IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,234

LEO ALEXANDER JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Jones' motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

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

"R" -- record on direct appeal to this Court;

"PC-R" -- record on instant 3.850 appeal;

"H" -- transcript of 1997 evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

Oral argument in this case has already been scheduled by this Court for February 24, 1998.

TABLE OF CONTENTS

PRELIMINARYSTATEMENT i

REQUESTFORORALARGUMENT i

TABLEOFCONTENTS ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

A. INTRODUCTION 3

B. BACKGROUND 5

C. THE EVIDENTIARY HEARINGS 13

SUMMARY OF ARGUMENT 55

ARGUMENT I

MR. JONES WAS DENIED A FAIR ADVERSARIAL TESTING BECAUSE THE STATE WITHHELD MATERIAL, EXCULPATORY EVIDENCE IN VIOLATION OF MR. JONES' CONSTITUTIONAL RIGHTS. 58

ARGUMENT II

THE CIRCUIT COURT APPLIED THE WRONG LEGAL STANDARD IN REVIEWING MR. JONES' CLAIMS AND FAILED TO CONSIDER THE CUMULATIVE EFFECT OF ALL THE EVIDENCE DISCOVERED SINCE MR. JONES' TRIAL. 71

ARGUMENT III

THE CIRCUIT COURT ERRED TN ITS ANALYSIS OF THE ADMISSIBILITY OF GLENN SCHOFIELD'S NUMEROUS CONFESSIONS. . , ... 79

ARGUMENT IV

MR. JONES WAS DENIED HIS RIGHT TO A FULL AND FAIR HEARING WHEN THE CIRCUIT COURT REFUSED TO CONSIDER AS EVIDENCE THE FACT THAT GLENN SCHOFIELD INVOKED HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT. 85

ARGUMENT V

THE CIRCUIT COURT ERRED WHEN IT LIMITED COUNSEL'S EXAMINATION OF GLENN SCHOFIELD AND REFUSED TO EVEN PERMIT A PROFFER ON HIS STATUS AS A CONFIDENTIAL INFORMANT. 91

ARGUMENT VI

THE CIRCUIT COURT ERRED IN DENYING MR. JONES' CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS TRIED AND SENTENCED BEFORE A JUDGE WHO WAS BIASED AGAINST HIM. 94

CONCLUSION __ 104

TABLE OF AUTHORITIES

Adams v. Miami Beach Hotel Assoc., 77 So. 2d 465 (1955) 101

Arango v. State, 467 So. 2d 692 (Fla. 1985) 63

Baker v. State, 336 So. 2d 364 (Fla. 1976) 84

Battle v. Delo, 64 F.3d 347 (8th Cir. 1995) 71

Baxter v. Palmigiano, 425 U.S. 308, 317-19 (1976) 87

Beck v. Alabama, 447 U.S. 625 (1980) 96

Bracy v. Gramley, 117 S. Ct. 1793, 1797 (1997) 95

Brink's Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983) 87

Carey v. Piphus, 425 U.S. 247, 262 (1978) 95

Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co., 819 F.2d 1471 (8th Cir. 1987) 88

Chambers v. Mississippi, 410 U.S. 284 (1973) 57, 81

Corbett v. State, 602 So. 2d 1240, 1244 (Fla. 1992) 78

Craig v. State, 620 So. 2d 174, 175 (Fla. 1993) 78

Crump v. State, 622 So. 2d 963, 969 (Fla. 1993) 85

Equitable Life Ins. Co. of Iowa v. Halsy, Stuart & Co., 312 U.S. 410 (1941) 101

Escobar v. State, 699 So. 2d 988 (Fla. 1997) 20

Federal Deposit Ins. Corp. v. Fidelity and Deposit Co., 45 F.3d 969 (5th Cir. 1995) . . 88

Fraser v. Security and Investment Corp., 615 So. 2d 841, 842 (Fla. 4th DCA 1993) . . 87

Gardner v. Florida, 430 U.S. 356 (1977) 96

Griffin v. California, 380 U.S. 609 (1965) 87

In re Blitzerian, 162 B.R. 583 (MD. Fla. 1993) 101

In re Murchiseon, 349 U.S. 133, 136 (1955) 96

Jean v. Rice, 945 F.2d 82 (4th Cir. 1991) 62

Jenkins v. Anderson, 447 U.S. 231, 239 (1980) 94

Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997) 2

Jones v. Butterworth, 695 So. 2d 679 (Fla. 1997) 2

Jones v. Butterworth, 701 So. 2d 76 (Fla. 1997) 2

Jones v. Dugger, 533 So. 2d 290 (Fla. 1988) 1

Jones v. Dugger, 928 F.2d 1020 (1 lth Cir. 1991) 1

Jones v. Florida, 117 S. Ct. 1088 (1997) 2

Jones v. State, 440 So. 2d 570 (Fla. 1983) 1

Jones v. State, 528 So. 2d 1171 (Fla. 1988) 1

Jones v. State, 591 So. 2d 911 (1991) 1, 79

Jones v. State, 678 So. 2d 309 (Fla. 1996) 2, 82

Jones v. Wainwright, 473 So. 2d 1244 (Fla. 1985) 1

Kyles v. Whitley, 514 U.S. 419 (1995) 56, 61, 64

LaChance v. Erickson, 1998 WL 17107 (January 21, 1998) 87

Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) 86

LiButti v. United States, 107 F.3d 110 (2nd Cir. 1997) 88

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 103

Maharaj v. State, 684 So. 2d 726 (Fla. 1996) 103

Marcotte v. Gloeckner, 679 So. 2d 1225 (Fla. 5th DCA 1996) 103

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) 95

Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996) 71

Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996) . . . . . *

Offut v. United States, 348 U.S. 11, 14 (1954) 96

Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991) 62

Porter v. Singletary, 49 F.3d 1483 (1 lth Cir. 1995) 102

RAD Services, Inc. v. Aetna Casualty & Surety Co., 808 F.2d 271 (3d Cir. 1986) . . . 88

Richardson v. State, No. 86,011 (Fla. January 29, 1998) 68

Rivera v. Director, Dept. of Corrections, 915 F.2d 280 (7th Cir. 1990) 82

Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990) 84

Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509 (8th Cir. 1984) 88

Rosenberg v. United States, 346 U.S. 273 (1953) 101

Schlup v. Delo, 5 13 U.S. 298, 329 (1995) 83

Shellito v. State, 701 So. 2d 837, 840 (Fla. 1997) 20

Shotwell Manufacturing Co. v. United States, 371 U.S. 341 (1963) 101

Stano v. Dugger, 901 F.2d 898 (1 lth Cir. 1990) 62

State v. Gunsby, 670 So. 2d 920 (Fla. 1994) 56, 70, 72

State v. Smith, 573 So. 2d 306 (Fla. 1990) 93

Swafford v. State, 679 So. 2d 736 (Fla. 1996) 56, 71

Taylor v. Hayes, 418 U.S. 488, 501 (1974) 96

Trammel v. United States, 445 U.S. 40, 50 (1980) 86

Traylor v. State, 596 So. 2d 957, 964 (Fla. 1992) 68

United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923) 89

United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997) 62

United States v. Bagley, 473 U.S. 667 (1985) 62, 70

United States v. Burgos, 94 F.3d 849 (4th Cir. 1996) 71

United States v. Gay, 567 F.2d 916, 920 (9th Cir. 1978) 89

United States v. Rivenbark, 8 1 F. 3d 152 (4th Cir. 1996) 71

United States v. Seifert, 648 F.2d 557 (9th Cir. 1980) 89

Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984) 63

STATEMENT OF THE CASE

Mr. Jones was convicted of first-degree murder in the circuit court of the Fourth Judicial Circuit, Duval County, and sentenced to death. This Court affirmed on direct appeal. Jones v. State, 440 So. 2d 570 (Fla. 1983). Mr. Jones filed a petition for writ of habeas corpus in this Court on February 1, 1985, and was denied on June 13, 1985. Jones v. Wainwright, 473 So. 2d 1244 (Fla. 1985). On October 8, 1985, Mr. Jones filed a Rule 3.850 motion. After an evidentiary hearing on Mr. Jones' claim that his trial attorney rendered ineffective assistance, the motion was denied. The denial was affirmed by this Court. Jones v. State, 528 So. 2d 1171 (Fla. 1988).

On September 12, 1988, the Governor signed a death warrant, setting Mr. Jones' execution for November 14, 1988. Mr. Jones filed his second state habeas petition. Mr. Jones' state habeas petition was denied on November 10, 1988. Jones v. Dugger, 533 So. 2d 290 (Fla. 1988). On November 14, 1988, Mr. Jones filed a petition for writ of habeas corpus in the District Court for the Middle District of Florida. The District Court issued a stay of execution. Mr. Jones' federal habeas petition was denied on June 28, 1989, and affirmed on appeal. Jones v. Dugger, 928 F.2d 1020 (11th Cir. 1991), cert. denied, 502 U.S. 875 (1991).

The Governor signed a second death warrant on October 16, 1991, setting Mr. Jones' execution for November 13, 199 1. Mr. Jones filed his second Rule 3.850 motion on November 8, 1991; the motion was denied on November 10th. This Court entered a stay of execution, reversed and remanded for an evidentiary hearing on Mr. Jones' newly discovered evidence of innocence claim. Jones v. State, 591 So. 2d 911 (Fla. 1991). The circuit court

conducted an evidentiary hearing in September 1992 and denied relief on December 11, 1992. The denial was affirmed on appeal. Jones v. State, 678 So. 2d 309 (Fla. 1996). Certiorari was denied on February 24, 1997. Jones v. Florida, 117 S. Ct. 1088 (1997).

On March 11, 1997, Governor Chiles signed Mr. Jones' third death warrant designating April 10 through April 17, 1997, as the warrant week. Mr. Jones' execution was scheduled for April 15, 1997. On April 3, 1997, Mr. Jones filed a petition in this Court seeking to invoke this Court's all writs jurisdiction, claiming that execution in Florida's electric chair constitutes cruel and unusual punishment. On April 10, 1997, this Court stayed Mr. Jones' execution and ordered an evidentiary hearing in circuit court. Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997). Following a hearing that was held from April 15 through April 18, 1997, the circuit court denied Mr. Jones' claim. On April 21, 1997, this Court stayed Mr. Jones' execution pending further notice and scheduled oral arguments on Mr. Jones' appeal from the circuit court ruling. On May 22, 1997, this Court relinquished jurisdiction and ordered a supplemental hearing on Mr. Jones' claim that execution in Florida's electric chair constitutes cruel and unusual punishment. Jones v. Butterworth, 695 So. 2d 679 (Fla. 1997). The circuit court held a hearing from July 9 through July 15, 1997. On July 18, 1997, the circuit court denied Mr. Jones' claim. After oral arguments before this Court on September 8, 1997, this Court affirmed. Jones v. Butterworth, 701 So. 2d 76 (Fla. 1997). Mr. Jones filed a petition for writ of certiorari on January 20, 1998.

On September 8, 1997, Mr. Jones filed his third Rule 3.850 motion and a motion to disqualify the trial judge, A.C. Soud, from presiding over any further proceedings in this case. In the 3.850, Mr. Jones raised claims based on Judge Soud's failure to disclose his

prior representation of Mr. Jones and based upon a newly discovered eyewitness who exonerated Mr. Jones and implicated Glenn Schofield. Both motions were denied on October 8, 1997. On October 31, 1997, Governor Chiles rescheduled Mr. Jones' execution for March 24, 1998. On November 10, 1997, this Court disqualified Judge Soud and ordered that any further proceedings be conducted by Senior Judge Clarence T. Johnson. This Court also scheduled oral argument for February 6, 1998, and directed that any proceedings in the circuit court be expedited.

The circuit court held a hearing from December 15 through December 18, 1997. During the hearing, Mr. Jones was permitted to orally amend the 3.850 with a Bradv claim based upon Cleveland Smith's testimony. Relief was denied on December 31, 1997. This appeal follows. Oral argument in this case has been scheduled for February 24, 1998.

STATEMENT OF THE FACTS

A. INTRODUCTION

Leo Jones is innocent of the crime for which he was convicted and sentenced to death, The evidence discovered since his trial establishes that Officer Szafranski was killed by another man, namely Glenn Schofield. Mr. Jones has presented testimony that Mr. Schofield has confessed to killing Officer Szafranski on twelve separate occasions. These confessions are corroborated by the testimony of five witnesses who saw Mr. Schofield on the night of the shooting. Their testimony further incriminates him as the man who killed Officer Szafranski.

On September 8, 1997, Mr. Jones filed his third Rule 3.850 motion presenting more

newly discovered evidence of his innocence. During the evidentiary hearing, he was permitted to orally amend the 3.850 with a newly discovered Brady claim based on the testimony of Cleveland Smith. All of the new evidence is consistent with that presented at both the 1986 and 1992 evidentiary hearings and provides additional support for the admission of Mr. Schofield's hearsay confessions as substantive evidence. This motion to vacate also included a judicial bias claim based on newly discovered evidence that Judge Soud had represented Mr. Jones in 1969, that he failed to make the appropriate disclosure in 1981, and that, as a result, Mr. Jones was denied his right to a fair trial.

At the December 1997 hearing, Mr. Jones presented witnesses who testified that, in the years since Mr. Jones' conviction, Mr. Schofield has confessed to Officer Szafranski's murder.' Mr. Jones also presented previously unavailable witnesses who saw Mr. Schofield on the night of Officer Szafranski's death whose testimony lends additional support to Mr. Jones' argument that he is innocent of this crime. One of these witnesses, Roy Williams, aka "Shorty," is the only known eyewitness to Officer Szafranski's murder. Mr. Jones also presented Cleveland Smith, a retired Jacksonville police officer, who testified that about a week prior to the Szafranski shooting the police who patrolled the area where Officer Szafranski was shot were instructed to do everything in their power to get Jones in jail. Former Deputy Smith also testified that Officer Mundy, the arresting officer, bragged for years about beating the confession out of Mr. Jones and that he entered Mr. Jones' apartment with the intent of killing whomever he found inside. Mr. Jones also presented the testimony

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'Judge Johnson refused to permit Mr. Jones to present the testimony of witnesses who had testified at either the 1986 or 1992 hearing.

of Chief Assistant Public Defender Bill White, who testified that Detective Hugh "Eason had witnessed L.F. Mundy beating Leo Jones and had to pull him off. He also told me if I ever told anyone that, that he would deny it if he took the stand." (H. 1143).

At a 1991 hearing concerning Mr. Jones' motion to vacate and request for a stay of execution, the State admitted that the evidence then available, if presented to a jury, "might create a debatable question" about Mr. Jones' guilt (Transcript of November 10, 1991, Hearing, p. 59). The evidence supporting Mr. Jones' innocence now does more than "create a debatable question" or even a reasonable doubt. This evidence definitively proves that Mr. Jones is innocent and that he is facing imminent execution for a crime he did not commit.

B. BACKGROUND

Mr. Jones was convicted and sentenced to death for the May 23, 198 1, murder of Jacksonville police officer Thomas Szafranski. The murder occurred in Jacksonville at the intersection of Sixth and Davis Streets at about 1:00 a.m.[2] Officer Szafranski was driving the third of a trio of police cars leaving a hostage situation near Fifth and Lee Streets (R.

[2]The testimony of the police officers at the scene could not definitively establish the exact location of Officer Szafranski's car when he was shot. Officer Dyal, who was driving the car in front of Officer Szafranski, heard the first shots while he was at the stop sign (R. 710). He then "pulled out -- just out into the intersection to a slight angle" when he heard more shots (R. 718). Officer Dyal's testimony indicates that Officer Szafranski's car would have been at least one car length behind the stop sign when the shots were fired. Officer Wilmoth, who was parked south of the intersection on Davis Street, testified that Officer Szafranski "had pulled up to the stop sign, crept forward and then stopped abruptly," (R. 736), implying that Officer Szafranski was shot while he was stopped at the stop sign. Because the exact location of the car cannot be determined, the triangulation calculations of Mr. Warniment that pinpointed the building, as opposed to the vacant lot, as the origin of the bullet are not reliable; Mr. Warniment admitted at the trial that he could not be certain where the car was located when Officer Szafranski was shot (R. 1068).

708-09). The police were travelling east on Sixth toward Davis where they planned to turn left and travel north toward University Hospital (R. 709-10). Numerous police officers converged on the scene immediately after the shooting (R. 739); however, they were unable to find any eyewitnesses to the shooting. Some people in the area directed the police to a building immediately south of the Sixth and Davis intersection (R. 743). Other witnesses testified at the trial that the shot originated from the vacant lot just north of that building (R. 1162, 1172, 1193).[3]

Police, led by Officer Mundy , began searching the building, and, in an upstairs apartment, they found Mr. Jones and his cousin Bobby Hammonds, who were taken into custody and transported to the Police Memorial Building shortly after one a.m. Mr. Hammonds told the police that he and Mr. Jones had nothing to do with the shooting, while Mr. Jones remained silent (R. 1104-05; 1093-94).[4] Between five and six a.m., Mr. Jones and Mr. Hammonds were taken to University Hospital for treatment of injuries sustained while in police custody (R. 1095). Detective Eason testified that Mr. Jones had only "slight injuries" and that he was taken to the hospital only as a "precautionary measure" (R. 1095). Detective Eason described Mr. Jones' injuries: "Leo Jones had an ear -- some blood trickling from his ear, or it had dried up. He had a bruise on his head and I want to say that he had a busted lip, but I don't remember exactly. It was bruised or something. " (R. 1103).

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[3]Two witnesses from the 1986 hearing also testified that the shots were fired from the vacant lot (Transcript of 1986 Evidentiary Hearing, p. 13 1, 176).

[4]Detective Eason testified at Mr. Jones' trial that he did not write down Mr. Hammonds' first statement because he did not believe it (R. 1104). This is the same Hugh Eason who later told Bill White that he had not only seen Officer Mundy beating Leo Jones, but that he had to pull him off Mr. Jones.

However, according to the treating physician, Mr. Jones was at the hospital for an hour and a half and received a full physical examination as well as x-rays (R. 1299, 1305). Officer Mundy testified that Mr. Jones' injuries were inflicted at his apartment when he resisted arrest; however, the testimony on this subject fails to account for injuries serious enough to warrant x-rays four to five hours later. Officer Mundy testified that while he was in the apartment, he heard "scuffling" and noticed Mr. Jones fighting with Officers Butler and Torrible (R. 792).[5] Officer Torrible testified that he did not recall Officer Mundy hitting Mr. Jones; he explained that "[i]t wasn't much of a scuffle, it was -- he [Jones] was immediately subdued. " (R. 980-81).[6] Officer Butler did not testify.

H. Randolph Fallin had been retained by Leroy Clark, Mr. Jones' brother, to represent Mr. Jones. Mr. Fallin contacted Detective Frank Japour at approximately five a.m. to inform the police that he represented Mr. Jones and that his client should not be questioned outside his presence (Transcript of 1986 Evidentiary Hearing, pp. 203-04). While they indicated to Mr. Fallin that they understood his request, the police ignored it and continued to question Mr. Jones (Id.). Mr. Fallin arrived at the police station at about nine a.m. but was denied access to Mr. Jones until after the confession had been signed at about noon, after almost eleven hours in police custody (Id. at 205). That confession, which was

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'Cleveland Smith, a former Deputy Sheriff, testified in 1997 that Officer Mundy was "like a hit-man on the police department." (220). Former Deputy Smith testified that Mundy was known to falsify reports and had admitted to Smith that he had beaten Leo Jones and had intended to kill him, but "another officer stopped him from doing it." (188).

[6]In addition to failing to account for the extent of Mr. Jones' injuries, this testimony is directly contradicted by Mr. Hammonds' 1992 affidavit and the 1997 testimony of Cleveland Smith and Bill White.

written by Detective Hugh Eason, contains no details of the crime and indicates that the shots were fired from either "a gun or rifle" (R. 1098-1101).[7]

The only evidence against Mr. Jones at trial was his presence in the Davis Street apartment, the presence of guns in the apartment, Bobby Hammonds' testimony which had previously and has subsequently been recanted,[8] and Mr. Jones' confession which he later retracted. Mr. Hammonds testified that Mr. Jones left the apartment carrying a rifle shortly after one a.m., that he heard a shot ten or fifteen minutes later, and that Mr. Jones returned to the apartment still carrying a rifle (R. 914-18). In his closing statement, the State Attorney referred to Mr. Hammonds' testimony as "the strongest testimony we've got." (R. 1459).[9]

The State presented evidence to support its theory about Mr. Jones' motive in shooting Officer Szafranski. For example, Officer Ritchey testified that he was present on

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[7]Cleveland Smith in a proffer testified that Hugh Eason was known for obtaining detailed confessions, not a two-sentence one as was done here where the confession expresses uncertainty over what the murder weapon was.

[8]Even before Mr. Jones' trial, Mr. Hammonds gave contradictory statements regarding what he saw the night of Officer Szafranski's death. At the suppression hearing, Mr. Hammonds flatly denied seeing Mr. Jones with a rifle and repeatedly testified that he implicated Mr. Jones only because he feared for his life. At the trial, he testified that he lied at the suppression hearing because he was afraid of Mr. Jones' family; however, he testified that threats from the family had been communicated to him by his sister just prior to trial so that they could not possibly have influenced his suppression hearing testimony (R. 943-44, 950). At one point during the suppression hearing, Mr. Hammonds told the State Attorney, "Hey, man, you frightening me, man, " and Judge Soud instructed Mr. Greene to "tone down the delivery of [his] questions, " indicating that Mr. Hammonds feared the police and the State Attorney and the consequences of telling the truth. Mr. Hammonds' 1992 affidavit confirms that he was beaten and coerced by the State into testifying falsely against Mr. Jones.

[9]This Court has refused to order an evidentiary hearing on Hammonds' 1992 recantation of his trial testimony because the jury knew that he had already recanted once; thus, his testimony was substantially impeached at trial.

May 16, 1981, when Mr. Jones was arrested for making an illegal left turn and heard him make threats against the police: "[h]e stated he was tired of the police hassling him, that the police weren't the only ones that had guns and that he was going to shoot him a mother-fucking pig." (R. 1142, 1150). Mr. Jones was not charged with making threats against the police that night, and the police reports detailing the arrest make no mention of any threats allegedly made by Mr. Jones (Id.). The only evidence of this statement, aside from the arresting officer's testimony, is an internal police memorandum from Officer Ritchey to Detective Eason that is dated May 23, 1981, a full week after the incident allegedly occurred.[10] This memo states only that "Jones made numerous threats about getting even with the police." Clearly, this memorandum was written after Officer Szafranski's shooting and Mr. Jones' arrest in order to create highly prejudicial motive evidence against Mr. Jones. In addition, during Detective Eason's testimony regarding the questioning of Mr. Jones on May 23, 1981, he attributed the following statement to Mr. Jones: "I'm tired of being fucked with. I go to the store and I'm fucked with, I go down the street, I'm fucked with, my friends are fucked with, my family is fucked with, and I'm tired of policemen fucking with me and I decided I'd kill a policeman and that's why I did it." (R. 1101). Detective Eason did not write this statement in his notes, or even include it in the confession he wrote for Mr. Jones to sign, because he "did not see any need to at that time." (R.

[10] Cleveland Smith has now revealed that about a week prior to the Szafranski shooting, police officers were instructed at roll call to do everything in their power to put Leo Jones in jail. This testimony casts a new, if not sinister, light upon the trial testimony of the police officers.

1119).[11]

The State also presented evidence implicating Mr. Jones in another shooting at a police officer at the same location one week earlier. Officer Mundy testified about the May 18, 1981, shooting at Officer Scott Carter whose car was hit at the same intersection where Officer Szafranski later died (R. 880-81). Because he was not hit, Officer Carter did not stop his car in the intersection, so the triangulation that was later done was unreliable because the police could only estimate the car's location when the shots were fired (R. 859). Officer Mundy testified that he did a triangulation and determined that the shot that hit Officer Carter's car originated in the vacant apartment across from the intersection (R. 881). Although Judge Soud conceded that "maybe [the triangulation calculations] weren't all that accurate, " he admitted the testimony to explain why Officer Mundy immediately went to that apartment building when he arrived at the scene of Officer Szafranski's shooting (R. 862-63).[12] Significantly, Officer Mundy's own drawings of the triangulation of the bullet that hit Officer Carter's car pinpoint the building next to the one in which Mr. Jones lived, contrary to his testimony at Mr. Jones' trial that the bullet came from the vacant apartment in Mr. Jones' building. Officer Mundy never entered Mr. Jones' building on the occasion of Officer Carter's shooting and he was not listed as a suspect in police notes.[13]

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[11]Again, this is the same Hugh Eason who told Bill White that he had to pull Mundy off Jones and that he would deny that fact if ever called to testify.

[12]Of course, trial counsel was unaware of the information recently revealed by Cleveland Smith that shortly before that night the police had been instructed at a roll-call to get Leo Jones.

[13]Officer Mundy had already testified that he suspected that apartment as the origin of the shots because it was a known "stash house," but Judge Soud felt that the State was entitled to tell the jury the full explanation. State Attorney Austin admitted the potential prejudice of

The State presented a two-sentence confession that Eason testified he obtained from Leo Jones. This confession was admitted over the defense objection that Leo Jones had been beaten and had signed the confession in fear for his life (R. 1097). Officer Mundy and Detective Eason testified that Jones was not beaten, that his injuries were minor and were a result of Jones attempting to flee (R. 1095).

Leo Jones testified at trial and explained that he had been beaten and signed the confession out of fear for his life (R. 1237, 1245). Mr. Jones testified that the guns in his apartment belonged to Glenn Schofield (R. 1214). Mr. Hammonds testified at trial that Mr. Schofield was in Mr. Jones' apartment that night and that he left shortly after midnight; Mr. Hammonds testified that Mr. Schofield left by the front door leading directly onto the porch and that he was carrying a gun (R. 914-15).[14] Ballistics tests could not link the bullet recovered from the scene with any of the guns in Mr. Jones' apartment (R. 1048). The results of the neutron activation test performed on Mr. Jones' hands to determine whether he had recently fired a gun were negative (R. 1074-75). A witness who lived on the first floor of the next apartment building testified that he heard running through the alley between the two buildings immediately after the shots were fired, implying that Officer Szafranski's killer

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this testimony: "I think that should come in; I think it should be more than a stash house. I obviously can't relate it to the defendant; it would not be fair, it would not be legal, it would be a mistrial and everything else." (R. 870). Judge Soud agreed the testimony would be prejudicial because of the impermissible implication that Mr. Jones was involved in the prior shooting: "The only problem we have got is it's so truthful that it's prejudicial. Now, that's almost prejudicial -- in other words, is it truthfulness on an extraneous issue which bears on the reasonableness of his testimony that it's so highly prejudicial that we have to exclude it, that we have to exclude the truth. " (R. 873).

[14] Mr. Schofield's presence in Mr. Jones' building is confirmed by the 1997 testimony of James Corbett (H. 1068-71).

fled the scene (R. 1193).

Glenn Schofield was a suspect in Officer Szafranski's murder from the beginning. Mr. Hammonds and Mr. Jones both testified that Mr. Schofield had been in the apartment that night, and this testimony was unrefuted. On May 24, 1981, Detective Eason began looking for Mr. Schofield. His notes indicate that he made the following efforts:

> The writer ran an N. C .I. C. Check on the subject Glen Schofield on 5-25-81 and found that he was wanted for Violation of Probation. The writer obtained photographs of the suspect and had a Police Bulletin with the description of the suspect and information in regards to this writer wanting to talk with the suspect concerning the shooting of Officer Szafranski distributed throughout the Sheriff's Office and through the State of Florida.

Significantly, Detective Eason made these efforts to find Mr. Schofield after Mr. Jones had signed a confession that did not even mention Mr. Schofield, and he continued to investigate Mr. Schofield as a suspect even after the grand jury indicted Mr. Jones.

Mr. Schofield gave two different alibis: he told Detective Eason in 1981 that he was with his girlfriend Patricia Ferrell and he told Lou Eliopulos, an investigator for Mr. Jones' clemency attorney, in 1984 that he was with Marion Manning and "Shorty." Ms. Ferrell, now Owens, testified in 1992 that Mr. Schofield was not with her that night but that he later asked her to provide an alibi for him and that he later confessed to Officer Szafranski's murder. Ms. Manning has confirmed that she was with Mr. Schofield and "Shorty" on the night of the murder, but her testimony incriminates rather than exonerates Mr. Schofield. And Roy "Shorty" Williams has testified that Mr. Schofield was there with the rifle at the time of the shooting. Mr. Schofield has now been incriminated by all of his alibi witnesses.

C. THE EVIDENTIARY HEARINGS

Mr. Jones has filed three Rule 3 . 850 motions and has had three evidentiary hearings. Proper analysis of Mr. Jones' current 3.850 requires consideration of all the evidence cumulatively. That evidence includes twelve independent confessions by Mr. Schofield that he killed Officer Szafranski, as well as five witnesses who saw him on the night of the murder. The scope of the first hearing in 1986 was limited to trial counsel's ineffectiveness; however, important witnesses testified then. Their testimony must be considered now.[15] In 1992, Mr. Jones' witnesses testified about Mr. Schofield's activity on the night of Officer Szafranski's death and his numerous confessions in the years since Mr. Jones' conviction. Again in 1997, Mr. Jones presented newly discovered evidence of his innocence, including an eyewitness who saw Mr. Schofield shoot Officer Szafranski, additional witnesses who saw Mr. Schofield on the night of the crime, and inmates to whom Mr. Schofield has confessed.

In addition, Mr. Jones presented the testimony of Cleveland Smith, a retired Jacksonville police officer, who testified that Officer Mundy, the arresting officer, bragged about beating the confession out of Mr. Jones. In addition, Mr. Smith testified that shortly before Mr. Jones' arrest, the police who patrolled the Davis Street area had been instructed to do everything in their power to get Mr. Jones in prison. Mr. Smith also explained that Mundy was known to have falsified police reports and beaten confessions out of other suspects. Mr. Smith was also proffered with reference to his knowledge of Detective Eason. Bill White, the Chief Assistant Public Defender in Jacksonville, testified to his conversation

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[15] Judge Johnson refused to allow witnesses from 1986 and 1992 to be recalled so that he could hear their testimony live.

with Detective Eason after Eason was forced out of the Sheriff's Department over an alleged conspiracy to commit murder. Bill White testified that Eason told him that he, Eason, had to pull Mundy off Leo Jones, but that if he, Eason, were ever asked under oath, he would deny making such an admission to Mr. White. Finally, Mr. Jones presented Alberta Brown who testified about Judge Soud's representation of Mr. Jones in 1968 and her involvement in the bribery of the judge who reduced Mr. Jones' sentence. When considered cumulatively, as required by this Court's opinion in State v. Gunsby, this evidence presents a compelling argument for Mr. Jones' innocence and establishes that if this evidence had been available at his trial the outcome would have been different.

Counsel for Mr. Jones called Mr. Schofield as his first witness at the 1997 hearing. Mr. Schofield invoked his Fifth Amendment right to remain silent and requested that he be assigned an attorney (H. 141-42). After consulting with Charles Willmott, Mr. Schofield testified on December 16, 1997. Glenn Schofield admitted in 1997, as he had in 1981 and 1984, that he was in the Davis Street area on the night of Officer Szafranski's death. On June 2, 1981, he was interviewed by Detective Hugh Eason whose homicide continuation report reveals that Mr. Schofield provided the following information:

> Sc[h]ofield stated that he was at the house of Leo Alexander Jones on the night of the shooting and he had gone over to transact some business. He stated that he was a drug dealer for Jones and that they had exchanged some drugs and money on the night of May 22, 1981, but he had left before the shooting occurred. He stated that he had overheard Leo Jones talking about "being fucked with by the Police" and that he was going to "waste a Policeman." He stated this statement was heard approximately a week before the Policeman was shot and he was talking to a black male by the name of Stanley.

(Def. Exh. 7). At the 1997 hearing, Mr. Schofield had no memory of talking with anyone

from the Duval County Sheriff's Department while he was in the hospital following his arrest in St. Johns County (H. 545, 548). During the course of his testimony, he would periodically deny ever talking to the police about the Szafranski shooting, but then clarify that the police possibly talked to him during their investigation (H. 606-07). Mr. Schofield initially claimed that he could not remember ever telling the police that he was at Mr. Jones' apartment on the night of the shooting (H. 547). However, his later testimony directly contradicts this professed lack of memory: "I talked with a police officer. They wanted to know why I was at Leo Jones' apartment and I told them I was there. I was there to pick up some heroin and that's why I was there." (H. 608). Mr. Schofield's testimony was also inconsistent regarding whether he had given the police a sworn statement or ever confessed to being a drug dealer. Mr. Schofield initially claimed that he had no memory of Detective Eason asking him to give a sworn statement (H. 549). Mr. Schofield also denied that he would ever tell the police he was a drug dealer (H. 547, 592). However, when confronted with Detective Eason's report indicating that he had in fact made this admission, Mr. Schofield testified that he had told Eason that he was picking up heroin at Mr. Jones' apartment but only because he "was under oath. Had to tell them the truth. " (H. 608). Mr. Schofield's explanation of the circumstances of this sworn statement contradicts his earlier testimony that he had no memory of Detective Eason's request for a sworn statement:

> Q Earlier this morning you indicated that you would never have told the police that you were dealing drugs?
>
> A I said I would never tell them under oath.
>
> Q You just now said you would tell them under oath?

A That's right. I told them under oath. But I wouldn't tell them without being under oath, just volunteer I'm dealing drugs. But under oath, yeah, I'll tell them the truth if I'm under oath.

Q So, you're saying that the police officer put you under oath and you told him you were dealing drugs?

A What you mean? You said -- the stenographer was there. The lady was there with the same thing.

Q You remember that?

A Yeah, she was there. That was under oath. That's the only way you can be under oath.

Q And you remember giving a statement with the stenographer present under oath?

A Yes.

(H. 609-10).

Mr. Schofield testified that he gave someone from the Duval County Sheriff's Office a sworn statement before a stenographer when he was transported back to Jacksonville after attempting to escape from the St. Johns County Hospital (H. 609-10). Counsel for Mr. Jones has never received a sworn statement from Mr. Schofield, and Assistant State Attorney Angela Corey Lee told the court and counsel that no such statement exists (H. 638). Obviously, Glenn Schofield's testimony was false in this regard. Mr. Schofield's testimony is also rebutted by Detective Eason's report which indicates that Mr. Schofield did in fact "volunteer" that he was a drug dealer and that he was not under oath when he provided this incriminating information (Def. Exh. 7).[16]

[16]Mr. Jones' collateral counsel sought to present evidence that Glenn Schofield was working as a confidential informant. However, the State objected to the question when asked

Despite the entry in Detective Eason's report indicating that when he was questioned about the murder Mr. Schofield attempted to incriminate Mr. Jones, Mr. Schofield denied ever telling the police that he had heard Mr. Jones say he was going to kill a police officer (H. 592). In fact, Mr. Schofield testified that this conversation never took place: "Once again, me and Leo have never talked or had a conversation about killing no police officer, about no police officer at all." (H. 611). Mr. Schofield also testified that he knew nothing about Officer Szafranski's murder and that he never talked to the police without first talking to his lawyer (H. 549). He insisted that if the police ever questioned him about the case, he would simply say that he knew nothing (H. 607). All of this testimony is contradicted by Detective Eason's report.

Detective Eason's report indicates that he and Detective Ralph Moneyhun returned to the St. Johns County Hospital on June 3, 1981, to interview Mr. Schofield again.[17] The report states that Mr. Schofield "gave Ralph Moneyhun the same information that he had given me concerning the shooting at 4th and Davis." However, Mr. Schofield also provided additional information concerning his own activity on the night of the shooting:

> The writer also received information from Glen Sc[h]ofield that his girlfriend's name was Patricia Ferrell and the following numbers are numbers that we could possibly get in touch with her in case we needed her in the investigation at a later date:

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of Cleveland Smith. Judge Johnson sustained the objection and would not even let Mr. Jones' counsel proffer the question and answer. Of course, Mr. Schofield's activity as a confidential informant would explain why certain police officers may not have wanted him charged with the murder or may want to believe Schofield's efforts in 1981 to pin the blame on Leo Jones.

[17] "Although the grand jury had already indicted Mr. Jones for the murder of Officer Szafranski, the Duval County Sheriff's Department continued to investigate Mr. Schofield as a suspect.

> 399-5943 - this is the telephone number of Glen Sc[h]ofield's sister who lives at 2150 Emerson Street, apartment #252, 356-8619 - this is the number of Glen Sc[h]ofield's step-mother and father, 354-2241 - this is the number of Pat Ferrell's father's house at 215 Elm Street.

(Def. Exh. 7). Mr. Schofield testified that he told the police he was with Ms. Ferrell on the night of Officer Szafranski's death; he also testified that it was possible that he gave the police Ms. Ferrell's phone number so that his alibi could be verified (H. 545-46).

However, Patricia Ferrell (then Owens) testified in 1992 that Mr. Schofield was not with her on the night of Officer Szafranski's death. In fact, her testimony reveals that Mr. Schofield tried to establish a false alibi for that night in anticipation of questioning by the police. Ms. Owens saw Mr. Schofield on the morning of May 24, 1981. She testified:

> A When he walked in, he said, Pat, if anybody want to know where I was, tell them I was with you. This is what he said.
>
> Q And did you say anything to him?
>
> A Yes.
>
> . . .
>
> Q And then what did you say to him?
>
> A I had asked him about the police officer. This is what I asked him.
>
> Q And what did he say?
>
> A And he said that do I think that he was going to say anything to go to prison for the rest of his life. This is what he said to me.
>
> Q In response to your inquiry about the police officer?

A Yes.

(Transcript of 1992 Evidentiary Hearing, pp. 215-16). Ms. Owens explained that "[f]rom when he left and while I did not see him, he wanted me to say that he was with me. This is what he meant." (Id. at 217). Mr. Schofield denied telling Ms. Owens to say that he was with her on the night of the murder and also denied that he ever talked to her about the Szafranski murder (H. 591, 603).

Detective Eason's report indicates that on June 4, 1981, he spoke with Assistant State Attorney Ralph Greene about the interviews with Mr. Schofield and that Mr. Greene instructed him to get a sworn statement from Mr. Schofield (Def. Exh. 7). Detective Eason's entry for June 9, 1981, indicates that he attempted to do so:

> The writer, along with Stenographer, Harriet Cohen, returned to St. Johns County Hospital in an attempt to get a sworn statement from Glen Sc[h]ofield, but his attorney Greg Williams, talked with this writer over the telephone and advised that his client Sc[h]ofield was not going to give this writer a sworn statement on this date, but would get back with me on a later date.

(Id.). Later that day, Detective Eason made the final entry in the homicide continuation report:

> Due to the circumstances surrounding this case and the fact that the suspect, Leo Alexander Jones, has been apprehended and arrested and charged with the murder of Officer Szafranski, this writer suggests that this case be cleared by arrest.

(Id.).

Also later on the same day that the police requested a sworn statement, Mr. Schofield

attempted to escape from the St. Johns County Hospital. [18] In 1997, Mr. Schofield claimed that he could not recall whether he tried to escape on the same day that he refused to give a sworn statement to Detective Eason (H. 531). However, the records establish that only hours after he was asked for a sworn statement, Glenn Schofield, while under arrest, fled the hospital,

While in 198 1 Mr. Schofield relied on Patricia Ferrell as his alibi when he was interviewed by the police, he provided a different alibi when he was interviewed in 1984 by an investigator working for Mr. Jones' clemency attorney. Lou Eliopulos testified that he interviewed Mr. Schofield in 1984 because through his investigation he realized that Mr. Schofield was "a prominent player as a possible suspect in the shooting." (H. 922). Mr Eliopulos described Mr. Schofield as both reluctant and curious about the interview and very concerned that his name not become involved in Mr. Jones' case (H. 930-3 1). Mr. Schofield gave Mr. Eliopulos the names of two alibi witnesses: "Marion -- Marion, which he referred to her as Marilyn -- Manning, is her last name. He also gave me the name of 'Shorty.'" (H. 925). Mr. Schofield provided no other identifying information for Shorty (Id.). Mr. Schofield told Mr. Eliopulos that he frequently used Ms. Manning to rent cars for him and that on the night of Officer Szafranski's death, he was with her and Shorty in a rental car (H. 926). During the interview, Mr. Schofield stated that on the night of the murder he was in Callahan's Bar with Ms. Manning and Shorty at about 11:00 p.m. or midnight and that they all left together in Ms. Manning's rental car to go to another bar (H. 937-38). Mr. Schofield

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[18] Evidence of flight is generally admissible as evidence of consciousness of guilt. See, e.g., Shellito v. State, 701 So. 2d 837, 840 (Fla. 1997); Escobar v. State, 699 So. 2d 988 (Fla. 1997).

indicated that he heard sirens while he was in the Davis Street area and that he thought it was in response to the hostage situation on Lee Street (H. 938). Mr. Schofield denied being in the Davis Street area at the time of Officer Szafranski's shooting (H. 936).

During the interview with Mr. Eliopulos, Mr. Schofield initially denied ever speaking with Detective Eason about the Szafranski murder, but near the conclusion of their meeting, he admitted that he had been interviewed at St. Johns County Hospital (H. 927, 935). Mr. Schofield also told Mr. Eliopulos that he had testified before the grand jury although he was hospitalized in St. Johns County having been shot during an escape attempt the day before (H. 935). Mr. Schofield also initially denied ever being in Mr. Jones' apartment, but then admitted that on one occasion he had gone to Mr. Jones' apartment to buy heroin (H. 931, 933). However, in contrast to what he told the police in 1981, Mr. Schofield told Mr. Eliopulos that he was not in Mr. Jones' apartment on the night of the Szafranski shooting (H. 934). Finally, although he was relying on her as his alibi witness, Mr. Schofield told Mr. Eliopulos that Ms. Manning is a liar (H. 953). Mr. Eliopulos testified that Mr. Schofield probably told him this in relation to the information Ms. Manning had already provided that incriminated Mr. Schofield in Officer Szafranski's death (H. 955).

At the 1997 hearing, Mr. Schofield denied that he ever spoke to Mr. Eliopulos and could not recall ever being interviewed by an attorney or investigator representing Mr. Jones (H. 546). However, his testimony combined elements from his 1981 alibi to the police and his 1984 alibi given to Mr. Eliopulos. He was at Mr. Jones' apartment between 6:00 and 7:00 p.m. on May 22, 1981; he went to pick up some heroin after making a deal with Mr. Jones' brother; and he took Ms. Manning with him because she knew where Mr. Jones lived

(H. 535-36). Mr. Schofield testified that he was with Ms. Manning in a rental car (H. 618). After leaving Mr. Jones' apartment, Mr. Schofield and Ms. Manning picked up his friend Roy "Shorty" Williams and then went to Ms. Manning's apartment (H. 534, 541).[19] Mr. Schofield, Ms. Manning, and Mr. Williams later went to a nightclub, but Mr. Williams stayed outside because he was too young to get in (H. 542). Sometime before daybreak, Mr. Schofield went to the apartment that he shared with Patricia, whose last name he referred to as both Reese and Ferrell (H. 540, 545). Mr. Schofield summarized his activity on the night of Officer Szafranski's death:

> After I went by there [Mr. Jones' apartment] and picked the heroin up, me and Marilyn went back to her apartment and we bagged it up and we went out there to the crab people's house. We stayed out there almost until the crab people's house closed. I think they closed about 2:00 o'clock or 3:00 o'clock. From there we left and went to her apartment. Me and her laid up during that time and before daybreak I went home so I can be with my woman.

(H. 539-40).

Other witnesses presented by Mr. Jones confirm that Mr. Schofield was in the Davis Street area on the night of Officer Szafranski's death. However, while Mr. Schofield testified that he left the Davis Street area in the early evening, Ms. Manning and Mr. Williams have both testified that they were still in the area with Mr. Schofield when Officer Szafranski was killed. Ms. Manning testified in 1986[20] that she had left Mr. Schofield in

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[19] Mr. Schofield confirmed in 1997 that Shorty, the man he first used as his alibi in 1984, is Roy Williams (H. 534). Mr. Schofield was previously unwilling to provide any information about Shorty's identity (H. 925).

[20] Judge Johnson would not permit Mr. Jones to recall her to the stand in 1997. Mr. Jones was forced to rely on the cold transcript of her testimony.

the Davis Street area while she went to a shopping center; they planned to meet back in that area to go out to a nightclub (Transcript of 1986 Evidentiary Hearing, pp. 113-14). However, when she returned to the intersection of Fourth and Davis Streets, Mr. Schofield was not yet ready to leave (Id. at 114). She drove around for awhile looking for his brother and then returned to look for Mr. Schofield:

> After we couldn't find him, we came back up Davis Street and we was looking for Glenn. That's when all the polices was down there on Sixth and Davis. They weren't there before we left, but when we came back to pick up Glenn to go to the club, said by the time we got back he would be ready. When we got back, his friend was there, but we couldn't find him and so he rushed and jumped in the car and said Glenn was around the corner, so I kept circling the block and circling the block, but I never did see Glenn until about -- I guess about five or six minutes later he came from in back of Lee Street and I was down there on Third and Davis. I had come -- kept going around and round. By the time I got to Third and Davis, he jumped in the back seat of the car.

(Id. at 115). Ms. Manning testified that Mr. Schofield had been running and that when he jumped into her car, "[h]e told me to hit the expressway." (Id.) Ms. Manning, Mr. Schofield, and his friend who was already in the car then went to a nightclub (Id.). According to Ms. Manning, Mr. Schofield "wasn't the same" and was acting "nervous" (Id. at 116-17). Alberta Brown also testified in 1986 that Ms. Manning had told her in 198 1 that she picked up Schofield on the night of the murder and that he had a rifle with him (Id. at 344). Ms. Manning's testimony clearly indicates that Mr. Schofield was still in the Davis Street area when Officer Szafranski was shot and that immediately after the shooting, as the police converged on the Sixth and Davis intersection, he was attempting to flee the area.

Roy Williams, whom Mr. Schofield identified as "Shorty," the friend he was with on

the night of Officer Szafranski's death, provided testimony consistent with Ms. Manning's that further incriminates Mr. Schofield. Mr. Williams testified that he was "partners" with Glenn Schofield in 1981 and that he often stayed with Mr. Schofield at the Emerson Arms apartments (H. 285, 327).[21] On the night of Officer Szafranski's death, Mr. Williams was with Mr. Schofield and Ms. Manning:[22]

Q Did you see a rental car with your own eyes that night?

A Oh, yes, ma'am.

Q Okay. Where did you see that car?

A It came up there on Fourth and Davis, Sixth and Davis.

Q Where did it stop?

A It had stopped to the juke joint up there.

Q To a juke joint?

A Yes, ma'am.

Q And that's when you first saw Glenn Schofield get out of this car?

A Yes, ma'am.

. . .

Q All right. How long would you say he was at the

[21] Mr. Schofield in his testimony confirmed that in 1981 Patricia Reese/Ferrell had an apartment at the Emerson Arms and that Mr. Williams would sometimes spend the night (H. 542-43).

[22] Mr. Schofield also confirms that on the night of the Szafranski shooting, he was with Ms. Manning and Shorty Williams.

juke joint?

A I don't know.

Q Well, Mr. Williams, you remember that you were there with another woman, right?

A Yes, ma'am. Me and the woman standing outside. I wasn't in any juke joint, now. 1 didn't say I was in no juke joint. I was standing outside. We were standing outside for a good little while.

(H. 3 17-18). Mr. Williams also testified that Ms. Manning had told him the car she and Mr. Schofield were driving was a rental car (H. 3 17).[23] After being at the "juke joint" with Mr. Schofield, Mr. Williams walked along Davis Street while Mr. Schofield took the back street, probably Lee Street (H. 314). The next time Mr. Williams saw Mr. Schofield, he was kneeling by Mr. Jones' building with a rifle as Mr. Williams watched from across the street where he stood with a female friend (H. 286, 313, 318).[24] Mr. Williams testified:

Q Okay. Now, you indicated you saw Mr. Schofield with a gun?

A Yes, sir.

Q Where exactly was he at?

A Standing on the side of the apartment, bending down.

Q Okay. What happened after you saw Glenn

[23] Schofield had told Eliopulos that he had a rental car that night.

[24] Mr. Williams initially would not reveal the name of the woman he was standing with (H. 298). He later testified **that** her name was Sheila Jones and then clarified that her name is Carolyn but that he called her Sheila (H. 302, 446).

kneeling down with -- was it a rifle?

A Yes, sir.

Q With the rifle?

A Yes, sir.

Q What happened next?

A I just heard some gunfire, and that's it.

Q Did you see a police car go by?

A Yes, sir.

Q And is that when you heard the shot?

A Yes, sir.

(H. 287-89; see also 449-50).

Mr. Williams also testified that Officer Szafranski's car was stopped, that his dome light was on, and that he was writing a report when he was shot (H. 299, 435-37). Randy Fallin, Mr. Jones' trial attorney, testified that in 198 1 he had information that corroborates Mr. Williams' hearing testimony. Mr. Fallin testified:

Q Now, did you develop information regarding Officer Szafranski having stopped the car to write a report?

A Yes. I don't know about write a report. What I had at the time was that he had stopped in the -- and he was looking at or writing something down, and the light was on in his car, and he was stopped at that intersection just for -- I never had information he got out of the car, but he had stopped there for a little longer than it would take him to turn right or left, as the officers preceding him had done.

Q And your information was the dome light was on?

A Yes.

(H. 737). Mr. Fallin testified that the medical evidence confirmed that Officer Szafranski was instantly debilitated by the shot and that his foot must have been on the break when the bullet hit him (H. 779, 782-83).

When Mr. Williams was taken to the crime scene in 1997 with Officer Senters of the State Attorney's Office, he stated that he saw Officer Szafranski's car, not in the intersection as it is seen on the crime scene pictures, but parked on Davis Street south of the intersection near Mr. Jones' building (H. 435). At the hearing, Mr. Williams confirmed on cross-examination that he believed Officer Szafranski's car was parked near Mr. Jones' building:

> Q And you say his car was in the middle of the intersection while he was writing up this report?
>
> A No, ma'am.
>
> Q Oh, where was his car?
>
> A I think it was parked in front of the house, down the street, in front of the house.
>
> Q In front of the house down the street?
>
> A Yes, ma'am.

(H. 300-01). However, Mr. Williams answered affirmatively when asked whether Officer Szafranski "was right there at the intersection of Sixth and Davis, writing that report" (H. 300); he also testified that he saw a police car driving by at the time the shots were fired (H. 365). The inconsistencies in Mr. Williams' testimony regarding the location of Officer Szafranski's car were explained by Officer W.D. Wilmoth who was called to testify for the State. Officer Wilmoth testified that just prior to the shooting, he drove south on Davis Street and stopped his car about one hundred and forty feet passed the intersection of Sixth

and Davis Streets (H. 1227). Officer Wilmoth stopped his car across the street from Mr. Jones' building and waited for the three police cars that were travelling down Sixth Street to Davis Street (H. 1249).[25] Officer Wilmoth's testimony supports Mr. Williams' belief that he saw a police car parked in front of Mr. Jones' building at the time of the shooting. Mr. Williams' confusion about who was in the car and whether the car was on the same or opposite side of the road can be explained by the passage of time and Mr. Williams' mental deficiencies.[26]

Mr. Williams testified that immediately after the shooting, he left the area (H. 289,

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[25] Officer Wilmoth's 1997 testimony is inconsistent with his trial testimony. In 1981, Officer Wilmoth testified: "I made a U-turn on Davis Street to head back north in the same direction as the other vehicles. At the completion of my U-turn I heard one of the units on the police radio stating that officers were being shot at at Sixth and Davis. I observed the two lead police cars; I continued north on Davis Street; while the third vehicle had pulled up to the stop sign, crept forward and then stopped abruptly." (R. 736). Officer Wilmoth stated at the trial that he did not hear the shots because he had both his police radio and FM radio on and his windows were up (R. 736-37). In 1997, Officer Wilmoth testified: "As I'm in the middle of making my U-turn, I heard something. At first I thought it sounded like gunfire and I wasn't sure. I know I heard it at least once, as I said, at that time for some reason, just kind of think, well, no, it really can't be . . . . As I'm, like I said, I was in the middle of my turn. I stopped because one of the units had called in the signal, signal 33, which means someone fired a gun, signal 33 is at the police, and it was also at that same time that I seen [sic] the third car in line pulled up to the stop sign just as it started to leave, it pulled slightly out into the intersection and stopped abruptly. " (H. 1228-30).

[26] Counsel for Mr. Jones concedes that Mr. Williams suffers from mental deficiencies (H. 1322). This is revealed in part by Judge Johnson's sua sponte inquiry of Mr. Williams whether he could read and how far he had gone in school (H. 324). Mr. Williams confirmed that he is illiterate (H. 324, 421). During his testimony, particularly cross-examination, Mr. Williams demonstrated the classic symptoms of "masking, " a tactic by which the mentally retarded attempt to disguise their disability. Mr. Williams lacks the sophistication necessary to withstand a rigorous cross-examination. He was easily made to agree to leading questions, as evidenced by his later rejection of his own answers when asked open-ended questions. Despite his limitations and the State's attempts to confuse him about the details of what he observed on the night of Officer Szafranski's death, Mr. Williams remained consistent about the central aspect of his story: that Glenn Schofield shot Officer Szafranski.

365, 450). However, he met up with Mr. Schofield about two minutes later:

> Q Okay. After you heard the shot, what happened?
>
> A I started walking back down the other end. I seen Glenn come running down on Lee Street, walking back down Lee Street, got in the car and left.
>
> Q Okay. Did at any point in time you have contact with Marion Manning?
>
> A Yes, sir.
>
> Q Can you tell me about that? How did that happen?
>
> A I seen her coming up. I told her she better go get Glenn off Lee Street.
>
> Q Why did you tell her that?
>
> A I just told her that, I said, Glenn is in trouble, I guess.

a

(H. 289, see also 330, 365). Mr. Williams testified that he was already in the car with Ms. Manning when they picked up Mr. Schofield and that they all left the area together (H. 368-69, 452).

Mr. Williams clarified that he did not actually see Mr. Schofield shoot Officer Szafranski:

> Q Did you see Glenn Schofield fire the shot?
>
> A Sir?
>
> Q Did you see Glenn Schofield fire the rifle?
>
> A No, sir. We was standing across the street and, as I looked, like, Glenn bend down. The only thing I seen him bend down. I didn't see him shoot the rifle.

Q Did you hear the rifle go off?

A Yes, sir.

Q Did you see him aim the rifle'?

A Yes, sir.

THE COURT: Did you say you saw it go off or you heard it go off?

THE WITNESS: I heard it go off.

THE COURT: You didn't see the flash of the fire?

THE WITNESS: No, sir.

(H. 296-97). Mr. Williams testified that, although he did not see Mr. Schofield fire the shots, he heard the shots, and they came from the same place where Mr. Schofield was kneeling (H. 359).

Mr. Jones has presented the testimony of four other witnesses who saw Mr. Schofield on the night of Officer Szafranski's murder. First, Dwayne Hagans testified that he is from Jacksonville and has known Mr. Schofield since 1977 or 1978 (H. 850). Mr. Hagans was in the Davis Street area on the night of Officer Szafranski's murder, and he saw Mr. Schofield in a car "with a little dude" (H. 851, 862). Mr. Hagans thinks that it was a rental car because "during the time back then, dudes rented Monte Carlos out of lots. It probably was a rental car." (H. 878-79).[27] Mr Hagans testified that "Schofield flagged us down. He wanted to get a little money to get out of town with" (H. 851). Mr. Schofield also wanted Mr. Hagans "to hold his rifle down," but Mr. Hagans, who had noticed a lot of police in the

[27] And, of course, Schofield told Eliopulos in 1984 that he had a rental car that night.

area and was trying to avoid them, refused to take the rifle (Id.). The next morning, Mr. Hagans read in the newspaper that Officer Szafranski had been killed (H. 852).

James Corbett also saw Glenn Schofield on the night of Officer Szafranski's murder He testified that he was driving in the area and as he made a left turn from Sixth Street onto Davis, he saw Mr. Schofield on the second-story porch of Mr. Jones' apartment building (H. 1068-69). This occurred at about 11:30 p.m. or midnight (H. 1071).[28] Mr. Corbett testified that when he saw Mr. Schofield, he "looked like he had a rifle looking towards Davis Street where the police were at. " (H. 1069).[29] After seeing Mr. Schofield on the porch, Mr. Corbett went to a friend's house at the Blodgett Homes at Fourth and Madison Streets (H. 1071). Mr. Corbett also testified that he heard the gunshots that killed Officer Szafranski:

> Q When you were in the house, did you hear anything?
>
> A Yeah, we was in there messing around for a while. I say it was about an hour or so after that. I don't know. About an hour or two. That's been a long time. I heard a gunshot, you know, and --
>
> Q And --

---

[28] Mr. Corbett's testimony is consistent with that of Bobby Hammonds who told the police after his arrest that Glenn Schofield was in Mr. Jones' apartment shortly before midnight and went out on the porch (R. 914-15). Hammonds testified to that at trial.

[29] The State implied in cross-examination and during its closing argument that it was too dark for Mr. Corbett to have seen Mr. Schofield on the porch (H. 1112, 1368). However, the evidence technician's diagram of the crime scene indicates that it was "Clear, 3/4 moon lite night, Street lite on" (Def. Exh. 10). In addition, Officer Wilmoth testified at Mr. Jones' trial that the street light on the southwest corner of Sixth and Davis was so bright that it cast a glare on Officer Szafranski's car windows so that he could not see inside (R. 737).

A And after a while, within minutes, I don't know, after the gunshot, man, the place was crowded with police all over. The whole area was shut down.

Q Okay. Were you --

A So we jumped and peered out the window, you know, and I thought I seen Glenn coming down from Madison Street running like he had -- I don't know whether it was a bat or a rifle or something in his hand. He was running down Madison Street into the project. Right behind him was Marilyn, not too far behind him.

Q Who is Marilyn?

A I guess that's his girlfriend.

Q And the next day, did you hear anything about what had happened that night?

A Yeah, that next morning, you know, we was out there in the project camping out and we heard that they say Leo had killed a police and I say "Man, no, I don't even believe that, you know. "

(H. 1071-72).

Mr. Corbett's testimony is consistent with that of Denise Reed and Daniel Cole who testified in 1992 that they also saw Mr. Schofield running on Madison Street with a rifle.[30] Mr. Cole testified:

[A]s we approached Fourth and Madison, we notice we seen somebody running toward us . . . [a]bout a good half block from me . . . [a]t that time I notice that he had shotgun in his hand . . . A rifle or either a shotgun. . . [It was] Glenn Schofield . . . I know him . . , [and] [h]e was running from the left-hand side, getting ready to run through Blodgett Homes . . . [A]t that time me and Denise [Reed], we walked toward Davis

[30] Judge Johnson refused to allow Mr. Jones to call these witnesses in 1997, forcing him instead to rely upon the cold transcript.

> Street and at the time when we got on Fifth Street a policeman approached us . . . stopped me and Sharon and . . . he told us to put our hands up against the wall . . . And then after that when they searched us and everything, because they had went upstairs, went across the street to where Leo was living . . . we noticed that they had went over to Leo's house and was bringing him and just got Bobby downstairs and put them in the car.

(Transcript of 1992 Evidentiary Hearing, pp. 73-81). Mr. Cole stated that after watching the police and rescue units cover the area:

> [M]e and Sharon [Reed], we decided we could walk on home and as we walked home, we was talking about what we had seen . . . At the time they [the police] didn't ask no questions . . . We talked about we wasn't going to discuss [seeing Schofield] with nobody . . . Because due to the fact at the time I was -- I was scared of her safety and also mine . . . Because Mr. Schofield's background, his violent background , . . He was just violent.

(Id. at 81-83).

Ms. Reed's testimony basically mirrored that of Mr. Cole. On the night in May of 1981 when the police officer was killed, she and Mr. Cole were going home from the Center Movie Theater after midnight (Id. at 126-27). As they walked on Fourth Street, they heard a shot and then saw someone running on Madison Street toward Fourth Street (Id. at 129-30). At the intersection of Madison and Fourth, Ms. Reed recognized the running person to be Glenn Schofield (Id. at 130-31). Schofield was carrying a rifle and running very fast (Id. at 13 1, 139). Ms. Reed and Mr. Cole continued walking and approached Sixth and Davis where they saw a police car sitting in the middle of the intersection, frantic police officers filling the area, and Mr. Jones being led into a police car (Id. at 132-34). Ms. Reed was not questioned by police about what she had seen and did not volunteer any information because

she was afraid of Schofield, his penchant for violence, and the police (Id. at 135).[31] On the way home, Ms. Reed thought about whether she should say anything about what she had seen but decided not to "[b]ecause I was afraid . . . [of] the polices, plus I was afraid of Schofield" (Id. at 139). When she got home, she called her mother, Martha Bell, and told her about what she had seen (Id. at 140-42). Ms. Bell testified that on the night that Officer Szafranski was killed, her daughter, Ms. Reed, phoned her and said that she had seen Mr. Schofield running from the scene with a rifle in his hand (Id. at 179-84).

In addition to the witnesses who saw Mr. Schofield on the night of Officer Szafranski's death, Mr. Jones has presented witnesses to whom Mr. Schofield has confessed. Mr. Schofield began confessing to Officer Szafranski's murder as early as 1982 and continued to confess even after the 1992 evidentiary hearing. Mr. Jones presented Jasper Kirtsey, who knew Mr. Schofield in Jacksonville and later encountered him at Lake Butler in 1982 (H. 689-90). He testified in 1997:

> Q When you saw Mr. Schofield at Lake Butler, did he ever talk about the shooting of a police officer in Jacksonville?
>
> A Yes, he got -- conversation got around to that, yeah.
>
> Q And what did he have to say about this shooting?
>
> A Well, he had a lot of things to say. Number one, he said that he didn't want to kill the police officer, but he said a lot of them was bad.
>
> Q What else did he say?

[31] Cleveland Smith's testimony confirms that Glenn Schofield was "a very big player" and was "dangerous" (H. 180-81, 200).

A He said he fingered Leo for the murder of the police officer in Jacksonville. I knew the police officer, he knew the police officer. He knew what he was talking about.

(H. 690).

Mr. Kirtsey's testimony also provides additional details that explain Mr. Schofield's motive in shooting Officer Szafranski:

Q You said earlier that you had seen from a distance Mr. Schofield talking to Officer Szafranski. Did Mr. Schofield ever tell you that -- about having any kind of argument with Officer Szafranski or any disagreement?

A Well, in particular, that last time that I was present, and Glenn and Officer Shashinski were present, they was doing a pay-off.

Q What -- what do you mean?

A It was money being given from Glenn to Officer Shashinski. And some argument occurred from that.

Q You saw -- you saw the money being passed from Glenn to Officer Szafranski?

A Yes. Like -- yes.

Q And they were arguing?

A Well, they was arguing, you know, they having a disagreement about the amount, you know, like the amount.

Q Did Mr. Schofield say why he killed Officer Szafranski?

A Yes.

Q And what did he say?

A Concerning the money. It involved money.

(H. 693-95). Mr. Schofield denied that he knew Officer Szafranski or that he had any business dealings with him (H. 618). However, Mr. Williams testified that Mr. Schofield told him that he was tired of Officer Szafranski harassing him (H. 332).

In 1983, Mr. Schofield confessed to Dwayne Hagans, whom he knew from Jacksonville, when they met at Union Correctional Institution. Mr. Hagans testified that Mr. Schofield talked about the night when he had flagged down Mr. Hagans in the Davis Street area. Mr. Schofield confessed that he was trying to borrow money to get out of town because he had just killed a police officer (H. 853).[32]

Mr. Schofield continued to admit that he had committed the murder throughout the mid-1980s. In 1985, he worked in the kitchen at Union Correctional Institution where he met Frank Pittro and told him about his involvement in Officer Szafranski's murder. Mr. Pittro testified in 1992:[33]

Q Do you know Mr. Leo Jones?

A No, I don't know him personally, no.

Q Have you ever heard his name being mentioned?

A Yes, I did.

Q And who did you hear mention Mr. Jones' name?

A Glenn Schofield .

Q And in what context did Mr. Schofield mention

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[32] The proffered testimony of Charles Polite confirms that Mr. Schofield was trying to borrow money to get out of town after Officer Szafranski's murder (H. 909).

[33] Judge Johnson refused to permit Mr. Jones to call Mr. Pittro and forced Mr. Jones to rely upon the cold transcript.

Mr. Jones' name?

. . .

A That he -- he said he shot a police officer

Q Who shot a police officer?

A Schofield said he did.

Q And how did that relate to Mr. Jones?

A Well, he said he shot him and they arrested Mr. Jones for it. I asked him, you know, was he bullshitting. He said, no, he wasn't. He says it was better him than himself.

(Transcript of 1992 Evidentiary Hearing, pp. 271-72).

Franklin Prince also met Mr. Schofield working in the kitchen at Union Correctional Institution.[34] Mr. Prince and others were talking about Mr. Jones' case when Mr. Schofield joined the conversation and confessed to his involvement in Officer Szafranski's death. Mr Prince testified in 1992:

Q Why were you talking about Mr. Jones's case?

A Because at that particular time I think it was in the paper. I think it had something to do with the Florida Times-Union, the article that we had read about this case.

Q Okay.

A And that just was the subject for the day.

Q Okay. And what happened?

A We was talking about the case and Schofield told the fellow that he didn't know what he was talking about, that

[34] Judge Johnson refused to permit Mr. Jones to call Mr. Prince and forced him instead to rely upon the cold transcript.

> he had did the crime. I said, well, why you telling us that? Why you won't tell the officials that? And he said the officials wouldn't believe him.
>
> Q So, he told you he did the crime?
>
> A Told me personally that he did the crime with everybody else standing around, too.

(Id. at 408).

Paul Marr also worked in the kitchen at Union Correctional Institution with Mr Schofield in 1985. Mr. Marr testified in 1986 that he often carried legal books with him and that Mr. Schofield approached him to ask legal questions (Transcript of 1986 Evidentiary Hearing, p. 356).[35] Mr. Marr explained:

> Q Did there come a time during these conversations with Mr. Schofield that he spoke to you regarding the death of a police officer in Jacksonville?
>
> A Yes, he did. On several occasions.
>
> . . .
>
> Q During that time period, what conversation did he have with you regarding the shootings of a police officer in Jacksonville?
>
> A The conversation was that he was very concerned and worried over the possibility of the state or otherwise reopening the case on Leo Jones because they suspected him or people had asked him questions regarding him being involved in that murder.

(Id. at 356-58). Mr. Marr also testified that Mr. Schofield had confessed to him: "He told me that the man on death row was not the person that killed the officer, that it was him that

[35] Judge Johnson refused to permit Mr. Jones to call Mr. Marr and forced him to rely upon the cold transcript.

killed the man." (Id. at 359-60).

Mr. Jones also presented Lamarr McIntyre, another inmate to whom Mr. Schofield confessed. Mr. McIntyre testified that he met Mr. Schofield at Union Correctional Institution in 1986 or 1987 and that he knew him for three or four years, until Mr. Schofield was released (H. 652). While they were incarcerated together, Mr. Schofield told Mr. McIntyre that he had killed a Jacksonville police officer and that Mr. Jones was convicted of the crime:

> Q Did he describe what happened in any way?
>
> A He said something about the guy -- the police was taking dope or they was setting up, playing like they was taking dope, and he wasn't going to have nobody taking his dope, or something to that effect.
>
> Q And he said that he shot the officer?
>
> A Yes.
>
> . . .
>
> Q . . . Did he say anything about Leo Jones?
>
> A That's what brought on the fact that he shot the police officer. I think Mr. Jones was -- had a hearing or something, a warrant or something had been signed, and that was the cause of me getting upset. He said, you know, that sucker should be dead or better him than me, or words to that effect, in regards to the fact that he was being executed, I think, or they was going to execute him.
>
> Q Did Mr. Schofield only talk about this once?
>
> A No, it was a bragging thing. That's what got me upset, the fact that he kept bragging about Mr. Jones being, you know, it better him than me. I wasn't concerned about the fact that he shot the police officer. I mean, you know, you know, people talk about stuff like that. It's just the fact that he kept

> saying, you know, that guy should be, you know, he don't care about that guy and, you know, it was argument like, hey, this dude man fixing to die. You talking about you done did something and the man getting ready to die. Better that sucker than me, and words to that effect.
>
> Q Did he say that Mr. Jones was the person convicted of killing the officer that he shot?
>
> A Right. That's what brought it up.

(H. 655-57).

In 1988, Mr. Hagans, who saw Mr. Schofield on the night of the crime and heard him confess in 1983, was on work release with Mr. Schofield, and Mr. Schofield again told him about killing the police officer (H. 854). Mr. Schofield also told Mr. Hagans that "he was going to sign a confession and give it to his old lady, Pat" (a.). Mr. Hagans explained why Mr. Schofield would sign a confession: "The reason why he said he was going to be doing that there, because he know the dude was on death row for something he ain't done, you know. And then he said he wasn't going to just go up there and really tell, you know, that he done it, but different ways of alleviating the problem, I guess." (Id.).

In 1989, when both Mr. Hagans and Mr. Schofield were back in Jacksonville, Mr. Schofield confessed again and provided additional details:

> He wanted to be part of this group I had put together, right, running a protection racket and drug and extortion, and Schofield wanted to be the recruiter. And Schofield was telling me the same thing he did before, saying "look, all the dudes fixing to prove theirself as being part of the group, I have the dude -- I knocked the police off on Davis Street; I started killing cops."

(H. 855). Mr. Hagans explained that "[h]e say he know where a spot was that was safe, the same spot he killed the police officers then." (H. 873).

When he was living in Jacksonville in 1989, Mr. Schofield also confessed to his girlfriend, Patricia Ferrell Owens.[36] Ms. Owens testified in 1992:

> Q When Mr. Schofield got out of prison in 1989, did he ever indicate to you or bring up the subject matter of this officer who had been killed on Sixth and Davis?
>
> A Yes.
>
> Q What did he say?
>
> A He talked about it all the time, a lot.
>
> Q And what did he say?
>
> A He would brag about it and --
>
> Q What did he say? Do you remember any specifics about what he said?
>
> A He would talk about the killing of the police officer, that -- what he did and who he will do it to, you know. He talked about it a lot.
>
> Q Did he ever mention Mr. Jones in any of those convictions [sic]?
>
> A Yes.
>
> Q And what did he say?
>
> A He said that he wasn't going to make any time for it, that he wasn't and that nobody was going to bother him, you know.

(Transcript of 1992 Evidentiary Hearing, pp. 219-20). Ms. Owens testified that the killing

[36] Judge Johnson refused to permit Mr. Jones to call Ms. Owens to testify and instead forced him to rely on the cold transcript.

of Officer Szafranski was "[t]he only crime he [Schofield] ever bragged of." (Id. at 220).

Mr. Schofield continued to confess to Officer Szafranski's murder after he returned to prison in 1990. Donald Perry, who grew up with Mr. Schofield in the Blodgett Homes in Jacksonville, saw him at Lake Butler Regional Medical Center in 1992. Mr. Perry testified about their meeting: [37]

> Well, Mr. Schofield first called me up to the cage, you know. He wanted reminiscing, What I mean by reminiscing, he wanted to talk about the past. It's been a long time since we saw one another. And I immediately asked him why he won't come back and tell the truth about Mr. Leo Jones, you know, and at that time he would talk to me because we trusted one another, you know, because we comrades. We go way back, you know. He said, look, he said, hey, man, said, I done it, man, there aint' no secret about it, I done it, but I'm scared.

(Id. at 384). Mr. Perry testified that Mr. Schofield said: "I killed the cop . . . but I'm scared, man, if I come back that the prosecutor is going to bring charges against me." (Id. at 385). Under questioning by the Court, Mr. Perry confirmed that Mr. Schofield told him he used a .30-.30 rifle to kill Officer Szafranski (Id. at 394).[38]

Louis Reed testified at the 1997 hearing that he knew Glenn Schofield at Cross City Correctional Institution from March 1993 until July 1994 (H. 151). Mr. Reed was a law clerk in the prison library and assisted Mr. Schofield with two Rule 3.850 motions (H. 152).

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[37] Judge Johnson refused to permit Mr. Jones to call Donald Perry and forced him to rely instead upon the cold transcript.

[38] In 1992, Mr. Jones also presented the affidavit of Stanley Willie, who was physically ill and unavailable, but the affidavit was not accepted by the court. Mr. Willie's affidavit states that when he met Mr. Schofield at the Duval County Jail in 1990, "Glen told me that Leo Jones did not kill the Jacksonville police officer. Glen said that they, meaning the police, got the wrong man."

Mr. Reed testified that Mr. Schofield asked whether there is a statute of limitations for murder and sought advice about his options if he were ever questioned about the death of a Jacksonville police officer (H. 153-54). Mr. Reed provided details about these conversations with Mr. Schofield:

> Well, he spoke of a man by the name of Leo Jones on occasion, and another person, last name Hammonds. And he had spoke of the fact that they didn't really know who had shot this officer and that he was involved -- he had shot this officer and got away after shooting the officer, and that this man is taking the weight, is in prison, receiving the electric chair for something he didn't do.

(H. 154). Mr. Reed testified that Mr. Schofield talked with him about the crime several times and that he provided additional details:

> Well, I was -- I was like his counselor, though I'm an inmate, during that time, a jailhouse lawyer. On several occasions, we had talked about it and he would ask questions, and I would always brush him off and always tell him to be careful.
>
> Q When he spoke about this shooting, did he give you any details about what happened, how the shooting took place?
>
> A No more than his admission and that they never got the rifle that shot the officer. Got rid of the rifle.
>
> Q Did he tell you that he got rid of the rifle?
>
> A Yes.
>
> Q Did he tell you what kind of rifle it was?
>
> A .30-.30 rifle.

(H. 155-56). Mr. Reed also testified that Mr. Schofield told him he threw the rifle "in the river. The Jacksonville River. " (H. 160).

Mr. Reed testified that Mr. Schofield was afraid of being charged with this crime; he explained:

> [T]hat is why he asked me the rules of court and law and what can be done. And 1 always used to tell him, "if they ask you something, Glenn, just tell them you don't know anything about it. They can't make you talk about it if you don't want to." I used to give him a lot of reassurance.

(H. 157).

Carnell Grayer also testified about meeting Mr. Schofield in prison and hearing him talk about the Szafranski murder. Mr. Grayer testified that he met Mr. Schofield at Cross City Correctional in either 1994 or 1995 (H. 679). While they were incarcerated together, Mr. Schofield confessed to Mr. Grayer:

> A He said -- he say he done got his stripes, he a soldier.
>
> Q What did that mean?
>
> A You have to take out somebody in order to have your stripes. That's what it was.
>
> Q Did that mean that he had killed somebody?
>
> A Yeah.
>
> Q And that's how you get your stripes?
>
> A Yes.
>
> Q Did he say that -- what he was referring to was the shooting of a police officer in Jacksonville?
>
> A Yes, said back in his young days, that's when he got his stripes, when he took out officer with some crazy last name. I don't know. I can't pronounce the name.
>
> . . .

Q Was the name Officer Szafranski?

A Yes, ma'am.

(H. 680-81). Mr. Schofield also told Mr. Grayer that he used a .30-.30 rifle to shoot the officer and that after the crime he ran away (H. 68 1). Mr. Schofield also bragged to Mr. Grayer about his marksmanship: "He said he ain't got to be all close, he can do it from long distance. He ain't got to get all messy and stuff." (H. 682). Finally, Mr. Grayer testified that Mr. Schofield shot Officer Szafranski because "he was fucking with him." (H. 686).

In his 1997 testimony, Mr. Schofield denied that he knew Paul Marr (H. 597), Jasper Kirtsey (H. 593), Lamarr McIntyre (H. 602), and Stanley Willie (H. 604). He admitted to knowing Frank Pittro (H. 598) and Franklin Prince (H. 600). Mr. Schofield testified that he might recognize Dwayne Hagans but that he does not know him by name (H. 601). Mr. Schofield admitted that he grew up with someone named Donald Perry who is on death row at Florida State Prison (H. 611). He denied seeing Mr. Perry at Lake Butler, explaining that as a death row inmate Mr. Perry would have been segregated from other inmates (H. 612). Mr. Schofield testified that he knows Louis Reed and that he sought his assistance on legal matters at Cross City Correctional Institution (H. 613). Mr. Schofield also admitted to knowing someone named Carnell at Cross City but was unsure of his last name (H. 615). Mr. Schofield explained that he does not always know the names of other inmates because many people use nicknames in prison; he admitted that he might know some of the other inmates whom he denied knowing, but that he might know them by another name (H. 616). Mr. Schofield repeatedly denied ever confessing to anyone that he had killed Officer

Szafranski, just as he denied talking to Lou Eliopulos or anyone else representing Leo Jones.[39] According to Glenn Schofield, everyone else was wrong in their testimony.

At the 1997 hearing, Mr. Jones also presented Cleveland Smith, a retired Jacksonville police officer .[40] Mr. Smith retired in January 1997 after twenty-four years (H. 177-78). In 198 1, he was assigned to the same patrol area as Officer Szafranski; as a result, he knew Mr. Jones, his brother Leroy Clark, and Mr. Schofield (H. 180-81, 200). Mr. Smith testified that "I made it a habit to know everybody that was anybody on my beat. Anybody that was a player, I had to know who they were. . . . Mr. Schofield was a very big player. He practically ran that beat. He practically ran that area. " (H. 180-8 1) . Mr. Smith agreed that Mr. Jones and Mr. Clark were also "players" who ran the drug scene in that area but that "Mr. Schofield was more dangerous. " (H. 200).

Mr. Smith testified about Officer Mundy's reputation based on his experience in the Jacksonville Sheriff's Department. He described Officer Mundy as a "braggert" and explained that "you didn't know where the truth ended and a lie began." (H. 215).[41] Mr Smith testified that "it was common knowledge that Officer Mundy was like a hit man on the police department. " (H. 220). He explained his role in the sheriff's department:

> The point I'm trying to make is that Officer Mundy has certain leeways that he was allowed. He was allowed certain

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[39] Of course, the denial of the conversation with Eliopulos makes no sense because whta Eliopulos says he was told in 1984 was to a large degree what Schofield said on the stand in 1997.

[40] Mr. Smith testified that he contacted Mr. Jones' counsel in October of 1997 after reading a newspaper article about Mr. Jones' pending 3.850 motion.

[41] Assistant State Attorney Angela Corey Lee represented in her cross-examination that Mundy was fired by the Sheriff's Office fourteen years ago (H. 216).

> things that go on. In fact, he was called to certain problems in order to beat suspects up.

(Id.).

> Mundy was an enforcer. Plain and simple. That's what he was. If somebody had somebody that was giving them a hard time -- you hear it all the time on the radio, "I need Officer Mundy . " And everyone knew what it meant. Officer Mundy was going to kick somebody's butt.

(H. 227).

Mr. Smith also testified about specific instances of conduct that he observed when he was patrolling with Officer Mundy . Mr. Smith testified that Officer Mundy would make up charges and falsify police reports and that Smith would sometimes refuse to sign Mundy's reports because he knew that they had been falsified (H. 189-90). In addition, Mr. Smith testified that he had observed Officer Mundy use excessive force in making arrests. The following testimony was proffered:

> There was a robbery at the Trailways Bus Station one night, and several of us responded to the call. By the time I arrived, they had -- an officer had one of the suspects in the rear of a police car. Officer Mundy pulled up. He got out of his car, walked over to the back of the other police car, opened the door, started questioning the suspect. The suspect wouldn't give him any answers.
>
> Officer Mundy then closed the door, went to the trunk of his vehicle, got out a pair of vice grips. Officer Mundy then came back to the police car, opened the rear of the car, told the suspect to place his legs outside the vehicle while he was still seated.
>
> When the suspect did, Officer Mundy grabbed his genitals with the vice grips, and made him tell everything he wanted him to tell him.

(H. 192).

On cross-examination, the following exchanges occurred:

> Q How many police officers have we fired and prosecuted over the last 16 years since you've been on this department?
>
> A Everybody knows -- it was common knowledge that Officer Mundy was like a hit man on the police department.
>
> Q That wasn't my question to you, sir.
>
> How many police officers have been prosecuted and fired over the last 16 years from the Jacksonville Sheriff's Office?
>
> A The point I'm trying to make is that Officer Mundy has certain leeways that he was allowed. He was allowed certain things that go on. In fact, he was called to certain problems in order to beat suspects up.
>
> Q Okay. Well, Officer Mundy is not the one on trial here.
>
> My question to you is: Why do you think that anybody would cover up for him, when you know he got fired and you know hundreds of other officers have gotten fired since then?
>
> A Look how long it took for Mr. Mundy to be caught. It was after his usefulness was all gone. That's when they finally did something about it.
>
> Q So would you say you were an accomplice in Officer Mundy's endeavors on the streets to beat people, to beat innocent people?
>
> A Oh, yeah. Probably me, and along with about three or four hundred other people who have knowledge of what happened.

(H. 220-21).

> Are you saying that out of a department of approximately two thousand sworn and civilian employees, there wasn't one person you could tell about Lynwood Mundy's comments or Hugh Eason's reputation?

A I think everybody already knew them and nobody did anything about it.

Q So you thought it was okay not to do anything then?

A No, I didn't think it was okay. I just didn't do anything.

(H. 225).

Mr. Smith also provided testimony about Officer Mundy's involvement in Mr. Jones' case. On proffer, Mr. Smith testified that Officer Mundy had confessed to beating Mr. Jones: [42]

Q What did -- what did Officer Mundy tell you about Leo Jones?

A Well, we talked about it several times. He told me that he kicked in a door and that he just started beating people. He says his intention was to kill somebody, and that another officer stopped him from doing it.

Q Did he indicate who he intended to kill?

A He said whoever was inside the building.

(H. 188). Mr. Smith also testified that Officer Mundy had told him that he had approval from his supervisor to beat Mr. Jones (H. 189). On cross-examination, Mr. Smith provided additional details about the conversation with Officer Mundy: [43]

A Officer Mundy, when I asked him what he was talking about, he stated that -- he said that he was telling the

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[42] Judge Johnson would not admit into evidence Mundy's statement to Cleveland Smith regarding his beating of Leo Jones.

[43] This cross-examination was not within the proffer. It presented this testimony without objection before Judge Johnson. It was thus admitted into evidence.

guys about what had happened during Officer Szafranski's shooting.

Q What did he say?

A Well, I asked him, I said, "what happened?"

He says, "Man, you should have seen it." He says, "Man, I just went and I kicked the door open." He says, "There was this guy in there and I just started beating him and beating him. "

I said, "Beating who?"

He said, "A guy we put in jail. "

I said, "How did you know that was the one?"

He said, "Man, we didn't care who we got. We were going to get somebody. "

(H. 223). Mr. Smith testified that Officer Mundy spoke about the beating several times and that in later conversations he referred to Mr. Jones as the man he had beaten (H. 230) .[44]

Mr. Smith explained why he did not come forward with this information sooner: he knew that Officer Mundy had a reputation for lying, and he did not initially believe the story about him beating Mr. Jones (H. 215-17). In September 1997, Mr. Smith learned of the beating allegation through a newspaper article; for the first time, Mr. Smith realized that the story Mundy had told him was true (H. 197-98). Although Mr. Smith did not witness either the beating or Mr. Jones' injuries, he believes that Mundy beat him because "if Mr. Mundy

[44] Mr. Smith's testimony about Officer Mundy beating Mr. Jones is corroborated by Bill White's testimony about Detective Eason: "Eason had witnessed L.F. Mundy beating Leo Jones and had to pull him off. He also told me if I ever told anyone that, that he would deny it if he took the stand." (H. 1143). Mr. White also testified that the public defender's office took pictures of Mr. Jones at his first appearance in 1981 to preserve a record of his injuries (H. 1149; Def. Exh. S for identification).

could use vice grips on somebody, he certainly could beat somebody up. " (H. 217- 18).

Mr. Smith testified that he did not go to Internal Affairs with the information he had about Officer Mundy because of a previous experience with that office in which Mr. Smith was disbelieved and even threatened: "By the time the investigation was over, I was told I didn't see what I thought I saw and if I didn't keep my mouth shut, that I could have serious problems." (H. 219).

Mr. Smith provided additional information relevant to Mr. Jones' case which explains why the police initially focused their attention on Mr. Jones:

> [I]t was brought up at roll call that an officer had had a fight, a very serious fight, and that the suspect involved was a Mr. Jones. We were then told to do everything in our power to put Leo Jones in jail.

(H. 199). Mr. Smith testified that this incident occurred in 1981 shortly before Officer Szafranski's death (Id.).

Counsel for Mr. Jones proffered to the court the following additional subjects on which Mr. Smith would testify:

> MCCLAIN: Okay. This officer also worked with a Hugh Eason, who was a witness at trial in Mr. Jones' case. Hugh Eason is the individual who testified that Leo Jones had written the confession. I believe it was a one or two-sentence confession. Having worked with Hugh Eason, this officer talked to Hugh Eason about the fact that Hugh Eason had been accused of rape in 1975. That's how he got demoted and was assigned to work with Patrolman Smith. That Hugh Eason made inculpatory statements regarding that rape to this witness; that Hugh Eason also was involved or alleged by a criminal defendant as having hired that criminal defendant to commit a murder.
>
> This witness knows that he had arrested that criminal defendant on a charge of armed robbery. That criminal

defendant, he knows him by the name of "Frog, " does not remember his actual real name, and that he received a call -- this officer received a call from the prosecutors, wanting to know what had happened to that complaint.

And apparently an investigation revealed that it had disappeared somehow, and it was believed that Hugh Eason is the person who had removed it in order to protect the individual, "Frog, " who "Frog" was contending Hugh Eason had hired to kill someone. And shortly thereafter, Hugh Eason was forced to leave the Sheriff's Department.

Also, this officer would testify that, about two weeks prior to the Officer Szafranski shooting, at I believe it was roll call or at some point in time in the station house, the police were told that there had been an altercation between Leo Jones and another police officer, and they were to do everything in their power to put Leo in jail.

This officer would also show the confession that Hugh Eason testified to and obtained from Leo Jones. And he would say from his experience and his knowledge of Hugh Eason that there would have been more detail, that Hugh Eason was known for getting very detailed confessions that explained the what, why, when, where, and how, and that the confession is not consistent with how Hugh Eason would have normally done it.

This witness would also testify that "Shorty" is a very common name in the community that he -- the beat area that he did, which is significant in terms of the many years that individuals have been trying to find "Shorty," when that was the only information that we had to go on.

Also, I would present from this witness that he has testified over a hundred times for the State of Florida in this county and in many criminal cases; that he has citations for bravery and letters of commendation.

(H. 193-95). The court accepted counsel's proffer (H. 196).

Randy Fallin, Mr. Jones' trial attorney, testified that he was unaware of the roll call incident. He explained its importance as impeachment evidence that could have been used at

the suppression hearing and at trial to assist the jury's evaluation of the police officers' credibility:

> Well, to give a motive to color their testimony or actually testify falsely or any number of things. It gives a reason to be upset or mad or get even with somebody, other than the detached police work which they're theoretically not involved emotionally or have a personal stake.

(H. 772). Mr. Fallin testified that Mr. Smith's testimony about the roll call incident and Officer Mundy's incriminating statements is both exculpatory and consistent with his defense strategy. He explained:

> [O]ne of the primary officers who testified in suppression was Officer Mundy about how nice they had treated Leo.
>
> And, of course, he exhibited signs of having been beaten. And that was explained that that was necessary to subdue him at the arrest scene. But it appeared to me now, as I presented, it appeared to be excessive in that regard. And that's why we pursued that, but the Court had ruled on that earlier.

(H. 758). Mr. Fallin testified that he had no information that Officer Mundy had ever confessed to beating Mr. Jones or that he had the intent to kill whomever he found in the apartment but that he would have used such information to support the motion to suppress Mr. Jones' confession had it been available to him (H. 759).

Bill White, the Chief Assistant Public Defender, testified that he had a conversation with Hugh Eason sometime after Mr. Eason was suspended and under investigation on conspiracy to commit murder charges. Mr. Eason told Mr. White that he, Eason, had seen Mundy beating Jones and had to pull Mundy off Leo Jones in order to stop the beating (H. 1143). However, Mr. Eason also told Mr. White that he would deny ever making the statement if he were ever called to testify (Id.).

At the 1997 evidentiary hearing, Mr. Jones also presented the testimony of Alberta Brown. Ms. Brown is the mother of Mr. Jones' four children and was his girlfriend in 1969 (H. 882, 896). Ms. Brown testified that after Mr. Jones was sentenced to one year in the county jail in 1969, she and Mr. Jones' mother hired Judge Soud to act as Mr. Jones' attorney:

> Ms. Hester and myself, we saved seven hundred dollars up, and we went to his office at the time. He was an attorney. And it was after hours. And we went in and we had a little small-talk at first, and then gave him the seven hundred dollars.
>
> I asked him how long it would be before Leo would be released.
>
> He said as soon as he could get the money to the judge.

(H. 884, see also 894). Ms. Brown testified that she had $200 and Ms. Hester had $500; she explained that she had the money in her bra and that she gave it to Ms. Hester who in turn handed it to Judge Soud (H. 895). Ms. Brown testified that Mr. Jones was subsequently released (H. 884). She never told Mr. Jones or anyone else that she and his mother had hired Judge Soud to represent him; it was not until a reporter from the Miami Herald interviewed her in August 1997 that Ms. Brown shared this information (H. 884). Ms. Brown explained why she did not tell anyone sooner: "Well, she -- I was afraid for Ms. Hester, if I would have said anything before. But when I talked to Ms. -- I think her name was Ellen -- it didn't matter; she was dead, so I told it." (H. 886).

The State called Judge Soud to testify about this same matter, Judge Soud testified that Ms. Hester hired him to represent her son Leroy Clark in 1969 and that his representation lasted from March 1969 through November 1970 (H. 1156, 1159-60). Judge

Soud testified that he was paid by Ms. Hester for his representation of Mr. Clark and that he met with her in his office but he could not say how many times (H. 1158). Judge Soud admitted that he was probably paid in cash over a period of time (H. 1195).

Judge Soud testified that in 1981 he did not recognize Mr. Jones or any members of his family when he saw them in court but that he recognized Leroy Clark at a pretrial hearing on Mr. Jones' capital case but did not remember his name (H. 1177). After learning Mr. Clark's name, Judge Soud disclosed that he had represented him and then secured the consent of all parties to his remaining the judge in Mr. Jones' case (H. 1183-84; State's Exh. 9, 10, 11). Judge Soud testified that he has no recollection of representing Mr. Jones, that he did not know that Mr. Clark and Mr. Jones were brothers before learning that fact in 198 1, and that he never spoke to anyone in the family aside from Ms. Hester (H. 1161, 1175). He testified that he had "absolutely no recollection of that case, or Mr. Jones or any connection to he [sic] or Ms. Hester. " (H. 1170). Judge Soud also testified that he had no recollection of meeting "a woman who was supposed to have been the girlfriend of someone else in the family" (H. 1161). Judge Soud denied that he ever conveyed money from Ms. Hester to Judge Harvey on behalf of Mr. Jones or that anyone ever took money out of her bra in his office (H. 1172, 1185). However, Judge Soud agreed that his name appears in the court file as the attorney for Mr. Jones on April 16, 1969, when his sentence was vacated (H. 1196). He also agreed that at that time he was still representing Mr. Jones' brother Leroy Clark (H. 1199).

SUMMARY OF ARGUMENT

1. Mr. Jones was denied his right to a fair trial because the State withheld material

exculpatory evidence in violation of Brady v. Maryland. Cleveland Smith, a former deputy Sheriff with the Jacksonville Sheriff's Department, testified that Officer Mundy, the arresting officer, bragged for years about beating a confession out of Mr. Jones. Officer Mundy also told Mr. Smith that he intended to kill Mr. Jones but that another officer restrained him. Mr. Smith also testified that shortly before Officer Szafranski's murder, the police who patrolled the Davis Street area were instructed to do everything in their power to get Mr. Jones in prison. Chief Assistant Public Defender Bill White also testified that Detective Eason told him that he saw Mundy beating Mr. Jones at the scene of his arrest and that he pulled Mundy off of Jones to stop the beating. The circuit court applied the wrong legal standard to Mr. Jones' claim, failing to consider the cumulative effect of all evidence withheld by the State as required by Kyles v. Whitley, 5 14 U.S. 419 (1995). Mr. Jones has demonstrated a reasonable probability that the outcome of his trial would have been different had this information been available.

2. The circuit court applied the wrong legal standard and failed to consider the cumulative effect of all the evidence discovered since Mr. Jones' trial as required by Kyles and this Court's decisions in State v. Gunsby, 670 So. 2d 920 (Fla. 1994), and Swafford v. State, 679 So. 2d 736 (Fla. 1996). Judge Johnson examined the testimony of the 1997 witnesses individually and also failed to consider the new evidence in conjunction with that which was presented at Mr. Jones' prior evidentiary hearings. A cumulative analysis of all the newly discovered evidence demonstrates that confidence in the outcome of Mr. Jones' trial is undermined. Mr. Jones has demonstrated a reasonable probability of a different outcome and he must be granted a new trial.

3. The circuit court erred in its analysis of the admissibility of Glenn Schofield's confessions. The court admitted Mr. Schofield's confessions only as impeachment. Mr. Jones has presented sufficient evidence demonstrating the trustworthiness of the confessions so that they should be admitted as substantive evidence of Mr. Jones' innocence under Chambers v. Mississippi, 410 U.S. 284 (1973). The continued exclusion of Mr. Schofield's confessions despite the demonstration of their trustworthiness denies Mr. Jones his due process right to present evidence in his defense.

4. Mr. Jones was denied his right to a full and fair hearing when the circuit court refused to consider as evidence the fact that Mr. Schofield invoked his Fifth Amendment right to remain silent. Judge Johnson rejected counsel's argument that adverse inferences could be drawn from Mr. Schofield's invocation because he is a nonparty witness in these proceedings. The circuit court erred in refusing to consider Mr. Schofield's invocation, not to incriminate Mr. Schofield, but as further exoneration of Mr. Jones that is supported by the other evidence presented since his trial.

5. The circuit court erred when it limited counsel's examination of Mr. Schofield. Counsel for Mr. Jones sought to examine Mr. Schofield about his criminal history and his past efforts to avoid punishment to demonstrate his motive to lie in this proceeding. In particular, counsel sought to question Mr. Schofield about a pretrial motion filed in 1990 seeking to preclude the State from presenting any evidence linking him to the murder of "Officer Lafranski." All of the evidence about which counsel sought to question Mr. Schofield would be admissible at a penalty phase if he were ever charged with this crime and would make it more likely that Mr. Schofield would receive a death sentence.

6. The circuit court erred in denying Mr. Jones' claim that his due process rights were violated when he was tried and sentenced to death by a judge who was biased against him. Mr. Jones presented testamentary and documentary evidence proving that his due process rights were violated because Judge A.C. Soud represented him in 1969 and failed to either make the appropriate disclosure or recuse himself in 1981.

ARGUMENT I

MR. JONES WAS DENIED A FAIR ADVERSARIAL TESTING BECAUSE THE STATE WITHHELD MATERIAL, EXCULPATORY EVIDENCE IN VIOLATION OF MR. JONES' CONSTITUTIONAL RIGHTS.

At Mr. Jones' trial, the State presented Mr. Jones' two sentence confession. This confession was obtained by Detective Eason. The confession provided:

> I Leo Jones on 23 May 81 took a rifle out of the front room of my apartment and went down the back stairs and walked to the front empty apartment and shot the policeman through the front window of the apartment. I then ran back upstairs and hid the gun or rifle and then the police came.

Mr. Jones contended that this confession was coerced; that he was beaten by Officer Mundy; that in fear for his life he signed the confession; and that the confession was not true. Mr. Jones in fact testified in this regard.[45]

The State responded with testimony from Mundy and Eason. Mundy denied beating Mr. Jones (R. 850). He went to Mr. Jones' apartment because his investigation of a prior

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[45] Mr. Jones also contended that Bobby Hammonds was coerced as well, and that Hammonds, despite an earlier recantation of his prior statement inculpating Mr. Jones, testified for the State out of fear arising from the beatings endured at the time of their arrests. As to Bobby Harnmonds, the question for the jury became whether Hamrnonds was periodically changing his story out of fear of the police or out of fear of Jones.

sniper incident cause him to think that the shot came from Jones' building (R. 808). While arresting Hammonds, Hammonds accidentally hit his head on Mundy's gun (R. 788). And Jones resisted arrest and had to be subdued in a minor scuffle (R. 850). Eason testified that, when he saw Jones, Jones had only "slight injuries" (R. 1095). Jones was not in fear, had no reason to be in fear, and voluntarily signed his confession (R. 1098). Thus, the jury was faced with believing Leo Jones or two, apparently upstanding, police officers -- Mundy and Eason. What the jury did not know, because State agents failed to disclose, was that neither Mundy nor Eason were what they seemed.[46]

According to Cleveland Smith, a week before the Szafranski's shooting, the police had been instructed to get Jones. This is significant in evaluating Mundy's testimony as to why he went to Jones' apartment. According to Smith, within the department, Mundy was a known liar who falsified reports. He was also the department's enforcer who was allowed to beat people up. Mundy entered Jones' apartment with the intent to kill whomever he found. Jones was not killed only because another officer restrained Mundy by pulling him off Jones.

In evaluating Jones' testimony and Mundy's testimony, the jury needed to hear these facts that were known by a State agent, Cleveland Smith. The failure to disclose this exculpatory evidence violated Mr. Jones' due process rights. The jury also needed to know that Hugh Eason told Bill White that he was the officer who had to restrain Mundy and pull him off Jones. Eason's statement to Bill White shows that Eason presented false testimony in order to convict Leo Jones. This corroborates Cleveland Smith's claim that there was a

[46] At the hearing below, the State acknowledged that both Mundy and Eason left the Sheriff's Office shortly after Jones' conviction in disgrace and disrepute.

specific directive to get Jones. Yet, this critical evidence was suppressed by State agents.

The State withheld this material, exculpatory evidence from Mr. Jones' trial attorney. This evidence was discovered after Mr. Jones' most recent Motion to Vacate was filed, and counsel for Mr. Jones orally amended the motion to add a claim that the State violated Brady v. Maryland (R. 1303-04).[47] Cleveland Smith, who patrolled the Davis Street area for the Jacksonville Sheriff's Office in 1981, testified that shortly before the Szafranski shooting the police on that patrol were instructed to do everything they could to get Mr. Jones in prison. Specifically, former Deputy Smith recalled the instruction to get Jones occurred at a roll call about a week before the Szafranski shooting. Smith also testified that Officer Mundy, the arresting officer, bragged for years about beating the confession out of Mr. Jones. On several occasions, Mundy indicated that he intended to kill Jones but was stopped by another police officer.

The circuit court dismissed Mr. Smith's testimony with the following analysis:

> The testimony of Cleveland Smith primarily dealt with Officers Mundy and Eason. Their role in this case was before the jury and the Florida Supreme Court. The further fact that Officer Mundy said he wanted to put Jones in jail adds nothing to detract from the proof offered at trial.

(PC-R. 143-44) .[48] The court ignored the following aspects of Mr. Smith's testimony: that

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[47] Judge Johnson ruled that the claim could be raised since it was being presented within a year of discovery, which occurred when former Deputy Cleveland Smith called Mr. Jones' counsel in October of 1997 (H. 1303).

[48] Judge Johnson refused to consider the evidence that he only allowed proffered. He even refused to allow certain evidence proffered (Schofield's status as a confidential informant). And finally, Judge Johnson did not conduct a proper Brady analysis. These were errors of law.

Mundy bragged about beating Mr. Jones; that it was well known in the sheriff's department that Mundy would use excessive violence in arresting suspects; that Mundy's supervisors knew of and approved his use of excessive force; that Mundy falsified police reports; that Mundy stated that he wanted to kill whomever he found inside the house without regard to the person's possible innocence; and that the police were instructed to do everything in their power to put Mr. Jones in prison. The court also misstated Mr. Smith's testimony: Mundy did not say that he wanted to put Mr. Jones in jail; this was an instruction from Mr. Smith's supervisors directed to all officers patrolling the Davis Street area. The statements attributed to Mundy by Mr. Smith were more incriminating and concerned the treatment of Mr. Jones at his arrest.

Additional testimony from Smith was proffered by Mr. Jones, but Judge Johnson erroneously refused to consider it. This included impeachment of Detective Eason. Judge Johnson in his order completely ignored Bill White's unrebutted testimony regarding Hugh Eason's statement that he had to pull Mundy off Jones. Judge Johnson also ignored the undisputed evidence that Mundy and Eason were both forced out of the department because they were bad cops. Judge Johnson even refused to allow Mr. Jones to proffer evidence that Mr. Schofield was a confidential informant in 1981.

In addition to overlooking the import of Mr. Smith's and Mr. White's testimony, the circuit court applied the wrong legal standard to Mr. Jones' Brady claim. Kyles v. Whitley, the Supreme Court explained that a reviewing court must consider the cumulative effect of evidence that was wrongly withheld by the State: "The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence

considered collectively, not item-by-item. " 514 U.S. 419, 436 (1995). In that case, the Supreme Court remanded and criticized the Circuit Court of Appeals' analysis of the defendant's Brady evidence: "The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative analysis required by Bagley." Id. at 459. In review of the withheld evidence offered by Mr. Kyles, the Court clearly stated that it was reviewing the evidence cumulatively:

> In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered . . .

Id. at 449 n. 19. The circuit court failed to apply this standard to Mr. Jones' Brady claim.

The Eleventh Circuit Court of Appeals has explained the elements of a Brady violation: "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial." Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(en banc)(citations omitted). Because the truth of a witness's testimony and a witness's motive for testifying are material questions of fact for the jury, the improper withholding of information regarding a witness's credibility is just as violative of the dictates of Brady v. Maryland as the withholding of information regarding a defendant's innocence. United States v. Bagley, 473 U.S. 667 (1985); Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991). Impeachment evidence of an important State witness is material evidence that must be disclosed by the prosecution. United States v. Arnold, 117 F.3d 1308 (1 lth Cir. 1997); Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). As a result of the State's misconduct in this case, Mr. Jones was precluded from effectively presenting a defense, including the

impeachment of State witnesses, and the jury was deprived of relevant evidence supporting Mr. Jones' innocence.

The fact that Mr. Smith did not share this information with the State Attorney's Office is irrelevant to Mr. Jones' ability to prove a Brady claim. In Kyles, the Supreme Court explained that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 514 U.S. 419, 437 (1995). The Court in that case rejected the State's argument that it could not be held accountable when the police did not provide the prosecutor with all of the evidence:

> To accommodate the State in this manner would, however, amount to a serious change of course from the Brady line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it," Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L.Ed.2d 104 (1972). Since, then, the prosecutor has the means to discharge the government's Bradv responsibilities if he will, any argument of excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Id. at 438. See also Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984)(noting that the test for determining state knowledge is the same for Bradv and Giglio and that "it 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"); Arango v. State, 467 So. 2d 692 (Fla. 1985)(vacating death sentence and remanding for new trial because of Bradv violation

although police officer testified that she had not told the prosecutor about the withheld evidence).

In analyzing a Brady claim under the Supreme Court's opinion in Kyles v. Whitley, the focus is whether the false testimony had an effect on the jury. The Court explained:

> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

115 S. Ct. at 449 n. 19 (citation omitted)(emphasis added). The Court's review of the evidence in Kyles similarly demonstrates its focus on the jury to determine whether the defendant satisfied the materiality standard established in Bagley. In Kyles, the Supreme Court found that the evidence withheld by the State would not only have resulted in a stronger case for the defense, but would also have substantially reduced, or even destroyed, the value of the State's two best witnesses. As in this case, the State in Kyles had some evidence connecting Mr. Kyles to the crime; however, the Court noted that "none of the Brady cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone." 514 U.S. at 435 n. 8. The Court explained:

> [T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution.

Id. at 453. Under the Brady standard, Mr. Jones is entitled to a new trial if he can

demonstrate that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435. Mr. Jones has met that standard.

Mr. Smith's testimony provides evidence on two distinct subjects: Officer Mundy and his behavior at the scene of Mr. Jones' arrest and the sheriff's department's motivation in seeking the conviction of Mr. Jones. Mr. Smith summarized Officer Mundy's admissions in regard to Mr. Jones' arrest: "He told me that he kicked in a door and that he just started to beating people. He says his intention was to kill somebody, and that another officer stopped him from doing it. " (H. 188). Mr. Smith also testified to Officer Mundy's response when he was asked how he knew the person he found had shot Officer Szafranski: "He said, 'Man, we didn't care who we got. We were going to get somebody."' (H. 223). Mr. Smith also testified about an incident that occurred shortly before Officer Szafranski's shooting:

> [I]t was brought up at roll call that an officer had had a fight, a very serious fight, and that the suspect involved was a Mr. Jones. We were then told to do everything in our power to put Leo Jones in jail.

(H. 199).

Randy Fallin, Mr. Jones' trial attorney, testified that he was unaware of the information Mr. Smith provided about the instruction to all officers prior to the shooting to do whatever they could to get Mr. Jones in jail (H. 757). He was also unaware that Officer Mundy had confessed to beating the confession out of Mr. Jones (H. 759). Mr. Fallin explained how he could have used such information to defend Mr. Jones:

> [A]s I recall, one of the officers who testified [at the suppression hearing] was Officer Mundy about how nice they had treated Leo.

> And, of course, he exhibited signs of having been beaten. And that was explained that that was necessary to subdue him at the arrest scene. But it appeared to me now, as I presented, it appeared to be excessive in that regard. And that's why we pursued that, but the Court had ruled on that earlier.

(H. 758). Mr. Fallin testified that information about Officer Mundy's statements regarding his intent to beat whomever he found in the apartment and his admission that he did in fact beat Mr. Jones "would have been -- helped greatly in our motion to suppress, as well as the case-in-chief. " (H. 759). While Mr. Fallin suspected that Mr. Jones had been beaten, he was unable to prove this allegation; he testified that he would have pursued such information if he had any hint that it existed (Id.).

At the hearing on the motion to suppress Mr. Jones' confession, the defense called Bobby Hammonds and Detective Frank Japour. Mr. Hammonds testified that he saw Officers Roberts and Mundy beating Mr. Jones at the Police Memorial Building, that he saw bruises on Mr. Jones' head, and that Mr. Jones was handcuffed and was not fighting back (R. Vol. IV, p. 72). He also testified that he had been beaten by the police, that his life was threatened, and that he only gave Detective Eason the statement implicating Mr. Jones because he was afraid of the police (Id. at 59-63, 76, 95). Detective Japour testified that Mr. Fallin had called the police station at approximately five a.m. on the morning of Mr Jones' arrest to inform the police that he was representing Mr. Jones (Id. at 352). Detective Japour admitted that he did not tell Mr. Jones that his family had retained a lawyer for him (Id. at 353). He also testified that Mr. Fallin did not tell Detective Japour to cease any questioning of Mr. Jones (Id. at 357).

The State presented Officers Roberts and Mundy, Detective Eason, and Dr. Norman

Pack. Officers Roberts and Mundy testified that Mr. Hammonds and Mr. Jones resisted arrest and that neither was hit after they had been handcuffed and subdued (Id. at 210-13, 232-35, 259-60). Neither threatened Mr. Hammonds or Mr. Jones or heard any other police officers threaten them (Id. at 238, 288). Detective Eason testified that he did not remember Mr. Jones having any bruises when he interviewed him (Id. at 322). He admitted that Detective Japour had pressured Mr. Jones about Mr. Hammonds and implied that Mr. Jones was guilty but was going to let his cousin take the blame for Officer Szafranski's death (Id. at 325). Detective Eason also testified that Mr. Jones was concerned about Mr. Hammonds and wanted the police to promise that he would not be charged with the crime; the police refused to make any promises (Id. at 326-27, 337). Dr. Pack, who treated Mr. Jones when the police brought him to the hospital, testified about the examination and the extent of Mr. Jones' injuries:

> Well, basically Mr. Jones had come in from the Police Department, had complaints of pain in the left ear, the facial area and the left chest wall. He had a superficial laceration of the ear. He had a -- about a half-dollar-size fresh bruise over the left eye and he had a mildly swollen lower lip. The rest of the examination included a neurological examination, which is normally performed on somebody with head trauma, also general examination of the rest of the body, x-rays of the skull and facial bones and x-rays of the ribs.

(Id. at 3 10-11). Judge Soud denied the defense motion to suppress, finding that there was no "extensive or coercive interrogation nor was any physical abuse forced upon the Defendant which otherwise made his statement involuntary and not free." (R. 103-04).

At trial, Mr. Jones testified that he was beaten and signed a confession out of fear for his life (R. 1237, 1245). Because the evidence presented by the State and the defense was in

direct contradiction, the jury was forced to decide the case on the basis of the credibility of the witnesses. Had the jury known what Cleveland Smith has now revealed, there is a more than reasonable chance that the balance would have tipped in Mr. Jones' favor. As Mr. Fallin testified in 1997, he believed that Mr. Jones had been beaten more severely than was admitted at the suppression hearing. He believed that Mr. Jones had been beaten to coerce a confession, not merely to subdue him at the scene of his arrest (H. 758). However, Mr. Fallin lacked the evidence necessary to prove to the trial court that the confession was coerced. Clearly, Mr. Smith's testimony would have shifted the balance in favor of the defense and led to an acquittal.

Further, this Court has recently reaffirmed that coerced confessions are not admissible. In Richardson v. State, No. 86,011 (Fla. January 29, 1998), this Court ordered a new trial in a capital case because the defendant's confession, which was obtained during ongoing plea negotiations, was inadmissible. Importantly, this Court recognized that the timing of the State's actions in seeking a confession is not necessarily determinative of the confession's validity; in criticizing the police tactics in Richardson, this Court noted that " [t]he coercive aspect of any such representation may also render a subsequent confession inadmissible. " Id. at 8 n. 14 (emphasis added)(citing Travlor v. State, 596 So. 2d 957, 964 (Fla. 1992)). In Travlor, this Court articulated the admissibility standard for confessions:

> To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, uninfluenced by fear or hope. To exclude it as testimony, it is not necessary that any direct promises of threats be made to the accused. It is sufficient, if the attending circumstances, or declarations of those present, be calculated to delude the prisoner as to his true positions, and exert an improper and undue influence over his mind.

596 So. 2d at 964. The State suggested at the evidentiary hearing that because Mr. Jones did not confess to Officer Mundy and that, in fact, he did not confess until more than eleven hours after his beating and arrest, any misconduct by Officer Mundy is irrelevant to the validity of the confession (H. 215-16). Clearly, under this Court's precedent, the police misconduct in this case requires the suppression of Mr. Jones' confession regardless of when that confession was obtained because the coercive atmosphere persisted.

Mr. Smith's testimony would also have been used at Mr. Jones' trial to impeach the police officers' testimony and to suggest to the jury that the police had an underlying motive in seeking Mr. Jones' conviction. Mr. Smith's testimony that his supervisor instructed the officers who patrolled the Davis Street area to do everything they could to get Mr. Jones in prison suggests that the police may have been motivated to manufacture evidence in order to secure Mr. Jones' conviction without regard for his innocence. Mr. Smith's testimony is particularly relevant to the testimony of Officer Ritchey about Mr. Jones' threats against the police one week before Officer Szafranski's murder and Officer Mundy's testimony implying that Mr. Jones was responsible for the shooting of Officer Carter. Mr. Smith's testimony would have enabled Mr. Fallin to put Officer Ritchey's memo about Mr. Jones' threats against the police into the context of a police force that had been instructed to get Mr. Jones in prison. In regard to Officer Mundy's testimony about the triangulation, Mr. Smith's testimony would provide the same context of a police force searching for ways to convict Mr. Jones; it would also have enabled Mr. Fallin to suggest to the jury that Officer Mundy was lying about the triangulation based on Mr. Smith's testimony that Officer Mundy falsified police reports and was willing to manufacture charges. Mr. Smith's testimony is

also relevant to the State's position that Mr. Fallin was not denied access to Mr. Jones. If the police were motivated to seek Mr. Jones' conviction regardless of his guilt or innocence, they could have denied him access to his attorney believing that this made a coerced confession more likely.

If Mr. Smith had been available as a defense witness at trial, he would have assisted Mr. Fallin in discrediting Officers Ritchey and Mundy because his testimony about the police being instructed to get Mr. Jones in prison implies that the police would manufacture motive evidence in order to bolster their case against Mr. Jones. Clearly, Mr. Jones has met his burden of establishing that the State withheld material exculpatory evidence and that there is "a reasonable probability that . . . the result of the proceeding would have been different. " United States v. Bagley, 473 U.S. 667, 682 (1985). In Travlor, this Court recognized the "tremendous weight accorded confessions by our courts." 596 So. 2d at 964. In light of the persuasiveness of any confession and the weakness of the State's case against Mr. Jones, this Court cannot conclude that the failure to disclose the exculpatory evidence at issue here was harmless. Mr. Jones must be granted a new trial.[49] Judge Johnson erred in refusing to permit Mr. Jones to proffer evidence of Glenn Schofield's status as a confidential informant; Judge Johnson erred in not admitting all of the proffered evidence from Cleveland; and Judge Johnson erred in his Brady analysis. This Court must reverse.

[49]Under this Court's decision in State v. Gunsby, 670 So. 2d 920 (Fla. 1994), the evidence discussed in this section that was withheld because of State misconduct must be considered cumulatively with all the other evidence discovered since Mr. Jones' trial. See Argument II.

ARGUMENT II

THE CIRCUIT COURT APPLIED THE WRONG LEGAL STANDARD IN REVIEWING MR. JONES' CLAIMS AND FAILED TO CONSIDER THE CUMULATIVE EFFECT OF ALL THE EVIDENCE DISCOVERED SINCE MR. JONES' TRIAL.

The circuit court failed to consider the cumulative effect of all the evidence not presented at Mr. Jones' trial as required by Kyles v. Whitley and this Court's precedent. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(directing the circuit court to consider newly discovered evidence in conjunction with evidence introduced in the defendant's first 3.850 motion and the evidence presented at trial).[50] Judge Johnson did not let Mr. Jones recall any of the witnesses who testified at the two prior evidentiary hearings. This was error; he failed to give Mr. Jones a full and fair evidentiary hearing. And in his order, he did not consider the evidence cumulatively with evidence presented in 1997, nor did he consider the 1992 evidence. Instead, he picked up each bit of testimony individually like a tailor examining individual threads while ignoring the fabric the threads combine to make. Judge Johnson's analysis was clearly erroneous under Kyles, Gunsby, and Swafford. n Kyles, the Supreme Court explained that a reviewing court must consider the cumulative effect of evidence withheld by the State in violation of Bradv v. Maryland: "The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed

[50]That Kyles v. Whitley is not limited to Brady claims is evidenced by its application to sufficiency of the evidence claims, United States v. Burgos, 94 F.3d 849 (4th Cir. 1996); United States v. Rivenbark, 81 F.3d 152 (4th Cir. 1996); ineffective assistance of counsel claims, Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996); and newly discovered evidence claims, Battle v. Delo, 64 F.3d 347 (8th Cir. 1995).

evidence considered collectively, not item-by-item." 514 U.S. 419, 436 (1995). In its review of the evidence offered by Kyles, the Court clearly stated that it was reviewing the evidence cumulatively:

> In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered . . .

Id. at 449 n. 19.

In State v. Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violations, ineffective assistance of counsel and/or newly discovered evidence. Gunsby is exactly on point here and should have been followed by the circuit court. In Gunsby, this Court found that a new trial was required because the evidence presented at the evidentiary hearing undermined the credibility of key State witnesses. Id. at 923. This Court also addressed the State's argument that some of the defendant's evidence did not meet the test for newly discovered evidence:

> 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. The second prong of Strickland poses the more difficult question of whether counsel's deficient performance, standing alone, deprived Gunsby of a fair trial. Nevertheless, 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, that confidence in the outcome of Gunsby's original trial has been undermined and that a

reasonable probability exists of a different outcome.

Id. at 924 (citations omitted). The circuit court not only failed to consider the cumulative effect of Mr. Jones's new evidence but also ignored this Court's instructions in Gunsby to consider evidence that does not satisfy the newly discovered test for its support of an ineffective assistance of counsel and/or Brady claims. The circuit court examined all the evidence Mr. Jones presented throughout his capital proceedings, it would have found that the previously unknown evidence, in conjunction with the evidence introduced at Mr. Jones' trial, undermines confidence in the outcome. Gunsby; Swafford. Had the jury heard all the evidence presented in Mr. Jones' post-conviction proceedings, the outcome of his trial would probably have been different.

Glenn Schofield was a suspect in this case from the beginning, and Detective Eason continued searching for Mr. Schofield even after Mr. Jones was indicted by the grand jury. When interviewed by Detective Eason, Mr. Schofield admitted that he was a drug dealer and that he was in Mr. Jones' apartment at about six or seven p.m. on the night of the murder to pick up heroin. Mr. Schofield also tried to implicate Mr. Jones in Officer Szafranski's murder by telling Detective Eason that he had heard Mr. Jones say he was going to shoot a police officer. At that time, Mr. Schofield gave Patricia Ferrell as his alibi witness. However, in 1984, he gave the names of Marion Manning and "Shorty" as his alibi witnesses. During his 1984 interview with Lou Eliopulos, an investigator working for Mr. Jones' post-conviction counsel, Mr. Schofield admitted that he had once been in Mr. Jones' apartment but denied that he was there on the night of Officer Szafranski's murder.

At the 1997 evidentiary hearing, Mr. Schofield combined elements from his two

previous alibis, claiming that he was with Ms. Manning and Roy "Shorty" Williams earlier in the evening on the night of the shooting and that before daybreak he went to Ms. Ferrell's apartment. While Ms. Manning and Mr. Williams have confirmed that they were with Mr. Schofield on that night, their testimony does not exonerate him. Mr. Williams testified that he saw Mr. Schofield kneeling by the side of Mr. Jones' apartment building aiming a rifle and that he then heard the shots that killed Officer Szafranski. He immediately left the scene, found Ms. Manning who was driving a rental car, and told her that Mr. Schofield was in trouble and needed to be picked up.[51] Ms. Manning confirmed that she was in the area immediately after the shooting looking for Mr. Schofield when his friend got in the car and told her Mr. Schofield was in trouble. When they found him, he got in the car and told her to "hit the expressway. " Ms. Ferrell has also incriminated Mr. Schofield: she testified in 1992 that the morning after the murder Mr. Schofield told her if she were asked to say that he was with her the previous night and that in 1989 he confessed to her that he had shot Officer Szafranski.

Other witnesses who saw Mr. Schofield on the night of the murder have provided additional incriminating testimony. James Corbett saw Mr. Schofield on Mr. Jones' porch at about 11:30 p.m.; Mr. Schofield had a rifle and was "looking toward Davis Street where the police were at." A couple of hours later, Mr. Corbett was at a friend's apartment in the Blodgett Homes when he heard the gunshots; he looked out a window and saw Mr. Schofield

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[51] Mr. Schofield confirmed in his 1984 interview with Lou Eliopulos that he did not have a license and that Ms. Manning frequently rented cars to drive him around Jacksonville (H. 926). He also told Mr. Eliopulos that he was with Ms. Manning and Mr. Williams in a rental car on the night of the shooting (H. 938). Mr. Schofield confirmed this in 1997 (H. 534, 541, 618).

running down Madison Street carrying either a rifle or a bat. Denise Reed and Daniel Cole were in the same area that night and offered similar testimony: they were at the intersection of Fourth and Madison Streets near the Blodgett Homes when they heard gunshots; they continued walking and, within minutes, saw Mr. Schofield running toward them with a rifle. Dwayne Hagans also saw Mr. Schofield that night in a rental car with "a little dude." Mr. Schofield flagged him down and tried to borrow money so that he could get out of Jacksonville and also asked Mr. Hagans to hold a rifle for him. The next morning, Mr. Hagans read in the newspaper that Officer Szafranski had been shot.

Finally, Mr. Jones has presented evidence that Mr. Schofield has confessed to shooting Officer Szafranski on at least twelve separate occasions. In 1982, Mr. Schofield confessed to Jasper Kirtsey and told him that he "fingered" Mr. Jones for the crime. In 1983, Mr. Schofield talked to Mr. Hagans about the night in 1981 when he had flagged him down and asked to borrow money; Mr. Schofield explained that he needed to get out of Jacksonville because he had just shot a police officer. In 1985, Mr. Schofield confessed to several inmates at Union Correctional Institution. Frank Pittro testified that Mr. Schofield told him that he had shot a police officer and that Mr. Jones was convicted of the crime. Paul Marr testified that Mr. Schofield confessed to him and said that the person on death row for the crime was innocent; Mr. Schofield also said that he was worried about the case being reopened and charges being filed against him. Mr. Schofield also confessed to Franklin Prince that he had killed Officer Szafranski. In 1986 or 1987, Mr. Schofield told Lamarr McIntyre that Mr. Jones had been convicted for shooting a police officer and that he was actually guilty of the crime. In 1988 and 1989, Mr. Schofield again confessed to Mr.

Hagans, first when they were on work release and then when they were both living in Jacksonville. In 1989, Mr. Schofield also confessed to his girlfriend Patricia Ferrell Owens, and, when asked about Mr. Jones, Mr. Schofield "said that he wasn't going to make any time for it, that he wasn't and that nobody was going to bother him."

Mr. Schofield continued to confess to shooting Officer Szafranski when he returned to prison in 1990. Donald Perry testified that when he saw Mr. Schofield in 1992, he admitted that he had committed the crime, stating that it was "no secret" but that he was afraid that the prosecutor might still bring charges against him. During 1993 and 1994, Mr. Schofield talked to Louis Reed about the crime; he told him that "he had shot this officer and got away after shooting the officer, and that this man is taking the weight, is in prison, receiving the electric chair for something he didn't do." Mr. Schofield sought legal advice from Mr. Reed, asking whether there was a statute of limitations for murder and what he should do if he were questioned about the Szafranski shooting. In 1994 or 1995, Mr. Schofield confessed to Carnell Grayer and "bragged about his marksmanship," telling Mr. Grayer that "he can do it from long distance. He ain't got to get all messy and stuff."

In addition to confessing to the shooting, Mr. Schofield explained to some of these witnesses why he had shot Officer Szafranski. He told Mr. Kirtsey that he killed him because of a dispute about money. Mr. Kirtsey explained that he had seen Mr. Schofield and Officer Szafranski "doing a pay-off" and that he had also seen them arguing during one of these transactions. Mr. McIntyre also testified that Mr. Schofield told him that "he wasn't going to have nobody taking his dope, or something to that effect." Mr. Grayer also testified that Mr. Schofield told him that he had shot the police officer because "he was fucking with him." Mr. Williams testified that Mr. Schofield also told him that he was tired of Officer

Szafranski harassing him.

This Court must also consider the testimony of Cleveland Smith in its cumulative review of all the evidence discovered since Mr. Jones' trial. Mr. Smith's testimony about Officer Mundy's reputation as an "enforcer" and a "hit-man" could have been used to impeach Mundy's testimony at the suppression hearing regarding Mr. Jones' arrest. Mr. Smith also testified to incriminating statements Officer Mundy made regarding his treatment of Mr. Jones: "He told me that he kicked in a door and that he just started beating people. He said his intention was to kill somebody;" and "He says, 'Man, you should have seen it.' He says, 'Man, I just went and I kicked the door open.' He says, 'There was this guy in there and I just started beating him and beating him.'" This testimony about Officer Mundy beating Mr. Jones is corroborated by Bill White's testimony that a representative of his office took pictures of Mr. Jones in court the day after his arrest to preserve evidence of his injuries. Bill White's testimony that Eason saw Mundy beating Jones and had to restrain him is also corroboration as is Mr. White's testimony that Eason was prepared to lie under oath about the matter. In addition, Bobby Hammonds testified that he saw the police beating Mr. Jones, and hospital records indicate that Mr. Jones sustained injuries serious enough to warrant x-rays four to five hours later.

Mr. Smith also testified that shortly before the Szafranski shooting, the police who patrolled the Davis Street area were instructed to do everything they could to get Mr. Jones in prison. This testimony explains why the police initially focused on Mr. Jones' building and would have assisted the defense at trial in efforts to discredit police testimony that presented motive evidence and implied that Mr. Jones had attempted the same crime one

week before Officer Szafranski's death. Officer Ritchey's testimony about Mr. Jones making threats to kill a police officer, in light of the fact that these threats were not recorded until after Officer Szafranski's death, could have been placed in a context that minimized its impact on the jury. Mr. Smith's testimony supports the defense argument that the police manufactured evidence against Mr. Jones in their zeal to convict him despite the lack of evidence linking him to the crime. In addition, Mr. Smith's testimony would have assisted the defense in discrediting Officer Mundy's testimony implying that Mr. Jones shot at Officer Carter at the same location one week earlier. Because Officer Mundy's triangulation diagrams do not show that the bullet in that case originated from Mr. Jones' building, his testimony implicating Mr. Jones could have been discredited if the defense had Mr. Smith's testimony at trial.

Confidence in the outcome of Mr. Jones' trial has been undermined by this evidence that was not available to his attorney. Mr. Jones has demonstrated a reasonable probability of a different outcome and he must be granted a new trial. Gunsby. Johnson erred in refusing to hear live testimony from witnesses who testified in 1986 and 1992 when he was not presiding over the case. This Court has said that a capital sentencing judge who did not hear the live witnesses testify cannot impose a death sentence after simply reading the cold record. Craig v. State, 620 So. 2d 174, 175 (Fla. 1993)(substitute judge who does not hear evidence presented during the penalty phase must conduct new sentencing proceeding before a jury); Corbett v. State, 602 So. 2d 1240, 1244 (Fla. 1992). The logic of that ruling applies with equal force here when the judge refuses to hear the live testimony of relevant witnesses under Gunsby and Swafford. Judge Johnson erred in failing to conduct

a cumulative analysis, instead examining each thread of Mr. Jones' tapestry individually to determine if the threads, as opposed to the fabric, established a basis for relief. This was error. Reversal is required.

ARGUMENT III

THE CIRCUIT COURT ERRED IN ITS ANALYSIS OF THE ADMISSIBILITY OF GLENN SCHOFIELD'S NUMEROUS CONFESSIONS.

Under the standard established by this Court in Jones v. State, 591 So. 2d 911 (199 1), Mr. Jones is entitled to a new trial and sentencing. In addition to evidence that Mr. Schofield has confessed on twelve separate occasions between 1982 and 1995,[52] Mr. Jones has presented the following evidence linking Mr. Schofield to this crime:

- James Corbett saw Mr. Schofield with a rifle on Mr. Jones' porch at approximately 11:30 p.m. "looking toward Davis Street to where the police were at;"

- Roy Williams saw Mr. Schofield bend down near Mr. Jones' building aiming a rifle just before he heard the shots that killed Officer Szafranski. Mr. Williams left the scene, found Mr. Schofield's girlfriend, and told her to pick him up because he was in trouble;

- Mr. Corbett, Daniel Cole, and Denise Reed saw Mr. Schofield fleeing the scene with a rifle just minutes after they heard the gunshots;

- Dwayne Hagans testified and Charles Polite testified on proffer that Mr. Schofield was trying to borrow money after the shooting so that he could get out of Jacksonville;

- Marion Manning testified that she was in the area that night

[52] Mr. Schofield confessed to Dwayne Hagans on three separate occasions -- in 1983, 1988, and 1989. Counsel has not included Mr. Schofield's 1990 confession to Stanley Willie because his affidavit was not accepted by the circuit court in 1992.

with Mr. Schofield and Mr. Williams, that Mr. Williams told her Mr. Schofield was in trouble and needed to be picked up. When she picked him up, Mr. Schofield was nervous and told her to "hit the expressway;"

- Patricia Ferrell saw Mr. Schofield the next morning and he told her if anyone asks she should say he was with her during the time of the shooting although this was not the truth.

When considered cumulatively,[53] this evidence clearly establishes circumstantial guarantees of trustworthiness which warrant the admission of the twelve confessions.

The circuit court erred when it analyzed the admissibility of Mr. Schofield's confessions. Referring to the five new witnesses to whom Mr. Schofield has confessed, the court stated that "[t]his testimony is cumulative to the testimony of Donald Perry, Franklin Delano Prince, Franklin [sic] Pittro and Patricia Owens at the 1992 3.850 hearing. " (PC-R. 144). The fact that the testimony is cumulative to that previously offered does not detract from its admissibility, in these circumstances it enhances it. As the Supreme Court recognized in Chambers v. Mississippi, repetition is a factor supporting the trustworthiness of hearsay statements; in that case, the Court noted that the "sheer number of independent confessions provided additional corroboration for each. " 410 U.S. 284, 300 (1973) .[54] The circuit court ignored that the testimony presented by Mr. Jones is strengthened by the fact that many witnesses, both in 1992 and in 1997, testified to the same fact: that Glenn

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[53]In addition, under State v. Gunsby, this Court must also consider the cumulative effect of this newly discovered evidence with the evidence that was not presented at Mr. Jones' trial because of the State's violation of Bradv v. Maryland. The testimony of Cleveland Smith and Bill White further supports Mr. Jones' claim that he is innocent of this crime.

[54]Significantly, in Chambers, the defendant sought to introduce confession testimony from three witnesses. Mr. Jones has presented a total of nine witnesses who have testified that Schofield confessed to them.

Schofield confessed to Officer Szafranski's murder.

The circuit court noted that the issue is different now than it was in 1992 because Mr. Schofield has testified, and his hearsay statements are now admissible as impeachment evidence. The court concluded: "However, instead of substantive evidence, they merely constitute impeachment of Glenn Schofield. They are not independent proof of culpability of Glenn Schofield. Chambers, supra, does not change that." (PC-R. 145). Counsel notes his agreement that the confessions are admissible at a minimum to impeach Mr. Schofield; however, the circuit court erred in failing to address the impeachment value of these statements and in failing to also admit the statements for substantive purposes. The court summarized Mr. Schofield's testimony without mentioning that Mr. Jones had presented this substantial impeachment evidence -- consistent testimony from independent sources contradicting Mr. Schofield's testimony.

The circuit court erred in concluding that because the confessions were admitted as impeachment evidence they could not also be admitted as substantive evidence supporting Mr. Jones' innocence claim. In 1996, this Court upheld the circuit court's exclusion of Mr. Schofield's confessions, finding that they were not admissible under the statement against penal interest exception to the hearsay rule because Mr. Schofield was available to testify. This Court also rejected counsel's argument that the confessions should be admitted under Chambers v. Mississippi, 410 U.S. 284 (1973). In Chambers, the Supreme Court reversed Chambers' conviction because he had been prohibited by Mississippi's hearsay rule from presenting the confessions of another man to the crime for which he had been convicted. The Court emphasized that due process requirements supersede the application of state

hearsay rules:

> [T]he testimony was . . . critical to Chambers' defense, In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id. at 302. See also Rivera v. Director, Dept. of Corrections, 915 F.2d 280 (7th Cir. 1990)(relying on Chambers, court held that exclusion of codefendant's hearsay confession exculpating defendant violates due process). However, this Court in 1996 distinguished Chambers, finding that "Schofield's alleged confessions do not bear 'persuasive assurances of trustworthiness. ' " Jones v. State, 678 So. 2d 309, 314 (1996). With the addition of the evidence discovered since Mr. Jones' last evidentiary hearing, Mr. Schofield's confessions should now be admitted as substantive evidence proving Mr. Jones' innocence. Because the testimony regarding Mr. Schofield's confessions bears sufficient indicia of reliability and directly affects the ascertainment of Mr. Jones' guilt or innocence, the strict application of a hearsay rule cannot be employed to exclude it.

In Chambers, the Supreme Court determined that due process overcame Mississippi's hearsay rule because the hearsay statements offered by the defendant bore indicia of reliability. The Court explained that the statements were made spontaneously to a close acquaintance, that each confession was corroborated by some other evidence in the case (such as the testimony of an eyewitness to the shooting and testimony that the declarant was seen with a gun immediately after the shooting), that "the sheer number of independent confessions provided additional corroboration for each, " and that the confessions were "in a very real sense self-incriminatory and unquestionably against interest. " 410 U.S. at 300-01

The statements offered by Mr. Jones bear similar indicia of reliability, and they should be considered by this Court as evidence of his innocence.[55]

In 1996, this Court agreed with the circuit court that the evidence admitted in 1992 was insufficient to provide circumstantial guarantees of trustworthiness: "[a]t most, the evidence linking Schofield to the murder suggests that Schofield might have participated in the shooting along with Jones. None of this evidence weakens the case against Jones so as to give rise to a reasonable doubt as to his culpability. " 678 So. 2d at 3 15. This conclusion is no longer possible. Had the wealth of information now available been presented at Mr. Jones' trial, the jury would have had a reasonable doubt about his guilt, and he would have been acquitted. See Schlup v. Delo, 513 U.S. 298, 329 (1995)(noting that "it must be presumed that a reasonable juror would fairly consider all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt. "). In Schlup, the Supreme Court noted that in light of newly discovered eyewitness testimony proving a defendant's innocence, "it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." Id. at 331.

The only evidence presented against Mr. Jones at his trial was, with the exception of the coerced and retracted testimony of Bobby Hammonds and Mr. Jones' coerced and retracted confession, entirely circumstantial. In addition, the prejudicial testimony of Officer Ritchey attributing a motive to Mr. Jones is no longer reliable in light of Cleveland Smith's

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"Judge Johnson also refused to consider Glenn Schofield's invocation of his right of silence and counsel. See Argument IV.

testimony about the officers in that area being instructed to put Mr. Jones in prison. Mr. Smith's testimony also discredits Officer Mundy's highly prejudicial and incriminating testimony linking Mr. Jones to the prior shooting at Officer Carter. Without this evidence, the State is left with Mr. Jones' presence in the Davis Street apartment and the presence of rifles in the apartment. Clearly, this evidence is insufficient to support his conviction. Testimony from five eyewitnesses placing Mr. Schofield in the Davis Street area at the time of the shooting and fleeing the area immediately afterward, in conjunction with his inculpatory statements, all work together to establish circumstantial guarantees of trustworthiness which warrant the substantive admission of the twelve confessions.

The Supreme Court's decision in Chambers cannot be narrowly read to apply only to the particular situation presented in that case; rather, it stands for the proposition that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302. This Court has similarly recognized in other contexts that "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990). And in Baker v. State, 336 So. 2d 364 (Fla. 1976), this Court first recognized the statement against interest exception to the hearsay rule and held that the circuit court did not abuse its discretion in admitting the testimony of a woman whose son-in-law made incriminating statements that exculpated the defendant. This Court rejected "any 'materialistic limitation on the declaration-against-interest hearsay exception' " :

> More is involved here than doctrinal incongruities. Law courts depend for such effectiveness as they have on the cooperation of the wider community, and trials must be conducted in a way that will earn the cooperation and support of people of good will

> in every walk of life. Excluding from one man's trial another man's confession to the offense charged is no means to that end.

Id. at 369.[56] The Court should not in this case mechanistically apply Florida's hearsay rule when doing so prevents Mr. Jones from presenting evidence in his defense.

ARGUMENT IV

MR. JONES WAS DENIED HIS RIGHT TO A FULL AND FAIR HEARING WHEN THE CIRCUIT COURT REFUSED TO CONSIDER AS EVIDENCE THE FACT THAT GLENN SCHOFIELD INVOKED HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

Counsel for Mr. Jones called Glenn Schofield as his first witness. When Mr. Schofield took the stand, he invoked his Fifth Amendment right to remain silent (H. 140-43). In closing argument, counsel for Mr. Jones argued that Judge Johnson should consider Mr. Schofield's invocation of his right as substantive evidence (H. 1316). Counsel explained that while the court could not draw an adverse inference from Mr. Schofield's silence and use it against him, such an inference could be used to benefit Mr. Jones:

> In looking at the evidence here, to decide whether or not I've met my burden, we have to start with Glenn Schofield. Now, Glenn Schofield, first of all, invoked initially his Fifth Amendment right of silence. Second, he requested counsel.

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[56] While in Baker, this Court considered whether the hearsay statements at issue would have been admissible at Baker's trial, in Crump v. State, 622 So. 2d 963, 969 (Fla. 1993), the focus was whether the hearsay statements would be admissible in the trial of another suspect. This Court rejected Crump's argument that the circuit court had improperly prevented him from eliciting testimony from a detective about other crimes committed by another suspect because such evidence would not have been admissible if the other suspect were on trial for the crime for which Crump was tried. In this case, even if this Court finds that Mr. Schofield's twelve hearsay confessions would not be admissible if Mr. Jones were granted a new trial, they would be admissible as party admissions if Mr. Schofield were ever tried for Officer Szafranski's death.

> Certainly there's no question that at his trial such actions would not be admissible against him, but at Mr. Jones' trial I submit they are admissible and in Mr. Jones' case you can consider that fact.

(Id.). Judge Johnson disagreed, noting that: "I think it would be dead wrong as a Judge to weigh against a party his invocation of a constitutional right we hold sacred. " (H. 1317). Judge Johnson dismissed counsel's explanation that Mr. Schofield was not a party, but only a witness, to this case: "I don't think the Constitution only says defendants have rights. Other people have rights, too. " (H. 1317-18). Judge Johnson then expressed his disagreement with counsel's argument that the Fifth Amendment does not preclude the admission of a nonparty witness's silence as evidence in this case (H. 13 18).[57]

In Lefkowitz v. Turley, 4 14 U.S. 70, 77 (1973), the Supreme Court explained that the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." However, the Court has recognized that privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify . . . has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. " Trammel v. United States, 445 U.S. 40, 50 (1980)(quoting Elkins v. United States, 364 U.S.

[57] Although Judge Johnson refused to consider Mr. Schofield's invocation of the Fifth Amendment as relevant evidence to Mr. Jones' innocence, he did consider Mr. Jones' decision to not testify when he noted in his Order that "[a]lthough Leo Jones has the burden of proof of the allegations in his Motion, he sat within 30 feet of Judge Soud during his testimony and never took the stand to say that A.C. Soud had ever represented him. " (PC-R. 138).

206, 234 (1960)(Frankfurter, J., dissenting)). While an inference of guilt may not be drawn from a criminal defendant's invocation of the right to remain silent, Griffin v. California, 380 U.S. 609 (1965), the same rule does not apply to parties to civil proceedings and nonparty witnesses in both civil and criminal cases.

The Supreme Court first articulated this distinction in Baxter v. Palmigiano, 425 U.S. 308, 3 17-19 (1976), when it held that an inmate's refusal to testify at a prison disciplinary proceeding could be used against him. The Court explained that because there were no criminal proceedings pending and because the inmate would not automatically be presumed guilty based on his silence in the absence of other evidence supporting the charges, drawing an adverse inference from the inmate's silence does not violate the terms or spirit of the Fifth Amendment. The Court criticized the Court of Appeals for reaching the opposite conclusion:

> It is important to note here that the position adopted by the Court of Appeals is rooted in the Fifth Amendment and the policies which it serves. It has little to do with a fair trial and derogates rather than improves the chances for accurate decisions.

Id. at 319. See also LaChance v. Erickson, 1998 WL 17107 (January 21, 1998)(relying on Baxter to hold that refusal to answer questions in the course of a federal agency investigation can be considered in determining truth or falsity of the charges); Fraser v. Security and Investment Corp., 615 So. 2d 841, 842 (Fla. 4th DCA 1993)(holding that jury properly learned that party invoked Fifth Amendment at deposition and that the court did not err in permitting the jury to draw adverse inferences against party to a civil case).

This rule allowing a court to draw adverse inferences from the invocation of the Fifth Amendment also applies to nonparty witnesses in both civil and criminal cases. In Brink's

Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983), the court relied on Baxter to hold that the invocation by former employees of the defendant corporation could be used adversely against the defendant. In that case, the court instructed the jury regarding the evidentiary value of the invocation of the Fifth Amendment by nonparty witnesses: "you may, but need not, infer by such refusal that the answers would have been adverse to the witness' interest." Id. at 707. See also Federal Deposit Ins. Corp. v. Fidelity and Deposit Co., 45 F. 3d 969 (5th Cir. 1995)(refusing to adopt a rule categorically barring adverse inferences based on a nonparty's invocation of the right even where that witness has no special relationship with the party against whom the inference is drawn); Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co., 819 F.2d 1471 (8th Cir. 1987)(establishing three-part test focusing on the relationship between the witness invoking the Fifth Amendment and the party against whom the adverse inference would be drawn); RAD Services, Inc. v. Aetna Casualty & Surety Co., 808 F.2d 271 (3d Cir. 1986)(analogizing to vicarious admissions, court held that jury can draw adverse inference from defendant's employees' invocation of their right to remain silent); Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509 (8th Cir. 1984)(reversing trial court's exclusion of witness who stated he would invoke the Fifth Amendment because party was entitled to present this evidence to the jury).

The rationale underlying this rule in civil cases supports its application to nonparty witnesses in criminal proceedings. In LiButti v. United States, 107 F.3d 110 (2nd Cir. 1997), the court articulated four factors to examine the nature of the relationship between the invoking witness and the party against whom the invocation of silence would be used; however, the court acknowledged that "the overarching concern is fundamentally whether the

adverse inference is trustworthy under all of the circumstances and will advance the search for truth." Id. at 124. The court in Rosebud similarly explained the necessity of allowing adverse inferences "to secure fairness in the administration of justice; to guarantee that the truth would be ascertained and proceedings would be determined justly. " 733 F.2d at 522-23. This recognition of the probative value of such evidence echoes the Supreme Court's criticism of the appellate court in Baxter that its refusal to consider such evidence "has little to do with a fair trial and derogates rather than improves the chances for accurate decisions." 425 U.S. at 3 19. In Baxter, the Court noted that " [s]ilence is often evidence of the most persuasive character. " Id. (quoting United States ex rel. Bilokumskv v. Tod, 263 U.S. 149, 153-54 (1923)).

In United States v. Seifert, 648 F.2d 557 (9th Cir. 1980), the court considered whether inferences drawn from a nonparty's invocation of the Fifth Amendment could be used for the benefit of a criminal defendant. Out of the presence of the jury, a witness declined to answer one question on the ground that his answer might be self-incriminating. The trial court denied the defendant's request to present this testimony to the jury. The appellate court found that such evidence would constitute impeachment and that the defendant had a right to have it considered by the jury. See also United States v. Gay, 567 F.2d 916, 920 (9th Cir. 1978)(noting that a nonparty witness who testifies can be required to invoke the Fifth Amendment privilege before the jury).

When the inference to be drawn from a nonparty witness's invocation of the right to remain silent is to be used against a party to the proceedings, the court must consider whether the probative value of the evidence is substantially outweighed by the danger of

unfair prejudice to that party. Brinks, 717 F.2d at 710. g is not required when the inference to be drawn is to be used for the benefit of a party. In such a case, policy concerns such as those articulated in Baxter, Lutti and Rosebud support the use of a witness's invocation of the right to benefit a criminal defendant and assist the court in its ascertainment of truth. As this Court observed in Rivera v. State, 561 So. 2d 536, 539 (Fla, 1990), "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission."

Clearly, Mr. Schofield's invocation of his Fifth Amendment right is relevant to Mr. Jones' claim that he is innocent of the crime for which he was convicted. Mr. Schofield acknowledged that he understood the purpose of the proceedings and the contention of Mr. Jones' counsel that he was guilty of Officer Szafranski's death (H. 492). Under these circumstances, his invocation of his right to remain silent constitutes probative evidence supporting Mr. Jones' innocence.[58] The circuit court erred in refusing to consider Mr. Schofield's invocation, not to incriminate Mr. Schofield, but as further exoneration of Mr. Jones that is fully supported by the other evidence discovered since Mr. Jones' trial.

[58]In fact, it was the State's position that Mr. Schofield could only properly invoke his Fifth Amendment rights if he were guilty. Therefore, if he invoked the Fifth, he would get no benefit from the State. It was only after this was explained to Mr. Schofield's court appointed lawyer, who in turn informed Mr. Schofield, that Mr. Schofield changed his mind and testified denying that he committed the murders.

ARGUMENT V

THE CIRCUIT COURT ERRED WHEN IT LIMITED COUNSEL'S EXAMINATION OF GLENN SCHOFIELD AND REFUSED TO EVEN PERMIT A PROFFER ON HIS STATUS AS A CONFIDENTIAL INFORMANT.

Counsel for Mr. Jones attempted to examine Mr. Schofield regarding his criminal past and his repeated efforts to minimize and distort his criminal conduct in order to avoid punishment. Counsel offered evidence demonstrating Mr. Schofield's history of denying guilt and lying to avoid punishment, as well as the likelihood that if charged with the Szafranski murder he would in fact face a death sentence. The possibility of receiving a death sentence provides further support for counsel's argument that Mr. Schofield has reasons to fear prosecution. The State argued that the evidence offered as impeachment was irrelevant because it would be inadmissible at his trial if Mr. Schofield were ever tried for Officer Szafranski's death. While conceding that some of the offered evidence might be admissible at a penalty phase if Mr. Schofield were convicted of this crime, the State argued that it was irrelevant to this proceeding because "none of this evidence would show either that Leo Jones is innocent or that Mr. Schofield is guilty. " (H. 566). Judge Johnson refused to allow the examination. However, counsel sought to use this evidence to impeach Mr. Schofield by showing his motives and his fears.

The circuit court admitted only evidence of Mr. Schofield's convictions and any statements made by Mr. Schofield about his mental health and any mental health treatment he may have requested and/or received. In rejecting the bulk of the evidence, the court observed:

> [B]ut the remainder of things that he sought in other trial courts to get parole or what he did is totally irrelevant and far-fetched to hedge-hop like you've done and say, well, he could be prosecuted and if prosecuted he could be convicted of first degree murder. If he's convicted of first degree murder, he could get the death penalty, then certain things could come in as aggravation. Then he would be entitled to show factors of mitigation, and these could come in by the State to rebut the factors of mitigation . . . . That's very, very far-fetched.

(H. 567). The circuit court's limitation of counsel's direct examination of Mr. Schofield was an abuse of discretion.

Counsel sought to question Mr. Schofield about inconsistent statements he made regarding crimes for which he was convicted, contradictory statements that he made in the context of seeking reduced sentences and parole, and a 1990 motion in limine filed in his Duval County case prohibiting the State from offering evidence linking Mr. Schofield to the murder of Officer "Lafranski. " The motion referring to "Officer Lafranski" seems particularly relevant here as it demonstrates that Mr. Schofield and his attorney must have believed that the State had evidence linking him to this case. All of this evidence, including the details of Mr. Schofield's convictions, would be admissible at a penalty phase if Mr. Schofield were ever tried and convicted of Officer Szafranski's death both to allow the State to prove aggravating factors and to rebut the defense presentation of mitigation."

Significantly, in upholding Mr. Jones' conviction and sentence on direct appeal, this

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[59]Mr. Jones was sentenced to death based on the following aggravating factors, all of which were upheld by this Court on direct appeal: prior violent felony; disruption of lawful exercise of governmental function; cold, calculated and premeditated. 440 So. 2d at 577. If Mr. Schofield were tried for this crime, the State could also argue that the victim was a law enforcement agent and that Mr. Schofield was under sentence of imprisonment because he was on parole at the time Officer Szafranski was killed.

Court rejected Mr. Jones' argument that he was unduly prejudiced by Officer Mundy's testimony implicating him in the unsolved shooting at Officer Carter: "This Court has consistently affirmed 'the concept that all relevant evidence having probative value is admissible save to attack character even though it would have a tendency to suggest the commission of a separate crime. ' " 440 So. 2d 570, 576 (Fla. 1983)(quoting Williams v. State, 110 So. 2d 654, 660 (Fla. 1959)). The same principle should apply here where Mr. Jones has the burden of proving that he must be granted a new trial. The evidence excluded by the circuit court was relevant and its exclusion violated Mr. Jones' due process right to present a defense.

The circuit court also erred when it prevented counsel from asking Mr. Schofield about his 1991 signed statement denying that he told anyone that he shot Officer Szafranski (State Exh. 1). Mr. Schofield gave this statement at the Duval County Jail to a Jacksonville police officer (H. 629). This statement was offered by the State to rebut the defense witnesses who testified that Mr. Schofield had confessed to them. Counsel sought to ask Mr. Schofield about the lack of detail in the statement, particularly that it mentions nothing about an alibi for the night of Officer Szafranski's death (H. 63 1). The court noted that "[w]hat the document contains is within the four corners of it and the law says it speaks for itself . . . . The rest of the world is not in the document so we all know that. " (H. 631-32).

The fact that Mr. Schofield did not give an alibi in 1991, while he did during his testimony in 1997, is a permissible area of inquiry. This Court recognized this principle in State v. Smith, noting that "[t]o be inconsistent, a prior statement must either directly contradict or materially differ from the expected testimony at trial. That includes allowing

'witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. ' " 573 So. 2d 306, 313 (Fla. 1990)(quoting Jenkins v. Anderson, 447 U.S. 231, 239, 100 S. Ct. 2124, 2129, 65 L.Ed.2d 86 (1980)). Clearly, providing a statement denying one's involvement in a crime is a situation in which one would provide an alibi supporting the denial. Mr. Schofield's failure to do this in 1991 is a permissible area of inquiry during his later testimony when he provided an alibi. The circuit court erred in prohibiting counsel from pursuing this line of inquiry.

The circuit court erred in refusing to let Mr. Jones even proffer testimony from Cleveland Smith regarding Glenn Schofield's status as a confidential informant in 1981. The State objected on the grounds of privilege, and Judge Johnson sustained the objection and precluded a proffer. The evidence is and was relevant to the police officers' interest in prosecuting Mr. Schofield and Schofield's ability to mislead the police with false leads incriminating Leo Jones. The circuit court erred. A reversal is required.

ARGUMENT VI

THE CIRCUIT COURT ERRED IN DENYING MR. JONES' CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS TRIED AND SENTENCED BEFORE A JUDGE WHO WAS BIASED AGAINST HIM.

Due process guarantees the right to be tried by a fair and neutral judge. The Supreme Court has explained the importance of determining whether a particular judge can preside over a litigant's case:

> Th[e] requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals

> in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done, " by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980)(citations omitted). The Supreme Court has observed that "the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 117 S. Ct. 1793, 1797 (1997) (citations omitted)(recognizing that the bias of a judge who had accepted bribes to fix criminal cases could violate the due process rights of a defendant who had not paid a bribe). The procedural due process guarantee of the right to a neutral and detached judiciary "convey[s] to the individual a feeling that the government has dealt with him fairly, [and] . . . minimize[s] the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978).

The Supreme Court has explained the focus of inquiry in determining whether a particular judge can preside over a defendant's trial:

> The inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." "Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties, " but due process of law requires no less.

Tavlor v. Haves, 418 U.S. 488, 501 (1974)(citations omitted). The Court has rejected a standard that would require a party to prove actual bias, noting that "our system of law has always endeavored to prevent even the probability of unfairness." In re Murchiseon, 349 U.S. 133, 136 (1955). See also Offut v. United States, 348 U.S. 11, 14 (1954)(noting that "justice must satisfy the appearance of justice. ") Judicial bias exists in violation of due process whenever the criminal judicial proceedings at issue "offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to 'hold the balance nice, clear and true between the state and the accused.'" Marshall, 446 U.S. at 242 (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

In capital cases, the scrutiny of judicial impartiality must be even more stringent. The Supreme Court indicated in Beck v. Alabama, 447 U.S. 625 (1980), that special procedural rules are mandated in a death penalty case in order to ensure the reliability of the sentencing determination. The Court explained in Gardner v. Florida:

> [D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

430 U.S. 356, 357-58 (1977)(citations omitted).

Mr. Jones presented both testamentary and documentary evidence proving that his due process rights were violated because the judge who presided over his capital trial represented him in 1969 and failed to either make the appropriate disclosure or recuse himself in 1981

Alberta Brown, Mr. Jones' girlfriend in 1969, testified that she and Ms. Hester, Mr. Jones' mother, went to Judge Soud's office after Mr. Jones received a one-year sentence in February 1969 (H. 884, 894). Ms. Brown and Ms. Hester gave Judge Soud $700 to represent Mr. Jones (H. 894). Ms. Brown asked when Mr. Jones would be released, and Judge Soud told her "as soon as he could get the money to the judge." (H. 884). Ms. Brown's testimony that Judge Soud represented Mr. Jones after he was sentenced is corroborated by the court file in Mr. Jones' case. The file contains a "clerk's memo" indicating that on February 18, 1969, Mr. Jones and his co-defendant Willie Fred Badger were both sentenced to one year in the county jail and that on April 16, 1969, this sentence was vacated and probation imposed for one defendant (State Exh. 7). Judge Soud's name appears as "Attorney for Deft" on April 16th, the date on which one defendant's sentence was vacated (Id.). The file also includes an April 16, 1969, Judgment and Sentence imposing a sentence of one year probation on Mr. Jones; this April 16th document does not refer to Mr. Badger (Id.).

Judge Soud emphatically denied the allegation that he conveyed money to Judge Harvey to secure a reduced sentence for Mr. Jones (H. 1185). He also denied any memory of having represented Leo Jones at the April 16, 1969, proceeding. However, his testimony corroborates numerous salient points. He conceded that Mr. Jones' mother hired him to represent her other son Leroy Clark in March of 1969 and that he continued as counsel until November 1970 (H. 1156, 1159-60). Judge Soud admitted that Mr. Jones' mother would have paid him to represent Mr. Clark, probably in cash, over a period of time and that he met with Ms. Hester in his office, although he could not say how many times (H. 1158,

1195). Judge Soud's representation of Mr. Clark would have been ongoing on April 16, 1969, the day that court files show Mr. Jones' sentence was vacated, the same day the files indicate that Judge Soud appeared on behalf of a defendant with the defendant's mother, Ms. Hester who had hired him to represent her other son. Judge Soud testified that he has no recollection of representing Mr. Jones, that he learned only in 198 1 that Mr. Clark and Mr. Jones are brothers, and that he never spoke to anyone in the family aside from Ms. Hester (H. 1161, 1175).

In denying relief on this claim, the circuit court noted that "[t]here is not one scintilla of credible evidence to support the defendant's allegations that Judge Soud paid anything at anytime to Judge Harvey. Nor, is there credible evidence that would require Judge Soud to disclose the possible representation of defendant some twelve years before when he has no recollection of it." (PC-R. 138). The court's order entirely misses the point of Mr. Jones' judicial bias claim. The fact that Judge Soud did not remember in 1981 that he previously represented Mr. Jones is irrelevant. Regardless of whether the circuit court believes Ms. Brown's testimony that Judge Soud was the conduit for a bribe paid to Judge Harvey in 1969, the issue is whether Judge Soud should have revealed his prior representation of Mr. Jones and/or recused himself. The circuit court order fails to address whether Mr. Jones is entitled to relief because he was sentenced to death by a judge who should have recused himself based on his prior representation of Mr. Jones.

The court's order summarizes the contents of the 1968 court file as follows:

> The only mention of A. C. Soud in the file is on a separate piece of file folder material about three inches wide dated April 16, 1969 which contains a rubber stamped entry A.C. Soud, Attorney for "Deft" present in court. Another stamped entry

> said "Mother of Deft" present in court. The stamps do not say which defendant or which defendant's mother. On that date, Leo Jones was sentenced to one year probation. The signed Judgment and Sentence in the court file does not reflect such a sentence to be a reduction. While the court file contains two Judgment and Sentence documents dated February 16, 1969, neither of these documents state what the sentence was, whether these are considered Minutes, or which defendant the Clerk meant A. C. Soud represented.

(PC-R. 136-37). The court file contains documents pertaining to both Mr. Jones and Mr. Badger, and the earlier documents, such as the Motion for Speedy Trial and Affidavit of Insolvency, include both their names. However, the February 18, 1969, Judgment and the April 16, 1969, Judgment and Sentence apply only to Mr. Jones.[60] What the circuit court refers to as a "separate piece of file folder material about three inches wide" was described at the hearing by the court clerk as a "clerk's memo" which in 1969 would have been stamped and completed by the clerk (H. 729-30). The clerk's memo for case number 68-3923 indicates that on February 18, 1969, both defendants were sentenced to one year in the county jail and that on April 16, 1969, one defendant was sentenced to one year probation. While the court's order states that "[t]he signed Judgment and Sentence in the court file does not reflect such sentence to be a reduction, " (PC-R. 136), the clerk's memo explicitly states that on April 16, 1969, "sent. of 2/18/69 set aside & vacated further sent. susp. 1 yr prob." indicating that the sentence of February 18, 1969, was set aside and vacated for one defendant. The Judgment placing Mr. Jones on probation, which is also dated April 16,

[60] At the evidentiary hearing, the State made much of the fact that the court file contains documents pertaining to both Mr. Jones and Mr. Badger. However, the documents pertaining to the April 16th sentence reduction apply only to Mr. Jones and correspond to the clerk's memo recording Judge Soud's appearance. These court documents refute the State's suggestion that Judge Soud's name appears in the file because he may have represented Mr. Badger.

1969, clearly corresponds to the clerk's memo vacating the previously imposed sentence. While the circuit court expressed concern that Judge Soud's name is found only once in the court file, as "attorney for deft" on April 16, 1969, this is entirely consistent with the allegations contained in Mr. Jones' Motion to Vacate and with the other evidence presented. Judge Soud appeared in court for the first time on April 16, 1969; the previously imposed sentence was vacated; and Mr. Jones was placed on probation. This irrefutable evidence supports Mr. Jones' claim that Judge Soud represented him in 1969 and belies the circuit court's conclusion that "not one scintilla of evidence" proves the allegations concerning Judge Soud. [61]

In support of its conclusion that Mr. Jones' claim lacks merit, the circuit court noted that "Judge Soud made a Disclosure of Information relating to his representation of Leroy Clark in 1981. All agreed he could continue with the case, including Leo Jones." (PC-R. 138). The fact that Judge Soud made a partial and misleading disclosure on the record in 1981 in fact supports Mr. Jones' claim. Judge Soud stated on the record in 1981 that he felt there was no conflict or basis for recusal and that he was making this disclosure only because "I think it should be in the open." (State Exh. 9). He explained his desire that "the record

[61] The circuit court also noted that Alberta Brown is "the only person making these allegations" and that Mr. Jones "sat within 30 feet of Judge Soud during his testimony and never took the stand to say that A.C. Soud ever represented him." (PC-R. 137-38). Ms. Brown was the only witness to testify to the events regarding Judge Soud's representation of Mr. Jones because, aside from Judge Soud himself, she is the only living person who knows what occurred. Mr. Jones' mother, who accompanied Ms. Brown to Judge Soud's office to deliver the money to Judge Soud, died last Spring. Mr. Jones was already serving his one-year jail sentence and was not present in court when Judge Soud made his appearance on Mr. Jones' behalf. Ms. Brown never told Mr. Jones or anyone else that Judge Soud represented him (H. 884).

would reflect that no one was hiding anything and trying to conceal anything and this was apparent. " (Id.). Judge Soud not only failed to disclose his representation of Mr. Jones, he made a partial disclosure on the record implying that there was no other basis for disqualification.[62] The dishonesty of Judge Soud's partial disclosure is compounded by his desire that "the record reflect that no one [is] hiding anything and trying to conceal anything. " Clearly, Judge Soud was more concerned with the appearance of propriety contained on the record than with the reality of his prejudice against Mr. Jones. After making this partial and misleading disclosure, he secured the parties' agreement that he should preside over Mr. Jones' trial. In light of a trial judge's ethical obligation to disclose all possible sources of conflict, Judge Soud's partial disclosure was "impregnated with deception, " Adams, 77 So. 2d at 467. The trial court erroneously found that this partial disclosure and Mr. Jones' agreement to Judge Soud continuing with his case somehow defeat Mr. Jones' claim that he was sentenced by a judge who should have recused himself. Contrary to this conclusion, the partial disclosure strengthens Mr. Jones' claim.

A trial judge has a duty to disclose conflicts; the defendant does not have a duty to

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[62] In other contexts, courts have recognized that a partial disclosure is as dishonest as an actual misrepresentation. Shotwell Manufacturing; Co. v. United States, 371 U.S. 341 (1963)(contrasting a "full and honest" disclosure with a "partial and misleading" one); Rosenberg v. United States, 346 U.S. 273, 281 n. 8 (1953)(stating that "[p]artial disclosure of votes on successive stages of a certiorari proceeding does not present an accurate picture of what took place"); Equitable Life Ins. Co. of Iowa v. Halsy, Stuart & Co., 312 U.S. 410, 426 (1941) (holding that "a statement of half truth is as much a misrepresentation as if the facts stated were untrue"); In re Blitzerian, 162 B.R. 583, 589 (MD. Fla. 1993)("Silence may be as misleading as a positive misrepresentation of existing facts; thus, [plaintiff] is under a duty to disclose the whole truth where partial disclosure is itself, a false misrepresentation. "); Adams v. Miami Beach Hotel Assoc., 77 So. 2d 465, 467 (1955)(noting that "a partial disclosure is impregnated with deception. ").

discover possible sources of conflict. As the Eleventh Circuit Court of Appeals has observed:

> In light of the Canons governing judicial conduct, we do not believe that an attorney conducting a reasonable investigation would consider it appropriate to question a judge, or the court personnel in the judge's court, about the judge's lack of impartiality. Canon 3(E)(1) requires a judge to sua sponte disqualify himself if his impartiality might reasonably be questioned. The Commentary to Canon 3(E)(1) provides that a judge should disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification. We conclude that both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process -- all to the detriment of the fair administration of justice.

Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995). See also Florida Code of Judicial Conduct Canon 3(E)(1)("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"). Mr. Jones should not be penalized because he and his attorney relied on Judge Soud's misleading disclosure; to do so would be to sacrifice Mr. Jones' constitutional right to a fair trial before a neutral judge when he was prevented from raising the claim earlier by the judge's dishonest withholding of relevant information.

Judge Soud's bias against Mr. Jones is revealed in his inappropriate comments to reporters following Judge Johnson's ruling denying the 3.850. Judge Soud told a reporter that he was "delighted" that Mr. Jones' conviction had been upheld. Such comments are an

obvious statement of bias. Judge Soud was "delighted" that Judge Johnson found that the newly discovered evidence and Brady material did not warrant a new trial. This statement is a statement of partiality. It reveals that Judge Soud has in fact harbored prejudice against Leo Jones, as three justices of this Court recognized last year when dissenting from the majority's failure to disqualify Judge Soud.

The facts that formed the basis for Mr. Jones' Motion to Disqualify related to Judge Soud's representation of Mr. Jones in 1969 and were not available to counsel earlier. Caselaw holds that when due diligence is exercised, it is immaterial that the motion to disqualify is filed after judgment is final and a motion to disqualify can be considered after a final judgment if good cause is shown for the delay. Porter, 49 F.3d 1483 (allowing further consideration of claim of judicial bias made approximately 17 years after trial because necessary information not discoverable through due diligence prior to that time); Maharai v. State, 684 So. 2d 726, 728 (Fla. 1996)(holding that Rogers procedure need not always be followed); Marcotte v. Gloeckner, 679 So. 2d 1225, 1226 (Fla. 5th DCA 1996)(holding that even though motion to disqualify came after adverse ruling, motion still timely because underlying facts discovered afterward). Cf. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988)(affirming decision vacating judgment based on judicial disqualification filed ten months after judgment was final because facts supporting motion were not discoverable earlier). There is no question that counsel for Mr. Jones has exercised due diligence in discovering the facts supporting the motion to disqualify. The appropriate remedy is for this Court to vacate all of Judge Soud's prior opinions.

CONCLUSION

On the basis of the arguments presented herein, Mr. Jones urges that this Honorable Court set aside his unconstitutional conviction and sentence and order that Mr. Jones be granted a new trial.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by hand delivery, to all counsel of record on February 6, 1998.

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