IN THE SUPREME COURT OF FLORIDA

CASE NO. 01-775

GREGORY MILLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

TODD G. SCHER
Litigation Director
Capital Collateral Regional Counsel-South
101 NE 3d Avenue Suite 400
Ft. Lauderdale, Florida 33301

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This proceeding involves the appeal of an order denying Mr. Mills' second Rule 3.850 motion following an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

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

"PC-R" -- record on instant appeal to this Court;

"T" -- transcript of the proceedings below.

All other citations will be self explanatory.

STATEMENT OF THE CASE AND THE FACTS

Mr. Mills was indicted in the Eighteenth Judicial Circuit, Seminole County, Florida, for first-degree felony murder and related offenses, and pled not guilty.

Trial commenced before Circuit Judge J. William Woodson on Thursday, August 16, 1979, and the jury returned guilty verdicts the next day.[1] After a penalty phase, the jury recommended that Mr. Mills be sentenced to life imprisonment without the possibility of parole for at least twenty-five (25) years. On April 18, 1980, the trial court overrode the jury's life recommendation and sentenced Mr. Mills to death, finding six (6) aggravating circumstances: (1) under sentence of imprisonment; (2) previous conviction of violent felony; (3) great risk of death to many persons; (4) felony murder; (5) pecuniary gain; and (6) heinous, atrocious, or cruel. Addressing only statutory mitigating factors,[2] the court found that no mitigating circumstances had been established.

The conviction for first-degree felony murder and sentence of death were affirmed by the Florida Supreme Court in a 5-2 decision. Mills v. State, 476 So. 2d

---

[1]The jury found Mr. Mills guilt of felony murder, aggravated battery, and burglary.

[2]The trial judge's sentencing order stated: "there are sufficient aggravating circumstances as specified in 921.141 and insufficient mitigating circumstances therein that a sentence of death is justified" (R. 642).

172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986). The Court, however, vacated the aggravated battery conviction because "we do not believe it proper to convict a person for aggravated battery and simultaneously for homicide as a result of one shotgun blast." Id. at 177. The Court also struck three (3) of the aggravating circumstances found by the trial court. The "great risk of death to many persons" aggravating factor was struck because "[t]he finding that Mills knowingly created a great risk of death to many persons was, as the state conceded, erroneous." Id. at 178. The pecuniary gain factor was struck due to improper doubling with the felony murder aggravating factor. Id. Lastly, the Florida Supreme Court struck the "heinous, atrocious, or cruel" aggravator as inapplicable to the facts of the case. Id.

Following the signing of a death warrant, a postconviction motion pursuant to Fla. R. Crim P. 3.850 was filed and summarily denied. On appeal, the Florida Supreme Court remanded the case for an evidentiary hearing "in regards to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental health mitigating circumstances." Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990). The Court also denied a request for state habeas corpus relief. Id.[3]

[3]In his state habeas petition, Mr. Mills challenged, *inter alia*, the constitutionality of the Florida Supreme Court's purported harmless error analysis on direct appeal. Justice Barkett would have granted habeas relief on this issue. Mills, 559 So. 2d at 579 (Barkett, J., concurring specially).

Following the evidentiary hearing and the lower court's order denying relief, the Florida Supreme Court, in a sharply divided vote, affirmed. Mills v. State, 603 So. 2d 482 (Fla. 1992).

Subsequent to the decisions in Stringer v. Black, 503 U.S. 222 (1992), and Sochor v. Florida, 504 U.S. 527 (1992), Mr. Mills sought habeas corpus relief in the Florida Supreme Court challenging both the adequacy of that Court's harmless error analysis in his case as well as the application of the "during the course of a felony" aggravating circumstance. The Florida Supreme Court held that Sochor was not new law under Witt v. State, 387 So. 2d 922 (Fla. 1980), and therefore the claim, raised for the second time, was procedurally barred. Mills v. Singletary, 606 So. 2d 622, 623 (Fla. 1992). The Court ruled in the alternative that "[w]e . . . applied, and applied correctly, a harmless error analysis in Mills' direct appeal." Id. at 623. Regarding the claim that the felony-murder aggravating factor is an unconstitutional automatic aggravating circumstance, the Court held: "We considered and rejected the substance of this claim on direct appeal." Id.

Mr. Mills sought habeas corpus relief in the United States District Court for the Middle District of Florida. During the pendency of the petition, the district court entered an order requesting supplemental briefing on the jury override issues presented in the petition. Following the submission of briefs, the district court entered judgment

against Mr. Mills, and the Eleventh Circuit Court of Appeals affirmed. Mills v. Singletary, 161 F. 3d 1273 (11th Cir. 1998), cert. denied, 120 S.Ct. 804 (2000).

Following the decisions by the United States Supreme Court in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), and Fiore v. White, 121 S.Ct. 712 (2001), as well as the decision by the Florida Supreme Court in Keen v. State, 775 So. 2d 263 (Fla. 2000), Mr. Mills sought habeas corpus relief in the Florida Supreme Court. While the petition was pending, Mr. Mills' death warrant was signed. Oral argument was conducted on April 2, 2001, and a sharply-divided decision denying relief was issued in the late afternoon of April 12, 2001. Mills v. Moore, No. SC01-338 (Fla. April 12, 2001).

On April 16, 2001, Mr. Mills filed a second rule 3.850 motion. A Huff hearing was conducted that same day, and the lower court granted an evidentiary hearing on Claim I. The evidentiary hearing occurred in the afternoon of April 17, 2001. The lower court entered an order denying relief in an order emailed to counsel in the afternoon of April 18, 2001. The lower court's order also indicated that it was being treated as a notice of appeal (thus obviating the ability of Mr. Mills to seek rehearing). This appeal follows.

SUMMARY OF ARGUMENTS

1. Newly discovered evidence establishes that Mr. Mills is entitled to a new trial; in the alternative, this new evidence establishes a reasonable basis for the jury's life recommendation. The lower court erred in analyzing Mr. Mills' claim and applied an erroneous legal standard, particularly as to the sentencing issue. The test is not a subjective one, that is, whether or not, in light of what the lower court knows about the sentencing judge, this new evidence would have changed the sentencing judge's mind. Rather, the test is an objective one, that is, whether this new information, in conjunction with the previous mitigation, would preclude a reasonable judge following the law from overriding the jury's life recommendation. This standard has clearly been met in Mr. Mills' case.

2. Newly discovered evidence in the form of an affidavit indicating that Vincent Ashley confessed to shooting the victim warrants relief either in the form of an evidentiary hearing or a new sentencing proceeding pursuant to Thompson v. State, 731 So. 2d 1235 (Fla. 1998). Moreover, just-disclosed documents reveal that the original order summarily denying Mr. Mills' first 3.850 motion was drafted by the State on an *ex parte* basis. This requires relief pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), and Rose v. State, 601 So. 2d 1181 (Fla. 1992). The State had the duty to disclose this to Mr. Mills' previous collateral counsel. Had counsel been aware, he

would have sought to disqualify Judge Woodson from presiding over Mr. Mills' evidentiary hearing. Due to the fact that the State failed to disclose this until now, Mr. Mills must be put back in a position where he should have been in 1989 when the *ex parte* communications occurred resulting in the drafting of the order.

3. The State's concession before this Court during oral argument that the "during the course of a felony" aggravating circumstance is an automatic aggravating circumstance requires Mr. Mills' previous claim on this issue to be revisited. The "automatic" aggravating circumstance in this case violates the Eighth and Fourteenth Amendments.

4. The lower court erred in denying many of Mr. Mills' requests for public records pursuant to Fla. R. Crim. P. 3.852.

ARGUMENT I

NEWLY DISCOVERED EVIDENCE WARRANTS A NEW TRIAL AND/OR ESTABLISHES A FURTHER REASONABLE BASIS FOR THE JURY'S RECOMMENDED SENTENCE OF LIFE WHICH PRECLUDES THE OVERRIDE.

In his Rule 3.850 motion, Mr. Mills alleged that newly-discovered evidence established that the co-defendant in this case, Vincent Ashley, had provided Mr. Mills' counsel with a completely different version of the events of May 25, 1974, and that this new version completely eviscerated Ashley's credibility, thereby providing a newly-discovered reasonable basis for the jury's recommendation of life. The lower court granted an evidentiary hearing, and Ashley was transported from South Bay Correctional Institution, where he is now serving a life sentence for a 1985 armed robbery. As explained below, Ashley refused to testify even in the face of the threat of contempt by the lower court. The State then suggested that the parties speak to Ashley about his concerns over testifying. During that conference, Ashley indicated that things would get "complicated" for him if he answered Mr. Mills' questions; in fact, he disclosed that he might testify that he was the shooter.[4]

[4]Ashley was released shortly after testifying at Mr. Mills' trial. On May 25, 1980, the individual whom the State cut loose on a string of robberies and burglaries, not to mention the Wright burglary and murder, was re-arrested for destruction of property, disorderly conduct, resisting arrest with violence, and aggravated assault/strongarm

Despite finding that "[t]he version of events contained in Claim I differs from Ashley's testimony at the trial in certain details," the lower court concluded that "showing the jury that the witness had credibility problems through another inconsistent statement would not have mattered" (PCR. 542). As to the effects on the sentencing in terms of the jury's recommendation, the lower court, acknowledging that this was "the most troubling aspect of this case" (Id.), nonetheless concluded that the new evidence would not have made a difference "to the judge who imposed the sentence" (PCR. 542-43). Mr. Mills submits that the lower court erroneously analyzed the evidence and applied an incorrect legal standard as to the affect of this newly-discovered evidence on the outcome of the sentencing proceedings.

1. Ashley's New Version.

After the clerk attempted to swear Ashley in, Ashley's response was: "I swear the testimony I'm gonna give is gonna be nothing" (T. 44). The Court then attempted to administer the oath, but Ashley stated "I'm not going to testify to nothing period"

---

battery on a police officer. He was convicted of the resisting with violence and aggravated assault charges, and sentenced to five (5) years state prison. According to the rap sheet provided by FDLE on April 13, 2001, Ashley was apparently released on January 20, 1984. On October 29, 1986, Ashley was again arrested and charged with armed robbery; he was convicted and sentenced to life imprisonment. Moreover, Ashley's DOC records, disclosed to Mr. Mills' counsel on April 18, 2001, show numerous violent episodes resulting in disciplinary sanctions.

(Id.). He then stated that "I'm protecting my right and protecting my soul" (Id. at 45). Mr. Mills' counsel then inquired about Ashley's trial testimony, to which Ashley cut off counsel:

> MR. ASHLEY: No. We're gonna stop that right there 'cause I ain't no sucker, man. I'm not gonna get rebellious or anything like that, but I ain't no fool, I ain't no sucker. I told you what I'm gonna do, that's what I'm gonna do. I'm straight. But I ain't -- I repeat, I ain't no fool and I ain't no sucker.

(Id. at 46).

The court then instructed Ashley to either answer the questions posed to him or be held in contempt of court:

> THE COURT: Well, I'm here in a motion to determine whether or not the questions that you answer today are going to be any different from the questions that you answered back then [at trial]. Because I've been asked to make a judgment as to whether or not this man sitting over here should be subject to living or dying. That's a pretty important question about this man's life. And you are the only person so far that I can tell on this earth that his lawyer believes is a person that might be able to testify about this event that would help him. So, it's pretty serious, and you have to decide whether you want to remain with us under contempt citation or if you want to testify.

(Id. at 48). Mr. Mills' counsel then inquired again whether Ashley would answer questions, and the following ensued:

> MR. SCHER: After having heard that, Mr. Ashley, is your

> opinion still the same about answering my questions?
>
> MR. ASHLEY: Look in my eyes.
>
> MR. SCHER: I would like you to answer my question, Mr. Ashley. Are you gonna refuse to testify?
>
> MR. ASHLEY: Look in my eyes.
>
> MR. SCHER: That's not an answer Mr. Ashley. Will you refuse to testify about these matters here today?
>
> MR. ASHLEY: I'm not gonna keep going over the same thing, man. I'm not gonna keep repeating myself. I ain't -- I'm not crazy, I'm no fool.

(Id.). Thereupon the court had Ashley removed from the courtroom (Id.).

At this point, counsel requested to proffer what Ashley had told him during interviews the previous week; initially the State agreed, and wanted counsel to have his investigator testify (the investigator was present during one of the two interviews conducted by counsel with Ashley) (Id. at 49). Just as the investigator was beginning his testimony, the State decided that perhaps a discussion with Ashley would be beneficial to "reassure[] him that he has nothing to fear from the authorities if he testifies truthfully here today" (Id. at 52). Mr. Mills' counsel responded that the allegations were that Ashley had lied at trial, and thus "I don't know that the Attorney General can be in a position of assuring him, unless they're gonna give him immunity as to anything arising from his testimony here today" (Id. at 54). In response, the

Attorney General stated that he and the prosecutor "can take care of ourselves, Judge" (Id.).

Thereupon, the parties went into the jury room and Ashley was brought in. Mr. Nunelley asked Ashley about his concerns over testifying, to which Ashley responded:

> MR. ASHLEY: 'Cause I don't feel comfortable. I mean, you know, back in the days, you know and all of that, you know, and I did what I did. Whatever happened happened, you know, but now that, from within, **I just don't feel comfortable, you know, not saying something, you know, that, you know, that could but a man to death or whatever, you know.** 'Cause Greg is no . . . he's no enemy of mine. I say I was just a fool, we were just fools, ah, and I did what I did, I done what I done, you know. May God forgive me for all of that, and he have, you know. I'm not gonna make something anew, afresh. I can't do it. My soul can't live with that.
>
> MR. NUNNELLEY: **So are you telling me, sir, Mr. Ashley, that your testimony at trial was the truth?**
>
> MR. ASHLEY: **See, that's the thing. I don't even -- Man, you know, I don't even want to say nothing. I don't want to give or take, you know, 'cause if I . . . I'm frustrated about it, you know. If I say anything, it's gonna complicate the matter.**
>
> MR. CARTER: **What do you mean by complicate the matter?**
>
> MR. ASHLEY: **I might tell you anything now. I might tell you I pulled the trigger.**
>
> MR. CARTER: And what would be your purpose of stating

that?

MR. ASHLEY: To keep from answering question after question, question after question. Because human can ask any question and I'm not gonna answer every question. But I'll say ... I'll say this. No, I'm not even gonna say that. **You know, I did what I did , you know, you do what you do. You know, 'cause I'm not gonna, you know, have an extra chip on my shoulder, no other burden.**

MR. CARTER: Just to understand, make sure, your refusal to testify is based on your soul can't handle it as opposed to you're afraid you're gonna get in trouble for it? 'Cause as you said, you did what you did and you've done what you done. The State did what it did and the State's done what its' done, and so therefore, we entered into an agreement with you, and that agreement is still binding, meaning we cannot prosecute you for the homicide or the robbery or the burglary that you were given immunity for way back when.

MR. ASHLEY: It has nothing to do with that, none of that.

MR. CARTER: Okay.

MR. NUNNELLEY: He's not gonna testify. Okay.

(Id. at 56-58).

Upon returning to the Court, Mr. Mills orally amended his motion to include Ashley's statements; there was no objection to the oral amendment. Moreover, the State stipulated to the facts as alleged in Mr. Mills' 3.850 regarding Ashley's new version, which provided:

According to what Ashley told the undersigned, when he

> and Mr. Mills decided that the Wright home looked like a good place to enter because it was dark and appeared vacant, he and Mr. Mills parked their bicycles and went up to the window. As he did indicate at trial, Ashley had the gun while Mr. Mills crawled inside the window into the house. However, Ashley adamantly denied ever going into the Wright residence. He stated that he remained outside the window while Mr. Mills entered the home. Ashley said he could see inside the house into the Wright's bedroom from where he remained outside, and that after he heard the shuffling of feet like someone was putting on shoes or slides, he moved off to the side so he could not be seen looking into the window. Then, Ashley said, he heard a shot. After the shot, he ran away from the house toward the sidewalk near the tree where the bicycles were. Mr. Mills came out the front door of the house and ran toward where Ashley was running, and they both then ran to a nearby ditch where they hid out for a while. Mr. Mills had the gun with him as they ran to the ditch. Ashley and Mr. Mills remained in the ditch for a few minutes while they gathered their thoughts, then they went back to the house, walking along the sidewalk, until they reached the tree where their bicycles were. At some point between arriving at the ditch and walking back to the Wright house, Ashley no longer saw the gun. They both got on their bicycles and went their separate ways. **Ashley said that his trial testimony about having actually been inside the Wright house and having seen what he testified to was a lie.**

(PCR. 385) (emphasis added).

2. Mr. Mills is Entitled to Relief.

Mr. Mills is entitled to a new trial, as the newly discovered evidence would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911, 915 (Fla.

1991). The lower court did not analyze this issue as to the effect on the guilt phase, other than to summarily conclude that it "would not have mattered." That is not a correct legal analysis. Rather, the lower court was required to

> consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at the trial, would have probably resulted in an acquittal. In reaching this conclusion, the judge will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.

Id. at 916. Here, the lower court failed to conduct the proper Jones analysis and failed to conduct any analysis as to the probability of an acquittal in light of the record as it now stands.

It is beyond dispute that Ashley was the State's key witness against Mr. Mills.[5]

---

[5]In exchange for his testimony, Ashley was the beneficiary of an extensive immunity deal:

> IT IS HEREBY agreed between the State of Florida, by and through the undersigned Assistant State Attorney, and Vincent LeRoy Ashley, hereafter referred to as "witness," that witness shall henceforth be granted immunity from prosecution for all his acts arising out of the following:
>
> 1. Burglary to the Wright residence, Sanford, Florida, on May 25, 1979, and subsequent shooting death of James A. Wright.
> 2. Burglary to residence of John Fox, Sanford, Florida, on May 8, 1979.

As the prosecutor candidly acknowledged in his closing argument: "Vincent Ashley

---

> 3. Robbery of Lanny Lockner, and other related charges of May 9, 1979.
>
> 4. Any and all other robberies between May 8, 1979, and this date occurring in Seminole County, Florida, and about which witness is called upon by the State to testify fully and truthfully to.
>
> In exchange for the aforementioned grants of immunity, witness agrees and shall testify fully and truthfully before the State Attorney of the Eighteenth Judicial Circuit of Florida, his assistants or any Grand Jury in said Circuit; shall submit to polygraph examination if requested by State Attorney or his assistants and shall personally appear without necessity of service of process at any and all proceedings, hearings, or trial requested by said prosecutor or his assistants.
>
> Said immunity shall be complete, both use and transactional, and shall be conferred upon witness upon testimony under oath, truthfully and fully, on behalf of State of Florida in the aforementioned matters alleged above. It is further agreed that witness shall remain in custody of Sheriff of Seminole County until such time as he has testified in each of the above matters. Upon completion of all testimony the State of Florida will recommend that the Court dismiss the Violation of Probation in Seminole County Case Number 74-186-CFA and the State will further recommend that the witness be restored to probationary status in Case Number 74-186-CFA.
>
> Dated this 8th day of August, 1979.

(R. 609).

knows things about what went on in that house that only a person who was there could possibly know" (R. 428). At trial, Ashley testified that on the night in question, he went to Mr. Mills' house around 2-2:30 AM, where he stayed about 45 minutes before he and Mr. Mills left on their bicycles (R. 241). According to Ashley, Mr. Mills had a shotgun, which he had put on the handlebars of his bicycle as they were driving around into the white section of town (R. 243). Their plan was "[t]o rob someplace or either break in somebody's house" (R. 244). After coming upon the house belonging to the Wrights, Ashley testified that it looked like everyone was asleep "and wouldn't be too much trouble" (R. 246). Mr. Mills and Ashley then laid their bicycles down by a nearby tree and crept up to the house (R. 246-47). They approached a window, which "was up but had a screen on it" (R. 247). Mr. Mills took the screen down, and Ashley was holding the gun (Id.). After Mr. Mills took the screen down, he climbed in the window "while I had the gun" (Id.). After Mr. Mills was inside, Ashley passed the gun to him, after which time Ashley testified that he "[g]ot in after him" (R. 243). Both of them then "stood for a little while, you know, looking around" and then Mr. Mills went into the living room while carrying the gun (R. 248). As Mr. Mills was in the other room, Ashley "[l]looked around in the other rooms to see what could I find" (R. 249). At some point, Ashley quickly went back out the window after he saw "[t]he old guy was getting up out of the bed" (Id.). According to Ashley, he could see into

the bedroom from the room he was standing in (R. 250). Ashley did not have time to say anything to Mr. Mills "because I didn't know whether the guy had a gun or whatever, you know, and I didn't have time to go in the other room and tell Greg" (R. 250). After he went back out the window, Ashley "was gonna run" but "then I stopped . . . because Greg was still in the house" (Id.). After he was about 25 or 30 yards from the house, Ashley heard a shot and then ran back to the house "because I didn't know who had got shot" (R. 251). When he ran back up to the house, Ashley testified that he "saw the old man" in the room "that I got in" and he was "[o]n the floor" (Id.). According to Ashley, "[t]he old guy was cursing like, you know, cursing in a mumbling manner" (R. 252). Ashley then started to run again, and saw Mr. Mills about halfway between the house and the tree where the bicycles were; at that point, they "[g]ot on their bicycles and left" and went their separate ways (R. 253). The next time Ashley saw Mr. Mills was in a police car at the Sheriff's Office (R. 254). The last time he saw him was a couple of days later, when Ashley asked Mr. Mills what he did with the gun; according to Ashley, Mr. Mills said that a man from the City had found it and turned it in, and "I asked him did he get the fingerprints off it. He said yes" (R. 255).

On cross-examination, Mr. Mills counsel specifically accused Ashley of being the triggerman:

Q Isn't it true, Mr. Ashley, that after you were

cruising down Elliott Street looking for a house to break into, you drove your bike right up to the tree; isn't that true?

A No.

Q You went into Mr. Wright's house and you shot him; isn't that true?

A No.

Q And after you shot him, you drove your bike away from the tree, went out and hid the gun; isn't that true?

A No.

Q Isn't it true the only reason you're blaming all this on Greg Mills is because you don't want to go to prison?

A No.

(R. 285).

It is important to note that Mr. Mills' defense at trial was that Ashley was the shooter, a defense supported by other evidence. For example, Margaret Wright, the victim's wife, testified at trial that after she heard the gunshot, she looked out the window and "saw somebody run. . . I saw a bicycle under the oak tree, and then I turned to my husband" (Trial T. 6-7). On cross examination, she re-emphasized that she saw only one figure and only one bicycle by the tree (Id. at 11-12). See also T. 15 (Yes, that's correct. I saw one bicycle"). Based on a description given by Mrs. Wright, the police dispatched information to be on the lookout for "a black male riding a bicycle

wearing something light in color on top and that . . . slender and tall" (T. 39). Ashley was subsequently stopped by police, who reported that Ashley was wearing a "light colored" long sleeve sweat jacket, a "light colored hat," and his clothing was "damp, it was wet" (T. 33). Upon a review of the crime scene, the police noted that "there was dew on the ground" around the house; police also noted one set of bicycle tracks leading from the tree in a northerly direction, and another set to the south of the tree (T. 35-36). Upon initial questioning by police, Ashley denied any involvement in the burglary or homicide.

In light of the new information as alleged in the 3.850 motion as well as Ashley's statements during the evidentiary hearing, Mr. Mills submits that there is more than a reasonable probability of an acquittal on retrial. Ashley was the star witness and the only eyewitness to the events in question. It was Ashley, and Ashley alone, who placed Mr. Mills at the scene. To the extent that the State relies on the testimony of Sylvester Davis, his testimony must be viewed in light of the context in which it arose. Both Davis and his girlfriend, Viola Mae Stafford, were accomplices (although Stafford never testified at trial). Davis and Stafford were spending the evening at Mr. Mills' apartment on the evening in question. When the police returned Mr. Mills home after he was released, the police specifically requested that Mr. Davis contact them if he had any information about the case; Davis never did so (T. 127-28). After Stafford was

arrested a few days later (she was shoplifting from a store at which Mr. Mills' sister-in-law worked and Mr. Mill's sister-in-law contacted police), "the idea came up that she would give them some information for, you know, the dropping of her charges" (T. 117). At that time, Davis and Stafford took the police to where they had hidden the shells from the gun (T. 118). However, they did not at that time say anything else about Mr. Mills' involvement (Id.). About two weeks later, Davis was arrested for burglary, and was taken to the police station (T. 118-19). At that time, Davis testified that "[m]e and the police department made a deal" that "they'd drop my charges, the charges they had on me for burglary" (T. 119-20). It was only then that Davis told the police his story about having seen Mr. Mills take a rifle on the night of the Wright homicide, and that Mr. Mills later that evening had told him "about he had shot some cracker or something." That the testimony of Davis and Ashley was critical to the State's case is evidenced by the fact that the jury, during deliberations, requested a read back of the testimony of Ashley and Davis (R. 473).

Mr. Mills submits that the new evidence elicited from Ashley, as well as his new "version" of events, establishes that relief is warranted under Jones. Imagine if, when Ashley is directly questioned by trial counsel, about whether he was the shooter, and he responded as he did on April 17, 2001: "I might tell you anything now. I might tell you I pulled the trigger." This alone calls into question the reliability of the State's case

against Mr. Mills. Moreover, in assessing the likelihood of an acquittal on retrial, the Court should consider that Ashley would refuse to testify, as he did during the evidentiary hearing. The lower court did not consider this fact in assessing the impact of this new evidence. Ashley was bound by contractual immunity to testify and testify truthfully about what he knew about this case. As established below, he now refuses to do so. If Ashley would refuse to testify at a new trial, the State has no case. This is a critical fact that must be analyzed in assessing whether Mr. Mills has met his burden under the Jones test. He submits that he has in light of the evidence and proceedings below, alone and in conjunction with the evidence adduced at trial.

It is insufficient to conclude, as the lower court did, that this new information "would not have mattered" because the jury already knew that Ashley had originally lied about his involvement in the murder. However, the State did not take the position that Ashley was lying or had credibility problems; the State strenuously argued that Ashley was telling the truth. And notwithstanding this "knowledge" by the jury that Ashley had credibility problems, the jury convicted Mr. Mills. Ashley provided not only an "eyewitness" account and pointed the finger at Mr. Mills as the shooter,[6] but

[6]As the prosecutor told the jury in closing argument, "Mr. Ashley is an eyewitness. I did the burglary. He participated in the burglary, but he didn't pull the trigger on that shotgun that killed that man. Mr. Mills did" (R. 436).

also provided graphic testimony about having seen Mr. Wright after he was shot. See R. 252 ("[t]he old guy was cursing like, you know, cursing in a mumbling manner"). According to the stipulated facts from the 3.850, this testimony about being in the house and seeing what he testified to seeing was a lie. Whatever concerns the jury had about Ashley's testimony at the guilt phase, clearly those concerns were resolved in Ashley's favor (particularly after the read back of his testimony), and against Mr. Mills. Just because the jury knew that Mr. Ashley had "credibility problems" as the lower court wrote, does not establish that this new information would not have completely eviscerated his testimony, particularly his admission now that "I might tell you I pulled the trigger." Mr. Mills submits that he is entitled to relief in the form of a new trial.

Mr. Mills also submits that he is entitled to a life sentence based on this newly-discovered evidence. Although the Jones standard does apply to sentencing issues as well, see Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992), the Court has not yet articulated how the Jones standard applies to sentencing when a jury has recommended life. Mr. Mills submits that the issue is whether there is a reasonable probability of a different outcome, "the outcome being the trial judge's decision to reject the jury recommendation." Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir. 1986). In fact, the State below agreed that the test was whether there was a reasonable probability of a different result, the result being whether Mr. Mills' jury recommendation would be

overridden today in light of this new evidence (T. 79-80).

Despite acknowledging that "the most troubling aspect of this case" is the effect of this information on the sentencing issue in light of the jury's life recommendation, the lower court concluded that no relief was warranted, writing:

> The court is now being called upon to determine if the "newly discovered evidence" would have made a difference to the judge who imposed the sentence. The court concludes that it would not have made a difference. See Jones v. State, 591 So. 2d 911 (Fla. 1992).

Mr. Mills submits that the lower court employed an erroneous legal analysis. The test is not whether Judge Eaton believes that this evidence "would have made a difference" to the sentencing judge, Judge Woodson. To impose on Mr. Mills a burden of establishing what is in Judge Woodson's mind and what he might have done is an impossible one to meet.[7] Rather, it was Judge Eaton who should have put himself in Judge Woodson's shoes and conducted his own analysis of whether, *in light of the record as it now stands and in light of this new information*, there is a reasonable

[7]Moreover, Judge Woodson's previous written remarks in Mr. Mills' case establish that nothing would have changed his mind. In his order summarily denying Mr. Mills' first 3.850 motion (an order which we know now may have been drafted by the State), Judge Woodson wrote that he would not have been persuaded not to impose the death penalty for any reason, no matter what additional mitigation counsel failed to present at the time of trial or sentencing. This is why imposing a burden on Mr. Mills to establish that he would have changed Judge Woodson's mind is an impossible one to meet and cannot be the legal standard.

probability that Mr. Mills' jury recommendation can be legally overridden and/or whether such an override would be allowed on appeal under current standards. The standard that applies to Mr. Mills' claim "should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." Strickland v. Washington, 466 U.S. 668, 695 (1984). Accord Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993). Just as "[a] defendant has no entitlement to the luck of a lawless decisionmaker," Strickland, 466 So. 2d at 695, the opposite is also true. "[E]vidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered. . . ." Id.

In other words, "the overriding question today is whether Mr. [Ashley's] culpability vis-a-vis that of Mr. [Mills] might be judged differently" in light of this new version of events as disclosed by Ashley[,] Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995) (Kogan, J., concurring), and whether this information could support a reasonable basis for the jury's life recommendation. Porter. See also Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989) ("the presentation of this mitigating evidence may have persuaded the trial judge that an override was unreasonable under the circumstances.

. . [I]f the trial judge views the case as one without any mitigating circumstances when in fact those circumstances exist, then confidence in the trial judge's decision to reject the jury's recommendation is undermined").

This Court was faced with an analogous situation in Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995). In Hildwin, the judge presiding over Mr. Hildwin's collateral ineffective assistance of counsel issues was not the trial judge. Following an evidentiary hearing, the court concluded that Hildwin had failed to establish prejudice in part because the postconviction judge concluded that there was no evidence that could have been presented to the trial judge which would have changed the trial judge's mind about sentencing Mr. Hildwin to death. Hildwin, 654 So. 2d at 111 (Anstead, J., specially concurring). "In other words, a substantial basis for the trial judge's denial of relief here was the candid belief that the sentencing judge was so predisposed to imposing death that there was virtually nothing that counsel could have done to change the outcome." Id. This analysis "alone undermines confidence in the integrity of the prior sentencing proceeding." Id. at 112. Justice Anstead concluded:

> When trial judges take an oath to uphold the law, that includes taking on the responsibility for sentencing in capital cases, including the potential imposition of the death penalty in those cases where the circumstances mandate its application in accord with legislative policy and judicial restraints. However, such a decision is controlled by the circumstances of each particular case, and cannot be made

> until those circumstances are developed though the detailed sentencing process required in capital cases. The constitutional validity of the death sentence rests a rigid and good faith adherence to this process. Confidence is undermined if the sentencing judge is already biased in favor of imposing the death penalty where there is "any" basis for doing so. Such a mindset is the antithesis of the proper posture of a judge in any sentencing proceeding.

Id.

Likewise, in Mr. Mills' case, Judge Eaton's clear conclusion is that this new information would not have made a difference to Judge Woodson. This conclusion has as its underlying assumption that Judge Woodson would not have followed the law irrespective of any evidence in the record which would support the jury's recommendation of life. In fact, Judge Eaton noted below "I know [Judge Woodson] and you don't" (T. 79). This is correct; Mr. Mills' counsel does not know Judge Woodson. For that precise reason, the burden cannot possibly be that Mr. Mills has to persuade one judge that another judge would have changed his mind. Strickland, 466 U.S. at 695. A correct analysis must presume that the sentencing judge would have an open mind, be impartial, and follow the law to determine whether this new information, in conjunction with the other mitigation, would have precluded an override of the jury's life recommendation. Here, that burden is clearly satisfied. The new evidence from Ashley is not simply more of what was already known. Rather, there

is a clear indication that Ashley might testify that he was the shooter.[8] Thus the issue goes beyond disparate treatment, but rather to the level of culpability between Mr. Mills and Ashley because, there is evidence now in this record that Ashley could have been the triggerman. In fact, this was the precise focus of Justice McDonald's dissent on direct appeal. See Mills, 476 So. 2d at 180 (McDonald, J., dissenting, in which Overton, J., concurred) ("The jury could also have concluded that Mills and Ashley were being treated so disparately *when their involvement was substantially the same* that any such doubt should be weighed in Mills' favor"). If this new evidence "could have raised in the jurors' minds the question of who actually [shot] the victim," Pentecost v. State, 545 So.2d 861, 863 (Fla. 1989), then Mr. Mills is entitled to relief, as the judge would have been precluded from overriding in light of this new evidence. Keen v. State, 775 So. 2d 263 (Fla. 2000).

Moreover, had the record as it now stands in Mr. Mills' case been the record before this Court on direct appeal, there can be no question that the override would have been reversed. See Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992) ("Based upon this record, this Court probably would have found Scott's death sentence inappropriate had Robinson's life sentence been factored into our review on direct

---

[8]In fact, before the Court is an affidavit from an individual to whom Ashley did confess. See Argument II.

appeal"). Indeed, a (bare) majority of this Court found in 1992 that while the override might not be sustained at that time, it was the "law of the case." Mills v. State, 603 So. 2d 482, 486 (Fla. 1992). In light of this new evidence, in conjunction with the other mitigation in this record from both the original penalty phase[9] as well as that evidence presented in postconviction,[10] there can be no question that this override can stand under a proper analysis pursuant to Tedder v. State, 322 So. 2d 908 (Fla. 1975), and Keen, supra. As the majority of the Court recently held in Mr. Mills' case, the Keen analysis is simply "an application of out long-standing Tedder analysis." Mills v. Moore, No. SC01-338, slip op. at 16 (Fla. April 12, 2001). That being the case, this record as it now stands would clearly require reversal under Keen.

Based on the foregoing, alone and in conjunction with the arguments set forth in Argument II, "in this case it would be [] appropriate to simply reverse for a resentencing before the trial judge." Thompson v. State, 731 So. 2d 1235, 1236 (Fla. 1998).

---

[9]See Mills, 476 So. 2d at 180 (McDonald, J., concurring in part and dissenting in part).

[10]See Mills, 603 So. 2d at 486 (Barkett, J., dissenting); id. at 487 (Kogan, J., dissenting).

ARGUMENT II

NEWLY DISCOVERED EVIDENCE REQUIRES THAT MR. MILLS BE PERMITTED TO AMEND HIS RULE 3.850 MOTION AT THIS TIME AND THAT AN EVIDENTIARY HEARING IS REQUIRED.

1. New Evidence of *Ex Parte* Communication.[11]

On March 29, 2001, Mr. Mills requested records from, *inter alia*, the State Attorney's Office in Seminole County pursuant to Fla. R. Crim. P. 3.852 (h)(3). The State responded by indicating that it was forwarding records in its possession generated after Mr. Mills' initial request in 1989 to the repository, as is required by Fla. R. Crim. P. 3.852 (PCR. 151). Mr. Mills was in contact numerous times with the repository, urging it to process the records as quickly as possible and forward them to Mr. Mills (PCR. 398).[12] Mr. Mills eventually sought to compel the Repository to provide the records to Mr. Mills as soon as possible.

---

[11]The issues in this claim were first raised in a Motion to Relinquish and for Clarification filed with the Court on April 19, 2001. The Court denied the motion. Thus, without further clarification or a relinquishment, Mr. Mills has no choice but to raise these issues in this brief. Because the State has opposed relinquishment, Mr. Mills submits that it is disentitled from challenging factual assertions either as to diligence or the merits, and as a result, "it would be more appropriate to simply reverse for a resentencing before the trial judge." Thompson v. State, 731 So. 2d 1235, 1236 (Fla. 1998).

[12]Of course, the repository was also handling on an expedited basis the records it had received in the Wayne Tompkins case.

The State Attorney's Office sent its records to the repository on April 6, 2001. However, they were not received by Mr. Mills' office until April 17, 2001, when they were thereupon downloaded and printed.[13] When Mr. Mills' counsel returned in the evening of April 18, 2001, from the Tompkins evidentiary hearing in Hillsborough County, he began to review the records. He discovered information not previously known to counsel and not previously disclosed to counsel by the State pursuant to its obligations under Brady v. Maryland, 373 U.S. 83 (1963).

Upon review of the records from the State Attorney's Office of the Eighteenth Judicial Circuit (records which had been generated following Mr. Mills' first request for records in 1989), counsel discovered that unsigned drafts of the order summarily denying Mr. Mills' first Rule 3.850 motion were contained in the State's files. Mr. Mills' counsel also discovered a handwritten note dated from 1989 (the actual dates are illegible), which reads:

> To: Sandy Masak
> Sanford SAO
>
> Here is the paperwork on D Gregory Mills that I copied

[13]The repository no longer makes hard copies of records; rather, it scans them onto a CD disc and the disc is what is received by CCRC. CCRC then must download the disc and print the documents.

from Judge Woodson's file. For Steve Plotnik.[14]

s/ Donna
Melb. SAO

Based on the discovery of this information, Mr. Mills submits that a claim now exists as to the State's preparation on an *ex parte* basis of the order summarily denying Mr. Mills' first 3.850 motion in 1989. This claim requires factual development. See Smith v. State, 708 So. 2d 253 (Fla. 1998) (appeal relinquished for evidentiary hearing on whether *ex parte* communication occurred regarding drafting of order); Swafford v. State, 636 So. 2d 1309 (Fla. 1994) (same). There is no other explanation for these unsigned orders being in the State's files.

This is the same situation addressed by the Court in Huff v. State, 622 So. 2d 982 (Fla. 1993), where the Court found a due process violation when collateral counsel was not provided adequate opportunity to review and/or object to the State's proposed order denying relief. Mr. Mills' case is even more egregious, as there is no indication that collateral counsel even knew that the judge had asked the State to prepare the order, much less that collateral counsel had inadequate opportunity to respond.

Mr. Mills' current counsel has spoken with Billy Nolas, who represented Mr.

[14]Steve Plotnik was one of the prosecutors working on Mr. Mills' first postconviction proceedings.

Mills in his previous 3.850 proceedings. Mr. Nolas indicated to the undersigned that he had not been aware that the State had drafted the order summarily denying the first 3.850 motion. Had he known, he would have filed a motion to disqualify Judge Woodson on that basis.[15] However, because this was not previously known, Judge Woodson then proceeded to preside over the evidentiary hearing ordered by this Court and made factual findings which have been relied on ever since by this Court and the federal courts as to Mr. Mills' ineffective assistance of counsel claims. Given this situation and if Mr. Mills were to prevail on this issue, he would be entitled to be put back in a position he should have been in 1990 and have an evidentiary hearing before a new judge. Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988). See also Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993) ("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. Given that Provenzano's ineffectiveness claims have arisen as a result of the disclosure of the file, we find that they are timely raised"). The original *ex parte* communication taints and vitiates the remainder of the proceedings. Suarez; Smith.

[15]The undersigned is attempting to secure an affidavit from Mr. Nolas, who is currently practicing law in Philadelphia, Pennsylvania. Mr. Mills will supplement the record with Mr. Nolas' affidavit as soon as it can be executed and forwarded to counsel.

In its pleading filed on April 19, 2001, opposing Mr. Mills' motion for relinquishment and/or clarification, the State asserted that the existence of the unsigned order "is far too slender a reed upon which to predicate any action at all" (Response at 1). Mr. Mills would note that in the Wayne Tompkins' case, he alleged that the State Attorney had drafted the sentencing order in Mr. Tompkins' case based on what had occurred in the Holton case, where the State had conceded the error based on, among other things, the existence of a draft sentencing order disclosed to Holton's collateral counsel. In asserting that Mr. Tompkins' claim was based on speculation, the State wrote in its response to Mr. Tompkins Rule 3.850 motion that "the claim for relief in Holton which was agreed to by the state attorney's office **was premised on the fact that an unsigned, draft sentencing order had been discovered in the prosecutor's file during postconviction investigation.** ***No such obvious proof has been identified by Tompkins*****.**" (State's Response to Motion to Vacate, Et. Al, Tompkins v. State, at p.39) (emphasis added). Thus, in Tompkins, the State asserted that evidence of draft orders in the prosecutors files is "obvious proof" warranting further investigation, yet in Mr. Mills' case, the State argues that the draft orders on Mr. Mills' first 3.850 motion is not enough. The State's position is meritless. See also State v. Riechmann, 777 So. 2d 342 (Fla. 2000). Moreover, Mr. Mills' allegation is not only premised on the draft order, but also on the handwritten note establishing that members of the State

Attorney's Office were copying "paperwork" from Judge Woodson's file.

The State also asserts that "the reasonable conclusion is that the drafts were prepared by Judge Woodson" (Response at 1). This is a factual assertion that warrants evidentiary development. There is nothing in the record to conclusively refute Mr. Mills' allegation.[16] Because the State is not conceding the necessity for a relinquishment or for an evidentiary hearing, Mr. Mills' allegations must be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The same holds true for the State's assertions regarding diligence. If the State is contesting diligence, then such must be tested during an adversarial evidentiary hearing. Card v. State, 652 So. 2d 344 (Fla. 1995).

The State argues that because Judge Woodson's summary denial order was reversed when this Court granted an evidentiary hearing, "there is no error" (Response at 3). The State completely misses the point. The "error" here is a violation of due

[16]The State argues that "unsigned orders were given to counsel on April 17 and April 18, 2001" in this case. As for the April 18 order, it was unsigned because it was sent via email from Judge Eaton with notice. As for the April 17 order, that too was distributed in open court to the parties; however, Judge Eaton had indicated that it had some corrections that might need to be fixed (T. 40). The State's analogy to the instant situation is belied by the fact there appear to have been no hearings at all in Mr. Mills' case before the entry of the summary denial, and further by the fact that the draft versions of the order at issue is not the same as the order eventually signed by Judge Woodson.

process resulting from the lack of notice and the *ex parte* communication. See Huff v. State, 622 So. 2d 982 (Fla. 1993); Rose v. State, 601 So. 2d 1181 (Fla. 1992). "The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990). This is not a situation as addressed in either Glock v. Moore, 776 So. 2d 243 (Fla. 2001), or Patton v. State, 2000 WL 142526 (Fla. Sept. 28, 2000), two cases on which the State relies. Glock and Patton addressed situations where, over defense objections, a court signed the State's proposed orders. In both case, notice was afforded to the defense that the State had proposed an order and the defense was provided an opportunity to object. This is not the situation that Mr. Mills alleges, which involves an *ex parte* communication about the order denying Mr. Mills relief. This situation is exactly like, and in fact is more egregious, than that addressed in Huff. Had Mr. Mills collateral counsel known of this situation, a motion to disqualify would have been filed and would have to have been granted. Thus, Mr. Mills' evidentiary hearing would have been presided over by a different judge who might have ruled differently and made different factfindings. 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).

Finally, the State argues that "the documents at issue could have been discovered in 1989 through the exercise of due diligence. Chapter 119 was available at that time, and the documents referred to by Mills could have been discovered then" (Response at 3). The State's diligence argument is curious; if the documents are merely a "slender reed" upon which to predicate any claim, then the State's argument that Mr. Mills should have known about the documents is disingenuous. The State cannot have it both ways. Moreover, the State's diligence argument is meritless. Mr. Mills did make a Chapter 119 request in 1989; these documents, however, were generated after the original request. See PCR. 286-87 ("the remaining documents not in existence and in this office's file at the time of the previous requests have been indexed and forwarded to the records repository of the Florida Secretary of State"). Mr. Mills knows, as does the State and as does this Court, that if Mr. Mills had made a demand for public records made after this Court remanded for an evidentiary hearing, the State, after making its predictable vituperative allegations about CCR's "vexatious" Chapter 119 requests, would have claimed an exemption because Mr. Mills' case was in active litigation. See State v. Kokal, 562 So. 2d 324 (Fla. 1990).[17] It is simply ludicrous for the State to

[17]In fact, the Attorney General's Office in the instant proceedings objected to Mr. Mills' demand for records on this basis: "to the extent that any of the files in the possession of the Office of the Attorney General could be considered to fall within the scope of Mills' request, no disclosure is required when litigation involving the Attorney

suggest that Mr. Mills should have made the request in 1990, for the State cannot with any good faith establish that it would have honored the request. That being the case, Mr. Mills cannot be faulted for not undertaking a fruitless effort.

In addition, the State's diligence argument is a not-so-subtle way of shifting its own obligations onto Mr. Mills. It is the State that has the ongoing duty to disclose exculpatory material during the postconviction process. See 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. Mills which could form the basis for relief. Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). This information was in the State's possession, and at no time was it disclosed to Mr. Mills.

2. New Evidence that Ashley was the Triggerman.

On April 18, 2001, a witness who counsel's investigator interviewed, provided a sworn affidavit that Mr. Mills' codefendant, Vincent Ashley, had confessed to him that he, not Mr. Mills, was the shooter:

AFFIDAVIT OF JOHN H. ANDERSON
DATED APRIL 18, 2000

My name is John H. Anderson and this is my sworn

General is ongoing" (PCR.) (citing Kokal).

statement:

> I am an inmate at Polk Correctional Institute in Polk Co., Florida
>
> I was a resident of Seminole County Jail in 1979 during which time I met Vincent Ashley. As we were walking in the prison yard one day, Vincent talked about the crime that both he and Greg had committed against the Wright family in Sanford, Florida.
>
> Vince Ashley stated that he had shot Mr. Wright "the dude" because he though the dude was going to shoot him first. At that time, Greg Mills, his partner, was on the porch and had no gun, that Vince had possession of the gun.
>
> Since that time, no attorney or investigator has ever approached me and no one has ever asked any questions about the crime in question, Vincent Ashley or Greg Mills until I first met with Nicholas Atkinson on Thursday April 12, 2001.
>
> s/John H. Anderson

(Attachment A).

This information requires evidentiary development, particularly in light of Ashley's statements to the court at the April 17 proceeding. See Argument I. However, the State has opposed relinquishment, arguing first that the evidence was known "as long ago as April 12, 2001 (Response at 4). This is not correct. Mr. Anderson was interviewed on two occasions, first on April 12, when he indicated a desire to think about whether he wanted to come forward with this information; Mr. Anderson was

then re-interviewed on April 18, 2001, when he disclosed the information contained in the affidavit executed on that date. Thus, the undersigned's investigator nor the undersigned did not know about the substance of what Mr. Anderson would say until April 18, the day of the affidavit.

The State also argued that this evidence is "functionally identical" to that addressed in Sims v. State, 754 So. 2d 657 (Fla. 2000). The definition of "functionally identical" is not set forth by the State. Of course, in Sims, an evidentiary hearing was held on the claims of newly discovered evidence. Ashley's confession would not be hearsay, or double hearsay, as was the case in Sims. Sims, 754 SO. 2d at 660. Ashley is the co-defendant, who made a confession to a third party. As such, it clearly qualifies as a statement against interest. § 90.804 (2), Fla. Stat. (1999). Here, Ashley's confession is clearly against interest; moreover, it is corroborated by his performance at the evidentiary hearing of April 17, 2001. See Argument I. Even if it were hearsay, Ashley's confession would also be admissible under Chambers v. Mississippi, 410 U.S. 284 (1973). Finally, Ashley's confession would be admissible at Mr. Mills' penalty phase. Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Green v. Georgia, 442 U.S. 95 (1979). The State also argues that Ashley's confession "in no way effects the testimony of Sylvester Davis, which was consistent with, but independent of, that of Ashley" (Response at 6). This assertion flies in the face of the State's disavowment of

Ashley's credibility below at the evidentiary hearing when it stipulated to Mr. Mills' allegations in the 3.850 motion that Ashley said he lied at Mr. Mills' trial. Furthermore, Davis' testimony was not "consistent" with Ashley's in the sense that they did not testify to the same events. Davis' testimony must be viewed in light of the context in which it arose. Both Davis and his girlfriend, Viola Mae Stafford, were accomplices (although Stafford never testified at trial). Davis and Stafford were spending the evening at Mr. Mills' apartment on the evening in question. When the police returned Mr. Mills home after he was released, the police specifically requested that Mr. Davis contact them if he had any information about the case; Davis never did so (T. 127-28). After Stafford was arrested a few days later (she was shoplifting from a store at which Mr. Mills' sister-in-law worked and Mr. Mill's sister-in-law contacted police), "the idea came up that she would give them some information for, you know, the dropping of her charges" (T. 117). At that time, Davis and Stafford took the police to where they had hidden the shells from the gun (T. 118). However, they did not at that time say anything else about Mr. Mills' involvement (Id.). About two weeks later, Davis was arrested for burglary, and was taken to the police station (T. 118-19). At that time, Davis testified that "[m]e and the police department made a deal" that "they'd drop my charges, the charges they had on me for burglary" (T. 119-20). It was only then that Davis told the police his story about having seen Mr. Mills take a rifle on the night of

the Wright homicide, and that Mr. Mills later that evening had told him "about he had shot some cracker or something." That the State must resort to this testimony from Davis demonstrates its desperation to find anything that can salvage a weak case.

Based on the foregoing, it is clear that relief is warranted. Mr. Mills submits that an evidentiary hearing is warranted. However, he also submits that in light of the posture of this case and the arguments contained in this brief, "it would be more appropriate to simply reverse for a resentencing before the trial judge." Thompson v. State, 731 So. 2d 1235, 1236 (Fla. 1998).

ARGUMENT III

THE STATE OF FLORIDA'S RECENT CONCESSION THAT THE "DURING THE COURSE OF A FELONY" AGGRAVATING CIRCUMSTANCE CONSTITUTES AN AUTOMATIC AGGRAVATING CIRCUMSTANCE WARRANTS RECONSIDERATION OF THIS ISSUE AND WARRANTS SENTENCING RELIEF.

Since his direct appeal, Mr. Mills has been challenging the "during the course of a felony" aggravating circumstance as an "automatic aggravating circumstance" in violation of the Eighth and Fourteenth Amendments.[18] The issue was raised on direct appeal and rejected by the Court:

> Mills argues that the factor of the murder having been committed in the course of a burglary should not have been considered in his case since it was submitted to the jury on the theory of felony murder. He contends that to submit this aggravating circumstance to the jury in a felony-murder case renders a finding of aggravation automatic. This, he argues, violates eighth amendment principles of proportionality because under this practice a person found guilty of felony murder is more likely to receive a death sentence than a person found guilty of premeditated murder. This contention is without merit. The legislative determination that a first-degree murder that occurs in the course of a felony is an aggravated capital felony is reasonable.

Mills v. State, 476 So. 2d 172, 178 (Fla. 1985) (citations omitted).

---

[18]Mr. Mills was convicted of first-degree felony murder.

Subsequent to the decisions in Stringer v. Black, 503 U.S. 222 (1992), and Sochor v. Florida, 504 U.S. 527 (1992), Mr. Mills sought habeas corpus relief challenging both the adequacy of the Court's harmless error analysis in his case as well as the application of the "during the course of a felony" aggravating circumstance. Regarding the claim that the felony-murder aggravating factor is an unconstitutional automatic aggravating circumstance, the Court held: "We considered and rejected the substance of this claim on direct appeal." Mills v. Singletary, 606 So. 2d 622, 623 (Fla. 1992).

In his federal habeas corpus petition, Mr. Mills again challenged the felony murder aggravating circumstance as an "automatic aggravator" in violation of the Eighth and Fourteenth Amendments, and again the claim was rejected by the federal courts. See Mills v. Singletary, 161 F.3d 1273, 1286-87 (11th Cir. 1998).

Thus, since 1980, Mr. Mills has been arguing that the felony murder aggravator constituted an impermissible automatic aggravator. Since 1980, the State has been arguing that Mr. Mills is wrong. Since 1980, the courts of Florida and the federal courts have agreed with the State. However, in 2001, the State of Florida announced before this Court that its position on whether Mr. Mills was automatically subject to the death penalty upon his conviction for first-degree felony murder had changed and that it now agreed with Mr. Mills' argument:

> **First of all, it is very significant that Mr. Mills was convicted on a felony murder theory. This is not a case where there is a general verdict. This is a case where it went to the jury on felony murder and they convicted on a felony murder theory. <u>At that point, there is absolutely no question that an aggravating circumstance had been proven beyond a reasonable doubt.</u>**

(Transcript of Oral Argument, April 2, 2001) (emphasis added).

In light of the State's concession before this Court, this claim cannot be procedurally barred, and Mr. Mills' argument must be revisited and relief must be granted at this time. Mr. Mills was convicted of one count of felony murder, with burglary being the underlying felony. Upon his conviction, the State has conceded that there is "absolutely no question that an aggravating circumstance had been proven beyond a reasonable doubt." The death penalty in this case was predicated upon unreliable automatic findings of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for the conviction.[19] Since under Florida law a death sentence is proper upon the finding of a single aggravating circumstance, the State's concession translates into a mandatory death sentence for Mr. Mills, which is

---

[19]If Mr. Mills had been convicted of premeditated murder, he would not have been automatically eligible for death, as the level of premeditation sufficient to support the existence beyond a reasonable doubt of the "cold, calculated, and premeditated" aggravating circumstance is more than is required to support a finding at the guilt phase of premeditated murder. <u>See</u> <u>Jackson v. State</u>, 575 So. 2d 181 (Fla. 1996).

patently unconstitutional. See Woodson v. North Carolina, 428 U.S. 305 (1976). If an aggravating circumstance "applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave v. Creech, 507 U.S. 463, 474 (1993).

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 112 S. Ct. 1130 (1992). Moreover, "it is not enough for an aggravating circumstance, as construed by the state courts, to be determinate. Our precedents make clear that a State's capital sentencing scheme also must `genuinely narrow the class of persons eligible for the death penalty.'" Arave, 507 U.S. at 474 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). To be constitutionally sound, an aggravating factor "may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder." Tuilaepa v. California, 512 U.S. 967, 972 (1994). However, in Mr. Mills' case, the State has conceded to the Florida Supreme Court that every defendant convicted of felony murder has at least one aggravating factor[20] against him before he

[20]In fact, depending on the felony, some felony murder defendants go into the sentencing phase with two aggravating circumstances. For example, if the underlying felony is robbery or burglary, the pecuniary gain factor would, under the State's concession, also automatically apply, whereas it would not if the underlying felony were kidnapping or arson, for example.

even enters the sentencing phase. This is unconstitutional under Florida's capital sentencing scheme as interpreted by the Eighth and Fourteenth Amendments.

Recently, Justice Anstead, joined by then-Chief Justice Kogan, wrote that the felony murder aggravating circumstance "may well be unconstitutional when applied to a defendant convicted of felony murder." Blanco v. State, 706 So. 2d 7, 12 (Fla. 1998) (Anstead, J., specially concurring). As Justice Anstead wrote:

> [] I write separately to express my disagreement with the reasoning of the majority opinion. This aggravator, as contained in section 921.141 (5)(d), Florida Statutes (1995), may well be unconstitutional when applied to a defendant convicted of felony murder. When the same felony used to establish guilt of first-degree felony murder is again used as an aggravator to justify to imposition of the death penalty, Florida's felony murder aggravator may well fail to meet the U.S. Supreme Court's mandate that aggravating circumstances in a state's death penalty scheme must "genuinely narrow the class of persons eligible for the death penalty" and "reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862 (1983).
>
> The concept of narrowing requires that once it has been established that a defendant is guilty of first-degree murder the sentencer may properly consider only additional factors, termed aggravators, that genuinely narrow the class of convicted murderers who may be eligible for the death penalty. For example, if a person is guilty of premeditated murder and is shown to have been guilty of additional aggravating misconduct, then he becomes part of a narrower, less numerous class of persons eligible for the death penalty. But a person convicted of felony murder who

then has the same felony used against her as an aggravator does not become a member of a smaller group. Rather, the felony aggravator used there would make the entire larger group of felony murderers automatically eligible for the death penalty without proof of any additional aggravating misconduct. Hence, the felony aggravator serves no legitimate narrowing function in such a case.

* * *

Under Florida's death penalty scheme, a convicted defendant cannot qualify for the death sentence unless one or more statutory aggravators are found to exist in addition to the conviction for first-degree murder. See Elam v. State, 636 So. 2d 1312 (Fla. 1994). Hence, a defendant convicted of intentional premeditated murder will not be eligible for the death penalty unless some additional aggravating circumstance, in addition to the premeditated murder, is found to exist. On the other hand, a person found guilty of felony murder automatically becomes eligible for a death sentence. By reason of the felony murder aggravator, the underlying felony is used not only as a legal substitute for premeditation to support a first-degree murder conviction; but is also used as a statutory aggravator to immediately make the defendant eligible for the death sentence. In other words, Florida's felony murder aggravator permits a defendant convicted of felony murder to be sentenced to death by virtue of his conviction for felony murder alone.

Common sense alone tells us the scheme described above is patently inconsistent with the United States Supreme Court's strict requirements in Zant v. Stephens for a rational and narrowing scheme for selecting those who will be subject to the death penalty. Recently, the U.S. Supreme Court reiterated the requisite narrowing function that must be served by proper aggravating factors, explaining again that where a weighing state, like Florida, uses aggravating

> factors to determine who is eligible for the death penalty, "it cannot use factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 503 U.S. 222, 235 (1992). By making a defendant convicted of felony murder automatically eligible for the death penalty based upon the same felony that was used to establish the defendant's conviction for murder, this scheme simply does not narrow the class of persons who become eligible for the death penalty. Rather, if anything, it clearly enlarges the eligible class in an irrational way.

Blanco, 706 So. 2d at 12-14.

Other states have determined that the "felony murder" aggravating circumstance violates the Eighth and Fourteenth Amendments. For example, the Tennessee Supreme Court struck the felony murder aggravator from its sentencing statute which, like Florida's, is a weighing scheme:

> In Zant v. Stephens, the United States Supreme Court said that in order to comply with the Eighth Amendment, aggravating circumstances must `genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' It seems obvious that Tennessee's statute fails to narrow the class of persons eligible for the death penalty because:
>
> > Automatically instructing the sentencing body on the underlying felony in a felony-murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony-murder, regardless

> of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.
>
> A comparison of the sentencing treatments afforded first-degree murder defendants further highlights the impropriety of using the underlying felony to aggravate felony murder. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically charged against him. This disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

State v. Middlebrooks, 840 S.W.2d 317, 341-46 (Tenn. 1992) (quoting Engberg v. State, 686 P.2d 541, 560 (Wyo. 1984) (Rose, J., dissenting)).

Similarly, the North Carolina Supreme Court has prohibited the felony murder statutory aggravating circumstance:

> A defendant convicted of felony murder, nothing else appearing, will have one aggravating circumstance `pending' for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberate killing, nothing else appearing, enters the sentencing phase with no strikes against him. This is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived.

State v. Cherry, 298 N.C. 86, 257 S.E.2d 551, 567 (N.C. 1979).

And the State of Wyoming has also echoed the holdings of North Carolina and Tennessee as to this aggravating circumstance:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was not used once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.

Engberg v. Meyer, 820 P.2d 70, 89 (Wyo. 1991).

In light of the State's concession to the Florida Supreme Court, Mr. Mills submits that this issue should be revisited and that relief should issue.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. MILLS' REQUESTS FOR PUBLIC RECORDS PURSUANT TO RULE 3.852.

Mr. Mills sought public records pursuant to Fla. Stat. Ch. 119 and Fla. R. Crim. P. 3.852 (h)(3) and (i). See Ventura v. State, 673 So. 2d 479 (Fla. 1996); Muehleman v. Dugger, 634 So. 2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Counsel for Mr. Mills has the duty to seek and obtain every public record in existence in this case. Porter v. State, 653 So. 2d 375 (Fla. 1995), cert. denied 115 S.Ct. 1816 (1995).

This Court has ruled that collateral counsel must obtain every public record in existence regarding a capital case or else a procedural default will be assessed against the defendant. Porter v. State, 653 So. 2d 375 (Fla. 1995). However, a concomitant obligation under relevant case law as well as Chapter 119 rests with the State to furnish the requested materials. Ventura v. State, 673 So. 2d 479 (Fla. 1996). When the State's inaction in failing to disclose public records results in a capital post conviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the post conviction motion should be denied or dismissed. Id. ("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").

Effective legal representation has been denied Mr. Mills because the circuit court denied access to public records from the following agencies: Florida Department of Law Enforcement; Orlando Police Department; Florida Parole Commission/Office of Executive Clemency; Department of State, Division of Elections; Office of the State Attorney, Eighteenth Judicial Circuit. Without these records, it is impossible for counsel to prepare a complete Rule 3.850 motion for Mr. Mills.

On April 10, 2001, Mr. Mills filed a motion to compel production of public records from all agencies who had not complied with Mr. Mills's previous demands. The aforementioned agencies filed objections to Mr. Mills' demands for additional public records.

The circuit court held a hearing on April 12, 2001 for the purpose of resolving all pending public records matters, including any outstanding objections and/or motions which had been filed in response to Mr. Mills' demands. At that time, the court denied Mr. Mills access to the records from the aforementioned agencies. These records are essential to conducting an adequate investigation in Mr. Mills's case.

The demands sent to the Florida Department of Law Enforcement and the Office of the State Attorney requested criminal records related to the jurors in Mr. Mills' case.

Whether or not any of the jurors had any criminal history and/or involvement with the criminal justice system, law enforcement or the state is relevant because it gives rise to a claim for relief if a juror failed to disclose this information to the court at the time of trial. In Buenoano v. State, 708 So. 2d 941 (Fla. 1998), this Court made it clear that any such claim will be procedurally barred if counsel fails to exercise due diligence. Unlike the Buenoano case, no juror questionnaires exist in Mr. Mills case, thus Mr. Mills only means of obtaining this information is through the current public records demands directed to FDLE and the State Attorney's Office.

The only records sought from the Orlando Police Department regard Mr. Mills and his codefendant Vincent Ashley. As such, the request was not overly burdensome. Orlando Police Department conducted the investigation of a prior felony which was used as an aggravator in the instant case. Mr. Ashley was also the codefendant in the prior felony and received immunity from prosecution on that felony as well as immunity in exchange for his testimony against Mr. Mills in the instant case. Additionally, the Orlando Police Department relied upon hypnotism in order to refresh the victim's memory regarding the suspect and as a result he was able to identify Mr. Mills. Because this unusual practice was used, Mr. Mills has requested the personal notes of the officer who hypnotized the victim, as well as his personnel and internal affairs files. The State is required to prove aggravators beyond a reasonable doubt, and here the

judge found the prior felony aggravator to exist. Certainly, it is counsel's duty to investigate each of the aggravators presented by the State. The fact that the victim in the prior felony case could not identify Mr. Mills until she was hypnotized causes concern of improper suggestion on the part of law enforcement and must be investigated. Because Mr. Mills has been denied these records, he is unable to adequately investigate any claim which may stem from the prior felony.

Likewise, the records requested from the Department of State, Division of Elections were not extensive. The only request made was for records regarding Judge William Woodson. These records are necessary to investigate a claim whether the trial judge received contributions from any persons having an interest in Mr. Mills case. See Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Porter v. Singletary, 49 F. 3d 1483 (11th Cir. 1995). Mr. Mills is prohibited from questioning a judge directly without first showing good cause. State v. Lewis, 656 So. 2d 1248 (Fla. 1994); Porter v. Singletary. As a result, Mr. Mills has no other means of establishing good cause.

Each of the demands sent to the above listed agencies were sent after a thorough search of the records previously received by Mr. Mills. The information sought in the demands was limited to only those individuals or information which directly pertains to the investigation of valid claims for relief. For example, the individuals who were the focus of the bulk of the demands were Vincent Ashley, Sylvester Davis and Viola

Mae Stafford. These were the key witnesses at trial. Mr. Mills is being denied the opportunity to thoroughly investigate and prepare a complete 3.850 motion.

Furthermore, there may be yet more records, the existence of which Mr. Mills is not currently aware, which have not yet been provided to Mr. Mills.[21] Therefore, Mr. Mills does not waive any public records claim that may exist, but that due to circumstances beyond his control, he does not know about. Mr. Mills should be allowed to amend once the requested records have been disclosed.

---

[21]Undersigned counsel is not in a portion to know whether the agencies and/or the repository have provided Mr. Mills with the public records to which he is entitled. For example, in another CCRC-South case, the repository was specifically requested to deliver to CCRC-South all records pertaining to that case from the various agencies who provided the repository with records. Although nine (9) boxes of records were delivered to CCRC-South, many records that CCRC-South anticipated to be included were absent. Despite the fact that the repository assured CCRC-South that all records were delivered, upon further investigation, eleven (11) additional boxes of records were discovered at the repository which were not previously sent to CCRC-South.

Furthermore, recently in the case of Wayne Tompkins, who is also represented by undersigned counsel, the Florida Department of Law Enforcement sent additional records to the repository one day after Mr. Tompkins Rule 3.850 motion was filed, and six days after an FDLE representative had told the circuit court that all records had already been sent to the repository. It is an impossibility for undersigned counsel to identify records that may or may not exist. The history of the repository and CCRC-South's experiences with the repository and agencies sending records to the repository bring forth legitimate concerns that records have been withheld.

CONCLUSION

Mr. Mills submits that he is entitled to a new trial or a new sentencing proceeding before the judge. Because the standards of Tedder cannot be met in light of the newly-discovered information contained herein, alone and in conjunction with the previously-presented mitigation in the record, the State is precluded from seeking the death penalty against Mr. Mills. Moreover, as the State has refused to conceded that the newly-discovered evidence alleged in Argument II warrants no evidentiary hearing, those allegations must now be accepted as true, and rather than remand for an evidentiary hearing that the State does not want, Mr. Mills submits that "it would be more appropriate to simply reverse for a resentencing before the trial judge." Thompson, 731 So. 2d at 1236.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by fax transmission to all counsel of record on April 20, 2001.

TODD G. SCHER
Florida Bar No. 0899641
Litigation Director
CCRC South
101 NE 3d Avenue, Suite 400
Ft. Lauderdale, Florida 33301
(954) 713-1284
Attorney for Defendant

Copies furnished to:

Kenneth Nunnelley, Asst. Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118

CERTIFICATE OF FONT

Counsel hereby certifies that this brief is typed in New Times Roman 14-point type.

Todd G. Scher, Attorney for Appellant