IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-88

LOWER COURT CASE NO. 91-16659 CFANO

TROY MERCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's fact findings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF THE CASE[1]

On November 14, 1991, Mr. Merck was indicted with the premeditated first-degree murder of James Newton (R. 17-8).

Mr. Merck's trial commenced on August 31, 1993, and he was found guilty on September 7, 1993 (R. 2010). The following week, Mr. Merck's jury recommended a sentence of death (R. 2054-5), and the trial court imposed a sentenced of death (R. 2129-35).

On direct appeal, this Court affirmed Mr. Merck's conviction, reversed his sentence of death and remanded for further proceedings. Merck v. State, 664 So. 2d 939 (Fla. 1995).

At Mr. Merck's re-sentencing, the jury recommended the death sentence and Mr. Merck was sentenced to death on September 12, 1997 (R2. 597; 762-74).

On direct appeal from the re-sentencing, this Court again reversed Mr. Merck's sentence of death and remanded for further sentencing proceedings. Merck v. State, 763 So. 2d 295 (Fla. 2000).

Mr. Merck's second re-sentencing proceeding commenced on

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[1]The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

"R. __" - record on direct appeal to this Court;
"T. __" - transcript of trial proceedings;
"PC-R. __" - record on appeal from the denial of Merck's initial postconviction motion;
"PC-R2. __" - record on appeal from the denial of Merck's successive motion for postconviction relief.

March 17, 2004. On March 19, 2004, the jury recommended a sentence of death, by a vote of 9-3 (R3. 251). On August 6, 2004, Mr. Merck was sentenced to death (R3. 310-5).

On direct appeal from the second re-sentencing, this Court affirmed Mr. Merck's sentence of death. Merck v. State, 975 So. 2d 1054 (Fla. 2007).

Mr. Merck filed a Rule 3.851 motion on September 2, 2009 (PC-R. 1-169), and a limited evidentiary hearing occurred on July 20-21, 2010. On August 27, 2010, the circuit court denied all relief (PC-R. 300-660).

Mr. Merck appealed to this Court. He simultaneously filed a petition for writ of habeas corpus. This Court denied all relief. Merck v. State, 124 So. 3d 785 (Fla. 2013).

Mr. Merck filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida on May 14, 2013. The petition was dismissed without prejudice on November 22, 2017.

On June 15, 2015, Mr. Merck, through his federally appointed CJA counsel, filed a successive Rule 3.851 motion in the circuit court (PC-R4. 6-37). At the State's behest, the circuit court struck the motion (PC-R4. 38-43; 44-6). Mr. Merck appealed (PC-R4. 47-8).

On January 8, 2016, this Court entered an order dismissing the appeal, which stated: "The Notice of Appeal is hereby

dismissed without prejudice for Linda McDermott to seek substitution of counsel in the circuit court pursuant to Suggs v. State, 152 So. 3d 471 (Fla. 2014)." See Merck v. State, Florida Supreme Court Case No. SC15-1439 (Jan. 8, 2016).

On January 25, 2016, Mr. Merck, through Ms. McDermott filed a Motion for Substitution of Counsel (PC-R4. 49-51). Simultaneously with his motion, Mr. Merck filed a successive Rule 3.851 motion, similar to the motion that had been struck (PC-R4. 55-76).

The State again filed a motion to strike Mr. Merck's successive Rule 3.851 motion (PC-R4. 77-9). On April 18, 2016, the circuit court granted the State's motion (PC-R4. 90-3). Mr. Merck timely filed a notice of appeal (PC-R4. 94-5).

While his appeal was pending, on January 6, 2017, Mr. Merck filed a successive Rule 3.851 motion relating to Hurst v. Florida, 136 S.Ct. 616 (2016) (PC-R4. 100-29).

On May 4, 2017, the circuit court granted Mr. Merck's motion, in part, and granted Hurst relief (PC-R4. 195-200).

That same day, this Court reversed the circuit court's order striking Mr. Merck's January 25, 2016, Rule 3.851 motion and remanded for further proceedings. Merck v. State, 216 So. 3d 1285 (Fla. 2017).

After a case management conference was held (*see* PC-R4. 361-71), the circuit court granted an evidentiary hearing on Mr.

Merck's newly discovered evidence claim (PC-R4. 267-70).

An evidentiary hearing was held on October 2, 2017. *See* PC-R4. 386-449). Thereafter, the circuit court denied all relief (PC-R4. 318-28). Mr. Merck timely filed a notice of appeal (PC-R4. 329-30).

This appeal follows.

STATEMENT OF THE FACTS

Merck's first capital trial occurred in November 1992, and concluded with a hung jury (R. 1386, 1465). At the first trial, Merck solely pursued a voluntary intoxication defense. The fact that the first trial resulted in a hung jury provided Merck an opportunity to hear and see the State's evidence. Thus, when new trial counsel was appointed and proceeded to a second jury trial in September, 1993, a mistaken identification defense was advanced in addition to an intoxication defense.

The testimony at trial revealed: On October 12, 1991, Merck and Thomas arrived at the City Lights nightclub in Clearwater Beach (T. 740, 820).

While at the bar, Thomas admitted that he provided alcohol to an underage Mr. Merck, though he down played Mr. Merck's level of intoxication. Indeed, Thomas testified that neither of them were drinking before they arrived at the bar (T. 737). Thomas testified that he and Merck arrived at the bar at approximately 10:30 p.m. and remained until closing at 2:00 a.m. (T. 740). Thomas was also asked about what he and Merck drank at the bar:

> Q: Okay. And what did you have to drink in the way of alcoholic beverages while you were there?
>
> A: Approximately six beers and two, three shots of liquor.
>
> Q: Did you notice if Troy Merck was drinking?
>
> A: Yes, sir.

Q: Do you recall what he was drinking?

A: He had approximately the same thing as I had, same amount.

Q: And as a result of, were you drinking like over that about four-hour period of time?

A: Yes, sir.

Q: And was Troy?

A: Yes, sir.

Q: And how did you feel from drinking that alcohol?

A: I was buzzed pretty good.

Q: Okay. What did you notice about Troy at the end of the night in terms of any affects from drinking?

A: Nothing noticeable.

Q: Did he have trouble walking?

A: No, sir.

Q: Standing?

A: No, sir.

Q: Talking?

A: No, sir.

Q: I mean, did he have any trouble with his speech?

A: No, sir.

Q: Slurring his words or, and so forth?

A: No, sir.

Q: When you spoke to him, did he reply back with appropriate responses?

A: Yes, sir.

(T. 740-1).[2]

Merck's testimony about his level of intoxication conflicted with Thomas'. Merck recalled that he drank between 12-15 beers and 8-10 shots (T. 823-4). Merck testified:

> I had them in sets. I had two Jack Daniels. I had two Jim Beams, and only had one Buttery Nipple. And I had one drink. It's 151 rum. You can put – stick a match in it, will light the place up. Then you put your hand over the top of it and you drink it. And the fire goes out. It looks like you drink the fire, too. I had two of those.
>
> ***
>
> I had, I had two, four Tequilas.

(T. 824-5). Then, as Merck was about to leave the bar as it closed, he chugged a final beer (T. 825).

At closing time, the two proceeded to the parking lot. While individuals milled about, a confrontation occurred relating to Merck and Thomas leaning against Katherine Sullivan's car. The confrontation escalated with Mr. Newton being attacked with a knife. Merck and Thomas fled the scene in their car, a Mercury Bobcat.

Sullivan testified at trial that, after the bar closed, she was sitting in her car with her boyfriend, Glen Sharpenstein when they were joined by Mr. Newton and Don Ward (T. 418). She asked two individuals (Merck and Thomas), who had been leaning on her

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[2]Thomas' testimony conflicted with the testimony he gave at his deposition which was taken just a month before the second trial. During his deposition, Thomas testified that Merck was "fairly drunk" on the night of the attack (T. 788).

car to move away from the car and the pair responded by being very sarcastic (T. 421). Sullivan exited her car to speak to Mr. Newton and the shorter of the two individuals made a sarcastic remark to them (T. 422-23). The exchange escalated quickly with the instigator trying to fight Newton and calling him names (T. 422-23). And, even though Sullivan identified Merck as being the attacker, instigating a fight and calling Mr. Newton a "pussy", i.e., the shorter one, according to Thomas, he was in fact the individual bantering with Mr. Newton, calling him a "pussy" and confronting him (T. 744-5; 796).

Sullivan also told law enforcement that the attacker had gone to the other side of the Bobcat, found the doors locked and called for the keys (T. 424). He did so by pounding his open palm on the top of the Bobcat, above the window (T. 424-32). Indeed, a palm print was located in this area of the Bobcat – it belonged to Thomas, not Mr. Merck (T. 612; 621-2).

Also, Sullivan was the only witness who could provide any details as to what the attacker (and his friend) were wearing. The description was used in the BOLO alert sent to law enforcement. Critically, Sullivan described the attacker as wearing khaki pants and a light colored shirt with rolled up sleeves (T. 425). Sullivan also did not recall the attacker having any tattoos (T. 472-3).[3]

[3]Merck had a large tattoo on his forearm (T. 852-3).

Merck was wearing blue jeans and a button down shirt that was pink. According to Merck, Thomas was wearing khaki pants and a light blue button down shirt with the sleeves rolled up. Indeed, the video tape from law enforcement's search of the vehicle depicts a light blue shirt, with the sleeves rolled up and a pair of khaki pants. The pink shirt, which was also reflected by the video did not have sleeves that were rolled up.

And, while Sullivan identified Merck as being the attacker, she did so only after being provided with information that was impermissibly suggestive.[4]

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[4]At the first state court evidentiary hearing, Dr. John Brigham, a psychologist, testified as to factors that affect the accuracy of eyewitness memory. Dr. Brigham testified that eyewitness identifications were often inaccurate (PC-R. 800).

According to Brigham, several factors would be relevant to determining whether Sullivan's identification of Merck as the attacker was reliable. The factors included: that Sullivan had consumed alcohol within hours of the attack (PC-R. 803); that Mr. Newton and Sullivan were friends and there would have been high motivation for her to identify the attacker (PC-R. 803); that Merck's unique appearance due to the condition of his eyelids make him stand out in a lineup (PC-R. 804); that Sullivan's vision may have been obscured due to her placement in her vehicle (PC-R. 805); and that it would have been more difficult to make an accurate identification after Sullivan had assisted in the drawing of the suspect (PC-R. 809).

Most importantly, Dr. Brigham testified as to his concerns about the way the photo pack was conducted. Specifically, Sullivan was told to pick out the person who most closely fit her description (PC-R. 806). Such a comment "is in complete violation of accepted practices for administering a lineup where you're supposed to make it clear that the person may or may not be in here." (PC-R. 806).

Brigham continued:

> There is another factor which – one of the issues is if you're told or led to expect or you lead yourself to expect

In addition, Richard Holton, who witnessed the attack from his truck testified that the driver of the car, who was not the attacker, was taller and skinnier than the person who committed the stabbing (T. 725). Thomas was two inches taller than Merck, but he was also nearly 40 pounds heavier.

After the attack, Thomas and Merck left the scene in the Bobcat. According to Thomas, Merck showed Thomas the knife which was covered with blood (T. 751). Merck also bragged about the attack and threatened to harm Thomas' grandmother if he said anything (T. 751-2).

After a few minutes, Thomas' mind "shifted to evasion" (T. 753). He pulled the car over and started changing clothes and pulled the tag off the car; "[Merck] started changing his

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> that the person is in there, then you're likely to treat it like a multiple choice test rather than as a true-false test. Multiple choice says which person is it.
>
> In this case, as I understand from the testimony, she moved, after looking for about two minutes, which is a relatively long time, she moved five photos out and said "these aren't him," and then concentrated on the remaining one, which indicates that she was treating it as a multiple choice situation, which of these six is it? It wasn't those five. So she was left with one. I believe that a police officer told her to close her eyes and concentrate and try to remember. She then positively identified the remaining photograph.

(PC-R. 806-7).

In addition, if Sullivan was instructed to select the suspect, meaning the attacker, versus asking her if she could identify anyone from the scene, law enforcement also may have interfered with the accuracy of the identification (PC-R. 807-8). Thus, the photo-pack was conducted in a suggestive manner (PC-R. 822).

clothes", too (T. 753). They both ran when they saw a police car and hid in the bushes (T. 753). Then, they got a taxi and went to a bowling alley across from their motel (T. 754). At Merck's suggestion, they played a game of pool (T. 754).

When they got back to the motel, Merck told the story of the attack "over and over". (T. 754).

Merck, who had suffered alcoholic blackouts in the past, testified that he did not remember the attack (T. 829). Merck recalled that Thomas was saying things to Mr. Newton when he dropped a shot glass and he didn't remember anything after bending down to pick it up (T. 829). The next thing Merck remembered was Thomas standing by the car and telling Merck that he had to change his clothes (T. 829-30).

The next day, Merck asked Thomas where the car was; he did not recall what had happened (T. 841). Merck also presented witnesses who described how Thomas kept telling Merck what happened that night and that Merck was the attacker while Merck seemed not to believe that he (Merck) was the attacker. This was particularly so because Merck had not been the one who was acting aggressively toward Mr. Newton, that was Thomas (T. 796-8).

At the October 2, 2017, evidentiary hearing, Thomas explained that he did not testify at Merck's original trial (PC-R2. 392), but after the mistrial, the State told him that he was needed to testify and if he did not show up he'd "be given a

protective custody warrant and [he'd] be held in jail until he testified (PC-R2. 392-3). In fact, the State had obtained an order to hold Thomas as a material witness (PC-R2. 340; 393). It was because of the order that Thomas testified against Merck (PC-R2. 393).

In his preparation for trial, Thomas met with Assistant State Attorney Brian Daniels (PC-R2. 393-4). During a meeting before his trial testimony, Thomas was having difficulty remembering the amount of alcohol that he and Merck had consumed (PC-R2. 396). Daniels instructed Thomas to stick to what he had said at the deposition, which was given just weeks before the trial testimony and more than a year after the crime (PC-R2. 396; *see also* R. 1612). Thomas understood the instruction to mean: "if I couldn't remember, then I needed to refer to what I had already said because that would have been in an earlier time ..." (PC-R2. 396-7). However, Thomas and the State neither shared the instruction or the interpretation of the instruction with Merck, his trial counsel or the jury.

Thomas also testified that during his trial testimony he recalled: "that when Troy and I were in the car and I was trying to get him to change his clothes, that I was having a hard time getting him to respond." (PC-R2. 397-8). Thomas testified that: "I felt like he needed to change clothes, so I had a hard time getting him out of the car and into the – to change his clothes."

(PC-R2. 402). Thomas further stated that following the attack, Merck was "kind of slumped over" in his seat (PC-R2. 398). It stuck with Thomas that Merck was "highly intoxicated", and "very, very drunk" at the time of the crime (PC-R2. 398, 399, 414).

Thomas also testified that Merck was a lightweight when it came to drinking alcohol (PC-R2. 401). Merck was half Thomas' body weight and Thomas was drunk on the night of the crime (PC-R2. 401). And, contrary to his trial testimony, Thomas stated that Merck may have actually had more to drink than he (Thomas) had (PC-R2. 403). Thmas' trial testimony bothered him because he believed that Merck was "probably a little bit more intoxicated than what he" testified to at trial (PC-R2. 407, 414).

And, while Thomas testified at the hearing that he was not instructed to minimize Merck's level of intoxication, he did acknowledge that he may have made that statement to Merck's postconviction investigators (PC-R2. 414-5).

Thomas also clarified that when he played pool with Merck following the crime, it was several hours later (PC-R2. 415). And, even though Thomas was drunk, he was able to play pool (PC-R2. 415).

Thomas also described how he had requested that Daniels assist him with a violation of probation that occurred which resulted in an outstanding warrant for his arrest (PC-R2. 415-6). Daniels told Thomas that he would see what he could do (PC-R2.

417). Thomas was given an ROR and ultimately his probation was terminated (PC-R2. 416).

In postconviction, trial counsel, Frederic Zinober, has twice testified that his defense of Merck was two-fold: he attempted to raise an intoxication defense in addition to a defense of reasonable doubt (PC-R2. 421-1), Specifically as to the recently disclosed information from Thomas, Zinober testified:

> One, I think it would have supported Troy's testimony that he actually didn't remember what happened as opposed to – and I realize that was an unusual thing to try to sell to the jury that somebody that had actually done, you know, what the State was suggesting Troy had done would not remember. It is an unusual thing.
>
> So basically, if Neil's testimony was more along the line of Troy's, it would support Troy's position that he really didn't remember, that it wasn't a situation which I believed that the State was taking the position that Troy was full of baloney, so to speak, that he really couldn't remember and he just wasn't willing to say that he didn't remember.
>
> So, A, it would have, I believe supported Troy's testimony in my position that it was an alcoholic blackout.
>
> And the second thing is, obviously, to the extent that it was an alcoholic blackout, it was that level of intoxication, it would have gone further to support the secondary defense of voluntary intoxication.

(PC-R2. 424-5). Zinober also pointed out that Thomas' recent testimony was highly conflicting with the state of mind of Merck that Thomas had described at the time of trial (PC-R2. 425).

Zinober also testified that he would have wanted to know the amount of influence that the State had exerted on Thomas at the time of the trial (PC-R2. 428-9).

SUMMARY OF THE ARGUMENT

Upon encountering James Newton in the City Lights parking lot, Neil Thomas became aggressive and began to instigate a fight with him. Sullivan recalled that the individual who physically attacked Mr. Newton was the individual who had called him a "pussy" during the verbal altercation. That individual was Neil Thomas. And though Sullivan identified Troy Merck as the attacker, her identification was riddled with problems. Thus, Thomas became the State's critical witness. Thomas not only implicated Mr. Merck as the attacker, but also testified that Mr. Merck was not intoxicated at the time of the attack.

Decades after the crime, Thomas revealed that what Mr. Merck had testified to at trial concerning his state of mind was in fact true. Indeed, Mr. Merck specifically testified that he remembered at some point that Thomas tried to get him to change his clothes, but he had trouble doing so. He remembered slumping over. Thomas also revealed, that as Mr. Merck claimed at trial, Mr. Merck likely had more to drink than Thomas. In 2017, for the first time, Thomas testified that at the time of the crime Mr. Merck was "highly intoxicated" and he had trouble responding to Thomas' directives.

Mr. Merck also learned for the first time that Thomas was told that if he did not testify against Mr. Merck he would be

arrested. Further, when Thomas had reservations about whether he had been accurate about how much and what alcohol Mr. Merck had consumed the night of the crime, he was told to stick to what he had said just a few weeks before in his deposition. Thomas' deposition was given after the mistrial, over a year and nine months after the crime. Mr. Merck was neither notified about Thomas' misgivings nor the instructions he was given.

A few years after Mr. Merck's conviction and death sentence, Thomas contacted Assistant State Attorney Brian Daniels about a warrant for his arrest. Thomas wanted Daniels assistance. Daniels filed a motion requesting that Thomas be given an ROR and he was. Shortly thereafter the violation of probation was dismissed.

Mr. Merck submits that either the State violated due process in failing to fully disclose Thomas's statements about Mr. Merck's alcohol consumption and its effects and the State's instructions to Thomas, or if the State did not violate due process that Thomas' recent statements constitute newly discovered evidence which when considered cumulatively with all of the admissible evidence would probably produce an acquittal of first degree murder.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. MERCK'S CLAIM THAT RECENTLY DISCOVERED EVIDENCE DEMONSTRATES THAT HIS CAPITAL CONVICTION IS CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE EVIDENCE ESTABLISHES THAT MR. MERCK'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE EVIDENCE.

In order to prove a violation of Brady v. Maryland, 373 U.S. 83 (1963), a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. Kyles, 514 U.S. at 433-434; Hoffman v. State, 800 So. 2d 174 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001); Young v. State, 739 So. 2d 553 (Fla. 1999).

A proper materiality analysis under Brady also must contemplate the cumulative effect of all suppressed information. Further, the materiality inquiry is not a "sufficiency of the

evidence" test. Kyles, 514 U.S. at 434. The burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 120 S.Ct. 1495 (2000); Kyles, 514 U.S. at 434. Or in other words: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. Rather, the suppressed information must be evaluated in light of the effect on the prosecution's case as a whole and the "importance and specificity" of the witnesses' testimony. United States v. Scheer, 168 F.3d 445, 452-453 (11th Cir. 1999).

Furthermore, in Giglio v. United States, 405 U.S. 150, 153 (1972), the United States Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 437, 433 n.7 (1995). The prosecution has a duty to alert the defense when a State witness gives false testimony. Napue v. Illinois, 360 U.S. 264 (1959).

The State's conduct in Merck's case violated both Giglio and Brady. At Merck's capital trial, Thomas testified that Merck

exhibited no discernable signs of intoxication (T. 740-1, 789). Indeed, Thomas testified that Merck had animatedly replayed the crime over and over and suggested that the two play pool after Mr. Newton had been attacked (T. 751-4). This testimony was directly contrary to Merck's testimony about the quantity of alcohol he had ingested and its effect on him. *See* T. 823-4. However, Thomas' recent testimony supports Merck's trial testimony and is inconsistent with much of his trial testimony.

And, what was unknown to trial counsel was that Thomas, contrary to his trial testimony, had been threatened with arrest unless he testified against Merck. *Compare* T. 766 with PC-R2. 340, 392-3. In addition, Thomas was instructed to stick to his story as it related to Merck's level of intoxication (PC-R2. 396-7). Indeed, Thomas ultimately requested that Assistant State Attorney Daniels assist him with a pending violation of probation, including a warrant for Thomas' arrest, and Daniels did assist him (PC-R2. 415-6; 341-4).

The United States Supreme Court has held: "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**". Napue v. Illinois, 360 U.S. 264 (1959)(emphasis added). Likewise, in Davis v. Alaska, the United States Supreme Court

held "that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." 415 U.S. 308, 315 (1974).

Here, there is no doubt that Thomas only testified against Merck due to the State's threat of incarceration and the *quid pro quo* that was fulfilled when Thomas requested Daniels' assistance with his violation of probation.

Certainly the State was aware of Daniels' communications and instructions to Thomas. However, trial counsel was unaware that Thomas had been instructed to testify and stick to his story or fear incarceration. Merck submits that his right to due porcess was violated.

In Merck's case both of his defenses were premised largely on his intoxication at the time of the crime. Therefore, the undiscovered evidence is so critical that it cannot be considered harmless. The credibility battle between Merck and Thomas as to the true circumstances of the crime and Merck's intoxication were central issues at the trial. Thomas' recent testimony support Merck's evidence.

In denying the Giglio aspect of Merck's claim, the circuit court found that Merck had not established that Thomas testified falsely at Merck's capital trial (PC-R2. 324). However, the circuit court's analysis fails to recognize two important aspects of Mr. Merck's claim: first, Giglio applies if a prosecutor

presents false or *misleading* testimony. Here, Thomas' testified, and his testimony was credited by the circuit court, that he told Daniels that he "wasn't real sure on the amount of alcohol that we had drank. I remembered it was significant, but I couldn't remember how much. At that point, I was told to refer to the deposition, that's what it said, and that was a lot sooner. And then, at that point, that's what I needed to stick to, what I had said, you know." (PC-R2. 396). But of course, Thomas testified at his deposition just a month prior to his testimony at trial (PC-R2. 395).[5] Thus, Daniels knew that Thomas was having trouble remembering how much Merck drank on the night of the crime, but rather than reveal this to Merck's trial counsel, he told Thomas to stick to his deposition testimony. *See* PC-R2. 399 ([M]y instructions were: If you're not sure, stick with what you said."). Likewise, Thomas did not share his observation of Merck being "slumped over and it was hard to get him to respond" (PC-R2. 398), immediately following the crime, even though he recalled that when he was testifying (PC-R2. 398). Of course, his observation was not included in his deposition.

Second, Thomas testified that he had not been promised or

[5]Interestingly, Thomas did not "stick to" his deposition testimony when it came to describing what Merck was wearing on the night of the crime. At his deposition, he indicated that he did not recall what pants Merck was wearing, but when showed a pair of pants at trial, almost two years after the night of the crime, he suddenly remembered. *See* T. 785.

threatened by the State (T. 763). Yet, it is clear that he was threatened with imprisonment if he refused to appear at Merck's trial (PC-R2. 392-3). It is also clear that Daniels assisted Thomas with his violation of probation and outstanding warrant in 1997.[6] Though this was after Thomas' testimony, it is relavant to Thomas' expectation of benefits at the time he testified at Merck's trial.

The record supports the conclusion that a Giglio violation occurred – Daniels instructed Thomas to "stick to" his deposition testimony eventhough he knew that Thomas was having difficulty remembering how much Merck had drank. At a minimum this misled Merck and the jury. Had Thomas testified that he was having difficulty remembering, while his testimony could have been refreshed, trial counsel could have made a compelling case that Thomas' recollection was faulty or even an outright lie and that was why he was having trouble remembering what Merck had to drink on the night of the crime. Indeed, the amount that Merck drank on the night of the crime was the most material information to both lines of defense, i.e., that Merck was not the attacker, Thomas was, and that Merck was not guilty of first degree murder due to his voluntary intoxication. Merck satisfied the criteria to show that a Giglio violation occurred.

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[6]Daniels', who was not the prosecutor in Thomas' violation of probation, filed the motion for ROR due to the outstanding arrest warrant (PC-R2. 343).

As to whether the State violated Brady, the circuit court denied Merck's claim concluding that the State did not coerce of force Thomas to testify to any "particular version of events" (PC-R2. 325). Thus, Merck had not established that the State suppressed any evidence (PC-R2. 325).

The circuit court erroneously found that Thomas could not recall exactly when he realized that "his trial testimony might not have been entirely accurate regarding Merck's level of intoxication." (PC-R2. 325). However, Thomas specifically stated: "**I'm testifying at trial**, and it was just that picture in my head that I remembered he was kind of slumped over and it was hard to get him to respond." (PC-R2. 398)(emphasis added).

Moreover, the circuit court did not consider how an instruction of "stick to" the testimony you gave in your deposition would have impacted Thomas. Brady does not require that Merck show that the State forced him to give false testimony. Rather, under Brady, Merck must show that favorable evidence was suppressed by the State, either willfully or inadvertently and prejudice ensued. Here, there can be no doubt that Thomas' recent testimony was favorable to Merck's defenses and the suppression caused prejudice. Zinober explained:

> One, I think it would have supported Troy's testimony that he actually didn't remember what happened as opposed to – and I realize that was an unusual thing to try to sell to the jury that somebody that had actually done, you know, what the State was suggesting Troy had done would not remember. It is an unusual thing.

> So basically, if Neil's testimony was more along the line of Troy's, it would support Troy's position that he really didn't remember, that it wasn't a situation which I believed that the State was taking the position that Troy was full of baloney, so to speak, that he really couldn't remember and he just wasn't willing to say that he didn't remember.
>
> So, A, it would have, I believe supported Troy's testimony in my position that it was an alcoholic blackout.
>
> And the second thing is, obviously, to the extent that it was an alcoholic blackout, it was that level of intoxication, it would have gone further to support the secondary defense of voluntary intoxication.

(PC-R2. 424-5). Zinober also pointed out that Thomas' recent testimony was highly conflicting with the state of mind of Merck that Thomas had described at the time of trial (PC-R2. 425).

Zinober also testified that he would have wanted to know the amount of influence that the State had exerted on Thomas (PC-R2. 428-9).

Additionally, the State clearly suppressed the fact that Thomas had been told that if he failed to appear to testify against Merck he would be arrested; that when Thomas expressed uncertainty about how much Merck had drunk, Thomas' statement was not disclosed to Merck or his counsel; and that Thomas was instructed to "stick to" the testimony in his deposition, which was given just a month before his trial testimony. Whether the State willfully or inadvertently intended to suppress this favorable testimony, the result was that the jury did not hear this evidence or Thomas' observations that Merck was slumped over and unresponsive shortly after the crime – which was consistent

with Merck's trial testimony. Likewise, the jury did not hear Thomas' testimony that Merck was "highly intoxicated" (PC-R2. PC-R2. 398, 399, 414).

Had trial counsel been aware of the communications between Daniels and Thomas, he could have impeached Thomas and ideally, Thomas would have been more forthcoming about how much Merck drank on the night of the crime and Merck's reaction to the alcohol – evidence was material and highly beneficial to Merck's defenses. Merck has established that the State violated his right to due process at his capital trial.

Relief is warranted.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. MERCK'S CLAIM THAT RECENTLY DISCOVERED EVIDENCE DEMONSTRATES THAT HIS CAPITAL CONVICTION IS CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.[7]

In establishing that newly discovered evidence entitles Merck to a new trial, he must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of the trial, and it must also appear that neither the defendant nor defense counsel could have known of such evidence by the use of due diligence. Second, the newly discovered evidence must be of a nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). Newly discovered evidence satisfies the second prong of the test if it weakens the case against Mr. Merck so as to give rise to a reasonable doubt as to his culpability. Id. at 526.

The circuit court held: "Accepting that Merck used due diligence to discover Thomas' current testimony, Merck fails to satisfy the second prong of the Jones test, to establish that the newly discovered evidence is of such a nature that it would probably produce an acquittal on retrial." (PC-R2. 326). In so

[7]Mr. Merck raised his claims before the circuit court in the alternative. Even if Merck has not shown that his right to due process was violated he has established that new, admissible and compelling evidence is available that would probably produce an acquittal to the charge of first degree premeditated murder.

holding, the circuit court determined that the testimony presented at the October 2, 2017, evidentiary hearing was essentially the same as that presented at trial (PC-R2. 326). Specifically, the jury knew that Merck "drank a significant amount of alcohol" and that the characterization of Merck as "highly intoxicated" was not materially different than the characterization that Merck was "pretty drunk" (PC-R2. 326).

First, Thomas never testified that Merck was pretty drunk. Rather, when he was questioned on cross examination at the trial, trial counsel attempted to impeach Thomas with his deposition, at which Thomas testified that Merck was "fairly drunk". *See* T. 787-8. However, Thomas explained that the characterization of Merck being "fairly drunk" was essentially meaningless:

> Q: Your testimony today was that you didn't notice anything about him being drunk or anything along those lines. But didn't you just tell me last month that he was pretty drunk?
>
> A: Yeah.
>
> Q: Did you tell me that?
>
> A: Yes, sir.
>
> MR. RIPPLINGER: Judge, I object to characterization. He never said that man was drunk, only asked about physical manifestation?
>
> BY MR. ZINOBER:
>
> Q: Let me ask you, was –
>
> MR. RIPPLINGER: So, he's making it be pretty –
>
> BY MR. ZINOBER:

Q: Was he pretty drunk?

A: He was he pretty –

THE COURT: Excuse me. Let me hear his objection. Let me rule on it, then you will know what you're gonna do.

MR. ZINOBER: Okay.

THE COURT: I'm gonna sustain the objection. Please rephrase.

MR. ZINOBER: All right.

BY MR. ZINOBER:

Q: Was he fairly drunk?

A: What's fairly drunk?

Q: Well, you were the one that told me fairly drunk in the past, were you not?

A: Yes, sir.

Q: So, now, you're asking me was he fairly drunk? You were in your own words.

A: Was fairly drunk, and he was the same that I was.

Q: Page 81, last month's depo, Line 13, okay?

THE COURT: Excuse me?

BY MR. ZINOBER:

Q: "Question: Did Troy seem to be intoxicated?

"Answer: We are both fairly drunk."

Did you give that answer?

A: Yes, sir. But fairly drunk to me means that you feel good. But that's not stumbling, falling down, inebriated.

(T. 788-9). Thus, Thomas made clear that his characterization of Merck as "fairly drunk" was meaningless.

Indeed, at the October 2, 2017, evidentiary hearing, trial counsel testified about Thomas' testimony that Merck was "fairly drunk":

> So in other words, in my view, what he was saying was that he was as drunk as [Thomas] was, but [Thomas] could remember everything and [Merck] couldn't remember anything, and I think there's a difference.
>
> * * *
>
> ...I was trying to get him to say, obviously, that – that [Merck] was drunk, was really drunk to support my theory that [Merck] had a alcoholic blackout. And then [Thomas] says, "Well, he was fairly drunk, as drunk as I am," but [Thomas] could remember and [Merck] couldn't, so I see there's a difference there.

(PC-R2. 432). Trial counsel believed that "there's a big difference between falling down, totally drunk, an alcoholic blackout, and fairly intoxicated, because fairly intoxicated would suggest that you could remember an event like what happened with the victim, but totally drunk and out of it, suffering an alcoholic blackout is a different story." (PC-R2. 434-5).

Thus, the circuit court's analysis failed to account for Thomas' minimization of Merck's intoxication at trial[8] – as his testimony at the evidentiary hearing makes clear, Thomas minimized the amount that Merck drank, the effects it had on him and the characterization of Merck's level of intoxication,

[8]The circuit court's reliance on a single statement that Sullivan claimed Merck made – that Merck was going to teach Mr. Newton how to bleed (PC-R2. 327) – to find that Merck was not intoxicated ignores all of the compelling, recently disclosed testimony from Thomas that Merck was "highly intoxicated".

stating that Merck was "highly intoxicated".

Likewise, the circuit court failed to consider Thomas' testimony that Merck was slumped over and difficult to get to respond just moments after the crime which was entirely consistent with Merck's trial testimony (PC-R2. 397-8)("when Troy and I were in the car and I was trying to get him to change his clothes, that I was having a hard time getting him to respond." (PC-R2. 397-8). *See also* PC-R2. 402. It stuck with Thomas that Merck was "highly intoxicated", and "very, very drunk" at the time of the crime (PC-R2. 398, 399, 414).

Also, the circuit court did not consider Thomas' testimony that Merck was a lightweight when it came to drinking alcohol (PC-R2. 401). Merck was half Thomas' body weight and Thomas was drunk on the night of the crime (PC-R2. 401). And, contrary to his trial testimony, Thomas stated that Merck may have actually had more to drink than he (Thomas) had (PC-R2. 403). It bothered Thomas because he believed that Merck was "probably a little bit more intoxicated than what he" testified to at trial (PC-R2. 407, 414).

Thomas also clarified that when he played pool with Merck following the crime, it was several hours later (PC-R2. 415). And, even though Thomas was drunk, he was able to play pool (PC-R2. 415). This was not how the evidence was presented at trial.

In addition, the circuit court did not consider the impact

of the State's communications with Thomas, including the fact that Daniels told Thomas that he was needed to testify and if he did not show up he'd "be given a protective custody warrant and [he'd] be held in jail until he testified (PC-R2. 392-3). In fact, the State had obtained an order to hold Thomas as a material witness (PC-R2. 340; 393). It was because of the order that Thomas testified against Merck (PC-R2. 393).

And, while Thomas testified at the hearing that he was not instructed to minimize Merck's level of intoxication, he did acknowledge that he may have made that statement to Merck's postconviction investigators (PC-R2. 414-5). That statement constitutes newly discovered evidence that would be admissible at a new trial to show Thomas' motive to testify the way he did and his bias.

The circuit court failed to consider most of the evidence presented at the evidentiary hearing which was germane to the credibility battle between Merck and Thomas as to the true circumstances of the crime and Merck's level of intoxication. Had the jury found that Merck was intoxicated, he could not have been found guilty of first degree murder. And, Thomas' recent testimony supports Merck's reasonable doubt defense.

Finally, the circuit court erroneously held that a cumulative analysis of the evidence was not required because there was no newly discovered evidence presented (PC-R2. 328).

As to the correct legal analysis, this Court has on a number of occasions been presented with newly discovered evidence claims in a successive Rule 3.851 motion. Hildwin v. State, 141 So. 3d 1178 (Fla. 2014); Swafford v. State, 120 So. 3d 760 (Fla. 2013); Smith v. State, 75 So. 3d 2005 (Fla. 2011); Johnson v. State, 44 So. 3d 51 (Fla. 2010); Rivera v. State, 995 So. 2d 191 (Fla. 2008); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999). In each of these cases, this Court found that the proper standard of review required cumulative consideration of all of the favorable evidence presented in the collateral proceedings and, also the use of the constitutional mandated yardstick as to the constitutional claims that had been presented in collateral proceedings to determine whether Rule 3.851 relief was warranted.

For example in Smith v. State, 75 So. 3d at 206, the Rule 3.851 motion relied upon newly discovered scientific evidence in conjunction with a Brady claim previously rejected by this Court on the merits. This Court reversed the denial of relief and remanded for an evidentiary hearing directing the circuit court to evaluate the claims using the cumulative materiality standard for Brady claims set forth by the Eleventh Circuit in Smith v. Sec'y, Dept. of Corrs., 572 F.3d 1327 (11th Cir. 2009).

In Johnson v. State, 44 So. 3d at 53, newly discovered evidence was presented in support of a previously rejected Rule 3.851 claim that had been presented under Giglio v. United

States, 405 U.S. 150 (1972). This newly discovered evidence contradicted testimony presented at trial, corroborated testimony of a Giglio violation presented in a prior Rule 3.851 motion, and conflicted with testimony presented by the State in the prior collateral proceeding. This Court granted relief on the newly discovered evidence claim using, not the standard set forth in Jones v. State, but the standard used for evaluating whether relief is warranted on a constitutionally based Giglio claim. In others words, the newly discovered evidence required revisiting the previous decision to reject the Giglio claim.

In Rivera v. State, 995 So. 2d at 197, newly discovered evidence in the form of the results from DNA testing was presented in a successive Rule 3.851 motion, along with newly discovered evidence of a Brady/Giglio violation. Additionally, in a prior Rule 3.851 proceeding, favorable evidence was presented in support of a guilt phase Strickland claim. This Court reversed the summary denial of the successive Rule 3.851 motion and remanded for an evidentiary hearing indicating that the previously presented favorable evidence supporting the Strickland claim must be part of the cumulative evaluation of the Brady/Giglio claim and the newly discovered evidence claim.

In Lightbourne v. State, 742 So. 2d at 247, newly discovered evidence was presented in support of a previously rejected Brady/Giglio claim. This Court reversed the summary denial and

remanded for an evidentiary hearing to determine whether the newly discovered evidence was credible, and if so, an evaluation of the evidence cumulatively with the evidence previously presented in support of the Brady/Giglio claim. This Court explained that: "This cumulative analysis must be conducted so that the trial court has a "total picture" of the case." Lightbourne, 742 So. 2d at 247.

These cases demonstrate that cumulative consideration of exculpatory evidence presented in support of Brady, Strickland, and Jones v. State is required in Rule 3.851 proceedings. It is required regardless of whether the claims are presented in one Rule 3.851 motion or in an initial and a successive motion because the exculpatory evidence in the successive motion was not known at the time of the initial motion. See Hildwin v. State, 141 So. 3d 1178, 1184 (Fla. 2014); Swafford v. State, 120 So. 3d 760, 775-6 (Fla. 2013). Rule 3.851 movants cannot be punished for not knowing of exculpatory evidence that could not have been known through due diligence at the time of the prior Rule 3.851 motion was filed.

Furthermore, the cases detailed above demonstrate that when newly discovered evidence qualifying for consideration under Jones v. State is presented in collateral proceedings along with evidence of a Giglio, Brady and/or Strickland violation, the prejudice standard that applies to the constitutional claim or

claims at issue governs as to whether a new trial is warranted. This can best be seen from this Court's analysis in Johnson v. State. There, newly discovered evidence that qualified for consideration in the successive Rule 3.851 motion was newly discovered evidence that would have been admissible in the prior Rule 3.851 motion in support of the Giglio claim on which an evidentiary hearing had been conducted. The newly discovered evidence was evaluated as evidence demonstrating that the prior collateral proceeding must be re-opened and re-evaluated. Just as qualifying evidence under Jones v. State requires re-opening the validity of the jury's verdict, it must also require re-opening the validity of a previous adjudication of a constitutional claim.

Therefore, in Merck's case, the circuit court was required to review all of the favorable, admissible evidence that had been presented at the trial, the first postconviction evidentiary hearing and the October 2, 2017, evidentiary hearing. That evidence includes Merck's testimony about the amount of alcohol he consumed on the night of the crime and the fact that he blacked out before the attack occurred; the testimony from Thomas that Merck was "highly intoxicated" and "very, very drunk" at the time of the crime (PC-R2. 398, 399, 414); Thomas' observation that he failed to reveal at the time of the trial "that when Troy and I were in the car and I was trying to get him to change his

clothes, that I was having a hard time getting him to respond." (PC-R2. 397-8); Thomas also testified that: "I felt like he needed to change clothes, so I had a hard time getting him out of the car and into the – to change his clothes." (PC-R2. 402); that Thomas observed that Merck was "kind of slumped over" in his seat (PC-R2. 398); that Merck may have actually had more to drink than Thomas had and Thomas was drunk (PC-R2. 403); that when he played pool with Merck following the crime, it was several hours later (PC-R2. 415); and that Thomas recently made the statement that he was instructed to minimize Merck's level of intoxication (PC-R2. 414-5).

That evidence also includes the evidence relating to the fact that Merck did not attack Newton. The evidence supporting his claim consisted of physical evidence which included the palm print found on the top of the Mercury Bobcat that belonged to Thomas; the admission by Thomas that he had engaged Mr. Newton and ridiculed him when Sullivan testified that the individual who argued with Mr. Newton was the attacker; a description of the driver of the vehicle, who was not the attacker, as being skinnier than the attacker when Thomas was forty pounds heavier than Merck; and Merck's description of the clothes worn by Thomas on the night of the crime.

A proper cumulative review would consider the evidence presented in relation to Merck's ineffective assistance of

counsel claim, including Brigham's testimony about the weakness of Sullivan's identification.

Undoubtedly, when a proper cumulative review is conducted it is clear that Merck would probably be acquitted at a new trial. Relief is warranted.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, **TROY MERCK**, urges this Court to reverse the circuit court's order and grant him a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic mail to Stephen Ake, Assistant Attorney General, on this 19th day of April, 2018.

/s/.Linda McDermott
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