by someone else who dumped the body and abandoned the vehicle.[4] The medical examiner investigated the murder as a homosexual rage killing and testified that the victim's wounds were consistent with at least a 4" blade (R. 206, 210). Counsel knew that a knife had been recovered from Mr. Mitchell, but never knew until the 3.850 hearing that the knife had only a 2" blade (PC 64, 65, 69). Counsel testified he never knew that the knife had been tested and was found negative for the presence of blood (PC 73, 807-08). At trial the State elicited testimony from Jesse and Gloria Harden that the knife had blood on it (R. 91, 96-97). Counsel also never knew the police had recovered the shirt Mr. Mitchell was wearing the night the murder occurred (PC 56). Mysteriously the shirt was never tested for the presence of blood. Neither the knife nor the shirt were introduced into evidence. Further counsel was unaware that a gay bathhouse was two blocks from Mr. Shonyo's place of employment (PC 49). Counsel was also unaware that male prostitutes worked the area of Mr. Shonyo's employment including Bivens in drag. Had counsel been aware of these facts he would have presented them to the jury.

The jury sentencing proceeding was conducted within minutes of the verdict. Defense counsel presented no evidence whatsoever during the penalty phase (R. 619-21). Following the jury's return of a 7-5 death recommendation, the trial court immediately sentenced Mr. Mitchell to death. Written findings were entered on November 14, 1986.

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[4]In addition to the evidence regarding Bivens which the jury did not hear, the jury never knew that Mr. Shonyo's place of employment was next to Club Tampa CBC, a gay bathhouse. Ms. Amato who worked in the neighborhood and testified at trial was never asked about the difficulties associated with Club Tampa CBC. At the 3.850 she related there were frequently violent episodes which occurred at the bathhouse and in the neighborhood (PC 275-80). Ms. Amato also testified that a photograph of Bivens in drag was the resembled a person she had seen hanging around in the rear of Mr. Shonyo's place of employment (PC 280).

The Florida Supreme Court on direct appeal affirmed Mr. Mitchell's conviction and sentence, Mitchell v. State, 527 So.2d 179 (1988). This Court concluded that there was competent substantial evidence to support the verdict of guilt based upon evidence in the trial record that Mitchell was covered with blood and that a small pocketknife with dried blood was seen near where Mitchell slept. Id. at 181. This Court specifically noted that "[n]either the knife nor the bloody shirt Mitchell wore on May 1 was ever found." Id. at 180. The facts relied on by the Florida Supreme Court in support of its conclusions have now been shown to be untrue. The knife was found and tests refuted the presence of blood. The State also had possession of the shirt which it chose not to test for the presence of blood or for blood-typing.

Mr. Mitchell filed his Motion to Vacate Judgment of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.850 in the Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County, on March 23, 1990, (PC 388-575). An evidentiary hearing was conducted under warrant by Judge Coe on April 16 and 17, 1990 (PC 1-378). The court found that trial counsel's performance at the penalty phase of Mr. Mitchell's trial was substantially and seriously deficient, "miserably below the standard required for competent counsel," and was prejudicial, (PC 360, 369). The court also found that trial counsel's performance during the guilt-innocence phase of Mr. Mitchell's trial was clearly deficient, below the standard required for competent counsel, but failed to find that this prejudiced Mr. Mitchell (PC 183-85, 216, 360). The trial court refused to overturn the guilt determination.[5] Mr. Mitchell's conviction was left intact. From that portion of the order this appeal was perfected.

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[5]The circuit court did not rule upon Mr. Mitchell's Brady claim, presumably because the circuit court believed that trial counsel had access or could have had access to the exculpatory evidence had he performed adequately.

SUMMARY OF ARGUMENT

I. Mr. Mitchell did not receive a fair adversarial testing of the prosecution's case at his capital trial due to his counsel's ineffective assistance and because of the State's failure to disclose material exculpatory evidence. The trial court's conclusion that counsel's performance was substandard was supported by competent evidence. The court's legal conclusion that there was no prejudice was in error.

II. The State failed in its duty to disclose material and exculpatory information, and in fact presented false and misleading evidence in violation of the fifth, sixth, eighth and fourteenth amendments.

III. Newly discovered evidence, which would have changed the outcome had it been presented to the jury, shows that Mr. Mitchell's conviction and sentence were unreliably obtained.

ARGUMENT

ARGUMENT I

MR. MITCHELL WAS DENIED A FAIR ADVERSARIAL TESTING OF THE PROSECUTION'S CASE THROUGH THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL, THROUGH THE STATE'S NONDISCLOSURES OF MATERIAL EXCULPATORY EVIDENCE, AND THROUGH THE STATE'S USE OF FALSE OR MISLEADING EVIDENCE AND ARGUMENT, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The accused is entitled to a fair trial. As the United States Supreme Court has explained:

> . . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). To insure that a true adversarial testing and a fair trial occurs, obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel, on the other hand, is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland.

Here, Mr. Mitchell was denied a reliable adversarial testing due to both the State's nondisclosures and his own counsel's repeated failures to investigate and prepare. Consequently, the jury never heard and considered compelling material evidence which would have established that Mr. Mitchell did not killed Walter Shonyo. Whatever the cause, the deprivation of a defendant's right to a fair adversarial testing, requires a reversal when there is a reasonable probability that the outcome could have been affected, undermining confidence in the results. Strickland; Bagley.[6]

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[6]Of course in capital cases in the United States Supreme Court has stated:

(continued...)

In Mr. Mitchell's 3.850 motion, he alledged both a Brady claim and ineffective assistance of counsel regarding a number of police reports and a wealth of exculpatory evidence which Mr. Mitchell's jury did not hear. At the evidentiary hearing there was no dispute that the information did not reach the jury. However, the defense attorney testified that he did not recall receiving the reports or exculpatory evidence from the State.[7] The State countered that full disclosure had occurred, that defense had access to the police reports, and that he chose not to present the evidence to the jury. The circuit court at the conclusion of the hearing found:

> I don't think that there is a reasonable probability. But for counsel's errors, I [don't] think the results would have been different (PC 337).
>
> "Performance was deficient," which it was in this case. Did the deficient performance prejudice the defense? I don't see the prejudice (PC 338).

Thus, the judge concluded that responsibility for the failure to present the exculpatory evidence to the jury lay with defense counsel. The judge found counsel's performance deficient.[8]

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[6](...continued)

> In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. [Citation.] This especial concern is the natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.

Ford v. Wainwright, 477 U.S. 399, 411 (1986).

[7]Defense counsel further testified that the information in the reports and elsewhere was crucial information consistent with the theory of defense, which should have been presented to the jury.

[8]Again the circuit court did not explicitly rule on the Brady claim. To the extent that the State were to argue to this Court that counsel's performance was reasonable because the State withheld evidence, the issue would be one of Brady. However at this point, this brief accepts the circuit court's factual resolution that defense counsel performance was decifient because he failed to learn of the exculpatory evidence.

Accepting the judge's factual resolution and determination, the issue on appeal is whether his legal conclusion that there was no prejudice is correct. It is Mr. Mitchell's contention in this brief that he was prejudiced by counsel's deficient performance. The evidence the jury did not hear undermines confidence in the outcome of the guilt phase of Mr. Mitchell's trial. In analyzing the issue this Court must first consider the evidence the jury heard and then review the evidence which it did not hear.

Turning first to the evidence the jury heard, on May 1, 1986, Walter Shonyo, a security guard at Fogerty's warehouse, was killed in his vehicle. James Bivens, also known as BeBe (BB) or Priscilla, a black male transvestite prostitute, reported finding the murder victim's body to his god-sister, Elizabeth Oates, who in turn called the police (R. 42, 46). At the time, Bivens, who claimed to have just been dropped off by a "client" after getting back from Ft. Lauderdale, disappeared before the police arrived. The defense tried to portray Bivens as a suspect. The State responded by having Bivens, who testified in drag, smile for the jury and demonstrate he was missing his front teeth (R. 48). The State argued that Biven's could not have been responsible for the bite mark left by the killer.[9]

Responding to Ms. Oates' call, the police found Shonyo's body located in a parking lot a ten minute driving distance from the Fogerty warehouse, Mr. Shonyo's place of employment (R. 143). When Mr. Shonyo was found, the fly of his pants was open and his pants were pulled down below his waist. The was another large pool of the victim's blood at his feet (R. 126) His pants pockets had been turned inside out (R. 122) and Mr. Shonyo's truck was later located 1000-1200 feet away from the location of his body (R. 128). There was a substantial amount of blood on the floorboard of the passenger's side of the

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[9]Of course what the jury did not know was that there was evidence that Bivens had partial dentures which could have made the bite mark.

truck (R. 131-32). The truck was found only 300-400' from the Harden residence where Willie Mitchell was staying (R. 146). A large pool of Shonyo's blood was found at the Fogerty warehouse (R. 135-36). It was evident from these facts that Mr. Shonyo had been stabbed in his vehicle at the Fogerty warehouse where he worked, then the perpetrator drove Shonyo's body in the victim's truck the five mile distance to where the body had been removed from the truck, and the truck then again driven by the perpetrator approximately 0.2 of a mile to the point where the vehicle was parked and abandoned.

The Medical Examiner investigated the murder of Mr. Shonyo as a homosexual rage killing (R. 210). Anal and oral swabbings were taken from the victim and sent to SmithKlein Bio-Science Laboratories (R. 211, 221). The Medical Examiners report revealed a level of 17.6 U/L acid phosphatase in the rectum of the victim (R. 820). A report from SmithKlein indicated that the assay regarding Walter Shonyo was made using "Beckman Dri-Stat ACP" having normal reference ranges for total acid phosphatase of 0-5.4 U/L (R. 824). Based upon the normal scale reference ranges utilized by the laboratory, a defense expert opined that these results indicated that anal sex had occurred shortly before death (R. 427-431).

Willie Mitchell testified and admitted burglarizing the victim's bloody but unoccupied truck, stealing tools and other items to sell to obtain money to purchase more crack cocaine (R. 462-63, 473; Exhibit 29). The defense was that Mr. Shonyo was killed in homosexual rage by someone other than Mr. Mitchell. Mr. Mitchell came upon the bloody but unoccupied truck and burglarized it. The defense offered Bivens as the most likely suspects. The State countered with damning evidence that a bloody pocketknife was seen in Mr. Mitchell's possession

shortly after the time of the stabbing (R. 91, 96-97).[10] Further the State presented witnesses who testified that Mr. Mitchell was wearing a shirt soaked in blood (R. 89).[11]

Silvio Lufrui was defense counsel. He testified at the evidentiary hearing concerning the theory defense as follows:

> Q. And how do you know Mr. Mitchell?
>
> A. I represented him in his murder trial.
>
> Q. And do you recall what year that was in, sir?
>
> A. I believe I was court-appointed in 1986.
>
> Q. Is that the first case, the first first-degree murder case in which the State was actively seeking the death penalty that you handled, sir?
>
> [objection overruled]
>
> A. Yes.
>
> * * *
>
> Q. So, that was your first capital case?
>
> A. Where they sought the death penalty, yes.
>
> Q. And have you done any since then, sir?
>
> A. No.
>
> Q. What was your theory of the case?
>
> A. My main underlying theory was that it was a homosexual rage killing.
>
> Q. And what did you base that on, sir, just briefly?
>
> A. Well, I engaged two experts. The first one was Doctor Michael Baden out of New York. When I initially got into the case, I took what limited amount of information I had to him and we met in a hotel in New York City.

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[10]However the State had infact recovered the knife and tests had revealed there was no blood present on it. Further the blade was too short to be the murder weapon.

[11]The State in its closing argument to the jury conceded that its case was one of circumstantial evidence (R. 570). However the jury did not hear all of the circumstances.

At that time he, after looking at the file, told me that it was obvious to him what we were dealing with, and he passed the records on to this other fellow who was also an expert in forensic odontology by the name of Lowell Levine because it was a bite mark case, and he said to me that it was obvious to him that we were dealing with a homosexual rage killing.

Q. And who said that, sir?

A. Doctor Michael Baden.

Q. And what other factors beside the bite mark he did indicate as an indicator that that was a homosexual killing?

A. Well, the high levels of acid phosphatase found in the anal region and the mouth, together with the numerous stab wounds over the body.

BY THE COURT:

Q. Phosphatase being found in the mouth and the anal canal of the victim?

A. Yes, sir.

BY MR. DUNN:

Q. Was there anything concerning the victim's clothing that also supported that theory, sir, the position of his clothing?

A. Well, the fact that his pants were down, yes. His fly was open.

Q. And in that theory, did you have any witness or did you have any suspects on which you were trying to focus attention on?

A. Well, basically, the way I recall is that the body was found, the victim's body was found by a transvestite, a male prostitute, or whatever you want to call him, some guy who dresses in female clothing.

And the manner in which it came about that he found the body, went to his aunt's house, told her about it and then disappeared led me to suspect that the could well be the party, the guilty party.

I didn't have many other suspects at that time or subsequent to that time to go after. So, my theory was basically that that homosexual rage killing was performed by this individual named "Bebe" or Bivens. He has another name.

Q. Priscilla?

A. Priscilla.

Q. And I believe he also went by James Biven is that correct?

A. Yes, that's correct.

(PC 19-22).

A handwritten note appeared in Mr. Lufriu's trial file concerning this suspect. Mr. Lufriu testified that the note was in his handwriting and reflected his decision to investigate Bivens as a suspect even though it identified Bivens by the wrong name. The note, dated August of 1986, provided: "Action, Willie Mitchell, need. Need find and subpoena James Boone, 4504 35th Street, alias 'Bebe' a prostitute homosexual. Give this assignment to investigator" (PC 27).

Mr. Lufriu further testified that he failed to interview Mr. Bivens, whose name at the time he believed to be Mr. Boone:[12]

Q. Did you attempt to interview Mr. Bivens prior to trial?

A. Yes, sir. I even hit the streets trying to find him, drove up and down Nebraska Avenue I don't know how many times.

Q. Did you have any luck in finding Mr. Bivens?

A. No, sir, no, sir.

Q. So he was never deposed?

A. No, no.

Q. When was the first time that you had an opportunity to question Mr. Bivens?

A. When he walked into the courtroom in drag.

Q. During the trial?

A. Yes.

Q. Were you ever given Mr. Biven's criminal rapsheet?

A. No, sir.

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[12]There is no question that the police reports correctly identified 'Bebe' as James Bivens.

Q. Were you ever aware that Mr. Bivens, in fact, had a criminal record?

A. I think he said something to the effect of homosexual-type activities, prosecution.

Q. But you didn't have any reports indicating that fact, that he had specific instances of criminal misconduct?

A. No.

(PC 25-26).

Trial counsel further testified he did not have incident reports concerning the location and reasons for Mr. Bivens' arrests:

Q. Mr. Lufriu, did you have any indication of the number of arrests for prostitution that Mr. Bivens had at the time that he testified at Mr. Mitchell's trial?

A. No.

* * *

Q. Mr. Lufrui, I am handing you what has been marked as Defense Exhibit 3 for identification and I ask you to take a look at that document.

* * *

BY THE COURT:

Q. Were you aware of those incident reports?

A. No, sir. I have only looked at Page 1, Your Honor. Let's see. Okay. No.

BY MR. DUNN:

Q. And you did not have this documents when Mr. Bivens testified; is that correct?

A. No.

Q. In fact, that document indicates that Mr. Bivens was involved in a homosexual act in a car on 41st Avenue; is that correct? 21st Avenue. Excuse me.

THE COURT: Well, the document speaks --

A. 16 January 84, and it says location of offense.

(PC 31-32).

Q. Have you ever, prior to Mr. Mitchell's trial in 1986, did you have a copy of Exhibit Number 5?

A. No.

Q. Exhibits 2, 3, 4, and 5, would they have been helpful to you at the time of Mr. Mitchell's trial?

A. Yes.

Q. Any question about that?

A. Any question about -- no, I just -- I just thought you were going to ask me about Number 5. No.

Q. Can you tell me, specifically referring to Number 5, why that would have been sigificant?

A. Well, that is the same modus operandi that occurred in the Mitchell case.

Q. And what do you mean by the same modus operandi?

A. Well, Bivens was arrested, according to this report, for having oral sex in a motor vehicle with a white male with a knife in his hand. The white male didn't have the knife in his hand; Bivens had the knife in his hand.

Q. And this occurred several months prior to this case?

A. It has 10 October '85. I guess, yes.

Q. It was prior to trial?

A. Yes.

Q. You did not have that information?

A. No, sir.

Q. Would you have used that information?

A. I would have used it.

Q. How would you have used it, sir?

A. I would have used it to present it to the jury to show a similar type of crime done by the person that I alleged did it.

* * *

Q. It indicates that Mr. Bivens said that was his knife?

A. I don't know. Wait a minute. The black male had under him a knife with the blade open and he stated that the knife, yeah, okay, the knife was his. Yes.

Q. In fact, those are the same, as you said, modus operandi that occurred in this case?

A. Yes.

Q. The victim in this case was killed in an automobile?

A. In a truck, I believe.

Q. And he was stabbed with a knife?

A. Numerous times.

* * *

Q. And you would have used this information if you had it at the time of the trial?

A. Absoultely.

(PC 35-38).

The incident report introduced as Exhibit 5 provided:

> Details: on listed time and date, officer and officer D.W. Tood were working on a plain clothes prostitution investigator in the area of N. Nebraska Avenue and E. Emma when he observed the two def's haveing [sic] conversation the B/M got into the car on the passenger side and both Def's drove to the area of E.Emma and N.34 st. The area is a residential area and has good visability from the street to all passerby's. This officer approached the Def's vehicle and observed the B/M Def. in the lap of the W/M Def. The B/M Def had in his mouth the penis of the W/M Def. The W/M Def had only his boxer shorts on while in the vehicle and was allowed to put his pants on after his arrest. The B/M had under him a knife with the blade open and he stated that the knife was his. Both were arrested and taken to SEb [sic] via Marked police unit. Both persons were advised of thier [sic] rights via Maranda [sic] Cards.

(PC 788). The report further identified James Bivens as the black male with the knife (PC 787).[13]

At trial evidence was introduced that when Mr. Bivens allegedly found the body he had just returned to Tampa from Ft. Lauderdale. A police report introduced at the 3.850 hearing noted that two matchbooks found in Mr. Shonyo's

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[13]Also introduced at the 3.850 hearing was an incident report from 1989. That report represented that Mr. Bivens attacked a police officer leaving bite marks on the officer's forearm (PC 42).

abandoned truck were from Ft. Lauderdale (Exh. 7). In this regard, Mr. Lufriu testified:

> Q. Do you recall ever hearing any information concerning the two matchbooks which are described in this report?
>
> A. No, no, not the Ft. Lauderdale connection and all that, no.
>
> Q. And where does it indicate that those two matchbooks were found?
>
> A. They were found inside the truck, the pickup truck.
>
> Q. The pickup trudk of the victim?
>
> A. Yes.
>
> Q. And what, if any, significance would that have to your case?
>
> A. Well, if nothing else, it provides a nexus, a matchup, as to where the person I suspected had committed the crime was prior to being here and the fact that those matches were found inside the vehicle where the victim was.
>
> Q. And what did those matchbooks say on the cover?
>
> A. According to this report, once again, because I have never seen the matchbooks --
>
> Q. Yes, sir.
>
> A. -- they were from the Hacienda Del Rio which listed a city as Ft. Lauderdale, Florida. The matchbooks were pink in color. One was located lying --
>
> * * *
>
> Q. Would you have used this information at Mr. Mitchell's trial?
>
> A. Yes, sir.
>
> Q. And how would you have used it?
>
> A. Once again, trying Mr. "Bebe," Bivens, to the scene of the crime in that the matchbooks that were found were Ft. Lauderdale. I would have also investigated to see if he had stayed in that hotel that night. That would have given me a further lead.
>
> I would have sent my investigators down to check to see if he had, in fact, stayed in that hotel. It would have given me something to tie him in a little tighter to the offense.

Q. In fact, does it indicate where in the truck that those matchbooks were found?

A. One was located lying in the open glovebox and the other was in the passenger's floorboard area of the vehicle. It says the matchbooks were taken into custody.

Q. Again, you never saw those matchbooks?

A. No, sir.

THE COURT: Again let me see this. What is this? This is Number 7. What is this?

MR. DUNN: Your Honor, that is a police report from the homicide in question here in which the detective talks about some of the evidence that he retrieved from the victim's truck.

In that report he talks about finding two matchbooks that were pink in color from the Hacienda Del Rio motel which is located in Ft. Lauderdale.

Obviously, the detective thought they were significant when he found them because the record indicates that he asked the victim's son if the victim had been to Ft. Lauderdale in the recent past.

(PC 44-46).

Clearly the police were not able to explain the presence of two Ft. Lauderdale matchbooks in Mr. Shonyo's truck. The jury, however, knew nothing about the matchbooks. No evidence regarding unexplained Ft. Lauderdale matchbooks was presented at trial. Thus the defense was never able to suggest that Bivens after committing the murder left the matchbooks behind in his haste to get away.

Mr. Lufriu testified that he had no recall of another police report which he believed should have been used at trial:

Q. Mr. Lufriu, I am going to hand you what has been marked as Defense Exhibit Number 8 and if I could ask you to take a quick look at that document.

A. Okay.

Q. Sir, have you ever seen that document before?

A. I don't think so. I can't remember every document I saw, but I don't think I saw this before.

Q. I am going to draw your attention to the fifth paragraph down. It's about two-thirds of the way down and it starts with "James asked."

A. Yes.

Q. Can you read that sentence for me?

A. "James asked her for some money but she did not have" --

Q. Do you ever recall Miss Oates testifying or do you recall seeing a statement provided to you by the State that "Bebe" had asked for money right after reporting finding the victim in this case?

A. To be honest with you, I don't remember. I just don't remember.

Q. According to "Bebe" when he testified at trial, did he not indicate to you that he had been just dropped off by a patron/customer?

A. Yes.

Q. And what if any significance would that sentence be in the context of having just been dropped off by a customer?

A. He should have some money.

Q. Would you have used that had you been provided or were aware of that information from Miss Oates?

A. Probably.

Q. Again, how would you have used that, sir?

A. Well, to question his veracity and also to establish the fact that he, in fact, was engaged in this kind of activity.

He, in fact, was there with the body, plus then I also would have looked for the guy. I think finding "Bebe" would be the key, if I would have just gotten ahold of him.

Q. In fact, if you look at Page 2.

A. Yes. "She did ask if we suspected [Bivens] might be involved, and I indicated not at this time."

Q. Would that have been useful to you?

A. Yes.

Q. That was his own Godsister asking that question?

A. Yes.

(PC 46-48). Again counsel failed to present this evidence to the jury in order to support his claim that Bivens probably did the killing.

At trial, the State challenged the Bivens-did-it defense with a smile from Bivens revealing no front teeth (R. 48). The condition of Bivens' teeth should have been a critical matter for the defense. Dr. Briggle, the State's forensic expert, indicated that the bite impressions on the victim could have been made by someone wearing partial dentures (PC 29). Counsel did not raise the matter of Bivens' teeth at trial because he was unaware of material information which Lenora Amato could have provided the defense concerning Bivens' "too perfect" teeth. Lenora Amato was a supervisor of the security firm employing Mr. Shonyo at the time of his murder. (See PC 272-290, 315) and testified at the trial (R. 30-40, PC 273). A report of her statements to the police (Exhibit 24) was in counsel's files. She subsequently gave an affidavit (Exhibit 33, PC 280) and at the hearing testified that her affidavit was accurate (PC 284).

Ms. Amato identified pictures of Bivens at the hearing (Exhibit 16, State's Exhibit 1), and was niney nine percent (99%) sure it was the same individual she had personally seen with another security guard at the warehouse on several occasions prior to the murder (PC 279-280). Had counsel investigated, Ms. Amato would have informed counsel that when she saw Bivens prior to the murder, Bivens had top front teeth "too perfect to be real" when he smiled (PC 315). Due to the lack of investigation, none of this information was presented at trial. But for counsel's lack of investigation, counsel would have known that Bivens wore a plate and could have examined Bivens on the issue.

In fact, defense counsel could easily have obtained a photograph of Bivens in drag wherein it appeared that front teeth were not missing:

> Q. Mr. Lufriu, I am going to show you what has been marked as Exhibit Number 16. Do you recognize Exhibit Number 16?
>
> A. Not from having seen it before but it looks like "Bebe".

Q. All right. And "Bebe" is the "Bebe" that testified in Mr. Mitchell's trial?

A. Yes.

Q. In fact, "Bebe" is the person who supposedly initially found the victim's body?

A. Yes.

Q. The evidence that you have seen here today that you indicated you have not seen prior to today, would that evidence, in your professional judgment, have been helpful to Mr. Mitchell's case?

A. Yes.

Q. And, in fact, you had known of that evidence at the time of Mr. Mitchell's trial, would you have used it?

A. Yes.

(PC 94).

At trial, the prosecutor responded to the defense's claim that the homicide was homosexual rage killing by saying:

> Okay. It's just a smoke screen thrown out to divert your attention. Don't let you attention be diverted from something that happened two nights before and to listen to Mr. Lufriu, what we have is some maniac homosexual stalking the warehouse area of Tampa. Is that what we got, some mysterious homosexual maybe with even a vasectomy stalking the warehouse area of Tampa.

(R. 565-66).

However, what neither defense counsel nor the jury knew was that Lenora Amato was ninety-nine percent sure that she had seen Bivens working "the warehouse area." Further neither defense counsel nor the jury knew about Club Tampa CBC. When asked at the 3.850 hearing, Ms. Amato, who was a security officer in the area at the time of the trial, testified:[14]

Q. What particular business during that time frame was your company providing security services to?

A. Seaboard Cold Storage, Selma Duro, Coca-Cola, and Club Tampa.

---

[14]Ms. Amato was in fact a State's witness at trial who testified that she drove by Mr. Shonyo's place of employment several times on the night of his death.

Q. How would you have described that area of the city during that time frame in 1985/1986?

A. Pretty rough.

Q. And what does "pretty rough" mean?

A. We had problems with break-ins, fighting, prostitution.

Q. A lot of prositution?

A. Yeah.

Q. Male and female?

A. That's correct.

Q. Did your duties involve confrontations with those type of people?

A. Yes, it did.

Q. Okay. Was that always peaceful?

A. No, it wasn't.

Q. Okay. Was it frequently violent or near violent?

A. A few times it was.

Q. And, in fact, there are numerous occasions in which there was violence in the neighborhood that you responded to?

A. That's correct.

Q. Specifically drawing your attention to Club Tampa, CBC, can you explain to the Court what that is?

A. It's a male bathhouse.

Q. All right. And what is a male bathhouse?

A. It's a homosexual place.

Q. It's a what?

A. It's a homosexual place that men go into.

Q. It's a social club for homosexual males?

A. That's correct.

Q. And you, in fact, indicated that your company, in fact, you were involved in providing securing to that establishment?

A. Yes, I was.

Q. Was there ever occasions in which things would become violent at Club Tampa?

A. Yes, there were.

Q. And how often would that occur?

A. Sometimes several times a month, sometimes none.

Q. Frequently though?

A. Yeah, frequently.

Q. And what were some of, I mean, how did things become violent? What were some of the incidents that you recall?

THE COURT: Well, let's don't go into that.

BY MR. DUNN:

Q. In your investigation, were many of the violent instances involving sexual jealously?

A. No one ever admitted it.

Q. What did you deducted from what you saw?

A. Possible.

Q. Where is Club Tampa in relationship to Fogarty Van Lines?

A. About two-and-a-half blocks.

Q. You indicated in conversations with me that it was your opinion that that place bread nothing but trouble?

A. Oh, it's a problem, yeah. It was. I don't know about now.

Q. Especially in that area of the city?

A. Uh-huh.

Q. Was there any time in the day when the problem seemed more frequent?

A. Late at night.

Q. You also had a problem with other individuals in the neighborhood?

A. Vagrants and such, yeah.

Q. You also indicated to me that group of people was called lumpers?

A. Right, for Fogerty.

Q. What is a lumper?

A. It's somebody that will go with a driver to unload a truck.

Q. And were they frequently in the area there?

A. Yes.

Q. And how would someone get hired by a trucker? Are they established employees? Are they waiting for a truck to arrive?

A. If a driver needed somebody and there was a group of men standing around, he would just ask if somebody wanted to work.

Q. And there was people, lumpers, in the area quite frequently?

A. Pretty often, yeah.

Q. Any problems that you ran into as far as lumpers?

A. Well, no, I can't say it was lumpers but people would break into the Fogerty trailers and sleep in them overnight, build fires in them.

(PC 274-77).

Again, the jury never heard this evidence. Defense counsel failed to talk to Ms. Amato about the neighborhood pretrial. However, at the 3.850 hearing he acknowledged this would have been important evidence for the jury to have heard:

Q. Sir, are you aware of an establishment in Tampa called the Club Tampa, CBC?

A. I am not.

Q. Can you tell us what your understanding of what Club Tampa CBC is?

A. It's a homosexual establishment.

Q. Okay. And when is it that you found out about this establishment?

A. About a year ago.

Q. And can you just briefly tell us what your reaction was when you found out about it?

A. Yeah. Well, I thought to myself, Well, there is a reason. There is another tie-in. This place is located just a thousand feet,

a thousand, five hundred feet from the murder scene. It's right there in the same locale. It's only a hop, skip and a jump.

Q. So, when you found out about this club, you immediately thought of Mr. Mitchell's case?

A. I sure did.

Q. And what, if anything, would you have done with that information had you known about it at the time of trial?

A. Well, if I had known the club existed, I would have tried to get into their records to see their membership to see if "Bebe" was, in fact, a member.

If he was a member, whether he was present or not at the time in question. If they had a sign-in sign-out procedure, I would have gone in there with my investigator and checked it out, checked who the patrons were of that club.

Now, if "Bebe" had been a member, and I could tie him to the scene of that murder at that time, that would have done a lot for me in my defense.

Q. And, again, you indicated that was very close to the murder scene; is that correct?

A. Yes, about three-tenths of a mile as my odometer goes.

(PC 49-50).

The circuit court found defense counsel's performance deficient in failing to investigate and prepare. As a result of that deficient performance the jury was prevented from hearing all the facts regarding Bivens which make him a very likely suspect. Bivens, a prostitute, worked the area of Mr. Shonyo's employment. The jury did not know that. Bivens had been seen in the area before. At that time, Bivens had teeth; in all likelihood partial dentures. The jury was led by the prosecutor to believe that Bivens had no front teeth and no dentures which could have caused the bite mark left on Mr. Shonyo's arm because at trial six months later he did not wear his dentures to court. The jury knew nothing of the unexplained presence in Mr. Shonyo's truck of Ft. Lauderdale matchbooks, and thus could not infer a link to Bivens who had hours before returned from Ft. Lauderdale. The jury did not know that Bivens clients

were always white middle aged men, like Mr. Shonyo, that Bivens always had his sexual encounters in parked vehicles frequently driven to the area he lived where Mr. Shonyo's body was found. Finally the jury did not know that Bivens carried a knife during his sexual encounters which he always kept handy.

Besides Bivens, the jury knew nothing of the warehouse area and the troubles associated with the prostitution and gay bathhouses. This was critical information in evaluating the defense's theory someone else did it in a homosexual rage.

In addition to the critical evidence the jury did not hear about other suspects, there was critical and exculpatory evidence the jury did not hear about Mr. Mitchell. This was a case in which evidence of Mitchell's guilt of murder was entirely circumstantial. In affirming the conviction and sentence, this Court noted that "[n]either the knife nor the bloody shirt Mitchell wore on May 1 was ever found," 527 So. 2d at 180 (emphasis added). This Court's conclusion that the verdict of guilt was supported by competent substantial evidence was based upon testimony of dried blood on the knife which supposedly the State never recovered. Id., at 181. This Court also relief upon evidence that Mitchell was "covered with blood" and was found in possession of Walter Shonyo's wristwatch, "which, presumably, was removed from the body," in reaching this conclusion. Ibid. Obviously this Court believed these facts constituted important and critical links in the chain of circumstantial evidence. However, there was evidence unrevealed to the jury and to this Court that negated these facts as links in the chain of circimstantial evidence.

The knife seen in Mr. Mitchell's possession had in fact been recovered by the police. The blade was too short to have caused Mr. Shonyo's injuries. Further it had been tested for the presence of blood with negative results; this completely rebutted the State's claim that the knife was the murder weapon and was covered with blood. In this regard defense counsel testified at the 3.850:

Q. Sir, do you recall if a knife was ever recovered in this case?

A. No, the weapon was never recovered.

Q. Do you know if a knife was every recovered as best as you can recollect?

A. Yes.

Q. And did you ever have an opportunity to look at that knife?

A. No.

Q. Do you recall ever having knowledge of the description of that knife?

A. It had a part missing from it. It was three-and-a-half inches long. The only reason I remember the size is because I knew it wasn't the murder weapon because it was Dr. Briggle, I believe, that testified it had to be at least four inches long.

Q. And do you recall what size the knife was?

A. I think it was three-and-a-half inches long.

Q. Would you be surprised of, in fact, the knife was two inches long?

A. Yeah.

Q. Do you think that would have been useful information to present to the jury?

A. Yes.

Q. In fact, did the State present that knife to the jury?

A. I don't think so.

(PC 64-65).

Q. Can you read for us the two sentences which describe the knife that [Mr. Harden] saw?

A. Mr. Harden described the knife as being silver with a two- to three-inch blade. According to Harden the blade would close at the handle.

The handle fell on the floor on its side and he took note that it was missing the plastic handle on the side which faced up.

Q. So he described a silver knife two to three inches with a plastic handle on one side missing?

A. Right.

Q. Now, did you ever see the knife that the state obtained from that residence?

A. To the best of my recollection, no.

Q. I am going to refer to the knife as defense Exhibit Number 25 that has been handed to you, sir. Sir, did you ever see that knife?

A. Nope.

Q. Having seen that knife and having read the description that Mr. Harden gave of the knife he saw, would you have done anything with that knife had you known about that?

A. Yeah.

Q. What would you have done with the knife, sir?

A. Well, I would have asked, I think it was, Dr. Briggle, the pathologist, asked him if this knife could have made those wounds.

Q. In fact, Dr. Briggle testified that many of the wounds would have been caused by a knife with a four-inch blade; is that correct? Do you recall that?

A. I think so.

Q. And can you tell if that is a four-inch blade, sir?

A. No, sir.

Q. I have a ruler here. If I can hand it to you and ask you to measure it.

A. All right. This is in centimeters and millimeters.

Q. I am sorry. The other side is in inches, sir?

A. Which one.

Q. That one.

A. Okay. All right.

Q. And how many inches approximately is that knife, sir?

A. The blade itself?

Q. The blade itself?

A. Two.

Q. Two inches. So it's not the four-inch knife that Dr. Briggle testified caused many of the wounds to the victim?

A. Do you want the knife back?

MR. BENITO: Dr. Diggs testified to that, not Dr. Briggle.

MR. DUNN: Excuse me. It was Dr. Driggs.

BY MR. DUNN:

Q. What, if anything, would you have done with this knife before the jury, sir?

A. First of all, I would have cross-examined the forensic people.

I would have introduced it into evidence if the state hadn't done so already, and I would have shown that that knife, which was his knife, which was the knife he had in his possession that night, was not the murder weapon.

Q. At least it's the knife that matches the description Mr. Harden gave?

A. Yes.

Q. Do you recall ever seeing any reports in which Mr. Harden indicates he was shown this knife and either identified it or said it wasn't the knife?

A. Independent recollection, no.

Q. Do you think that it a crucial fact that you would have remembered that it happened, had you known of it?

A. Whew. Had I known that -- do that again for me, please.

Q. If you had had documents in your files?

A. Yes.

Q. Which indicated that, in fact, they showed Mr. Harden this knife and he either positively identified it was the one that he saw or said it wasn't, would you not have done something with it?

A. Yes. I don't have any independent recollection that he was ever shown that knife.

Q. Now, in fact, Mrs. Gloria Harden also testified about seeing that same knife that Jesse saw, did she not?

A. Yes.

Q. Okay. And do you recall what here description of the knife was?

A. No.

Q. I am going to show you Pages 96 and 97 of the record in Mr. Mitchell's case and ask you just to read that to yourself, please?

A. Where do you want me to start, the whole page?

Q. Yeah. Start at the top, sir.

A. The next page, too?

Q. Yes, yes.

A. Okay.

Q. In fact, Mrs. Glorida Harden also testified about the same knife that Jesse saw?

A. That's correct.

Q. And she led the jury to believe that, in fact --

A. Well, let me just take that back for one moment.

Q. Okay.

A. Only because I don't have enough here to show me who is testifying.

Q. Okay. I am sorry. That is the testimony of Mrs. Gloria Harden. I will represent that?

A. It has Q, A, Q, A.

Q. Just read the top of the page so we know what the page nunmber is?

A. This is Page 96 and 97.

Q. Okay. Thank you?

A. Yes. If this is Glorida talking.

Q. Then she is also representing the same thing?

A. Yes.

Q. Did you at any time -- and I may have asked this and I apoligize if I did -- hear Annie Harden testify or Jesse Harden testify or Gloria Harden testify that this was not the knife they were talking about?

A. Not based on my independent recollection, no.

Q. Thank you. Your recollection of the record is the state never produced this knife at trial?

A. This is my independent recollection.

Q. Do you recall if Mr. Benito used the knife in his closing argument?

A. No.

MR. BENITO: Which knife. How can I introduce the knife when it wasn't introduced at trial.

MR. DUNN: I will rephrase the question.

BY MR. DUNN:

Q. Do you recall if Mr. Benito argued that the knife Jesse describes and testified to, that the knife that Gloria testified to was, in fact, the murder weapon. Do you recall if he argued that?

A. Independently, no.

Q. Sir, do you recall if this knife was ever tested for blood?

A. No, sir.

MR. DUNN: Let the record reflect that I am showing Mr. Lufriu Exhibit Number 9 for identification, and I am handing a copy to Mr. Benito.

BY MR. DUNN:

Q. Sir, do you recognize that document?

A. I think I have seen it before.

* * *

Q. Sir, let me direct your attention to Page Number 3. I ask you to look at item Number 17.

A. Yes.

Q. What is described as item Number 17?

A. One folding pocketknife with broken handle.

Q. Okay. And there is a sentence above that which indicates where that item came from. Could you read that for us?

A. Yes. The following items represented as being from 424 East Stratford.

Q. Sir, could you turn to Page 4 of that document and could you read to us the sentence that starts, "Analysis of Exhibit 17"?

A. Yes. Okay. "Analysis of Exhibit 17 failed to give chemical indications for the presence of blood?

A. Yes.

Q. According to that report?

A. According to this report.

(PC 68-75).

Q. In your own assessment as the trial attorney, was the knife being seen by Mr. Harden and Mrs. Harden an important factor that you had to contend with?

A. Yes.

Q. Had you known about this knife, could you have done something with it?

A. I would have surely tried.

Q. Did you do anything with the knife, sir?

A. No, sir.

(PC 77-78)(emphasis added).

Clearly, there was evidence to show there was no blood on the knife in Mr. Mitchell's possession. Yet the jury never knew that fact. Moreover this Court relied on that false evidence in affirming: "a witness testified that he saw a small pocketknife with dried blood near where Mitchell slept after the murder." Mitchell, 527 So. 2d at 181.[15] Certainly the fact that the knife had been found and that subsequent testing demonstrated there was no blood on it was highly exculpatory evidence breaking the chain of circumstantial evidence necessary to sustain the conviction.

Counsel did not look at the knife prior to trial (PC 68). At the motion hearing counsel learned for the first time that this knife had only a 2" blade (PC 65, 69). Had counsel adequately investigated, he would have known this

[15]This Court also believed the knife was never found. Mitchell, 527 So. 2d at 180.

critically material fact and could have presented this evidence at trial. Dr. Diggs, the State's pathologist, testified at trial the victim's wounds were consistent with a knife that had at least a 4" blade (R. 206). The length of blade of this knife (two inches) is clearly inconsistent with the wounds inflicted on the victim and would have raised reasonable doubt in the minds of the jurors of Mitchell's guilt of the murder. Due to counsel's failure to investigate, none of this critically material evidence was ever presented to the jury. It should have been.

Contrary to the facts known to the prosecution, the State introduced testimony by Gloria Harden that the knife had dried blood on it (R. 91). This testimony was directly refuted by the undisclosed results of the State's own forensic examination (PC 75; see Exhibit 9, Item 17). Counsel failed to adequately investigate, to learn the facts, and to present this critical exculpatory evidence to the jury. The jury was deprived of the opportunity to consider these significant facts regarding the putative murder weapon due to the State's nondisclosures and counsel's complete failure to adequate investigate the facts. Mr. Mitchell was denied a fair adversarial testing of the critical issues relating to the knife.

This Court also concluded on direct appeal that Mr. Mitchell's shirt was never found. Mitchell, 527 So.2d at 180. This Court, in concluding there was substantial evidence to support the verdict of guilt, also stated Mitchell "was covered with blood and that the amount of blood present on Mitchell was much more than would have been caused by the small abrasion on his lip."[16] Id., at 181. The shirt, however, had been found by the police (Exhibits 10, 11); and it matched the descriptions of the shirt which Mitchell wore that night. Regina

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[16]Gloria Harden's testimony at the 3.850 hearing was to the effect that her trial testimony was shaded at the direction of the prosecutor and that in fact the amount of blood on Mr. Mitchell's shirt was consistent with a small abrasion on his lip (PC 307-10).

Harden said Mitchell was wearing a white short-sleeved shirt with horizontal stripes with buttons down the front, blue jeans and white tennis shoes (Exhibit 24, PC 66, 875). Jessie Harden said Mitchell was wearing a striped shirt that evening (PC 66, PC 876). The shirt found by the police met these descriptions.

On May 2, 1986, after a search of the neighborhood, detectives found a shirt which matched the description of the shirt Mr. Mitchell was wearing on May 1st (Exhibit 11). The shirt, a man's white/blue pullover, was placed into police property by Detective Tate and received by property clerk Fernandez on May 2, 1986 (PC 810, Exhibit 10). Mitchell has "A" type blood, while the victim had "O" type blood (Exhibit 9, PC 807). This shirt, however, does not appear as one of the items sent to the FDLE laboratories for testing. (Exhibit 9, PC 805-808). There is no record that this shirt was ever tested for blood. Certainly the failure to test the shirt reflects on the condition of the shirt and whether it looked like it had blood on it.

In this regard counsel testified:

> Q. Okay. Do you recall at any time receiving reports from Mr. Benito which indicated a shirt identified by Miss Regina Harden as the shirt being worn by Mr. Mitchell on the night that was found at a dumpster by his house?
>
> A. Did I ever receive a shirt, no.
>
> Q. So you had no information to indicate that a shirt had been found?
>
> A. No.
>
> Q. To the best of your recollection?
>
> A. To the best of my recollection.
>
> Q. Thank you, sir. Do you recall what color shirt Miss Glorida Harden and Miss Annie Harden testified that Mr. Mitchell was wearing on the night of the homicide?
>
> A. I don't know. I think it was a black shirt.
>
> Q. Do you recall if there were any statements from any other witnesses which contradicted the color of the shirt?
>
> A. Yes.

Q. Okay. Sir, do you recall what color the other witnesses indicated the shirt was?

A. I think it was white.

Q. Do you recall which witnesses in particular had indicated that tit was a white shirt?

A. No.

Q. Do you recall a Jesse Harden testifying at the trial, sir?

A. Yes.

Q. Do you recall ever seeing a statement from Jesse which she indicated he had a white -- that Mr. Mitchell had on a white shirt with blue stripes?

A. Do I recall that unequivocally.

Q. Do you recollect that, sir?

A. I don't remember what he said to be honest with you. Exactly, I don't remember.

Q. And do you recall a witness by the name of Regina Harden?

A. Yes.

Q. And do you recall what color she indicated that the shit was?

A. No.

Q. Do you recall if she testified as to the color at all?

A. No.

Q. Would it have been important for you to know that, in fact, a shirt was found matching the description given by Miss Regina Harden?

A. Yeah, it could have helped.

Q. Would it have been helpful to know that the state, in fact, submitted that for testing?

A. Yes.

Q. Would it have been helpful to know if, in fact, there were any bloodstains on that shirt?

A. Yes.

Q. Would it have been helpful to know the amount of bloodstains on the shirt?

A. Yes, sir.

Q. Do you recall the testimony of Miss Gloria Harden concerning the fact that Mr. Mitchell had sneakers on on the night of the offense?

A. Vaguely. Okay. You got to remember it's been four years.

Q. I understand. As best as you can recall, sir?

A. Vaguely.

Q. Do you remember at any time knowing that the government, in fact, had obtained a pair of sneakers from Mr. Mitchell?

A. Independent recollection, no.

Q. Independent recollection.

A. No.

Q. Do you recall having asked to see those sneakers?

A. No.

Q. Would it have been importat to know, in fact, when if any, stains were on those sneakers?

A. Sure.

Q. Do you recall if the state ever introduced any sneakers into evidence in Mr. Mitchell's case?

A. I don't recall.

Q. Do you recall if the state ever introduced a shirt into evidence in Mr. Mitchell's case?

A. I don't believe they did.

Q. If the record reflected that they didn't introduce any shoes, you wouldn't have any reason to question the record on that?

A. No.

Q. How important was the credibility of Gloria and Annie Harden?

A. Pretty important.

Q. Why is that, sir?

A. Because they were saying some pretty damaging things about my client at the time.

Q. In fact, was that not one of the issues that you contested at trial, was the credibility of both Miss Glorida Harden and Miss Annie Harden?

A. Yes.

Q. If you had known that there was, in fact, a shirt obtained by the State which didn't match their description but more closely matched the description of Mr. Jesse Harden and Miss Regina Harden, would you have used that before the jury?

A. Probably.

Q. Why is that, sir?

A. Well, it would have tended to prove my client's innocence.

Q. And did you at any time remember seeing a shirt.

A. No.

(PC 56-60).

Even prior to trial, counsel knew there was a conflict between the witnesses concerning the description of the shirt worn by Mitchell that night (PC 56-57). Counsel failed altogether to investigate this matter in preparation for trial. Trial counsel did not learn that a shirt was recovered, did not look at the shirt, did not know if the shirt had indicia of blood on it, nor did he know whether the shirt had been tested by the FDLE laboratory for bloodstains (PC 56-58). Counsel simply never learned about the shirt and the shirt was never produced or even mentioned at trial although counsel testified the information concerning the shirt would have been very important to the defense (PC 58-60). The jury never heard about the shirt that was recovered. Mr. Mitchell was denied a fair adversarial testing of the critical issues concerning the shirt.

Gloria and Annie Harden were key prosecution witnesses and their credibility, therefore, was critical at trial (PC 59-60). At trial, Mr. Mitchell was in direct conflict with his cousins, Gloria and Annie Harden; he

said they were lying about his shirt being soaked with blood (R. 476, PC 133). At her deposition, Gloria Harden stated no charges were pending against her (PC 175). However, Gloria Harden had been arrested prior to deposition and trial for petit theft (Exhibit 21, PC 90). Moreover, Gloria, together with her mother, Annie Harden, were arrested prior to deposition and trial during a second incident, again for petit theft (Defendant Exhibit 22, PC 91). After her first arrest on August 10, 1986, Gloria Harden was in jail and asked Mr. Benito, the State Attorney, to get her out (PC 175); she had called Mr. Benito when she was arrested and asked for help (PC 293). She was then released (PC 293, 295). Annie Harden also called Mr. Benito (PC 296), and also was released. Both Gloria and Annie Harden were later key State witnesses at the trial (R. 65, 85).

Counsel did not pursue the charges pending against Gloria and Annie Harden, or that Benito himself intervened on their behalf to secure their release from jail (PC 90-91). Counsel testified he should have used this information, had it been disclosed to him, to impeach these witnesses during the trial (PC 91):[17]

> Q. Prior to their testimony, did you know, were you aware of these arrests concerning Miss Gloria Harden and Miss Annie Harden?
>
> A. No.
>
> Q. Did Mr. Benito ever --
>
> A. No independent recollection.
>
> Q. No independent recollection.
>
> A. Yes, sir.
>
> Q. Did Mr. Benito ever disclose to you, either in writing or orally, that he, in fact, had intervened on behalf of Miss Gloria Harden in these cases?
>
> A. No, sir.
>
> Q. If you had known that, in fact, Mr. Benito did intervene on behalf of Miss Gloria Harden concerning these crimes, what, if

[17]Counsel testified that the State failed to disclose this information. However the circuit court ruled that counsel's performance was deficient; thus placing the blame with counsel for the jury's failure to hear this impeachment.

anything, would you have done with that information at Mr. Mitchell's trial?

A. I would have made it known to the jury if, in fact, that did happen, that Mr. Benito had entered into some kind of an agreement for their testimony.

Q. Were you ever aware, during the investigation or during the actual trial of Mr. Mitchell that, in fact, Gloria Harden had been promised leniency from Mr. Benito for her cooperation?

A. No, sir, no, sir.

Q. And if you had known that, would you have done anyting with it?

A. Yeah. Like I said earlier.

(PC 92-93).

Counsel never learned these facts, which should have been used to impeach these witnesses at trial. Beyond cavil, evidence of this kind is a classic source for impeachment of a state's witness for interest or bias in providing favorable testimony for the state. At the 3.850 hearing, Gloria Harden testified that in fact she did shade her testimony to help Mr. Benito get a conviction because he convinced her of Mr. Mitchell's guilt. Counsel failed to adequately investigate and use this information at trial to impeach the critical testimony given by Gloria and Annie Harden concerning Mitchell's shirt and Gloria's further testimony about the "bloody" knife. Consequently, Mr. Mitchell was denied the opportunity to put the testimony of these two key witnesses to a fair adversarial testing. The jury never heard the facts concerning the credibility of these key witnesses.

This Court also concluded Mr. Mitchell was in possession of the victim's watch, 527 So.2d 180, and further stated that the wrist watch "presumably was removed from the body." Id, at 181.

On May 2, 1986, two watches, a Seiko and a Nelsonic, were recovered from the Harden residence where Mr. Mitchell was staying [PC 807]. A Nelsonic watch was found in a closet under the stairway in the Harden residence [PC 842].

Neither were Timex watches as described by the victim's son [PC 832]. Only one watch was later introduced at trial (State's Trial Exhibit 15, R. 110).

Annie Harden told the detective she saw Mr. Mitchell "in possession of one (1) Seiko watch which she described as being a solar type" (PC 843, Exhibit 19). Gloria Harden positively identified one of the watches as having been worn by Mr. Mitchell on May 1, 1986. The watch however was not a Timex with a sweep second hand, but rather was a Seiko watch; it had a black band, not a silver colored metal band (PC 849). Jessie Harden stated that he had seen a silver digital, solar operated Seiko watch on Mr. Mitchell's left wrist that night of the murder (PC 877). At approximately 0645, Jessie Harden woke up and saw the watch which Mitchell had been wearing lying on the dining room table. Jesse Harden then stole the watch and hid it (PC 879). The police later recovered this Seiko watch from the place where Jessie had hidden it.

When Bruce Shonyo, the victim's son, was shown the Seiko watch by the police, he clearly stated he could not identify the watch as belonging to his father (PC 850, Exhibit 20). On May 1, 1986, Investigator Parrish interviewed Bruce Shonyo. Officer Shonyo was very specific in his description of his father's watch. He stated: "1. On w/m Shonyo, Walter's person "A" Timex watch with silver colored metal elastic type band. The watch had a sweep hand and gave the day and date. The watch was battery operated" (PC 832, Exhibit 17). On August 18, 1986, Bruce Shonyo was deposed and again stated he had not recognized the watch as the watch allegedly taken from his father (Exhibit 18, PC 837).

Prior to trial, the Seiko wristwatch was clearly identified by three persons as having been seen in Mr. Mitchell's possession, but this Seiko watch was clearly not the victim's watch (PC 837, 850). Moreover, none of these witnesses provided any evidence either before or during trial to show that Mr. Mitchell was ever seen in possession of a Nelsonic watch (PC 843, 849, 877).

Having failed to obtain any identification of the Seiko watch as the victim's watch and having failed to develop any evidence which in any way linked the Nelsonic watch to Mr. Mitchell, the State nevertheless introduced the Nelsonic watch at trial (State's Trial Exhibit 15). Bruce Shonyo then testified that watch (State's Trial Exhibit 15) looked like the watch his father wore (R. 118).

Relying upon pretrial discovery directed to the subject of Seiko watch, defense counsel inexplicably never caught on to the fact that the State had played a shell game with the watches, switching the watches and introducing a different watch at trial. Counsel never realized that the watch actually admitted at trial was different than the one which had been the subject of his discovery efforts. After having conducted pretrial discovery directed to the Seiko watch, defense counsel was unaware that the State then switched the watches and introduced the Nelsonic, not the Seiko, at trial. Counsel never established during the trial that the watch admitted into evidence was not the same watch seen in Mitchell's possession on the night of the murder, nor did counsel ever establish through the witnesses knowing the facts that Mitchell was never seen in possession of the Nelsonic watch or that there were no facts linking the Nelsonic watch to Mr. Mitchell.

Counsel testified at the 3.850 hearing:

> Q. Do you recall the watch that was submitted into evidence, in fact, was not a Timex watch? Do you have any recollection of that?
>
> A. No.
>
> Q. Do you recall if Mr. Shonyo's son even positively identified the watch?
>
> A. No.
>
> Q. Would it help your recollection if I told you he merely said that it looks like his dad's watch?
>
> A. Some.

Q. Now knowing that he made two prior statements indicating, that, in fact, it was a Timex watch and the fact that he could not identify the watch, could you have done anything with that on cross-examination?

A. Probably.

Q. Would you have done something with it?

A. Yes.

Q. Okay. You wouldn't have any tactical reason for not doing that?

A. I don't recall at the time but based on the evidence that I had and what I was dealing with and the dynamics of the moment, yeah, I think I would have done something.

(PC 63-64).

Counsel was also completely unaware that the son's testimony differed from his deposition when he stated at trial that the watch looked like his father's (R. 118). Trial counsel had the deposition of the son wherein the son stated he could not identify the watch (PC 61-62). Counsel could have, but failed to impeach him on his prior inability to identify the watch and also on two prior inconsistent statements that his father's watch was a Timex, not a Seiko or a Nelsonic (PC 63-64). Due to counsel's failure to adequately investigate, prepare and know the facts of the case, the jury never heard all of the facts concerning the two watches and was left with the same erroneous impression this Court had on direct appeal, Mr. Mitchell was in possession of the victim's watch. The result was a lack of any meaningful adversarial testing of the issue concerning the watches.

On May 1, 1986, the day the victim died, the State gathered specific physical evidence consisting of the following: fingernail scrapings and clippings taken from the deceased and a hair removed from the victim's right little finger (stuck to nail), hair samples taken from head (pulled and combed) and samples taken from the pubic area (Exhibit 10, PC 800). On May 2, 1986, approximately sixty pieces of physical evidence were gathered, including vacuum

sweepings, blood swabbings and scrapings from the victim's truck, clothes and other items (Exhibit 9). This evidence, including the truck (which was towed to Tallahassee (R. 245)), was to be submitted to laser, super-glue and other forensic testing. The State requested examination of all evidence for trace materials, blood, latent prints and any other items of physical evidence (Exhibit 12, 13). On May 6, 1986, the Tampa Police Department obtained a search warrant in order to obtain dental impressions, hair samples, saliva samples, fingernail scrapings and a blood sample from Mr. Mitchell. This search was effectuated on May 6, 1986 (R. 647-52). On May 7, 1986, the hair samples, saliva samples, fingernail clippings, fibers, the alleged murder weapon (knife), clothes from the victim, blood samples, and some thirty other pieces of physical evidence were submitted to the Florida Department of Law Enforcement (FDLE) in Tallahassee. The FDLE was requested by the TPD to match human hair, to determine from the saliva samples whether the subject was a secretor and to determine blood type, to attempt to match latent prints, and to determine if foreign fibers matched any of the items submitted for testing (Exhibits 12, 13).

Two weeks prior to trial, Mrs. Cortese of FDLE was deposed. (PC 78-79) None of the nail scrapings, saliva samples or hair samples had then been tested according to Cortese. Counsel then asked for, and was promised, the test results (PC 78, 89-90, 161). Counsel would have used the test results up at trial (PC 80). The scrapings included a hair from the fingernail of the victim, which was probably that of the perpetrator (PC 81). Exhibit 14, Item 5, identified scrapings from fingernails of the victim (PC 85); Exhibit 12, Item 5, showed that fingernail scrapings were submitted to FDLE lab (PC 83); and Exhibit 13 was a request for analysis.

Following the deposition, counsel failed to pursue the matter to ensure the promised forensic testing was done and that the results were made available to the defense for use at trial. Counsel's own experts, prior to trial, asked why

counsel did not have the test results (PC 163). He said, "I don't know." "Once I found myself in a situation where I knew that the only alternative was to utilize the lack of evidence as my defense, the choice was not made by me but it was made for me, primarily by me not having that evidence" (PC 161).

Counsel never received any test reports, nor did he pursue their production prior to trial. The trial court clearly indicated that, had he been requested by counsel, he would have order their production (PC 160). Counsel never requested an order for production from the Court, although he acknowledged the Court would have compelled the discovery had he requested it (PC 160).

Hairs were recovered from the glovebox of the victim's truck (Exhibit 14) in addition to the single hair attached to the victim's fingernail. Counsel stated that the hairs were exculpatory (PC 78). However, the hairs on the glovebox had never been tested (PC 74; Exhibit 14, Item 1QQ). Counsel failed to further investigate the matter and to insist on forensic testing and the production of the results to the defense. None of the hairs have never been examined and compared with the exemplars to determine whether they are consistent or inconsistent with either the victim or Mitchell.

Counsel also failed to object to the testimony of Dr. Briggle. Counsel never investigated Dr. Briggle's background or learned of his lack of expertise. Had counsel adequately prepared and litigated the issue, Dr. Briggle's testimony certainly would have been excluded.

The corner-stone of ineffective assistance of trial counsel is Strickland v. Washington, 466 U.S. 668 (1984). There the Supreme Court held counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted.) Strickland requires a defendant to plead and demonstrate objectively unreasonable attorney performance and prejudice. Mr. Mitchell has done both.

In United States v. Cronic, 466 U.S. 648 (1984), the Supreme Court recognized that in certain situations counsel may be rendered ineffective through actions of the State which deprive counsel of the opportunity to put the prosecution's case to a fair and adequate adversarial testing, thus rendering counsel ineffective. In such circumstances, unlike Strickland's test, the defendant need not prove prejudice; rather prejudice is presumed. In addition to the due process violations arising from the State's repeated non-disclosures of material exculpatory evidence to the defense the failure of the State to make such disclosures rendered trial counsel ineffective.[18] Counsel was prevented by the State from putting the prosecution's case to a true adversarial testing, easing the State's burden to obtain a conviction.

The courts have repeatedly held "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also, Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[a]t the heart of effective representation is the independent duty to investigate and prepare"); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to investigate possibility that others had motive, opportunity and ability to kill victim was ineffective assistance); Chambers v. Armontrout, 885 F.2d 1318 (8th Cir. 1989)(failure to interview an alibi witness was ineffective assistance).

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[18]Certainly this must be the case with regard to the State's introduction of evidence that Mr. Mitchell's knife was covered with blood. The State knew this was not true and did nothing to correct the false evidence.

It is also the case regarding the prosecution's armtwisting of Gloria Harden. The prosecution had exercised undisclosed assistance to Ms. Harden and further convinced her that Mr. Mitchell was guilty, therefore it was okay for her to shade her testimony. Without revealing this to defense counsel, circumstantial ineffective assistance was guaranteed.

After hearing and considering all of the testimony including Mr. Lufriu's admissions of his lack of investigation, preparation and presentation of available evidence during the guilt phase of the trial, the trial court found counsel's representation of Mr. Mitchell was substandard (PC 184, 216). The Court's findings and conclusions in this regard. However the circuit's legal conclusion that confidence is not undermined in the guilt determination is in error.

There can be little doubt that material evidence did not reach the jury in Mr. Mitchell's case. Trial counsel testified how he would have used the evidence; it was consistent with the theory of defense. The unpresented evidence was favorable to the defense. The only question is whether the evidence was material. In other words does the failure to present the evidence at trial undermine confidence in the outcome of the guilt-innocence. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87. This Court has previously said: "The inability to gauge the effect of [counsel's] omission[s] undermined the court's confidence in the outcome," thus warranting 3.850 relief. State v. Michael, 530 So. 2d 929, 930 (Fla. 1988). Certainly that is the case here.

The withheld evidence's materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). E.g., Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973). Here, as trial counsel has stated, the unpresent evidence was critical to the theory of defense -- both in implicating Bivens and exculpating Mr. Mitchell.

Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. However, it is not the defendant's burden to show that the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. Such a probability undeniably exists here.

In a case strikingly similar to Mr. Mitchell's, the Eleventh Circuit held:

> As noted on the earlier appeal, issues arose as to whether Smith's attorney had possession of the prior statement of Smith and, by failing to use it for impeachment, rendered ineffective assistance to his client or whether the state had failed to disclose the statement in spite of the mandate of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The district court found, after hearing, that there had not been a Brady violation but that counsel's representation had been inadequate. This finding is supported by the evidence.
>
> The conviction rested upon the testimony of Johnson. His credibility was the central issue in the case. Available evidence would have had great weight in the assertion that Johnson's testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different.

Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986).

Here the jury did not know that Mr. Mitchell's knife had been found and tested for the presence of blood. The test results were negative; no blood was found. Under Smith v. Wainwright, that alone would constitute sufficient prejudice to require a reversal. However, there was much more. The jury did not know Bivens was seen at Mr. Shonyo's place of employment. The jury did not know male prostitutes, such as Bivens, worked the area. The jury did not know there was a homosexual bathhouse two and a half blocks from Mr. Shonyo's place of employment. The jury did not know Bivens' clients were all white males, that his sexual activity always took place in a vehicle, that he frequently drove to

the neighborhood the body was found before the sexual activity commenced (thus he had ties to both where Mr. Shonyo disappeared and where his body was found).[19] The jury did not know that Bivens carried a knife which he kept handy during his sexual encounters. The jury did not know that Bivens frequently kept his true gender from his clients until sexual activity was underway which caused clients to become angry and explained Bivens' need for a knife. The jury did not know that there were unexplained Ft. Lauderdale matchbooks in Mr. Shonyo's truck after his death (the significance of this is obvious in light of the evidence that Bivens returned from Ft. Lauderdale the day of the homicide). The jury did not hear any argument from defense counsel about why Bivens after being with a client would need money.

The evidence the jury did not hear about Bivens would certainly have established a reasonable doubt about Mr. Mitchell's guilt. It, thus, more than a creates a reasonable probability of a different outcome. However, when coupled with the evidence that the jury did not hear as to Mr. Mitchell, himself, there can be no doubt an acquittal would have occurred.

As noted earlier, the jury did not know Mr. Mitchell's knife had been found and did not have blood present on it. The jury did not know Mr. Mitchell's shirt had been found, and the State decided not to test it for the presence of the victim's blood. The jury did not know that Mr. Shonyo's son had initially indicated his father had a Timex wristwatch as opposed to Nelsonic he tentatively identified at trial, a watch which had never been seen in Mr. Mitchell's possession. The jury did not know of the assistance Mr. Benito gave Gloria and Annie Harden and their resulting bias in favor of the prosecution.

In another case strikingly similar to Mr. Mitchell's, the Eighth Circuit concluded:

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[19]This in in contrast to Mr. Mitchell. The State never linked Mr. Mitchell to the area of Mr. Shonyo's employment.

> We agree with the district court that trial counsel's failure to adequately investigate the facts of the murder falls below the objective standard of reasonable assistance required under the Sixth Amendment. Eldridge, 665 F.2d at 237. Adequate representation probably would have produced a different result. The jury that convicted Henderson knew of the circumstantial evidence implicating him, but had no reason to doubt the inferences the state drew from the facts. At retrial the jury will be confronted with substantial evidence supporting an alternative theory of the murder. It would be a fundamental miscarriage of justice to affirm Wilburn Henderson's conviction in a capital case, given the probability that a jury would have reasonable doubt about his guilt if he were tried with effective counsel.

Henderson v. Sargent, 926 F.2d at 714.

Mr. Mitchell need not demonstrate his innocence beyond a reasonable doubt; he need not demonstrate beyond a reasonable doubt that another committed this murder. He need only demonstrate the existence of evidence, together with the inferences drawn from the evidence, which would have raised reasonable doubt of his guilt of robbery and murder had the evidence been presented during his trial but for the ineffective assistance of counsel -- doubt which would have changed the outcome and which now undermines confidence in the results. See, e.g., Chambers v. Armontrout, 885 F.2d 1318, 1324 (8th Cir. 1989)(Defendant does not have to prove ineffective assistance of counsel was outcome determinative).

No adversarial testing occurred. Mr. Mitchell was convicted without the effective assistance of counsel. His trial was "a sacrifice of [an] unarmed prisoner []to gladitators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied sub nom.; Sielaff v. Williams, 423 U.S. 876 (1975). Accordingly, Mr. Mitchell's conviction must be vacated and a new trial ordered.

ARGUMENT II

MR. MITCHELL WAS DENIED A FAIR ADVERSARIAL TESTING WHEN MATERIAL EXCULPATORY EVIDENCE WAS NOT DISCLOSED TO DEFENSE COUNSEL IN VIOLATION OF BRADY v. MARYLAND AND WHERE FALSE OR MISLEADING EVIDENCE AND ARGUMENT WAS PRESENTED TO THE JURY, CONTRARY TO HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

At the hearing, Mr. Mitchell's trial counsel testified to the failure of the state to disclose material evidence in violation of the Due Process Clause was introduced, evidence which trial counsel would have used at trial to establish reasonable doubt of guilt, to impeach witnesses against Mr. Mitchell, and to substantively support his defense. All of this evidence should have been presented to the jury at Mr. Mitchell's trial but for the State's nondisclosure of the evidence. Brady v. Maryland, 373 U.S. 83 (1963). The State's nondisclosures prejudiced the entire course of counsel's investigation, preparation and presentation of the defense to the jury. Without the State's disclosures of all material evidence, counsel simply could not adequately formulate a viable theory of defense and conduct an adequate and meaningful investigation, preparation and presentation of that defense. The state's nondisclosures were compounded, moreover, by trial counsel's own failures in other areas to adequately investigate, prepare and present other available evidence on behalf of his client under Strickland and Cronic.

In either event, the ultimate consequence was the same -- Mr. Mitchell was prejudiced by the failure to present material evidence to the jury. The jury never heard all the facts. Consequently, Mr. Mitchell was denied a fair trial, a true adversarial testing of the prosecution's case, as is constitutionally mandated. Here, the jury never heard and considered compelling material evidence which would have raised reasonable doubt whether Mr. Mitchell killed Walter Shonyo. The undisclosed evidence was exculpatory because it tended to indicate the murder was committed by someone else and not by Mitchell. In order

"to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential that the jurors hear this evidence.

Defense counsel filed a discovery request asking for everything the State had relating to the case, and the State responded (PC 22; R. 659-660, 664-668, 672-678, 682, 687-692). Counsel stated that he understood that the State responded by giving him all the State had (PC 23).

The State, however, had in its possession additional material evidence which would have exonerated Mr. Mitchell; exculpatory evidence which would tend to prove that it was not Mr. Mitchell who killed the victim, Mr. Shonyo. At a minimum, the evidence would have raised reasonable doubt of his guilt of robbery and murder. At the 3.850 hearing, Mr. Lufriu identified critical Brady documents which were never provided to him by the State in response to his discovery requests.[20]

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[20]Among others, Mr. Lufriu identified the following undisclosed items:

1. Exhibit 2 [Rap Sheet of Bivens], PC 25;

2. Exhibit 3 [Bivens arrest report], PC 26;

3. Exhibit 4 [Bivens arrest report], PC 26;

4. Exhibit 5 [Bivens arrest report - exposed knife incident] PC 26;

5. Exhibit 9 [Laboratory report disclosing no blood on the knife], PC 37;

6. Exhibit 10 [Crime Scene Supplement - list of photographs and evidence, and disclosing the shirt placed in evidence], PC 80;

7. Exhibit 11 [Auxiliary Report with Gloria Harden interview wherein she stated Mitchell was covered with blood, and disclosing the recovery of the shirt], PC 56;

8. Exhibit 12 [Auxiliary Police Report - identifying evidence sent to FDLE lab and requests for examination], PC 83;

9. Exhibit 13 [Lab Transfer Form - microanalysis request], PC 84;

10. Exhibit 14 [Request for Analysis], PC 85;

11. Exhibit 19 [Police Report]: [Gloria's description of the knife is consistent with description by Jessie Harden and with knife itself

(continued...)

At trial the State introduced no direct evidence linking Mr. Mitchell to the body of the victim. Proof of Mitchell's involvement in the murder was entirely circumstantial. As we now know, additional critically material evidence existed, but was never disclosed by the State. The jury never knew about or considered this evidence. See Argument I, supra, wherein this evidence is discussed at length.

The state took full advantage of its nondisclosures. During the State's closing, Mr. Benito said:

> Don't convict Willie Mitchell because we got no fingernail scrapings. What did Mary Cortese tell you? Fingernail scrapings, just because we have them, are not going to lead to any evidence of any value.
>
> Don't convict Willie Mitchell because we don't say whose hair that is. Is that Willie Mitchell's hair under the glovebox? Is that the victim's hair under the glovebox? Is that some dog's hair under the glovebox? Who cares about the hair, ladies and gentlemen.
>
> * * * *
>
> There is also an indication in this lab report of a folding pocketknife. There is no indication that was the knife that Jessie Harden saw that night at the apartment. Don't get misinformed by those two items that are listed on that lab report.

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[20](...continued)
(Exhibit 25)];

12. Exhibits 21 & 22 [Arrest reports of Annie & Gloria Harden];

13. Exhibit 25: Knife with original packaging. [Trial counsel did not see the knife, PC 68].

14. Exhibit 26 [Items Sent to Orlando Lab - Interlaboratory Evidence Log], PC 87 [Cortese testified the evidence was never tested. Counsel asked that it be tested, PC 89; Counsel did not receive the tests, PC 90];

15. Exhibit 29 [FDLE reports disclosing unidentified 8 latent fingerprints and 2 palm prints and request for analysis in Orlando of knife and knife handle], PC 210;

16. Exhibit 30 [FDLE report on suspected blood samples], PC 210.

R. 556-57 (emphasis added.)[21]

This was a gross misrepresentation of the available evidence in the case, one of constitutional dimension: a misrepresentation concerning the "handling" and very existence of undisclosed evidence in the State's possession. Defense counsel was unprepared to meet this misrepresentation with evidence of the knife's negative test results because of the State's nondisclosure. Counsel was unable to meet the representations due to the State's willful failure to provide test results to the defense. Counsel was blinded and rendered ineffective by the State's manipulation and suppression of the evidence. The State failed to conduct and reveal forensic tests on evidence which could have severed any connection between Mr. Mitchell and Mr. Shonyo's body.

In sum, significant material and exculpatory evidence bearing upon Mitchell's guilt or innocence was purposely secreted from defense counsel. None of this, of course, excused defense counsel's failure to otherwise render effective assistance. Where, as here, guilt of murder was built entirely on circumstantial evidence, the misconduct of the State, compounded by the deficient performance of defense counsel, cannot be considered harmless.

The circumstantial evidence linking Mr. Mitchell to the robbery and murder was exculpatory when viewed in the full light of the additional evidence not disclosed by the State. But for the State's nondisclosures, that evidence would have given rise to inferences consistent with innocence. Willie Mitchell was convicted on circumstantial evidence which could have shown him to be innocent of the murder of Walter Shonyo had all the material facts and evidence been disclosed by the State to counsel and the jury.

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[21]To the contrary, statements made by Jessie Harden [Exhibit 24], Glorida Harden and Annie Harden [Exhibit 19] to the police clearly identified the knife sent to FDLE as the knife seen by them in Mitchell's possession.

The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information, as was done here, renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, United States v. Bagley; Arango v. State, 497 So.2d 1161 (Fla. 1986). See also Dennis v. United States, 384 U.S. 855, 874 (1966) ("In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts"). A defendant's right to present favorable evidence is violated by such state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); Giglio v. United States, 405 U.S. 150 (1972). The resulting unreliability of a conviction or sentence of death derived from proceedings such as those in Mr. Mitchell's case also violates the eighth amendment requirement of heightened reliability in capital cases. See Beck v. Alabama, 447 U.S. 625 (1980); Ford v. Wainwright, 477 U.S. 399 (1986). Here, rights designed to prevent miscarriages of justice and to ensure the integrity of the fact-finding process were abrogated.

Material exculpatory information withheld by the State violated due process of law under the Fourteenth Amendment. If there is a reasonable probability that the withheld information could have affected the conviction, a new trial is required. United States v. Bagley, 105 S.Ct. 3375 (1985); Brady v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976).

Due process is also violated when the evidence is manipulated by the prosecution. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974). The use of false or misleading evidence corrupts the truth-seeking function of the trial process and is incompatible with the rudimentary demands of justice, United States v. Agurs, 427 U.S. 97, 103-04 and n.8 (1976); Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). Accordingly, the

knowing use of false evidence requires reversal if the falsity could in any reasonable likelihood have affected the jury's verdict. Bagley.

The prosecutor must reveal to the defense any and all information that is helpful to the defense, Bagley, whether the material evidence relates to a substantive issue, Alcorta v. Texas, 355 U.S. 28 (1957), the credibility of the State's witnesses, Napue; Giglio, or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967). Additionally, Fla. R. Crim. P. Rule 3.220 requires the production of evidence in a criminal prosecution. There can be no doubt about Mr. Mitchell's entitlement to full disclosure.

Here exculpatory physical evidence, exculpatory test results, arrest records of key witnesses, and other statements and reports material to the defendant's case were not disclosed. Clearly, the undisclosed evidence tends to negate Mitchell's guilt of murder and this evidence was "within the State's possession or control." The nondisclosures cannot be found to be harmless.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt or capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984); Brady. The Bagley materiality standard is met, and reversal is required, once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. Such a probability undeniably exists here, as the evidence presented now discloses; further, the state failed to prove beyond a reasonable doubt to the contrary. Had the jury heard this evidence, but for the state's nondisclosures, there would have been a reasonable doubt concerning Willie Mitchell's guilt, and a different outcome would have resulted. Willie Mitchell "was deprived of

evidence which was critical to the determination of his guilt or innocence." See, Smith v. Wainwright, 799 F.2d 1442, 1443 (11th Cir. 1968).

However here the prosecutorial misconduct went beyond a mere failure to disclose. Here the prosecution presented false and misleading evidence and argument. The prosecutor knew that Mr. Mitchell's knife had been tested for the presence of blood with negative results. However, he presented false evidence and misleading argument to the effect that Mr. Mitchell's knife was seen with blood on it and that it was subsequently never found or tested.

When a prosecutor knowingly allows false and misleading evidence to go to the jury uncorrected, relief is appropriate if there is any reasonable likelihood that the evidence may have affected the jury's verdict. Bagley, supra; Giglio, supra. According to Bagley this standard is virtually identical to the Chapman v. California, 386 U.S. 18 (1967), harmless beyond a reasonable doubt standard. Bagley, 473 U.S. at 679 n9. False and misleading testimony regarding the knife went to the jury, and the prosecutor never corrected it. If the prosecutor's interest is that "justice shall be done," see Berger v. United States, then the State must concede that the prosecutor's actions in this case violated Mr. Mitchell's rights to a fair trial. The fasity of the evidence and argument was established at the 3.850 hearing. Yet, the jury did not know this, nor was the information available for this Court on direct appeal. It is, however, cognizable now in the 3.850 process. Relief must be granted.

ARGUMENT III

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. MITCHELL'S CAPITAL CONVICTION AND SENTENCE WERE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Under Richardson v. State, 546 So.2d 1037 (Fla. 1989), evidence in existence at the time of trial but unknown to the parties is cognizable in Rule 3.850 proceedings.[22] As the Florida Supreme Court noted in Richardson:

> The 1984 amendment to rule 3.850, while not making any substantive changes, implicitly recognized that a motion pursuant to rule 3.850 is the appropriate place to bring newly discovered evidence claims by including, as one of the exceptions to the two-year time limitation for bringing claims under the rule, situations where "the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence." The Florida Bar re Amendment to Rules of Criminal Procedure, 460 So.2d 907, 907 (Fla. 1984).

546 So.2d at 1038. Evidence which was not in existence at the time of the trial may yet warrant an evidentiary hearing as newly discovered evidence in Rule 3.850 proceedings. Smith v. Dugger, 565 So.2d 1293 (Fla. 1990).

Here, evidence in existence at the time of trial has been newly discovered, as well as evidence which has arisen since trial. This evidence supports the defense theory at trial that Mr. Mitchell was not the killer and that the killing was in fact a "homosexual rage" killing. The logical suspect was Mr. James Bivens. In 1989 Bivens had an encounter with a police officer detailed as follows in a police report:

> On Thursday, 08-17-89, at approx 2037 hrs, I was operating a marked cruiser unit and traveling north bound on North Nebraska Ave approaching E. Cayugast, a known high prostitution area.

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[22]The factual basis for the ineffective assistance of counsel claim, and the Brady/Giglio claim must not be viewed in isolation. The evidence that was never presented because of trial counsel's deficient performance, the suppressed evidence, and the false evidence become even more significant in light of the newly discovered evidence that has been found. With this newly discovered evidence, the theory defense counsel attempted to assert at trial that Mr. Mitchell was the wrong man is now more clearly focused. The nature of this evidence when viewed in conjunction with trial counsel's deficient performance and the Brady, and Giglio, violations certainly dictates a new trial.

At that time I observed the def. standing in the road, off to the right side edge, at the listed intersection. The B/M def was dressed in a long black wig, red sweater shirt, and a tight black shirk. He had fake breast inserts in the shirt and his face was made up, and finger nails painted red, and his was carrying a womans purse.

I observed his skirt to be pulled up to the point that his bare genitals were almost exposed. He was standing in a seductive manner and he was attemptimg to stop cars by extending his arm and hand out into the passing vehicles line of sight.

Upon seeing my unit the def quickly pulled his skirt down to its normal lenght and walked out of the road and onto the side walk of the north bound lane.

I stopped my unit and approached the B/M and identified him verbally. I recognized the def. visually and by his name as a known person with past prostitution related offenses convictions. A check by T.P.D. radio verified that the def. was last convicted of loitering for prostitution on 05-05-89, T.P.D. case #89-038317.

I instruced the def. to place his hands on the hood of my vehicle as he was under arrest. As I attempted to handcuff him, he spun and pushed at me. He then attempted to flee on foot.

I tackled the def. at which time he began to punch and kick at me. As we rolled around on the ground he pulled my hair and violently screamed while fighting. I then managed to roll him onto his stomach and attempted to pin him down by putting my knee between his shoulder blades.

He continued to fight violently causing me to roll off off him. He attempted to get up to flee again but I grabbed him around the chest and pulled him back to the ground. The def. then used his teeth to bite my left and right forearms. This action broke the skin on my right arm and caused superficial bite marks to both arms.

I then was able to call for back up, at which time he continued to fight violently. I then struck the B/M numerous times to the left side of his head with my left fist. Still he was able to slip out of my hold and stand up. As we stood I grabbed the def by the shirt and kicked him several times in the abdomen area, causing him to begin to fall. At this time Off Barrows arrived and tackled the def. we were then able to restrain and handcuff him. He was transported to the hospital. I was treated and released at TGH.

(PC 790-91, Exhibit 6).

Mr. Mitchell urges this Court to recognize the importance this evidence would have had on the outcome of the trial. This evidence unquestionably undermines confidence in the reliability of Mr. Mitchell's conviction, a conviction which resulted in a sentence of death. The Eighth Amendment

recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Such matters cannot be treated through mechanical rules and stiff principles.

The U.S. Supreme Court has repeatedly held that because of the "qualitative difference" between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Gregg v. Georgia, 428 U.S. 153, 187 (1976); Reid v. Covert, 354 U.S. 1, 45-56 (1957) (Frankfurter, J., concurring); id. at 77 (Harlan, J., concurring). The requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence, including: those phases specifically concerned with guilt, Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Ford v. Wainwright, 477 U.S. 399 (1986); sentence, Lockett v. Ohio, 438 U.S. 586, 604 (1978); appeal, Gardner v. Florida, 430 U.S. 349, 360-61 (1977); and post-conviction proceedings, Amadeo v. Zant, 108 S.Ct. 1771 (1988). Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, Gregg v. Georgia, 428 U.S. 153, 187 (1976), including full and fair post-conviction proceedings. See, e.g., Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980); Evans v. Bennet, 440 U.S. 1301, 1303 (1979) (Rehnquist, Circuit Justice).

The Eighth Amendment mandates this Court not dismiss this newly discovered evidence. Mr. Mitchell submits that this evidence more than sufficiently questions the reliability of his conviction and death sentence. When viewed in conjunction with the evidence never presented because of trial counsel's deficient performance and the evidence withheld in violation of Brady, his

conviction cannot withstand the scrutiny of the eighth amendment and fourteenth amendment due process. Rule 3.850 relief is required.

CONCLUSIONS

The Circuit Court's finding that trial counsel's performance at the guilt phase of the trial was substandard is supported by substantial, competent evidence. The Circuit Court erred, however, as a matter of law and fact its legal conclusion that trial counsel's substandard performance was not prejudicial, and this part of its Order should be reversed and relief granted. The Circuit Court erred in denying a new trial; a new trial must be ordered.

Respectfully submitted,

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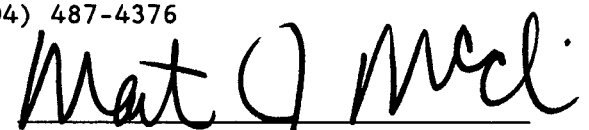
By: 
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