IN THE SUPREME COURT OF FLORIDA

CASE NO. 89434

JOHN MILLS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

EMERGENCY MOTION: CAPITAL CASE, DEATH WARRANT SIGNED; EXECUTION IMMINENT.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR WAKULLA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT AND REQUEST FOR STAY OF EXECUTION

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PRELIMINARY STATEMENT

This case is before the Court on appeal of the circuit court's denial of Rule 3.850 relief and the underlying application for a stay of execution. Given the time constraints involved in this action, this brief presents a summary of the reasons why the circuit court's denial of a stay of execution and Rule 3.850 relief was improper. Mr. Mills requests and urges that this Court enter a stay of execution.

Citations in this brief designate references to the records, followed by the appropriate page number, as follows: "R.___" -- Record on Direct Appeal to this Court; "PC-R. ___" -- Record on Appeal from denial of Mr. Mills' first Rule 3.850 motion; "PC-R2. ___" -- Record on Appeal from denial of the instant Motion to Vacate Judgment and Sentence; "App. ___" -- Appendix accompanying Mr. Mills' instant Motion to Vacate. The hearing conducted in the lower court on December 2, 1996, is paginated individually, separately from the record on appeal, and will be cited as "T.," followed by the page numbers, i.e., "T. ___". All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

The Court has scheduled oral argument for Tuesday, December 3, 1996, at 2:00 p.m.

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INTRODUCTION

At John Mills' trial, the State's case for first-degree murder and a death sentence rested entirely upon the testimony of codefendant Michael Frederick. Frederick testified that he and Mr. Mills were looking for places to burglarize and randomly came upon the trailer of the victim, Les Lawhon. According to Frederick, Mr. Mills entered the trailer under the guise of seeking directions, kidnapped Mr. Lawhon, had Frederick drive Mr. Lawhon to an isolated area, and then murdered Mr. Lawhon. After the murder, according to Frederick, the pair returned to Mr. Lawhon's home and stole property, which Mr. Mills then took home.

Mr. Mills consistently maintained that he did not commit the murder or burglary and that the Lawhon property later found in his possession was given to him by Frederick to pay off a debt. No evidence other than Frederick's testimony and the stolen property connected Mr. Mills to the murder. The defense strategy at trial was to contend that Frederick and some other person committed the murder. To this end, the defense presented evidence that a blue bandanna found near the victim's body was similar to a bandanna worn by a woman named Debra Mock.[1]

Both this Court and the United States Court of Appeals for the Eleventh Circuit have recognized that the State's case at trial depended on Michael Frederick and that the defense theory at trial was that Frederick and another person committed the murder. On direct appeal, this Court recognized that Frederick was "the main witness against Mills at trial" and that "[t]he

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[1]Debra Mock could not be located at the time of trial.

defense suggested that Frederick and another person had killed Les Lawhon." Mills v. State, 462 So. 2d 1075, 1077-78 (Fla. 1985). The Eleventh Circuit likewise recognized that the facts of the offense "are derived primarily from Frederick's testimony as a witness for the prosecution at Mills' trial," Mills v. Singletary, 63 F.3d 999, 1002 n.1 (11th Cir. 1995), and that "[t]he defense strategy was to paint Frederick as an untruthful witness by highlighting his inconsistent stories to the police and by raising the possibility that Frederick had kidnapped and murdered Lawhon alone or with the help of unknown accomplices." Id. at 1006.

Unbeknownst to the defense at the time of trial, the State knew but did not reveal significant evidence casting substantial doubt on the truth of Frederick's testimony and providing substantial support for Mr. Mills' defense. At trial, Michael Frederick testified that he did not know the victim, Les Lawhon, before the murder. The State knew but did not reveal that this was false. Michael Frederick testified that he did not know Debra Mock on the day of the murder. The State knew but did not reveal that this, too, was false. Michael Frederick testified that he had never been to Les Lawhon's trailer before the day of the murder. The State knew but did not reveal that this was yet another falsehood.

Claim I of Mr. Mills' Rule 3.850 motion (Argument II herein) specifically pled that the State possessed information showing, contrary to Frederick's trial testimony, that Frederick knew Les

Lawhon quite well, having supplied Lawhon with drugs and prostitutes, and that Frederick had been to Lawhon's trailer on several occasions. Claim I was supported by the sworn affidavits of Marsha Porter, Bertha Earl, Monica Hall and Tanya Lockhart. Apps. 1, 2, 3, 4. This evidence not only substantially undermines the credibility of Frederick's trial testimony, but also substantially supports the defense theory by showing that it was Frederick who had a reason to go to the victim's trailer, that it was Frederick who had a relationship with the victim, that it was Frederick who provided Debra Mock as a prostitute for the victim, and therefore that Debra Mock also had a connection to the victim.

Claim I of Mr. Mills' Rule 3.850 motion also specifically pled that the evidence obtained from Marsha Porter, Bertha Earl, Monica Hall and Tanya Lockhart was not previously available because there had never been any indication that these persons had any connection to Mr. Mills' case and because the witness who ultimately led to uncovering them -- Tina Partin -- had never been previously located by post-conviction counsel despite diligent investigation. In support of these allegations of due diligence, Mr. Mills presented the affidavits of Jeffrey Walsh, Mark Olive, James Lohman and Judith Dougherty. Apps. 5, 6, 7, 8. As these affiants attest, the evidence presented in Claim I of Mr. Mills' Rule 3.850 motion was not previously available to post-conviction counsel through the exercise of due diligence.

Claim II of Mr. Mills' Rule 3.850 motion (Argument III herein) presented new facts showing that an old claim regarding the State's coercion of Michael Frederick's testimony should be reconsidered. In his prior Rule 3.850 motion, Mr. Mills had alleged that the State coerced and coached Frederick in order to obtain his trial testimony. This allegation was supported by a 1987 affidavit signed by Frederick (PC-R. ___) but which Frederick later disavowed in part at an evidentiary hearing (PC-R. ___). In 1988, Frederick signed another affidavit stating that he disavowed the 1987 affidavit because he believed CCR had double-crossed him (PC-R2. ___). However, in a recent affidavit, Frederick has revealed that he disavowed the 1987 affidavit because the State told him "that if I testified to the sworn affidavit that I would go to trial for murder today" and "that I would face the electric chair" (App. 10). Frederick now attests that "[b]ecause of what [Assistant State Attorney] Tim Harley said to me, I said the [1987] affidavit was not true." (Id.). Thus, Frederick's previous disavowal occurred because he feared the State. That fear extended to the 1988 affidavit where Frederick did not fully reveal the State's coercion in either 1987 or at the time of trial. As Mr. Mills' 1988 post-conviction counsel, Billy Nolas, explains in an affidavit, Frederick's 1988 affidavit did not give rise to a claim because, as the State argued at the time, the affidavit "did not contain any Brady material or information relevant to an ineffective assistance of counsel claim" and Mr. Mills' counsel "had no additional

information that Michael Frederick had more to say than what he attested to in his 1988 affidavit" (App. 9).

Thus, despite the exercise of due diligence, Frederick's present affidavit could not have been obtained earlier due to the State's coercion of Frederick. In 1988, Frederick said he disavowed the 1987 affidavit simply because he believed CCR had "double-crossed" him. In 1988 the State said this was not a sufficient basis for any claim. Now, Frederick has revealed that he disavowed the 1987 affidavit because the State coerced him and he feared the State. This evidence could not have been obtained previously through the exercise of due diligence, and Mr. Mills' 1987 claim must be reconsidered.

Individually or cumulatively, Claims I and II of Mr. Mills' Rule 3.850 motion require this Court to grant a stay of execution and an evidentiary hearing. Roberts v. State, 678 So. 2d 1232 (Fla. 1996). Swafford v. State, 679 So. 2d 736 (Fla. 1996); Spaziano v. State, 660 So. 2d 1363 (Fla. 1995); Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989). For the reasons summarized above and discussed at length below, Mr. Mills is entitled to a stay of execution and a full and fair evidentiary hearing.

STATEMENT OF THE CASE AND OF THE FACTS

John Mills, Jr. was indicted for first-degree murder and other offenses on May 19, 1982, in Wakulla County, Florida. John Mills pled not guilty to all charges. The jury returned guilty verdicts on December 4, 1982, and recommended a death sentence on

December 6, 1982. Mr. Mills was sentenced to death on January 5, 1983.

John Mills appealed his convictions and sentences, which were affirmed on January 10, 1985. Mills v. State, 462 So. 2d 1075 (Fla. 1985). Certiorari was denied on July 1, 1985. Mills v. Florida, 105 S. Ct. 3538 (1985).

On March 11, 1987, Florida's Governor issued a death warrant, setting Mr. Mills' execution for May 7, 1987. On April 28, 1987, Mr. Mills filed a motion pursuant to Fla. R. Crim. P. 3.850 in the state circuit court. That court conducted a limited evidentiary hearing on May 1, 1987, and denied all relief on May 4, 1987. One claim addressed at the circuit court evidentiary hearing was Mr. Mills' penalty phase ineffective assistance of counsel claim. On May 5, 1987, the Florida Supreme Court heard oral argument on Mr. Mills' state petition for a writ of habeas corpus, which had been filed on May 4, 1987, and on his Rule 3.850 appeal. That same date, the Florida Supreme Court denied all relief. Mills v. State, 507 So. 2d 602 (Fla. 1987).

John Mills filed his federal petition for a writ of habeas corpus on May 6, 1987. The district court stayed John Mills' execution. The district court denied relief on several of Mr. Mills' claims and scheduled an evidentiary hearing on one claim. While John Mills' federal petition was pending, he filed a second state habeas corpus petition in the Florida Supreme Court on January 8, 1988. That petition was denied without opinion on February 15, 1988. Mills v. Dugger, 523 So. 2d 578 (Fla. 1988).

The district court held an evidentiary hearing on January 13 and 15, 1988. On August 25, 1988, the district court denied all relief. John Mills' motion to alter and amend judgment was denied and notice of appeal was filed. The district court issued a certificate of probable cause to appeal.

While John Mills' appeal was pending, he requested that the proceedings be held in abeyance pending the filing and disposition of a state habeas corpus petition. That request was granted. John Mills filed a state habeas corpus petition in the Florida Supreme Court, which denied relief on November 8, 1990, Mills v. Dugger, 574 So. 2d 63 (Fla. 1990), and denied rehearing on February 28, 1991.

After briefing and oral argument, John Mills again requested that the court hold his appeal in abeyance while the Florida Supreme Court considered a state habeas corpus petition filed by Mr. Mills based upon Espinosa v. Florida, 112 S. Ct. 2926 (1992). The motion was granted. On June 17, 1993, the Florida Supreme Court denied relief. Mills v. Singletary, 622 So. 2d 943 (Fla. 1993). The Eleventh Circuit then allowed supplemental briefing. On August 15, 1995, the Eleventh Circuit issued an opinion affirming the district court's denial of relief. Mills v. Singletary, 63 F.3d 999 (11th Cir. 1995). John Mills' petition for rehearing was denied on November 8, 1995.

A Petition for Writ of Certiorari to the United States Supreme Court was filed on March 22, 1996 and denied on May 20, 1996.

A Petition for Executive Clemency was filed with the Clemency Board by Miami Attorney Jesse J. McCrary on September 20, 1996. Governor Chiles signed a death warrant on October 30, 1996, scheduling Mr. Mills' execution for December 4, 1996.

Mr. Mills filed an Emergency Motion to Vacate Judgments and Sentence and Request for Evidentiary Hearing and a Stay of Execution on Monday, December 2. 1996. The Circuit Court heard argument and summarily denied all relief (PC-R2. ___).

Mr. Mills filed a Notice of Appeal to this Court. This Court ordered simultaneous briefing by noon, December 3, and scheduled oral argument for 2 p.m., December 3.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING RELIEF WHERE AN EVIDENTIARY HEARING ON THE SUBSTANTIVE AND PROCEDURAL ASPECTS OF MR. MILLS' CLAIMS WAS REQUIRED, WHERE THE FILES AND RECORDS IN THE CASE DID NOT CONCLUSIVELY SHOW THAT MR. MILLS WAS ENTITLED TO NO RELIEF, AND WHERE THE LOWER COURT ATTACHED NO PORTIONS OF THE RECORD CONCLUSIVELY SHOWING THAT MR. MILLS WAS ENTITLED TO NO RELIEF.

The lower court entered an order summarily denying relief, stating, "It is also this Court's finding that all claims raised therein are procedurally barred as representing matters which were or could have been raised previously for the reasons contained it [sic] the State's Response" (PC-R2. ___). In entering this summary denial, the lower court did not accept Mr. Mills' allegations as true and did not identify any parts of the record which conclusively showed that Mr. Mills was entitled to no relief. The lower court's disposition of Mr. Mills' Rule

3.850 motion is contrary to Rule 3.850 and to this Court's precedents. Roberts v. State, 678 So. 2d 1232 (Fla. 1996); Card v. State, 652 So. 2d 344 (Fla. 1995). A stay of execution and remand for a full and fair evidentiary hearing are required.

Under Roberts, the lower court was required to, but did not, attach portions of the files and records showing that Mr. Mills was entitled to no relief:

> Rule 3.850(d) requires that "[i]n those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief shall be attached to the order." While we have found failure to attach the pertinent portion of the files and record not to be reversible error in some instances, see, e.g., Goode v. State, 403 So. 2d 931, 932 (Fla. 1981) (finding trial court's order denying relief not procedurally defective where it referenced specific pages of record in lieu of attachment of portion of files and record), we cannot reach that conclusion in this case. Here, the order denies Roberts' motion for postconviction relief after "having considered the Motion [to Vacate Judgment and Sentence], the State's answer thereto, the files and records in this cause, and arguments of counsel, and being otherwise fully advised in the premises." There are no records or files attached, no citation to the portions of the record that the judge relied upon in denying relief, nor any explanation for the basis of the court's ruling. Thus, we can only speculate as to the court's basis for denying the motion.

Roberts, 678 So. 2d at 1236. Here, as in Roberts, this Court "can only speculate as to the court's basis for denying the motion," because the lower court did not reference any portions of the record and attached no portions of the files and records

to its order denying relief. Rather, the lower court simply referred generally to "the reasons contained it [sic] the State's Response."[2] The order is insufficient under Roberts.

Further, the lower court was required to, but did not, accept the facts pled in Mr. Mills' Rule 3.850 motion as true. In assessing the allegations of a Rule 3.850 motion, a court must "[a]ccept[] the allegations . . . at face value" and determine whether they are sufficient to require an evidentiary hearing. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989). This rule applies to both the substantive allegations supporting a claim for relief as well as allegations regarding due diligence. In Swafford v. State, the Court remanded for an evidentiary hearing on both substantive and procedural questions, stating, "We accept as sufficient for the purpose of demonstrating that an evidentiary hearing is required, Swafford's claim that Lestz's statement amounts to newly discovered evidence." Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996). Similarly, in Card v. State, the Court ordered an evidentiary hearing on both substantive and procedural questions, stating, "in view of the allegations in this case that the information concerning Judge Turner's sentencing practices was newly discovered, we cannot say

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[2]At the conclusion of argument, the lower court directed the State to prepare an order. When the State faxed the proposed order to Mr. Mills' counsel, Mr. Mills' counsel specifically informed the State that the order did not comply with Roberts because it did not show how the files and records in the case conclusively refuted Mr. Mills' claims (PC-R2. ___) (letter from Assistant CCR Terri Backhus to Assistant State Attorney Tim Harley, dated December 2, 1996).

that the procedural bar appears on the face of the pleadings." Card v. State, 652 So. 2d 344, 345 (Fla. 1995).

Here, Mr. Mills presented specifically pled allegations, supported by sworn affidavits, both as to the substantive and procedural questions involved in Mr. Mills' claims. However, without accepting those allegations as true, the lower court procedurally barred the claims, attaching no files or records which conclusively refuted Mr. Mills' allegations.

For example, regarding Claim I, Mr. Mills attached affidavits from an investigator and from Mr. Mills' prior post-conviction counsel stating that the evidence obtained from witnesses Marsha Porter, Bertha Earl, Monica Hall and Tanya Lockhart could not have been obtained earlier (Apps. 5, 6, 7, 8). The evidence could not have been obtained earlier because, although post-conviction counsel were aware that Tina Partin testified at trial and although post-conviction counsel wanted to talk to her, counsel had never been able to locate Tina Partin (Apps. 5, 6, 7, 8). Only with the advent of new technology for tracing people in 1996 were post-conviction counsel able to locate Tina Partin, who then suggested that Tanya Lockhart might have some information (App. 5). Tanya Lockhart in turn referred counsel to Marsha Porter, who then referred counsel to Bertha Earl (App. 5). Before locating Tina Partin, Mr. Mills' counsel had never heard of Tanya Lockhart, Marsha Porter or Bertha Earl and had no indication that they had any information relevant to Mr. Mills' case (Apps. 5, 6, 7, 8). Mr. Mills also specifically

alleged that post-conviction counsel could not locate Monica Hall without the new technology which just became available in 1996 (App. 5).

Regarding these allegations, the lower court simply stated that the claims were "procedurally barred as representing matters which were or could have been raised previously for the reasons contained it [sic] the State's Response" (PC-R2. ___). The court attached no files or records showing that these allegations were conclusively refuted by the record. Roberts. The court did not explain what in the record showed that this claim "could have been raised previously." Rather, the lower court simply relied on "the reasons contained it [sic] the State's Response."

The State's response raised two arguments for procedurally barring Claim I of Mr. Mills' Rule 3.850 motion. The State first argued that the claim was barred because "Mills raised a Brady claim in his first 3.850 motion in 1987, and cannot present a new one in a successive motion on different grounds" (State's Response at 2). The State's argument seems to recognize that the instant claim is different from Mr. Mills' previous Brady claim ("on different grounds"), but then fails to recognize that if the claim has different grounds, it is not the same claim. The State appears to be arguing that if the State conceals Brady material past the first post-conviction motion, then the State has successfully prevented the defendant from raising a claim based on that material.

The State's second argument that Claim I is procedurally barred was that the claim could have been raised earlier because Tina Partin "was a defense witness at trial, and the matter of Frederick's alleged relationship with Mock was investigated and presented by trial counsel at the time of trial; Partin could have provided this information at that time" (State's Response at 2). This argument does not even address--much less show how or where the record conclusively refutes--Mr. Mills' well pled allegations that Tina Partin was not previously available to post-conviction counsel despite diligent efforts to locate her. The State's Response points to nothing in the record showing that Tina Partin or the witnesses she led to were available to post-conviction counsel. The State's Response contains no attachments addressed to the allegations in Claim I of Mr. Mills' motion. Likewise, in argument before the lower court, the State cited to no portions of the files and records conclusively refuting Mr. Mills' allegations regarding post-conviction counsel's diligence. Since post-conviction counsel could not locate Tina Partin, post-conviction counsel could obtain no information from her leading to other witnesses.

The State may be suggesting that trial counsel should have found out about the other witnesses from Tina Partin. If so, the State is relying upon trial counsel's ineffectiveness in failing to discover Brady material. However, the State fails to recognize that whether the State failed to disclose this evidence or trial counsel ineffectively failed to discover these

witnesses, the bottom line is the jury never heard from them. This Court has explained:

> In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996).

Here, either the State failed to disclose or (as the State now contends) trial counsel failed to discover this evidence. Regardless of which occurred, the jury never heard the evidence. Regardless of whether it was the State's or trial counsel's failure, the fact remains that post-conviction counsel were never previously able to locate Tina Partin or these witnesses, and thus were never able to present any claim based upon the information available from these witnesses.

Accepting the detailed allegations in Claim I of Mr. Mills' Rule 3.850 motion as true and the lower court having neither attached nor referred to any part of the record conclusively refuting those allegations, Mr. Mills is clearly entitled to an evidentiary hearing on Claim I. Roberts; Swafford v. State, 679 So. 2d 736 (Fla. 1996); Scott v. State, 657 So. 2d 1129 (Fla. 1995). The allegations in Claim I of Mr. Mills' motion, accepted as true, would entitle Mr. Mills to relief, for these allegations show the complete unbelievability of Michael Frederick's trial

testimony--the only evidence supporting Mr. Mills' conviction for first-degree murder and his death sentence. A stay of execution and an evidentiary hearing are required.

As to Claim II of Mr. Mills' Rule 3.850 motion, the State's response fails to recognize that the allegations regarding the State's coercion of Michael Frederick's trial testimony must be reconsidered in light of the evidence presented in Claim I. See Swafford, 679 So. 2d at 739 (effect of newly discovered evidence must be considered in conjunction with evidence introduced in first Rule 3.850 motion and at trial); Gunsby, 670 So. 2d at 924 (court must consider cumulative effect of errors). Further, the State fails to recognize that Frederick has only now revealed that the reason he disavowed the 1987 affidavit is not simply because he thought CCR was double-crossing him, which is all he said in his 1988 affidavit, but because of State misconduct. Frederick has only now revealed that he disavowed the 1987 affidavit because the State threatened him with being tried for first degree murder and receiving a death sentence. This allegation of State misconduct requires reconsideration of Mr. Mills' claim.

Mr. Mills presented specifically pled claims supported by sworn affidavits. Nothing in the files and records conclusively refutes Mr. Mills' allegations. The lower court's order did not attach any such files and records, nor even provide any citations to the record. The State's response, upon which the lower court relied, likewise provided no citations to the record conclusively

refuting Mr. Mills' allegations. Accepting Mr. Mills' allegations as true, an evidentiary hearing is required on both the substantive and procedural issues presented by Mr. Mills' claims.

ARGUMENT II

MR. MILLS WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT/INNOCENCE PHASES OF MR. MILLS' TRIAL. AS A RESULT, MR. MILLS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE.

The State presented evidence to John Mills' jury that Michael Frederick did not know Les Lawhon before the murder. This was false. The State presented evidence that Michael Frederick did not know Debra Mock on the day of the murder. This, too, was false.

Michael Frederick knew his victim well. A pimp and drug dealer, Michael Frederick provided Les Lawhon with prostitutes, marijuana and other drugs. Michael Frederick visited the Lawhon trailer many times, often bringing with him his prostitute, Debra Mock, and other women. These people would drink alcohol, smoke cocaine and have sex with Les Lawhon. These women were told by Les Lawhon that they had to leave the trailer before his wife returned home from work. Les Lawhon and Michael Frederick also would visit Frenchtown together in search of drugs and women. The State made Les Lawhon out to be "sickly man, disabled, young, early thirties. His wife was working full-time to help take care of him because he can't work." (R. 1840).

Regarding the merits of this claim, the State argued below that "a relationship between Frederick and Lawhon does not preclude the latter's murder at the hands of John Mills" (State's Response at 2). This disingenuous argument of course overlooks the fact that the existence of a relationship between Frederick and Lawhon means that Frederick's trial testimony was not true. This argument also overlooks the fact that the State's case is wholly dependent on the jury believing Frederick.

A. Newly discovered evidence establishes that Michael Frederick lied at Mr. Mills' trial.

At trial, Michael Frederick testified that he did not know Les Lawhon and had never been to his trailer. Michael Frederick testified that John Mills randomly picked the Lawhon trailer as the place to commit a burglary. Michael Frederick testified to the following:

Q. Did you know where you were?

A. No, sir.

Q. Had you ever been to that trailer before?

A. No, sir.

Q. Do you know or did you know Les Lawhon?

A. No, sir.

Q. Did you know his wife, Shirley Lawhon?

A. Yes, sir.

Q. How did you know her?

A. I used to work at the Wakulla Manor.

Q. Did you know where she lived?

A. No, sir.

Q. Were you ever at her house?

A. No, sir.

Q. Your mother works there at the Wakulla Manor, too, doesn't she?

A. Yes, sir.

Q. Has your mother ever told you where Shirley Lawhon lives?

A. No, sir.

Q. And had your mother taken you by where Shirley Lawhon lived?

A. No, sir.

Q. Had you ever been to that trailer before in your life?

A. No, sir.

Q. Had you ever seen Les Lawhon before March 5, 1982?

A. No, sir.

(R. 1206-1207).

Michael Frederick's testimony was filled with lies. He knew Les Lawhon. See Affidavit of Marsha Porter, Affidavit of Bertha Earl. He had frequently visited Les Lawhon's trailer. See Affidavit of Marsha Porter; Affidavit of Bertha Earl. He also lied when he testified that he did not know Debra Mock during March 5, 1982, as the following excerpts from Mr. Mills' trial demonstrate:

Q. Now, isn't it a fact, Mr. Frederick, that on March 5, 1982, that Ms. Debra Mock, the day that you went over and

murdered Les Lawhon, that she was in that truck?

A. No sir, I didn't even know Debra Mock during March 5, 1982.

Q. You're saying you started dating her after that?

A. It wasn't a dating.

Q. You had a relationship with her, didn't you?

A. One night affair.

Q. That is the only time you have seen her?

A. No, it's not the only time I seen her.

Q. But it is your testimony that she was not with you on March 5, 1982, the day that you went out there and killed Les Lawhon?

A. I did not kill Mr. Les Lawhon and Debbie Mock, I did not know of her at that time.

(R. 1295-1296).

Contrary to his trial testimony, Michael Frederick knew Debra Mock well. He knew her before Les Lawhon was killed because Michael Frederick was Debra Mock's pimp. Michael Frederick would pimp Debra Mock out to Les Lawhon on many occasions. Witnesses have said that on many occasions, Michael Frederick, Debra Mock, and others would be invited into Les Lawhon's trailer for sex and drugs.

Marsha Porter, who was well known by the State at the time of Mr. Mills' trial, was discovered by post-conviction counsel. During the investigation of the Les Lawhon murder, Ms. Porter

talked to Detective Charlie Ash of the Leon County Sheriff's Department. Detective Ash was asked by the Wakulla County Sheriff's Department to locate Michael Frederick in Tallahassee on May 4, 1982 in connection with some burglaries. Detective Ash arrested Michael Frederick after talking to unnamed confidential informants.

Marsha Porter personally told Detective Ash that Michael Frederick, Debra Mock and Les Lawhon knew each other, engaged in sexual activity and took drugs together. Detective Ash indicated to her that he was well aware of these facts:

> 1. My name is Marsha Porter. In the early 1980's I was living in the Frenchtown area of Tallahassee. I was a prostitute and a drug addict. While working the streets I met a white girl by the name of Debra Mock. Debra's nickname was Dee. Dee told me she needed money and asked me about turning "tricks." We soon became friends and Dee would stay at my place in Frenchtown.
>
> 2. A black man by the name of Michael Fredericks hung out in Frenchtown. He would claim that he could provide some of the girls working the streets a better life. After he won their trust he became their pimp. Michael Fredericks became Dee's pimp. Michael Fredericks set up many of Dee's "dates." Michael Fredericks was a very violent man. I saw him beat his girls.
>
> 3. A white man by the name of Les Lawhon started hanging out in Frenchtown with Michael Fredericks. Everyone called Les "pumpkin head." His picture is attached to this statement. I would see Les and Michael together. Les Lawhon was one of Dee's regular customers.
>
> 4. Les often invited Dee and Fredericks to his trailer for alcohol and drugs. He lived in Wakulla County. Les said that everyone would have to leave before his

wife got home from work. I once gave Les, Dee, Michael Fredericks and a woman named Twana Byrd a ride over to Les' trailer.

5. I remember one time I picked up Dee at the El Camino after one of her "dates" with Les Lawhon. Michael Fredericks was beating Dee in the parking lot. Les locked himself in the room and would not come out. I saw him looking out the window and watching Fredericks beat Dee.

6. In 1982 I noticed that Les was not coming to Frenchtown anymore. I asked Dee about Les and if she had seen him. Dee said, "You don't have to worry about that goofy mother fucker anymore." That was the last time Dee and I talked about Les.

7. I did, however, talk about Les Lawhon with a police officer named Charlie Ash.

8. I knew Charlie because he would eat at a restaurant in Frenchtown where my mother was a cook. Charlie knew my whole family. I always called him "Uncle Charlie."

9. After Les Lawhon stopped coming to Frenchtown, Charlie Ash asked me a lot of questions about Les, Dee Mock and Michael Fredericks. He showed me some pictures, too. I told Charlie that the three of them would get together in Frenchtown and about how Fredericks would hook up Les and Dee at the El Camino Motel so they could have sex. I also told Charlie about driving to Les' trailer and the drugs. Charlie told me that he already knew what I was telling him.

10. Sometime after I talked to Charlie Ash, Dee Mock moved to Alaska.

11. I have never known a black man named John Mills, Boon or Ans Serene. I do not remember anyone using those names hanging out in Frenchtown back in the time when Dee Mock, Les Lawhon and Michael Fredericks were doing their thing.

12. Up until about one year ago, I was living in the streets and moving around a

> lot. Part of the time I was living in Tampa and South Florida. I was known as "Sporty Red." Because I used that nickname most people did not know my real name.
>
> 13. About a year ago I got treatment for my drug addiction. I am now clean, use my real name and have a place to live.

Appendix at 1.

Detective Ash knew about Michael Frederick's involvement with prostitutes, drugs and Les Lawhon, but this information was never disclosed to the defense. This information contradicts Michael Frederick's trial testimony that he never knew the victim, Les Lawhon, that he did not know where Les Lawhon lived and that Les Lawhon's trailer was randomly selected. (See R. 1205-1207). Further, this information undermines Michael Frederick's trial testimony that John Mills was involved in the murder of Les Lawhon.

Specifically, Marsha Porter's affidavit undermines Michael Frederick's assertion that John Mills gained entrance into Les Lawhon's trailer under the pretense that he needed to use the phone and then forced Les Lawhon outside at knife point. (See R. 1208-1213). Because of Michael Frederick's intimate relationship with Les Lawhon, Frederick needed no pretense to gain entry into the trailer. Further, Les Lawhon could have been persuaded to go along with Michael Frederick by a promise of drugs and sex. Michael Frederick's testimony simply does not make sense.

Further evidence indicates that the State knew about Michael Frederick and his connection with Les Lawhon, Debra Mock, prostitution and drug use. In the State's Fifth Motion in

Limine, the State requested that the defense not mention or question Michael Frederick about the following: (1) that he procured white women to work as prostitutes; (2) that he was paid to burn down the Barwick Crab House; and (3) that he was a drug dealer (R. 183).

The prosecutor argued during the State's motion:

> During the course of the deposition, Michael Frederick was asked did he procure white women to work as prostitutes. Was he paid the burn down the Barwick crab house. And there was allegations that he was a drug dealer.
>
> Now, he admitted selling drugs. So let me go to the first two first: Judge, we're not talking about allowing the Defense attorney to develop his case. I don't see what saying Michael Frederick -- asking him, "Isn't it true, Mr. Frederick, that you procured white women to work as prostitutes," has got to do with this case at all except if Mr. Randolph wants to show bad character or propensity. And Judge, the courts in Florida have said you cannot use specific instances of conduct to show bad character or propensity to commit a crime. And, you know, just the allegation that, "Isn't it a fact that you procured white women to work as prostitutes," I mean, that is just -- <u>it's got nothing to do with this case.</u>

(R. 1079-1080)(emphasis added).

Roosevelt Randolph, John Mills' defense attorney, was perplexed by what motivated the State to file a motion prohibiting him from asking Michael Frederick questions concerning prostitution and drug dealing, when the defense had no intention of raising such questions. He said:

> MR. RANDOLPH: Your Honor, maybe we could save some time. That was not a question that

I was going to ask, in the first place, that he procured white women to work as prostitutes. That question phrased in that manner is not one which I think would be appropriate or has probative value. I'm not saying that there won't be other matters that will come out related to white women, because I think I will be able to show that it is in fact relevant.

THE COURT: Number one as written --

MR. KIRWIN: Are you talking about sale of property? I mean, I'm just saying if there is anything to do with him procuring, pimping, dealing with prostitutes in a sex trade or something like that, I don't see how that is relevant.

THE COURT: Number one as written then, is granted.

MR. RANDOLPH: Right.

THE COURT: You say you're not going to use it anyway.

MR. RANDOLPH: No, I'm not going to use that.

THE COURT: How about number two?

MR. KIRWIN: Number two is the same thing, Judge. I mean, it's just a bare allegation.

MR. RANDOLPH: Judge, I don't have anything to back it up, I mean anything that I can admit to back it up.

THE COURT: Number two?

MR. RANDOLPH: Right. I don't have anything that I can really --

THE COURT: Okay. If you can't, it is granted them.

MR. RANDOLPH: I'm not going to ask that question. I can't.

THE COURT: Number three?

MR. KIRWIN: Number three, Judge, he said that he sold drugs but I don't see how the fact --

THE COURT: I think he's got a right to ask him if he sold drugs or anything then to show his character to a degree. I'm going to allow number three not as a drug dealer but that he's sold drugs.

MR. RANDOLPH: Judge, I think the testimony would come out that on the day of this incident he said that he was on cocaine at that time, or that morning.

MR. KIRWIN: Fine. The use of drugs, I'm not talking about.

MR. RANDOLPH: Well, some of the other witnesses -- we'll just have to wait and see how it develops -- but as written --

MR. KIRWIN: You're not going to ask him about drug dealing --

MR. RANDOLPH: I just say I'm going to ask him about drug dealings, but I didn't say as written, the way it is now, no.

(R. 1079-1082).

After Marsha Porter was contacted by post-conviction counsel, she told counsel about other people who were aware of the relationship between Michael Fredericks, Les Lawhon, Debra Mock, prostitution and drug use. Ms. Porter provided post-conviction counsel the name of Bertha Earl, who was a prostitute for Michael Frederick in 1981. Ms. Earl was very familiar with Les Lawhon:

I, BERTHA EARL, having been duly sworn or affirmed do hereby say:

1. My name is Bertha Earl. Around 1981 and 1982 I was a prostitute in the part of Tallahassee known as Frenchtown. My pimp was a black man named Michael Fredericks.

2. At that time there was a white man who came to Frenchtown looking for girls to have sex with him. I always called him "goofy pumpkin head." His picture is attached to this statement. This white man hung out with Michael Fredericks. He would ask Michael to hook him up with a girl. This man asked Michael for a girl many times.

3. Michael Fredericks was also the pimp for a white girl named Dee Mock. Dee had blond hair and wore a blue bandanna. Michael would usually hook up Dee and this white man for sex.

4. This white man would ask us to go to his trailer to do drugs. Michael Fredericks, Dee Mock and me would go to his trailer in Wakulla and cook up cocaine. We did this several times.

5. This is the first time anyone has ever asked me about going to the white man's trailer with Michael Fredericks and Dee Mock or the white man being in Frenchtown. If I had been asked, I would have told all I know about them.

Appendix at 2.

This information directly contradicts and undermines Michael Fredericks' trial testimony. Michael Fredericks knew the victim, knew where the victim lived and was on intimate terms with the victim. A pretense to enter the victim's trailer was never needed.

The State never disclosed to defense counsel the information that Marsha Porter had given to Detective Ash. Had the State disclosed this information, defense counsel would have been able to locate Bertha Earl to corroborate her information concerning Michael Frederick. Additionally, defense counsel would have known to question other potential witnesses concerning the

relationship Michael Frederick had with Debra Mock and whether Michael Frederick knew Debra Mock before the murder of Les Lawhon.

Monica Hall, who was arrested with Michael Frederick in 1982 in Franklin County, knew that Michael Frederick was Debra Mock's pimp. Ms. Hall had seen Michael Frederick and Debra Mock selling items similar to the items stolen from the Les Lawhon trailer:

> I, MONICA HALL, being first duly sworn do hereby say:
>
> 1. My name is Monica Hall. In the early 1980's I knew a white girl in Frenchtown named Dee Mock. Dee had blonde hair and always wore a blue bandanna. She was a small woman.
>
> 2. Dee was a prostitute in Frenchtown. Dee was going with a black guy named Michael Fredericks. Michael Fredericks was also Dee's pimp. They were always together. I knew them for about six months or so.
>
> 3. Sometimes Michael Fredericks, Dee and me would hang out at the El Camino Motel. Dee turned a lot of her tricks at the El Camino Motel. One time, Michael Fredericks and Dee Mock were selling guitars, amplifiers and stereo equipment.
>
> 4. A couple of months after they were selling all of that stuff the three of us were arrested in Franklin County. A black guy named Sunshine was with us. Michael Fredericks was throwing handfuls of pills out the window as the cops followed us. One of the cops that pulled us over told Dee and I, "Don't you know that you are riding around with murderers and ex-cons." The cop then took us to a friend's house in Wakulla.
>
> 5. After the arrest in Franklin County I never saw Dee again. I heard she left town.

6. No one ever asked me about Dee Mock and Michael Fredericks. I would have told them everything I know about them.

Appendix at 3.

The information that Michael Fredericks and Debra Mock were selling items similar to items stolen from Les Lawhon's trailer is of particular interest because Michael Fredericks testified that John Mills received all the stolen property from the burglary. Michael Frederick also testified that he managed to take only the "ring" that he pawned in Tallahassee when John Mills was not looking. (See R. 1244-1245).

Tanya Lockhart has provided information that Debra Mock bragged about being present when Les Lawhon was killed. Debra Mock said she left her bandanna at the scene of the crime:

1. My name is Tanya Lockhart. In the early 1980's I was living in the Frenchtown area of Tallahassee. While hanging out in Frenchtown I met a white girl by the name of Debra Mock. I knew Debra as Dee.

2. Dee was a prostitute in Frenchtown and was doing lots of drugs. I would hang out in or around Crump's Tavern. Dee and I would smoke pot and drink beer together.

3. Dee would always wear a blue bandanna tied around her head. I could always recognize her on the streets by her blue bandanna and dyed blonde hair.

4. In early 1982 I was hanging out in Crump's Tavern in Frenchtown when Dee came in the bar. Dee sat down and started bragging about someone being killed. Dee said, "I left my bandanna where he was killed, but no one can link it to me."

5. Dee was not wearing her bandanna that night. I never saw Dee wear the blue bandanna again.

> 6. Later Dee left town and I never saw her again. If anyone would have asked me about Dee bragging about a murder I would have told them everything I knew.

(Affidavit of Tanya Lockhart)(Appendix at 4).

The significance of this statement is that a blue bandanna was found at the scene of the murder and Debra Mock was known to wear a blue bandanna. (See R. 1772-1777). If the State was forthcoming about the information that Marsha Porter had concerning the relationship between Michael Fredericks, the victim and Debra Mock, Mr. Mills' trial attorney would have known to question all potential witnesses who had information concerning Debra Mock's involvement in this case.

The State withheld this information about Michael Frederick's association with Les Lawhon. A wealth of exculpatory and impeachment evidence was not disclosed to trial counsel. This evidence was discovered in the post-conviction process. This evidence would have been investigated, pursued and presented to John Mills' jury had Mr. Randolph known of its existence. It was consistent with the theory of defense and would have effectively destroyed the State's case. It was not presented to the jury only because Mr. Randolph was unaware of its existence.

The State violated Brady v. Maryland, 373 U.S. 83 (1963), and Rule 3.220, Florida Rules of Criminal Procedure. Mr. Mills specifically invoked Brady and Rule 3.220 when he made a request for disclosure of impeaching information on October 13, 1982:

> COMES NOW the Defendant, JOHN MILLS, by and through his undersigned attorney, and pursuant to Rule 3.220 (a)(2) of the Florida

> Rules of Criminal Procedure and the principles of Brady vs. Maryland, 373 U.S. 83 (1963), request the Court to enter an order directing the State of Florida forwith to make inquiry and disclose all of the following information within the possession, custody or control of the State of Florida, or the existence of which is known or by the exercise of due diligence could become known to the State of Florida:
>
> * * * *
>
> 4. Any and all records of information which arguably could be helpful or useful to the Defendant in impeaching or otherwise detracting from the probative force of the State of Florida's evidence or which arguably could lead to such records or information.

(R. 89-91). This motion was granted on October 26, 1982. Yet, trial counsel for Mr. Mills was never given the exculpatory information that Michael Frederick knew his victim and had supplied him with prostitutes and drugs.

The State knowingly presented false and misleading testimony in order to secure a conviction. This violated the Eighth and Fourteenth Amendments. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). This Court has held that Rule 3.850 relief is required where new non-record evidence establishes that the State "subvert[ed] the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993).

When a prosecutor presents false and misleading evidence, a reversal is required unless the error is harmless beyond a reasonable doubt. United States v. Bagley, 473 U.S. 667, 679 n.9

(1985). A prosecutor's knowing use of false evidence violates a criminal defendant's right to due process of law. Mooney v. Holohan, 294 U.S. 103 (1935). The Fourteenth Amendment's Due Process Clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

A prosecutor not only has the constitutional duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, but also to correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). The State's use of false evidence violates due process whether it relates to a substantive issue, Alcorta, the credibility of a State's witness, Napue; Giglio v. United States, 405 U.S. 150, 154 (1972), or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. at 103-04 and n.8. The "deliberate deception of a court and jurors by presentation of known false evidence is

incompatible with the rudimentary demands of justice." Giglio, 150 U.S. at 153. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the court has applied a strict standard. . .not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

The State put on knowingly false evidence when it argued to the jury in closing arguments:

> MR. KIRWIN: Look to see if Michael Frederick's testimony didn't have the ring of truth to it. You know, I think that's one of the things that we need to use common sense on.
>
> You know, a lot of times you have -- oh, I don't know, little children, and they tell you something, and you just think to yourself, "I don't want to say the child isn't telling the truth, but I've heard the truth before in my life, and that doesn't sound like it. There's just something wrong."
>
> But that same child can come to you and tell you something, and even if what he tells you is extra-ordinary, even if what he tells you just -- you can't imagine that it would occur, sometimes, if he tells it to you and you look at him and you listen to him, and you hear what he has to say, you can almost hear the ring of truth. It is not something that you have got to go yourself and investigate and pick up and look at. Sometimes the ring of truth is just there.
>
> One of the things I'm going to ask you to do and ask you to do it right now, and I'm going to ask you to do it when you get back there, is remember carefully Michael Frederick's testimony, not just what he said,

ladies and gentleman, but how he said it. Was he sure of himself? I suggest he was.

Was he strong? I suggest he was.

Was he shaken by an hour's worth of cross examination? I suggest he wasn't. And do you know why? Because Michael Frederick is telling the truth this time.

You know, an old friend of mine, an attorney, always seemed that his witnesses were just a little better than the normal run of witnesses. I couldn't ever figure out what it was, so I asked him one day, why is it. And Mr. Williams said to me: "The truth makes a good witness, truth. Not preparation, not constructed lies, but truth." And it dawned on me at that time that I have known that from the beginning. I was taught that as a little boy. And I think Michael Frederick finally learned a lesson that most people in society learn as little children at their parents' knees.

You can't tell one lie, you have got to tell 100 lies to cover up for your first lie. And you can't be convincing when you tell a lie because you have got to think of what your next lie is going to be and what your last lie was. How can you be convincing? You can't. There is only one way to be convincing. There is only one way to be strong. There is only one way to be sure. It is to tell the truth. Then you don't have to do anything but remember what happened. You don't have to fabricate, you don't have to plan ahead, you don't have to watch out for pitfalls behind. You just tell what happened as you remember it. And that's the beauty of truth. And that's the lesson that Michael Frederick didn't learn until after his arrest. And I'm afraid it is a lesson that Boone Mills hasn't learned to this day.

Compare Michael Fredericks testimony right alongside with what Boone Mills tells you. Which one of those two had that ring of truth?

> I'll talk about Mr. Mills' testimony in a little while. But I can't pass it up now. I have got to talk something about it.
>
> * * * *
>
> You know, it was pointed out to you on cross examination that Michael Frederick was pitiful when he was arrested. He was a pitiful liar. He was a pitiful witness. He couldn't keep it straight. He couldn't think fast enough. He is not the most intelligent person in the world. He certainly isn't, and he is certainly not intelligent enough to be able to create a fabric of lies that would withstand cross examination by an extremely able attorney for an hour, an hour.
>
> The judge is going to tell you that you can take into account not only what Michael Frederick, but you can also take into account the way he acted on the stand. Was he calm? I suggest he was.
>
> Was he strong? Yes.
>
> So when you go back there and you compare what Boone Mills told you today and what Michael Frederick told you on Wednesday, please carry your mental image of Michael Frederick sitting there on the stand for close to four hours, I think. Three and a half certainly. Take that image back with you and when the judge tells you that you can take into account how he acted, remember how he acted. And then think of Boone Mills.

(R. 1848-1852).

A defendant's conviction must be set aside if the knowing use of false evidence could in any reasonable likelihood have affected the jury's verdict. United States v. Bagley, 473 U.S. 667, 679 n.9 (1985), quoting United States v. Agurs, 427 U.S. at 102. The most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes

from the mouth of a State's witness. The defendant is entitled to a new trial if there is **any reasonable likelihood**, that the falsity affected the verdict. This test is the equivalent of whether the State has shown the error harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679 n.9. Thus, if there is **"any reasonable likelihood"** that the uncorrected false and/or misleading testimony of the State's witnesses affected the verdicts at guilt-innocence or sentencing, Mr. Mills is entitled to relief. Obviously, here, there is much more than just a possibility--as the factual allegations here demonstrate.

When the "inquiry is whether the State authorities knew" of the falsity of a government witness' testimony, "[i]t is of no consequence that the facts pointed to may support only knowledge of the police because such knowledge **will be imputed to state prosecutors.**" Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984)(citations omitted)(emphasis added). Moreover, "[i]t is of no consequence that the falsehood [bears] upon the witness's credibility rather than directly upon [the] defendant's guilt." Brown v. Wainwright, 785 F.2d 1457, 1465 (1986), quoting Williams v. Griswald, and Napue v. Illinois.

The State not only withheld vital information from the jury, but deliberately put on false testimony by Michael Frederick regarding the circumstances under which Les Lawhon knew his killer. Post-conviction counsel has learned through the witness affidavits that Detective Charlie Ash of the Leon County Sheriff's Department knew about the relationship between Les

Lawhon and Michael Frederick. Detective Ash reported this information to the Wakulla County Sheriff's Department. The information Charlie Ash obtained and the investigation he conducted on the relationship between Michael Frederick and Les Lawhon is imputed to the State.[3]

There is much more than a "reasonable likelihood" that this false testimony offered by the State's "star" witnesses affected the jury's judgment at guilt-innocence or sentencing. Accordingly, Rule 3.850 relief must issue. At a minimum, an evidentiary hearing is required.

John Mills was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that was obviously exculpatory as to Mr. Mills. Whether the prosecutor failed to disclose this significant and material evidence or whether the defense counsel failed to do his job, no one disputes the jury did not hear the evidence in question. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear

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[3]Defense counsel has never been provided with any information from Detective Ash's investigation into the relationship between Michael Frederick and Les Lawhon. This information continues to be withheld today, despite requests from post-conviction counsel. See Argument IV.

the evidence.[4] Confidence is undermined in the outcome since the jury did not hear the evidence.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/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). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. This standard applies whether the breakdown in the process occurs because the prosecutor failed in his duty to disclose or the defense attorney failed in his duty to investigate. Strickland v. Washington, 466 U.S. 668 (1984); Bagley.

The prosecution's suppression of evidence favorable to the accused violates due process. United States v. Bagley. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel request the specific information. A defendant's right to present favorable evidence is violated by such state

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[4]Mr. Mills argues Brady and ineffective assistance of counsel in the alternative. Either the prosecutor unreasonably failed to disclose or defense counsel unreasonably failed to discover exculpatory evidence. Either way the resulting conviction was unreliable and the Sixth Amendment violated.

action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). Here, evidence favorable to the defense, evidence that supported and furthered the defense, was not disclosed to the defense. This must be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). This undisclosed evidence undermines confidence in the outcome of the guilt phase and certainly the penalty phase.

To the extent that any of this evidence was disclosed to defense counsel, counsel failed to present it to the jury. This was deficient performance which prejudiced Mr. Mills. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). Counsel has a duty to investigate and prepare. Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992). Counsel's failure to familiarize himself with available information is not reasonable. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc). Whether defense counsel failed in his duty or the prosecutor failed in his duty is of no moment if confidence is undermined in the outcome of the trial as a result of evidence which went either undisclosed or undiscovered. Smith v. Wainwright.

Confidence in the outcome of Mr. Mills' trial is undermined because the unpresented evidence was relevant and material to Mr. Mills' guilt of first-degree murder and certainly to whether a death sentence was warranted. Here, exculpatory evidence did not reach the jury.[5] Either the State unreasonably failed to

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[5]Workman v. Tate, 957 F.2d 1339, 1346 (6th Cir. 1992)(reasonable probability found where uncalled witnesses would have provided corroboration of defense witnesses and contradicted

disclosed its existence, or defense counsel unreasonably failed to discover it. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington. Moreover, the prosecution interfered with counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. As a result, no constitutionally adequate adversarial testing occurred. An evidentiary hearing must be held, and thereafter, Mr. Mills' conviction and sentence must be vacated and a new trial and/or new penalty phase ordered.

The affidavits of Marsha Porter, Bertha Earl and Monica Davis, Tanya Lockhart constitute new evidence not previously available to Mr. Mills which establishes that his conviction and sentence of death are unreliable. See Gunsby v. State, 670 So. 2d 920 (Fla. 1996) ("when we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case,

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testimony of police officers); Barkauskas v. Lane, 878 F.2d 1031, 1034 (7th Cir. 1989)(the undisclosed impeachment evidence, in conjunction with that already presented to the jury, may have "pushed the jury over the edge into the region of reasonable doubt that would have required it to acquit"); Ouimette v. Moran, 942 F.2d 1, 10 (1st Cir. 1991)(confidence undermined in the outcome because suppressed evidence "might have affected the outcome of the trial"); Chambers v. Armontrout, 907 F.2d 825, 832 (8th Cir. 1990)(in banc)(reasonable probability exists where "jury might have acquitted"). See also Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991); Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991).

that confidence in the outcome of Gunsby's original trial has been undermined.") To the extent that the State argues that trial counsel could have found out about this evidence had he been diligent, then trial counsel was ineffective and relief is required. Gunsby. An evidentiary hearing is required.

In analyzing the prejudicial impact of Michael Frederick's false testimony, consideration must be given to the Brady and ineffective assistance of counsel arguments previously pled in this Court in 1987. The State has hidden exculpatory evidence for 15 years. Mr. Mills must be put in the position he would have been in had the evidence been disclosed. To do otherwise would reward the State for withholding evidence.

This Court has a long and established precedent that a stay of execution is proper when the defendant presents "enough facts to show . . . that he might be entitled to relief under rule 3.850." State v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985). When the defendant presents such facts, a trial court has "a valid basis for exercising jurisdiction" and granting a stay of execution and an evidentiary hearing. Id.; see also State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1986).

This Court must accept Mr. Mills' allegations as true at this juncture. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989). The allegations show bases for granting relief and

require an evidentiary hearing. Lightbourne. This Court must grant an evidentiary hearing. If an evidentiary hearing is proper -- as is the case here -- then a stay of execution is proper as well. Both are proper here.

B. The affidavits of Marsha Porter, Bertha Earl, Monica Davis and Tanya Lockhart have only recently been discovered despite due diligence by current and former counsel.

The State withheld information on Marsha Porter, Bertha Earl, Monica Davis and Tanya Lockhart from trial counsel and post-conviction attorneys. Because of the State's failure to disclose these witnesses, Mr. Mills could not reasonably have discovered it. Mr. Mills used due diligence, but the State failed to disclose the evidence necessary to establish this misconduct. With the new disclosures just obtained from Marsha Porter, Bertha Earl, Tanya Lockhart and Monica Davis, this argument must be considered now as the facts asserted herein were not previously available because they were withheld by the State.

The technology that only recently became available has enabled CCR investigators to find these four witnesses. Several of them have married and changed their names. Jeffrey Walsh, a CCR investigator, was able to track down Tina Partin, along with other women who knew Michael Frederick and Debra Mock in 1982.

> 1. My name is Jeffrey Walsh. I am an investigator with the Office of Capital Collateral Representative (CCR) in Tallahassee, Florida.
>
> 2. On October 30, 1996, when Governor Chiles signed a death warrant against John Mills, Jr., I was directed to find Debra Mock, who was never found at trial or in post-conviction proceedings.

3. My initial attempt to locate Debra Mock was by trying to find a woman named Tina Partin. She testified at trial as to Debra Mock's bandanna being found near the body of Les Lawhon.

4. I had difficulty finding Tina Partin because I had very little information to work with. I did not know Tina's date of birth, social security number or other identifiers. I only knew her sex, race, an approximate age, and a 1982 Frenchtown address.

5. It has been virtually impossible to locate a witness without more than what we knew about Tina Partin. Now that the information superhighway is accessible, our office has been able to advance our witness location efforts through a cross-referenced public records data base known as Auto-Trak. This continuously expanding on-line tool makes it possible to locate a witness with very little identifying information.

6. Tina Partin's name was entered and a search for information relating to her that would enable us to determine her whereabouts was conducted. Our efforts produced nothing with the spelling of the last name P-a-r-t-i-n.

7. I was able to locate, on Auto-Trak, a document which placed a white female in Tallahassee in the early 1980's at a Frenchtown address with the last name of P-a-r-t-a-i-n. This Auto-Trak document provided me with Tina's date of birth. Without Auto-Trak, I would not have been able to uncover such information.

8. A more exhaustive search placed Tina Partain at many addresses throughout Louisiana. I was also able to determine that Tina Partain married. Her legal name changed to Tina Clement and she was residing in Spiro, Oklahoma. Without Auto-Trak it would have been impossible to ascertain such information.

9. I flew to Spiro, Oklahoma and made contact with Tina Clement. She was unable to

provide me with the whereabouts of Debra Mock, but she led me to a woman named Tanya Lockhart, who might have information on the whereabouts of Debra Mock.

10. Tanya Lockhart was unable to provide us with Debra Mock's whereabouts, but she led us to a woman named Marsha Porter, who knew Debra Mock and Michael Frederick in the early 1980s. Marsha Porter led us to a woman named Bertha Earl, who also knew Debra Mock, Michael Frederick and Les Lawhon.

11. Tanya Lockhart, Marsha Porter and Bertha Earl were not known by Mr. Mills to have information relating to Debra Mock, Michael Frederick or Les Lawhon. We did not know to look for them.

12. Through the use of Auto-Trak, I was also able to locate a woman named Monica Hall who matched all of the identifying characteristics of a woman listed by the state as Monica Davis. Monica Hall is the same person listed in the state's file as Monica Davis. Without the benefit of Auto-Trak, I would not have been able to locate Monica Hall and make such a determination.

Appendix at 5.

Every attorney who worked on the John Mills' case knew the importance of finding Debra Mock. Her whereabouts, however, could not be determined. Mark Olive and James Lohman, collateral counsel who represented John Mills, Jr. in an evidentiary hearing in state court in 1987, provided the following sworn statements:

1. My name is Mark Olive. I am an attorney licensed to practice in the State of Florida. I currently am in private practice.

2. I previously worked for the Office of Capital Collateral Representative as an attorney and litigation director. I left CCR in early 1988.

3. In 1987, I represented John Mills, Jr. I personally supervised the litigation

of the John Mills case. I advised attorney Jimmy Lohman to find Debra Mock and any others who would know of her whereabouts.

4. In 1987, the Office of CCR was hampered by a lack of funds and limited technology. We learned that Tina Partin, who testified at trial, had married, changed her name and left Tallahassee. We could not find her in 1987.

5. If I had obtained any information linking Debra Mock to Michael Frederick or to the victim, Les Lawhon, or to the murder, or any information showing that Michael Frederick's trial testimony was untruthful, I would have presented it in state court.

6. Had I found information on Marsha Porter, Tanya Lockhart, or Bertha Earl, I would have presented this information at the evidentiary hearing in 1987.

* * * *

1. My name is James Lohman. I am an attorney licensed to practice in the State of Florida. I currently live and practice law in Tallahassee.

2. I worked for the Office of the Capital Collateral Representative (CCR) from October 1985 to December 1987. I was one of the attorneys assigned to the John Mills, Jr. case, and represented him in 1987.

3. Attorney Mark Olive assigned me to the John Mills' case although I had only been a member of the Florida bar for less than one year. My job was to thoroughly investigate the case. Three of the witnesses I wanted to talk to were Tina Partin, Monica Davis and Debra Mock. I was unable to locate Monica Davis or Debra Mock, and I was advised that Tina Partin had married and moved way from Tallahassee.

4. During John Mills' hearing in state court in 1987, I did not have the technology to find Tina Partin or other witnesses who could have led me to Debra Mock. I did not have a date of birth or social security

number for either of these witnesses. In 1987, these identifiers were essential in finding any witness.

5. If I had information on Marsha Porter, Tanya Lockhart, Bertha Earl and Monica Davis, I would have presented it in 1987.

Appendices at 6 and 7.

Judith Dougherty, who also represented John Mills during an evidentiary hearing in federal court in 1988, emphasized the importance of finding Debra Mock and any other people who knew her, Michael Frederick, Les Lawhon and others. She provided the following sworn statement regarding the search:

1. My name is Judith Dougherty. In January, 1988, I was an attorney for the Office of Capital Collateral Representative. One of my assignments involved the representation of John Mills, Jr.

2. On my review of the trial record, it became immediately apparent that we needed to find Debra Mock, who trial counsel contended had been with Michael Frederick around the time of the murder. My post-conviction investigation strategy for Mr. Mills' case recognized Debra Mock as a witness requiring further investigation. At trial, Roosevelt Randolph identified Debra Mock as a woman who wore a blue bandanna and who had received jewelry from Michael Frederick. Mr. Randolph was unable to find Debra Mock for trial. In state post-conviction proceedings, Mr. Randolph testified that his defense theory was that Michael Frederick and a woman committed the murder, but that the defense was never able to locate the woman.

3. I met with a CCR investigator after I was assigned to the Mr. Mills' case. I emphasized to the investigator that we needed to find Debra Mock and anyone else who may have information about Debra Mock's connection with Michael Frederick around the

> time of the murder. I specifically instructed the investigator to notify me if we got a lead on Debra Mock's location or any other information regarding the relationship between Debra Mock and Michael Frederick. The investigator informed me that there had been previous unsuccessful efforts to obtain such information. I stressed that we must keep trying.
>
> 4. Despite recognizing the significance of finding information about Debra Mock's role in this case, we were unable to locate her or any information regarding her connection with Michael Frederick and the State never disclosed any such information to us.
>
> 5. If we had obtained any information linking Debra Mock to Michael Frederick or to the victim, Les Lawhon, or to the murder, or any information showing that Michael Frederick's trial testimony was untruthful, I would have amended Mr. Mills' federal habeas petition and/or filed a second Rule 3.850 motion in state court.

Appendix at 8.

The aforementioned Brady material, including but not limited to the sworn statements of Marsha Porter, Bertha Earl, Tanya Lockhart and Monica Hall were not provided to the defense. Despite the diligent search by each collateral counsel, these witnesses have only recently been discovered because of the latest computer technology.

To the extent that the State argues that somehow counsel's unawareness of these witnesses was due to his lack of diligence, then Mr. Mills received ineffective assistance of counsel. Mr. Mills is entitled to effective assistance of counsel in trial and during his post-conviction proceedings. Strickland v. Washington, 466 U.S. 668, 685 (1984); Spalding v. Dugger, 526 So.

2d 71 (Fla. 1988). Once counsel has been appointed to assist a prisoner in postconviction, the prisoner is entitled to effective assistance of counsel. Farmer v. State, 642 So. 2d 127 (Fla. 5th DCA 1994); Jones v. State, 642 So. 2d 121 (Fla. 5th DCA 1994).

Mr. Mills' allegations must be taken as true at this juncture. The affidavits of Marsha Porter, Bertha Earl, Tanya Lockhart, Monica Davis, Jeff Walsh, James Lohman, Mark Olive and Judith Dougherty must be accepted as true. All other allegations submitted herein must be accepted as true under Lightbourne v. Dugger, 549 So. 2d at 1365; Scott v. State, 657 So. 2d 1129 (Fla. 1995). Allegations of fact as to due diligence also must be accepted as true. Swafford v. State, 679 So. 2d 736 (Fla. 1996); Card v. State, 652 So. 2d 344 (Fla. 1995). Accepting them as true, it is clear that an evidentiary hearing is required for the same reasons set forth in Swafford, Lightbourne and Scott. These facts and witnesses were not previously known to postconviction counsel, despite the exercise of due diligence.

The argument presented here could not have been presented earlier because the witnesses giving rise to the information were only recently disclosed through the latest technology. These allegations must be accepted as true, Lightbourne, and an evidentiary hearing is required. Walker v. State, 661 So. 2d 945 (4th DCA 1995). A stay of execution and an evidentiary hearing are required.

ARGUMENT III

MR. MILLS WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT/INNOCENCE OR PENALTY PHASE OF MR. MILLS' TRIAL IN VIOLATION OF BRADY V. MARYLAND, GUNSBY V. STATE, AND THE FIFTH, SIXTH AND EIGHTH AMENDMENTS. CONFIDENCE IS UNDERMINDED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE.

Michael Frederick was the State's star witness at John Mills' trial. He testified that John Mills was the mastermind behind the murder of Les Lawhon and that John Mills randomly picked out the Lawhon trailer to commit a crime. Michael Frederick testified at trial that he brought up the name of John Mills, Jr, and told authorities about his involvement. Michael Frederick testified that it was John Mills who randomly selected the Lawhon residence, and that it was John Mills who kidnapped and killed Les Lawhon.

But Michael Frederick lied. He lied at trial and he lied again in 1987. Michael Frederick's testimony in 1982 and again in 1987 was lie after lie. He lied when he said he was not promised anything in exchange for his testimony. He lied when he said he was not coerced into testifying against John Mills. One of his most blatant lies was the he first brought up the name of John Mills:

> Q. Had anybody promised you anything if you would tell them a particular set of facts?
>
> A. No, sir.
>
> Q. Did anyone promise you anything if you would talk to them -- I'm speaking about

the law enforcement officers now -- if you would talk to them about John Mills, Jr.?

A. No, sir.

Q. Frederick, who brought up the name of John Mills, Jr.?

A. I did, sir.

Q. Did anyone suggest that name to you before you talked to them about it?

A. No, sir.

Q. Has anyone promised you anything?

A. No, sir.

Q. At any time?

A. No, sir.

(R. 1250-1251).

Michael Frederick testified on cross examination that he did not make a deal with the State to avoid the electric chair:

Q. Mr. Frederick, you would say almost anything to keep you out of the electric chair, wouldn't you?

A. No, sir.

Q. Are you saying then, that you have no problems with the electric chair?

A. No, I'm not saying that, sir.

Q. But you don't want to go to the electric chair, do you?

A. No, sir, I do not.

Q. And you aren't going to the electric chair in this case, are you?

A. From the way the charge is, no sir.

Q. Because you made a deal with the State of Florida, didn't you?

A. I entered a plea, yes, sir.

(R. 1254-1255).

Michael Frederick further testified that he started telling the police the truth only after he "had went back to the scene" of the crime and showed police the remains of Les Lawhon (R. 1255).

Michael Frederick continued to rely on his lies through John Mills' evidentiary hearing in state court in 1987. In May, 1987, Michael Frederick signed an affidavit prepared by Mr. Mills' then collateral counsel. When he got to court, however, Michael Frederick refused to swear to the contents of the affidavit. Michael Frederick could not adequately explain why he had changed his mind about the affidavit:

Q. Do you swear that the contents of this affidavit are true?

A. No, I do not.

Q. You do not?

A. No, I do not.

* * * *

Q. Did he (State Attorney Tim Harley) tell you that you would get in a whole lot of trouble if the contents of this affidavit were true or if you testified to this affidavit?

A. No, he did not.

Q. He didn't?

A. No, he did not.

(PC-R. 1248-1250).

Post-conviction counsel for Mr. Mills had no basis for knowing that Michael Frederick had additional information to add to his trial testimony and the information he supplied to CCR via affidavits in 1987 and 1988. In fact, Billy Nolas, who represented John Mills, Jr. in 1988 in preparation for his initial brief to the Eleventh Circuit Court of Appeal, attested to the following:

> I, Billy H. Nolas, certify under penalty of perjury that the facts stated herein are true and correct pursuant to 28 U.S.C. section 1746 and 18 Pa. C.S. section 4904:
>
> 1. My name is Billy Nolas. I am an attorney licensed to practice law in the State of Florida. Between 1986 and 1991, I was employed by the Office of the Capital Collateral Representative (CCR) in Tallahassee, Florida. I began representing John Mills, Jr. after his evidentiary hearing in the United States District Court in January, 1988. I began preparing his initial brief to the Eleventh Circuit Court of Appeals.
>
> 2. In the course of my preparation, I learned the facts of Mr. Mills' case in order to determine what collateral remedies to pursue.
>
> 3. I was aware of Michael Frederick's affidavit obtained by CCR in 1988 and the one obtained from him in 1987. At the John Mills hearing in federal court in January, 1988, the State represented to the court and CCR that the information contained in Michael Frederick's 1988 affidavit did not contain any Brady material or information relevant to an ineffective assistance of counsel claim. The judge agreed with the State and ruled the affidavit was not relevant.
>
> 4. I did not have a basis for contesting the State's representation or the federal district court's ruling. I had no additional information that Michael Frederick

had more to say than what he attested to in his 1988 affidavit. I was unaware that Michael Frederick in 1988 was still afraid of the State's actions and repercussions, and thus, was less than forthcoming. I did not see a basis for pursuing this matter further. The State had accepted the 1988 affidavit as representing what Mr. Frederick would say, and convinced the federal judge that even so, Mr. Frederick's affidavit did not demonstrate State misconduct.

5. Had I known that Michael Frederick had additional information to reveal, I would have done things differently and pursued this information. I would have re-investigated the matter; contacted Mr. Frederick and confronted him with the previously undisclosed information (including information about motive, bias, interest and motivation to distort, shade or withhold facts in order to assist the State); and I would have definitely presented claims such as those currently raised by Mr. Mills' collateral counsel. It is very important evidence and raises important issues implicating the reliability and validity of Mr. Mills' conviction and death sentence.

Appendix at 9.

It was not until CCR investigators gathered the Brady material and confronted Michael Frederick on November 26, 1996 and again on November 29, 1996, that Michael Frederick added any new facts to his previous testimony. He has stated under oath:

Michael Frederick has recently admitted under oath that his testimony at John Mills' trial and again in 1987 was false. He has stated under oath:

1. My name is Michael Frederick. In 1982 I was arrested in Tallahassee. I was questioned in Tallahassee and taken to the Wakulla County Jail.

2. While in the Wakulla County Jail I was coerced into making a statement. For three nights I was interrogated all night. I

was physically assaulted. This was done by law enforcement and the state attorneys office.

3. I was show an award poster with a photo of Les Lawhorn. There was a reward of I believe $10,000 for information leading to his whereabouts. I was told that if I could lead the police to Mr. Lawhorn's whereabouts I would be given the money.

4. The state brought up the name of John Mills. They said, something like, we know you have been hanging with John Mills, Jr. They also told me that they knew his girlfriend bonded me out of jail.

5. I was told that if I would testify for the state and help them convict John Mills, Jr., that I would serve "nary a day."

6. The state also contacted my mother. They told her that if I did not testify they would give me the electric chair. They told me that, too.

7. Because of all the pressure -- the interrogations, physical abuse, threats -- I made a statement that involved John Mills, Jr. I did not willingly make any statement about Les Lawhorn or anything pertaining to Les Lawhorn.

8. The state also promised me that if I testified for the state and helped them convict John Mills, Jr., they would take care of all my other charges.

9. Right after I was charged, the prosecutor began contacting me on how to testify. He told me to sit up straight in the chair and face the jury when I was testifying. He also typed up a script. The prosecutor did this so that I could remember what to say.

10. I was coerced by the state to testify falsely. I was being coerced and coached prior to ever agreeing to change my plea.

> 11. In 1987 I signed an affidavit for CCR. That affidavit is true. But Tim Harley told me, in the Wakulla County Courthouse, that CCR was trying to put me in the electric chair. He also told me that if I testified to the sworn affidavit that I would go to trial for murder today. He told me that I would face the electric chair. Because of what Tim Harley said to me, I said the affidavit was not true.
>
> 12. CCR investigator Jeffrey Walsh has read me this affidavit. I also read this affidavit myself. It is a true statement.

Appendix 9.

Michael Frederick said under oath that his trial testimony was a lie. Accepting this affidavit as true, an evidentiary hearing is required. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

Michael Frederick said under oath that the State interrogated him, assaulted him and threatened him. Michael Frederick also testified under oath that the State promised him that he would not serve "nary a day" if he testified the way the State wanted him to. **This must be taken as true.**

Michael Fredericks stated under oath "that I was coerced by the state to testify falsely." **This must be taken as true.**

In the State's closing argument, Michael Frederick's version of events was the foremost reason relied upon to argue for a guilty verdict.

In his closing argument, the prosecutor argued:

> Because Michael Frederick, ladies and gentlemen, if you accept his testimony, convicts Boone Mills of premeditated murder and opens the door to the electric chair.

(R. 1841).

The State also argued about the credibility of its "star" witness:

> Look to see if Michael Frederick's testimony didn't have the ring of truth to it. You know, I think that's one of the things that we need to use common sense on.
>
> * * * *
>
> One of the things I'm going to ask you to do and ask you to do it right now, and I'm going to ask you to do it when you get back there, is remember carefully Michael Frederick's testimony, not just what he said, ladies and gentlemen, but how he said it. Was he sure of himself? I suggest he was.
>
> Was he strong? I suggest he was.
>
> Was he shaken by an hour's worth of cross examination? I suggest he wasn't. And do you know why? Because Michael Frederick is telling the truth this time.

(R. 1849).

> You know, it was pointed out to you on cross examination that Michael Frederick was pitiful when he was arrested. He was a pitiful liar. He was a pitiful witness. He couldn't keep it straight. He couldn't think fast enough. He is not the most intelligent person in the world. He certainly isn't, and <u>he is certainly not intelligent enough to be able to create a fabric of lies that would withstand cross examination by an extremely able attorney for an hour, an hour.</u>
>
> <u>The judge is going to tell you that you can take into account not only what Michael Frederick [said], but you can also take into account the way he acted on the stand. Was he calm? I suggest he was.</u>
>
> <u>Was he strong? Yes.</u>

(R. 1849-51).

Michael Frederick's new affidavit establishes that the State had exculpatory evidence that was not disclosed to the defense. The State promised Michael Frederick consideration for his testimony. The nondisclosure of this evidence violated the Eighth and Fourteenth Amendments of the United States Constitution and Rule 3.220 of the Florida Rules of Criminal Procedure. Gorham v. State, 597 So. 2d 782 (Fla. 1992); Roman v. State, 528 So. 2d 1169 (Fla. 1988).

Michael Frederick now swears he affirmatively lied when in direct examination by the trial prosecutor. At trial, he indicated no promises or threats had been made to secure his testimony. In fact, promises and threats had been made by both Assistant State Attorneys Tom Kirwin and Tim Harley. Thus, the State knowingly presented false and misleading testimony to secure a conviction. This violated the Eighth and Fourteenth Amendments. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959).

This Court has held that Rule 3.850 relief is required when new non-record evidence establishes that the State "subvert[ed] the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993). When a prosecutor presents false and misleading evidence, a reversal is required unless the error is harmless beyond a reasonable doubt. United States v. Bagley, 473 U.S. 667, 679 n.9 (1985).

This new evidence undermines confidence in the outcome of Mr. Mills' trial and penalty phase. The State withheld this evidence for 15 years. Mr. Mills' conviction rests solely on the false testimony of Michael Frederick.

Michael Frederick's affidavit constitutes new evidence not previously available to Mr. Mills, which establishes that his conviction and sentence of death are unreliable. See Gunsby v. State, 670 So. 2d 920 (Fla. 1996)("[w]hen we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined.") To the extent that the State argues that trial counsel could have found out about this evidence had he been diligent, then trial counsel was ineffective and relief is required. Gunsby v. State.

In analyzing the prejudicial impact of Michael Frederick's false testimony, consideration must be given to the Brady and ineffective assistance of counsel arguments previously pled in this Court. Since Mr. Mills was denied relief on the basis that the previously pled nondisclosures and deficient performance did not undermine confidence in the outcome, those matters must be revisited. The State has hidden exculpatory evidence for fifteen years. Mr. Mills must be put in the position he would have been in had the evidence been disclosed. To do otherwise would reward the State for hiding evidence.

Michael Frederick's recantation and the State's manipulation of the facts requires this Court to re-evaluate this claim of State misconduct so that a "collective[], not [an] item-by-item" analysis can be conducted. Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995); Gunsby v. State, 670 So. 2d 920 (Fla. 1996). A stay must be granted and the matter remanded for the evidentiary hearing.

ARGUMENT IV

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. MILLS' CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Mills sought public records disclosure pursuant to Fla. Stat. Ch. 119. See Ventura v. State, 673 So. 2d 479 (Fla. 1996); Roberts v. Dugger, 623 So. 2d 481 (Fla. 1993); Walton v. Dugger, 621 So. 2d 1357 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), and Fla. R. Civ. P. 1.350.

On November 5, 1996 and again on November 14, 1996, counsel for Mr. Mills filed Motions to Compel the Disclosure of Documents Pursuant to Chapter 119.01, Et. Seq., Fla. Stat. Three state agencies were asked to disclose various documents. Among those were the Office of the State Attorney, the Wakulla County Sheriff's Department and the Leon County Sheriff's Department.

In a Motion to Compel hearing on November 15, 1996 before Circuit Court Judge Charles D. McClure, Assistant State Attorney Tim Harley notified counsel that the State Attorney and the Wakulla County Sheriff's Department had fully complied with Mr. Mills' request. These agencies supplied letters to that effect. See Appendix 10.

The State provided counsel for Mr. Mills some documents from the Leon County Sheriff's Department, however, these were the wrong documents. Mr. Mill's specifically requested documents from the Leon County Sheriff's Department that dealt with the arrest of Michael Frederick in May, 1982. The documents turned over at hearing did not pertain to Michael Frederick's arrest in May, 1982.

Assistant State Attorney Tim Harley in a telephone conversation on Monday, November 25,1996, told counsel for Mr. Mills that the Leon County Sheriff's Department had no documents pursuant to his request.

Based on CCR's investigation of witnesses, however, counsel for Mr. Mills learned that an investigation was conducted by the Leon County Sheriff's Department of Michael Frederick. This information leads counsel to believe such information exists either in the Leon County Sheriff's Department and/or the Wakulla County Sheriff's Department.

Since the Leon County Sheriff's Department has not claimed any exemptions and has not turned over the requested documents, this information is either being withheld in violation of Brady

v. Maryland, or the Leon County Sheriff's Department has not conducted a thorough search for these documents.

Counsel for Mr. Mills has the duty to seek and obtain every public record in existence in this case. Porter v. State, 653 So. 2d 375 (Fla. 1995), cert. denied 115 S. Ct. 1816 (1995). Collateral counsel must obtain every public record in existence regarding a capital case or else a procedural default will be assessed against the defendant. Porter v. State, 653 So. 2d 375 (Fla. 1995). However, a concomitant obligation under relevant case law as well as Chapter 119 rests with the State to furnish the requested materials. Ventura v. State, 673 So. 2d 479 (Fla. 1996). When the State's inaction in failing to disclose public records results in a capital post conviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the post conviction motion should be denied or dismissed. Ventura. ("The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act").

Because of the State's misconduct and/or lack of diligence, Mr. Mills has been denied access to information regarding public records, records to which he may be entitled under Chapter 119. This Court should issue a stay of execution, and remand this action to the trial court for a determination of the propriety of the State's refusal to comply with Mr. Mills' Chapter 119 requests.

CONCLUSION

Based upon the foregoing and upon the record, Mr. Mills urges the Court to grant a stay of execution, order an evidentiary hearing, and grant such other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by hand delivery, to all counsel of record on December 3, 1996.

Kevin T. Beckham for #0946427

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