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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 17-929

DENNIS SOCHOR,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's denial of Mr. Sochor’s successive motion for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

“R.”—record on direct appeal to this Court;

“PCR.”—record on 3.850 appeal to this Court following the 1999 evidentiary hearing;

“PCR2.”—record on the instant appeal.

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Sochor requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF CASE AND FACTS

A. Procedural History

The Circuit Court of the Seventeenth Judicial Circuit, Broward County, entered the judgments of conviction and sentence under consideration. Mr. Sochor was indicted on October 9, 1986 for the crimes of murder in the first degree and kidnapping. (R. 1143).

Mr. Sochor's trial began on October 13, 1989, and the jury returned a verdict of guilty as charged as to both counts of the indictment on October 20, 1989. (R. 1189-90). At the penalty phase, the jury recommended death by a vote of ten to two. (R. 1225). The trial court subsequently sentenced Mr. Sochor to death on November 2, 1989. (R. 1237-38). The trial court found the following aggravating circumstances: (1) prior violent felony; (2) the crime was committed during the course of a felony, kidnapping and the uncharged crime of sexual battery; (3) heinous, atrocious, or cruel; and (4) cold, calculated, and premeditated manner. (R. 1231-36). The trial court found no statutory or non-statutory mitigating circumstances. (R. 1231-36).

On direct appeal, this Court struck the "cold, calculated, and premeditated" aggravating circumstance while affirming Mr. Sochor's convictions and death sentence. *Sochor v. State*, 580 So. 2d 595 (Fla. 1991). The United States Supreme Court granted certiorari, vacated Mr. Sochor's death sentence, and remanded the

case to this Court because it failed to conduct an adequate harmless error analysis. *Sochor v. Florida*, 504 U.S. 527 (1992). On remand, this Court again affirmed Mr. Sochor's death sentence. *Sochor v. State*, 619 So. 2d 285 (Fla. 1993). The United States Supreme Court thereafter denied certiorari. *Sochor v. Florida*, 114 S. Ct. 638 (1993).

On July 25, 1995, Mr. Sochor filed his initial rule 3.850 motion to vacate judgment of conviction and sentence, including his sentence of death. On February 21, 1996, Mr. Sochor filed his first amended rule 3.850 motion. After public records litigation, Mr. Sochor filed a second amended rule 3.850 motion on January 23, 1998. (PCR. 796-853). Following a *Huff*[1] hearing on June 12, 1998, the Circuit Court granted a limited evidentiary hearing. The evidentiary hearing took place on April 19 through 22, 1999. The Circuit Court denied postconviction relief by order dated March 28, 2001. (PCR. 1137 *et seq.*).

This Court affirmed the denial of Mr. Sochor's rule 3.850 motion and denied his petition for a writ of habeas corpus on July 8, 2004. *Sochor v. State*, 883 So. 2d 766 (Fla. 2004). Rehearing was denied on September 21, 2004.

On September 19, 2005, Mr. Sochor filed his Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida, Miami Division. His federal habeas petition was denied on September 23, 2009 and his

[1] *Huff v. State*, 622 So. 2d 982 (Fla. 1993)

appeal to the Eleventh Circuit Court of Appeals was denied on June 27, 2012. *Sochor v. Sec'y, Dep't of Corr.,* 685 F.3d 1016 (11th Cir. 2012). Rehearing was denied on August 23, 2012. The United States Supreme Court subsequently denied certiorari on April 22, 2013.

On March 14, 2008, Mr. Sochor filed a successive Rule 3.851 motion, raising three claims: (1) Florida's lethal injection statute and existing method used to carry out executions by lethal injection violates Article II, section 3 and Article I, section 17 of the Florida Constitution, as well as the Eighth Amendment to the U.S. Constitution; (2) the Department of Corrections improperly delegated its expressly authorized power to create and institute lethal injection protocols to the Office of the Attorney General, thereby violating separation of powers and due process of law; and (3) Mr. Sochor is exempt from execution under the Eighth Amendment because he suffers from such severe mental illness that death can never be an appropriate punishment. The Circuit Court summarily denied Mr. Sochor's successive Rule 3.851 motion without an evidentiary hearing, and this Court affirmed the denial on October 30, 2009.

On March 13, 2009, Mr. Sochor filed another successive motion to vacate judgment of conviction and sentence pursuant to Rule 3.851 based on newly discovered evidence that Mr. Sochor's brother, Gary Sochor, actually committed the murder for which he was convicted and sentenced to death. The State filed its

response on July 15, 2009. The Circuit Court conducted a *Huff* hearing/case management conference on October 12, 2009. On November 17, 2010, Mr. Sochor filed a motion for leave to amend his successive rule 3.851 motion and an accompanying amended rule 3.851 motion based on the United States Supreme Court's opinion in *Porter v. McCollum*, 130 S. Ct. 447 (2009). The State filed a substantive response to Mr. Sochor's amended Rule 3.851 motion on January 14, 2011. On January 18, 2011, the Circuit Court entered an order denying Mr. Sochor's successive motion.

The Circuit Court decided to treat the amended successive Rule 3.851 motion based on *Porter v. McCollum* as a separate successive motion. The Circuit Court entered an order denying the motion on September 6, 2011. Mr. Sochor timely filed a notice of appeal on September 26, 2011. This Court did not grant relief on the *Porter* claim.

On August 8, 2016, Mr. Sochor filed his Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend, raising a claim of newly discovered evidence pursuant to Fla. R. Crim. P. 3.851; *Brady v. Maryland*, 373 U.S. 83 (1963) and *Jones v. State*, 709 So. 2d 512 (Fla. 1998); and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. On September 6, 2016, the State filed its response to the motion and on September 12, 2016, without conducting a Case Management Conference, this

Court entered an order denying Mr. Sochor's motion. However the order denying relief was not served on undersigned counsel. It was only because during that time period CCRC-South had not been receiving notification of e-filings from the Florida e-Portal filing system on CCRC-South emails. Because of this, on February 9, 2017, undersigned counsel checked the on-line docket of the Broward County Clerk of Court to determine if anything had been filed subsequent to the February 1st filings. It was at this point that undersigned became aware that this Court had entered an order denying Mr. Sochor's August 8, 2016, Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend giving Mr. Sochor thirty (30) days to appeal the order. CCRC-South attorneys have been receiving the filings from the e-Portal on their personal emails. However, this Court's September 12, 2016 order denying Mr. Sochor's motion has never been received via personal nor CCRC-South email. February 9, 2017 is the first time that Mr. Sochor has been made aware of this Court's September 12th order denying his motion to vacate judgments of conviction and sentence. Consequently undersigned counsel filed a motion to re-enter the order denying relief which was granted. A notice of appeal was timely filed. This appeal follows.

B. Trial and Penalty Phase

In its opinion affirming Mr. Sochor's convictions and death sentence on direct appeal, this Court described the facts of the case as follows:

Testimony at trial established that, on December 31, 1981, the victim, an eighteen-year-old female, and a friend went to a lounge located in Broward county to celebrate New Year's Eve. During the course of the evening the friend became ill. Sochor and his brother, Gary, helped the victim escort her friend outside to her car. Promising her that she would return soon, the victim returned to the lounge.

Early the next morning the friend awoke in the car, discovered the victim missing, and called the police. The police obtained a photograph taken that night which showed an unidentified man sitting at the bar near the victim. The photograph was shown on television, and, several days later, that man was identified as Sochor. The police talked with Sochor's roommates who said that he had left suddenly when he saw his picture on television. They also told police that Sochor's brother, Gary, had been visiting him and had recently returned to Michigan. The police interviewed Gary who implicated his brother in the victim's disappearance and voluntarily returned to Florida to attempt to locate her body. In May 1986 authorities arrested Sochor in Georgia on an unrelated offense and extradited him to Florida where a grand jury indicted him on charges of first-degree murder and kidnapping. The victim's body has never been recovered.

At trial Gary gave the following testimony. He went to the lounge on New Year's Eve with his brother who spent the evening talking with the victim and her friend. When it came time to leave, the victim and his brother were kissing in the lounge parking lot while Gary waited in the truck. Several minutes later, she agreed to go to breakfast with them. They left the parking lot with Sochor driving his employer's truck, Gary in the passenger seat, and the victim seated between them. Sochor drove to a secluded spot nearby and stopped the truck. Gary remembered the victim screaming for help and seeing Sochor on top of her with her hands pinned down on the ground. He yelled at him and threw a rock over his head. In response Sochor stopped assaulting the victim, turned and looked at Gary

> like a man "possessed," angrily told him to get back in the truck, and resumed his assault. Awhile later Sochor got in the truck with Gary and drove home. The next morning Gary found a woman's shoe and sweater and a set of keys in the truck. He hid the keys. Later he noticed that the truck had been cleaned and the articles removed. When told about the keys, Sochor became upset and demanded their return, which Gary did. A few days later Gary returned to Michigan.
>
> The state also introduced Sochor's three taped confessions which it played to the jury. In these statements Sochor said that he met the victim that night at the bar and spent the evening talking with her. He remembered kissing her in the lounge parking lot and wanting to have sex. When she refused, they argued and he grabbed her. When she hit him, he became angry and choked her. He thought that he killed her and drove to a secluded area where he disposed of the body. He said that Gary was not with him when this happened. When he awoke the next morning, he remembered feeling that something terrible had happened. He thought he had raped "another girl." He also stated that he found several woman's articles in the truck which he put in the trash. When he saw his picture on television, he took his employer's truck and drove to Tampa. From there he went to New Orleans where he stayed for some time before moving to Atlanta where he was arrested.

Sochor v. State, 619 So. 2d 285, 287-88 (Fla. 1993).

At trial, Mr. Sochor based his defense on theories of voluntary intoxication and mistaken identity. In his closing argument, Mr. Sochor's trial counsel pointed out the obvious: "The only two people who really knew anything about this case [are] Gary Sochor and Dennis Sochor." (R. 865). He went on to compare the Sochor brothers and their respective motivation for giving their different accounts of the

events that occurred the evening of December 31, 1981:

> So, let's look at the picture impression of two brothers. One brother, Gary, who lied to you to save his own skin, and one brother, Dennis, who lied to you to save his brother. Now, you may say that's just lawyer's talk. That's just a way out because that's the only defense that Dennis may have is voluntary intoxication, but that's a defense that is there, but I am not saying that. I am saying to you that there is a big question in my mind as to who actually committed this crime. Was it Gary? Was it Gary, when he was screaming and yelling and had his face in his hands screaming because he realized what he had done? Was it Gary, who was trying to protect his brother, when he said Denny didn't do it. Denny didn't do it.

(R. 881-82). Trial counsel continued to describe what he referred to as "the tale of two brothers":

> Just look at these two brothers. They are both from the same parents. They are both from the same environment. They both have the same psychiatric problems. They are both alcoholics, two peas in a pod. It's so unlike one another that it's difficult to understand how they could be from the same womb, one who lies to protect his own skin, Gary, and one who lies to protect his brother.

(R. 889-90). Trial counsel argued to the jury that "[t]here's all kind of evidence here that Dennis is taking the rap for his brother, and there is all kind of evidence here that Gary is lying to protect his own skin, and they are lies." (R. 900). Yet the jury rejected this argument and found Mr. Sochor guilty of first-degree murder and kidnapping.

At Mr. Sochor's penalty phase, trial counsel presented the testimony of Mr.

Sochor's parents, sister, and brother. *Sochor*, 883 So. 2d at 772. Counsel had not contacted Mr. Sochor's parents until the trial was well under way and neither inquired about Mr. Sochor's background nor spent any more than half an hour preparing them. (T. 198). Mr. Sochor's sister, Kathy Cooper, was not contacted by counsel at all, and instead testified at her own insistence after her mother called her the night that Mr. Sochor was found guilty. (T. 210). The record of the penalty phase shows that Kathy Cooper, Rosemary Sochor, and Charles Sochor were not subjected to traditional direct examination about Mr. Sochor's life but rather asked to prepare statements that they would like the jury to hear.

Although trial counsel failed to educate the witnesses as to the purpose of the penalty phase, he effectively delegated the responsibility of developing mitigation to the witnesses themselves.

From the witnesses' prepared statements, the jury learned that Mr. Sochor's father, Charles Sochor, used to discipline the children by beating them and singled Mr. Sochor out for extra punishment. *Sochor*, 883 So. 2d at 774. They learned that there were ten children in the Sochor family and that therefore sometimes Mr. Sochor did not get as much attention as he needed. *Id*. They learned that as a child, Mr. Sochor once fell on a tin horn that pierced the top of his mouth and required stitches. *Id*. They heard that when Mr. Sochor's father was demoted, Mr. Sochor went to work and gave the family his paycheck. *Id*. They also learned that after Mr.

Sochor was discharged from the Army his personality changed, and he became violent when he drank alcohol. *Id*. The family tried to get him psychiatric help after he beat up one of his brothers, but were unable to get him the help he needed. *Id*. Mr. Sochor's family told the jury that he at one point attempted to commit suicide, but found Jesus and changed his mind. *Id*. Mr. Sochor's family members begged the jury to spare his life. *Id*. Trial counsel also entered into evidence the reports of the mental health experts who had testified in the guilt phase, and who had not been provided with any background information as to Mr. Sochor and had not been asked to—and therefore, did not—conduct any evaluations as to mitigation. *Id*. at 775.

Trial counsel's failure to investigate Mr. Sochor's life and failure to even read the family members' prepared statements before the jury heard them became obvious during his closing argument to the jury. Instead of summarizing what little mitigation had been presented through the family members and connecting those facts to statutory and non-statutory mitigating factors that the jury should consider, counsel made rambling political, religious, karmic, and economic arguments against the death penalty in general. For example, as to the "committed while under the influence of extreme mental or emotional disturbance" statutory mitigating circumstance, trial counsel made the following argument:

> I will go through the drill, as to mitigating circumstances. The crime for which the defendant is to be sentenced was committed while he was under an extreme or emotional disturbance. Boy, if that one mitigating factor does not

> outweigh all the aggravating circumstances that [the prosecutor] can tell you, and I know [the prosecutor] is trying to dig at your moral fortitude in saying you have to kill because that's the only punishment that fits the crime, but can you honestly in your heart say that this defendant doesn't have some kind of problems mentally? Is he really responsible for what molded his Karma and his destiny, or was the outside forces in which he was raised, his environment, was that responsible for the final production that we see here.
>
> Now, that was beyond and above his control. Certainly that one factor alone would outweigh any of the aggravating circumstances.

(T. 1099-1100).

The jury recommended a sentence of death by a vote of ten to two. The Circuit Court judge found that four aggravating circumstances existed: (1) prior violent felony; (2) the crime was committed during the course of a felony, kidnapping and the uncharged crime of sexual battery; (3) heinous, atrocious, or cruel; and (4) cold, calculated, and premeditated manner. (R. 1231-36). After finding no statutory or non-statutory mitigating circumstances existed, the circuit court sentenced Mr. Sochor to death. On direct appeal, this Court struck the "cold, calculated, and premeditated" aggravating circumstance. *Sochor v. State*, 580 So. 2d 595 (Fla. 1991).

C. Postconviction

In its opinion affirming the Circuit Court's denial of postconviction relief, this Court agreed with Mr. Sochor that his trial counsel's penalty phase performance was

deficient. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004). Though it noted that Mr. Sochor's counsel was not alive at the time of the evidentiary hearing, this Court concluded from its review of the trial record and evidentiary hearing testimony that Mr. Sochor's counsel "put little time or effort into preparing expressly for the penalty phase" and probably used the same "strategy" in preparing for Mr. Sochor's case as he did in preparing for the penalty phase of a different capital defendant. *Sochor*, 883 So. 2d at 772 FN 9.

An investigation into Mr. Sochor's background conducted in postconviction revealed a drastically different view of Mr. Sochor's troubled life and struggle with mental illness than was revealed at trial. At the postconviction evidentiary hearing, Mr. Sochor presented additional testimony from the family members who testified at trial, as well as from other siblings (Blaine Sochor, Melanie Wheeler, and Lisa Fisher), friends (Helen Foley, Rachel Moore, Marvin Droste, and Bill Mitchell), teachers (Father Melvin Fox, Louis LaScala, and Christine Thatcher) and two mental health professionals (Richard Greer M.D. and Karen Froming Ph.D.). The picture painted by these witnesses of Mr. Sochor's upbringing and mental state was far more detailed and wretched than the one that the jury saw.

On appeal, this Court ultimately concluded that Mr. Sochor was not prejudiced by his trial counsel's deficient performance. *Sochor v. State*, 883 So. 2d 766, 782-84 (Fla. 2004).

SUMMARY OF THE ARGUMENT

1. Newly discovered evidence establishes that the State withheld the fact that Gary Sochor told Marvin Droste that he was involved in the murder, in violation of *Brady v. Maryland*.

2. It was error for the lower court to deny Mr. Sochor's Rule 3.851 motion without either a case management conference or an evidentiary hearing.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. *See Ornelas v. U.S.*, 517 U.S. 690 (1996); *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). Since no evidentiary development was permitted, Mr. Sochor's factual allegations must be accepted as true. *Borland v. State*, 848 So. 2d 1288, 1290 (Fla. 2003); *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

ARGUMENT I

NEWLY DISCOVERED EVIDENCE SHOWS THAT MR. SOCHOR WAS DENIED AN ADVERSARIAL TESTING AT THE GUILT/INNOCENCE PHASE OF HIS CAPITAL TRIAL WHEN THE JURY DID NOT KNOW THAT MARVIN DROSTE HAD CALLED THE BROWARD SHERIFF'S OFFICE WITH INFORMATION THAT GARY SOCHOR WAS THE KILLER AND HAD CONFESSED TO MR. DROSTE DUE TO THE STATE'S SUPPRESSION OF MATERIAL EXCULPATORY EVIDENCE.

A. Introduction

The evidence presented to the jury by the State, combined with the State's arguments to the jury, establish that the jury's verdict finding Mr. Sochor guilty of first-degree murder was predicated on the jury concluding that Mr. Sochor was the person who killed the victim. In large part this was predicated on the testimony of Mr. Sochor's brother, Gary Sochor. Because the State so strongly entrenched its case for first-degree murder on this scenario, had the jury not believed that Mr. Sochor killed the victim it cannot be said that the jury would have still convicted Mr. Sochor of first-degree murder. But for the violations of Mr. Sochor's rights under *Brady v. Maryland*, 373 U.S. 83 (1963) the jury would have concluded that Mr. Sochor did not kill the victim. Had these violations not occurred, the jury would have concluded that Mr. Sochor was not the principal actor.

B. Gary Sochor's Confession to Marvin Droste

Marvin Droste[2] is a native of Michigan who grew up knowing the Sochor family. During the 1999 postconviction evidentiary hearing, he testified as to Mr. Sochor's excessive drug use when he was young in support of Mr. Sochor's claim that his trial counsel was ineffective for failing to develop and present mitigation evidence.

In Portland, Michigan in early 1982, while at Walt's Bar, Mr. Droste was approached by, and engaged in conversation with Gary Sochor. At that time, Mr. Sochor was still "on the lamb (sic)". However, at the time of that conversation, Mr. Droste was unaware that Mr. Sochor was a fugitive from Florida.

During an investigatory trip to Michigan in August of 2014, CCRC-South investigators interviewed Mr. Droste. During that interview, new information regarding the 1982 conversation that Mr. Droste had with Gary Sochor was revealed. And, on August 7, 2015, Mr. Droste executed a Declaration as to the contents of that conversation and Mr. Droste's subsequent actions.

In pertinent part the declaration states that:

> Gary explained that there had been some trouble in Florida, a "coke whore" had been picked up in a club and had died while partying later. I asked if this death could be considered a homicide by law and was told yes, possibly. I stopped Gary's speech and cautioned him I would not be informed of detail that could make me complicit in the

---

[2] Pursuant to Rule 3.851(e)(2)(C), Mr. Droste's address and phone number are as follows: 8882 Wager Rd., Lyons, Michigan 48851; and 989-855-2258.

> crime or subject to investigation.
>
> I asked if this involved an automobile and was told yes, that this girl had come out of the car. I took this to mean an accidental vehicular homicide. When I asked why they "might" be in trouble Gary said he didn't think the body had been found and might never be. He said the body was buried in the sand. Gary called the victim a "coke whore". He said that they picked the girl up but that the death was an accident (not planned). Gary said, in a remorseful way, that he was "more responsible than anyone else".

(PCR2. 27)

Sometime after that 1982 conversation, Mr. Droste became aware that Mr. Sochor was being sought for murder. He telephoned the Broward Sheriff's Office (BSO) and spoke to a representative of BSO. He informed BSO that he had information regarding the Dennis Sochor case. He gave his contact information and was told that someone would return his call. However, no one ever called him back.

C. The State Withheld Evidence of Gary Sochor's Confessions from Mr. Dennis Sochor in Violation of *Brady v. Maryland*.

As evidenced by Mr. Droste's Declaration, the police knew of this material exculpatory and impeachment evidence but failed to turn it over to the defense. *See Brady*. The State never disclosed the existence of this highly exculpatory and critical impeachment evidence to the defense.

In *Cardona v. State*, 826 So. 2d 968 (Fla. 2002), the Florida Supreme Court reiterated the required showing for establishing a *Brady* violation:

> In order to establish a *Brady* violation, a defendant must

prove:

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.
>
> Thus, not every instance where the State withholds favorable evidence will rise to the level of a *Brady* violation necessitating the granting of a new trial, but only those where there is a determination that the favorable evidence that was withheld resulted in prejudice. The determination of whether a *Brady* violation has occurred is subject to independent appellate review.

Cardona at 973 (citations omitted).

The evidence that the State failed to disclose was clearly favorable to Mr. Dennis Sochor as it constituted both exculpatory and impeachment evidence. There is no doubt that this impeachment evidence against the State's star witness "could have been persuasive for the defense when weighed against the State's case, especially when considered in the light of the heavy burden placed upon the State to prove guilt in a criminal case ***beyond any reasonable doubt and the legal requirement that the jury's verdict be unanimous***. ***In effect, this means that only one juror finding reasonable doubt would change the outcome***." *See Floyd v. State*, 902 So. 2d 775, 785 (Fla, 2005) (emphasis added). Furthermore:

> The [un-investigated] evidence would not only have empowered the defense to discredit [Gary Sochor] but also would have stifled the prosecution's fervid efforts to portray [Gary Sochor] as a believable witness. Specifically the [un-investigated] information would have cast doubt

> on the veracity of [Gary Sochor's] testimony….

Mordenti v. State, 894 So. 2d 161, 171 (Fla. 2004).

Mr. Sochor's case bears marked similarities to the *Cardona* case in which the Florida Supreme Court granted a new trial to Ms. Cardona based on a *Brady* violation. The *Brady* violation occurred when the State's star witness (and Ms. Cardona's co-defendant) was found to have made statements pretrial which were entirely inconsistent with her trial testimony, and suggested that she, and not Ms. Cardona, was the principle actor in the death of the child victim. Here, as in *Cardona*:

> Because of the State's reliance on [Gary Sochor] as its key witness, both to obtain its conviction of first-degree murder and to argue for the death penalty, we conclude that impeaching [Gary Sochor] as to these material inconsistencies could have further undermined [Gary Sochor's] credibility before the jury, and thus bolstered the defense's contention that [Gary Sochor], and not [Mr. Dennis Sochor], was the primary actor in the ...death of [the victim].

Cardona at 981.

Just as in *Cardona*, the jury's assessment of the relative culpability of Gary Sochor as against that of Mr. Dennis Sochor could have affected the jury's decision on whether or not to return a first-degree murder conviction. There is more than a reasonable probability that at least one juror based his or her guilty verdict on the relative culpability of Mr. Sochor alone based, *inter alia*, on the testimony of the

State’s star witness, Gary Sochor. The impeachment value of Gary Sochor’s confession to Mr. Droste is devastating to his credibility.

Because Mr. Droste told the BSO that he heard Gary Sochor make these admissions, the State had a duty to disclose this evidence to the defense. The State instead suppressed this evidence.

This evidence is material to the defense, and therefore the State's failure to disclose this evidence prejudiced the defense. In *Cardona*, this Court held:

> As we explained … "[a] showing of materiality 'does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal.' " Rather, as the United States Supreme Court has explained:
>
> > [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."
>
> ….Further, the cumulative effect of the suppressed evidence must be considered when determining materiality.

Cardona at 973-974 (citations omitted).

Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been

different." *United States v. Bagley*, 473 U.S. 667, 680 (1985). To determine materiality, undisclosed evidence must be considered "collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419 (1995). Such evidence must be disclosed regardless of a request by the defense, and the State has a duty to evaluate the point at which the evidence collectively reaches the level of materiality. *Bagley* at 682. It is not the defendant's burden to show that the nondisclosure "[m]ore likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected such a standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here. Had trial counsel gained possession of this material, he would have been able to cast reasonable doubt on the State's theory and impeach the State's witnesses. The outcome of Mr. Sochor's capital trial would have been different. The evidence suppressed by the State supports the theory that Gary Sochor participated in the crime and that Mr. Sochor was not the principal actor. Because the truth of a witness' testimony and a witness' motive for testifying are material questions of fact for the jury, the improper withholding of information regarding a witness' credibility is just as violative of the dictates of *Brady* as the withholding of information regarding a defendant's innocence. *See United States v. Bagley*, 473 U.S. 667 (1985). Impeachment evidence of an important State witness is material evidence that must

be disclosed by the prosecution. *See United States v. Arnold*, 117 F.3d 1308 (11th Cir. 1997). As a result, Mr. Sochor was precluded from effectively cross-examining key State witnesses and from effectively presenting a defense. The jury was deprived of relevant evidence with which to evaluate the evidence.

As the United States Supreme Court has explained the issue is ***whether the jury*** "would reasonably have been troubled" by the withheld information and whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." *Kyles* at 441-43.

A. Newly discovered evidence

Mr. Droste's evidence that Gary Sochor confessed to him would most likely result in an acquittal at a retrial. In *Jones v. State*, 709 So. 2d 512 (Fla. 1998), this Court held:

> …Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994).
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones*, 591 So. 2d at 911, 915. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly

> discovered evidence and the evidence which was introduced at the trial." *Id*. at 916.

Jones at 521.

Both criteria are met in this case. Trial counsel was unaware of Mr. Droste's conversation with Gary Sochor ***and*** his subsequent call to the BSO because he was unaware of Mr. Droste. And, while this Court found that trial counsel's failure to investigate and present mitigation evidence at Mr. Sochor's trial constituted deficient performance pursuant to *Strickland*, there was never any suggestion that Mr. Droste might be a material witness as to the guilt phase.

As to the second criterion, the evidence that Gary Sochor was the major participant in the crime would not only exculpate Mr. Sochor of first-degree murder, but act as impeachment evidence so that any future jury would not believe Gary's version of events as he testified to at Mr. Sochor's original trial. Thus, Mr. Sochor was prejudiced and relief is warranted.

Due to the State's suppression of this material exculpatory evidence and the fact that this new evidence has only recently been discovered, this evidence has previously been unavailable to Mr. Sochor. Should this Court schedule an evidentiary hearing, Mr. Droste will be available to testify under oath to the facts alleged in this motion and the attached declaration.

The lower court did not conduct a Case Management Conference on this successive Rule 3.851 motion, but merely entered a conclusory order. See PCR2 57.

Relief, in the form of an evidentiary hearing and a new trial, is warranted.

ARGUMENT II

THE TRIAL COURT'S SUMMARY DENIAL OF MR. SOCHOR' SUCCESSIVE RULE 3.851 MOTION WITHOUT HOLDING A CASE MANAGEMENT CONFERENCE WAS ERROR

A. The lower court summarily denied Mr. Sochor's Rule 3.851 motion without a Case Management Conference

Florida Rule of Criminal Procedure 3.851(f)(5)(B) provides that for a successive Rule 3.851 motion "Within 30 days after the state files its answer to the successive postconviction motion, the trial court shall hold a case management conference. At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held, and hear argument on any purely legal claims not based on disputed facts. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing."

Mr. Sochor was not afforded the opportunity to make argument as to why the files and records do not show that he was entitled to no relief.

B. Summary denial

The lower court summarily denied the motion notwithstanding the fact that the instant claim clearly requires a factual determination. Mr. Droste signed a declaration which was attached to the Rule 3.851 motion. *See* Argument I *supra*.

This Court has indicated a preference for evidentiary hearings to be held on an initial postconviction motion. *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999) (Pariente, J., specially concurring). This Court promulgated Florida Rule of Criminal Procedure 3.851(f)(5)(A)(i), which requires that an evidentiary hearing be held on all initial postconviction motions where claims, as in the instant case, require a factual determination. As the Court noted in *Gaskin*, "[t]he rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion." *Gaskin*, 737 So. 2d at 516.

CONCLUSION AND RELIEF SOUGHT

In light of the foregoing arguments, Mr. Sochor submits that he is entitled to have the lower court's order reversed and his case remanded to the circuit court for an evidentiary hearing on his claims. Based on his claims for relief, Mr. Sochor is entitled to a new sentencing proceeding.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Celia Terenzio, Assistant Attorney General, this 28th day of August, 2017.

/s/ Rachel Day
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CERTIFICATE OF FONT

Counsel certifies that this Initial Brief is typed in Times New Roman 14-point font, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

/s/ Rachel Day
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