IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1389

JOEL DALE WRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Wright's amended motion for post-conviction relief following this Court's remand for an evidentiary hearing. Wright v. State, 581 So.2d 882 (Fla. 1991). On June 5, 2000, the circuit court denied Mr. Wright's claims two and a half years after the evidentiary hearing and only after Mr. Wright filed a petition for a writ of mandamus with this Court. See Wright v. State, Sup. Case No. SC00-1119. Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on appeal to this Court in first direct appeal;

"PC-R1. ___" - Record on appeal to this Court from 1989 denial of the Motion to Vacate Judgment and Sentence;

"PC-R2. ___" - Record on appeal to this Court from 2000 denial of the Amended Motion to Vacate Judgment and Sentence;

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

This is an appeal from the denial of post-conviction relief in a capital case. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims and the issues raised here.

Mr. Wright, through counsel, respectfully urges the Court to permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

INTRODUCTION

This is the story of justice gone awry, a young man convicted of a murder he did not commit, sentenced to death and left on death row for eighteen (18) years and still counting.[1]

Lima Page Smith was found stabbed to death at 4:15 pm. on (R. 1628). Joel Dale Wright (Jody) lived next door to Ms. Smith with his family (R. 1583). Early in the police investigation, Jody was interviewed and cleared after Charles Westberry confirmed that Jody spent the early morning hours of February 6th sleeping on his living room couch (Douglas Depo. at 34).

Subsequently, Charles Westberry, while talking to his estranged wife, changed his story and claimed Joel Dale Wright arrived at his house much later and confessed the murder to him. The estranged wife told the deputy sheriff who she was dating of this conversation. After Charles was arrested and charged as an accessory to murder, he agreed to testify against Jody in return for immunity (PC-R2. 2415-17). On the basis of his testimony, Jody was convicted and sentenced to death.[2]

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[1]Interestingly, Dr. Harry Krop evaluated Jody Wright in 1988 (PC-R1. 1017-56). At the time that he testified in October of 1988, Dr. Krop had evaluated some 200 individuals who were capital defendants. Jody Wright was one of three whose MMPI results were completely within "normal" ranges. Dr. Krop found Jody Wright to be an intact person with no signs of sexual deviancy or sociopathic tendencies. Jody Wright did not fit the profile to which Dr. Krop had become accustom.

[2]Justice Blackmun in his dissent from the denial of a writ of certiorari said "this case comes down to Wright's word against Westberry's." Wright v. Florida, 474 U.S. 1094, 1097 (1986)(Blackmun, J., dissenting).

However, the jury never heard a wealth of evidence implicating Henry Jackson and Clayton Strickland in the murder of Ms. Smith.[3] On February 4, 1983, Henry Jackson and Clayton Strickland were roommates and lived next door to Charlene Luce (PC-R2. 445, 2611). This was "about a block away" from Ms. Smith's residence (PC-R1. 965). On February 4th, Strickland approached Ms. Luce and told her that, even though Henry might kill him, he wasn't scared (PC-R2. 445).[4] Ms. Luce then,

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[3]The jury also did not hear certain undisclosed impeachment evidence regarding Charles Westberry. Besides the disclosed immunity on the accessory to murder charges, the prosecutor gave Charles "a limited grant of immunity" regarding the illegal scrap metal business that he and Jody had operated together (PC-R1. 756). Charles has acknowledged that he was "scared of getting into trouble for this" (PC-R1. 652). And because Paige had knowledge of the illegal business, he was worried she may get into trouble too. This additional immunity was not disclosed to defense counsel (PC-R1. 652). Moreover, the prosecutor met with Charles on a daily basis in the week or so leading up to trial (PC-R1. 756, 758). The prosecutor wrote out Charles' answers to the questions that he intended to ask at trial (PC-R1. 763, 766). The prosecutor then "gave it to Charles Westberry prior to trial, asked him to review it, go over it, make sure what was there was the truth." (PC-R1. 757). Charles was instructed to return the written answers to the prosecutor prior to taking the stand (PC-R1. 759). Charles remained in jail until a week after his testimony when he was finally released (PC-R1. 701). In 1988, Charles testified that he had been given typed answers to read over in preparing to testify at Jody's trial (PC-R1. 670, 678). He still had the documents when he was released from jail, but subsequently was unable to find them (PC-R1. 669-70). The existence of these written answers was not disclosed to defense counsel at trial, and the written answers have never surfaced during the post-conviction process (PC-R1. 762).

[4]Henry Jackson had previously been convicted of a homicide (PC-R2. 2615-16). Jody Wright's prosecuting attorney, James Dunning, had represented Henry Jackson when Mr. Jackson was prosecuted for the homicide (PC-R2. 2432). Mr. Jackson also had a burglary conviction for burglarizing Earl Smith's house which was across the street from Ms. Smith's residence (PC-R2. 2432, 2434-35).

observed Jackson come outside into the yard brandishing a knife in his right hand (PC-R2. 445).[5] The knife was a "pocket knife" with a blade "about three or four inches long" (PC-R2. 2626).[6] Mr. Jackson was angry and was demanding money from Mr. Strickland (PC-R2. 445).

On February 5, 1983, Wanda Brown, a mail carrier, observed Ms. Smith outside her residence arguing with Mr. Strickland and Mr. Jackson and motioning for them to move away with her hand (PC-R2. 447, 2558). Mr. Strickland then shook his arm at Ms. Smith (PC-R2. 447). When Mr. Strickland saw Ms. Brown in her postal jeep, he ran in front of the vehicle forcing her to stop (PC-R2. 2559). He walked up to the door of the vehicle and demanded to know if she had his social security check (PC-R2. 2560). She indicated that "no, I don't have your check." He said "I need some money." She indicated that she had no mail for the Jackson mailbox (PC-R2. 447). He asked Ms. Brown to give him some money (PC-R2. 447). She became frightened by his demeanor and drove away. "I could smell the liquor. And it - - I was kind of scared, you know, I didn't really trust either one of them." (PC-R2. 2560). When she looked back she notice Ms. Smith "making a motion like that for them to go off" (PC-R2. 2560).

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[5]The evidence showed that Ms. Smith was in all likelihood stabbed by a right-handed person (R. 1739, 1816). Jody is left-handed.

[6]The stab wounds on Ms. Smith were consistent with a pocket knife - "a sharp-edged weapon about, oh, a half-an-inch in width and an eighth of an inch in thickness, and not particularly long" (R. 1822). Between 2:00 and 3:00 pm. on February 6, 1983, Clayton Strickland sold Earl Smith a pocket knife for $5.00.

After Ms. Brown heard about Ms. Smith's murder, she called the sheriff's office and reported her observations. Two detectives went to her home on February 7, 1983, and took her statement (PC-R2. 2570).[7]

After dark on the evening of February 5, 1983 (during the period that the medical examiner gave as the range in which the murder occurred), William Bartley observed Henry Jackson and Clayton Strickland standing in the vacant lot next to Ms. Smith's house, drinking (PC-R1. 1006-07, PC-R2. 2431).[8]

Late in the afternoon on February 6, 1983, Kim Holt, a cashier at a local supermarket, saw a man she identified as Henry Jackson in her check out line. Mr. Jackson had fresh scratch marks on his face and "what appeared to be blood on him, fresh blood" (PC-R2. 2583). Ms. Holt was familiar with Jackson and the fact that he usually had no money. (PC-R2. 444). He announced "I got money today" (PC-R2. 444). He paid Ms. Holt with a one hundred dollar bill and showed her that he possessed another one (PC-R2. 2583). Mr. Jackson then asked Ms. Holt if she knew that

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[7]James Dunning, the prosecutor, testified in 1988 that this document "should have been given" to defense counsel because it contained information that "may [be] considered [] favorable to the Defense"(PC-R1. 724-25).

[8]The medical examiner initially placed the time of Ms. Smith's death as occurring between 5:00 p.m. and 9:00 p.m. on Saturday, February 5th. It was only after Westberry changed his story on April 19th and claimed that Jody had confessed to doing the murder at 5:00 a.m. that the medical examiner expanded the time range to include 5:00 a.m. on Sunday, February 6th (R. 1852).

Ms. Smith had been killed (PC-R2. 444, 2583). As he was leaving, Ms. Holt noticed that it was 4:30 pm. (PC-R2. 444).

Between 4:30 pm. and 5:00 pm., Charlene Luce was called over to her fence by Henry Jackson who informed her that Ms. Smith had been killed (PC-R2. 2621). When Ms. Luce asked "why her," Mr. Jackson said that "Miss Smith told him that she didn't kept [sic] money at home" (PC-R2. 446). He also indicated that she once gave him a box of chocolates.[9] Ms. Luce asked Mr. Jackson if he had killed Ms. Smith. In response, "he just turned real red in the face, and he looked at me real funny, and he turned and walked away" (PC-R2. 2622). Ms. Luce gave the sheriff's office a written statement regarding these events on February 9, 1983 (PC-R2. 445).[10]

Sheriff officers interviewed Henry Jackson and Clayton Strickland on February 10, 1983. According to Jackson, the scratches on his face were from a fight Sunday night (February 6th) (PC-R1. 378).[11] According to Strickland, he had last seen Ms. Smith on "Tuesday or Wednesday" of the previous week (PC-R1.

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[9]Ms. Smith was found with a chocolate bar on her exposed abdomen.

[10]Mr. Dunning testified in 1988 that he did not remember whether he had this statement prior to trial, but if he had it, he "[c]ertainly" would have disclosed to defense counsel (PC-R1. 727). In fact, Mr. Dunning acknowledged that he would have been obligated to disclose it (Id.).

[11]Of course, when Kim Holt was interviewed on February 28th, she indicated the scratches were already present at 4:30 pm.

379).[12] According to Jackson, "we went to bed early" on Saturday, February 5th. According to Strickland, "Henry and I had been drinking a lot on Saturday and was pretty high. We went to bed around eight o'clock I guess. I didn't get up until Sunday morning and I made some coffee for Henry and I. Henry and I stayed at the trailer all morning" (PC-R1. 379).

In 1988, then Deputy Taylor Douglas testified that Jackson and Strickland were eliminated as suspects when they each passed a polygraph denying involvement in the murder ("And of course both of them had agreed to take a polygraph with no, no problem with that. And they ran very clean on the polygraph that neither of them was involved with the Lima Paige Smith murder.")(PC-R1. 964). In denying post-conviction relief, Judge Perry relied upon this testimony to conclude that the evidence implicating Jackson and Strickland was "highly speculative."

In 1997, Sheriff Taylor Douglas[13] testified that he knew "Mr. Wright was" polygraphed, but beyond that he was not sure. He initially said as to Jackson and Strickland being polygraphed, "Possibility" (Douglas Depo, at 35). After refreshing his recollection, he listed those individuals who were polygraphed: Paul House, Charles Westberry, Jody Wright and Denise Easter (Douglas Depo at 39). Thus, the sole basis for excluding them as

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[12]Wanda Brown in her February 7th statement had advised law enforcement that she had witnessed an encounter between Strickland and Ms. Smith on Saturday, February 5th.

[13]In the intervening years, Taylor Douglas had been elected Putnam County Sheriff.

suspects, according to the 1988 testimony, was revealed to be nonexistent.[14]

None of the statements regarding Henry Jackson and Clayton Strickland were provided to defense counsel.[15] Defense counsel has testified that he would have used these various statements at trial had he been aware of them (PC-R1. 808).

As it was Jody's jury heard none of the evidence implicating Henry Jackson and Clayton Strickland. However, a forensic examiner for FDLE testified that she found in a pubic hair combing from the victim, "one brown hair present which demonstrated some characteristics of caucasian pubic hair, but the hair was different from the hairs in the pubic hair standard from Smith." (R. 2080). The examiner compared this hair to

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[14]In 1988, Taylor Douglas testified that he recalled that the police accounted for Jackson's possession of money and his scratched face because they determined that Jackson had done some tree trimming. However when pressed, Taylor Douglas had nothing to support this belief (PC-R1. 956). James Dunning testified that he had been advised that the sheriff's office had "substantiate[d] that the money he had came from a Social Security check he had cashed, and that the substance that was on him turned [out] to be paint as opposed to blood (PC-R1. 721). Initially, Captain Miller said that Jackson got the scratches while trimming trees. When confronted with Jackson's sworn statement, he acknowledged that Jackson's under oath statement indicated that "he got scratched at his sister's" during a fight (PC-R1. 1068). Captain Miller explained his previously stated belief as the result of his failure to "refresh[] my memory with these documents" (Id.). Of course, Jackson's sworn statement indicated that he got scratched Sunday night and did not explain how Kim Holt saw the scratches Sunday afternoon.

[15] No hair was obtained from either Jackson nor Strickland for forensic comparisons to the hair found on Ms. Smith's body (PC-R1. 1003). No fingerprints comparisons were conducted between Jackson's and Strickland's known prints and the unidentified prints of value found at the crime scene (PC-R1. 1003, R. 2051).

known standards from Jody, "and the bottom line that we have here is that whatever that pubic hair was or whose ever it might have been, in the pubic hair found in the pubic hair of Miss Smith, [the examiner] could not match it with Jody Wright." (R. 2095). The examiner noted that the hair "demonstrated some characteristics of caucasian pubic hair. Wright's pubic hair standard demonstrated characteristics of caucasian pubic hair. They were different because one was characteristic of pubic hair, the other was not." (R. 2096).[16]

Additionally, there were "[t]hree latent palm prints and one latent impression" from the footboard of Miss Smith's bed that were never matched to any known fingerprints (R. 2051, Exh. 47). However, comparisons with Jackson and Strickland were never made.

Jody maintained his innocence and did so when he testified in his own defense at his trial.[17] Kathy Waters, an individual in the courtroom listening to his testimony, realized that she had seen someone looking like Jody walking on the road to Charles Westberry's residence at precisely the time Jody said (R. 2613-17). After the evidence was closed, she contacted defense

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[16]So, the hair had sufficient characteristics to be compared to Ms. Smith's known hair, and it was determined to not be hers. It also could not be matched to Jody, but the examiner buried this fact in language that was frequently nonsensical. The jury requested, but was not permitted, a read back of this testimony (R. 2899-2908).

[17]A fingerprint identified as Jody's had been found on Ms. Smith's stove (R. 2057). Jody acknowledged that he and Paul House had previously gone into Ms. Smith's home "to look around" (R. 2563). Paul House confirmed that he and Jody had gone into Ms. Smith's residence in January of 1982 without permission when Ms. Smith was not home (R. 2396).

counsel and advised him that she remembered driving some young people home after a church function at approximately 12:30 a.m. on February 6, 1983, and seeing someone who looked like Jody walking toward the trailer park where Charles Westberry resided (PC-R2. 2446). Judge Perry refused to allow the defense to call Ms. Waters as a witness saying it would rendered the sequestration rule meaningless if a witness could confer with others and then provide testimony which seemed almost "tailor-made." (R. 2645, 2678).

Accordingly, Jody Wright despite his innocence of the crime was convicted of the murder of Lima Smith and sentenced to death.

STATEMENT OF THE CASE

On April 22, 1983, Joel Dale Wright was charged by indictment in Putnam County with one count of first degree murder, one count of sexual battery with great force, one count of burglary of a dwelling, and one count of grand theft of the second degree (R. 5). On April 23, 1983, Howard Pearl was appointed to represent Mr. Wright (PC-R2. 2406). The assigned prosecutor was James Dunning.[18] Thereafter, Mr. Wright entered pleas of not guilty on all counts.

Trial commenced on August 22, 1983, before Judge Robert Perry[19] and on September 1, 1983, the jury returned guilty verdicts on each count (R. 688).[20]

On September 2, 1983, the penalty phase proceeding began. Later that same day, the jury returned a recommendation of death.

On September 23, 1983, Judge Perry imposed a sentence of death with regard to the murder count, 99 years on the sexual

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[18]Mr. Dunning was suspended from the practice of law shortly before the 1988 evidentiary hearing, although the suspension was not disclosed by Mr. Dunning at the time of the evidentiary hearing (PC-R2. 1836, 2592, Exh. 45).

[19]On October 3, 1991, Judge Perry resigned his position as a circuit judge in settlement of judicial inquiry which alleged judicial improprieties (PC-R2. 2590-92, Exh. 44). The inquiry concerned judicial misconduct in 1988 and 1989 involving improper ex parte conduct and not displaying impartiality.

[20]During the deliberations the jury asked for the testimony of Ms. Lasko, the FDLE technician who had conducted an analysis of hair found on Ms. Smith's body and was unable to match it to Jody Wright. The jury also asked for the testimony of Dr. Latimer, the medical examiner who concluded the assailant was probably right-handed. However, Judge Perry refused to provide the jury with the testimony (R. 2899-2908).

battery, 15 years on the burglary, and 5 years on the grand theft.

Mr. Wright's convictions and sentence of death were affirmed by this Court in 1985; this Court found the exclusion of Kathy Waters' testimony was error, but harmless. Wright v. State, 473 So. 2d 1277 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986)(Blackmun, J., joined by Brennan, and Marshall, JJ, dissenting regarding this Court's determination that the trial court's decision to preclude Ms. Waters as a defense witness was harmless error).

Mr. Wright thereafter sought relief pursuant to Fla. R. Crim. P. 3.850 on February 22, 1988. An evidentiary hearing commenced before Judge Robert Perry on October 3, 1988.[21]

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[21]One of the three prosecutors at the evidentiary hearing was Robert (Mac) McLeod. According to Charles Westberry, Mac McLeod advised him he did not have to talk to Mr. Wright's collateral counsel (PC-R1. 230). After that conversation, Mr. Westberry refused to talk to collateral counsel even though he had previously agreed to do so (PC-R1. 146).

Also in 1988, Robert McLeod handled the capital trial in Randall Scott Jones. At an evidentiary hearing in February of 2000, Robert McLeod testified that as a result of ex parte contact with Judge Perry, he prepared the sentencing findings that resulted in a sentence of death. He indicated that he did the same thing in the case of Manuel Colina who was also sentenced to death by Judge Perry. Jones v. State, Case No. SC00-1492, Post-conviction ROA 572). Colina's sentence of death was reversed on appeal for other reasons. Colina v. State, 570 So.2d 929 (Fla. 1990).

Another prosecutor at the 1988 Wright evidentiary hearing was John Alexander. Judge Perry's law clerk testified in an evidentiary hearing in 1998 that Mr. Alexander on ex parte basis participated in the 1989 drafting of sentencing findings imposing a death sentence upon Richard Randolph. Randolph v. State, Case No. SC93675, Post-conviction ROA 5344). In fact, the State in 1998 stipulated that a draft judgment and sentence came from the

On June 8, 1989, Judge Perry entered an order denying post-conviction relief. Judge Perry's decision was premised upon a factual finding that "Mr. Freddie Williams [Howard Pearl's investigator] testified that he was aware of the statements by Brown and Luce" (Wright v. State, 581 So.2d 882,883 (Fla. 1991)).[22] Relying upon Taylor Douglas' testimony that Jackson and Strickland were eliminated as suspects when they passed polygraph examinations, Judge Perry further stated: "Whether the statements were exculpatory in nature is highly speculative and thus, the claim is legally insufficient to support a claim under Brady" (581 So.2d at 883).

On June 22, 1989, Mr. Wright filed a motion for rehearing and a motion to amend regarding newly discovered evidence regarding Howard Pearl's status as a special deputy sheriff. On August 21, 1989, Judge Perry denied relief on the "Pearl" issue on the basis of the decision by another judge in another case in which an evidentiary hearing had been conducted.[23]

State Attorney's file (Randolph, Post-conviction ROA 5313).

[22]This Court quoted Judge Perry's order virtually verbatim in its opinion affirming on appeal.

[23]Judge Perry did not reveal at this time or at any time while he presided over the case that he too was a special deputy sheriff in Putnam County (Pellicer Depo. at 19). Special deputy appointments were given to political allies of Sheriff Pellicer (Miller Depo. at 7). People like to have a "deputy card," "when they got stopped for speeding they pulled card [sic], you know, Oh, are you a deputy sheriff? Oh, yeah. Be careful, Sheriff, go ahead — a courtesy card, still call it that." (Pellicer Depo. at 20).

Thereafter, Mr. Wright appealed to this Court. This Court, quoting Judge Perry's order verbatim, stated: "We find that the trial court properly denied relief on each of the claims made in Wright's initial rule 3.850 motion." Wright v. State, 581 So.2d 882, 886 (Fla. 1991). However, this Court did reverse the denial of the claim regarding whether Howard Pearl's ability to provide effective assistance was impaired because of his status as a special deputy. The case was "remanded for an evidentiary hearing." 581 So.2d at 887.

On remand, the case was consolidated with other capital cases in which Howard Pearl had been the state-paid defense counsel. This Court appointed the Honorable B.J. Driver to presided over the consolidated cases. A consolidated evidentiary hearing was held in December of 1992 before Judge Driver.

Meanwhile, Mr. Wright's collateral counsel had renewed a Chapter 119 request on the Putnam County Sheriff's Office. Counsel was advised that additional records were being provided which had not been provided in 1988 (PC-R2. 2690-91). These newly disclosed documents provided additional Williams Rule evidence against Henry Jackson and Clayton Strickland. In light of the new disclosures, Mr. Wright filed an amended 3.850 (PC-R2. 115).

During the December, 1992, evidentiary hearing, Judge Driver severed the matters raised in the amended 3.850 saying: "The Court having been fully advised regarding Mr. Wright's 3.850 claims which warrant evidentiary development, this Court

determines it is without jurisdiction to address any matters other than Mr. Pearl's status as a special deputy sheriff, and therefore severs those other claims so that they may be pursued in a court of competent jurisdiction." (PC-R2. 475).

During the evidentiary hearing, it was learned that Judge Perry had a special deputy appointment out of Duval, Volusia, and Orange Counties. Judge Perry, who was called as a witness, did not recall whether such an appointment had occurred in Putnam County (PC-R2. 1962).

After Judge Driver denied Mr. Wright's claim regarding Mr. Pearl's status a special deputy, Mr. Wright chose not to immediately appeal, and instead sought an immediate hearing on his other claims, specifically his innocence (PC-R2. 2369). Mr. Wright also amended his 3.850 to include a claim based upon Judge Perry's status as a special deputy sheriff (PC-R2. 480). However, Judge Driver refused to preside over the matter saying it was outside the scope of his appointment (PC-R2. 573). Subsequently after some delay, the case was formally assigned to Judge Nichols on March 16, 1994 (PC-R2. 574, 575, 613).

Mr. Wright obtained permission for forensic testing of evidence in the possession of the Putnam County Sheriff's Office (PC-R2. 576, 2194). The tests proved inconclusive (PC-R2. 2195). Collateral counsel then petitioned Judge Nichols for over a year seeking an evidentiary hearing (PC-R2. 2193).

At that point, this Court rendered its decision in Teffeteller v. Dugger, 676 So.2d 369 (Fla. 1996), finding that

the consolidated hearing in December of 1992 had been conducted in violation of due process (PC-R2. 2193). In response, the State conceded in Mr. Wright's case that "there definitely will need to be an evidentiary hearing." (PC-R2. 2195)

Meanwhile, CCR had learned in another Putnam County case involving Manuel Colina that the Putnam County Sheriff's Office had failed to previously to properly respond to all Chapter 119 requests (PC-R2. 704, 2194). Extensive Chapter 119 discovery was permitted, and additional Chapter 119 records were disclosed.[24] Mr. Wright's motion to vacate was again amended to include the new disclosures. The newly disclosed records included Judge Perry's status as a special deputy sheriff. Former Sheriff Walter Pellicer explained that the card was one that could be pulled out to get out of a speeding ticket or any other problem the possessor was having with the Sheriff's Department (Pellicer Depo. at 18-20). Captain Miller explained that the cards were given "to political allies" of Sheriff Pellicer (Miller Depo. at 7). Sheriff Pellicer testified that Howard Pearl might have been a special deputy in Putnam County. He revealed that Freddie Williams (Mr. Pearl's investigator) was a bonded deputy in Putnam County (Pellicer Depo. at 18).

The evidentiary hearing commenced in March of 1997, and was concluded December 7-8, 1997. Mr. Wright called Freddie Williams as a witness to support his claim that Judge Perry's factual

[24]The previously undisclosed records were in fact introduced into evidence at the December 1997 evidentiary hearing. Exh. 47.

finding (that Freddie Williams, as the defense' investigator at the time of trial, had seen the police reports concerning Jackson and Strickland) was erroneous as a matter of fact. Mr. Williams specifically testified that he did not see the police reports concerning Jackson and Strickland until five years after Mr. Wright's trial (PC-R2. 2526-36). The State objected to this testimony, arguing that right or wrong Judge Perry's finding was binding as law of the case ("regardless of whether Judge Perry may have been mistaken in his interpretation of what this witness testified to in a prior hearing" PC-R2. 2528). Judge Nichols struck the testimony and allowed Mr. Wright only to proffer it for the record (PC-R2. 2533, 2535).

Howard Pearl also testified, as did Charlene Luce, Wanda Brown and Kim Holt.

In order to expedite the case, the parties submitted oral closings at the closing of the evidentiary hearing on December 8, 1997. Judge Nichols indicated that he planned to issue a ruling by the end of the year.

With no decision nearly two years later, Mr. Wright submitted a Notice of Supplemental Authority and Motion for Relief on September 27, 1999. In this motion, Mr. Wright set forth a number of relevant and important decisions supporting his claims for a new trial. Mr. Wright included a claim that pursuant to Jones v. State, 740 So.2d 520 (Fla. 1999), the delay in ruling denied Mr. Wright due process.

When still no action result, Mr. Wright petitioned this Court for a writ of mandamus on May 25, 2000, nearly two and one half years after the closing srgument. Wright v. State, Case No. SC00-1119. On June 5, 2000, Judge Nichols issued his order denying Mr. Wright a new trial.

In addressing Mr. Wright's claim that he was deprived of an adequate adversarial testing, Judge Nichols took two and a half years to say:

> 3. Claim II as to "no adversarial testing", and Claims VII and VIII are premised on the disclosure of additional documents since the trial and the initial 3.850 hearing in 1991 are related. There is just no evidence that the outcome of the Defendant's trial would be different. There is only speculation on the Defendant's part as to these claims.

(PC-R2. 1138).[25] This was the totality of Judge Nichols discussion of the primary claim Mr. Wright had advanced at the evidentiary hearing and closing argument.

[25]Of course in the two and half years he sat on the case before issuing his order, Judge Nichols failed to notice that the prior evidentiary hearing to which he referred occurred in 1988, not 1991. Then again, may be he did not obtain the full record and review it.

STATEMENT OF THE FACTS

A. The Trial Record.

Ms. Smith, a seventy-five year old school teacher had lived next door to the Wrights for many years (R. 1583). Joel Dale Wright was born the seventh of eight on August 28, 1957 (R. 2968. PC-R1. 63). He and his family had always gotten along well with Ms. Smith, despite Ms. Smith's eccentricities (PC-R1. 66). Over the years, her house had become piled with debris; this included newspapers, groceries, empty cat and dog food containers, etc. (R. 1534). The debris was between one and three feet deep throughout the house (R. 2305). The residence lacked running water (R. 1597). Frequently, Ms. Smith would sit in her car as opposed to her house (R. 1611). She would grade papers there. Sometimes she would just sit in the car reading or eating. She generally left the back windows of her house open so that her cats could go in and out unencumbered (R. 1612).

On February 6, 1983, at 4:15 p.m., the Putnam County Sheriff's Office received a call from Earl Smith, Ms. Smith's brother. Mr. Smith, who lived across the street from Ms. Smith, had just discovered her body in her bedroom (R. 1628). Sheriff officers found Ms. Smith's body in a crevice (not over six inches wide R. 1600) between the bed and the wall of her bedroom. Ms. Smith had twelve stab wounds in the left side of her face and neck (R. 1739, 1816). The stab wounds were consistent with a pocket knife (R. 1822). Located on top of Ms. Smith's exposed abdomen was a candy bar (R. 1728).

The evidence against Mr. Wright derived from three sources. First, there was the presence of a fingerprint from Mr. Wright in Ms. Smith's house. Mr. Wright explained that he was her neighbor and had been in the house on numerous occasions.[26]

Second, there was the testimony of Charles Westberry. Jody and Charles had been friends who had started stealing scrap metal and selling it for profit.[27] After Ms. Smith's death, Jody had been interviewed and explained that on the night of the homicide he had been out late playing poker.[28] When he arrived home after midnight, he was locked out. He walked across town to Charles's house where he spent the night.[29] Charles vouched for the accuracy Jody's report, confirming his arrival sometime around 1:00 a.m.[30] A couple of months later, Charles had a conversation with his estranged wife, Paige, who was dating a deputy sheriff.

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[26]Fingerprint comparisons for Henry Jackson and Clayton Strickland were not done.

[27]The enterprise was quite lucrative. Charles Westberry acknowledged that one sale in mid-march of 1983 resulted in $1200 in proceeds (R. 2183-95).

[28]The evidence at trial was that Mr. Wright had won approximately thirty dollars in the poker game (R. 1874).

[29]Mr. Wright passed a polygraph while relating these facts.

[30]Denise Easter was sharing a bedroom with Charles Westberry at the trailer belonging to Allen Westberry, Charles' brother. She reported at Jody's trial that she and Charles had gone to bed around 1:00 am. (R. 1925). Charles had gotten up at some point during the night. When she awoke the next morning, Jody was asleep on the living room couch. This was not an unusual occurrence. Jody had no blood on his clothes that she observed.
Similarly, Allen Westberry testified that he saw Jody on the couch at 7:00 a.m., and Beverly Westberry, Allen's wife, saw Jody on the couch when she got up at 6:30 am. (R. 1946, 1957). Neither noticed anything looking like blood on his clothing.

Charles indicated to his estranged wife that Jody was making trouble for him: "he had a lot of nerve to get him in trouble when Charles said he had enough shit to put him under the jail." Charles then indicated to Paige that Jody had confessed the murder of Lima Smith to him. However, his description of how Jody had committed the murder matched newspaper accounts, not the evidence from the scene.[31] Page told her boyfriend, a deputy sheriff. Charles was arrested and charged as accessory to murder. He was given immunity on the condition that he testify against Jody.

Third, a police officer, Walter Perkins, who was involved in the arrest of Mr. Wright,[32] testified that Mr. Wright at one point was alone with Officer Perkins and said to him: "If I confess to this, I'll die in the electric chair, if I don't talk I stand a chance of living."[33]

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[31]According to Paige, Charles reported that Jody had claimed to have used a kitchen knife to slit Ms. Smith throat. In fact, Ms. Smith had been stabbed twelve times with a pocketknife. Originally, Charles had told Paige that Jody had arrived at Charles' trailer "covered with blood." Charles had thought Jody had been in accident. Charles had said that Jody had showed him $243.00 in small bills. Subsequently at Jody's trial, Charles reported considerably less blood, and claimed Jody said he got $290.00 from Ms. Smith's purse as well as a jar of change. Due to the condition of Ms. Smith's house and the manner in which she lived, there was no evidence that a specific amount of money or specific items were missing.

[32]During the winter months prior to Ms. Smith's death, Walter Perkins had become angry with Jody Wright's mother over her failure to keep Jody and his brother away from his step-sister. So he told her that he was going to make her sorry that she ever had those two boys (PC-R2. 2587).

[33]In denying the 3.850 motion in 1989, Judge Perry addressed Jody's claim the statement was in fact merely a statement

During the trial, the prosecutor received a tip that two individuals[34] were in possession of a glass money jar that they had obtained from Jody after Ms. Smith's death and which they believed was the glass money jar described by Charles as taken from Ms. Smith's home (PC-R1. 771-73). Mr. Pearl had a witness available to identify the glass jar as a decanter that was a Wright family heirloom, and the witness possessed the matching glasses to prove it (PC-R1. 815-23). Mr. Pearl decided to present this evidence to impeach Charles' claim that Jody stole a glass jar filled with change from Ms. Smith. Mr. Pearl presented the evidence that Jody had kept money in this glass jar. He then forgot to present the testimony establishing that the jar was a decanter with matching glasses that had been in the Wright family for years (PC-R1. 815-23). The prosecutor capitalized on Mr. Pearl's error in his closing, arguing that the glass jar was the one taken from Ms. Smith's residence at the time of the homicide (R. 2742).

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invoking silence and its introduction violated Miranda. Judge Perry said "the Florida Supreme Court has held that allowing such statements to be admitted at trial was harmless error, when, as in the instant case, the improper statement was not the primary evidence linking the Defendant to the crime, but rather cumulative to the evidence presented by the key witness. [Citation.] Therefore, even if the Defendant's allegation of a Fifth Amendment violation is taken as true, the Defendant's claim is insufficient to merit relief." Wright v. State, 581 So.2d at 884.

[34]As it turned out, one of the individuals who came forward with this evidence was Cynthia Kurkendall who the prosecutor was dating and subsequently married (PC-R1. 773).

In the defense's case, Jody testified in his own behalf. A spectator in the courtroom, Kathy Waters, heard Mr. Wright's description of his movements around town upon discovering that he was locked out of his house. After the evidence was closed, she contacted defense counsel and advised him that she remembered driving some young people home after a church function at approximately 12:30 a.m. on February 6, 1983, and seeing someone who looked like Jody walking toward the Westberry's trailer. Judge Perry refused to allow the defense to call Ms. Waters as a witness saying it would rendered the sequestration rule meaningless if a witness could confer with others and then provide testimony which seemed almost "tailor-made." (R. 2678).

B. The 1988 Post-Conviction Record.

Chapter 119 records were sought from the State Attorney's Office and the Putnam County Sheriff's Department. On the basis of the records disclosed, collateral counsel presented a Brady claim based on a wealth of records in the State's possession which implicated Henry Jackson (a former client of James Dunning, the trial prosecutor, who had a prior conviction for second degree murder and for burglarized Earl Smith's home across the street from Miss Smith) and Clayton Strickland in the murder of Ms. Smith. In addition, collateral counsel also challenged the effectiveness of Howard Pearl's trial representation.

In October of 1988, the trial judge, Judge Robert Perry held an evidentiary hearing. At the evidentiary hearing the trial prosecutor, James Dunning, was called to testify. Mr. Dunning

acknowledged that he had "defended Henry [Jackson] in a homicide case back when [he] was a Public Defender" (PC-R1. 720). He recalled that the Sheriff's Office had eliminated Jackson as a suspect because "they were able to substantiate that the money he had came from a Social Security check he had cashed, and that the substance that was on him turned [out] to be paint as opposed to blood." (PC-R1. 721).[35] Mr. Dunning acknowledged that the statement by Wanda Brown was "something that [trial counsel] should have been given." (PC-R1. 724). He also testified that as to the Charlene Luce statement he "would have furnished [trial counsel] with any statement relating to the investigation," he was simply unsure whether he had the statement prior to Mr. Wright's trial (PC-R1. 727).

Mr. Dunning also testified that the way to know for certain what statements had been provided to trial counsel was to inspect the signed receipts. "The only was I would have of knowing would be to go back to the receipts that would be, I believe, in the State Attorney's file that were signed by [trial counsel's investigator] and determine if that was one of the documents furnished" (PC-R1. 724). These receipts had been prepared by Mr. Dunning. "I made sure that everything that the receipt said was

[35]Of course as has been previously noted, Taylor Douglas testified that he believed that the money came from tree trimming (PC-R1. 956). Wanda Brown's statement indicates that on Saturday a social security check was not delivered to Henry Jackson (PC-R2. 447). And Henry Jackson's statement indicates that the substance on his face was blood, and that he got scratched in a fight on Sunday night, apparently after Kim Holt observed the scratch marks on Sunday afternoon (PC-R1. 378).

there was there. I had [trial counsel's investigator] verify that, and I had him sign for it" (PC-R1. 730).[36]

Mr. Dunning also acknowledged that Charles Westberry received "a limited grant of immunity" for the illegal scrap metal business (PC-R1. 756). Westberry testified that he was "scared of getting into trouble for [scrap metal business]" (PC-R1. 645). He was also "worried that if [he] got in trouble Paige would get in trouble" (PC-R1. 652). When Mr. Dunning found out about the business prior to Mr. Wright's trial, Mr. Dunning questioned Westberry concerning it. According to Westberry, Mr. Dunning told him he would not prosecute him over the scrap metal business, but he never guaranteed Westberry that he would not be prosecuted for stealing scrap metal and selling it for profit. Westberry was scared at the time of trial and at the time of the 1989 evidentiary hearing that he could still be prosecuted for his actions (PC-R1. 653).

The additional immunity, which Mr. Dunning orally extended apparently without Mr. Westberry's full understanding, was given after the formal written immunity agreement had been prepared and was not reflected in it. Mr. Pearl testified that he "was never informed by the State of any communication passing from Westberry to the State or back concerning the theft of scrap metals."(PC-R1. 791). Further, Mr Pearl was "never advised that [Westberry]

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[36]The receipts were introduced into evidence by Mr. Wright and supported Mr. Pearl's testimony that he did not receive the Luce, Brown or Holt statements (PC-R1. 793-807).

was - - that any prosecution or immunity for prosecution were being discussed with him concerning that event."(PC-R1. 791).

Further, Mr. Pearl was not advised that Mr. Dunning had written out Mr. Westberry's written responses to questions and provided them to Mr. Westberry (PC-R1. 830). Mr. Pearl did not know that such statements of Mr. Westberry existed.

Mr. Pearl also testified that he had not received the statements from Charlene Luce, Kim Holt and Wanda Brown (PC-R1. 793-808). Mr. Pearl testified that these statements would have provided him with "a truckload of leads" that he would have pursued and used (PC-R1. 807).

Mr. Pearl also testified to what he described as a serious lapse on his part during the trial. He testified regarding the events during the trial leading to the production a glass decanter by Charlotte Martinez[37] which she provided to the prosecutor as possibly the jar Charles Westberry claimed Mr. Wright stole from Ms. Smith (PC-R1. 816). Charlene Martinez indicated that one night when Jody needed money he ran into his house and brought out the decanter filled with change.

Once, this decanter surfaced Mr. Pearl learned that it in fact was a Wright family heirloom. He "brought down from South Carolina a Mrs. Wiggs . . . who was Jody's [aunt], who identified

[37]Charlotte Martinez was accompanied by Cynthia Kurkendall, her sister, when the decanter was handed over to Mr. Dunning during the trial (PC-R1. 771-72). According to Mr. Dunning, he had seen Cynthia "on several occasions [] at bars and so forth, had conversations with her, knew her" (PC-R1. 773). Subsequently, he married Cynthia.

that glass jar as one having been bought by her together with a group of matching glasses and given to Jody's mother, which would have established ownership clearly." (PC-R1. 818).[38] In fact, Mr. Pearl accompanied Mrs. Wiggs to the Wright residence and observed the matching glasses in the cupboard where Jody's mother had kept them (PC-R1. 818). Based upon this, the prosecutor elected not to present Charlotte Martinez to testify about the decanter she had provided the prosecution. Mr. Pearl then decided to call her to present the fact that Jody had access to money in his own house if he needed it and that he acquired no unexplained infusion of cash (PC-R1. 819). However after presenting Ms. Martinez's testimony, Mr. Pearl failed to call Mr. Wright's aunt to identify the glass decanter and the matching glasses. Regarding this failure Mr. Pearl testified:

> I failed to prove, and I had the proof in my hand, that jar was in fact the property of Jody's mother. I failed to do it. It was a lapse, a mistake. I just — I can't explain it to you. It is as if it passed out of my mind, perhaps due to the pressure of other matters during the trial. But I cannot explain it. It was inferior performance.
>
> Mr. Dunning brilliantly took advantage of that lapse in closing arguments to argue to the jury that could have been, or must have been the jar that Charles Westberry had been talking about. And, therefore, I feel very badly about it. I feel very much at fault about it. It was a sorry performance on my part.

(PC-R1. 819-820).

There was also testimony from a deputy sheriff, Taylor Douglas, that the basis for eliminating Henry Jackson and Clayton

[38]Jody's mother had died after Jody's arrest and before his trial.

Strickland as suspects was that they provided each other with an alibi, they went to their home early and slept. According to Deputy Douglas' testimony in 1988, they each passed a polygraph ("And of course both of them had agreed to take a polygraph with no, no problem with that. And they ran very clean on the polygraph that neither of them was involved with the Lima Paige Smith murder.")(PC-R1. 964).[39]

Similarly, Captain Cliff Miller was called at the 1988 evidentiary hearing. During his testimony the following exchange occurred:

> Q Did you come up with any proof that Mr. Strickland and/or Mr. Jackson did not kill Miss Smith?
>
> A Their interviews, what other interviews we did, coupled with the polygraph exam.

(PC-R1. 1071). Captain Miller claimed to recall that there was an interview of someone from whom "Jackson said he got money [for] cutting down a tree" (PC-R1. 1071). Captain Miller also believed that he had found someone who said "Mr. Jackson was retained to cut down a tree, and the scratches he received as a result of the tree" (PC-R1. 1067). When confronted with Jackson's own statement indicating that scratches came from a fight the night of Sunday, February 6th, Captain Miller retorted:

> A We're talking about five years of recollection. I haven't refreshed my memory with these documents. That is, as I recall, that I remember the scratches,

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[39]Despite intensive effort to locate these polygraph results, they have never been produced pursuant to Chapter 119. And in March of 1997, Taylor Douglas testified that polygraph exams were not given to Henry Jackson and Clayton Strickland (Douglas Depo. at 39).

and I thought he had gotten it from the tree. I stand corrected.

(PC-R1. 1068). Captain Miller also acknowledged that he could not find a statement "from the individual that had retained Jackson to cut down the tree" (PC-R1. 1070).[40] Captain Miller stated that he, himself, conducted none of "the interviews with regard to Mr. Jackson and Mr. Strickland" (PC-R1. 1066). Thus, he was forced to rely entirely upon the reports of others:

> Q So you're relying on what other people told you when you're saying they were dead-ends?
>
> A They take the results of their investigation and bring it to me, and indicate their opinion. And I either concur, or I direct them to go out and do some more. In this issue I concurred.

(PC-R1. 1066).

Deputy Stout was also called at the 1988 evidentiary hearing. During his testimony the following was elicited:

> Q Okay. In that connection, what you found at the house, was there anything to indicate one way or another whether it was one or two people who had done the crime?
>
> A I really don't have an opinion one way or the other.
>
> Q Okay. So it's basically just a void of evidence; there's no evidence one way or another to indicate whether it's one, two, or more?
>
> A Any — any assertion on my part as to one person or two would be absolute speculation based not on any hard evidence that I saw in the residence.
>
> * * *

[40]In fact, such a statement has never surfaced in all of the extensive Chapter 119 discovery, just as no polygraph examination of either Jackson or Strickland has ever surfaced.

Q Was hair from Mr. Jackson or Mr. Strickland submitted to the lab?

A No, sir, I don't believe it was.

Q Were the fingerprints of Mr. Jackson and Mr. Strickland compared to fingerprints found in the house?

A I don't think they were.

Q Was there any particular reason why that did not occur?

A My understanding is I believe Mr. Jackson and Mr. Strickland had been eliminated from the investigation sometime prior to the necessity of sending the fingerprints.

Q How were they eliminated?

A I believe by some investigation done by Mr. Douglas.

Q Okay. Do you have any knowledge of precisely what that investigation was and how they were eliminated?

A Everything that I have is secondhand memory of elimination.

Q Did you ever see any reports?

A No, sir, I did not.

(PC-R1. 1001-02, 1003-04).

The undisclosed police reports implicating Henry Jackson and Clayton Strickland were introduced into evidence at the 1988 evidentiary hearing. These included the statement by Charlene Luce (reporting her observations of Jackson and Strickland on February 4th and 6th), the a handwritten statement from Wanda Brown (regarding on her February 5th observations of an encounter between Ms. Smith and Clayton Strickland), and the sworn

statement of Kimberly Holt (describing her encounter with Jackson at around 4:30 p.m. on February 6, 1983).

Also at the 1988 evidentiary hearing, Mr. Wright called William Bartley as a witness. He had been a state witness at trial. No one had asked him in 1983 if he had seen Jackson and/or Strickland near Ms. Smith's house around the time she was killed. However, he testified in 1988 when asked that he recalled seeing Jackson and Strickland standing in the empty lot next to Ms. Smith's house on Saturday night, February 5, 1983 (PC-R1. 1006-07). The medical examiner had initially placed the time of death between 5:00 p.m. and 9:00 p.m., after Mr. Wright was arrested he expanded the time range until 5:00 a.m. (R. 1852).

On June 8, 1989, Judge Perry entered an order denying 3.850 relief. First as to the undisclosed written responses from Westberry, Judge Perry said:

> The so-called script furnished to Westberry would not tend to exonerate the Defendant. Both the former prosecutor and Westberry testified at the evidentiary hearing that the document contained a summary of Westberry's prior statements, in Westberry's own words. . . . [T[he so-called script is not Brady material and the Defendant's claim does not warrant relief.

Wright, 581 So.2d at 883.

As to the statements from Wanda Brown, Charlene Luce and Kim Holt, Judge Perry stated:

> The investigator for the Public Defender's Office, Mr. Freddie Williams, testified that he was aware of the statements by Brown and Luce. . . . Mr. Williams and defense counsel worked closely together and it is likely that defense counsel was made aware of the statements through Mr. Williams. Additionally, defense

> counsel testified that he knew of the incident involving Ms. Holt and, in fact, had interviewed her with Mr. Williams but that he had never seen the statement given by Ms. Holt to the authorities. . . . Whether the statements were exculpatory in nature is highly speculative and, thus, the claim is legally insufficient to support a claim under Brady.

Wright, 581 So.2d at 883.

Judge Perry further found Mr. Pearl's representation adequate without addressing the failure to present the evidence establishing that the glass jar had been in the Wright family for years. Judge Perry also did not address whether, given his finding that Freddie Williams, the investigator, had seen the reports concerning Jackson and Strickland, trial counsel's failure to investigate and present the evidence implicating them in the murder was deficient performance.

Mr. Wright timely filed a motion for rehearing which included a request to amend the 3.850 motion on the basis of newly discovered evidence that Mr. Pearl had been a special deputy sheriff at the time of Mr. Wright's trial. Judge Perry denied the claim on the basis of another judge's ruling in another case in which evidence had been received. Judge Perry did not disclose that the Putnam County Sheriff had provided him with a special deputy card which Sheriff Pellicer gave to his political allies so that they could get out of speeding tickets and other traffic stops.

On appeal to this Court, Judge Perry's order was quoted verbatim. Wright v. State, 581 So.2d 882, 883-886 (Fla. 1991). This Court then stated: "We find that the trial court properly

denied relief on each of the claims made in Wright's initial rule 3.850 motion." 581 So.2d at 886. There was no discussion of the claims regarding Strickland and Jackson by this Court. However, this Court did reverse the denial of the claim regarding whether, in light of his status as a special deputy, Howard Pearl rendered ineffective assistance of counsel. The case was "remanded for an evidentiary hearing on whether Wright's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance." 581 So.2d at 887.

C. Proceedings at the 1997 Evidentiary Hearing.

At the 1997 evidentiary hearing, Mr. Wright's post-conviction investigator, Jeff Walsh was called as a witness. He testified that in 1991 following the remand he was handed a packet of material by Captain Cliff Miller who said these are the documents that Mr. Wright did not receive in 1988 (PC-R2. 2600-01). At that time, Mr. Walsh was lead to believe that this packet of materials "were the only records that CCR had not received before" (PC-R2. 2601). These documents were introduced into evidence without objection as Exhibit 46 (PC-R2. 2600). These newly disclosed documents included police reports regarding criminal investigations of Henry Jackson and Clayton Strickland. One of the reports was regarding an incident in 1984 shortly after Mr. Wright's trial. A elderly woman, Grace Moore, had reported that after hiring Henry Jackson to do yard work, she was awakened by him the next day with a bump on her head and the money in her pantyhose gone (Exh. 46).

Subsequently in 1996 in connection with another Putnam County case, State v. Colina, Mr. Walsh learned that the Putnam County Sheriff's Office had a systemic problem that had precluded it in the past from fully disclosing all public records to the Office of the Capital Collateral Representative (PC-R2. 2603). Based upon this new information, Mr. Walsh made new public records requests of the Putnam County Sheriff on Mr. Wright's behalf. An accordion folder full of additional records was subsequently disclosed (PC-R2. 2603). This accordion file was introduced into evidence as Exhibit 47. Mr. Walsh testified that he had examined this documents and ascertained that CCR had not previously received any of the materials contained in Exhibit 47 (PC-R2. 2604).

The records disclosed in 1996-97 and contained in Exhibit 47 included materials revealing that Walter Perkins was fired by the Sheriff's Department in January of 1986 because he was lazy and untrustworthy.[41] He had been written up in 1980 over his handling of another case. There, a woman named Dell Gillman, who had sought help from the Sheriff's Department regarding spousal abuse, claimed that Officer Perkins' report regarding his response to her call for help was not truthful and "did in fact falsify the actual report." She queried that his conduct raised

[41]The memorandum was from Paul Usina and stated "I have found [Walter Perkins} to be lazy and unwilling to perform fully his capabilities. Additionally, I feel that Mr. Perkins is not trustworthy." (Exh. 47).

the question of whether he would engaged in similar behavior in other cases (Exh. 47).

In connection with this evidence concerning Walter Perkins, Mr Wright called Bobbi Mixon, his sister, as a witness. She testified during the winter proceeding Ms. Smith's death Walter Perkins had become angry with Mrs. Wright and threatened her:

> And Walter came up there and said, told my mother - - one of my brother's was seeing one of his stepsisters, so both my brother's would go do [sic] down. And he came down there and told my mother that he wanted her to make my two brothers stop going down there to see his stepsister.
>
> And my mom in return told him that whenever his step-dad, Julian, and I can't remember the last name, told them they couldn't come down there any more she would tell them. Walter didn't live with them. And Walter said, well, if you can't keep those two boys from down there at my sister's house, my dad's house, I'm going to make you sorry you ever had them two boys. And my mother got very angry. I mean, no one has the right to threaten you. And she told Walter get off her property and not to come back on her property unless he had a search warrant. And I remember my mother was so upset. But, now she didn't call the police or anything, because Walter left as soon as she told him too.

(PC-R2. 2587-88).

An evidence receipt form provided in 1997 showed that Taylor Douglas obtained ink rolled fingerprints from Jody Wright on February 11, 1983, after a February 9th interview (Exhibit 47). Yet, a comparison with the prints from Ms. Smith's house was not made until April 20, 1983, after Walter Perkins has assisted in his arrest.

Jail records revealed in 1997 included as part of Exhibit 47 contained a report that Jody had attempted suicide on the eve of

trial after his mother's death (Exh. 47). Though this report indicated that Freddie Williams was contacted, Mr. Williams testified that he had no memory of the incident (PC-R2. 2536). And the matter was never brought to the attention of the trial court in 1983.

Mr. Wright also sought to present testimony from Freddie Williams that he saw the Jackson and Strickland documents in the State Attorney's Office for the first time five years after Mr. Wright's trial. However, the State's objection to that testimony was sustained, and Judge Nichols refused to consider the fact that the statements of Wanda Brown, Charlene Luce and Kim Holt were not disclosed to the defense.

Wanda Brown was called as a witness (PC-R2. 2557). She testified to her encounter with Clayton Strickland on February 5, 1983, in front of Ms. Smith's home. She testified that she also witnessed an encounter between Mr. Strickland and Ms. Smith which ended with Ms. Smith making hand motions for him to leave her alone (PC-R2. 2560). Her testimony matched her February 7, 1983, statement to the police, except that she remembered that Mr. Jackson was present with Mr. Strickland (PC-R2. 2559). Near the end of Ms. Brown's testimony the State made objection that the testimony was cumulatively to what had been presented in 1988 (PC-R2. 2560-61). After much discussion, Judge Nichols allowed Mr. Wright's counsel to finish his examination without making a ruling on the State's objection (PC-R2. 2570).

Charlene Luce was called as a witness by Mr. Wright (PC-R2. 2609). She testified to her knowledge of Henry Jackson whom she had known virtually all of her life in 1983. She remembered an incident from when she was a little girl:

> I remember Mrs. Jackson, she'd be put outside and it was nothing for them to kick her, you know, just take and kick her in the heinie, and grab her by the hair of the head and tell her to get in there and cook them something to eat, or you could hear them slapping her, her begging them to quit, you know, not to hurt her.

(PC-R2. 2614-15). She remembered when Henry Jackson killed his brother-in-law (PC-R2. 2615). She remembered what it was like to meet up with Henry Jackson:

> A Well, he would probably, you know, be all right, but you just never knew, you know. It was just too risky to take a chance. If you loaned him money, that might be fine, you'd never expect to get it paid back. If you helped him in any way, that was fine, but if you tried to stand up to him, tell him you didn't want to be bothered with it, the next time he went on one of those drunk binges you'd hear about it.
>
> Q Were you afraid of Henry Jackson?
>
> A To a certain extent, yes, sir.

(PC-R2. 2617).

When Mr. Wright's counsel began to question Ms. Luce regarding the events the weekend of Ms. Smith's death, the State objected on cumulative grounds (PC-R2. 2618). However, Judge Nichols allowed the testimony (PC-R2. 2619).

Charlene Luce then testified to her encounters with Henry Jackson on February 4th and 6th, 1983. Her testimony was in conformity with her statement to the police in 1983 and her 1991

affidavit. As to her questioning of Henry as to whether he committed the murder, her testimony was:

> A Well, we chit-chatted there for a few minutes and I said Henry did you do that?
>
> Q And what was his reaction to that?
>
> A And he, for some reason, he just turned real red in the face, and he looked at me real funny, and he turned and walked away. And I said, Henry I was just kidding about that, I wasn't, you know. And he never did answer.
>
> Q Did he ever answer that question for you?
>
> A No, sir.

(PC-R2. 2622).

Mr. Wright also called Kim Holt as a witness. At the time of the hearing, her name was Kim Holt Holliman (PC-R2. 2579). She testified concerning her observations of Henry Jackson as she had reported in her February 28, 1983, statement (PC-R2. 2582). She verified that it was from Mr. Jackson that she learned that Ms. Smith was dead, and that at the time Mr. Jackson had "scratches on him and had what appeared to be blood on him" (PC-R2. 2583).

Mr. Wright called Mildred Thomas as a witness. Ms. Thomas was Kim Holt's mother (PC-R2. 2506). The State objected to Ms. Thomas' testimony regarding what Kim had told her in February of 1983. The objection was sustained on hearsay grounds, but Mr. Wright was permitted to proffer the testimony in support of his claim that the testimony was being presented to show what information would have been available to Mr. Pearl in 1983. Kim had told her mother:

> that a man that usually came through her line [] scrounging around for money, had come through and he had money, and that there were scratches on his hands and on his throat. And I told her I said well, perhaps you better tell the police about it, because we knew by then that Ms. Page had been killed.

(PC-R2. 2508).

Taylor Douglas' deposition in 1997 was introduced as Exhibit 27 (PC-R2. 2520). At first, Taylor Douglas indicated that "Mr. Wright was" polygraphed, but beyond that he was not sure. As to Jackson and Strickland being polygraphed, he indicated, "Possibility" (Douglas Depo, at 35). Taylor Douglas was then permitted to refresh his recollection. Afterwards, he listed those individuals who in fact were polygraphed: Paul House, Charles Westberry, Jody Wright and Denise Easter (Douglas Depo at 39). Jackson and Strickland were not on the list of those who had been polygraphed.

Mr. Wright called Glenna Logan Fox and her sister, Tammy Logan Marjenhoff as witnesses (PC-R2. 2537, 2548).[42] They testified concerning a September 9, 1980, incident that had been reported to the police. The police report regarding the incident was introduced into evidence as Exhibit 41 (PC-R2. 2543). Ms. Fox explained that someone had been trying to break into her residence for several months (PC-R2. 2549). She had tried to catch the person without success. Then on September 9th, she awoke to the screen door shaking "like somebody trying to shake

[42]They were located as witnesses only after the 1991 disclosure of public records that had previously not been provided to Mr. Wright's collateral counsel (PC-R2. 167).

it, trying to get [] the latch to come unlatched" (PC-R2. 2552). She saw Henry Jackson and he told her he needed a light for his cigarette and tried to get her to open the door (PC-R2 2552-53). She reported the incident to the police and moved because of her fear of Jackson two weeks later (PC-R2. 2554).

Leon Wells was called as a witness by Mr. Wright (PC-R2. 2573).[43] He testified that he had known Henry Jackson and his brothers virtually all his life. Mr. Wells worked at a convenience story in the early 80's and had occasion to see Henry come into his story on a regular basis, once or twice a week (PC-R2. 2574). Mr. Wells recalled:

> Q Did you ever see them fight?
>
> A Oh yeah, I've seen them fight.
>
> Q How many times do you think you've seen Henry Jackson fight?
>
> A In my lifetime 30 or 40.
>
> Q Now, other than fighting did Henry have any other qualities that make you remember him?
>
> A Pertaining to his fighting, I think him and Leroy both liked knives.

(PC-R2. 2575).

On January 29, 1981, Mr. Wells had to call the police to arrest Henry Jackson (PC-R2. 2577). Mr. Wells explained as follows without objection:

> Q Do you recall the incident that led to this police report dated January 29th, 1981?

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[43]Mr. Wells was located as a witness only after the 1991 disclosure of public records that had previously not been provided to Mr. Wright's collateral counsel (PC-R2. 169).

A It's been a long time ago, but they were just fighting, just like the report says, they were arguing amongst one another and just wouldn't leave the store.

Q Okay. Do you think you may have called the police other times other than on this occasion on the Jacksons?

A I called them - - one that I remember distinctly because it involved a gun and the one the one on Crill Avenue where Henry had a gun on his daddy and they were arguing over a bottle of wine.

Q Okay. Do you remember what happened in that incident?

A They let him go, because he run around the building before the cops got there and hid the gun and they couldn't find the gun. And they asked him to leave and they left.

Q Now, is there anything about Henry Jackson that you'd like to tell the court other than what you've said today?

A Well, you can't go under hearsay, but they were terrible bad boys. Like I said I grew up with them most of my life one way or another.

(PC-R2. 2577-78).

Mr. Wright called Ella Hill as a witness (PC-R2. 2629).[44] She testified that she had lived at her address in Palatka for 39 years (PC-R2. 2630). She indicated that she had been very familiar with Henry Jackson. She recalled him killing his brother-in-law:

Q How did you know Henry Jackson did this shooting in your neighborhood?

A It was a gunshot, the law was called and they took him off.

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[44]Ms. Hill was located as a witness only after the 1991 disclosure of public records that had previously not been provided to Mr. Wright's collateral counsel (PC-R2. 174).

Q Okay.

A And the brother-in-law was dead.

Q So, the neighbor across the street, who was his brother-in-law, died?

A Right.

Q And Henry Jackson did not come back to the neighborhood after that night for how long?

A I'm not sure. Quite a while, but I'm not sure.

(PC-R2. 2633).

Ms. Hill explained that she called the police regarding Henry Jackson a number of times:

Q Now, did you ever call the police yourself as a result of activity by Henry Jackson in your neighborhood?

A Yes.

Q Do you have any idea over the years he lived there how many times that was?

A A lot. Twelve, 15 maybe.

* * *

Q And what was the most memorable occasion on which you called the police?

A Most memorable occasion was the time that the shot went through the front door.

Q Did you actually call the police that night?

A Yes.

* * *

Q Did you ever see any other kinds of violence at the Jacksons while you lived there?

A Yes.

Q Could you describe that?

A I saw his brother throw his mother out the backdoor.

(PC-R2. 2633-35).

According to a police report admitted into evidence, Grace Moore, with a listed age of 70, reported on May 29, 1984, that she had Henry and Mike Jackson do some work for her. After she went to bed that night and fell asleep, she was awakened by Henry Jackson the next morning. "[S]he was laying on the floor with a bump on her head" (PC-R2. 185). "She noticed $300.00 cash that was in her pantyhose [that] she was wearing was gone" (PC-R2. 185).[45]

The records received in 1996-97 that were introduced as Exhibit 47 contained a voluntary statement from Bobby Lou Hackney, age 18, which was taken by Taylor Douglas. The statement concerned sexual battery charges that had been made against him. Mr. Hackney was formally arrested on the charges on April 30, 1981. Jim Dunning filed an Announcement of No Information on May 15, 1981. Another arrest report shows that Mr. Hackney was arrested for burglary on October 16, 1982. A commutation of Hackney's resulting sentence for petit theft shows that he was released on February 4, 1983. Another arrest report shows an arrest on June 29, 1983, for burglary and grand theft. Still another report shows another arrest for burglary and grand theft on September 5, 1983. Deputy Jerry Vaughn recalled in his

[45]The police reports that were admitted into evidence as Exhibit 46 also show that Henry Jackson was found dead on February 2, 1985, after expressing complaint about shortness of breath and chest pains. He was 39 years old (PC-R2. 188).

deposition, Exhibit 36, that Bobby Hackney was involved in the illegal stealing and selling scrap metal.[46]

Also contained in Exhibit 47 is a handwritten note from Johnny McClendon to Captain Miller. The note is poorly written and contains many misspellings. It talks about trying to get a Ray man to confess to the crime. This seems to be a reference to Connie Ray Israel.[47]

The September, 5, 1997, deposition of Walter Pellicer was entered into evidence as Exhibit 40 (PC-R2. 2521). Mr. Pellicer had been the Sheriff of Putnam County in 1983, at the time of Mr. Wright's trial, and in 1988, at the time of the evidentiary hearing before Judge Perry. Former Sheriff Pellicer testified that Judge Perry had been a special deputy sheriff in Putnam County at the time of trial (Pellicer Depo. at 19). Former Sheriff Pellicer indicated that he thought Howard Pearl, as well as Jim Dunning, had been special deputies in Putnam County (Pellicer Depo. at 18). Former Sheriff Pellicer further stated that Freddie Williams was a bonded deputy in Putnam County (Pellicer Depo. at 18). Former Sheriff Pellicer explained the benefit of having a special deputy appointment, "when they got stopped for speeding they pulled card [sic], you know, Oh, are

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[46]No records were revealed of whether Bobby Hackney was seriously interviewed as a suspect or if so how he was eliminated.

[47]No records were revealed as to whether Connie Ray Israel was considered as a suspect and if so how he was eliminated. See Israel v. State, Case No. SC95873.

you a deputy sheriff? Oh, yeah. Be careful, Sheriff, go ahead — a courtesy card, still call it that" (Pellicer Depo. at 20).

Judge Perry testified on December 18, 1992, as part of the consolidated hearing that was subsequently voided by this Court in Teffeteller v. Dugger, 676 So.2d 369 (Fla. 1996). In his testimony, Judge Perry recalled having been placed "on the special deputy list in Duval, Volusia, and perhaps Orange Counties" (PC-R2. 1962). Judge Perry explained his understanding of the status associated with the listing, "[t]hey were strictly a friendship thing based on my personal acquaintance with the various sheriffs involved. And I would assume when the sheriff was out of office that appointment was also voided" (PC-R2. 1963). When asked whether he had such a listing in Putnam County, Judge Perry stated, "[w]hen Mr. Pellicer was sheriff, I may well have been" (PC-R2. 1962). Before and during the 1997 hearing, Mr. Wright sought to obtain further testimony from Judge Perry (PC-R2. 2485).[48] However, Judge Nichols did not grant the request and Judge Perry died before he could be called at the evidentiary to testify regarding these matters.

[48]Not only had Sheriff Pellicer revealed in 1997 that in fact he had placed Judge Perry on the special deputy list, but Judge Perry's ex parte contact with the State in the Richard Randolph capital proceedings in the late 1989 had surfaced. Undersigned counsel did not learn of ex parte contact in the case of Randall Scott Jones and Manuel Colina until the year 2000. Since no public records have been disclosed by the State to date reflecting ex parte contact at Mr. Wright's trial or during the 1988 evidentiary hearing, it was necessary to ask Judge Perry about what apparently was his standard practice.

The deposition of Clifford Miller was introduced into evidence as Exhibit 19 (PC-R2. 2519). Captain Miller worked in the Sheriff's Office during Walter Pellicer's tenure as sheriff. Captain Miller explained that former Sheriff Pellicer had provided the special deputy appointments "to political allies" (Miller Depo. at 7).

Howard Pearl was called at the 1997 evidentiary hearing. He testified that he had received an appointment in Marion County as a special deputy in 1972. The appointment was "still enforce when I represented Mr. Wright" (PC-R2. 2437). Mr. Pearl was paying insurance on the Marion County appointment (PC-R2. 2438). In addition, Mr. Pearl had received a special deputy card from Volusia County prior to Mr. Wright's trial. He also had received a special deputy card from Lake County prior to Mr. Wright's trial (PC-R2. 2438). Neither Mr. Pearl nor Judge Perry advised Mr. Wright of any of the special deputy appointments (PC-R2. 2439).

Mr. Pearl did distinguish between his Marion County status and the special deputy appointments in Volusia and Lake Counties. The Marion County appointment authorized him to carry a gun and required insurance. According to Mr. Pearl, "I think to serve as a special deputy sheriff in the circuit, Seventh Circuit, would constitute at least the appearance of a conflict of interest, whereas being a special deputy sheriff with no powers in Marion County would not" (PC-R2. 2469). In fact, that was the reason he obtained the Marion County appointment, one that was outside the

Seventh Circuit. “I considered that and completely rejected it” (PC-R2. 2469).

Mr. Pearl invoked discovery after his appointment to represent Mr. Wright (PC-R2. 2439). In Mr. Wright’s case an unusual procedure was followed. Either Mr. Pearl or his investigator, Freddie Williams, was required to sign for each piece of paper received in the course of discovery. The answer to the demand for discovery containing all of the signed receipts was identified by Mr. Pearl and introduced into evidence as Exhibit 13 (PC-R2. 2441-43). Mr. Pearl testified that he did not receive the statements of Kim Holt, Wanda Brown or Charlene Luce (PC-R2. 2421, 2427, 2428). Mr. Pearl was unaware that William Bartley had seen Henry Jackson and Clayton Strickland during the time period the murder may have happened standing in the empty lot next to Ms. Smith’s house drinking (PC-R2. 2431). Mr. Pearl was unaware of Henry Jackson’s prior murder conviction (PC-R2. 2432). He did not know of Jim Dunning’s representation of Henry Jackson for the murder charges (PC-R2. 2432). He did not know of Henry Jackson’s prior burglary conviction regarding his entry into Earl Smith’s house, which was located across the street from Ms. Smith (PC-R2. 2434).

At one point, Mr Pearl learned of Kim Holt and interviewed her. At the time he interviewed her in August of 1983, she was unsure of exactly when Mr. Jackson was in the store in February. Mr. Pearl concluded that her observations were insignificant because he did not have the benefit of her statement to law

enforcement in February of 1983 pinpointing the time as 4:30 p.m., February 6th (PC-R2. 2418). She did indicate to Mr. Pearl that she had been interviewed by sheriff deputies. Mr. Pearl then confronted Captain Miller shortly before trial, and Captain Miller assured him that Henry Jackson had been eliminated as a suspect (PC-R2. 2419). Mr. Pearl testified:

> I asked him if he had any earlier statements of Ms. Holt, and if so would he please produce it so that he could - - it could be furnished to me by way of discovery. And his reply was that he reached behind his desk, to a piece of furniture behind it, and he came back with a file about an inch and a half, two inches thick, full of paper, he said these are records of the investigations we made when we were following up leads that we received. Most of them had no value. We eliminated these persons as suspects and therefore didn't send it to the state attorney and we considered those matters closed. He said if you want to read through this file, here it is; take it. I said I can't do that. I've got a deal with Dunning, I've got to sign for everything I get. I'm not going to violate that agreement.

(PC-R2. 2419-20).

Mr. Pearl was advised of the bad blood between the Wright family and Walter Perkins (PC-R2. 2437). Mr. Pearl made a feeble attempt to question Officer Walter Perkins about the bad history. When he met resistance, he withdrew his questions and apologized to Officer Perkins in front of the jury (R. 2364-67). He made no effort to call of any of Jody's family members to explain the history and the threats made by Officer Perkins to make Jody's mother sorry that Jody had ever been born (PC-R2. 2438).

Mr. Pearl acknowledged that he as a matter of standard practice he inquired of potential jurors of any law enforcement connections that they might have (PC-R2. 2435). He also

indicated that he in consultation with Mr. Wright would have no hesitation in peremptorily excusing jurors with such ties (PC-R2. 2435). This in part would be due to fear that the ties to law enforcement may unconscious influence their decisionmaking (PC-R2. 2443-44)("One reason would be that [the] ties to law enforcement would influence their judgment in any case in which they sat").

Mr. Pearl testified that Mr. Wright was never given an opportunity to object to his representation because he was a special deputy sheriff (PC-R2. 2441). Mr. Pearl acknowledged that it was important to him to keep a good relationship with law enforcement (PC-R2. 2442)("I find that it's very beneficial to make friends in law enforcement, because they tend to cooperate with you").

Mr. Wright, himself, was called as a witness at the 1997 evidentiary hearing. He testified that he had no knowledge at the time of trial that either Howard Pearl or Freddie Williams was a special deputy sheriff (PC-R2. 2640). Had he known, Mr. Wright indicated that he would have objected. Further, Mr. Wright testified that he did not know at the time of trial or during the 1988 proceedings that Judge Perry was a special deputy sheriff in Putnam County (PC-R2. 2641). Mr. Wright indicated had he know if would have asked to disqualify him from the case. The State conducted no cross-examination of Mr. Wright (PC-R2. 2641).

STANDARD OF REVIEW

Specific findings of historical fact in the circuit court's resolution of Brady and ineffective assistant of counsel claims following an evidentiary hearing are reviewed deferentially on appeal. That means as to those findings this Court will accept them as long as there is "competent and substantial evidence" to support the circuit court's finding of historical fact. However, the legal determinations as reviewed de novo. In Stephens v. State, 748 So.2d 1028, 1034 (Fla. 1999), this Court explained that under the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), "both the performance and prejudice prongs are mixed question of law and fact." As a result, "alleged ineffective assistance of counsel claim[s are] mixed question[s] of law and fact, subject to plenary review." Stephens, 748 So.2d at 1034.

This is equality true of the standard of review of a Brady claim. In United States v. Bagley, 473 U.S. 667, 682 (1985), the Supreme Court adopted the Strickland prejudice prong standard as the standard to review the materiality prong of a Brady claim. See Duest v. Singletary, 967 F. 2d 472, 478 (11th Cir. 1992), vacated on other grounds, 113 S. Ct. 1940, adhered to on remand, 997 F.2d 1326 (1993)("This issue presents a mixed question of law, reviewable de novo."). Rogers v. State, ___ So.2d ___ (Fla. Feb. 15, 2001)("[t]he standard requires an independent review of the legal question of prejudice")(Slip Op. at 7).

SUMMARY OF THE ARGUMENTS

1. Mr. Wright was deprived of a constitutionally adequate adversarial testing at his trial. The prosecutor failed to disclose a plethora of exculpatory evidence that both impeached the State's case against Mr. Wright, and also established a case against Henry Jackson and Clayton Strickland. In addition, Mr. Wright's trial counsel failed to develop and present a wealth of exculpatory evidence that both impeached the State's case against Mr. Wright, and also established that Henry Jackson and Clayton Strickland had motive and opportunity to commit the murder of Ms. Smith. When the exculpatory evidence that was not presented to the jury is considered cumulatively and the proper constitutional standard is applied, confidence in the outcome of the trial is undermined.

In addition, there is evidence that qualifies under Jones v. State, 591 So.2d 911 (1991). This evidence of innocent must also be considered cumulatively with the other exculpatory evidence that the jury did not hear. When the evidence is properly evaluated, a new trial is required.

2. Howard Pearl and Freddie Williams were bonded deputy sheriff's: Mr. Pearl in Marion County, Mr. Williams in Putnam County. In addition, Mr. Pearl possessed special deputy cards signaling his friendship and political loyalty to the sheriffs of Volusia and Lake Counties. Under the circumstances and facts in Mr. Wright's case, the status enjoyed by Mr. Pearl and Mr.

Williams interfered with their ability to render effective representation on behalf of Mr. Wright.

3. Judge Perry presided over Mr. Wright's trial while he possessed a special deputy card from Putnam County Sheriff Walter Pellicer. This card represented Judge Perry's alliance and friendship with Sheriff Pellicer. In addition, Judge Perry regularly engaged in ex parte contact with the State Attorney's Office in capital case in Putnam County. His standard practice was to have the State draft the findings in support of death. Judge Perry was forced to resign his position as a judge because of his improper ex parte contact and his lack of impartiality. The fact that Judge Perry presided over Mr. Wright's 1983 trial and 1988 evidentiary hearing deprived Mr. Wright of due process.

4. Judge Perry's standard practice to have the State on an ex parte basis draft the findings in support of a death sentence violated due process and Florida law. Mr. Wright's sentence of death must be vacated.

5. Judge Nichols delay in ruling on Mr. Wright's motion to depose Judge Perry and his delay in ruling on the 3.850 denied Mr. Wright his right to due process under Jones v. State, 740 So.2d 520 (Fla. 1999).

6. The circuit court erroneous ruled that "nothing has occurred" that demonstrates that Eighth Amendment error occurred when this Court struck an aggravating circumstances on direct appeal and failed to conduct the requisite harmless error analysis required by Sochor v. Florida, 504 U.S. 527 (1992).

ARGUMENT I

MR. WRIGHT WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE.

A. Introduction.

Mr. Wright first alleged that he had been denied an adequate adversarial testing when he litigated his Rule 3.850 in 1988.[49] Though the circuit court denied that claim, that denial was premised upon false facts found after Mr. Wright had erroneously be denied public records which refuted the false facts and provided additional support for his claim. In the course of the proceedings below on remand, Mr. Wright presented proof that the circuit court's 1989 order denying Rule 3.850 relied upon false facts. Mr. Wright also presented the public records containing exculpatory evidence that was disclosed after the remand.

This Court was presented with similar circumstances in Lightbourne v. State, 742 So.2d 238 (Fla. 1999). There, Mr. Lightbourne had presented a claim in 1989 that he had been

[49]It should be noted that this proceeding is a continuation of the first Rule 3.850 motion filed by Mr. Wright. This Court affirmed the denial of some of Mr. Wright's claims in its 1991 opinion, but it remanded for further proceedings on "whether Wright's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance." Wright v. State, 581 So.2d at 887. During the proceeding on remand, it was established that the Putnam County Sheriff's Office had failed to previously disclose all the public records Mr. Wright had requested in 1988.

deprived of an adequate adversarial testing because the State had failed to disclose exculpatory evidence. The claim was denied and the denial affirmed by this Court. After that decision denying was final,[50] Mr. Lightbourne discovered new evidence that supported his claim. This Court ruled that a cumulative analysis of Mr. Lightbourne's claim that he did not receive an adequate adversarial testing was required.

Mr. Wright was entitled to the same cumulative consideration that was order in Lightbourne. Mr Wright did not receive that cumulative consideration. Judge Nichols merely stated:

> Claims II as to 'no adversarial testing', and Claims VII and VIII are premised on the disclosure of additional documents since the trial and the initial 3.850 hearing in 1991 are related. There is just no evidence that the outcome of the Defendant's would be different. There is only mere speculation on the Defendant's part as to these claims.

(PC-R2. 1138-39). Judge Nichols then address Claim III separately. Having sustained the State's objection to Mr. Wright's effort to prove that Judge Perry's earlier decision was premised upon the false fact that the statements of Wanda Brown, Charlene Luce and Kim Holt were disclosed to the defense pre-trial, Judge Nichols honored the false fact:

> Claim III concerns newly discovered evidence, i.e. police reports of incidents involving Henry Jackson and Clayton Strickland. Both of these gentlemen were initially interviewed by the Putnam County Sheriff's Office and were eliminated as suspects early on. The defense team knew of these gentlemen well before trial.

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[50]Here, the denial was never final in that this Court remanded for further proceedings on a related claim concerning whether trial counsel provided effective representation in light of his status as a special deputy sheriff.

> The fact that police reports existed on these persons as to incidents of loitering, trespass and other disturbances could have been discovered by the trial team. There is simply no newly discovered evidence. The defendant has only speculation, but no evidence, that the results of this trial would have been different.

(PC-R2. 1139).

The errors in this analysis are numerous. First, Judge Nichols failed to apply the proper standard under Kyles v.Whitely, 514 U.S. 419 (1995) by requiring Mr. Wright to prove "that the outcome of the Defendant's trial would have been different."[51] Second, Judge Nichols found trial counsel's lack of diligence in discovering exculpatory evidence in the State's possession relieved the prosecutor's of his obligation to disclose under Brady. This was erroneous under Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000), and Strickler v. Greene, 527 U.S. 263 (1999). Finally, Judge Nichols treated the undisclosed Brady as Jones evidence, and thus applied the wrong legal standard.[52]

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[51]The more likely than not standard was specifically rejected in Kyles v. Whitley, 514 U.S. at 434 ("[t]he question is not whether the defendant would have more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

[52]Under Jones v. State, 591 So.2d 911 (Fla. 1991), evidence of innocence, which neither the prosecutor failed to disclose at trial nor defense counsel unreasonably failed to discover at trial, may nonetheless warrant a new trial if the evidence probably would have resulted in an acquittal if it had been known by the jury. This burden of proof is obviously higher than the burden established in Strickland v. Washington.

In the course of this Argument, Mr. Wright will address first the evidence and information that was not considered by the circuit court previously in 1989 that justifies revisiting the claim under Lightbourne. He will then address why that cumulative analysis is required and in turn requires that Mr. Wright be afforded a new trial.

B. Previously Unavailable Evidence and False Facts.

Mr. Wright presented below evidence establishing that Judge Perry's 1989 order denying Rule 3.850 relief was premised upon false facts. These false facts were absolutely critical to the resolution of Mr. Wright's claim for a new trial. These false facts were presumed correct by this Court on appeal, thereby tainting this Court's decision to affirm that part of Judge Perry's order.

In addition, Mr. Wright was presented in 1991 and again in 1997 with previously undisclosed public records that had been requested in 1988, but were not then disclosed.[53] The State thus

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[53]Too often collateral litigants have used sloppy language in pleading claims for relief. Frequently, the phrase "newly discovered evidence" is employed to described two different types of evidence. On the one hand, this phrase has been used to refer to evidence that could not have been discovered sooner through the use of due diligence. Under Rule 3.850 if diligence is present, the merits of the underlying claim is before the court. Lightbourne.

On the other hand, the phrase has also been used to describe evidence supporting a claim under Jones v. State. In those circumstances, evidence of innocence, which was unavailable at trial, warrants a new trial if the jury would have probably acquitted had it heard the evidence.

In writing this brief, undersigned counsel has endeavored to not use the ambiguous phrase "newly discovered evidence" since it has engendered so much confusion in the past.

failed in its obligations to disclose exculpatory evidence and to disclose public records when requested.[54] In analyzing the evidence, the circuit court should have put Mr. Wright in the position he would have been in had the evidence been disclosed when requested in 1988. By doing otherwise, Judge Nichols rewarded the State for suppressing exculpatory evidence.

Since the previously undisclosed public records further supported Mr. Wright's claims for a new trial, the previously presented claim should have been revisited and re-evaluated in light of the newly disclosed evidence. Lightbourne. All of the exculpatory evidence should have been considered cumulatively with the evidence presented in 1988.

1. False fact regarding Freddie Williams.

Freddie Williams was Howard Pearl's investigator. He was called as a witness in 1988, and he testified concerning his knowledge of the statements of Wanda Brown, Charlene Luce and Kim Holt. Judge Perry relied on Mr. Williams' testimony to deny Mr. Wright's claim that exculpatory evidence was not disclosed by the prosecutor. In 1989, Judge Perry made the following factual determination:

> The investigator for the Public Defender's Office, Mr. Freddie Williams, testified that he was aware of the statements by Brown and Luce. . . . Mr. Williams and

[54]The State has an ongoing duty under Brady even when a case is in the postconviction stage. Johnson v. Butterworth, 713 So. 2d 985 (Fla. 1998); Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996). The State has a duty to learn of evidence that might be favorable to Mr. Wright which could form the basis for relief. Kyles v. Whitley, 514 U.S. 419 (1995).

> defense counsel worked closely together and it is likely that defense counsel was made aware of the statements through Mr. Williams.

Wright, 581 So.2d at 883.

However, that was never in fact Freddie Williams' testimony. Judge Perry cited to a page in the transcript where Freddie Williams said he had seen the documents in the State Attorney's Office. A full reading of the transcript should have revealed that Mr. Williams was referring to the fact that he saw the documents in the State Attorney's Office while preparing to testify for the 1988 evidentiary hearing a full five years after Mr. Wright had been convicted. But because Judge Perry had made such an explicit factual determination supported by a page of the transcript taken out of context, this Court found itself bound by the factual determination on appeal. Stephens v. State, 748 So.2d at 1034.

On remand, Mr. Wright presented an affidavit from Mr. Williams clearly stating that the factual determination made by Judge Perry was not true. At the December 1997 hearing, Mr. Wright called Mr. Williams to the witness stand and during his testimony attempted to elicit testimony from Mr. Williams regarding the fact that he had not seen the three statements in question until five years after the trial. The State objected to the testimony arguing right or wrong it was barred by Judge Perry's explicit finding to the contrary (PC-R2. 533)("regardless of whether [Judge Perry] may have been mistaken about the specific interpretation of what this witness testified to [in a

prior hearing]"). The State asserted that the actual truth did not matter given that:

> [Judge Perry's] order was affirmed by the supreme court and I have reviewed the briefs on appeal, and this very argument that's being made now about Judge Perry being mistaken about his interpretation of what this witness said, was argued by the defense in their briefs, and the supreme court apparently did not find it very noteworthy, because they adopted Judge Perry's order.

(PC-R2. 2530-31). Judge Nichols sustained the objection and refused to consider the fact that Judge Perry's finding was false (PC-R2. 2532)("I'm going to uphold the objection. I'm going to sustain the objection). Mr. Wright was forced to merely proffer Mr. Williams' testimony in this regard. On proffer, Mr. Williams specifically testified that he did see the police reports concerning Jackson and Strickland until five year's after Mr. Wright's trial (PC-R2. 2526-36).

This Court has stated "Truth is critical in the operation of our judicial system. . . ." The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000); The Florida Bar v. Cox, ___ So.2d ___, Case No. SC96217 (Fla. May 17, 2001). Yet at the State's urging below, Judge Nichols ruled in essence that the truth did not matter. Judge Perry had made the factual determination that Freddie Williams had seen the exculpatory statements of Wanda Brown, Charlene Luce and Kim Holt before the trial, and regardless of the truth, that factual determination was binding on Mr. Wright.

Of course, Mr. Wright had challenged this factual determination in this Court in the prior appeal. He asserted

that the finding was squarely contradicted by Howard Pearl's testimony, and even by Jim Dunning's testimony. And he asserted that the finding was a misreading of Freddie Williams' testimony. But, the State did not then concede the point. It argued that the factual determination was one within Judge Perry's discretion to make. And this Court implicitly accepted that argument. Stephens v. State, 748 So.2d at 1034.

On remand, the State argued that this Court's application of the standards of appellate review precluded Mr. Wright from presenting the truth. And equally important, the State argued that Judge Nichols was precluded from considering the truth. And astonishingly, Judge Nichols agreed and refuse to permit Mr. Wright to introduce the simple truth that the statements in question were never disclosed to the Mr. Wright's defense team before or during his trial.

The time has come for the truth, which this Court has said "is critical to the operation of our judicial system," to matter in Mr. Wright's case. The statements of Wanda Brown, Charlene Luce, and Kim Holt were not disclosed as even the trial prosecutor recognized they should have been. Those statements must be finally considered and evaluated cumulatively with the other exculpatory evidence that the jury did not hear in order to ascertain whether confidence is undermined in the outcome.

2. False fact as to polygraph.

At the 1988 evidentiary hearing, both Taylor Douglas and Captain Miller testified that Henry Jackson and Clayton

Strickland were excluded as suspects and shown to be dead leads when they passed polygraph examinations. In 1989, Judge Perry relied upon that testimony when he concluded:

> Whether the [Brown, Luce and Holt] statements were exculpatory in nature is highly speculative and, thus, the claim is legally insufficient to support a claim under Brady.

Wright, 581 So.2d at 883.

However in 1997, Taylor Douglas acknowledged that Jackson and Strickland did not take polygraphs and thus were not cleared in that fashion. Initially, Taylor Douglas indicated that he knew "Mr. Wright was" polygraphed, but beyond that he was not sure. As to Jackson and Strickland being polygraphed, he indicated it was a "[p]ossibility" (Douglas Depo, at 35). Taylor Douglas was then permitted to refresh his recollection. Afterwards, he identified those individuals who were polygraphed as Paul House, Charles Westberry, Jody Wright and Denise Easter (Douglas Depo at 39). Thus, the sole basis for excluding them as suspects, according to the 1988 testimony, was revealed to be nonexistent. Judge Perry relied upon a false fact to conclude that Jackson and Strickland had been eliminated as suspects.

3. Previously undisclosed exculpatory evidence.

In addition, the Putnam County Sheriff's Office provided Mr. Wright's collateral counsel in 1991 and again in 1996-97 with public records that had not been previously provided. The situation here is virtually identical to that in Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993), where, this Court stated:

> Our remand after Provenzano's initial 3.850 motion was designed to put Provenzano in the same position he would have been in if the files had been disclosed when first requested. Provenzano, 561 So. 2d at 549. Given that Provenzano's ineffectiveness claims have arisen as a direct result of the disclosure of the file, we find that they are timely raised.

Provenzano v. State, 616 So. 2d at 430-31. See Ventura v. State, 673 So.2d 479, 481 (Fla. 1996)("The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act").

Since the circumstances here are identical to those which arose in Provenzano, the result must be the same. Mr. Wright must be put in the position he would have been put in if the files had been disclosed when requested. If the State had disclosed the Chapter 119 material when first requested, Mr. Wright would have obtained the cumulative consideration of all of the allegedly Brady material. Therefore, he must receive that cumulative consideration now.

Judge Nichols concluded that the previously undisclosed evidence could have been found by trial counsel. Therefore, he did not analysis the evidence as Brady material at all. However, this analysis was error under Strickler v. Greene. Occhicone v. State, 768 So.2d at 1042.

Judge Nichols also said it was Mr. Wright burden to use the previously undisclosed evidence to prove that the result of the trial would have been different. That is too is the wrong standard. The proper standard is whether the evidence undermines

confidence in the outcome of the trial. Rogers v. State. This is something less than more likely than not. Kyles v. Whitley; Strickland v. Washington.

Finally, Judge Nichols failed to do the detailed analysis of each bit of the evidence and consider whether the evidence considered cumulatively undermined confidence in the outcome as set forth in Kyles v. Whitley. Judge Nichols never even discussed the evidence, let only consider it cumulatively. He simply said Mr. Wright had only presented speculation.

C. Guarantee to Adequate Adversarial Testing.

The United States Supreme Court has explained:

> ... a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Here, Mr. Wright was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that would have implicated Jackson and Strickland in the murder, and further evidence exculpating Mr. Wright. Whether the prosecutor failed to disclose this significant and material evidence or whether the defense counsel failed to do his job, the record is clear that the jury did not hear the evidence in question.[55] In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear this evidence.[56] Here, confidence must be undermined in the outcome since the jury did not hear the evidence. Rogers v. State; Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993).

Evidence favorable to the defense of which the jury was unaware warrants a new trial when it creates a reasonable probability that the outcome of the guilt and/or capital

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[55]In fact, the record is clear that both the prosecutor and the defense attorney failed in their respective obligations. A wealth of favorable evidence was not disclosed by the prosecutor. And trial counsel has testified that he provided "inferior performance" when he had "a lapse" and made "a mistake" and forgot to present the evidence establishing that the glass decanter was a Wright family heirloom (PC-R1. 820). Trial counsel also neglected to present the testimony that Officer Walter Perkins had threatened Mrs. Wright saying "I'm going to make you sorry you ever had them two boys" (PC-R2. 2587).

[56]In Bagley, the Supreme Court adopted the Strickland prejudice standard as the proper measure for determining the materiality of the nondisclosure of exculpatory evidence. Thus, whether the alleged error is the prosecutor's failure to disclose exculpatory evidence or the defense attorney's failure to adequately represent the defendant, reversal is required when confidence is undermined in the outcome.

sentencing trial would have been different. Garcia v. State, 622 So. 2d at 1330-31. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. This is true whether the evidence was unpresented because of the prosecution's failure to disclose or because of trial counsel's deficient performance.

Though error may arise from individual instances of nondisclosure and/or deficient performance, proper constitutional analysis requires consideration of the cumulative effect of the individual nondisclosures in order to insure that the criminal defendant receives "a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434. The proper analysis cannot be conducted when suppression of exculpatory evidence continues or when, despite due diligence, the evidence of the prejudicial effect of the nondisclosure does not surface until later. The analysis must be conducted when all of the exculpatory evidence which the jury did not know becomes known. Lightbourne.

1. Evidence not disclosed by the State. The evidence not disclosed be the State before Mr. Wright's trial included the following:

a. Wanda Brown's statement describing the encounter she observed between Ms. Smith and Clayton Strickland

on the day she was murder and his demand for money from Ms. Brown.[57]

b. Kim Holt's statement describing her observations of Henry Jackson's physical and financial condition when he announced that Ms. Smith was dead at a time when her death was not common knowledge, in fact the police had just been notified of the discovery of her body.

c. Charlene Luce's statement describing Henry Jackson's threatening behavior while having a knife poised in his right hand on the day before the homicide, and additionally her observations of his behavior and demeanor after the murder when she asked him if he had killed Ms. Smith.

d. Henry Jackson's criminal history including a conviction for a homicide and a conviction for a burglary of a residence the victim's brother which was located across the street from the victim's residence where she was killed.

e. The police report concerning Glenna Fox' observation of Henry Jackson attempt to enter her home unlawfully at 2:00 a.m. when she was home alone.

f. The police report concerning Leon Wells' call concerning Henry Jackson's violent behavior.[58]

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[57]When called to the witness stand, Wanda Brown said that Henry Jackson had been present when the encounters took place.

[58]When called to the witness stand, Leon Wells discussed Henry Jackson's fondness for knives (PC-R2. 2575).

g. The police report concerning Ella Hill's twelve to fifteen complaints to the police about Henry Jackson's violent behavior.

h. Police reports concerning Bobby Hackney which demonstrated that despite his criminal history he was not seriously or adequately investigated as a suspect.[59]

i. A letter from Johnny McClendon regarding his efforts to get Ray (Connie Ray Israel) to confess to the crime, despite no records of a criminal investigation of Connie Ray Israel even though he had a history of raping and robbing elderly women in Palatka who lived alone.[60]

j. Jim Dunning's undisclosed decision not to prosecute Charles Westberry for his theft of scrap metal and his dealing in the sale of stolen property in return for his testimony against Jody Wright.

k. The typed answers to his anticipated questions that Jim Dunning provided Charles Westberry to study in order to prepare in advance of his trial testimony and the numerous and

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[59]The Supreme Court has specifically recognized that evidence that impeached the reliability of law enforcement's criminal investigation is exculpatory evidence that must be disclosed to the defense. Kyles v. Whitley, 514 U.S. at 446 ("the defense could . . . have attacked the reliability of the investigation in failing to consider [another suspect's] possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted").

[60]This also goes to the reliability of law enforcement's criminal investigation. Kyles.

nearly daily coaching sessions that Mr. Dunning had with Mr. Westberry in the weeks before the trial.[61]

l. The police report concerning Dell Gillman's allegation that Officer Walter Perkins had falsified a police report and her concern that he would engage in similar behavior in other cases.[62]

m. The fact that Jody Wright's fingerprints had been obtained on February 11, 1983, but no comparison to the prints from the crime scene was made until after Officer Walter Perkins helped arrest him on April 19th.[63]

n. The fact that there was no documentation of law enforcement of ever checking out Henry Jackson's story of how he obtained the money observed by Kim Holt and how he obtained the scratches she observed on his face as well.[64]

o. The fact that the fingerprints of Henry Jackson and/or Clayton Strickland were never compared to the prints lifted from the crime scene.[65]

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[61]This Court recently held that as a matter of law "evidence of coaching and conflicting accounts clearly was clearly [evidence] favorable to [the defendant]." Rogers v. State, Slip op. at 24.

[62]This goes to the reliability of the police investigation. Kyles v. Whitley, 514 U.S. at 446.

[63]This goes to the reliability of the police investigation. Kyles v. Whitley, 514 U.S. at 446.

[64]This goes to the reliability of the police investigation. Kyles v. Whitley, 514 U.S. at 446.

[65]This goes to the reliability of the police investigation. Kyles v. Whitley, 514 U.S. at 446.

p. The fact that hair was never obtained from Henry Jackson and/or Clayton Strickland and compared to the unidentified hair found on Ms. Smith's body.[66]

Moreover the disclosure of this evidence would have lead to the discovery by defense counsel that a witness called by the State at trial, William Bartley, observed Henry Jackson and Clayton Strickland standing in the empty lot next to Ms. Smith's house just hours after Wanda Brown observed Ms. Smith shake her fist at them. William Bartley indicated that this observation was just after dark on the evening of February 5, 1983 (PC-R1. 1006-07). Interestingly, the medical examiner's initial estimate of the time of death was between 5:00 p.m. and 9:00 p.m. on February 5, 1983 (R. 1852).[67]

2. Evidence not present by defense counsel. The available evidence that defense counsel knew of and should have presented, but failed to, included the following:

a. The fact that the glass decanter identified by Charlotte Martinez was a Wright family heirloom and not the glass jar that Charles Westberry claimed Jody Wright took from Ms. Smith's house (PC-R2. 819-20).[68]

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[66]This goes to the reliability of the police investigation. Kyles v. Whitley, 514 U.S. at 446.

[67]Not only does this goes to the reliability of the police investigation, it provides substantial evidence that Henry Jackson and Clayton Strickland committed the murder and lied to police about the activities on the evening of February 5, 1983.

[68]In the credibility battle described by Justice Blackmun in his dissent from the denial of certiorari review, the prosecutor

b. The fact that Walter Perkins, a police officer, who testified that Jody Wright made an incriminating statement, had told Jody's mother, Mrs. Wright months before, that he was "going to make [her] sorry [she] ever had them two boys" (PC-R2. 2587-88).[69]

c. The fact that Jody Wright was suicidal over his mother's death on the eve of his trial.

d. After learning that Kim Holt had provided a statement to law enforcement, Howard Pearl had confronted Captain Miller, but had refused Captain's Miller offer to look at the Kim Holt statement. Thus he failed to learn and present Kim Holt's observations of Henry Jackson at the precise time that the police were responding to call and discovering the body.

e. Trial counsel failed to learn and present the fact that Charles Westberry was fearful that either himself or his wife could be prosecuted and sent to jail for stealing and selling scrap metal.

f. Trial counsel failed to present the fact that Westberry's initial description to Paige of how Jody had committed the murder matched newspaper accounts, not the evidence from the scene.

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used the glass jar to bolster Charles Westberry's credibility (R. 2742).

[69]Again, Kyles recognized that a defense attorney can use to good effect information that evidence may have been planted or that the police investigation was unreliable.

3. Confidence is undermined in outcome.

In Kyles v. Whitley, the Supreme Court explained:

> 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.

Kyles, 514 U.S. at 437.

The Court demonstrated how the analysis should be conducted by doing it in Kyles:

> In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officer, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibers, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could have challenged the prosecution's good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.
>
> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's

> appraisal of Burns's credibility at the time of Kyles's trials.

Kyles, 514 U.S. at 449 n. 19 (citations omitted).

In Mr. Wright's case, the undisclosed exculpatory evidence was central to the theory of defense at the guilt phase. Mr. Wright's defense was that someone else did it. He testified in his own behalf that he did not commit the murder. The undisclosed evidence provided an indication who had committed the murder. It demonstrated that Jackson and Strickland had the opportunity and subsequently behaved in a fashion consistent with guilt. They had an encounter with Ms. Smith on the afternoon of February 5th while they were looking for money. She rebuffed them. Henry Jackson was known for his bad temper, particularly when drunk. According to Wanda Brown, he and Clayton Strickland were drunk. They were observed drinking more alcohol in the empty lot next to Ms. Smith's house during the precise time period that the medical examiner estimated was the time of death. Henry Jackson had unexplained knowledge of the homicide the next afternoon. He also possessed scratches on his face at a time that was inconsistent with the explanation he gave in his subsequent statement to law enforcement. And in his statement, Clayton Strickland misrepresented the last time he saw Ms. Smith. Strickland said he had last seen Ms. Smith the Tuesday or Wednesday before her death, not the day of her death as observed by Wanda Brown. Both Jackson's and Strickland's statements were also contradicted by Bartley's observation of them after dark on February 5th.

The unpresented evidence that the jury did not hear would have demonstrated the woefully inadequate investigation by law enforcement. It would have established a motive on the part of Officer Walter Perkins, a member of the investigation team who had a checkered past, to frame Jody Wright for this murder. The unpresented evidence when considered as a whole demonstrated that law enforcement conducted no real investigation into Henry Jackson or Clayton Strickland, despite having sworn statements that contradicted Jackson's and Strickland's statements. Despite Jackson's criminal history, there was no fingerprint comparison or hair sample obtained.[70] Law enforcement had no reason to think the murder was committed by only one assailant, it could just as easily have been two (PC-R1. 1001-02). Yet, Jackson and Strickland were discarded as suspects without one shred of admissible evidence to justify accepting their denial of guilt.[71] Further, law enforcement failed generally to conduct a reliable investigation of any of the suspects, including Bobby Hackney and Connie Ray Israel.[72]

In addition, the State's case against Jody Wright was dependent upon the testimony of Charles Westberry. As noted by

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[70]Between February 6th (the discovery of the body) and April 19th (the arrest of Charles Westberry), no fingerprint comparisons were made at all. Law enforcement was purportedly baffled and stumped by the murder.

[71]Certainly if denial of guilt alone were enough to exonerate individuals suspected of a crime, then Jody Wright's sworn testimony would have precluded him from having spent the last eighteen years on death row for a crime he did not do.

[72]See Israel v. State, Case No. SC95873.

Justice Blackmun, “this case comes down to Wright’s word against Westberry’s.” Wright v. Florida, 474 U.S. at 1097. Yet, Mr. Westberry was very afraid of going to jail for stealing and selling scrap metal. He was also afraid that his wife, Paige, may go to jail for this as well. He was told by Jim Dunning that he would not be prosecuted for this in return for his testimony against Jody Wright. This was impeachment not disclosed by the State. The jury did not learn that Jim Dunning was meeting with Charles Westberry almost daily to prepare him for testfying and that he provided Westberry with Westberry’s answers to the questions that he would be asking. This constituted impeachment vividly demonstrating that even Jim Dunning was unsure that Charles Westberry could remember his answers, supposedly the truth, without having them written down to study for several weeks before the trial.

This must all be evaluated cumulatively with the glaring failure of trial counsel to present the evidence establishing that the glass decanter, which surfaced in the midst of trial, was a Wright family heirloom and not the glass jar that Westberry claimed was taken from Ms. Smith’s house. Jim Dunning, the prosecutor, argued that the existence of the glass jar was corroboration of Westberry, yet Mr. Dunning knew that his argument was false.[73]

[73]It is clear that Mr. Dunning knew the truth about the decanter because after Mr. Pearl obtained the proof of the decanter’s origins, Mr. Dunning chose not to present it. It was only after Mr. Pearl’s “sorry performance” that Mr. Dunning had the opening to make the argument that he knew was false (PC-R1.

Additionally, this Court on direct appeal found the exclusion of Kathy Waters' testimony to be harmless error. She claimed to have observed someone matching Jody Wright's build walking on the highway in the spot and at the time that Jody Wright testified that he was there walking. Judge Perry excluded the evidence because Kathy Waters had not been sequestered and he described her testimony as seemingly "tailored-made" (R. 2645, 2678). That is because it was corroborative of Jody's testimony and in turn inconsistent with Westberry's. In evaluating the cumulative impact of the undisclosed and unpresented evidence, consideration must be given to exclusion of her testimony.

Confidence in the outcome of Mr. Wright's trial clearly must be undermined by the unpresented evidence which was relevant and material to Mr. Wright's guilt of first degree murder. Here, exculpatory evidence that was known either to State or to defnse counsel did not reach the jury. As to some of the evidence, the prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. And as to some of the evidence, defense counsel failed to provide effective representation and insure an adversarial testing. As a result, no constitutionally adequate adversarial testing occurred. Confidence is undermined in the outcome.[74] There is much, much more than a reasonable

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819-20).

[74]The jury was required to acquit if it had a reasonable doubt of Jody Wright's guilt. The question under Kyles is not whether more likely than not the jury would have had a reasonable

probability of a different outcome. Mr. Wright was convicted and sentenced without a constitutionally adequate adversarial testing.

D. Evidence of Innocent Under Jones v. State.

This Court recognized in Jones v. State, 591 So.2d 911 (Fla. 1991), that where neither the prosecutor nor the defense attorney violated there constitutional obligations in relationship to evidence the existence of which was unknown at trial, a new trial is warrant if the previously unknown evidence would probably have produced an acquittal had the evidence been known by the jury. Where such evidence of innocence would probably have produced a different result, a new trial is required.

Impeachment evidence may qualify as under Jones v. State as evidence of innocence that may establish a basis for Rule 3.850 relief. As stated in State v. Robinson, 711 So.2d 619, 623 (Fla. 2d DCA 1998):

> Historically, newly discovered evidence in the form of impeachment evidence was considered insufficient as a matter of law to warrant a new trial. [Citations omitted]
>
> Recently, however, this rule of impeachment evidence has been expanded. Florida courts now are willing to consider newly discovered 'impeachment' evidence as sufficient to grant a new trial in certain limited circumstances. In Jones, the supreme court stated: '[A]n evaluation of the weight to be accorded the [newly discovered] evidence includes whether it goes to the merits of the case or whether it constitutes impeachment evidence.' [Citations omitted].

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doubt. The question is whether confidence is shaken in the reliability of the jury's determination that it possessed no reasonable doubt in light of the evidence discussed herein which was unknown to the jury.

Evidence of evidence which qualifies under Jones v. State as a basis for granting a new trial must be considered cumulatively in deciding whether in fact a new trial is warranted. State v. Gunsby, 670 So.2d 920 (Fla. 1996).

Here, the evidence which qualifies under Jones includes:

a. A 1986 memorandum terminating Officer Perkins employment as a law enforcement officer wherein Paul Usina stated "I have found [Walter Perkins} to be lazy and unwilling to perform fully his capabilities. Additionally, I feel that Mr. Perkins is not trustworthy." (Exh. 47).

b. A police report indicating that Grace Moore, with a listed age of 70, complained on May 29, 1984, that after she had Henry and Mike Jackson do some work for her, she went to bed and fell asleep only to find when awakened by Henry Jackson that"she was laying on the floor with a bump on her head" and "$300.00 cash that was in her pantyhose [that] she was wearing was gone" (PC-R2. 185).

c. Police reports from 1983 through 1985, regarding Clayton Hughes, an identified suspect in the homicide and a witness against Mr. Wright (PC-R1. 548; Miller Depo. 21, 23; Stout Depo. 4, 8), showing arrests for burglaries, assaults with knives, and sexual batteries (Exh. 47).[75]

E. Cumulative Analysis Is Required.

[75]Apparently, Clayton Hughes' mother was one of elderly women living alone who was rape and murdered by Connie Ray Israel. See Israel v. State, Case No. SC95873.

In analyzing the prejudicial impact of the Brady evidence, Strickland evidence, and Jones evidence, the evidence must be evaluated cumulatively in deciding whether a new trial is warranted. This Court in Jones v. State, 709 So.2d 512 (Fla. 1998), and reaffirmed in Lightbourne, made it clear that the cumulative analysis is in fact legally required where a Brady claim, an ineffective assistance claim, and/or a Jones v. State claim are presented in a 3.850 motion. In State v. Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effects of Brady violations, ineffective assistance of counsel, and/or Jones evidence of innocence using the following analysis:

> Gunsby raises a number of issues in which he contends that he is entitle to a new trial, two of which we find to be dispositive. First, he argues that the State's erroneous withholding of exculpatory evidence entitles him to a new trial. Second, he asserts that he is entitled to a new trial because new evidence reflects that the State's key witnesses at trial gave false testimony in order to implicate him in a murder he did not commit and to hide the true identity of the murderer.
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> * * *
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> Nevertheless, when we consider the cumulative effect of the testimony presented at the 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome. Cf. Cherry v. State, 659 So.2d 1069 (Fla. 1995)(cumulative effect of numerous errors in counsel's performance may constitute prejudice); Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995)(same). Consequently, we find that we must reverse the trial judge's order denying Gunsby's motion to vacate his conviction.

Gunsby, 670 So.2d at 923-24 (emphasis added). See Young v. State, 739 So.2d 553 (Fla. 1999). This Court held in Lightbourne v. State, 742 So.2d at 247 that a cumulative analysis of Mr. Lightbourne's Brady claim and his newly discovered evidence was required. This means Mr. Wright's claims require cumulative consideration of all previously pleaded claims that Mr. Wright did not receive an adequate adversarial testing because his jury did not hear favorable and exculpatory evidence. The claims presented previously must be evaluated cumulatively with the evidence presented herein. Way v. State, 760 So.2d 903 (Fla. 2000). If considering the claims cumulatively results in a loss of confidence in the reliability of the outcome, relief is warranted. Young v. State; Kyles v. Whitley.

The State's case against Mr. Wright was based upon testimony of Mr. Westberry. Justice Blackmun in his dissent from the denial of a writ of certiorari said "this case comes down to Wright's word against Westberry's." Wright v. Florida, 474 U.S. 1094, 1097 (1986)(Blackmun, J., dissenting). As outlined above the evidence the jury did not hear because the prosecutor and the defense attorney failed to comply with their constitutional obligations, already undermines confidence in the outcome. But when combined with the fact that Officer Perkins was fired because he was "untrustworthy," It is even more clear that Mr. Wright's conviction is not worthy of confidence. When cumulative consideration is given to all the evidence of Mr. Wright's innocence, it is clear that the jury would have had a reasonable

doubt and that Mr. Wright must be afforded a new trial. The order denying 3.850 relief failed to conduct the requisite cumulative analysis and must be reversed.

ARGUMENT II

HOWARD PEARL'S STATUS AS A SPECIAL DEPUTY SHERIFF, IN CONJUNCTION WITH WALTER PELLICER'S TESTIMONY THAT FREDDIE WILLIAMS, MR. PEARL'S INVESTIGATOR WAS A BONDED DEPUTY SHERIFF IN PUTNAM COUNTY, AFFECTED THE DEFENSE TEAM'S PERFORMANCE AND INTERFERED WITH ITS ABILITY TO PROVIDE EFFECTIVE REPRESENTATION.

Mr. Wright's conviction violated the laws and constitution of the State of Florida and the United States of America due to trial counsel's undisclosed status as a special deputy sheriff, and due to his investigator's undisclosed status. Howard Pearl was as a bonded special deputy sheriff in Marion County. His investigator, Freddie Williams, according to the Putnam County Sheriff, Walter Pellicer, was a bonded special deputy in Putnam County. Mr. Pearl received a benefit from the Marion County Sheriff, he received the authority to carry a gun. Freddie Williams received the same benefit in Putnam County. The right to carry a gun was a benefit that could be revoked at any time. The privilege to carry a gun and Mr. Pearl's status as a deputy sheriff depended entirely on remaining in good favor with the Sheriff of Marion County. His investigator's privilege depended entirely on remaining in good favor with Walter Pellicer, the Sheriff of Putnam County. To keep in the good graces of these sheriffs, Mr. Pearl and Mr. Williams had to serve two masters, the Sheriff of Marion County, and the Sheriff of Putnam County, the chief law enforcement officer of those counties and Jody Wright, the indigent client charged with capital murder in Putnam County.

Mr. Wright's defense team was burdened with an undisclosed conflict that interfered with the defense's ability to represent Mr. Wright. This denied Jody Wright his right to counsel as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution.

A defendant is deprived of the Sixth Amendment right to counsel where (i) counsel faced an actual conflict of interest, and (ii) that conflict "adversely affected" counsel's representation of the defendant. Strickland v. Washington, 466 U.S. 668, 692 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); LoConte v. Dugger, 847 F.2d 745, 754 (11th Cir.), cert. denied, 488 U.S. 958 (1988); see also United States v. Khoury, 901 F.2d 948 (11th Cir. 1990), modified on other grounds upon denial of rehearing, 910 F.2d 713 (11th Cir. 1990); (absent a knowing, voluntary waiver, defendant is entitled to representation free of actual conflict), modified on other grounds upon denial of rehearing, 910 F.2d 713 (11th Cir. 1990).

Because the right to counsel's undivided loyalty "is among those `constitutional rights so basic to a fair trial, . . . [its] infraction can never be treated as harmless error.'" Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (citing Chapman v. California, 386 U.S. 18, 23 (1967)). Defense counsel is guilty of an actual conflict of interest when he "owes duties to a party whose interests are adverse to those of the defendant." Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir.), cert. denied, 444 U.S. 833 (1979).

In United States v. Tatum, 943 F.2d 370, 375 (4th Cir. 1991), the court noted the overlapping nature of the "actual conflict" and "adverse effect" prongs of the Sixth Amendment analysis. Tatum, 943 F.2d at 375-76. There, the court stated:

> [an attorney's] representation of conflicting interests . . . is not always as apparent as when he formally represents two parties who have hostile interests. He may harbor substantial personal interests which conflict with the clear objective of his representation of the client, or his continuing duty to former clients may interfere with his consideration of all facts and options for his current client. When the attorney is actively engaged in legal representation which requires him to account to two masters, an actual conflict exists when it can be shown that he took action on behalf of one. The effect of his action of necessity will adversely affect the appropriate defense of the other. Moreover, an adverse effect may not always be revealed from a review of the affirmative actions taken. Rather, the failure to take actions that are clearly suggested from the circumstances can be as revealing. Thus, the failure of defense counsel to cross-examine a prosecution witness whose testimony is material . . . can be considered to be [an] actual lapse[] in the defense.

Id. at 376 (emphasis added).

Not only was Mr. Pearl a bonded special deputy in Marion County, he also was on the special deputy lists in Volusia and Lake Counties. Obviously, the sheriff's departments of Marion, Lake, and Volusia counties of the State of Florida are entities with interests adverse to Mr. Wright. Even if this Court were to consider only Mr. Pearl's deputy sheriff status in Marion County, his law enforcement responsibilities extended from Marion County into Volusia County -- where he served in the Capital Division of the Public Defender's office. Under Fla. Statutes Secs. 23.12, et seq., Florida has enacted an overall law enforcement scheme

which coordinated mutual cooperation among law enforcement agencies throughout the State. Mutual aid agreements for voluntary cooperation and requested assistance encourage members of any law enforcement agency to render assistance outside their own jurisdiction. In so doing, all the privileges, powers and immunities granted to law enforcement officers -- whether paid, volunteer or auxiliary -- within their own jurisdiction are retained and apply with equal effect in other jurisdictions.

Former Sheriff Pellicer explained the benefit of having a special deputy appointment (Mr. Pearl's status in Volusia and Lake Counties), "when they got stopped for speeding they pulled card [sic], you know, Oh, are you a deputy sheriff? Oh, yeah. Be careful, Sheriff, go ahead — a courtesy card, still call it that" (Pellicer Depo. at 20). According to Captain Miller, the special deputy lists were for political allies of the elected sheriff.

Former Sheriff Pellicer further stated that Freddie Williams was a bonded deputy in Putnam County (Pellicer Depo. at 18). Howard Pearl, himself, said it would have been a conflict to have been a bonded special deputy in any of the counties of the Seventh Circuit. According to Mr. Pearl, "I think to serve as a special deputy sheriff in the circuit, Seventh Circuit, would constitute at least the appearance of a conflict of interest, whereas being a special deputy sheriff with no powers in Marion County would not" (PC-R2. 2469). In fact, that was the reason he obtained the Marion County appointment, one that was outside the

Seventh Circuit. “I considered that and completely rejected it” (PC-R2. 2469). Yet, Freddie Williams was a bonded special deputy in Putnam County according to Sheriff Pellicer.

Mr. Pearl acknowledged that he as a matter of standard practice he inquired of potential jurors of any law enforcement connections that they might have (PC-R2. 2435). In consultation with Mr. Wright, he would excuse jurors with such ties (PC-R2. 2435). This in part was because ties to law enforcement may unconscious influence their decisionmaking (PC-R2. 2443-44)(“One reason would be that [the] ties to law enforcement would influence their judgment in any case in which they sat”).

In this case, Mr. Pearl apologized to Walter Perkins in front of the jury during his cross-examination after Mr. Perkins denied having a bad relationship with the Wright family. Rather than believe his client and his client’s family, Mr. Pearl abandoned the line of questioning and apologized to his fellow law enforcement officer. Mr. Pearl allowed his loyalty to the State to overshadow his responsibility to Mr. Wright by abandoning his effort to impeach Walter Perkins, the very man who had threatened Jody Wright’s mother by telling her he would make her sorry her two sons were ever born. Since Mr. Pearl was laboring under an undisclosed conflict as was his investigator, no decision can be the result of any valid strategy.

Similarly when speaking to Captain Miller about the undisclosed statement of Kim Holt, Mr. Pearl blindly accepted Captain Miller’s assurance that Henry Jackson had been eliminated

as a dead lead. Mr. Pearl and Mr. Williams were willing to abandon any challenge to law enforcement's investigation into Ms. Smith's homicide out of loyalty to the Sheriff's Office.

Because of Mr. Pearl's status as a special deputy sheriff and because of his investigator's bonded deputy status, Jody Wright was denied his right to counsel with unfettered loyalty to him as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. As part their status as good ole boys who were part of the law enforcement community, Mr. Pearl's judgment and Mr. Williams' judgment was clouded and the ability to provide effective assistance to Jody Wright in the circumstances here was impaired.

The United States Supreme Court recognized:

> (i)n certain Sixth Amendment contexts, prejudice is presumed. . . . Prejudice, in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.

Strickland v. Washington, 466 U.S. 668, 692 (1984).

Under this standard, a conflict of interest is subjected to a "similar, though more limited, presumption of prejudice" than the per se presumption. Strickland, 466 U.S. 692. Under Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) prejudice is presumed if Mr. Wright demonstrates that Mr. Pearl (1) "actively represented conflicting interests" and (2) the "actual conflict of interest affected his lawyer's performance." The phraseology assumes the conflict arises from conflicting service as a lawyer. But here, Mr. Pearl was both a lawyer and a person with a license to carry a gun that was dependent on staying in the good graces of law

enforcement officials. Mr. Williams was similar burdened by the two hats he wore. Mr. Pearl himself said had the special deputy status been in Putnam County it would have been improper. The question thus, has to be did his desire to carry a gun and the resulting ties to law enforcement have an actual and visibly adverse effect on his performance as Mr. Wright's counsel. Here, Mr. Pearl's cross-examination of Walter Perkins demonstrates an overarching desire to stay in good graces with law enforcement to the detriment of his client, Jody Wright. So too, Mr. Pearl's reaction when he learned that he had not been provided Kim Holt's statement. The Sixth, Eighth and Fourteenth Amendments must mean that a criminal defendant is entitled counsel with undivided loyalty.

Mr. Pearl and Mr. Williams failed to investigate the adequacy of police procedures, crime scene analysis or any other official procedure. Mr. Pearl acknowledged that he did not challenge the credibility of the police officers even though the criminal investigation in this case was abysmal. This is reflects an adverse interest and adverse effect. This is the conflict of interest under Cuyler v. Sullivan, 446 U.S. 335 (1980). Mr. Wright was entitled to know that his defense counsel was a deputy sheriff, be it honorary, special or actual. Mr. Wright as he testified was not told about this status and he would have fired Howard Pearl had he been advised.

ARGUMENT III

MR. WRIGHT WAS DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JUDGE WHEN JUDGE ROBERT PERRY PRESIDED OVER HIS TRIAL IN 1983 AND OVER HIS POST-CONVICTION EVIDENTIARY HEARING IN 1988 IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Introduction.

It is a fundamental precept of our justice system that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). The right to an impartial judge is one of the most, if not *the* most, fundamental right guarantees of our Constitution. See, e.g. In Re Murchison, 349 U.S. 133 (1955); Marhsall, 446 U.S. at 242; Bracey v. Gramley, 520 U.S. 899 (1997). See also Porter v. Singletary, 49 F.3d 1483, 1487-88 (11th Cir. 1995) ("[t]he law is well-established that a fundamental tenet of due process is a fair and impartial tribunal"). As Justice Scalia recently wrote for a unanimous Supreme Court, "[a] criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him." Edwards v. Balisok, 117 S.Ct. 1584, 1588 (1997). See also Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (while "most constitutional errors have been held amenable to harmless-error analysis, . . . some will always invalidate the conviction") (citing, *inter alia*, Tumey v. Ohio, 273 U.S. 510 (1927), for proposition that "trial by a biased judge" is error that always invalidates the conviction). This fundamental principle stems from the paramount constitutional

precept that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 (1966), and "[t]he right to an impartial adjudicator, be it judge or jury, is such a right." Gray v. Mississippi, 481 U.S. 648, 668 (1987). See also Johnson v. United States, 117 S.Ct. 1544, 1550-51 (1997) ("[w]e have found structural errors only in a very limited class of cases" and citing "lack of an impartial trial judge" as such error); Brecht v. Abrahamson, 507 U.S. 619, 629 (1993) (structural defects "require[] automatic reversal of the conviction because [it] infect[s] the entire trial process"); Arizona v. Fulminante, 499 U.S. 279, 290 (1990) ("Chapman specifically noted three constitutional errors that could not be categorized as harmless error: using a coerced confession against a defendant in a criminal trial, depriving a defendant of counsel, and trying a defendant before a biased judge").

In Fulminante, Chief Justice Rehnquist explained that the types of trial error to which a harmless error analysis can be properly and constitutionally applied can be "qualitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Arizona v. Fulminante, 499 U.S. at 308 (Rehnquist, C.J., dissenting in part). However, as to errors such as "a judge who was not impartial," id. at 309, "[t]hese are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards. The entire conduct of the trial

from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial." Id. at 309-10. As the Court noted in Vasquez v. Hillery, 474 U.S. 254 (1986):

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motiviations are hidden from review, and we must presume that the process was impaired.

Id. at 265 (emphasis added).

The Court in Rose v. Clark, 478 U.S. 570 (1986), similarly acknowledged that "some constitutional errors require reversal without regard to the evidence in the particular case" because those errors "necessarily render a trial fundamentally unfair." Id. at 577. As Justice Powell wrote:

> The State of course must provide a trial before an impartial judge, . . . with counsel to help the accused defend against the State's charge. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, . . . and no criminal punishment may be regarded as fundamentally fair.

Id. (citations omitted). In distinguishing structural errors from trial-type errors, the Court in Rose explained that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." Id. at 579. The Court made it very clear, however, that a trial by a biased adjudicator remained without a doubt an error which results in the denial of the basic trial process "altogether." Id. at 578

n.6 (citing Tumey v. Ohio, 273 U.S. 510 (1927)). See also Rose, 478 U.S. at 592 (Blackmun, Brennan, and Marshall, JJ., dissenting) ("effective defense counsel and an impartial judge play central roles in the basic trial process").

Justice O'Connor's majority opinion in Satterwhite v. Texas, 486 U.S. 249 (1988), again reiterated the Court's unwaivering stance that structural errors can never be harmless:

> Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category.

Id. at 256. Because "the scope of a violation" such as presence of a biased judge at a criminal trial "cannot be discerned from the record, any inquiry into its effect on the outcome of the case would be purely speculative." Id. It is for this reason that harmless error analysis is especially inappropriate for judicial bias claims, and Mr. Wright does not have to identify any purportedly erroneous rulings by the circuit court. The right to an impartial judge "is not subject to the harmless-error rule, so it doesn't matter how powerful the case against the defendant was or whether the judge's bias was manifested in rulings adverse to the defendant." Cartalino v. Washington, 122 F.3d 8, 10-11 (7th Cir. 1997). Accord Anderson v. Sheppard, 856 F.2d 741, 746 (6th Cir. 1988) ("Because of the fundamental need for judicial neutrality, we hold that the harmless error doctrine is inapplicable in cases where judicial bias and/or hostility is found to have been exhibited at any stage of a judicial

proceeding"). See also Suarez v. Dugger, 527 So.2d 190 (Fla. 1988) (following evidentiary hearing, Court decides that judge should have disqualified himself, and reversed for a new evidentiary hearing); Rogers v. State, 630 So.2d 513 (Fla. 1994) (same); Smith v. State, 708 So.2d 253 (Fla. 1998)(same).

B. Ties to Sheriff Pellicer.

Judge Robert Perry presided over Jody Wright's trial in 1983 and at his post-conviction evidentiary hearing. At no time during those proceeding did Judge Perry reveal his affiliation with the elected Sheriff Walter Pellicer's who office had conducted the criminal investigation at issue in the case.

In his deposition, Walter Pellicer testified that he had been the Sheriff of Putnam County in 1983, at the time of Mr. Wright's trial, and in 1988, at the time of the evidentiary hearing before Judge Perry. Former Sheriff Pellicer testified that Judge Perry had been a special deputy sheriff in Putnam County at the time of trial (Pellicer Depo. at 19). Former Sheriff Pellicer explained the benefit of having a special deputy appointment, "when they got stopped for speeding they pulled card [sic], you know, Oh, are you a deputy sheriff? Oh, yeah. Be careful, Sheriff, go ahead — a courtesy card, still call it that" (Pellicer Depo. at 20).[76] "But it was a courtesy thing and a

[76]Former Sheriff Pellicer also explained the phrase "pistol-toting deputy" as "the black person's slang for part-time deputies" (Pellicer Depo at 16). He elaborated "[w]ent to a colored juke one night out in West Putnam, of course my predecessor was well known, he was raised up in Clay and Putnam County, mostly in Putnam, and every colored person in the county knew him. * * * But that night at this particular juke, the

political good thing" (Id.). He explained, "we had a record, a book of it, logged them all in, dates they got them; and when I cancelled one, we cancelled them on our record book" (Pellicer Depo. at 19).

Judge Perry testified in 1992, as part of the consolidated hearing that was subsequently voided. In that testimony, Judge Perry revealed having been placed "on the special deputy list in Duval, Volusia, and perhaps Orange Counties" (PC-R2. 1962). Judge Perry explained his understanding of the status associated with the listing, "[t]hey were strictly a friendship thing based on my personal acquaintance with the various sheriffs involved. And I would assume when the sheriff was out of office that appointment was also voided" (PC-R2. 1963). When asked whether he had such a listing in Putnam County, Judge Perry stated, "[w]hen Mr. Pellicer was sheriff, I may well have been" (PC-R2. 1962). Before and during the 1997 hearing, Mr. Wright sought to obtain further testimony from Judge Perry, but the requests were not ruled upon before Judge Perry died before either his testimony could be perpetuated or before he could be called to the evidentiary hearing (PC-R2. 2485).

Captain Miller worked in the Sheriff's Office during Walter Pellicer's tenure as sheriff. Captain Miller explained that

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Sheriff had given me a pistol that he'd confiscated out of a robbery, told me to use it. * * * I - - he stepped upon the porch and I stepped up on the porch, and this black fellow stepped out and he stepped to one side and he said - - they called Sheriff Revels "Rivers", "Mr. Rivers, I see you got a pistol-toting deputy" (Pellicer Depo. at 17-18).

former Sheriff Pellicer had provided the special deputy appointments “to political allies” (Miller Depo. at 7).

Former Sheriff Pellicer’s testimony was unrebutted. In his 1992 testimony, Judge Perry described the special deputy cards as a “friendship thing” and conceded he may have had one from Putnam County while Pellicer was sheriff. This alliance between the sheriff and the judge was undisclosed to Jody Wright. Had it been disclosed, it would have resulted in a motion to disqualify.

C. Ex parte contact with State was standard practice.

On October 3, 1991, Judge Perry resigned his position as a circuit judge in settlement of judicial inquiry which alleged judicial improprieties (PC-R2. 2590-92, Exh. 44). The inquiry concerned judicial misconduct in 1988 and 1989 involving improper ex parte conduct and not displaying impartiality.

One of the three prosecutors at the Jody Wright’s 1988 evidentiary hearing was Robert (Mac) McLeod. Also in 1988, Robert McLeod handled the capital trial in Randall Scott Jones. At an evidentiary hearing in February of 2000, Robert McLeod testified that as a result of ex parte contact with Judge Perry, he prepared the sentencing findings that resulted in a sentence of death. He indicated that he did the same thing in the case of Manuel Colina who was also sentenced to death by Judge Perry. Jones v. State, Case No. SC00-1492, Post-conviction ROA 572). Ex parte contact with the State was standard procedure for Judge Perry.

Another prosecutor at the 1988 Wright evidentiary hearing was John Alexander. Judge Perry's law clerk testified in an evidentiary hearing in 1998 that Mr. Alexander participated on ex parte basis in the 1989 drafting of sentencing findings imposing a death sentence upon Richard Randolph. Randolph v. State, Case No. SC93675, Post-conviction ROA 5344). In fact, the State in 1998 stipulated that a draft judgment and sentence came from the State Attorney's file (Randolph, Post-conviction ROA 5313).

Judge Perry entered his order denying Jody Wright post-conviction relief in 1989. Throughout 1988 and 1989, Judge Perry had ex parte contact with the prosecutors representing the State in the proceedings against Mr. Wright.[77]

D. Conclusion.

Judge Perry's actions required disclosure and disqualification from Mr. Wright's case. Mr. Wright's due process rights were violated by Judge Perry's actions and by his law enforcement loyalties. Mr. Wright's conviction and sentence of death should be vacated. At a minimum, the 1989 order should be declared null and void.

[77]Of course, Mr. Wright was never notified by either the State or Judge Perry of his ex parte standard operating procedure. After Mr. Wright filed this claim in 1993, he sought to depose Judge Perry in order to inquire. Judge Nichols delayed ruling on the requests until after Judge Perry was dead, thereby depriving Mr. Wright of due process and the opportunity permitted under State v. Lewis, 656 So.2d 1248 (Fla. 1995), to discover relevant evidence of constitutional error.

ARGUMENT IV

MR. WRIGHT'S WAS SENTENCED TO DEATH BY A JUDGE WHOSE STANDARD PRACTICE WAS TO HAVE THE STATE DRAFT THE FINDINGS IN SUPPORT OF A SENTENCE OF DEATH. THIS PROCEDURE ERRONEOUS PROCEDURE VIOLATED DUE PROCESS AND FLORIDA LAW.

In State v. Riechmann, 777 So.2d 342 (Fla. 2000), this Court recognized that when the State drafted the findings in support of a death sentence on an ex parte basis, two legal principles were implicated. First, Florida law required the sentencing judge to independent weigh the aggravating and mitigating circumstances. Section 921.141, Fla. Stat. (1985). And second, Florida law precluded ex parte communications concerning a pending matter. Canon 3B (7) of Florida's Code of Judicial Conduct. The Court noted in Riechmann, that it had previously addressed the interplay of these two legal principles in Spencer v. State, 615 So.2d 688, 691 (Fla. 1993):

> It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed. Capital proceedings are sensitive and emotional proceedings in which the trial judge plays an extremely critical role. This Court has stated that there is nothing "more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant." Rose v. State, 601 So.2d 1181, 1183 (Fla. 1992).

Spencer, 615 So.2d at 690-91.

In Riechmann, the Florida Supreme Court affirmed the finding that reversible error occurred when Judge Solomon had the State draft the findings in support of a death sentence on a ex parte basis:

> In this case, there is no evidence in the record that the trial judge specifically determined the aggravating or mitigating circumstances that applied or weighed the evidence before delegating the authority to write the order.

Riechmann, 777 So.2d at 352. Under the circumstances here, Mr. Wright's sentence of death must be vacated.[78]

[78]Undersigned counsel did not learn until reading the Randall Scott Jones initial brief filed on April 5, 2001, that Robert McLeod revealed in February of 2000 that Judge Perry's standard practice was to have the State write the sentencing order on an ex parte basis. Given that neither the State nor Judge Perry revealed this standard practice for over sixteen years, Mr. Wright has been denied due process. Jones v. State, 740 So.2d 520, 524 (Fla. 1999).

ARGUMENT V

THE PROCEDURE FOLLOWED DURING POST-CONVICTION HAS VIOLATED MR. WRIGHT'S DUE PROCESS RIGHTS UNDER JONES V. STATE, 740 SO.2D 520 (FLA. 1999), AND NEW TRIAL IS WARRANTED.

Here, Judge Nichols refused to timely rule on Mr. Wright's motion to depose Judge Perry. Given that the State did not comply with its ongoing duty under Brady even when a case is in the post-conviction stage. Johnson v. Butterworth, 713 So. 2d 985 (Fla. 1998); Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996). The State has a duty to learn of evidence that might be favorable to Mr. Wright which could form the basis for relief and to disclose it. Kyles v. Whitley, 514 U.S. 419 (1995). The failure to timely disclose has denied Mr. Wright due process.

Moreover, Judge Nichols unreasonable delay in ruling also deprived Mr. Wright his rights to due process.

ARGUMENT VI

THIS COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF SOCHOR V. FLORIDA WHEN IT AFFIRMED MR. WRIGHT'S SENTENCE OF DEATH ON DIRECT APPEAL.

The circuit court found that this Court had properly disposed of Mr. wright's claims regarding the aggravating circumstances in the direct appeal and "nothing has occurred since that would change the rulings made therein" (PC-R2. 1139). The circuit court's ruling was erroneous as this Court struck and an aggravating factor on direct appeal and failed to conduct any harmless error analysis as required by Sochor v. Florida, 504 U.S. 527 (1992). After striking an aggravating circumstance, this Court merely stated that "the imposition of the death penalty was correct." Wright v. State, 473 So.2d at 1280. Accordingly, Eighth Amendment error occurred and the circuit court's conclusion to the contrary must be reversed.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Wright respectfully urges the Court to reverse the lower court's denial of 3.850 relief, vacate his sentence of death, and grant him a new trial.

CERTIFICATE OF COMPLIANCE AS TO TYPE SIZE AND STYLE

I HEREBY CERTIFY that this Initial Brief of Appellant complies with the font requirements of Fl. R. App. P. 9.210(a)(2) typed in Courier, 12 point type, not proportionately spaced, this date, May 24, 2001.

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