

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC18-48**

WILLIAM GREG THOMAS,

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 a successive motion to vacate that had been filed on the basis of newly discovered evidence.

Citations to Thomas's record on appeal in his direct appeal will be designated as "R --";

Citations to the record on appeal from the denial of post conviction relief in 2001 will be as "PCR --";

Citations to the record on appeal from the denial of a prior successive motion to vacate will be as "PCR2 --";

Citations to the current record on appeal from the denial of the successive motion to vacate at issue in this appeal will be as "PCR3 --".

REQUEST FOR ORAL ARGUMENT

Mr. Thomas has been sentenced to death. The validity of Mr. Thomas's conviction and death sentence are at issue. This Court has not granted oral argument in other cases in a similar procedural 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. Mr. Thomas, through counsel, respectfully requests that this Court grant oral argument in this appeal.

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INTRODUCTION

“When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.” *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004).

In 2016, when William Greg Thomas had been without a court-appointed capital collateral registry attorney since 2003 (some 13 years), his federally appointed CJA counsel stumbled upon information that led to even more information, which revealed that the State in Thomas’s case had violated its due process obligations set forth in *Giglio v. United States*, 402 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Banks v. Dretke*, 540 U.S. 668 (2004), when the State has violated *Giglio* and/or *Brady*, it has an affirmative duty that continues into collateral proceedings to reveal its violations of *Giglio* and/or *Brady*. In Thomas’s case, the State failed to honor its duty under *Banks* to disclose its violations of *Giglio* and/or *Brady*.¹

¹In *Banks v. Dretke*, the US Supreme Court ruled that it is incumbent on the State to disclose the *Giglio* violation and/or the *Brady* violation. As explained in *Banks*, “Courts, litigants, and juries properly anticipate that ‘obligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed.’” *Banks*, 540 U.S. at 696. “Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.” *Id.* at 695. “If it was reasonable for *Banks* to rely on the prosecution’s full disclosure representation, it was also appropriate for *Banks* to

Here, the State did not set the record straight and come clean as *Banks* required. Instead, it presented evidence in 2001 that nothing had been withheld. The State presented testimony from one of the trial prosecutors, Lance Day (who was by 2001 a sitting judge), to vouch for the State's compliance with its obligation to disclosed favorable information to the defense.

Following this Court's affirmance of the circuit court's denial of 3.851 relief, *Thomas v. State*, 838 So. 2d 535 (Fla. 2003), Thomas's court appointed registry counsel withdrew and no one was appointed to replace him. While Thomas sought federal habeas relief, he was left without state court representation.

When Martin J. McClain was appointed in 2015 to assist in Thomas's federal habeas proceedings, he discovered that Thomas was without state court representation. In the fall of 2015, McClain asked the federal district court to authorize him to represent Thomas in state court. The request was denied. When McClain re-raised the issue in the fall of 2016, the district court ordered counsel for the State to take the steps necessary to have state court registry counsel appointed. As a result, the law firm of Brunvard Wise, P.A. was appointed in August of 2016

assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Id.* at 694.

to serve as Thomas's state court registry counsel.

Meanwhile in June of 2016, while Thomas was without state court representation and McClain was without the means to obtain investigative services, McClain wanted to locate Ahmed Dixon, a jailhouse informant who the State had called at Thomas's 1994 trial. While McClain was in Jacksonville on another case, he went by the Jacksonville Sheriff's Office (JSO) and got Dixon's criminal history. In it, he noticed that Dixon was arrested on July 17, 1993 by JSO on state charges. Dixon had testified at Thomas's trial that the arrest had been on federal charges.

In following up on this anomaly, McClain discovered that state court charges arising from the July 17th arrest had been formally filed against Dixon, counsel had been appointed, probable cause had been found, and the charge mysteriously dropped, all on August 9, 1993. Another state charge was formally filed against Dixon on January 26, 1994. As with the previous charge, counsel was appointed, probable cause was found, and the charge was mysteriously dropped, all on the same day, January 26, 1994. Yet, Dixon testified in a deposition and at trial that he had faced no state charges. He claimed that this meant there was no benefit that the State could give him for his testimony against Thomas. The JSO printout and the clerk's docket showed that Dixon's testimony was not correct.

Due to Dixon's testimony about another jail inmate, Adrian Cason,² McClain then looked into Cason's situation in 1993. After the State listed Cason as a witness, he was deposed. Though he did not testify at Thomas's trial, Cason had testified in his deposition that in exchange for his guilty plea, the State had dropped its pursuance of a death sentence. **There was no indication that the State had dropped death after he offered to assist the State in its prosecution of Thomas.**

McClain discovered that after Cason entered his guilty plea in September of 1993, he was not sentenced until after Thomas's death sentence was imposed. When Cason received consecutive sentences, he felt his plea agreement had been violated. He filed a 3.850 alleging that his trial counsel had been ineffective. In the fall of 2000, an evidentiary hearing was conducted on Cason's 3.850. Cason's attorney, Frank Tassone, testified. George Bateh, one of Thomas's prosecutors, also testified. Thomas's other prosecutor, Lance Day (who was by then Judge Day), presided.³

²According to Dixon, he had walked in a conversation between Cason and Thomas in Cason's jail cell. Cason told Thomas it was okay to talk in front of Dixon. In his testimony, Dixon claimed that is when Thomas proceeded to confess to the murder.

³Shortly after Cason's evidentiary hearing concluded in late 2000, Judge Day testified in January of 2001 at the evidentiary hearing on Thomas's 3.851 motion. Despite the testimony he had heard at Cason's hearing, Judge Day testified that he was unaware of any favorable information having been withheld from Thomas.

Tassone testified that in late July of 1993, he asked Cason to let him negotiate a deal with Bateh. Tassone told Cason that things looked bad if they went to trial. He could almost guarantee that Cason would get a death sentence. With trial set for mid-August, Cason agreed to let Tassone to begin negotiations with Bateh the last week of July.

Bateh testified that the case against Cason had been very strong, “this was a particularly egregious murder, there were extremely strong facts for the State for prosecution.” Bateh said that he was committed to seeking a death sentence for Cason. (Cason PCR 519) (“it was the state attorney’s position in this case that this case warranted a death penalty, and because of the egregious facts on this case the State needed to a death penalty.”). Bateh was “very reluctant” to agree to a sentence less than death. Bateh testified that Tassone only got him to waive death when shortly before the trial, Tassone said Cason would assist the State in its case against Thomas.⁴ Hearing this, Bateh “rather reluctantly agreed to waive a death sentence.” (Cason PCR 520). Bateh dropped death “in return for [Cason] plea of guilty and his

⁴Bateh had spoken with Cason’s aunt who “wanted to avoid the death penalty; she expressed that thought to me. And I remember telling her - - this was after Mr. Tassone had approached me about [C]ason assisting in the Greg Thomas murder cases.” (Cason PCR 539).

truthful cooperation on the Greg Thomas cases.” (Cason PCR 523).⁵

In 2000, Bateh also testified that he NEVER intended to use Cason as a testifying witness at Thomas’ trial. This was “because the facts of the murder that [Cason] committed were so egregious that he would lack any credibility.” (Cason PCR 524). This means that the cooperation and/or assistance Bateh wanted from Cason was help in gathering evidence to use against Thomas. Since Cason was not to testify, testimony about statements made by Thomas would have to come from someone else. Because Cason was in the jail when he was not meeting with Bateh, his assistance could only mean that he was an agent of the State in the jail looking for witnesses who could testify against Thomas.

The Cason docket shows that his trial date was to be August 17, 1993. On that date, the State orally moved for a continuance. The motion was granted. The deal was in place. Cason’s meetings with Bateh continued until the guilty plea was

⁵Once the agreement was reached, Cason met with Bateh regularly in Bateh’s office, often without Tassone present. On at least one occasion, Cason testified that Lance Day was present. Judge Lance Day, who had been one Thomas’s prosecutors, was inexplicably presiding over Cason’s evidentiary hearing. At the meeting with Bateh and Day, Cason specifically recalled the discussion was about the Thomas case. During this meeting, Day (Judge Day) would sometimes get up and leave the room. (Cason PCR 581). But, he was present for discussions about “the Greg Thomas case.” (Cason PCR 581). Cason meetings with Bateh occurred before he entered his guilty plea on September 23, 1993.

formally entered on September 23, 1993.

At Thomas's trial, Dixon testified that he walked in on a conversation between Cason and Thomas in late August of 1993. Dixon reported that Cason told Thomas that it was okay to keep talking in front of Dixon. After this, Thomas resumed talking.

It is clear from the information discovered in Dixon's criminal history and court files that he gave false and/or misleading testimony in a deposition and in his trial testimony which was not correct by Thomas's prosecutors at trial or in collateral proceedings. Favorable impeachment information concerning Dixon was not disclosed by the State at trial or in collateral proceedings. Both *Giglio* and *Brady* were violated.

It is also clear from the testimony and evidence introduced at Cason's 3.850 evidentiary hearing held in 2000 that Cason gave false and/or misleading testimony in his deposition given shortly before Thomas's trial began. Cason got his deal in exchange for his assistance in Thomas's case. And because Bateh never intended to call Cason as a witness, the assistance that Bateh wanted from Cason was for him to act as State agent trying to find witnesses in the jail who could testify against Thomas. Cason was an undisclosed State agent in the jail who conversed with Thomas in violation of the Sixth Amendment. This is the conversation that Dixon

claimed to have walked, and his testimony regarding was inadmissible *See Johnson v. State*, 44 So. 3d 51 (Fla. 2010).⁶

The circuit court summarily denied Thomas's 3.851 motion as procedurally barred. It agreed with the State's argument that it had not been the State's obligation to disclose the *Giglio* and *Brady* violations, but Thomas's burden to discover the violations. The circuit court's ruling that Thomas was not diligent is contrary to *Banks v. Dretke*, as well as this Court's decisions in *Johnson v. State*, 44 So. 3d 51 (Fla. 2010), and *Waterhouse v. State*, 82 So. 3d 84 (Fla. 2012). *See Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000) ("the "due diligence" requirement is absent

⁶Besides Cason's false or misleading testimony in his deposition, the State withheld favorable information from Thomas, information that would have revealed Cason was acting as a State agent trying to gather evidence against Thomas.

Additionally, Bateh's desire to secure a death sentence in Cason's case and his reluctance to waive death constitutes impeachment because it shows that Bateh knew he need Cason's help in Thomas's case more than he wanted to get a death sentence in Cason's case. Trial counsel's arguments that the State did not find Doug Schraud credible and knew that Christina Thomas's testimony and Joseph Stewart's testimony reflected Thomas's Mafia and Kung Fu fantasies, not reality. Bateh's willingness to make a deal with Cason and violate Thomas's Sixth Amendment right shows how weak he knew his case to be.

Cason's regular meetings with Bateh at the State Attorney's Office also was undisclosed favorable information. These meetings gave Bateh a mouthpiece inside the jail. Cason was his undisclosed agent inside the jail able to help Bateh build his case against Thomas. Their discussions about Thomas's case were not disclosed, and the content of those discussion not documented in any fashion. Those meeting were in essence off the books.

from the Supreme Court's most recent formulation of the *Brady* test”).⁷

The circuit court summary denial of Thomas’s *Giglio* and *Brady* claims was error and must be reversed.

STATEMENT OF THE CASE AND FACTS

On or about September 12, 1991, Rachel Aquino Thomas disappeared. She was William Greg Thomas’s ex-wife. Her disappearance was reported to the police, and an investigation was initiated.

A year later, Rachel Thomas’s disappearance remained a mystery. It was written up in a newspaper article on September 12, 1992. In September of 1991, Doug Schraud had worked alongside Mr. Thomas as part of a yard maintenance crew employed by Publix. Schraud read the newspaper article in September 1992 and became frightened.⁸ He became scared that he was going to be arrested. As a result, he reached out to a friend. He told his friend that he had helped kidnap Rachel Thomas (T856). The police, the friend went and told the police what Schraud had

⁷In 1999, the US Supreme Court issued *Strickler v. Greene*, 527 U.S. 263, 284 (1999), and found that in collateral proceedings, it was proper for the defendant to rely on “the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials.”

⁸Schraud was interviewed by the police in September of 1991 after Ms. Thomas’s disappearance and had denied knowing anything about it (T855).

said to him. The police then went and found Schraud in order question him about Ms. Thomas's disappearance (T857). A year earlier, Schraud had been interviewed and stated that he did not know anything. In September of 1992, Schraud told the police that he had gone with Thomas and helped him kidnap Rachel Thomas (T858). Schraud consented to wear a wire and go speak with Thomas. Schraud had two taped conversation with Thomas, one on September 15 and one on September 16. At that point, the police had Schraud's statement that he had helped Thomas kidnap Rachel, and tapes of Schraud's conversations with Thomas. But, nothing happened.⁹

On May 18, 1993, an arrest warrant issued for Thomas's arrest. The supporting affidavit indicated that the police had "learned that Greg Thomas and

⁹At trial, the prosecutor in his guilt phase closing noted, "Doug Schraud is not the brightest guy in the world." (T1187). Defense counsel in his closing suggested that law enforcement did not find Schraud's story very credible or the taped statements very incriminating:

Well, isn't odd Schraud is their key witness and the tapes were available on September the 16th, 1992, and when did Greg Thomas get arrested? Seven or eight months later in 1993 in May. That's how overwhelming the proof was against him on the basis of those tapes.

It wasn't. Law enforcement didn't think so and it's not proved here today. Those tapes if they - - listen carefully to them. There are times on there Greg Thomas says I didn't do it. I wasn't there. I don't have anything to hide.

(T1213).

Doug Schraud went to Rachel Thomas' house" on September 12, 1991, and kidnaped her. "Greg Thomas, in taped conversations has discussed disposal of Rachel's body, but has not revealed its location." The State waited eight months before arresting Thomas on the basis of Schraud's statement and his two taped conversations with Thomas.¹⁰

In the meantime, Thomas had remarried in December of 1992 (T895). On the day of Thomas's arrest, a detective told Thomas's new wife, Christina Eagerton Thomas, that "this was [her] opportunity to either tell the truth or to face whatever happens." (T933). The next day, she was arrested and charged as an accessory after the fact (T888). She agreed to cooperate and told the police that Thomas had told her that his family was in the Mafia. His Uncle Leo "was head of a Mafia ring." (T892). Later, he told her that his Mafia family had learned that his ex-wife, Rachel Thomas, was planning to have him killed (T893). So, his Mafia family decided to kill her first.

According to Christina, Thomas had stopped by Rachel's house. When he arrived:

two guys were waiting for him at the door and that he did his Kung Foo and he broke one of the guy's neck and he killed the other guy and the

¹⁰ Schraud was also arrested on May 18, 1993. He was charged with kidnapping.

family jumped him from out in the bushes and out - - from everywhere around the house and took Rachel from the house.

(T905). His Mafia family then took Rachel “because they were going to kill her since she had plotted to kill him.” (T906). Other than what Thomas had told her, she did not know what had happened to Rachel Thomas (T931). However, she had concluded that Thomas’s claim to have Mafia family and the stuff about what the Mafia family did “was fantasyland.” (T928).¹¹

On May 19, 1993, Joseph Stewart was also arrested and charged as an accessory after the fact. Stewart also worked with Thomas doing yard maintenance work at Publix. After his arrest, he told the police that Thomas had told him that he had an Uncle Leo was a leader with the Mafia (T942).¹² According to Stewart, Thomas had claimed that he and Uncle Leo’s body guard had gone to Rachel’s house. “When they did step through the door as the door closed an individual jumped out behind the door with a weapon which Greg killed him with a blow behind the

¹¹Christina testified that she had decided by the time of trial that Thomas’s stories about his Mafia family was a “fantasy that [he] had developed over - - certainly the whole time that [she] knew him.” (T928).

¹²In a previous interview, Stewart did not tell the police about Thomas’s claim that he and his Uncle Leo’s bodyguard had gone to Rachel’s house, fended off three attackers, and then killed Rachel. He withheld the information out of fear of Thomas’s Mafia family. (T948).

neck.” (T944). Two other attackers appeared, but Leo’s body guards and Thomas “took out those two guys.” The body guards grabbed Rachel, tied her up, killed her and put her in the trunk of her car along with the three dead bodies. (T945). Thomas called his Uncle Leo who “sent a dozen or so guys to the house to clean up” and “take care of the bodies” (T945).¹³

On May 20, 1993, Thomas was indicted and charged with: 1) the first degree murder of Rachel Aquino Thomas, 2) burglary, and 3) kidnapping. The offenses were alleged to have occurred between September 12 and September 15, 1991.¹⁴

On May 24, 1993, the public defender’s office was assigned to represent Thomas. Bill White was assigned by the public defender’s office to serve as Thomas’ lead attorney. The State was represented by Lance Day and George Bateh.

Due to the high public profile of the case, the parties had agreed that the State would hand-deliver discovery response to defense counsel and would not put discovery responses in the court file (R31). On July 9, 1993, Thomas’s counsel filed a motion to compel discovery. (R13). The motion complained about “the State’s

¹³Stewart said that at one point, he had agreed to drive a car to Miami and help Thomas kill someone for \$35,000 (T951).

¹⁴On May 20, 1993, William Greg Thomas was also indicted and charged with the first degree murder of Elsie Thomas. The offense was alleged to have occurred on the evening of May 4, 1993.

Response to Demand and Demand for Reciprocal Discovery.” The motion stated: “These responses are so vague and indefinite that they fail to place the defense on notice that statements have been made, and if so, to whom.” (R14).

At a July 21, 1993 hearing, Thomas’s counsel advised the court that the State “has informed us this morning that they have had some difficulty in getting the homicide supplement reports completed.” In light of the State’s representation and with the understanding that the reports would be provided soon, the motion to compel was tabled and not heard at that time. (R-V12-20).¹⁵

Without significant physical evidence and having only the testimony of Schraud, Christina Thomas, and Stewart, which provided inconsistent versions of events, the prosecutors seemed lucky when a jailhouse informant, Ahmed Dixon, stepped forward. Dixon contacted Thomas’s prosecutors a week or two after Dixon claimed Thomas had confessed to him. Dixon said that “in late August, 1993,” he was in the Duval County Jail. He walked into Adrian Cason’s jail cell.¹⁶ Thomas was talking with Cason. “Cason told him I was cool so then I sat down and [Thomas]

¹⁵During the July 21, 1993 hearing, the State announced that the case charging Thomas with the murder of Rachel Thomas would be tried first, before the case regarding Elsie Thomas was tried.

¹⁶Dixon said that while in jail, he and “Adrian Cason [had] become very good friends.” (T959).

continued to talk.” (T961). Dixon reported that Thomas “said him and his friend had went and picked up the bitch” and “when he got there it got out of hand and he said that he chopped the bitch in the throat and when he chopped her she collapsed and when she fell he didn’t realize she was dead” (T962-63). Dixon claimed that Thomas said he and his friend put the body in the car’s trunk, and then Thomas dropped his friend off, but did not say what he did with the body (T963-64).

Dixon said that he had been jailed on July 17, 1993 after his arrest on a federal drug charge on July 17, 1993 (T955).¹⁷ He said he had faced no state charges. Dixon said he contacted Thomas’s prosecutors to offer his testimony against Thomas because he “felt as though I was doing the right thing.” (T966). Dixon said he asked for and was receiving no consideration for his testimony and had no deals with the State (T967).

On September 8, 1993, Thomas’s counsel filed a motion asking that the pre-trial discovery not be publicly disclosed. (R30-32).

On September 13, 1993, Thomas’s public defender filed a motion for

¹⁷Dixon pled guilty to his federal charge on October 3, 1993 (T969). It was his fourth felony conviction. (T970). The federal charge was the possession of cocaine with the intent to distribute. When Dixon testified at Thomas’s trial on March 22, 1994, he had not yet been sentenced; he facing up to 27 years in federal prison (T957).

continuance citing the 73 witnesses in listed in discovery and the resulting problems in locating witnesses and scheduling depositions. (R35-37).

After Dixon spoke with the Thomas's prosecutors in late August or early September, he and Cason were called before a grand jury on September 30, 1993, to testify about Thomas. Writs of habeas corpus ad testificandum were filed on September 30 in Thomas's case. The writs directed Julio Puente and Ahmad Dixon to be brought under safe and secure conduct ... before the State Attorney's Office when [their] presence is needed for any pre-trial matters that should arise during the pendency of this case." (R42-45). Dixon was then called to testify before the Duval County Grand Jury regarding Thomas as Dixon later indicated in his testimony at Thomas subsequent trial. (T968).

A newspaper account of the September 30th grand jury proceedings indicated that when Dixon testified his face was covered with a hood. It was reported that two other individuals also testified before the grand jury and all three testified with their faces covered by hoods. The newspaper account indicated that sources identified one of the three as Adrian Cason. The newspaper did not identify the other two hooded witnesses. "Prosecutors also refused to say why the grand jury is hearing more testimony about the Thomas case five months after he was indicted on two first-degree murder charges." Thomas' attorney, Bill White, "had no advance knowledge

that they were going before the grand jury and [he] ha[d] no idea why.” *Sarasota Herald-Tribune*, October 2, 1993, page 12B.¹⁸

On October 12, 1993, White filed a Suggestion of Conflict because Cason, who had been represented by his office from September 16, 1992 to January 8, 1993, had been listed as a witness for the State. At a hearing held on October 12, 1993, White stated: “We asked the Court to put this case on the calendar today based on a conversation I had with Mr. Bateh **last week**. Mr. Bateh called me and indicated that they have a number of witnesses who are offering testimony at this time to the state against my client, at least two of whom are former clients of the Public Defender’s Office.”¹⁹ (R-V12-26). As to Cason, White stated: “I guess it’s ironic but Mr. Bateh was one of the prosecutors in that case and there was a jailhouse person who was represented by the Public Defender’s Office at the time and we were required to

¹⁸The grand jury testimony given by Dixon and Cason was not provided in discovery until March 18, 1994. (R81-82). This was after Cason was deposed by Thomas’s counsel on March 9, 1994, and after Thomas’s jury was selected on March 17, 1994.

¹⁹During this hearing, no mention is made of Dixon. Later in his deposition and trial testimony, Dixon said that there were no state charges filed against him. Logically, that would mean that the public defender’s office was not appointed to represent him. Yet, the clerk’s online docket shows that the public defender’s office was appointed as counsel on August 9, 1993, and again on January 26, 1994. But on both occasions the public defender’s office moved to withdraw the same day on which it was appointed.

withdraw from Mr. Cason's cause at this time."

Bateh responded that Cason had "become a critical witness for the state" in both of the cases pending against Thomas. (R-V12-31). The judge asked Bateh if Cason was "an essential witness?" Bateh replied "he is an important witness." The judge asked: "Important witness?" Bateh responded: "He is a witness the state intends on using in both of these prosecutions." (R-V12-32).²⁰ The judge then found "a conflict does exist over the developments of these new witnesses." (R-V12-33).

On October 13, 1993, an order was entered appointing Richard Nichols as counsel, replacing the public defender's office.

On November 10, 1993, the State filed a suggestion of mental incompetence to proceed and insanity at the time of the offense. (R51-52). The State said that it "has received information from inmates housed with the defendant ... which alleges the defendant has been exhibiting inappropriate behavior in their presence, i.e., staring at one object or a location for an excessive period of time, going into a meditation or trance-like state." Lance Day signed the certificate of good faith.

On November 10, 1993, Dr. Ernest Miller and Dr. Beth Shadden were appointed to examine and evaluate Thomas. (R53).

²⁰However, Cason was not called by the State to testify at Thomas's trial.

On March 9, 1994, Dixon was deposed by Nichols, Thomas's court appointed counsel. Dixon testified that he was in jail on a "[c]onspiracy to traffic cocaine" charge (Depo at 5). Dixon testified that was a charge in "federal court." Dixon was asked: "Are there any other cases pending against you in federal court, state court, anyplace?" Dixon answered, "No, sir." (Depo at 5-6). Dixon testified that he came to know Thomas after Dixon's July 17, 1993 arrest. (Depo at 4). Dixon affirmed that the only charge he had pending when he came to know Thomas was "this one charge pending and that's the one Fallis represents you on." (Depo at 7). Fallis was Dixon's federal counsel.²¹ Dixon was asked about his pending criminal charges at the point in time when he listened to a conversation between Cason and Thomas. Specifically, Dixon was asked, "and you had no charges pending except those federal charges?" Dixon testified, "Yeah, federal charges." (Depo at 18). Dixon then said "[n]o" when asked "is there anything you might get charged with or they are about to charge you with or anything like that?" (Depo at 18).

On March 9, 1994, Cason was deposed by Nichols. Cason denied that he and Dixon had "become friendly" - "No, not really." (Depo at 8). After the conversation

²¹Thomas G. Fallis was Dixon's federal counsel. Later in 2000, Thomas G. Fallis was one of the two attorneys representing Cason at the evidentiary hearing on Cason's 3.850 motion.

with Thomas that Dixon walked in on, Cason claimed that he “never talked to Ahmad Dixon about it.” (Depo at 16). Cason said he talked to his lawyer, Frank Tassone, about what Thomas had said in their conversation because what Thomas said had bothered him. Cason said he never talked to any detectives about what Thomas had said. As to who, if anybody, he talked to after his lawyer, Cason said that he “really can’t remember.” (Depo at 17). Later in the deposition, Cason remembered that he had spoken with “Day and Mr. Bateh, you know, since then but that is about it. That’s all, you know, the only people I talked to.” Cason testified that in exchange for his guilty plea that the State agreed to not seek a death sentence. (Depo at 5).

On March 17, 1994, Thomas’s trial began with jury selection (T122). During voir dire, Nichols advised the venire that “there will not be a body. There will not be medical testimony or medical examiner’s testimony about the nature of the death” (T396). Nichols indicated the fact that the alleged victim, Rachel Aquino Thomas, “has been missing for a period of time is a circumstance that you can consider in deciding whether or not that is proved, but her being missing is not in and of itself proof of her death” (T396-97).

On March 21, 1994, Lance Day presented the State’s opening and asserted that if Rachel Thomas were “still alive today she would probably right now be across

the river at Prudential Insurance Company where she worked for several years” (T459-60). Day asserted that “the cold, hard, plain truth of this she is dead. Rachel is dead. She has been killed. She has been killed. She has been murdered, and there sits her murderer, William Greg Thomas, her ex-husband.” (T460). Later, Day stated: “since September 12th, 1991 nearly two-and-a-half years ago Rachel has never been seen, has never been heard from.” (T464).

In the opening statement, Day told the jury:

You are going to hear from Ahmad Dixon. Ahmad Dixon is a federal defendant. He is in there on federal charges. He will tell you that he also was a cellmate of Greg Thomas, and when I say cellmate there is a pod area and a lot of them over there so I don't mean that he actually live in the actual cell but he is in the same area, and he will tell you that one day he heard Greg Thomas talking to somebody else and he heard Greg Thomas say that he had kidnapped Rachel and that he was trying to get Rachel to sign some custody papers for Bennie, their son, and she refused and when she refused he chopped her in the throat and his word were I chopped the bitch in the throat and she fell to the ground.

And at first he didn't realize she was dead and then she didn't move and realized she was dead, so somehow they put her in the trunk of the car, he and this other guy, and Ahmad is going to tell you he doesn't know who this other guy is but he thinks it's the other guy that's in jail meaning Doug Schraud, and he is going to tell you that Greg Thomas said only he knows where the body is.

Only he knows because he didn't want the other guy to know where the body was so they wouldn't have anything on him. Only he knows where the body is.

(T522-23).

On March 21, 1994, Doug Schraud was called to testify. He testified that on September 12, 1992, one year after Rachel Thomas had disappeared, he read a newspaper article about the disappearance. He became anxious and told a friend he “was scared of being arrested and [] scared of [Thomas’s] uncles” (T856). Shortly thereafter, the police picked him up and questioned him (T857). He gave the police a written statement indicating that he had been with Thomas and helped him kidnap Thomas in broad daylight (T858). Schraud did not know what happened to Rachel after the kidnapping. When he left, she was still alive (T843). Schraud agreed to talk with Thomas while wearing a wire. Schraud had two taped conversations with Thomas (on September 15 and 16, 1992) which were introduced into evidence. Schraud acknowledged that he knew of no one who could corroborate his account of the kidnapping (which happened in broad daylight) or his travel to and from Rachel’s house (T883). Despite having Schraud’s written statement and the tapes of two conversations he had with Thomas, no charges were filed another eight months.

Christina Thomas was called as the State’s next witness. She testified about the story Thomas had told her as to what happened when he stopped at Rachel’s house. According to Christina, Thomas told her that when he arrived:

two guys were waiting for him at the door and that he did his Kung Foo and he broke one of the guy’s neck and he killed the other guy and the family jumped him from out in the bushes and out - - from everywhere

around the house and took Rachel from the house.

(T905). His Mafia family then took Rachel “because they were going to kill her since she had plotted to kill him.” (T906).²² Other than what Thomas had told her, she did not know what had happened to Rachel Thomas (T931). However, she had concluded that Thomas’s claim to have Mafia family and the stuff about what the Mafia family did “was fantasyland.” (T928).

The State’s next witness was Joseph Stewart who said that Thomas had told him that Thomas had an Uncle Leo who was a leader with the Mafia (T942). According to Stewart, Thomas had claimed that he and Uncle Leo’s body guard had gone to Rachel’s house. “When they did step through the door as the door closed an individual jumped out behind the door with a weapon which Greg killed him with a blow behind the neck.” (T944). Two other attackers appeared, but Leo’s body guards and Thomas “took out those two guys.” The body guards grabbed Rachel, tied her up, killed her and put her in the trunk of her car along with the three dead bodies.²³

²²Absent from this version is any mention of Schraud. In fact, this version of events is inconsistent with Schraud’s version. It is not possible for both versions to be true.

²³There is no mention of Schraud in this version of events. In fact, this version is inconsistent with Schraud’s version. It is also at variance with the version Christina reported.

(T945). Stewart testified that Thomas told him that he called his Uncle Leo who “sent a dozen or so guys to the house to clean up” and “take care of the bodies” (T945).²⁴

Dixon was the State’s next witness. He testified that he was arrested on a federal drug charge on July 17, 1993 and placed in the Duval County Jail. (T955). When asked if he was being at all prosecuted by the state attorney, Dixon responded “[n]o”. (T956). Dixon said that he had faced no state charges. He testified that he no “agreements or plea bargains or any sort of deals” with the federal government when he pled guilty. Dixon also testified that there were no deals or agreements with the State Attorney’s office as to his federal drug charge in return for his testimony. (T957). Dixon testified that while in jail, he and “Adrian Cason [had] become very good friends.” (T959). He testified that “in late August, 1993” while he in the Duval County Jail, he walked into Cason’s jail cell and Thomas was there talking with Cason. After “Cason told [Thomas] I was cool so then I sat down and [Thomas] continued to talk” (T961).²⁵ Dixon testified that Thomas “said him and his friend

²⁴Stewart also testified that at one occasion Thomas, who worked with him doing yard maintenance work for Publix, offered him \$35,000 if he would drive a car to Miami and help Thomas kill someone (T951). Stewart accepted the offer, though nothing ever came of it.

²⁵It is clear from this account that Thomas stopped talking. He only resumed

had went and picked up the bitch” and “when he got there it got out of hand and he said that he chopped the bitch in the throat and when he chopped her she collapsed and when she fell he didn’t realize she was dead” (T962-63). Then Dixon testified that Thomas said he and his friend put the body in the trunk of the car, and Thomas dropped his friend off (T963-64). Dixon testified that Thomas did not say what happened to Rachel’s body.

Dixon testified that he contacted the State Attorney’s Office “[a]bout a week, two weeks, two weeks after that. About a week-and-a-half, somewhere after that” (T966). Dixon said that he went to the State and offered his testimony against Thomas because he “felt as though I was doing the right thing.” (T966). Dixon claimed that he asked for no consideration for his testimony.²⁶ (T967).

Dixon testified that he pled guilty to his federal charge on October 3, 1993 (T969). He testified that the federal charge was possession of cocaine with the intent to distribute.²⁷ He testified that as of the date of his testimony, March 22, 1994, he

when Cason encouraged Thomas to keep talking.

²⁶Mr. Dixon was not asked if he knew that his testimony might help his good friend, Mr. Cason, avoid receiving a death sentence.

²⁷In his deposition, Mr. Dixon testified that the federal charge was conspiracy to traffic in cocaine.

had yet to be sentenced. The federal case was his fourth felony conviction (T970). He did say that sentencing was set for March 30, 1994, and he faced up to 27 years in prison (T957).²⁸

Thomas's defense as explained by his counsel was simply that Thomas "if not a pathological liar is a habitual and very energetic liar." (T542). "Greg Thomas was living in some fantasy world, some illusion of his own creation that he ... tried to create that aura that he was a Mafia person and he was related to the Andretti family and that he was some karate guy and everybody should be afraid of him." (T1170-71). Thomas lived in a "delusional fantasy world." (T1214). He "talk[ed] about people getting him and his house being bugged and the Mafia being his buddies." (1214).

Nichols specifically challenged Schraud's credibility:

Are we supposed to take Doug Schraud, a guy who says - - Doug Schraud, is there any reason to doubt his testimony?

He says that he is willing to go over and help kill somebody for a person he barely knows for no incentive, for no payment, no reward, says he wasn't threatened. He just said Greg wanted him to go help and that's what he did, and he said that he knew when he went over there that she was going to be killed.

Now that flies so squarely in the face of reason. It's impossible to say

²⁸At no time during Dixon's testimony did either prosecutor correct it or otherwise indicate any of it was inaccurate or misleading.

that there is no reason to doubt his testimony. He comes to you saying that he thinks he can get life in prison when there is no doubt that the range of penalty that he might be exposed to is substantially less than that.

Is there reason to doubt his testimony? If what he said is true he has gotten a heck of a deal. If what he says is true he is guilty of felony murder. He could be facing life imprisonment and the death penalty, but instead he is facing something between 10 and 20 years probably.

(T1161-62).²⁹

In his rebuttal closing, Nichols returned to Schraud and the taped statements of his conversations with Thomas:

It flies in the face of human experience and common sense to think that there is not reason to doubt Doug Schraud. The state wants to contend that these tapes somehow tie the last know or put the last loop in this noose that they waved in front of you.

Well, isn't it odd Schraud is their key witness and the tapes were available on September the 16th, 1992, and when did Greg Thomas get arrested? Seven or eight months later in 1992 in May. That's how overwhelming the proof was against him of the basis of those tapes.

It wasn't. Law enforcement didn't think so and it's not proved here today. Those tapes if they - - listen carefully to them. There are times on there where Greg Thomas says I didn't do it. I wasn't there. I don't have anything to hide.

* * *

²⁹ In the State's closing, Day acknowledged: "Doug Schraud is not the brightest guy in the world" (T1187). Day argued that the jury should believe Schraud and cited Dixon's testimony as corroboration (T1190-91, 1196).

These tapes if they are anything show the hysterical behavior on the part of Doug Schraud to try to get something on Greg Thomas so that he could cut his deal and minimize his penalty with the State.

They already had him. They picked him up, took him downtown and essentially let him know what was going on unless he tried to put something on Greg Thomas which is what he did.

(T1212-13).

Nichols argued that the State's failure to arrest Thomas after Schraud gave his statement in September of 1992 showed that the State did not find Schraud's story credible. He argued that the story Christina Thomas set out in her testimony was inconsistent with Schraud's version, and too farfetched to be real. Similarly, counsel noted that the version of events provided by Stewart was not only inconsistent with Schraud's version, but Christina's as well, and if anything, Stewart's version was still even more farfetched. As for the testimony of the jailhouse informants, counsel suggested that it made no sense for someone as paranoid as Thomas was that he would talk to, let confess to, strangers he was jailed with. (T1215).

On March 24, 1994, the jury retired for deliberations at 9:23 a.m. (T1264). At 2:00 p.m., the jury returned its verdict and found Thomas guilty on all three counts. (T1271-72).

In the penalty phase, Thomas testified, and in cross he testified that "I never even talked to Ahmad Dixon." (T1395).

On March 30, 1994, the jury returned a death recommendation by a vote of 11-1 (R88).

On July 22, 1994, a death sentence imposed was imposed in Case. No. 93-05394. The judge relied upon July 14th guilty plea to find previous conviction aggravator which was not before the jury.³⁰ The judge also found in the course of felonies, pecuniary gain, HAC, and CCP (5 aggs). (R141-48). The judge found “no mitigating circumstances existing which would outweigh or outnumber the statutory aggravating circumstances”. (R148). The judge found that the aggravators were “sufficient” to “justify the sentence of death.” (R148).

On March 20, 1997, this Court affirmed Mr. Thomas conviction and sentence of death. However, it did find that the sentencing judge in his sentencing order

³⁰On July 14, 1994, Thomas entered a guilty plea in Case No. 93-05393. The plea form indicated: “I agree to waive my rights to appeal any matter whatsoever arising out of Case # 93-5394 (Rachel A. Thomas) whether direct, collateral or appeals under Rule 3.850 FRCP. However, the defendant specifically reserves the right to appeal matters concerning the sentencing in 93-5394 on count alleging 1st degree murder. Further, waive all appeals rights, whether direct collateral or under FRCP 3.850 in Case # 93-5393 except matters of sentencing.” (R95-96). The State had listed Dixon and Cason witnesses in Case No. 93-5393. Dixon was going to testify that after Cason told Thomas to speak in front of Dixon that Thomas confessed to killing Elsie Thomas. Just as it had not revealed that Cason was acting as a State agent in Case No. 93-5394, it had not disclosed that fact in Case No. 93-5393. The guilty plea would not have been entered had Thomas known that there was a basis to exclude Dixon’s testimony.

committed in error in failing address and consider the mitigating evidence presented by Thomas. “This was error, but harmless.” *Thomas v. State*, 693 So. 2d 951, 953 (Fla. 1997), *cert denied* 522 U.S. 985. In its harmless error analysis this Court relied upon Thomas’s guilty plea and resulting conviction on the charge of first degree murder in Case No. 93-5393, even though the guilty plea was entered nearly four months after the jury’s death recommendation had been returned.

On September 10, 1998, ten months after the denial of certiorari review by the US Supreme Court, the state circuit court appointed Jefferson Morrow to serve as Thomas’s capital collateral registry counsel. Section 27.711(2), Fla. Stat., provided that the appointed “attorney must immediately file a notice of appearance with the trial court indicating acceptance of the appointment to represent the capital defendant throughout all postconviction capital collateral proceedings, **including federal habeas corpus proceedings.**” (Emphasis added). At the time of Morrow’s appointment on September 10, 1998, just over sixty days remained on Thomas’s one year clock under Rule 3.851. However, the Court Commentary to Rule 3.851 explained that this Court in 1993 had adopted the one year clock (a reduction down from a two year clock) with the understanding that “[a] capital prisoner will have counsel **immediately** available to represent him or her in a postconviction relief proceeding.” (Emphasis added). The Court Commentary to Rule 3.851 from 1993

continued: “In the event the capital collateral representative is not fully funded and available to provide proper representation for all death penalty defendants, **the reduction in the time period would not be justified and would necessarily have to be repealed**, and this Court will forthwith entertain a petition for the repeal of the rule.” (Emphasis added). The ten month delay in appointing Morrow as Thomas’s capital collateral registry counsel deprived Thomas of his right under the Court Commentary to “have counsel immediately available to represent him.”

On October 2, 1998, Morrow served a Rule 3.851 motion on behalf of Thomas. This motion was filed just 22 days after Morrow was appointed to serve as Thomas’ registry counsel and was charged with providing Thomas with effective representation. *See Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988) (Florida capital postconviction defendants are entitled under Florida statutes to effective collateral representation.). The motion was filed with the clerk’s office on October 5, 1998. It was 6 pages in length, and contained only one claim, an ineffective assistance of trial counsel claim. Morrow indicated in the motion that “Thomas’ pleading is incomplete - the untenable predicament caused by the very recent appointment of the undersigned counsel by this court was no previous work up or investigation has made it impossible for counsel to properly investigate and effectively present Thomas’ post-conviction claims.” Morrow indicated that he had

yet to receive any public records from the State but had been told that they would be provided.³¹ The wherefore clause of the motion asked for “time to properly investigate file and [sic] amended post conviction relief motion.”

This docket of the Duval County Clerk of Court shows that the next substantive filing by Morrow was his motion to withdraw as Thomas’s collateral counsel, which was served on December 29, 1999. This 2 page motion simply stated “[t]here exists a conflict wherein continued representation would amount to an appearance of impropriety.” The conflict was not identified, nor was there any indication as to when it arose. Without any further inquiry or information, an order was entered granting the motion on January 3, 2000. Between October 5, 1998, and January 3, 2000, the Rule 3.851 was not amended, nor were any hearings conducted.

In the order granting Morrow’s motion to withdraw, the circuit court entered an order appointing Dale Westling to serve as Thomas’s capital collateral registry counsel. On April 19, 2000, a little over 90 days after Westling’s appointment, the clerk’s docket shows that he filed an amended motion to vacate on behalf of Thomas. The motion included 2 claims for relief. Claim I alleged that Thomas’s death sentence stood in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Claim

³¹This clearly indicates that the public records had been requested and were forthcoming.

II asserted that Thomas was deprived of effective representation of counsel. On August 15, 2000, Westling filed a two page addendum to the motion to vacate “alleg[ing] two additional grounds indicating ineffective assistance of counsel.”

On January 29, 2001, the state circuit court held an evidentiary hearing on the motion to vacate filed by Westling. At the evidentiary hearing, the State was represented by Bateh and Tatiana Salvadore (now Judge Salvadore). Bateh called Lance Day (by the time of the evidentiary hearing, Judge Day) to testify.³² Day testified that he was familiar with the prosecution’s obligation under *Brady v. Maryland*. Judge Day testified that: “any material that is brought to the attention of the prosecutor that can be in any way favorable to the defense should be turned over

³²An evidentiary hearing on Cason’s 3.850 motion had begun on September 6, 2000. Judge Day presided at the hearing. Bateh had represented the State at the hearing. Judge Day heard testimony from Tassone on September 6, 2000; and from Bateh, and Cason on October 10, 2000. All of the testimony concerned the plea deal that led to Cason’s September 23, 1993 guilty plea. Bateh testified that he reluctantly agreed to waive death and let Cason pled guilty after Tassone told him that Cason would provide assistance in Thomas’s case. Judge Day heard Bateh testified that he never intended to call Cason as a witness, so the plea agreement was not for Cason’s testimony at Thomas’s trial. Judge Day heard testimony that Bateh and Cason had numerous meetings in Bateh’s office before the guilty plea was entered. Judge Day heard testimony that Bateh and Cason discussed Thomas’s case in those meetings and that Judge Day was present for some of the discussion, but would also excuse himself from some of the discussion. Despite having just heard this testimony, Judge Day testified that he was unaware of any undisclosed *Brady* material in Thomas’s case.

to the defendant.” (PCR313). When asked if there was any *Brady* material that he failed to turn over to the defense, Day testified: “Not to my knowledge.”³³

The circuit court issued an order denying 3.851 relief on May 17, 2001.

On May 22, 2001, Westling filed an appeal to this Court. While that appeal was pending before this Court, Westling filed another motion to vacate on the basis of *Ring v. Arizona*, 536 U.S. 584 (2002), in the state circuit court.

On January 30, 2003, this Court issued an opinion denying Thomas’s appeal that Westling had filed. *Thomas v. State*, 838 So. 2d 535 (Fla. 2003).

On February 21, 2003, Westling filed a motion in the state circuit court seeking to withdraw from representation of Mr. Thomas. After receipt of this Court’s mandate, the circuit court on April 4, 2003, entered an order denying the motion to vacate predicated on *Ring v. Arizona*. An order granting the motion to withdraw and formally discharging Westling as Thomas’s counsel was entered on November 5, 2003.

In March of 2003, Westling had contacted Mary Bonner to see if she would

³³Despite what he revealed in his recent testimony at Cason’s evidentiary hearing and what he learned from other witnesses, Bateh did not disclosed any undisclosed or hidden favorable information before, during or after the 2001 evidentiary hearing on Thomas’s 3.851 motion. Instead, he presented Judge Day’s testimony that no *Brady* material had been withheld and relied upon that testimony as accurate.

represent Thomas in a federal court challenge to his conviction and sentence. On March 24, 2003, Bonner filed a motion in federal district court asking to be appointed as Thomas CJA counsel. On April 2, 2003, Bonner's motion was granted. Thereafter, a federal habeas petition was filed on Thomas's behalf. Proceedings on that habeas petition are ongoing, although there have been a number of changes in counsel over time.

On July 13, 2015, the federal district court appointed Martin McClain to replace Ann Finnell and Patrick McGuinness as Thomas's CJA counsel as to the merits of his habeas petition.

After his appointment, McClain discovered that Thomas was without state court registry counsel. As a result, in the fall of 2015, McClain asked the federal district court to authorize him to represent Thomas in state court. The request was denied.³⁴

On June 9, 2016, McClain was in Jacksonville on another case. Because he had been provided no investigative services, he had to do any investigation himself.

³⁴McClain re-raised the issue in the fall of 2016. At that time, the federal district court ordered the State to take the steps necessary to have state court registry counsel appointed. The State filed a motion in circuit court asking that Thomas be provided registry counsel. As a result, the law firm of Brunvand Wise, P.A. was appointed in August of 2016 to serve as Thomas's state court registry counsel.

He was in the process of trying to locate witnesses that he could interview. So he took advantage of his trip to Jacksonville to stop by JSO to get criminal histories on witnesses in Thomas's case. He was able to get a printout of Dixon's criminal history. When he was able to sit down and go through it, McClain saw the entries showing state court charges for possession of controlled substances arising from the July 17, 1993 arrest. The printout said the charge was dropped on August 9, 1993. There was also an entry showing state court charges for a rape arising from the July 17, 1993 arrest which was dropped on January 26, 1994. Puzzled, McClain accessed the online records of the Duval County Clerk of Court. It showed that a state court information was formally filed on August 9, 1993 and charged Dixon with conspiracy to traffic in controlled substances. It also showed that the charge was dropped that same day after a finding of probable cause was entered and counsel was appointed.

The online docket also showed another information was formally filed on January 26, 1994 and charged Dixon with an attempted sexual battery. But, this charge was also dropped that same day after a finding of probable cause was entered and counsel was appointed.

The information from JSO and from the clerk's online docket did not match Dixon's testimony in his deposition or at trial. McClain then looked at Dixon's

testimony even more closely. The reference to his good friend, Cason, conflicted with Cason's deposition testimony that he and Dixon were not that friends. So even though Cason had not testified at the trial, McClain started looking for more information on him.

McClain saw that in 2000, Cason filed a 3.850 motion on which an evidentiary hearing was held. Because when Cason lost he appealed, transcripts of the hearing had been prepared and filed with the First District Court of Appeal. McClain then obtained those transcripts. The hearing had concerned Cason's claim of ineffective assistance as his attorney failure to insure Cason received concurrent sentences. The transcripts included the testimony of Cason's attorney, Tassone, as well as Bateh and Cason. The transcript also reflected that the evidentiary hearing was conducted before Judge Lance Day, who did not to disqualify from the proceedings.

The testimony showed that in late July of 1993, Tassone advised Cason that he was facing a death sentence if he went to trial for first degree murder and that he needed to authorize Tassone to negotiate with Bateh in order to work something out starting by the beginning of the next week. Bateh in his testimony indicated that when Tassone approached him in early August of 1993, he did not want to agree to a sentence of less than death for Cason because his crime was so heinous. But when Tassone said Cason would assist in Thomas's case, Bateh agreed to drop his pursuit

of a death sentence. Bateh also testified that he had never intended to call Cason as a witness at Thomas's trial because Cason's crime was too heinous for him to be a credible witness. Obviously, Bateh had meant all along for Cason to assist the State as an agent in the jail recruiting witnesses who Bateh could call to testify against Thomas.

This testimony sheds a whole new light on Dixon's testimony that he walked in on a conversation between Cason and Thomas. Dixon in his testimony said that Cason told Thomas it was okay to talk in front Dixon. But at the time of that conversation in late August, Thomas had invoked his Sixth Amendment right to counsel. The fact that Cason was a State agent who initiated the conversation and encouraged Thomas to keep talking without disclosing that he was a State agent violated Thomas's right to counsel. The testimony also revealed that in August of 1993 the State's case against Thomas was so weak that Bateh, against his own view of Cason's case, agreed to waive death. It also raises questions about the State's willingness to use jail inmates as State agents looking for evidence inside the jail that could be used at Thomas's trial.

The State did not ever provide Thomas or any of his attorneys with the information set out in the transcripts of Cason's evidentiary hearing.

On the basis of the information that McClain found concerning Dixon and

Cason, Thomas filed a 3.851 motion on June 8, 2017. The motion to vacate asserted that Thomas's rights under the Fifth, Sixth, Eighth and Fourteen Amendments had been violated by the State's conduct at trial and in post conviction proceedings. Thomas asserted that the State had presented false and/or misleading information at trial, in pre-trial depositions, and in court hearings which went uncorrected in violation of the line of cases that includes *Giglio v. United States*, 405 U.S. 150 (1972). Thomas also asserted that the State had withheld favorable information from Thomas and his counsel in violation of the line of cases that includes *Brady v. Maryland*, 373 U.S. 83 (1963). Thomas also asserted that the State had violated its obligation to come clean and disclosed *Giglio* and/or *Brady* obligations either at trial or during collateral proceedings. Thomas also argued that his Eighth Amendment rights under *Johnson v. Mississippi*, 486 U.S. 578 (1988), were violated when materially inaccurate information was heard by his capital jury. Under *Banks*, Thomas and his counsel had the right to presume that the State and the attorneys representing the State would comply with their constitutional obligations under *Giglio* and *Brady*, particularly given that the State presented testimony from Lance Day representing that no favorable information had been withheld from Thomas and/or his counsel.

In his 3.851 motion, Thomas also asserted that his motion was timely because

it was filed within one year of when McClain obtained Dixon's criminal history which led to his discovery of an anomaly in Dixon's criminal history that was inconsistent with Dixon deposition testimony and which was never at any time corrected by the State. Again, Thomas relied upon the US Supreme Court's holding in *Banks v. Dretke* that until the State comes clean and discloses its violation of a defendant's constitutional rights, the defendant is entitled to presume that the State has honored its obligations, particularly when the State's counsel has affirmatively vouched for itself on the record.

The State filed its response to the 3.851 motion on July 18, 2017. The State argued that the motion was untimely (PCR3 35). The State ignored and did not address *Banks v. Dretke*. The State ignored the fact that it had not complied with *Giglio* and/or *Brady*. The State ignored the fact that it had presented testimony from Judge Day vouching for its compliance with *Giglio* and *Brady*. Instead, the State argued that the withheld information could have been discovered sooner by Thomas's counsel. **The premise of this argument is that Thomas and his counsel should not have been taken in by the State's representations that it had complied with *Giglio* and *Brady*. The State's position is that Thomas and his counsel, contrary to the holding in *Banks v. Dretke*, were not entitled to presume that the prosecutors in his case were honorable and would honor their**

constitutional obligations under *Giglio* and *Brady*.

After conducting a case management hearing, the circuit court entered on December 11, 2017, summarily denying Thomas’s 3.851 motion. The order stated: “This Court finds merit in [the State’s] assertions and concludes that the instant Motion is procedurally barred.” (PCR3 134).

Upon receipt of this order, Thomas filed a notice of appealed.

STANDARD OF REVIEW

Where a 3.851 motion has been summarily denied, the factual allegation set forth in the motion must be accepted as true on appeal, while the circuit court ruling is reviewed de novo by this Court. *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

SUMMARY OF THE ARGUMENT

The circuit court erroneously failed to accept Thomas's factual allegations as true. The circuit court erroneously rejected Thomas's allegation that the State had not disclosed at any point in time prior to June 9, 2016 that it allowed false or misleading testimony or information to go uncorrected and that it had failed to disclose favorable information to Thomas and his counsel. The circuit court erroneously ignored the fact that the State had affirmatively claimed that it had complied with its constitutional obligations and had not withheld anything that it was required to disclose. The circuit court erroneously ignored *Banks v. Dretke* that held that in such circumstances as these, Thomas and his counsel were entitled to presume that the State had complied with *Giglio* and *Brady*, look elsewhere for viable constitutional issues to pursue in collateral proceedings. The circuit court erroneously accepted the State's contention that it bears no obligation to disclose *Giglio* or *Brady* violations that it committed, or its use of materially inaccurate information to obtain a death sentence in violation of the Eighth Amendment.

ARGUMENT

THE CIRCUIT COURT’S CONCLUSION THAT MR. THOMAS’S 3.851 MOTION WAS PROCEDURALLY BARRED BECAUSE 1) HE SHOULD NOT HAVE BELIEVED THE STATE WHEN IT ASSERTED THAT IT HAD NOT WITHHELD ANY FAVORABLE INFORMATION, 2) HE SHOULD HAVE EXERCISED GREATER DILIGENCE THAT IS REQUIRED OF TRIAL COUNSEL, 3) HE SHOULD HAVE ASSUMED THAT THE STATE KNOWINGLY PRESENTED FALSE OR MISLEADING EVIDENCE EVEN THOUGH HE HAD NO BASIS FOR SUCH AN ASSUMPTION, 4) HE SHOULD HAVE BEEN INVESTIGATING WITNESSES THAT THE STATE DID NOT CALL FOR NO PARTICULAR REASON, JUST AS A MATTER OF COURSE, AND 5) HE WRONGLY BELIEVED THAT THE STATE HAD ANY DUE PROCESS OBLIGATION TO DISCLOSE *GIGLIO* OR *BRADY* VIOLATIONS ONCE A CONVICTION AND DEATH SENTENCE WAS FINAL. WHEN PROPERLY EVALUATED THE *GIGLIO* AND/OR *BRADY* VIOLATIONS WARRANT 3.851 RELIEF.

A. Introduction.

Under Rule 3.851, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. *See* FLA. R. CRIM. P. 3.851(f)(5)(B); *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). This means that the facts alleged by Thomas must be accepted as true in determining whether the he is entitled to an opportunity to present evidence in support of his factual allegations. *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989). Factual allegations in support

of a claims for relief as well as on the issue of diligence must be accepted as true. An evidentiary hearing is required if the claims involve “disputed issues of fact.” *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). As to a successive postconviction motion, allegations of previous unavailability of new the facts, as well as of movant’s diligence, are to be accepted as true and require evidentiary development so long as not conclusively refuted by the record. *Card v. State*, 652 So. 2d 344, 346 (Fla. 1995).

Thomas’s factual allegations on which his *Giglio*, *Brady* and Eighth Amendment claims were premised as well as the factual allegations as to his diligence, must be taken as true. When those allegations are taken as true, it is apparent that the circuit court erred in denying these claims without conducting an evidentiary hearing.

B. Due Diligence.

Thomas alleged that he was diligent because within one year of his counsel obtaining Dixon’s criminal history which was his first clue that the State had failed to meet its obligations under *Giglio*, *Brady* and the Eighth Amendment, he filed his 3.851. Prior to June 9, 2016, Thomas maintained that he was entitled to rely on the State’s affirmative representations that it had honored its constitutional obligations under *Giglio*, *Brady*, and the Eighth Amendment. For this, Thomas relied upon

Banks v. Dretke. There, US Supreme Court wrote: “When police or prosecutors conceal significant exculpatory or impeaching material in the State’s possession, it is ordinarily incumbent on the State to set the record straight.” *Banks v. Dretke*, 540 U.S. at 675-76. The Supreme Court explained that a rule “declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.”³⁵ *Id.* at 696. “Prosecutors’ dishonest conduct or unwarranted concealment should attract no judicial approbation.” *Id.* The Supreme Court explained: “**Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.**” *Id.* at 695 (emphasis added).

Without mentioning *Banks* or acknowledging its holding in any way, the State convinced the circuit court that the opposite was true, that Thomas and his counsel had been required to scavenge for hints of undisclosed *Brady* material even though the State maintain all *Giglio/Brady* material had been disclosed. According to the State, Thomas was required to scavenge for signs that the State failed to honor its

³⁵In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Supreme Court explained: “To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.”

obligation under *Giglio* and *Brady* even though Bateh presented testimony from Judge Day, one of the trial prosecutors, that he was not aware of any favorable information having been withheld from Thomas.

Under *Banks v. Dretke*, Thomas and his counsel were entitled to accept the State at its word, it had met its obligations under *Giglio and Brady*. Taking the word of prosecutors who are officers of the court that neither *Giglio* nor *Brady* were violated does not mean that Thomas and his counsel were not diligent.

This Court has acknowledged that collateral counsel for capital defendants effectively manage the resources available to them. For example in *Johnson v. State*, 44 So. 3d at 72 n.18, Johnson and his counsel were found to have exercised due diligence even though the piece of paper from the State's files that when deciphered revealed a *Giglio* violation had been in Johnson's possession for nine years before its meaning was discovered. In late 2006, Johnson's collateral counsel consulted another attorney who was able to decipher the meaning of the handwritten document first provided in 1997 in response to a public records request. In April of 2007, Johnson filed his Rule 3.851 motion raising his *Giglio* claim based on the handwritten document. The fact that the handwritten notation had been provided to Johnson in 1997, this Court found that Johnson had exercise due diligent. This Court explained:

To the extent the trial court's ruling is based on written materials-Pickard's handwritten notes-the ruling is subject to de novo review, for this Court is just as capable as the trial court of assessing those materials. Our review of Pickard's notes relating to James Smith shows that the dates on those notes give no hint as to their purpose, for the dates do not coincide with trial or deposition dates. Also, there are no initials on several pages of those notes, and no indication whatsoever who wrote them or for what purpose. In fact, the notes appear to have been written by several persons. Key passages are cryptic. The fact that defense counsel had to send the notes to counsel in another part of the state to be deciphered attests to the notes' inscrutability and to defense counsel's diligence. Based on our review of Pickard's notes relating to James Smith, we conclude that defense counsel exercised due diligence in raising the present *Giglio* claim.

Johnson v. State, 44 So. 3d at 72, n.18.

It is clear from this Court's analysis in *Johnson* that the issue is not whether a document was or was not a public record, or even was or was not in collateral counsel's possession, but instead did collateral counsel act reasonably in discovering the evidence, its significance to the case, and timely present any claims arising from the document once its significance was understood.

This Court in *Waterhouse v. State*, 82 So. 3d 84 (Fla. 2012), also addressed what constitutes due diligence under Rule 3.851(d)(2). In that case, a witness's name, Sotolongo, appeared in a police report prepared in 1980. However, the police report did not accurately reflect the information that Sotolongo had imparted to the police officer who wrote the report. In 2012, Waterhouse's collateral counsel obtained an

affidavit from Sotolongo that set forth what he claimed he had the police officer. Trial counsel also signed an affidavit saying had he known what Sotolongo had to say, he would have called him to testify at Waterhouse's trial. Thus in Waterhouse, there was no question that as early as 1980 the defense had Sotolongo's name. In affirming a finding that Waterhouse exercised due diligence, this Court wrote:

The State contends on cross-appeal that the fact that Leglio Sotolongo's name was mentioned in the police report placed collateral counsel on notice that Sotolongo was a potential witness-even though the police report stated that Sotolongo did not know when Waterhouse or the victim left the ABC lounge. It is undisputed that Waterhouse's trial counsel, and all subsequent counsel, possessed the January 7, 1980, .. report prepared by Detective Hitchcox which mentioned Sotolongo. The State contends that Waterhouse has failed to carry his burden to demonstrate why, after more than thirty years, neither he nor his counsel could have not easily discovered the witness now being presented.

In *Mungin*, we expressed concern with the fact that defense counsel may have relied upon a false report. See *id.*, at 737. In *Mungin*, we did not state that defense counsel, or collateral counsel, upon receiving a police report, must presume that the report is false and thereafter independently verify every detail of the report or every statement made by a witness to the police. **To place the onus of verifying every aspect of an unambiguous police report on defense or collateral counsel would not only create a substantial amount of work in a capital case, but also could be viewed as downplaying the seriousness of allegedly false police reports.** Moreover, to hold that collateral counsel must investigate every aspect of a police report-even where it appears that such investigation would be fruitless- is inconsistent with a prior case where **we held, in the context of an alleged *Brady***

violation, that due diligence by trial counsel was satisfied even though the witness who provided the impeaching evidence had been named in a police document that was provided to defense counsel.

In a similar manner, in *State v. Huggins*, 788 So.2d 238, 243 (Fla. 2001), during discovery, defense counsel was provided with hundreds of "lead sheets" from the police, including one regarding a potential witness named Ausley. However, the information provided in that lead sheet was inaccurate and did not provide defense counsel with any indication that Ausley had information that was useful to the defense. *See id.* For this reason, defense counsel did not interview Ausley. *See id.* Prior to trial, Ausley gave a second statement to the prosecution which accurately depicted the information that he possessed. *See id.* at 241-42. The prosecutor concluded that this information "did not support what he believed the defense's theory of the case would be" and did not reveal this information to the defense. *Id.* at 242. After the defendant was convicted of murder, Ausley approached defense counsel and informed them of the exculpatory information that he possessed. *See id.* at 242.

In evaluating the *Brady* claim in that case, the trial court found that the defendant could not have possessed the suppressed information with the use of due diligence. *See id.* at 243. On appeal, this Court affirmed these findings, holding that there was competent, substantial evidence to support the lower tribunal's determination that the State had suppressed favorable evidence which was unavailable to the defendant. *See id.* We reached this conclusion despite the State's assertion that the information was not suppressed because the State had "disclosed lead sheet 302 and if defense counsel had interviewed Ausley prior to the trial, they would have learned the substance of Ausley's tape-recorded statement." *Id.* Relevant to this case, in *Huggins*, this Court noted that defense counsel only became aware of Ausley's evidence when Ausley contacted the defense. *See id.* at 242. Thus, defense counsel in *Huggins* was not required to investigate hundreds of leads provided by the police-including leads which "did not reveal that further investigation would produce useful results"-in order to satisfy due diligence. *Id.* at

243.

The issue presented by the State's cross-appeal is whether the analysis applicable to defense counsel in Huggins should apply to collateral counsel. Essentially, **we must determine whether collateral counsel should be held to a different, higher standard of investigation than original trial counsel.** Having considered the assertions of the State and Waterhouse, we conclude that collateral counsel should not be held to a higher standard. While pretrial resources are unquestionably limited, **collateral counsel's resources are also not unlimited.** Thus, requiring collateral counsel to verify every detail and contact every witness in a police report—even where the police report indicates that the witness has no useful information—would place an equally onerous burden on collateral counsel, with little chance of discovering helpful or useful information.

Waterhouse, 82 So.3d at 103-04 (emphasis added).³⁶

Under *Johnson* and *Waterhouse*, whether a document was a public record or not, or even whether collateral counsel had in his possession some hidden clue to favorable information is not dispositive of collateral counsel's due diligence. Under *Johnson* and *Waterhouse*, the issue of collateral counsel's diligence is concerned with the reasonableness of his or her efforts in investigating and presenting claims for relief.

The US Supreme Court held in *Banks v. Dretke* that it is reasonable for

³⁶It is worth noting that trial counsel has not been ineffective when he or she accepts the State's representation that it has honored its *Brady* obligation. Under *Waterhouse*, a heavier burden cannot be imposed on collateral counsel than is imposed on trial counsel.

collateral counsel to accept representations made by the State that it had met its *Giglio* and *Brady* obligations. Indeed, it is incumbent upon the State to come clean. In deciding how to allocate his or her resources, collateral counsel is not required to presume that the State's has falsely represented that it complied with *Giglio* and *Brady*.

The State did not disclose that Dixon's testimony was false or misleading and/or that Cason's deal with the State was to provide assistance in Thomas's case by serving as a State's agent in the jail and looking for evidence that will assist the State in its prosecution of Thomas. These matters were not disclosed at trial or in collateral proceedings. Thomas and his counsel had no reason to believe that Dixon's testimony was false or misleading or that Cason had a deal with the State, not to testify, but help the prosecution get evidence to use against Thomas. Accordingly, until June 9, 2016, when Thomas's counsel stumbled upon information calling the accuracy of Dixon's testimony into question, Thomas had no reason to doubt that the State had honored its *Giglio* and *Brady* obligations.

Even if this Court were to say that Thomas should have discovered the uncorrected misrepresentations in Dixon's testimony, *Waterhouse* surely means that due diligence did not demand that Thomas investigate a witness like Cason, who was not called at to testify at trial. The existence of a transcript of an evidentiary

hearing on Cason's 3.850 motion was known to the State. Even more significantly, the content of the testimony appearing in the transcript was known to the State, particularly Bateh who represented the State at the 2001 evidentiary hearing on Thomas's 3.851 motion, and Judge Day who Bateh called as a witness. Thomas had no reason to know that Cason had filed a 3.850 motion. Thomas had no reason to believe that the 3.850 motion proceedings would be relevant to him and his case. Thomas had no reason to know that the testimony given at Cason's evidentiary hearing concerned Cason's agreement to assist the State in its prosecution of Thomas.

The fact that the State knew all about the evidence at Cason's evidentiary hearing, while Thomas knew nothing and had no reason to know, must mean under *Banks v. Dretke*, it was the State's obligation to disclose and not Thomas's burden to discover.³⁷ The significance of the evidence at Cason's hearing for Thomas is so

³⁷In its response to the 3.851 motion, the State asserted that "Mr. Bateh's testimony [at Cason's evidentiary hearing] was a matter of public record and available for examination after the denial of Cason's appeal on March 26, 2002, which occurred over fifteen years ago." (PCR3 39). The State argued that "the latest that [Thomas] should have discovered this information [in Bateh's testimony] was at the conclusion of Cason's appeal in 2002." This argument that the circuit court adopted flies in the face of *Banks v. Dretke*, *Johnson v. State*, and *Waterhouse v. State*. Thomas had no reason to know of the Cason evidentiary hearing, let alone that the testimony given was relevant.

apparent that the State's knowledge of must be seen as imposing an even greater obligation on the State to disclose it to Thomas.

Under *Banks v. Dretke*, *Johnson v. State* and *Waterhouse v. State*, the circuit court erred in ruling that Thomas failed to exercise due diligence and that his 3.851 motion was untimely and procedurally barred.

C. *Giglio* Violations.

As with diligence, Thomas's factual allegations set forth in his 3.851 motion regarding the *Giglio* violations must be accepted as true in this appeal.

As to the law, the *Giglio* line of cases can be traced back to *Mooney v. Holohan*, 294 U.S. 103 (1935). There, the Supreme Court held:

[I]f a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured[,] [s]uch a contrivance by a State to procure the conviction and imprisonment of a defendant is ... inconsistent with the rudimentary demands of justice....

Id. at 112. In *Alcorta v. Texas*, 355 U.S. 28, 31 (1957), the Court found due process violated where a prosecutor *deliberately* "gave the jury the false impression that [witness's] relationship with [defendant's] wife was nothing more than casual friendship."³⁸ The Supreme Court has held that due process is violated "when the

³⁸ Obfuscation can qualify as a *Giglio* violation if the prosecutor knows that

State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Napue v. Illinois*, 360 U.S. 264, 268 (1959). In *United States v. Agurs*, 427 U.S. 97, 103 (1976), the Supreme Court said that since *Mooney*, it “has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair.”³⁹ If a State’s witness misrepresents a material fact, the prosecutor is obligated to stand up and correct the witness’ misstatement. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In *Giglio v. United States*, 405 U.S. at 153, the Supreme Court quoting *Napue* wrote: “we said, ‘(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.’ *Id.*, at 269.”

In *Gray v. Netherland*, 518 U.S. 152, 165 (1996), the Supreme Court explained: “*Mooney* forbade the prosecution to engage in ‘a deliberate deception of court and jury.’” Accordingly, *Gray* acknowledged that intentionally misleading the defense can constitute a due process violation as well. The State is not entitled to

the jury and/or the defense is being misled and chooses not to reveal the truth. *Johnson v. State*, 44 So. 3d 41 (Fla. 2010).

³⁹In *Wilde v. Wyoming*, 362 U.S. 607 (1960), the validity of a guilty plea was called into question in part because of the allegation that “the prosecutor willfully suppressed the testimony of two eyewitnesses to the alleged crime which would have exonerated the petitioner.”

obtain an unfair advantage by knowingly sandbagging the defense any more than it may knowingly mislead a jury or allow a jury to hear a jury to hear false or misleading testimony that it knows to be false and that it allows to stand uncorrected.

This Court has held that the State “may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts.” *Garcia v. State*, 622 So.2d 1325, 1331 (Fla. 1993). *See Alcorta v. Texas*, 355 U.S. at 31 (“It cannot seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship.”) When a prosecutor breaches his duty under due process to refrain from deliberate deception, this type of due process error warrants relief unless it is determined to be harmless beyond a reasonable doubt. *Guzman v. Sec’y Dep’t of Corrs.*, 663 F.3d 1336 (11th Cir. 2011).

Here, the State did not correct Dixon’s testimony that he was arrested on federal charges on July 17, 1993, and not on state charges. The State did not correct Dixon’s testimony that he had not faced any state charges following his July 17, 1993 arrest until he testified at Mr. Thomas’s trial on March 22, 1994. The State did not correct his testimony regarding his claim that when he pled guilty in federal court, it was not pursuant to a plea agreement, but because he was guilty.

The State also did not correct Dixon's testimony in his deposition which was materially inaccurate and misleading to Mr. Thomas's counsel.

The State did not correct Cason's testimony in his deposition when he indicated that he did not know Dixon that well and that they weren't good friends. Cason also did not acknowledge in his testimony that his plea agreement was to assist the State in its prosecution of Mr. Thomas.

Bateh deliberately misled the judge and the defense when he advised them that Cason was material witness who the State would be calling to testify and Thomas's trial. Bateh has testified under oath that he never intended to call Cason as a witness due to egregious nature of Cason's crime which would destroy Cason's credibility. This deception was purposeful. It kept the defense from knowing that Cason was working as a State agent inside the jail.

Had the State corrected Dixon's testimony at trial and in his deposition, his credibility would have been damaged. The jury would have learned that there were state charges and that he was not telling the truth when he claimed that the State was not in position to give him any benefit.

But the damage to Dixon's credibility and to the State's case would have increased exponentially had the false and misleading testimony Cason gave at his deposition and the false statements made by Bateh to the judge and to the defense

been corrected. Cason and the State misled the judge and the defense regarding the State's agreement with Cason to assist the State in its prosecution of Thomas. Bateh deliberately withheld the fact that he had no intention to call Cason as a witness at Thomas's trial, but intend to use Cason as a State agent inside the jail.

In evaluating whether the *Giglio* violation was harmless beyond a reasonable doubt, consideration must be given how the proceedings would have been impacted had the *Giglio* violation not occurred. Here, had the truth not been hidden by false and misleading testimony from Cason and statements by Bateh, a violation of Thomas's Sixth Amendment rights would have been revealed. The testimony given by Dixon would have been rendered inadmissible under Sixth Amendment law.

After a criminal defendant is indicted, his Sixth Amendment right to the assistance of counsel attaches. An indicted defendant is entitled to have counsel present when questioned by agents of the State. *Massiah v. United States*, 377 U.S. 201, 206 (1964) ("We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."). In *United States v. Henry*, 447 U.S. 264 (1980), the Sixth Amendment was found violated when after Henry's indictment he was jailed and the police got another inmate in the jail to question

Henry without his counsel present. The State used an inmate in the jail as State agent for the purpose of obtaining evidence that would assist in Henry's prosecution. The US Supreme Court found that the police had violated Henry's Sixth Amendment right to counsel:

An accused speaking to a known Government agent is typically aware that his statements may be used against him. The adversary positions at that stage are well established; the parties are then "arms' length" adversaries.

When the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent, the same cannot be said. Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents. Indeed, the *Massiah* Court noted that if the Sixth Amendment "is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." The Court pointedly observed that *Massiah* was more seriously imposed upon because he did not know that his codefendant was a Government agent.

United States v. Henry, 447 U.S. at 273. The Supreme Court held:

By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel.

Id. at 274.

Here, the testimony at the evidentiary hearing on Cason's 3.850 motion in 2000 reveals that a deal was struck with Cason when he offered his assistance to the State in its prosecution of Thomas. Bateh testified that when making the deal for

Cason's assistance, he knew that he did not want Cason as a testifying witness. Bateh indicated that Cason would have no credibility in light of the egregious murder that he committed. Thus, Cason's assistance was for help getting evidence, not his own testimony, that would help Bateh prosecute Thomas.

Dixon's testimony at Thomas's trial when compared to the 3.850 testimony of Cason's attorney, Tassone, and the prosecutor, Bateh, regarding when the deal was made, shows that the deal was in place when Dixon claimed he walked in on a conversation between Cason and Thomas. Dixon further testified that Cason had to encourage Thomas to talk in front of Dixon because otherwise he did not want to. Clearly, Cason as a agent on behalf of the State was deliberately inducing Thomas to make incriminating statements in front of Cason's good friend, Dixon, so that Dixon would be able to be the testifying witness. Cason was acting as a state agent who was assisting in the prosecution of Thomas by obtaining incriminating evidence from Thomas in violation of his Sixth Amendment right to the assistance of counsel.

The introduction of Dixon's testimony cannot be found harmless beyond a reasonable doubt. First, the fact that Bateh reluctantly made the deal with Cason reveals Bateh's need for Cason's assistance. Schraud was not a very credible witness. The testimony given by Christina and Stewart regarding patently absurd statements made by Thomas were inconsistent with Schraud's testimony.

Indeed, Bateh's decision to use a jail inmate as a State agent is a testament to the weakness of his case in August of 1993 when the deal was made.

But, the taint from Bateh's use of a jail inmate as a State agent casts a pall over every other witness, as well as the credibility of law enforcement's investigation and the prosecutor's themselves. *See Kyles v. Whitley*, 514 U.S. 419, 445-46 (1995) ("Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well.").

Consideration must also be given to whether the *Giglio* error created an Eighth Amendment violation. In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the US Supreme Court discussed the Eighth Amendment's requirement that death sentences be reliable and free from arbitrary factors:

The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special **“need for reliability in the determination that death is the appropriate punishment”** in any capital case. *See Gardner v. Florida*, 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment)(quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976)). Although we have acknowledged that “there can be ‘no perfect procedure for deciding in which cases governmental authority should be used to impose death,’” we have also made it clear that such decisions cannot be predicated on mere “caprice” or on **“factors that**

are constitutionally impermissible or totally irrelevant to the sentencing process.” *Zant v. Stephens*, 462 U.S. 862, 884–885, 887, n. 24, 103 S.Ct. 2733, 2747, 2748, n. 24, 77 L.Ed.2d 235 (1983).

Johnson v. Mississippi, 486 U.S. at 584-85 (emphasis added).⁴⁰

In *Johnson v. Mississippi*, Eighth Amendment error occurred when the jury in a capital case heard materially inaccurate evidence. In collateral proceedings, it was discovered that the evidence was materially inaccurate. That discovery required the death sentence to be vacated because the materially inaccurate evidence may have contributed to a juror’s decision to vote in favor of a death sentence. In *Johnson v. Mississippi*, it was held that collateral relief was required unless the error could be determined to be harmless beyond a reasonable doubt.

D. *Brady* Violations.

As with due diligence and the *Giglio* claim, this Court must accept Thomas’s factual allegations regarding his *Brady* claims as true as well.

⁴⁰In *Johnson v. Mississippi*, the US Supreme Court unanimously vacated a death sentence imposed by a unanimous jury because a prior conviction of the defendant that had been introduced into evidence to prove an aggravating circumstance, was subsequently vacated and found to be invalid. The Supreme Court found that the death sentence violated the Eighth Amendment because “the jury was allowed to consider evidence that has been revealed to be materially inaccurate.” *Johnson v. Mississippi*, 486 U.S. at 590. Thus, new evidence not available at the time of trial carries Eighth Amendment implications when it undercuts the reliability of a decision to impose a death sentence.

A second line of cases traceable to *Mooney v. Holohan* is set forth in *Brady v. Maryland*. There, the Supreme Court held: “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. Prosecutors have an “affirmative duty to disclose evidence favorable to a defendant.” *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). “Impeachment evidence, ... as well as exculpatory evidence, falls within the *Brady* rule.” *United States v. Bagley*, 473 U.S. 667, 676 (1985). As a result, “evidence that could be useful in impeaching prosecution witnesses must be disclosed under *Brady*.” *Smith v. Sec’y Dep’t of Corrs.*, 572 F.3d 1327, 1343 (11th Cir. 2009). This includes reasons that the State knows a witness has “to ingratiate himself with the police.” *Kyles v. Whitley*, 514 U.S. 419, 442 n.13. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959)(“The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend”).

In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court held expressly adopted the *Strickland* prejudice prong standard, *i.e.* “reasonable probability of a different outcome”, as the standard to be used when conducting the

materiality analysis of undisclosed favorable information in *Brady* cases. In *Kyles v. Whitley*, the Supreme Court held that the proper analysis of the materiality prong of *Brady* as explained in *United States v. Bagley*, 473 U.S. 667 (1985), was not to be conducted item by item, but collectively. *Kyles v. Whitley*, 514 U.S. at 436 (“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.”).

The materiality of evidence not presented to the jury must be considered “collectively, not item-by-item,” *Kyles*, 514 U.S. at 436; *Young v. State*, 739 So.2d 553, 559 (Fla. 1999). This cumulative evaluation of the undisclosed favorable information and evidence must include *Brady* material that was presented in a previously filed Rule 3.851 motion, despite it having been found in the prior proceeding insufficient without more to undermine confidence in the outcome. As explained by this Court in *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999) (“This cumulative analysis must be conducted so that the trial court has a ‘total picture’ of the case”), the cumulative analysis must be conducted when additional *Brady* material surfaces.

Here, the State did not disclose the existence of Dixon’s state charges. Not only did the undisclosed information impeach Dixon’s testimony that there were no state charges, it also revealed that he had reason to curry favor with the State under

Davis v. Alaska, 415 U.S. 308 (1974). Additionally, Dixon testified that Cason was his really good friend. The undisclosed information that Cason would avoid a death sentence by helping the State gather evidence against Thomas shows a previously unknown reason for Dixon to testify that Thomas confessed. His testimony helped Cason.

The wealth of favorable information revealed during the 2000 evidentiary hearing on Cason's 3.850 motion was not disclosed by the State before, during or after Thomas's trial. That wealth of favorable information was not disclosed in collateral proceedings. It only surface because Thomas's federal CJA counsel in June of 2016 happened upon it when he was following up on previously unknown information concerning Dixon.

Bateh's testimony in 2000 regarding his view of the egregious nature of Cason's crime was extremely favorable information given Bateh's commitment to seek a death sentence for Cason for such an egregious homicide. His reluctance to waive death shows the value of what Cason offered, assistance in the Thomas prosecution. It shows that the State's case against Thomas in early August of 1993 was not strong at all.⁴¹ Bateh wanted additional evidence to bolster his weak case.

⁴¹Thomas's trial counsel really hammered the weakness of the testimony from Schraud, Christina, and Stewart, which was all the State had before recruiting

Bateh's testimony that he never intended to call Cason as witness because he did not believe he would be credible in light of the homicide that Cason had committed would have been extremely helpful. It could be used to argue that Cason knew he needed to get someone else to testify against Thomas in order to ensure that he, Cason, avoided a death sentence. Who better for Cason to get than his best friend in the jail, Dixon. As a result, Dixon's testimony that in late August after Cason's deal was in place and Cason was working for the State, he happened to go to Cason's cell while Cason was talking with Thomas, and Cason got Thomas to keep talking in front of Dixon. The undisclosed evidence would have provided the defense with a basis to argue that the testimony was completely manufactured by Cason and Dixon, or alternatively, that the chance encountered was a set up by Cason and Dixon.

Further, Bateh's testimony that he never intended to call Cason as a witness, which meant his cooperation had to be in the form of a State agent set loose inside the jail trying to get evidence in violation of Thomas's Sixth Amendment right to counsel, reveals Bateh's willingness to violate constitutional guarantees in order to get a conviction and a death sentence. Had the information been disclosed, Dixon's

jailhouse informants. Bateh's 2000 testimony proves the validity of trial counsel's argument.

testimony would have been ruled inadmissible.

The taint extends further than just Dixon's testimony. Bateh's willingness to use Cason as a State agent inside the jail serves to impeach the entirety of the State's case. What other improper means did Bateh use to get the evidence that he needed? *See Kyles v. Whitley*, 514 U.S. 419, 445-46 (1995) ("Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well.").

Also important was Cason's testimony (which was undisputed) that he met numerous times with Bateh in Bateh's office without Cason's counsel present before his guilty plea was entered on September 23, 1993. Cason testified that he and Bateh discussed Thomas's case. He told Judge Day who was representing that Day had participated in some of the discussion, although Day excused himself from other parts of the discussion. These meetings and the conversations about Thomas's case gave Bateh the means and the ability to use Cason as a mouthpiece inside the jail talking to Dixon and other potential jailhouse informants. This provided not just a means of recruiting witnesses, but also conveying what elements their proffered testimony needed to contain.

Indeed, the defense would have been able to use from the information revealed

by the testimony at Cason's evidentiary hearing to impeach every aspect of the State's case and every witness called by the State. The State's case would be discredited by Bateh's willingness to cut corners and Judge Day's countenance of it as reflected by his willingness to preside at an evidentiary hearing in which his recusal was required by Canon 3(E)(1) of the Code of Judicial Conduct.

All of the undisclosed favorable information must be evaluated cumulatively. And when the *Brady* violations that were alleged in the motion are considered cumulatively, it is apparent that they cast a whole new light on the case. The undisclosed information would have entitled the jury to find reasonable doubt. *See Kyles v. Whitley*. Accordingly, the undisclosed information undermines confidence in the reliability of the outcome of Thomas's trial.

At a minimum, an evidentiary hearing is warranted on Thomas's *Brady* claims.

CONCLUSION

In light of the foregoing arguments, this Court must reverse the circuit court's ruling that Thomas's motion to vacate was untimely and procedurally barred.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Initial Brief has been furnished by email, to Jennifer A. Donahue, Assistant Attorney General, at her primary email address: jennifer.donahue@myfloridalegal.com on June 4, 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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