IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1159

MICHAEL MORDENTI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Mordenti is under a sentence of death. Herein, Mr. Mordenti appeals the circuit court's denial of Rule 3.850 relief following an evidentiary hearing.

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

"R. ___"	- Record on direct appeal to this Court;
"PC-R. ___"	- Post conviction record on appeal
"PC-T. ___"	- Evidentiary hearing transcript
"D-Ex. __"	- Defense exhibits entered at the evidentiary hearing and made part of the post conviction record on appeal.
"S-Ex. __"	- State exhibits entered at the evidentiary hearing

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

REQUEST FOR ORAL ARGUMENT

Mr. Mordenti, through counsel, respectfully requests that the Court permit oral argument.

INTRODUCTION

At the heart of Mr. Mordenti's appeal is his claim of innocence. Michael Mordenti and his attorneys maintain that he did not commit the June 7, 1989, murder of Thelma Royston nor participate in the murder in any way.

This Court acknowledged on direct appeal that "[n]o physical evidence was produced linking Mordenti to the crime, and Gail Mordenti [Milligan] was the only witness who was able to place him at the scene of the murder." Mordenti v. State, 630 So.2d 1080, 1083 (Fla. 1994). The State's case rested entirely upon the credibility of Gail Mordenti Milligan, who testified that "as long as I told the truth, that I had total immunity." (R. 661).[1] Gail elaborated in cross-examination at

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[1]In 2001, John Atti, Mr. Mordenti's lead trial attorney testified that he "considered [Gail] to be the key witness." (PC-T. 525). He explained that "impeaching her was the entire case." (Id.). Karen Cox, the lead prosecutor, testified that Gail's credibility "was a very important issue, yes, it was." (PC-T. 714). Richard Watts, Mr. Atti's co-counsel, described Gail as "the most important witness." (PC-T. 902). In fact at the 2001 evidentiary hearing, Mr. Mordenti's conviction was summarized in the following fashion by ASA Vollrath and Mr. Watts:

> Q And as you sit here today, isn't it the fact that the jury just believed Gail Mordenti and didn't believe the alibi witnesses presented?
>
> A Apparently.
>
> Q Uh-huh. Isn't that kind of a decision of a question of fact, credibility factor, judging by the jury - - isn't that a determination of fact?
>
> A Yes.

(PC-T. 959-60).

trial that “as long as I told the truth, the whole truth, that I had immunity” (R. 703). The jury was told that Gail had been given total immunity to identify the person that she hired to commit the murder.[2] Mr. Mordenti maintains that Gail’s testimony was false and that the immunity deal was misrepresented to produce a vouching effect. The jury was led to believe that any falsehood exposed Gail to criminal liability that she did not otherwise face; surely the State would pounce on untruthful testimony to prosecute her. Yet, her testimony was, as has been established and conceded, rife with false information.[3] In the post-conviction proceedings below, Gail admitted when showed her undisclosed daily calendar that her trial testimony was "wrong" regarding her timeline of the events (PC-T. 1097).[4]

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[2]Certainly, the jury was led to believe that Gail was given total immunity for truthful testimony. On direct appeal, this Court too believed that “complete immunity” had been provided. Mordenti v. State, 630 So.2d 1080, 1083 (Fla. 1994). However at the 2001 hearing, it was revealed that Gail merely received the standard use immunity that attaches to sworn testimony that is given pursuant to a state attorney subpoena (PC-T. 253).

[3]Mr. Mordenti maintains that Gail identified the wrong man in order to protect the real killer. In fact, Mr. Mordenti was "not a suspect in the homicide until March 8, 1990, when Gail mentioned him as the person who had committed the murder" (PC-T. 790).

[4]This is in reference to her trial testimony that her discussions with Larry Royston about murdering his wife began at the end of February or early March. Her undisclosed date book that had been in the State’s possession at the time of trial revealed that the luncheon at which she and Larry first discussed the murder occurred on April 11, 1989 (PC-T. 1005-06, 1096-97). This revelation in post-conviction proceedings

Absolutely no physical evidence connected Mr. Mordenti to the murder of Thelma Royston. The State's case at trial was entirely dependent upon the credibility of Gail Mordenti Milligan. However, the evidence presented at the evidentiary hearing demonstrated that Mr. Mordenti's jury did not have all of the information because Gail's testimony was not truthful. When the legal claims that Mr. Mordenti advances are fully analyzed, it is clear that not only did he not receive a constitutionally adequate adversarial testing, but also that his conviction and death sentence represent a manifest miscarriage of justice and cannot be allowed to stand.[5]

STATEMENT OF THE CASE AND FACTS

A. **Procedural History.**

Mr. Mordenti was indicted by a grand jury in Hillsborough County, Florida, on March 14, 1990 (R. 1591-1593). He was charged with the first-degree murder of Thelma Royston and with conspiracy to commit murder.[6] The basis of the charge was Gail Mordenti Milligan's March 8, 1990, immunized

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established that Gail's finely woven time line was completely and totally wrong. All the planning occurred after Michael Milligan, her boyfriend and future husband, had moved in with her in direct contravention of her trial testimony.

[5]The lead attorney for Mr. Mordenti at his 1991 trial was John Atti who surrendered his Florida Bar license in 1993 (PC-T. 501). The lead prosecutor at Mr. Mordenti's trial was Karen Cox who at the time of the evidentiary hearing was under suspension from the Florida Bar (PC-T. 5). Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001).

[6]Thelma Royston was murdered on June 7, 1989.

statement that she, on behalf of the victim's husband, hired Mr. Mordenti to commit the murder.[7]

Larry Royston, the victim's husband, was also charged and indicted. Mr. Royston was represented by John Trevena (PC-T. 316). On March 18, 1991, on the eve of his trial, Mr. Royston committed suicide (PC-T. 317). Thereupon, the assigned prosecutors, Karen and Nick Cox, without notice to Mr. Mordenti or his counsel obtained a court order directing Mr. Trevena to reveal to the State "information that Mr. Royston had provided [Mr. Trevena] during the course of the representation" (PC-T. 328). The prosecutors did not share Mr. Trevena's statement with Mr. Mordenti nor with his counsel (PC-T. 534).[8]

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[7]On April 20, 1990, Gail married Michael Milligan, an individual who matches the description of one of two men seen near the victim's barn about the time of the murder (PC-T. 797, 1088, 1102).

[8]The State did not specifically use the information that it obtained because the information did not implicate Mr. Mordenti. Mr. Trevena testified that he told the State that Larry Royston's position was "that Gail Mordenti had orchestrated [the murder]." (PC-T. 330). He advised the State that "Mr. Royston had indicated to [Mr. Trevena] that [Royston] did have a sexual affair with Gail Mordenti, and that she wanted to continue that affair" (PC-T. 330). He advised the State that Gail "wanted Mr. Royston freed up so that she could share, I believe, in his assets" (PC-T. 331). Mr. Trevena advised the State that Royston maintained that the cell phone call on June 7, 1989, to Mordenti and Associates was "innocent in nature and that it was relating to some type of a boat or motor vehicle" (PC-T. 332). "There was no discussion concerning any homicide or violence, that it was related to business and that the call had been set up by Gail" (PC-T. 336). Mr. Trevena indicated that there had been discussions with the State prior to Royston's death in the nature of plea negotiations. However as Mr. Trevena explained

Mr. Mordenti's trial commenced July 8, 1991. At his trial, Mr. Mordenti was represented by John Atti and Richard Watts.[9] The jury found Mr. Mordenti guilty of both counts. The penalty phase took place on July 29, 1991. The jury returned a death recommendation (R. 1499). On September 6, 1991, the court sentenced Mr. Mordenti to death (R. 1547).

On direct appeal, this Court affirmed Mr. Mordenti's convictions and sentences. Mordenti v. State, 630 So. 2d 1080 (Fla. 1994). Subsequently, Mr. Mordenti filed for Rule 3.850 relief. The circuit court summarily denied. On appeal, this Court reversed and remanded. Mordenti v. State, 711 So. 2d 30

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to the State, Royston had been:

> quite eager to give [the State] information about Gail Mordenti. He had no knowledge about Michael Mordenti, so he was not in a position to confirm or deny the allegations against him, other than to let the State know that Gail had set this up. She may have hired Michael Mordenti, she may have hired someone else, but he was not directly involved and it was not at his behest to contract this killing.

(PC-T. 333). Mr. Trevena also disclosed to the State that Royston was "scared of Gail Mordenti" (PC-T. 334). Royston had indicated to Mr. Trevena that "he did not know what was going on, and in the sense that her hiring of a hit man, would she then turn around and, because he wouldn't marry her, hire a hit man to kill him" (PC-T. 335).

Mr. Trevena did not disclose this information to Mr. Mordenti's trial counsel due to the privilege. Even at the 2001 evidentiary hearing, Mr. Trevena still asserted privilege when called to the stand by undersigned collateral counsel.

[9]In 2001, Mr. Atti testified that he was convinced of Mr. Mordenti's innocence, "[e]very piece of this evidence that I looked at, every witness that I talked to, every avenue that I took indicated Mr. Mordenti was not guilty of the crime" (PC-T. 508).

(Fla. 1998).

Mr. Mordenti amended his Rule 3.850 motion on June 30, 2000 (PC-R. 488). The State filed its Response on August 28, 2000 (PC-R. 687-1044). On October 19, 2000, the lower court held oral argument pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993). On December 8, 2000 the lower court entered an order granting an evidentiary hearing claims I (ineffective assistance of counsel at the guilt phase), III (violation of due process under Brady and Giglio); XIII (penalty phase Brady and Gigilo violations and/or ineffective assistance of counsel); and XXXI (cumulative error). The lower court summarily denied the remaining claims (PC-R. 1182).[10]

[10]These claims are: II (newly discovered evidence of unconstitutionality); IV (unconstitutional admission of hearsay); V (record omissions resulted in an unreliable transcript); VI unconstitutionally gruesome and shocking photographs); VIII (ineffective assistance as to State v. Neil, State v. Slappy, and Batson v. Kentucky); IX (violation of right to silence); X (erroneous instruction on standard to judge expert testimony); XII, (misleading testimony and improper prosecutorial argument); XIV,(improper prosecutorial argument at penalty phase); XV (failure to weigh mitigation in the record); XVI (non-statutory aggravating factors considered); XVII(failure to present Skipper evidence rendered sentencing determination unreliable); XVIII (unconstitutional consideration of CCP aggravating factor); XIX (fundamental error as to HAC aggravator); XX (sentencing jury misled regarding sentencing responsibility); XXI (improper shifting of burden to prove life appropriate sentence); XXII (Florida's aggravating factors are unconstitutionally vague and over broad); XXIII (innocence of the death penalty); XXIV (prosecutor impermissibly argued death was required); XXV (prohibition against juror interviews); XXVI (juror misconduct); XXVII (Florida's sentencing statute is unconstitutional); XXVIII (incomplete 3.851 motion filed due time limitation, workloads); XXIX (access to files and records denied); XXX (Fla. R. 3.851 is unconstitutional).

On August 21, 2001, Mr. Mordenti filed another amendment to his pending Rule 3.850 motion (PC-R. 1238-1241). Mr. Mordenti amended claims I, II, III, and XII with evidence from the FBI that undermined the trial testimony of FBI agent Michael Malone. Mr. Mordenti also added claim XXXII alleging that the Florida criminal justice system is unable to reliably resolve cases that require an accurate credibility determination. On August 28, 2001, the lower court granted an evidentiary hearing as to the amendment of claims I and III and denied as it related to claims II, XII and XXXII (PC-R. 1250-1254).

The evidentiary hearing commenced on September 10, 2001.[11] Mr. Mordenti had presented the testimony of eight witnesses (PC-R. 1273)and introduced approximately 36 exhibits (PC-R. 1273-1275) when the State filed on September 20, 2001, its "Notice of Additional Information" that disclosed that a former member of Mr. Mordenti's trial defense team, Paula Montlary, was employed by the Attorney General in the Capital Appeals Bureau (PC-R. 1276-1277). Over objection, the State called Ms. Montlary as a witness after the evidentiary hearing resumed in November.

The evidentiary hearing resumed for three days on November 5th. When Mr. Mordenti called Mr. Trevena as a witness, the State objected to "Mr. Trevena discussing

[11]The proceedings were stopped and continued due to the September 11 terrorist attacks.

substance of conversations that occurred regarding his representation of Mr. Royston" (PC-T. 322). The State asserted that the evidence was inadmissible hearsay. The judge sustained the objection, but permitted Mr. Mordenti to proffer the evidence (PC-T. 326-27).

The evidence was finally closed on November 27, 2001. Written closing arguments were filed. On April 23, 2002, the lower court entered its order denying Mr. Mordenti relief (PC-R. 1384-1425). Mr. Mordenti timely filed his Notice of Appeal on May 9, 2002 (PC-R. 1426).

B. **Statement of the Facts**.

1. **According to trial evidence.**

The centerpiece of the State's case was the immunized testimony of Gail Mordenti Milligan - Michael Mordenti's ex-wife. According to Gail's trial testimony, when she was picked up by Detective Baker and Detective Kroll on March 8, 1990, "they said they had the power - - that they could grant me immunity if I would tell them everything that I knew, and I said that if they could do that, then I would tell them everything that I knew about it, and they said fine. And then nothing else was said until we got here" (R. 701). Gail was asked by trial counsel "if I understand it, that they approached you regarding the issue of immunity, and you did not approach them asking for immunity." (R. 701). Gail

responded, “that’s correct” (R. 701).[12]

Gail testified at trial that Larry Royston asked her to find someone to murder his wife, Thelma Royston.[13] Gail testified Larry Royston came to her house for lunch “it was either late February, or the beginning of March [of 1989].” (R. 609). At that luncheon, Larry Royston asked Gail if she knew anyone who could kill his wife (R. 611).[14] After she was unable to recruit three other individuals, she turned to her ex-husband, Michael Mordenti within a couple of weeks of the luncheon (R. 672-73).[15] According to Gail’s trial testimony, Mr. Mordenti wanted to scope out the Royston place in the daytime (R. 617). Gail testified that later Mr. Mordenti wanted to take a second drive out to the Royston’s place, this time at

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[12]Contrary to Gail’s trial testimony, Lee Atkinson, the prosecutor who obtained a sworn statement from Gail on March 8, 1990, testified that he did not bestow total immunity upon Gail. He testified that all Gail received was the standard use immunity which accompanies any testimony given pursuant to a subpoena (PC-T. 255-57).

[13]Gail acknowledged in 2001 that Larry Royston “had money” and had once said flippantly that “it’s too bad I couldn’t be interested in him” (PC-T. 998).

[14]In 2001, Gail testified that Larry “seemed like a nice person” (PC-T. 1081). She “didn’t know Thelma. All I knew was what Larry told me, and I thought she was just a really horrible person. I didn’t know and it was very bad judgment. I know it was bad judgment, and I know it was wrong” (PC-T. 1082).

[15]She stated that one of the individuals she tried to recruit was former business partner John Robin “Jack” Gartley (R. 673). Mr. Gartley did not testify at Mr. Mordenti’s trial, but was called at the 2001 hearing and denied Gail’s claim. Gail also claimed to have contacted "Jerry Carter" and "Bill - - and it’s Rosenthal or Rosenfield" (R. 674-75).

night. According to Gail's trial testimony, Mr. Mordenti went to Gail's house in the middle of the night (R. 620). Gail and Mr. Mordenti then went and checked into a motel near the Royston place.[16] This was maybe a month after the first trip, but definitely before Milligan moved in with Gail (R. 682). Gail testified that Michael Milligan moved in to her house "either the end of March or beginning of April" (R. 677).[17]

At trial, Gail testified that Michael Mordenti had given her a loaded gun. "Michael gave it back to me after the murder, and I had it at the house" (R. 662). Gail gave the gun and the accompanying bullets to the police in March of

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[16]In March or April of 1990 shortly after Gail gave her immunized statement, Det. King went to the motel that Gail had identified to law enforcement, but was unable to find any registration under Michael Mordenti's name (PC-T. 794, 799).

Yet, Mr. Mordenti's trial attorneys complained that they were never timely given the name of this hotel and believed that a Richardson violation occurred. Richard Watts even wrote a memo to the filed documenting that "[t]he name of the motel wasn't disclosed to us. We couldn't go and look." (PC-T. 901; D-Ex. 68).

[17]Gail's trial testimony wove a tight time line. All of the planning and contact with Mr. Mordenti that she claimed occurred, she pegged as happening before Michael Milligan moved into her home as her boyfriend at "the end of March or beginning of April" (R. 677). However, her daily calendar that was in the State's possession and was not disclosed to the defense revealed that the luncheon discussion with Larry Royston about the murder of his wife occurred on April 11, 1989 (PC-T. 1004-05).

If the luncheon happened on April 11th, Michael Milligan had already moved in with her and as Gail herself testified, Michael Mordenti did not go into her house in the middle of the night to rouse her to go to the Royston place when Milligan was with Gail.

Interestingly, Milligan's description matches that of one of the men seen near the Royston place on the night of the murder shortly before the murder (PC-T. 797, 1088).

1990, and evidence was introduced at trial regarding the FBI's metallurgical examination of the bullets.[18] On cross-examination, Gail testified that Mr. Mordenti gave her the gun and bullets while she worked at Carlisle, which was "from October of '89 until April of '90, and it had to have been during that time" (R. 685). "[I]t was after I was working at Carlisle Hyundai, and that was after Ms. Royston's death" (R. 685).

Previously in her March 8, 1990, sworn statement, Gail indicated that she received the gun "January, February, March [ ] 89." Gail had explained on March 8, 1990, "yeah, it was kind of a long time ago" (D-Ex. 37 at 19).[19] Thus, this sworn testimony placed the receipt of the gun before Thelma Royston's death. When asked at trial in cross-examination about this prior inconsistent testimony, Gail testified "I don't remember making [that statement], no. I can read it, but I don't remember making it." (R. 689). Thus, the State successfully precluded the introduction of the prior sworn statement directly contrary to her trial testimony. In fact during closing, ASA Karen Cox successfully argued to the trial

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[18]The FBI's bullet lead compositional analysis concluded that the bullets at the crime scene matched the bullets that were with the gun.

[19]Gail was picked up on March 8, 1990, pursuant to a state attorney subpoena (PC-T. 787). She had previously been questioned by the police on July 12, 1989, regarding the homicide. At that time, she had indicated "she thought about dating Larry, due to the fact he has a lot of money, but the situation never came up" (PC-T. 776).

judge that defense counsel could not mention that the prior inconsistent sworn testimony existed (R. 1224-34).[20]

According to Gail's trial testimony, when she was picked up by Detectives Baker and Kroll on March 8, 1990, "they said they had the power -- that they could grant me immunity if I would tell them everything that I knew, and I said that if they could do that, then I would tell them everything that I knew about it, and they said fine. And then nothing else was said until we got here." (R. 701). Gail was asked at trial by defense counsel "if I understand it, that they approached you regarding the issue of immunity, and you did not approach them asking for immunity" (R. 701). Gail responded, "that's correct" (R. 701).[21]

At trial, the state utilized Mr. Royston's cell phone records to show numerous phone calls from Larry Royston to T&D Auto Repair in the month of May of 1989 as evidence of Mr. Royston's efforts to pressure an unwilling Gail make the

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[20]Yet on November 27, 2001, Gail remembered the March 8, 1990, sworn statement and was uncertain whether it or her contradictory trial testimony was true as to when Mr. Mordenti gave her the gun and bullets (PC-T. 1043-45). She indicated that she had not "deliberately lie[d] at trial regarding when [she] got the gun" (PC-T. 1044).

According to John Atti, Mr. Mordenti's trial attorney, this discrepancy was "absolutely pivotal" (PC-T. 563-64). By virtue of Gail's convenient inability to remember the prior inconsistent statement and Karen Cox's successful argument to preclude mention of the prior inconsistency, Mr. Mordenti's jury was left unaware of the "absolutely pivotal" inconsistency.

[21]According to Det. Baker's 2001 testimony, this was not correct (PC-T. 788).

murder happen (R. 629, 742-43).[22] The State also used Mr. Royston's phone records of a 13 minute cell phone call placed from Larry Royston's mobile phone to Mordenti & Associates on June 7, 1989, the day of Thelma's murder in an effort to link Mr. Mordenti to Larry Royston. At trial, Gail testified that she placed the call and handed the phone to Larry (R. 631).[23]

At trial Karen Cox presented the testimony of Horace Barnes. Mr. Barnes testified that Mr. Mordenti "let me know that he was in the mob" (R. 747). In response to a defense objection, Ms. Cox told the court that Horace would further testify that Mr. Mordenti told Mr. Barnes that "he was a hit man" (R. 748).[24] The trial judge ruled that the mob comment

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[22]However, as was clearly established at 2001 hearing, Gail did not start working at T&D Auto Repair until June 1, 1989 (PC-T. 1022).

[23]In 2001, Mr. Trevena testified that Mr. Royston had advised him that this call was a business call about selling a boat (PC-T. 332).

[24]On direct appeal, this Court stated, "we do find that it was error for Mordenti's **cellmate** to testify regarding Mordenti's purported 'mob' association; however, defense counsel failed to request a mistrial, this claim is procedurally barred." Mordenti, 630 So.2d at 1084 (emphasis added). However, Mr. Barnes was **not a cellmate**. He **was a bank robber that Mr. Mordenti had assisted the FBI in apprehending**. Mysteriously, the true facts never made it into the record, and this Court misperceived the circumstances.

The trial prosecutor, Ms. Cox, used the ambiguity to Mr. Mordenti's detriment. She elicited from Gail testimony that Michael Mordenti "was involved in some kind of investigation of bank robbery, and that was - - so he didn't want any conversations over the phone because he didn't know if anyone was listening in because of the bank robbery" (R. 658). In conjunction with the presentation of Horace Barnes who admitted to the jury that he was a bank robber who had

was inadmissible, but the “hit man” comment could be presented (R. 749). Mr. Barnes testified that he saw Mr. Mordenti illegally sell a friend of his a gun (R. 750). This was used to support Gail’s testimony that Mr. Mordenti had "‘throw away pieces’ and that she knew he ‘was dealing with some people that were shady.’" Mordenti v. State, 630 So.2d at 1084.[25]

At trial, Karen Cox argued in closing that Mr. Mordenti was not to be believed. Ms. Cox argued that in a February of 1990 interview of Mr. Mordenti, he said he did not know Larry. She argued that on the tape recording of the March 8, 1990, phone call from Gail to him, Mr. Mordenti acted as if he did know Larry (R. 1195).[26] According to Ms. Cox this proved that Mr. Mordenti was lying and that Gail was telling the truth.

2. **The post-conviction evidence.**

When Gail testified at the evidentiary hearing on November 27th, she acknowledged that her date-book (D-Ex. 11)

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dealings with Mr. Mordenti, the false implication was created that Michael Mordenti was involved with this bank robber in some fashion and was afraid of getting caught.

[25]This Court found no error in the admission of Gail’s comments.

[26]At the evidentiary hearing, a police report summarizing the February interview was introduced into evidence. It indicated that in the interview Mr. Mordenti actually “state[d] he has never met Larry Royston but has heard of him via Gail. In fact he advised his daughter went to work for Larry after the murder” (D-Ex. 5). This report exposed as untrue Karen Cox’s argument that, “[t]he actions of Gail Mordenti show you that she’s telling the truth, and the actions of Michael Mordenti in his repeated denials of ever knowing or even hearing of Larry Royston, show you beyond any reasonable doubt that she’s telling you the truth” (R. 1201).

established that the luncheon with Larry Royston was not in February or March of 1989, -– as she testified to at trial -- but was on April 11, 1989 (PC-T. 1005-06). Gail testified at the evidentiary hearing when confronted with her trial testimony about the lunch with Larry, "If my book says that it was April 11th, then I was wrong" referring to her trial testimony (PC-T. 1097).[27] The luncheon was at Gail's invitation. Gail also acknowledged that at this luncheon on April 11th, she had the first conversation she had with Larry Royston ever about his desire to find someone to kill his wife Thelma (PC-T. 1080).[28] Prior to April 11, 1989, she had undertaken no actions in search of a killer. Thus, she

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[27]Gail's date book had been given to Ms. Cox before Mr. Mordenti's trial (PC-T. 1072). Ms. Cox confirmed her possession of the date book before Mr. Mordenti's trial (PC-T. 34).

[28]In 2001, Gail indicated that it was just a coincidence that she invited Larry to a luncheon the day before she was interviewed by the police regarding Fortune Bank's claim that either she or Jack Gartley were responsible for $200,000 that was missing (PC-T. 1066; D-Ex. 58). She did know in advance that the police wanted to question her on April 12, 1989 about the missing money, but she "can't tell you when they notified me" (PC-T. 1069). In the statement to the police dated April 12th, Gail described Jack Gartley as "an albatross around [her] neck" (PC-T. 1067). Yet at the evidentiary hearing, Gail indicated that she "wasn't angry" with Jack Gartley; "I trusted him and believed him because he was my partner" (PC-T. 1068). So when Larry indicated that he wanted to find someone to kill his wife, Gail first contacted Jack Gartley, the man she described as "an albatross around her neck" to see if "he would talk to Larry, and they would arrange something" (PC-T. 1081).

Because defense counsel was not provided access to the date-book (PC-T. 530-31), he did not know to inquire about the proximity of the luncheon to the police questioning of Gail Mordenti Milligan regarding the missing money.

admitted her trial testimony was not the truth, the whole truth.

In this undisclosed daily calendar, Gail's entry for June 7, 1989, the day Thelma Royston was murdered included the following:

Call on ticket for Michael

* * *

Make calls again to Bus Co.

(D-Ex. 12). In 2001, Gail testified that the entry "call on ticket for Michael" referred to Michael Milligan, the man with whom she was living and would marry in April of 1990 (PC-T. 1063). She testified that this was in reference to a "speeding ticket" (PC-T. 1089). When asked how she knew that, she answered "[b]ecause he got a lot of them." She had no explanation for the entry "make calls again to Bus Co." (PC-T. 1063).[29]

Mr. Atti, trial counsel, testified that he attempted to come up with a time line regarding the events Gail stated occurred (PC-T. 531). Had the date book been disclosed, he would have used the evidence that pinned down the specific dates of events, looked for inconsistencies in Gail's versions of events and that it would have been valuable information to

[29]However, the State had interviewed Michael Milligan on 2/10/91. The undisclosed notes of this interview reveal that Michael Milligan told Karen Cox that he went to New Mexico in June of 1989, the month of Thelma Royston's murder (D-Ex. 14). In her trial testimony, Gail indicated that she understood that the car that had been used to get to the crime scene was left on the Mexican border (R. 638).

have to cross examine her with (PC-T. 530, 532-33). The day after the April 11th luncheon with Larry, Gail gave a statement to law enforcement regarding an investigation in an allegation that she had and stolen over $200,000 from a bank (D-Ex. 58).[30] The date book and the April 11th luncheon was important to trial counsel. Since he did not have the date book, counsel could not know the timeline that revealed the significance of the timing of the luncheon and the ongoing theft investigation of Gail (PC-T. 530-33).[31]

During the time between April 11th and the June 7th murder, Gail was facing a mountain of debt and lawsuits that were not revealed to Mr. Mordenti's jury. First, Fortune Bank and the police were trying to recover over $200,000 (PC-T. 1066-67; D-Ex. 56, 58). Gail was also being sued by "the Mulhollan[d] attorneys" in connection with her receipt of $50,000 from a defendant, Mr. Check, in a civil suit filed by her ex-boyfriend Glenn Donnell. Mr. Donnell's lawyers believed that Gail and her boyfriend had arranged the financial transaction

[30]To know the significance of the timing, counsel needed to be given the date book that revealed that the luncheon with Mr. Royston who Gail had described as a man who "had money" occurred the day before law enforcement was to interview her regarding allegations that she had stolen over $200,000.

[31]Having the date book also leads to questions about Gail's claim that she tried to recruit Jack Gartley for Mr. Royston's "job" when on April 12, 1989, she is signing a sworn statement describing Gartley as an albatross around her neck. Of course at the 2001 hearing, Mr. Gartley unequivocally denied Gail's claim (PC-T. 878)("She never mentioned it to me once").

to deprive the lawyers of their contingency fee (PC-T. 1074-76; D-Ex. 53). Gail was sued by Great Western Bank in late 1989 because she "missed the July payment, 1989" (PC-T. 1077).[32] According to Gail, "I realized I was going to have to claim bankruptcy because I had talked to an attorney about it, and he said it probably would cost me 30,000 or 40,000 to try to defend myself against it, which I didn't have that kind of money" (PC-T. 1079). But in 2001, Gail said "no," she had not "fe[lt] like the walls were closing in" (PC-T. 1079).[33] Bankruptcy "bothered [her]. It's a blemish on your record, but I didn't have any other choice" (PC-T. 1079).[34]

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[32]According to Gail, the bank sued her even though she had only missed one house payment in July of 1989 (PC-T. 1077).

[33]At the 2001 hearing, Mr. Mordenti introduced several exhibits documenting Gail's financial situation including:

1. D-Ex. 58: Criminal Investigation of Gail Mordenti for theft of $200,000 conducted in April, 1989.
2. D-Ex. 52: Gail's bankruptcy petition filed 10/89.
3. D-Ex. 53: Law Office of Mullholand and Mullholand suit filed against Gail Mordenti filed in 1988.
4. D-Ex. 54: Great Western Mortgage foreclosure suit initiated December 1989, alleging non-payment for months.
5. D-Ex. 55: Small Claims suit filed July 29, 1989.
6. D-Ex. 56: Fortune Savings band Suit filed July 29, 1989 in the amount of $200,000.

[34]According to Gail's 2001 testimony, the timing of the call to Larry Royston to invite him to lunch at her house was just a coincidence, "at that point I didn't really know that I had a whole bunch of financial concerns. At that point I was in the process of trying to get the cars ready to sell, and my bills would be caught up and I wanted to get back into business for myself" (PC-T. 1080).

Of course, Gail did state at the 2001 hearing, "I once flippantly said, it's too bad I couldn't be interested in [Larry Royston] because he had money, and it seems that

In 2001, Gail testified that she began employment at Glen Donnell's business venture, "T & D", **on June 1**, 1989 (PC-T. 1022)("I looked over my testimony, and I seemed very sure it was June 1st"). Yet, Ms. Cox had argued over objection in her guilt phase closing that Larry Royston's cell phone records showing phone calls to Glen Donnell's place of business ("T &D") in the **month of May** were relevant evidence to corroborate Gail's testimony that Larry kept calling her, "you'll see that Larry Royston places numerous telephone calls to T & D. In May - - Gail Mordenti was working there in May" (R. 1253-54).[35]

Contrary to Gail's trial testimony, Lee Atkinson, the prosecutor who obtained a sworn statement from Gail on March 8, 1990, testified in 2001 that he did not bestow total immunity upon Gail. He testified that all Gail received was the standard use immunity which accompanies any testimony given pursuant to a state attorney subpoena (PC-T. 253).[36]

When Det. Baker testified in 2001, he indicated that

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everyone that I have had a relationship with or been married to didn't" (PC-T. 998).

[35]Mr. Atti stated while making his objection, "There is no evidence that he was necessarily calling Gail; he could have been calling Glen Donnell about cars. We're assuming a fact not evidence, that he called. The testimony from Glen Donnell and Gail Mordenti she started working there around June 1st." (R. 1252-53). The objection was overruled.

[36]Karen Cox admitted at the evidentiary hearing that she understood that Gail Mordenti Milligan did not have total immunity, merely "use immunity" (PC-T. 27). As trial counsel noted, he was misled when Ms. Cox did not correct Gail's inaccurate trial testimony (PC-T. 985).

contrary to Gail's testimony, it was Gail who first brought up immunity (PC-T. 788; D-Ex. 6). "Ms. Mordenti advised that she knew more about the homicide than she originally told us, that she would cooperate if given immunity for prosecution."[37] When she testified in 2001, Gail said that Det. Baker's testimony was not true (PC-T. 1091).[38]

At the 2001 hearing, Ms. Cox identified undisclosed handwritten notes of her interview of Gail in which Gail advised:

> *Michael made no efforts to sell boat & car*
> *Doesn't think that ever looked for buyers*
> *Larry's boat was a replica of the boat used "on golden pond" not a high powered speed boat*

(D-Ex. 15, at 1, line 31-34).[39] Additional notes indicated another statement by Gail that there was at least romantic potential between Gail and Larry that they had discussed:

> *He invited her to Tenn. He said that he did [not] want to date until divorce was over & had time to get head together*

(D-Ex. 14, at 2, lines 17-20). This note also said that Gail

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[37]Karen Cox argued in her closing argument at trial, Gail's conduct at the time of her arrest was "clearly the act of somebody who was so upset that they are not being calculating." (R. 1193).

[38]She also claimed that Jack Gartley's testimony denying that she ever contacted him about killing Larry's wife was untrue, as well as Glen Donnell's statement to the police that she did mention to him that in May that Larry was looking for someone to kill his wife (PC-T. 1083).

[39]These notes show that the State was aware of Larry Royston's claim that the June 7th phone call with Mr. Mordenti concerned the sale of a boat.

had advised that:

> *Larry had a boat [which] she was trying to sell it for him $20,000. Larry had rebuilt engines*

(D-Ex. 14, page 2 lines 31-32).[40]

These notes reflect that Gail told Ms. Cox that Larry Royston indeed had a boat for sale and that she was trying to help him find a buyer. Mr. Atti testified that this information was significant because "[i]t would have showed the connection between Gail and Larry Royston " (PC-T. 527). Neither these notes reflecting a statement of a State's witness nor the content was disclosed to Mr. Atti (PC-T. 522).

At the 2001 hearing, Karen Cox identified her handwritten notes documenting a 2/10/91 interview of Michael Milligan (D-Ex. 14). She indicated that she tried to make the notes "accurate and make them in a summary fashion such that they'll be of some value to me in the future" (PC-T. 41). The notes were introduced into evidence. They reveal that Milligan reported that he had worked for Michael Flynn of Flynn Motors as a transportation representative since 1985, that he met Gail in 1988 and that he starting seeing her in March 1989. The notes revealed:

> **6/89- mordenti called him & had car picked up w was used in bank robbery from New Mexico**

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[40]The reference to Mr. Royston's desire to sell a boat was particularly significant given that the defense knew of a witness that reported that Mr. Mordenti had called in mid-1989 trying to sell a boat for Gail that had been used in a movie (PC-T. 276-77, 915).

(D-Ex. 14, at 1, lines 10-11). According to this note, Milligan told Ms. Cox that he went to New Mexico in June of 1989, the month of Thelma Royston's murder.[41] The defense was not provided with these notes nor advised of the content (PC-T. 523-24).

FBI agent Barry Carmody was not called to testify at Mr. Mordenti's trial. At the 2001 hearing, he explained that Mr. Mordenti had sold Horace Barnes an automobile. Subsequently, Mr. Barnes claimed that the auto was in need of repair. Mr. Barnes took the auto back to Mr. Mordenti and got a loaner. Mr. Barnes used the loaner in a January, 1990, bank robbery (PC-T. 280-82). Agent Carmody testified that there was no evidence that Mr. Mordenti was involved in the robbery or with Horace and Tracey Leslie (Mr. Barnes' girlfriend) (PCR. 282, 289). As a result of Mr. Mordenti's assistance, Mr. Barnes and his girlfriend were arrested in New Mexico (PCR. 282). Mr. Mordenti picked Mr. Barnes out of a line up and testified before a federal grand jury (PC-T. 282).[42]

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[41]The reference to picking up the car for Mr. Mordenti in New Mexico after the bank robbery is a clear effort at confabulation. After Horace Barnes used a car that he had obtained from Mr. Mordenti's place of business to rob a bank, Mr. Mordenti assisted the FBI in tracking him down in New Mexico (PC-T. 280-81). Thus, Mr. Mordenti's car did end up in New Mexico. However, the bank robbery did not occur until January of 1990. So the chances that Milligan was in New Mexico in 1989 for that stated purpose, months before the bank robbery occurred, are nil.

[42]In connection with Mr. Mordenti's assistance, Agent Carmody happened to be at Mr. Mordenti's office conversing with him when the State arranged for Gail to call Mr. Mordenti

Horace Barnes testified in 2001 that his trial testimony was untrue (PC-T. 297-98). Mr. Barnes was mad and angry at Mr. Mordenti after he learned that it was Mr. Mordenti who turned him in to FBI agent Barry Carmody (PC-T. 292-93) for a bank robbery that Mr. Barnes and his girlfriend, Tracey Leslie, committed (PC-T. 282-83, 293).[43] Mr. Barnes blamed Mr.

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in order to try to get him to make incriminating statements (PC-T. 287). Agent Carmody testified that state law enforcement was "irritated" over his presence at Mr. Mordenti's office and expressed it (PC-T. 288).

[43]This was quite a different picture than the one that the State presented at trial. The jury heard Mr. Barnes, a bank robber testify that he knew Mr. Mordenti, and then falsely represent that Mr. Mordenti had told him he was connected to the "mob" and had illegally sold guns. The jury heard Gail testify that Mr. Mordenti was involved with bank robbers and had throw away guns (R. 658). The implication was involvement as assisting the bank robbers, not in helping to apprehend them. The trial prosecutors did not disclose the notes of their interview of Agent Carmody (PC-T. 54, D-Ex. 22).

In 2001, Mr. Atti did acknowledge that he had been aware that Mr. Mordenti had been "a good guy helping to solve the problem" (PC-T. 547). Having read the trial transcript, Mr. Atti recognized that someone at the trial could have concluded from Gail's testimony that "Michael Mordenti was participating in the bank robberies" (PC-T. 547). Mr. Atti recognized that he had failed to clarify the situation (PC-T. 547-48).

During the State's cross-examination in 2001, the following questioning occurred:

> Q So Mr. Carmody, the agent for the FBI, came in, gave full testimony about how - - what a wonderful person Mr. Mordenti was, to have given this situation - - was allowed to catch the two bank robbery suspects, correct?
> A That's correct.
> Q The jury heard that?
> A I believe so, yes.
> Q So when Ms. Mordenti testified that Mr. Mordenti was involved in a bank robbery investigation, they actually had the information to process that statement, correct?
> A The first part of the statement.

(PC-T. 622-23).

Mordenti for his arrest and his trial testimony was "pay back" (PC-T. 310). Mr. Barnes had been interviewed by Det. Baker with the Hillsborough Sheriff's Office in connection with the Royston homicide on March 7, 1990 (PC-T. 307). Mr. Barnes advised Det. Baker that Mr. Mordenti was dirty and that he was willing to testify against him (304, 306, D-Ex. 10 at p. 3).[44] However, Mr. Barnes indicated in 2001 that he had been lying all along because of his anger. Mr. Barnes ultimately pled guilty to the bank robbery (PC-T. 305).

Mr. Barnes testified that the prosecutor, Ms. Cox, talked to him and said that "she needed this case real, real bad, and you know, she told me that if I cooperate with her, she'd do, you know, a couple of favors for me" in the form of possibly dropping a state detainer or helping him get with his girlfriend Tracey Leslie(also in jail) "because you can't have any contact in prison system" (PC-T. 296). Mr. Barnes testified that arrangements were made to have contact with

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There is only one problem with the State's scenario; it did not happen. **Agent Carmody was not called to testify at trial**. In re-direct, the following occurred:

> Q Now, you were asked questions about Barry Carmody's testimony. Is it your understanding that Barry Carmody testified at this trial?
> A Yes.
> Q What's that based on? If the record shows that he didn't testify, would you stand corrected?
> A Ms. Vollrath asked me the question.

(PC-T. 648).

[44]According to Baker's report, Mr. Barnes' bias was obvious: "It was apparent Barnes wanted a piece of Mordenti because he burned him and his girlfriend" (D-Ex. 10 at p. 3).

Tracey Leslie after he talked to Karen Cox. He had contact in the county jail (PC-T. 296).[45]

At the 2001 hearing, Ms. Cox acknowledged that Mr. Barnes and Ms. Leslie may have been put in a holding cell together:

> I don't remember whether he was - - you know, I know Tracy Leslie was transported, and I don't know whether they were in the holding cell together, it's very likely I might have said, you can't talk to each other about your testimony.

(PC-T. 686).

At the evidentiary hearing Karen Cox also identified her co-prosecutor husband's writing and note from the prosecutorial file. The note bore Tracey Leslie's name and stated "**GET STATE CHARGES TAKEN CARE OF**" (PC-T. 705, D-Ex. 59).

At the 2001 hearing, Nick Cox identified his undisclosed notes of an interview he and Karen Cox conducted on March 20, 1990 of Larry Royston's lawyer, John Trevena (PC-T. 81-82, D-Ex. 23). Mr. Trevena had represented Larry up until his suicide (PC-T. 317). The interview occurred as a result of an *ex parte* order signed by the trial judge ordering Mr. Trevena to submit to the interview by the State (PC-T. 328, D-Ex. 22). The order stated:

> The attorney-client privileged does not apply to this factual situation involving information obtained from the deceased client's attorney which could be relevant in the investigation of the

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[45]In 2001, Mr. Barnes testified that his trial testimony that he was not promised anything in return for his testimony was untrue (PC-T. 746).

client's death.

(D-Ex. 22).

After the State's objection to John Trevena's testimony was sustained, he testified on proffer that when Karen Cox provided him with a signed copy of the order obtained by the State on an *ex parte* basis, "he [felt] obligated to reveal privileged information, pursuant to that order" (PC-T. 327-28). Mr. Trevena in the proffer revealed what privileged information had been provided the State. In the proffer, Mr. Trevena indicated that Mr. Royston had advised him that the 13 minute call on June 7th had been a business call (PC-T. 332). Mr. Royston had "explained the call as being innocent in nature and that it was relating to some type of sale of a boat" (PC-T. 332). Of course, this information would have been significant information to Mr. Mordenti's defense team (PC-T. 915).[46] Mr. Trevena indicated that after the 1991 interview, he did become aware that "Karen Cox listed [him] as a witness for the State at Mordenti's trial" (PC-T. 337-38). However in 2001, he had "no independent recollection of speaking with [Mr. Atti] about it" (PC-T. 338).

Mr. Atti testified that he was never aware that John

[46]At the 2001 hearing, Mr. Trevena did invoke privilege. When the court ordered him to answer undersigned counsel's questions on a proffer, he did. However prior to the in court proceeding or during the proceedings, undersigned counsel was not given access to records from Mr. Royston's estate to ascertain what records of this boat still existed that would have assisted Mr. Mordenti at trial.

Trevena talked to Karen and Nick Cox and revealed attorney client material regarding what Larry Royston had to say about this homicide and that if he had known about it, it would "definitely" be something he would remember (PC-T. 534). Even though the State listed John Trevena as a witness on its list of witnesses, the statements Mr. Trevena provided to the State were not disclosed to the defense. See, Rule 3.220(b), Fla. R. Crim. P.[47] Richard Watts, Mr. Atti's co-counsel, also testified that the defense was never provided these notes nor the significant information contained therein (PC-T. 912-13).

Ray Cabral did not testify at trial, but explained at the 2001 hearing that Mr. Mordenti had called him about a boat for sale and that he gave a sworn statement about it on April 22, 1990 (PC-T. 275). Mr. Cabral frequently would travel from up north to Florida to see his elderly parents, buy boats, return north with the boats and re-sell them (PC-T. 276). The conversation he had with Mr. Mordenti concerned a boat Gail was trying to sell for someone. However, Cabral was not interested in buying the boat (PC-T. 277).

At the 2001 evidentiary hearing, Det. King testified:

> Q. At some point in time, did you travel to Tarpon Springs to establish a hotel that Gail Mordenti said that she and Mr. Mordenti went to, and then he subsequently left and scoped out the victim's property?

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[47]Either the notes contain statements from a co-defendant, Larry Royston, or statements from a listed witness, John Trevena. Accordingly, their disclosure to the defense was required.

A. Yes, ma'am.

Q. Okay. Do you recall approximately when that was?

A. I believe it was March or April of **1990**.

Q. Okay. Of **1990**?

A. **I believe it was 1990, yes, ma'am**.

Q. Qkay. **And was it at that time that you** – did you look – what did you do – did you find the – I'm sorry. Strike all of that. **Did you ever find the hotel that Ms. Mordenti had –**

A. **Yes**, ma'am.

(PC-T. 793-94) (emphasis added). Det. King indicated that he went through the records and did not find a registration for Michael Mordenti, Michael Milligan, Larry Royston or Gail Mordenti. On cross examination, Detective King explained:

Q. The other thing is, in reference to checking out the motel, you indicated it would have been in March of April of 1990, that you went to the motel?

A. I believe that's when it was, yes, sir.

Q. And so that would have been after Gail Mordenti's arrest or when she first gave her statement on March 8th of 1990?

A. Correct.

Q. So that was the follow up to that?

A. That's where the information came from, yes, sir.

(PC-T. 799-800). This information was not provided to the defense. Mr. Watts testified, "[t]he name of the motel wasn't disclosed to us. We couldn't go and look" (PC-T. 901, D-Ex. 68).

Ms. Cox testified in 2001 that she did not disclose the name of the motel because she did not learn it until the eve of trial:

> It was shortly within weeks before the trial, maybe two or three weeks, maybe even less, and, basically Gail Mordenti, I believe, drove by and identified the hotel because it couldn't - - she would describe it or she had provided information about it, she had been questioned about it and we could never figure it out. So she finally went out at my request, I believe, and said, okay, I've driven by, it's this particular hotel.

(PC-T. 689).

At the time of the case, Mr. Mordenti's lead trial attorney, John Atti, had been practicing general law for less than three years and had never handled a capital murder trial, nor received any training in capital defense litigation.[48] Mr. Atti's felony experience was very limited. He testified that he graduated law school in 1978 and "did not practice law right away" (PC-T. 503). He "reapplied – started taking the Bar in 1985 [and] was admitted in 1987" and worked for a lawyer in Gulfport (PC-T. 503). Mr. Atti received training in various fields, went into private practice one year later handling a "variety of cases"(PC-T. 504). Mr. Atti testified that he had not previously handled a murder case and that his case load prior to this case was "[b]attery cases, DUI cases, domestic type cases. I handled a lot of federal cases

[48]Within two years of the trial in Mr. Mordenti's case, Mr. Atti was suspended from the practice of law by the Florida Bar (PC-T. 501). As of 2001, Mr. Atti had not sought reinstatement. He no longer practices law.

regarding court appointed that ranged – that were all kinds of variety, including assault with a deadly weapon – just any case that came down, basically" (PC-T. 540). Regarding his trial experience, he testified that it:

> consisted of a couple of DUI cases that resulted in an acquittal, one aggravated battery case that resulted in a conviction and couple of other misdemeanor battery cases that were dismissed prior to the trial – actually beginning while we were sitting the jury, I believe.

(PC-T. 504). Mr. Atti had handled only one felony trial as a lead attorney prior to Mr. Mordenti's case (PC-T. 504).

Mr. Atti undertook Mr. Mordenti's case for a total fee of $50,000 (PC-T. 505). It was Mr. Atti's expectation that this fee would cover all expenses associated with Mr. Mordenti's case. Mr. Atti explained, "[a]ctually, I didn't at that time expect the case to go to trial." (PC-T. 506). Thus, the fee was the amount that Mr. Atti thought it would take "to get the case prepared." (PC-T. 506). Mr. Atti entered his notice of appearance on January 7, 1991 (PC-T. 502). Mr. Atti in his testimony explained why he agreed to take the case:

> I was struggling financially. A lot of my clients were people that I knew had worked at the St. Pete Times and hadn't paid me, quite frankly, and anybody in the legal business knows to get your money up front. Well, I was a nice guy. I let people make payments and really didn't receive a lot of payments and really was struggling to pay my bills at the time and to pay for my bills.

(PC-T. 514-15).

Mr. Atti explained the basis for his belief that Mr. Mordenti's case would not go to trial:

> I had actually thought that the state attorney, with all the evidence, would see Mr. Mordenti was not the party to be charged, that there were other people clearly more in a position that could have been involved with the crime, and I thought once they saw that evidence and saw the information that I had read that Mr. Cohen worked up, that they would come to that same conclusion. In fact, at one point early on, I remember talking to one of the state attorneys, Nick Cox, about that they didn't have a very good case, that we may be able to work out an agreement. I believe he mentioned something about five to seven years. When I approached Mr. Mordenti with that, he said, no way, I'm totally innocent. I agreed with him. We went forward from that point.

(PC-T. 507). Mr. Atti also expected the co-defendant, Mr. Royston, to be tried first, "Yeah. It was clear that the Royston case was going to go first before Mr. Mordenti's case" (PC-T. 509). This expectation affected his preparation: "It was my expectation that during the trial, I would gather the information, if an, that the State had linking Mr. Mordenti to the crime and also, of course, hear the information that was available regarding Mr. Royston and his possible involvement in the crime" (PC-T. 509). Mr. Atti anticipated monitoring the Royston trial and using it as a prime discovery tool (PC-T. 509-10). Mr. Atti testified that Mr. Royston's suicide "drastically" changed his expected approach to handling Mr. Mordenti's case:

> it changed it drastically in that I was expecting some information and had reason to believe from Mr. Trevena that there was going to be something very helpful for Mr. Mordenti come out of that case, that and also the fact that I was not going to be able to see what evidence that the State was going to present regarding the murder changed the entire way that I was looking at the case.

(PC-T. 510).

Prior to Royston's suicide, Mr. Atti had a conversation with Mr. Royston's attorney, John Trevena. Mr. Trevena would not reveal attorney-client privilege and did not give specifics but "he indicated to me that there was some information that was going to be really helpful to my client that would come up during the [Royston] trial" (PC-T. 510).[49]

After Royston's suicide, Mr. Atti realized that the State had become serious about going after Mr. Mordenti, "there seemed to be a change by the prosecutor, mainly Karen Cox, that suddenly Mr. Mordenti was her focus" (PC-T. 511). So, he decided that he needed help. Mr. Atti enlisted Richard Watts to serve as co-counsel. Mr. Watts filed his notice of appearance in Mr. Mordenti's case on May 21, 1991, approximately 45 days before Mr. Mordenti's capital trial began (D-Ex. 64). The agreement was that Mr. Watts would handle the penalty phase and alibi witnesses (PC-T. 891-92). Mr. Atti was to pay Mr. Watts $5,000 from his $50,000 fee (PC-T. 513).

Mr. Atti had not anticipated the cost of discovery depositions, assuming (incorrectly) that the case would be dismissed (PC-T. 515-16). The cost of discovery depositions was also to be paid from the $50,000 fee. Mr. Atti did not

[49]Obviously, Mr. Trevena must have been referring to the information that was divulged to the State pursuant to the *ex parte* order (D-Ex. 22, 23).

realize “the extent not only the discovery depositions, but what it would cost to travel to depositions where there were witnesses that I needed to talk to.” (PC-T. 516).

Mr. Watts, who at the time of Mr. Mordenti’s trial, had participated in five to ten capital cases, had approximately 45 days to prepare for Mr. Mordenti’s trial (PC-T. 893). Regarding his level of experience at that time and the time he had to prepare in Mr. Mordenti’s case, Mr. Watts testified:

> Q. Okay. In terms of that experience, what is having six weeks to prepare –
>
> A. Never have I had that short of period of time. Usually it’s measured in a year – usually it’s about a year from getting the case to actually going to trial.
>
> Q. Okay. In the course of getting ready for trial, what did you find? What did you conclude?
>
> A. Well, let me qualify that first answer. I’ve come in late in trial and only done a second phase, and I’ve done it comfortably more than once, usually more than six weeks. But when I got involved in this case, it became apparent that Phase I would need some more work, a lot more work, and I was concerned at the amount of work that hadn’t been done. We’re on the eve of trial, and the case isn’t ready. I’m not familiar – I wasn’t familiar with the entire scope of Phase I. I concentrated on preparing the alibi, and I was pretty near ready – pretty near ready for the alibi, but not ready. It needed polishing.

(PC-T. 893). Mr. Watts acknowledged that Mr. Mordenti’s predecessor counsel, Barry Cohen, had compiled voluminous materials regarding the case. However, the quantity of materials to review exceeded the time in which to do it:

> Q. But also, I mean, my question then also is, in terms of having a lot of material that somebody else

has collected and hands off to you, does that save you time?

A. Not necessarily. You have to read it, and since you didn't generate it, you're not exactly sure of the perspective that it's coming from, so it doesn't have the same meaning as if you generated the material.

Q. Okay.

A. It saves some time, maybe.

Q. In fact, I mean, did you have concerns about the defense being ready for trial?

A. Yes.

Q. Did you express those concerns?

A. Yes.

Q. Explain to the Court what you felt.

A. Well, I felt we weren't ready. In a case of this magnitude, first of all, this is a complex case. I didn't know all the players. I didn't know all the potential players, and I didn't know the scenarios. Even as a Phase II lawyer, I like to know that, and I make it my business to find out what's going on in Phase I and I'm willing to participate in that because to me it's important. I expressed those concerns to lead counsel and I was brushed aside. We'll be ready, he said, we're okay.

Q. And speaking of – you indicated some concerns about not knowing the players. Were you involved in actually doing depositions?

A. This was one of those – another – my growing role, I hadn't – I hadn't intended to take the depositions, but Mr. Atti was ill and time was near. So I stood in for him at the depositions.

(PC-T. 894-96). Accordingly, Mr. Watts testified that in his opinion Mr. Mordenti did not receive the trial that he was entitled to because the defense was not adequately prepared (PC-T. 937-38).

At the guilt phase, defense counsel presented the testimony of Anna Lee, who testified at trial that she was with Mr. Mordenti on June 7, 1989. She testified that she attended an auto auction with him and went to a Shoney's restaurant afterward. She was able to establish the date because she had just undergone shoulder surgery days before. The State argued that Ms. Lee was lying (and the other alibi witnesses that were called at trial) for Mr. Mordenti because she went out and found witnesses who could verify his whereabouts.

Steve Cook, Anna Lee's son, lived with his mother and was with her early afternoon of June 7, 1989 (PC-T. 151-152). He was not called as a witness to testify at trial. Mr. Atti had no reason for not calling Steve to corroborate his mother's testimony. Steve was close to his mom, and they left each other notes to let each other know what was going on (PC-T. 154). On March 29th, 1991 he gave a deposition in this case (PC-T. 151; D-Ex. 31). In that 1991 deposition and at the 2001 hearing, he testified that on June 7, 1989 his mother was at Mr. Mordenti's business during the day, came home, then left again. (PC-T. 153). Steve was upset with his mother because she was out until 4:00 a.m.; Steve's mother and Mr. Mordenti were on a date (PC-T 151). He learned that she had been with Mr. Mordenti and they had attended an auto auction, had a late dinner and drove to St. Petersburg (PC-T. 153). Steve remembered the date because his mother had just had

surgery on her right shoulder and he did not want her to be out because of it (PC-T. 154, 159). When Mr. Mordenti was charged with the June 7, 1989 murder, Steve knew it could not be true because he remembered that his mother was with Mr. Mordenti. His mom's surgery to her arm triggered his memory (PC-T. 154). He and his mother talked about the date and she tried to find witnesses to verify that they were at the auction because she knew Mr. Mordenti was with her that night.

SUMMARY OF ARGUMENT

1. Mr. Mordenti was deprived of his rights to due process when the State knowingly presented false or misleading evidence and/or argument at his trial in order to obtain a conviction and sentence of death. Further, the State failed to disclose a wealth of exculpatory evidence in its possession to Mr. Mordenti. Confidence in the reliability of the outcome of the proceedings is undermined by the non-disclosures. The circuit court erred in its analysis of the components of this due process claim and failed to consider the cumulative effect of the prejudice suffered as a result of the State's misdeeds. Mr. Mordenti's convictions and sentence of death must be vacated and a new trial and sentencing ordered.

2. Mr. Mordenti was deprived of the effective assistance of counsel at his capital trial and sentencing. As a result of counsel's unreasonable and deficient performance, Mr. Mordenti was prejudiced and confidence in the reliability of the outcome at both the guilt and penalty phases of the capital

trial are undermined. Mr. Mordenti's convictions and sentence of death must be vacated and a new trial and sentencing ordered.

3. Mr. Mordenti was deprived of a full and fair evidentiary hearing when the State over objection was permitted to call Paula Montlary as a witness. The State's conduct violated the attorney-client privilege.

4. Mr. Mordenti was deprived of effective assistance of counsel at the penalty phase of his capital trial when counsel unreasonably failed to present evidence of compelling and substantial mitigating circumstances.

5. Mr. Mordenti was denied due process when the circuit court erroneously summarily denied several of his claims which denied him a full and fair evidentiary hearing.

6. The circuit court erred in summarily denying Mr. Mordenti's newly discovered evidence claim and failure to consider evidence supporting it.

ARGUMENT I

MR. MORDENTI WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS WHEN THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND /OR PRESENTED FALSE OR MISLEADING EVIDENCE AND/OR ARGUMENT AT HIS CAPITAL TRIAL.

A. Standard of Review

In addressing this Claim below, the circuit court made numerous legal errors that are subject to *de novo* review by this Court. Rogers v. State, 782 So.2d 373, 377 (Fla. 2001). The circuit court addressed some of Mr. Mordenti's claimed

Giglio violations, but made erroneous legal determinations while denying relief (PC-R. 1412, 1416, 1417). The circuit court erroneously ruled that the Brady claim included a "diligence" element (PC-R. 1409). The circuit court also failed to find "prejudice" from the various non-disclosures by the State (PC-R. 1410, 1415, 1418). The circuit court further failed to conduct any cumulative analysis of the prejudice arising from the non-disclosures. The circuit court further failed to address several key aspects of Mr. Mordenti's allegations and the evidence presented at the evidentiary hearing that supported them.

B. Giglio Claim.

1. Legal basis.

In Giglio v. United States, 405 U.S. 150, 153 (1972), the Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." The Supreme Court has further recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). Accordingly, the Court "forbade the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112

(1935). This Court has stated “[t]ruth is critical in the operation of our judicial system.” Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, United States v. Bagley, 473 U.S. 667 (1985), but also has a duty to alert the defense when a State’s witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); and, to refrain from deception of either the court or the jury. Mooney v. Holohan. A prosecutor must not knowingly rely on false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957)(principles of Mooney violated where prosecutor deliberately "gave the jury the false impression that [witness’s] relationship with [defendant’s] wife was nothing more than casual friendship"). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993).

In cases “involving knowing use of false evidence the

defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." United States v. Bagley, 473 U.S. at 678, quoting United States v. Agurs, 427 U.S. at 102. Thus, if there is "any reasonable likelihood" that uncorrected false and/or misleading argument affected the verdict (as to both guilt-innocence and penalty phase), relief must issue. In other words, where the prosecution violates Giglio and knowingly presents either false evidence or false argument in order to secure a conviction, a reversal is ***required*** unless the error is proven harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679 n.9.

In denying this claim, the circuit court misapplied the law to the facts that were presented.[50]

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[50]At the evidentiary hearing, Mr. Mordenti sought to introduce evidence of Karen Cox's pattern and habit of presenting false and misleading evidence, improper prosecutorial misconduct. However, the lower court refused to consider this evidence:

> Defendant maintains that egregious prosecutorial misconduct and discovery violations took place during his trial. Defendant is also quick to point out that Karen Cox, one of the prosecutors in *State v. Michael Mordenti*, has since had her license suspended by the Florida bar. This claim, while undeniable, is not appropriate for further analysis by this Court.

The court further stated in a footnote:

> This fact, in and of itself, does not demonstrate to the Court that Ms. Cox neglected her duties as mandated by the Florida Bar during the prosecution of *State v. Michael Mordenti*).

2. The False and/or Misleading Evidence and/or Argument.

a. *Regarding Mr. Mordenti's Knowledge of Larry Royston*

During Ms. Cox' closing argument at the trial, she stated:

> And when [Michael Mordenti] was questioned again in February of 1990, "No, I don't know Larry Royston. I've never heard of Larry Royston."
>
> But lo and behold, when Gail calls him on the phone, despite his repeated denials of ever having even heard of the man, Gail says, "Oh, should I - - should I call Larry?"
>
> "No, don't call him." He doesn't say, "Larry who? What are you talking about?"

(R. 1195). However, D-Ex. 5, a police report, presented at the evidentiary hearing, establishes that this argument was false. According to D-Ex. 5, Michael Mordenti was interviewed on February 20, 1990, and he "state[d] he has never met Larry Royston **but has heard of him via Gail. In fact he advised his daughter went to work for Larry after the murder**." (Emphasis added). Ms. Cox testified that she would have had possession of this report (PC-T. 23).

Ms. Cox's false argument was the lynchpin of her effort to convince the jury that Gail's story was credible and worthy of belief. Ms. Cox concluded her guilt phase closing by repeating her false argument, "The actions of Gail Mordenti

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(See PC-R 1409 at footnote 24). The circuit erred in refusing to consider the instances of prosecutorial misconduct in other cases. It is relevant evidence of the prosecutor's pattern.

show you that she's telling the truth, and the actions of Michael Mordenti in **his repeated denials of ever knowing or even hearing of Larry Royston**, show you beyond any reasonable doubt that she's telling you the truth." (R. 1201)(emphasis added). The jury was given a completely "false impression" of Mr. Mordenti's truthfulness to law enforcement. Alcorta v. Texas; Garcia v. State.

The circuit court did not specifically address this false argument in its order denying relief. This was error. A new trial is required.

b. *Regarding Gail's Immunity*

Det. Baker testified at the 2001 hearing that **Gail** when picked up on March 8, 1990, immediately inquired if she could get immunity. This testimony is corroborated by D-Ex. 6 which was in Ms. Cox's possession at trial (PC-T. 25). Yet, Ms. Cox argued to Mr. Mordenti's jury that "before [Gail] was promised immunity, she asked about, 'What's going to happen to me? Can I go to jail?"(R. 1192-93). Ms. Cox argued that Gail's conduct was "clearly the act of somebody who was so upset that they are not being calculating; that **they are not thinking of their own best interest, because she didn't - - she had no guarantees at that point of anything**." (R. 1193)(emphasis added).

According to Det. Baker's testimony in 2001, that was a false argument to the jury. Det. Baker testified in 2001 that law enforcement was not the first to raise the issue of

immunity:

> Q. Okay. Did you ever tell Gail Mordenti that she was going to get immunity in this case?
>
> A. No.
>
> Q. Do you have the authority to tell an arrested individual that they would be getting immunity?
>
> A. No, I don't.

(PC-T. 782). Det. Baker further testified:

> Q. Okay. And I just wanted to point out in this report [Def Exh. 6], there's an indication that Ms. Mordenti advised that she knew more about the homicide than she originally told us, that she would cooperate if given immunity for prosecution. Do you recall that happening?
>
> A. Asking for immunity?
>
> Q. Or indicating that she would cooperate if she got immunity.
>
> A. I remember ***her*** asking that question, yes.
>
> Q. Okay. And that was in the vehicle on the way to the state attorney's office?
>
> A. That's correct.
>
> Q. So she communicated that she would like immunity?
>
> A. Yes.

(PC-T. 788).

Gail however, testified at trial that she did not approach law enforcement about immunity, but that "they approached [her]" (R. 701), and testified at the November 27, 2001 evidentiary hearing that Det. Baker was wrong when he stated to the contrary (PC-T. 1083). In closing argument at trial, Ms. Cox used this to bolster Gail's credibility with

the jury (R. 1193). Ms. Cox's argument was false as the police report in her possession revealed.

But there was more that Ms. Cox knew was false and that she failed to correct. Gail testified at trial, "as long as I told the truth, that I had total immunity" (R. 661). Ms. Cox knew that Gail did not have total immunity. In 2001, **she testified that Gail only had "use immunity."** (PC-T. 26).[51] Gail had no immunity "other than what immunity being under subpoena covers." (PC-T. 69). At trial, Ms. Cox never corrected Gail's trial testimony which was not accurate. Instead she reaped the benefit from the false testimony. The immunity explained why the State had not charged Gail with the murder. In order to get evidence against the others in the conspiracy, it had to give Gail a deal. Moreover, Gail's deal was blown if she lied. So the State was keeping track, and would go after her if she said something untrue. Since the State was honoring the deal, the jury was led to believe that the State had determined that Gail's testimony was the truth, the whole truth.[52] In conjunction with the misleading argument that Gail did not initiate the immunity discussion, the jury

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[51]Not only was the jury and Mr. Mordenti's trial counsel misled, but so was this Court in the direct appeal. This Court clearly understood that Gail received complete immunity. Mordenti v. State, 630 So. 2d at 1083.

[52]The difference between use immunity attaching to a statement given pursuant to a subpoena and complete immunity matters greatly. A witness's motives are cast in different light depending upon the type of immunity given.

was given a completely "false impression" of Gail's immunity. Alcorta v. Texas; Garcia v. State.

The circuit court did not specifically address this false argument in its order denying relief. Moreover, the materiality is apparent from an examination of this Court's opinion on direct appeal. Mordenti v. State, 630 So.2d at 1083 ("Gail Mordenti was offered complete immunity"). The jury, the defense, and this Court were all deceived by the State's failure to reveal the true nature of the immunity bestowed on Gail. This was constitutional error.

c. *Regarding Gail's Employment at T & D Auto Repair.*

Ms. Cox argued in her closing over Mr. Atti's objection that Larry Royston's cell phone records showing phone calls to T & D Auto Repair in the month of May were relevant and corroborative of Gail's testimony that Mr. Royston kept calling her, "you'll see that Larry Royston places numerous telephone calls to T & D. In May - - Gail Mordenti was working there in May." (R. 1253-54). Ms. Cox's argument was false. At the 2001 hearing, Gail testified that she began employment at T & D, on June 1, 1989. Notes in Ms. Cox's handwriting reveal that Ms. Cox knew that there was a problem with her argument on this point:

> *When started w. T& D*
> [with arrow drawn to]:
> *look @ stmt to LEO p. 8*

D-Ex. 17, at 2, upper right hand corner. Ms. Cox's argument was false, and she knew it was false.

The lower court denied this portion of the claim stating:

> Under *Giglio*, Defendant has failed to demonstrate that the statement of when Gail Mordenti started working at T&D was material. Additionally, Defendant has failed to demonstrate that the State knew the statement was false when it was said. As such, Defendant is not entitled to relief upon this allegation.

(PC-R. 1412).

Contrary to the lower court's finding, Mr. Mordenti demonstrated through Gail's own testimony that the argument was false. Mr. Mordenti also showed that the State knew that the argument was false. Ms. Cox's own notes, which were entered into evidence, clearly demonstrate Ms. Cox's keen awareness of the problem. The state noted: "when started w. T&D" then drew an arrow to "look @ statement to LEO p. 8".

When at trial Ms. Cox argued it was May, Mr. Atti objected and correctly pointed out that it was June. However, Ms. Cox wanted the conviction and needed to argue that the phone records corroborated Gail's claim that Mr. Royston was after her to get the job done, even though she did not want to do it. There was no corroboration for this story. So, Ms. Cox insisted on falsely arguing that Gail's employment started in May, so that she could argue the meaningless phone records as corroboration.

The circuit court's analysis of this point overlooked Gail's testimony, Ms. Cox's testimony, D-Ex. 17, and the trial record.

d. *When Gail Received the Gun and Bullets*

At trial Mr. Mordenti's trial counsel, John Atti, attempted to rely on Gail's inconsistent prior sworn statement regarding when she received the gun and accompanying bullets from Michael Mordenti (***before*** or ***after*** the murder). However, he was thwarted when Ms. Cox successfully precluded the jury from knowing the truth – that Gail had given a prior inconsistent sworn statement. Ms. Cox's handwritten notes clearly show that she was aware of Gail's prior inconsistent sworn statement (D-Ex. 17). At the top of the second page of the exhibit, the handwritten note states, "got gun back accord to stmt in Jan Feb, March 89." Ms. Cox deliberately kept from the jury proof that Gail had told an untruth (since both statements can't possibly be true, one of them was false). In fact, Mr. Atti stated to the judge at trial that this inconsistency was "crucial to the case, and I believe that it's impeachment, direct impeachment on the State's most important witness." (R. 1227). Yet, the trial judge at Ms. Cox's urging ruled against Mr. Atti and refused to let him get this before the jury.[53]

The lower court stated:

> Here, Defendant has failed to prove that this was a "material" fact as it is not alleged that "the gun" was the murder weapon. In the State's closing

[53]Whether Mr. Mordenti's counsel was ineffective in failing to know how to get a prior inconsistent sworn statement into evidence is also a claim. However, Ms. Cox clearly took advantage of John Atti's inexperience in order to keep important and admissible impeachment evidence of the State's star witness from the jury.

> argument, it argues that this gun was not the murder weapon. This may have provided impeachable material for the defense, but it would not rise to the level of a ***Giglio*** violation as Defendant has failed to demonstrate that such a fact was material.

(PC-R. 1416). The lower court completely missed that the State argued that the bullets accompanying the gun were a compositional match to the fatal bullet and therefore the fatal bullet had been in the box of bullets provided by Mr. Mordenti to Gail (according to Gail) (R. 1211). The State was contending that Gail's testimony on the point was essential.[54] That was why Mr. Atti called his failure to get the prior inconsistent statement before the jury "absolutely pivotal." Certainly, the State intentionally obfuscated the truth and violated due process. Garcia v. State.

e. *Mr. Mordenti's "Involvement" with Bank Robbers.*

Ms. Cox also deliberately presented misleading evidence designed to assassinate Mr. Mordenti's character. Ms. Cox elicited from Gail testimony that Mr. Mordenti "was involved in some kind of investigation of bank robbery, and that was -- so he didn't want any conversations over the phone because he didn't know if anyone was listening in because of the bank robbery" (R. 658). The implication was that Mr. Mordenti was

[54]It was Mr. Atti's contention that if the gun and the accompanying bullets were in Gail's possession at the time of the murder, the meaning of the FBI's findings would be turned inside out. That was why he described Ms. Cox's successful effort to mislead the jury and the trial judge on this point "absolutely pivotal" (PC-T. 563-64).

a bank robber who was afraid of getting caught.[55]

Actually, the truth as explained by FBI Agent Carmody was that Mr. Mordenti was the good citizen that helped the FBI locate the bank robber, Horace Barnes and girlfriend, Tracey Leslie. (PC-T. 280-88). Ms. Cox had interviewed Agent Carmody and knew that Mr. Mordenti had assisted the FBI in arresting the bank robber, Mr. Barnes (PC-T. 289, D-Ex. 21). Ms. Cox's handwritten notes of her March 5, 1991, interview of Agent Carmody demonstrate that he advised her:

> *Mordenti I D ed bank surveillance photos Horace Barnes. Mordenti had significant information on whereabouts of Barnes. Carmody realized that Mordenti was potentially a significant wit. for gov.*

(PC-T. 54).[56]

Ms. Cox knowingly presented misleading evidence suggesting that Michael Mordenti was a bank robber afraid of being caught. The lower court stated that Gail's testimony that Mr. Mordenti was involved in a bank robbery was not false

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[55]Clearly, Ms. Cox tried to use this as false corroboration to Gail's claim that Mr. Mordenti had "'throw away pieces' and that she knew he 'was dealing with some people that were shady.'" Mordenti v. State, 630 So.2d at 1084.

[56]During the 2001 hearing, the State suggested during its questioning of Mr. Atti that any prejudice was cured by the presentation at trial of Agent Carmody's testimony. ASA Vollrath asked, "So Mr. Carmody, the agent for the FBI, came in, gave full testimony about how - - what a wonderful person Mr. Mordenti was, to have given this situation - - was allowed to catch the two bank robbery suspects" (PC-T. 622-23). Contrary to this assertion, Agent Carmody was in fact inexplicably **not** called as by the defense at trial (PC-T. 648).

or misleading because Mr. Mordenti was involved, albeit in the investigation of it (PC-R. 1416). However, the testimony deliberately created a false impression. The circumstances here are indistinguishable from those found by the Supreme Court in Alcorta v. Texas. The circuit court's analysis overlooked the case law. The question is not one of technical falsehood, but instead whether the evidence was deliberately misleading and designed to create a false impression. Certainly, that was the case at Mr. Mordenti's trial. Ms. Cox's action violated due process.[57]

f. *Horace Barnes & Tracey Leslie.*

To further prejudice Mr. Mordenti, Ms. Cox deliberately presented the testimony of Horace Barnes, the person that Agent Carmody arrested because of the information provided by Michael Mordenti. Ms. Cox elicited testimony from Mr. Barnes that Mr. Mordenti "let me know that he was in the mob" (R. 747). In response to an objection, Ms. Cox explained that Mr. Barnes would further testify that Mr. Mordenti told Mr. Barnes that "he was a hit man" (R. 748). The trial judge ruled that the mob comment was inadmissible, but the "hit man" comment could be presented (R. 749). Thereafter, Mr. Barnes also testified that he saw Mr. Mordenti illegally sell a gun to a friend of Mr. Barnes.

Ms. Cox did not advise the jury or the judge that Mr.

[57]In fact, this Court was deceived on direct appeal when it concluded that Mr. Barnes was a cellmate of Mr. Mordenti.

Barnes was a bank robber who had been caught because Mr. Mordenti assisted the FBI in locating him. Ms. Cox did not advise the jury that Mr. Mordenti had testified before a grand jury and identified Mr. Barnes. Ms. Cox knew that Mr. Barnes had a grudge against Mr. Mordenti and wanted to get him. A March 7, 1990, police report was in her possession that indicated that "[i]t was apparent Barnes wanted a piece of Mordenti because he burned him and his girlfriend" (D-Ex. 10 at 3). The jury was completely misled regarding Mr. Barnes.[58] Neither the jury (nor this Court when it affirmed the convictions) knew that Mr. Barnes had a grudge against Mr. Mordenti and that it was apparent to law enforcement that "Barnes wanted a piece of Mordenti" (D-Ex. 10). Ms. Cox knowingly presented misleading and inaccurate evidence. She improperly exploited Mr. Barnes' testimony to bolster Gail's effort to frame Mr. Mordenti for a murder he did not commit.[59]

The circuit court ruled that it need not address this

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[58]Not only was the jury misled, so was this Court. In affirming on direct appeal, the Court understood from the record that Mr. Barnes was "a cellmate of Mordenti's." Mordenti v. State, 630 So.2d at 1084. The fact that Mr. Barnes was not "a cellmate of Mordenti's," but in fact a bank robber who was caught by the FBI because of information provided by Mr. Mordenti, casts quite a different light on Mr. Barnes' reasons for testifying. See Davis v. Alaska, 415 U.S. 308 (1974).

[59]Certainly, defense counsel was asleep at the wheel when he failed to combat Ms. Cox's improper actions. Defense counsel's failings aggravated the prejudice and underscore that Mr. Mordenti did not receive an adequate adversarial testing.

portion of the claim, "as the Florida Supreme Court found that Barnes' testimony was inconsequential." Specifically, the circuit court relied upon this Court's comment regarding the introduction of Mr. Barnes' "he was in the mob" statement. This Court found the issue had not been preserved and then alternatively stated, "the elimination of the cellmate's testimony would not have changed the outcome of this proceeding and otherwise constituted harmless error." Mordenti v. State, 630 So.2d at 1085. Given that this Court was only addressing the "he was in the mob" statement and given that this Court had been completely misled as to what Mr. Barnes' connection to Mr. Mordenti was all about, the circuit court's reliance of this Court's opinion was misplaced. The State violated due process. It deliberately obfuscated the truth. Garcia v. State.

g. *"Don't Mention Rings."*

Notes in Ms. Cox's handwriting revealed that Ms. Cox knew that there was a problem prior to trial with an aspect Gail's testimony. These notes stated:

Don't mention [word jewelry is scratched through] *rings - only jewelry*

(D-Ex. 14, at 2, upper right hand corner, line 3)

This note related to Gail's testimony that Mr. Mordenti had told her that Thelma "had on a lot of rings and jewelry and that he wished he could have taken them." When this note is compared to a photograph of Ms. Royston at the crime scene

(D-Ex. 57), it is obvious that Ms. Royston did not have any rings on at the time she was murdered.

In addressing this allegation the lower court again misstated the evidence:

> Defendant alleges that these notes illuminate that Ms. Cox was coaching Gail Mordenti in regard to her testimony at trial. In particular, Defendant refers to Ms. Cox's notation of "don't mention the jewelry."

(PC-R. 1409). However, the note says "don't mention rings, only jewelry." Thus, Ms. Cox's notation revealed that she knew that there was a problem with Gail's statement and testimony. The problem was with the word "rings," not "jewelry" as the circuit court stated. In fact, Gail testified at the evidentiary hearing, "Karen told me that there were no rings on her hands" (PC-T. 1100). However at trial, Ms. Cox did not correct this testimony that she knew to be inaccurate.

The lower court also concluded:

> The Court finds no prosecutorial misconduct in reference to Ms. Cox's handwritten notes. First, Ms. Cox admits to writing the notation "don't mention the jewelry[sic]," as the notation is in her own handwriting. Ms. Cox also testified, however, that her personal notes were taken in preparation of the trial, and typically such notes were not shown to witness. In addition, Gail Mordenti does not recall ever seeing these notes, or the notation, "don't mention the jewelry [sic],". In sum, the Defendant has failed to prove that a *Giglio* or *Brady* violation occurred. As such, this allegation is without merit.

(PC-R. 1410). However, the issue is not about whether Ms. Cox showed her notes to Gail. The significance of the

notation is that it demonstrated that Ms. Cox knew that what Gail testified to could not be true and she coached Gail at trial regarding it. What matters is that Gail testified at trial that Mr. Mordenti had told her Thelma had on rings and a lot of jewelry and that he wished he could have taken them. Yet according to Gail's 2001 testimony, Ms. Cox told Gail at the time of trial that "there were no rings." The jury was deliberately deceived.

h. *Hotel Name*.

The lower court completely failed to address the State's deliberate failure to disclose the name of the motel that Gail alleged that she and Mr. Mordenti checked into when checking out the Royston farm. Det. King revealed at the 2001 hearing that he had the name of the hotel in March or April of 1990.

Mr. Mordenti's attorneys complained that they were never given the name of this hotel and believed that a Richardson violation occurred. Mr. Watts even wrote a memo to the file documenting that "[t]he name of the motel wasn't disclosed to us. We couldn't go and look." (PC-T. 901, D-Ex. 68).

Ms. Cox testified at the 2001 hearing that she did not disclose the name of the motel because she did not learn of the name of the motel until the eve of trial (PC-T. 689). Clearly, Ms. Cox's testimony contradicted Det. King's testimony in this regard. He indicated that the name of the motel was received more than a year in advance of the trial, not a week of so before trial. If Det. King's testimony was

not truthful about immediately following up on the information provided by Gail, then the State should have disclosed that for its impeachment value as to the reliability of law enforcement's investigation. If Det. King's 2001 testimony was truthful, then Ms. Cox's testimony was not, and at trial she misrepresented her knowledge of the name of the hotel and she intentionally withheld Brady material from Mr. Mordenti's trial counsel. The circuit court did not address this aspect of the claim.

3. Cumulative consideration.

The circuit court never gave cumulative consideration to the numerous instances of false and/or misleading evidence and argument. When the proper cumulative consideration is given, it is clear that Rule 3.850 relief for this deprivation of basic due process is necessary. This is particularly so given the pattern evidence that the circuit court erroneously refused to consider that demonstrated that Ms. Cox had engaged in this kind of behavior during other criminal prosecutions as well.

C. Brady claim.

1. Legal Basis.

In order to insure that a constitutional adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. 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).[60] The State's duty to disclose exculpatory evidence is applicable even though there has been no request by the defendant. Strickler at 280.[61] The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Id. at 281. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). 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. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but

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[60]In Strickler v. Greene, 527 U.S. 263 (1999), the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." See Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Hugins, 788 So.2d 238 (Fla. 2001); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001).

[61]This Court has recognized that the United States Supreme Court in Strickler eliminated the due diligence element of a Brady claim. Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000); Way v. State, 760 So.2d 903 (Fla. 2000).

whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. at 434.

The Supreme Court has clearly stated that diligence is not a required element of a Brady claim. Strickler, 527 U.S. at 281. It is reasonable for trial counsel to rely on the "presumption that the prosecutor would fully perform his duty to disclose all exculpatory evidence." Strickler at 284. The circuit court erroneously overlooked this case law.

This Court has indicated that the question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So.2d at 553. The information need not be inadmissible form. If the State possessed exculpatory information and it did not disclose this information, a new trial is warranted where the non-disclosure undermines confidence in the outcome of the trial. In making this determination "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So.2d at 385. This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446. Information regarding "coaching" of State witnesses is Brady material because it gives the defense a tool to argue

against the witness' credibility. Rogers v. State, 782 So.2d at 384.

2. The Circuit Court Misstated and Misapplied the Law.

In assessing this claim however, the lower court erroneously included diligence of defense counsel as an element:

> In reference to any *Brady* claims, Defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence, (3) that the prosecution suppressed favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Hedgewood v. State*, 575 So. 2d 170, 172 (Fla. 1991).

(PC-R 1409). This was error.

Additionally, in denying relief, the lower court failed to follow the mandate of Kyles v. Whitley, wherein the withheld evidence is not to be analyzed item by item in a piecemeal fashion, but rather collectively. See Cardona v. State, 826 So.2d 968, 973 (Fla. 2002). The lower court did exactly what Kyles forbids.

3. The Withheld Exculpatory Evidence.

a. *Gail Mordenti Milligan's Date Book*.

According to Gail Mordenti Milligan, she provided Karen Cox with her date-book before the trial (PC-T. 1072). Ms. Cox confirmed that she had possession of the date-book (PC-T. 34). So, the State was in possession of evidence that Gail has

acknowledged established that during her trial testimony she was "wrong" as to the correct date of her luncheon with Larry Royston (PC-T. 1097). John Atti testified he did not have access to the date book. It was never provided to him (PC-T. 531).

The circuit court denied relief as to the date-book saying, "Defendant has not alleged any prejudice, only speculation that this entry from Gail Mordenti's date-book would have helped for the sake of investigatory purposes" (PC-R. 1417). Thereafter the circuit court concluded:

> Even though the failure to provide the defense with a copy of Gail Mordenti's date book may have constituted a discovery violation, the Court finds no prejudice in Defendant not receiving copies of it. The Court finds that Gail Mordenti testified that she had one lunch date with Larry Royston, and the fact that she was slightly inaccurate as to when the lunch occurred is inconsequential. Even if the State withheld the date book, the Court finds that the outcome was not prejudiced. Prejudice must ensure to support a finding of a *Brady* violation. *See Rogers v. State, 782 So. 2d 373, 378 (Fla. 2001)*. As such, the allegation that the State withheld Gail Mordenti's date book is denied.

(PC-R. 1418). The circuit court overlooked Mr. Mordenti's closing memorandum wherein he explained in detail the value of the date book to his trial defense.

i. Gail's date book entry for April 11, 1989.

The lower court failed as a matter of law to properly consider the significance of the discrepancies regarding the date of the luncheon. On April 11, 1989, Gail wrote:

Larry Royston Here Lunch

(D-Ex. 11). When Gail testified in 2001, she acknowledged that her date-book established that the luncheon with Larry Royston was on April 11, 1989 (PC-T. 1005-06). Gail testified at the evidentiary hearing when confronted with her trial testimony about the lunch with Larry, "If my book says that it was April 11th, then I was wrong" (PC-T. 1097). Gail also acknowledged that on April 11th, she had the first conversation she had with Larry Royston about his desire to find someone to kill Thelma. Accordingly, prior to April 11, 1989, she had undertaken no actions in search of a killer.

Mr. Atti had attempted to develop a time line of Gail's claimed sequence of events (PC-T. 531). Clearly, the defense wanted to cross reference Gail's claims in order to find impeachment. Certainly, the undisclosed date book revealed a wealth of otherwise unavailable impeachment (PC-T. 532-33). It would have established that her trial testimony was false; the testimony that she told the jury had to be the truth, the whole truth.

On April 12, 1989, one day after she invited Mr. Royston to come her house for lunch, Gail had been invited to give a statement to law enforcement regarding a criminal investigation into a bank's allegation that she had stolen over $200,000 (D-Ex. 58). As she acknowledged in 2001, she had been notified prior to April 12th that the police wanted to talk to her about the missing $200,000 (PC-T. 1066-67). Because defense counsel was not provided access to the date-

book (PC-T. 530-32), he did not know to inquire about the proximity of the luncheon to the police questioning of Gail regarding the missing money. Between it and the other documents disclosing Gail's desperate financial straits and possible criminal prosecution,[62] Gail's depiction of herself at trial would have been completely undercut (D-Ex. 28, 52, 53, 54, 55, 56, 58). She was desperate. She needed money, and she needed it fast on April 11th.[63] And who did she call, Mr. Royston whom she had described as a man who "had money." Gail's motivation can only be understood when the context of the luncheon engagement are accurately revealed.[64]

The April 11th entry in the date-book would have also

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[62]At the 2001 hearing, Gail revealed for the first time that she was consulting with a lawyer regarding her financial and legal problems and was advised that she was facing legal costs of $30,000 to $40,000 (PC-T. 1079).

[63]These exhibits not only take on new meaning in light of the date-book, but they also could be used to reveal Gail's history of double talking. For example, the Mullholland suit (D-Ex. 53) shows that Gail and Glen Donnell conspired to cut Glen's lawyer out of his contingency fee. In a deposition in that case, Gail gave sworn testimony that she was paid $50,000 by Mr. Check to compensate her. This statement worked to keep Mr. Donnell's attorney from being able to claim his contingency fee from the $50,000. This prior sworn statement was contrary to Gail's testimony on November 27th, that the $50,000 check was merely made out in her name, but the money went to Glen Donnell (PC-T. 1074-76).

[64]Gail knew about the date-book; it was hers. If she wanted to tell the jury the truth, the whole truth, she knew of the date book's existence and its location. Her failure to consult it is also telling.

Ms. Cox knew of the date-book and its location as well. Her failure to consult it is also telling. Her actions in this regard constitutes impeachment evidence under Kyles in that it shows shoddy investigation by law enforcement.

provided important impeachment of Gail's story because of the statement to law enforcement she made the next day on April 12, 1989. The day after Mr. Royston came to lunch with her at her house, she gave a statement to law enforcement regarding the criminal investigation into the allegation that she had stolen over $200,000 (D-Ex. 58; PC-T. 1069). In this statement, Gail blamed the missing money on Jack Gartley whom she described as "an albatross around [her] neck." (PC-T. 1081).[65] Yet according to Gail's trial testimony, after her April 11th luncheon at which she was "shocked" by Larry Royston's request for help in killing his wife, the first person she turned to was Jack Gartley, "the person who [was] the albatross around [her] neck, the person who [was] destroying [her] reputation," at least according to her statement to police on April 12, 1989 (PC-T. 1080-81).[66]

The context of the April 11th luncheon must also be considered in light of Gail's trial testimony that Milligan

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[65]Meanwhile, Jack Gartley's sworn testimony is that Gail took the money (PC-T. 871). Therefore, Gail in her April 12th statement was trying to lay the blame on Jack Gartley for something she did, exactly what she has done to Mr. Mordenti in connection with the murder of Thelma Royston. The pattern is exculpatory.

[66]Jack Gartley testified on November 27, 2001, that Gail "never" approached him to help find a way to eliminate Larry Royston's wife (PC-T. 878). Gail Mordenti Milligan's reaction to Jack Gartley's testimony was "he's lying." (PC-T. 1083). She had a similar reaction to Glen Donnell's statement that she had in fact mentioned to him, Glen, that Mr. Royston was looking for someone to kill his wife, "he's lying." (PC-T. 1083).

moved in with her “at the end of March or beginning of April” (R. 677). So, here was a woman in financial and legal straights. She got Milligan to move in with her to save money. She called up Mr. Royston, a man with money, and invited him over for lunch. The subject of murder came up. And according to her trial testimony, the first person she tried to recruit to kill Thelma Royston is Jack Gartley, the man who was claiming she stole over $200,000 and for which she faced questioning on April 12th when she said he was trying to destroy her reputation and was an albatross around her neck.

Of course, had trial counsel known of the date-book, he could have told the jury that logic would have precluded contacting Jack Gartley and giving him further ammunition to use with law enforcement.[67] He could have argued the logical person for Gail to have turned to after that luncheon was the man with whom she was living, Michael Milligan.

ii. *Gail’s entry for June 7, 1989.*

The date book entry for June 7, 1989 included:

Call on ticket for Michael

* * *

Make calls again to Bus Co.

(D-Ex. 12). Gail has testified that the entry “Call on ticket for Michael” refers to Michael Milligan, the man she was

[67]Certainly, this date book would have given trial counsel good reason to decide to call Jack Gartley as a witness to explain this very point.

living with and would marry in April of 1990 (PC-T. 1063).[68] She testified that this was in reference to a "speeding ticket." When asked how she knew that, she answered "[b]ecause he got a lot of them" (PC-T. 1089). She had no explanation for the entry "Make calls again to Bus Co." (PC-T. 1063).

In addressing this allegation, the lower court stated:

> When asked of these entries, Gail Mordenti has a faint recollection. When specifically asked about the reference to "Michael" she indicated that it was in reference to her husband, Michael Milligan. She has no recollection about the bus company reference. Defendant argues that this would have been very important for investigatory purposes as Mr. Atti speculated that Gail Mordenti might have substituted Michael Mordenti's name for the name of the real killer, Michael Milligan.
>
> Here, the Court does not find as *Brady* violation, as prejudice must ensue. Defendant has not alleged any prejudice, only speculation that this entry from Gail Mordenti's date book would have helped for the sake of investigatory purposes.

(PC-R 1418). Again the lower court ignored the evidence presented at the evidentiary hearing, and held Mr. Mordenti to a higher burden than required under Brady. The circuit court held Mr. Mordenti to prove that the outcome would have different. Under Brady, Mr. Mordenti need only show that there is a reasonable probability of a different verdict, that the verdict rendered is not worthy of confidence. What the

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[68]Gail married Milligan shortly after giving her immunized statement to law enforcement. Had counsel known of the sequence of events revealed by the date-book, he would have been able to suggest that the timing of the marriage was to bestow marital privilege upon both the husband and wife.

lower court labels as “speculation” is what defense counsel testified to at the evidentiary hearing about what he could have done had he been provided the information, since he was not provided the information he could not pursue – i.e., was prejudiced from other avenues of investigation, cross examination and presentation of a defense.

Further, the circuit court conducted no cumulative consideration.

b. **Undisclosed Interview of Michael Milligan.**

The lower court committed serious error in completely failing to address this allegation (PC-R. 1384-1423). Michael Milligan was Gail Mordenti Milligan’s boyfriend in March, 1989, and they married April 20, 1990. At the 2001 hearing, Ms. Cox identified her handwritten notes documenting a 2/10/91 interview of Michael Milligan (D-Ex. 14). She indicated that she tried to make the notes “accurate and make them in a summary fashion such that they’ll be of some value to me in the future” (PC-T. 41). The notes indicated that Milligan had advised the State in his interview that he worked for Michael Flynn of Flynn Motors as a transportation representative since 1985, that he met Gail in 1988 and starting seeing her in March 1989. The notes further contained the following:

> *6/89- mordenti called him & had car picked up w was used in bank robbery from New Mexico*

(D-Ex. 14, at 1, lines 10-11). Thus, Milligan told Ms. Cox

that he went to New Mexico in June of 1989, the month of Thelma Royston's murder. The note further indicated:

> *Michael know larrys name b/c she told him it*

(D-Ex. 14, at 2, line 2)

This undisclosed statement by someone the defense and police considered a suspect was very important information that the State had a duty to disclose and did not (PC-T. 907). Milligan's statement was exculpatory. At trial, Gail indicated that the car used in the murder was left on the Mexican border (R. 638). In his undisclosed statement to Ms. Cox, Milligan placed himself in New Mexico, obviously near the Mexico border, at the time that Gail says the car was being left at that border. It also puts a different spin on the June 7th entries in Gail's date-book.[69]

As for Milligan's claim that Mr. Mordenti had sent him to New Mexico to pick up the car used in the bank robbery, this is clearly an attempt to falsely create an innocent explanation for his whereabouts in the month of June, 1989. The bank robbery Milligan refers to as happening in June of 1989 actually did not happen until January of 1990.[70] Thus,

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[69]Whoever drove the car to the Mexican border obviously needed a way to get back. A bus ticket would provide a means.

[70]Mr. Barnes used a car from Mordenti and Associates to commit the bank robbery in January of 1990. He was subsequently arrested in New Mexico where he had possession of the car he had obtained from Mordenti and Associates.

Milligan could not have been transporting the car used in the robbery in June of 1989. Thus had trial counsel had been provided the undisclosed exculpatory information, he could have seriously argued that Gail substituted Michael Mordenti's name (her ex-husband) for the name of the real killer, Michael Milligan (her then boyfriend, and now present husband).[71] A compelling argument could have been made to the jury that Gail had much more interest in protecting the killer, the man she was dating and then married, by naming as the killer the ex-husband about whom she had publicly and frequently stated "she wanted to hire somebody to kill him" (PC-T. 883).

Since the circuit court failed to address the non-dsiclosure of Millgan's statement to Ms. Cox, the circuit court failed to give cumulative consideration to this non-disclosure when evaluating the non-disclosures that it did find and address.

c. Undisclosed Interviews of Gail.

The evidence regarding the undisclosed interview of Milligan was not the only evidence the circuit court failed to address. The State also had undisclosed notes of interviews of Gail. These interviews and/or the notes regarding and the substance of the interviews were never disclosed to trial counsel. Ms. Cox identified her handwritten notes documenting

[71]As previously noted, Milligan matched the description of one of the two men seen near the Royston farm around the time of the murder.

interviews of Gail (D-Ex. 14, 15). Ms. Cox indicated that she tried to make the notes "accurate and make them in a summary fashion such that they'll be of some value to me in the future" (PC-T. 41). These notes:

> *Michael made no efforts to sell boat & car*
> *Doesn't think that ever looked for buyers*
> *Larry's boat was a replica of the boat used "on golden pond"*
> *not a high powered speed boat*

(D-Ex. 15, at 1, line 31-34). The notes in Ms. Cox's handwriting indicated that there was at least a romantic tension between Gail and Larry that was discussed:

> *He invited her to Tenn.*
> *He said that he did [not] want to date until divorce was over & had time to get head together*

(D-Ex. 14, at 2, lines 17-20). This note also indicated:

> *Larry had a boat [which] she was trying to sell it for him $20,000*
> *Larry had rebuilt engines*

(D-Ex. 14, page 2 lines 31-32).

These notes reflect that Gail told Ms. Cox that Mr. Royston indeed had a boat for sale and that she was trying to help him find a buyer. Mr. Atti testified as to the significance of this information because "[i]t would have showed the connection between Gail and Larry Royston" (PC-T. 527). This would have also increased the significance of Ray Cabral's information, that in May of 1989 Michael Mordenti was trying to sell a boat used in a movie as "a favor to Gail" (PC-T. 527). Had Mr. Atti been given the information contained in Ms. Cox's notes, he would have wanted to present

it because it provided an essential and innocent explanation for the thirteen minute cell phone call and would have affected his decision making in terms of calling Ray Cabral (PC-T. 528-30).

Mr. Atti understood that the 13 minute cell phone call that the State asserted occurred between Larry Royston and Mr. Mordenti was business related. When initially interviewed by police, Gail stated that the phone call would have been related to business, possibly antique cars for sale (D-Ex. 7). Had the notes of Ms. Cox's interview of Gail been disclosed, it would have led to presentation of evidence that the phone call was indeed business related and not connected to Ms. Royston's murder as the state asserted.

The circuit court did not address these undisclosed notes or their content. Neither did the circuit court give cumulative consideration to these notes when evaluating the other non-disclosures found to have occurred.

d. Statement of Royston's Attorney.

Introduced into evidence at the evidentiary hearing were the handwritten notes of Nick Cox of the 3/20/90 interview of John Trevena, the attorney who had represented Larry Royston up until Royston's suicide (PC-T. 81-82; D-Ex. 23). The interview occurred as a result of an *ex parte* order signed by the trial judge (PC-T. 57-58, D- Ex 22). Mr. Atti testified he had not been aware of the order (PC-T. 533-34). The order stated:

> The attorney-client privilege does not apply to this factual situation involving information obtained from the deceased client's attorney ***which could be relevant in the investigation of the client's death.***

(D-Ex. 22)(emphasis added). Mr. Trevena testified that when Ms. Cox provided him with the order, "he [felt] obligated to reveal privileged information, pursuant to that order" (PC-T. 328).[72]

Mr. Trevena testified that he told the State that Larry Royston's position was "that Gail Mordenti had orchestrated [the murder]" (PC-T. 330). He advised the State that "Mr. Royston had indicated to [Mr. Trevena] that [Royston] did have a sexual affair with Gail Mordenti, and that she wanted to continue that affair" (PC-T. 330). He advised the State that Gail "wanted Mr. Royston freed up so that she could share, I believe, in his assets" (PC-T. 331). Mr. Trevena advised the State that Royston maintained that the cell phone call on June 7, 1989, to Mordenti and Associates was "innocent in nature and that it was relating to some type of a boat or motor vehicle" (PC-T. 332). "There was no discussion concerning any homicide or violence, that it was related to business and that the call had been set up by Gail" (PC-T. 336). Mr. Trevena indicated that there had been discussions with the State prior

[72]At the 2001 hearing, the State's objection to Mr. Trevena testimony was sustained, and the testimony was heard on a proffered basis only (PC-T. 326-27). Mr. Mordenti renewed his request that the lower court revisit the issue, overrule the State's objection, and admit Mr. Trevena's testimony into evidence; however, the lower court erroneously refused to do so. (PC-T. 348).

to Royston's death in the nature of plea negotiations. However as Mr. Trevena explained to the State, Royston had been:

> quite eager to give [the State] information about Gail Mordenti. He had no knowledge about Michael Mordenti, so he was not in a position to confirm or deny the allegations against him, other than to let the State know that Gail had set this up. She may have hired Michael Mordenti, she may have hired someone else, but he was not directly involved and it was not at his behest to contract this killing.

(PC-T. 333). Mr. Trevena also disclosed to the State that Royston was "scared of Gail Mordenti" (PC-T. 334). Royston had indicated to Mr. Trevena that "he did not know what was going on, and in the sense that her hiring of a hit man, would she then turn around and, because he wouldn't marry her, hire a hit man to kill him" (PC-T. 335).

Mr. Trevena testified that he did not provide any of the information that he provided to the State to Mr. Mordenti's counsel, Mr. Atti (PC-T. 338). Mr. Trevena did become aware that "Karen Cox listed [him] as a witness for the State at Mordenti's trial" (PC-T. 338). However, he had "no independent recollection of speaking with [Mr. Atti] about it" (PC-T. 338).

Even though the State listed John Trevena as a witness on its list of witnesses, the statements Mr. Trevena provided to the State were not disclosed to the defense. See, Rule 3.220(b), Fla. R. Crim. P.[73]

[73]Either the notes contain statements from a co-defendant, Larry Royston, or statements from a listed witness, John

At the 2001 hearing the State objected to Mr. Trevena's testimony and the lower court sustained the objection. In the order denying post conviction relief, the lower court stated:

> Defendant also alleges that the State possessed notes revealing, *inter alia,* that Gail Mordenti was the main orchestrator of the scheme to murder Thelma Royston and that she wanted to marry Larry Royston.
>
> The only evidence Defendant offers in support of these allegations is the testimony of John Trevena, Larry Royston's former counsel. The Court, however, ruled at the evidentiary hearing on November 5, 2001, that such testimony was hearsay, and therefore, inadmissible evidence.

(PC-R. 1410).

The court erred in refusing to consider Mr. Trevena's testimony. The information that Mr. Trevena provided to the State, but that the State failed to disclose to defense would have been the starting point to conduct further investigation and a timely investigation. The State's failure to investigate the information that it had received could have been used to impeach the reliability of law enforcement investigative techniques in the case. Kyles. Mr. Atti would have used the notes not only for admissible evidence contained therein, but as an investigative tool to look for leads of where to look for other evidence (PC-T. 535). Further investigation would have been conducted had he been provided the notes (PC-T. 536).[74]

Trevena. Accordingly, their disclosure to the defense was required.

[74]Mr. Mordenti is still being prejudiced by the non-disclosure. At this juncture, Mr. Mordenti has only been able to obtain information from Mr. Trevena via a proffer. What

Morever, the lower court because it did not admit the evidence, did not give the non-disclosure cumulative consideration when evaluating the other non-disclosures.

In its order denying relief, the lower court stated:

> Such evidence is not only hearsay, but of questionable credibility as the notes were taken during the course of preparation by an attorney, Mr. Trevena, in anticipation of representing his client, Larry Royston, who was facing first-degree murder charges. *See Robinson v. State, 707 So.2d 688 (Fla. 1988)*.

(PC-R. 1410)(emphasis added). Quite to the contrary, these notes were not Mr. Trevena's notes taken in preparation of his representation of Mr. Royston. These were notes taken by the prosecutors in Mr. Mordenti's case, of their interview of Mr. Trevena. Further, the lower court erred in stating:

> Nothing else during the evidentiary hearing was presented to support the allegations that Gail Mordenti was the chief orchestrator of the crime and that she wanted to marry Larry Royston.

(PC-R. 1410). Mr. Mordenti did present the testimony of Jack Gartley who testified to seeing Gail and Larry together in a car auction and witnessed them holding hands and kissing (PC-T. 868).

The lower court also stated:

> Additionally, as to the allegation that she was the main orchestrator, Gail Mordenti has never denied her involvement in the death of Thelma Royston. She has always maintained that she helped Larry Royston look for someone to murder his wife. As to the allegation that she wanted to marry Larry Royston,

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documentation Mr. Trevena or Royston's estate might possess that supported Royston's statements is unknown because the Court sustained the State's objection (PC-T. 321-326).

> Gail Mordenti, at the trial and again at the evidentiary hearing, testified that she and Larry Royston had only a business relationship.

(PC-R 1410-1411). The circuit court completely failed to cumulatively consider the evidence of non-disclosures. In the face of the evidence presented at the evidentiary hearing, the mere fact that Gail has stuck to her story does not indicate that she was telling the truth, the whole truth from the beginning. Moreover, Gail did not stick to the same story as we now know through her 2001 testimony regarding the luncheon date, the time frame she worked at T&D, and when she received the gun and bullets – all of which are different from her trial testimony and documented by extrinsic evidence -- her date-book and other undisclosed evidence.

e. **Hotel Name.**

The lower court completely failed to address this non-disclosure presented at the evidentiary hearing. Det. King testified:

> Q. At some point in time, did you travel to Tarpon Springs to establish a hotel that Gail Mordenti said that she and Mr. Mordenti went to, and then he subsequently left and scoped out the victim's property?
>
> A. Yes, ma'am.
>
> Q. Okay. Do you recall approximately when that was?
>
> A. I believe it was March or April of **1990**.
>
> Q. Okay. Of **1990**?

A. **I believe it was 1990, yes, ma'am**.

Q. Qkay. **And was it at that time that you** – did you look – what did you do – did you find the – I'm sorry. Strike all of that. **Did you ever find the hotel that Ms. Mordenti had –**

A. **Yes**, ma'am.

(PC-T. 793-794)(emphasis added). Det. King indicated that he went through the records and did not find a registration for Michael Mordenti, Michael Milligan, Larry Royston or Gail Mordenti. On cross examination, Det. King explained:

Q. The other thing is, in reference to checking out the motel, you indicated it would have been in March of April of 1990, that you went to the motel?

A. I believe that's when it was, yes, sir.

Q. And so that would have been after Gail Mordenti's arrest or when she first gave her statement on March 8th of 1990?

A. Correct.

Q. So that was the follow up to that?

A. That's where the information came from, yes, sir.

(PC-T. 799-800).

Ms. Cox explained that she did not disclose the name of the motel because she did not learn of the name of the motel until the eve of trial, if at all:

It was shortly within weeks before the trial, maybe two or three weeks, maybe even less, and, basically Gail Mordenti, I believe, drove by and identified the hotel because it couldn't - - she would describe it or she had provided information about it, she had been questioned about it and we could never figure it out. So she finally went out at my request, I believe, and said, okay, I've driven by, it's this particular hotel.

(PC-T. 689)(See also PC-T 690: "Q: After you obtained the name of the hotel did you disclose it to the defense? A:[by Karen Cox]: I don' know."). Clearly, Ms. Cox's testimony contradicts Det. King's testimony at to the timing of the discovery of the name of the hotel. If Det. King's testimony was not truthful about immediately following up on the information provided by Gail, then the State should have disclosed that for its impeachment value of the reliability of law enforcement's investigation. If Det. King's testimony is truthful, then Ms. Cox's testimony is not, and she intentionally withheld Brady material from Mr. Mordenti's trial counsel.

The lower court ruled:

> no hotel records have ever been recovered. Defendant failed to demonstrate that the State ever possessed favorable evidence in the form of hotel registration cards, as such, this allegation is without merit as counsel cannot be deficient for failing to pursue this issue.

(PCR. 1398). The lower court failed to recognize that the defense was also hampered because they were not given the name of the hotel so they could ask themselves.

f. Undisclosed Interview of Agent Barry Carmody.

On March 5, 1991, Ms. Cox interviewed FBI agent Barry Carmody. Ms. Cox made "notes of information elicited from Mr. Carmody when [she] was present" (PC-T.55). These undisclosed notes indicated that Mr. Carmody advised that:

> *Mordenti IDed bank surveilance [sic] photos as Horace Barnes. Mordenti had significant information on whereabouts of Barnes. Carmody relized [sic] that*

Mordenti was potentially a significant wit for gov. He gets arrest warrent [sic] for Barnes & Leslie

(Def. Exh. 21 at 1, lines 19-23). Mr. Carmody also indicated Mr. Mordenti gave other helpful information to the FBI and that Agent Carmody was present with Mr. Mordenti when Gail called Mr. Mordenti (PC-T. 284). Gail made the phone call to Mr. Mordenti at the request of law enforcement. At the 2001 hearing, Mr. Atti testified that he was never provided his exhibit.

In addressing this, the circuit court stated:

> Defendant also alleges that Karen Cox elicited testimony during trial from Gail Mordenti that Michael Mordenti "was involved in some kind of investigation of bank robbery, and that was-so he didn't want any conversations over the phone because he didn't know if anyone was listening in because of the bank robbery. Defendant asserts that by perpetuating this testimony, Cox was implying that Defendant was a bank robber.
>
> The Court finds no merit to this allegation because Gail Mordenti's statement, in and of itself , is not false as required by ***Giglio***. FBI agent Barry Carmody testified that Defendant ***helped*** in the investigation of a bank robbery. By helping with the investigation, it is also true that Defendant was therefore ***involved*** in the investigation. The State [sic] finds nothing wrong with Cox's examination of Gail Mordenti in this respect. Nowhere did Gail Mordenti say the Defendant was a bank robber. As such this allegation is without merit.

(PCR. 1416-17)(emphasis original). The circuit court thus only addressed this in the context of a Giglio claim.

Had this information been disclosed, Mr. Atti could have used it in order to correct the false impression given at trial that Mr. Mordenti was a criminal involved in bank

robberies. The evidence is also compelling impeachment evidence that could have been used to confront Mr. Barnes with and expose his true motivation for testifying against Mr. Mordenti. Defense counsel could also have presented this evidence in mitigation to show that Mr. Mordenti was actually being a good citizen by helping the FBI capture federal fugitives from justice. Additionally, had defense counsel been given this information he could have presented evidence to put the phone call made by Gail to Mr. Mordenti at the behest of law enforcement in context. Agent Carmody was present when Mr. Mordenti received the call. Instead, the jury was allowed to hear a tape recording of the phone call without any further context given to it.

The circuit court failed to properly analyze this claim. It failed to engage in cumulative consideration.

g. Tracey Leslie's consideration.

The lower court completely failed to address the evidence regarding this allegation other than as it relates to Horace Barnes wherein the lower court refused to address the issue:

> The Court does not find that it needs to examine this ground, as the Florida Supreme Court found that Barnes' testimony was inconsequential, as 'the elimination of the cellmate's [Barnes's] testimony would not have changed the outcome of this proceeding and otherwise constituted harmless error." *Mordenti*, 630 at 1085.

(PC-R. 1415).[75]

[75]As previously explained, this Court was misled in the direct appeal. Mr. Barnes was not a cellmate of Mr. Mordenti. Michael Mordenti was out on bond pending trial.

Introduced at the 2001 hearing were Nick Cox's hand written notes regarding Tracey Leslie which stated:

**** GET STATE CHARGES TAKEN CARE OF WHILE TRACEY IS HERE***

(D-Ex. 59). This note corroborates Mr. Barnes' 2001 testimony that he had sought and was told he would receive help for his girlfriend, Tracey Leslie.

Introduced as Def. Exh 60 was Tracey Leslie's letter addressed to Nick and Karen Cox dated 4/10/91 thanking them for their help. This also corroborates that Nick Cox, as indicated in Def. Exh. 59, did assist in getting the State charges taken care of, or that at least Tracey Leslie and Horace Barnes believed that assistance had been provided in return for Mr. Barnes' agreement to testify against Mr. Mordenti. Mr. Barnes' understanding that assistance would be provided was undisclosed to Mr. Mordenti's defense attorneys.

At the 2001 hearing, Ms. Cox acknowledged that Mr. Barnes and Ms. Leslie may have been put in a holding cell together:

> I don't remember whether he was - - you know, I know Tracy Leslie was transported, and I don't know whether they were in the holding cell together, it's very likely I might have said, you can't talk to each other about your testimony.

(PC-T. 686). The undisclosed note constitutes exculpatory evidence showing undisclosed consideration for Mr. Barnes' trial testimony. This was confirmed by Mr. Barnes' 2001 testimony that he received consideration for his assistance against Mr. Mordenti.

The circuit court failed to consider the non-disclosure

of this consideration. The circuit court failed to conduct the required cumulative consideration.

h. Gail's grand jury testimony.

The lower court completely failed to address the fact that the State possessed a transcript of Gail's grand jury testimony which was never disclosed to the defense. The testimony contains inconsistent statements, which would have provided valuable impeachment evidence (PC-T. 537). This also should have been considered cumulatively with the other non-disclosures.

i. FBI hair analysis.

The lower court completely failed to address the State's failure to disclose defects in the FBI's hair analysis which was presented to the jury. At the 2001 hearing, Mr. Mordenti presented the testimony of Steve Robertson. Mr. Robertson testified that he was contacted by the FBI to review reports and analysis done by FBI agent Michael Malone who testified at Mr. Mordenti's trial (PC-T. 140). Mr. Robertson testified that he reviewed Malone's work done in Mr. Mordenti's case (PC-T. 140) and testified that Malone's conclusion that the hair found at the crime scene was not Mr. Mordenti's was supported by Robertson's review of the analysis (PC-T. 142). However, Mr. Robertson questioned Malone's testimony that the hair on the victim was "highly unlikely" to be anyone's other than the victim as baseless (PC-T. 144). Had defense counsel known this information that hair on the victim was not the victim's

they could have investigated further to determine if someone else's hair was left at the crime scene. We know it was not Mr. Mordenti's.

The lower court held:

> Defendant alleges that counsel failed to impeach Gail Mordenti regarding statements Defendant allegedly told her after Thelma Royston was killed. Gail Mordenti testified that Defendant said that Thelma Royston "put up quite a fight." Defendant maintains that these statements were impeach-able because none of Thelma Royston's hair recovered from the crime scene were damaged or frayed. In reviewing this allegation, the court finds that it went unaddressed at the evidentiary hearing. As such, it is waived , and Defendant is not entitled to relief.

The circuit erred.

j. FBI metallurgical analysis.

Similarly, the State failed to disclose defects in the FBI's metallurgical evidence. The FBI's database was woefully inadequate to support the conclusions that were presented to the jury. There was no scientific basis for the conclusions. The evidence was nothing more than junk science.

At trial, FBI agent Jack Riley testified that it was his opinion that bullet projectiles from Thelma's body "came from the same box of ammunition" as did the bullets that Gail gave to the police and said came from Michael Mordenti. Mr. Riley put only one condition on his opinion and that was if they did not come from the same box, "then they came from another box that was manufactured at the same place on or about the same date." (R. 480). This was the state's only physical evidence to link Mr. Mordenti to the crime (and then one **must**

believe Gail Mordenti when she said that Michael gave her the gun and the bullets at all in the first place).[76]

The jury was lead to believe that there was a very close connection between the bullets Gail said came from Michael Mordenti and the bullets that killed Thelma. However as William Tobin (PC-T. 384-449)and Erik Randich (PC-T. 455-500) testified at the evidentiary hearing, this testimony was seriously misleading. Had defense counsel known and used this, they could have seriously rebutted the state's only possible piece of physical evidence.

In addressing this claim the lower court held Mr. Mordenti to an invalid standard of proof:

> Tobin and Erik Randich, two experts presented by the defense at the evidentiary hearing, could not conclusively refute Mr. Riley's conclusions. Just because experts do not agree does not indicate to this Court that one side has intentionally put on false and misleading testimony. As such, the court finds no merit that the State presented false and misleading testimony regarding the custody of the bullets, which took into the consideration a comparison of the bullets. As such, Defendant is not entitled to relief upon this allegation.

(PCR. 1415). The circuit court failed to apply the proper Brady standard. Mr. Mordenti is not required to conclusively refute the trial testimony in order to prevail. Rather he has met his burden in showing that the verdict is not worthy of confidence.

Additionally, the lower court misunderstood the

[76]On top of this is the fact that Gail is not consistent on when she supposedly got the gun and bullets from Michael to begin with.

metallurgy evidence as having something to do with Mr. Mordenti's allegation regarding the chain of evidence, it was not.

4. Cumulative Consideration.

The circuit court entirely failed to conduct any cumulative analysis of the prejudice prong of the Brady standard. When cumulative consideration is given to all of the State's due process violations, confidence is undermined in the outcome of both the guilt and penalty phases of Mr. Mordenti's trial. Rule 3.850 must issue and a new trial must be ordered.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING MR. MORDENTI'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL.

A. Legal Basis/Standard of Review.

In Strickland v. Washington, 466 U.S. 668, 685 (1984), the Supreme Court 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." In order to insure that a constitutionally adequate adversarial testing, and hence a fair trial, occur, 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 defense counsel fails in his obligations, a new trial is required if confidence is undermined in the outcome.

Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

In addressing lead trial counsels' general unpreparedness, the lower court stated:

> Watts' testimony contradicts Mr. Atti's because Watts testified that he did not feel prepared to Mordenti.
> Here the Court is left with one co-counsel indicating that he felt that he was prepared as best as he could be to represent the defendant, while the other co-counsel testified that he needed more time to prepare in representing the defendant.
>
> * * *
>
> The Court must stress that an ineffective assistance of counsel claim has two prongs, ... the court does not find that counsel was generally unprepared to represent defendant. Watts' bare claim that he felt that he needed more time to prepare does not affirmatively proof [sic] prejudice, in that the outcome of the proceedings would have been different. As such, the allegation that counsel was woefully unprepared in represented Defendant is without merit.

(PCR. 1394). Thus, the circuit court found proof of prejudice wanting. The circuit court's analysis is subject to *de novo* review and is erroneous under that standard. Stephens v. State, 748 So.2d 1028 (Fla. 1999).

B. Mr. Mordenti's Prejudice.

1. Miranda.

Trial counsel failed to raise a Rhode Island v. Innis objection to law enforcement arranging an encounter between Michael Mordenti and Larry Royston after Mr. Mordenti invoked his Miranda rights. On this allegation the circuit court incorrectly ruled that the claim was not pursued at the

evidentiary hearing, that the issue was waived and thus summarily denied the claim (PCR. 1408). At the 2001 hearing, Mr. Atti testified that this issue did not occur to him and he had no strategic reason for failing to raise to raise the fact that the police deliberately set it up so Larry Royston and Michael Mordenti would bump into each other equivalent to unconstitutional nonverbal interrogation at trial (PC-T. 545). Mr. Mordenti had previously invoked his right to remain silent. Mr. Mordenti was prejudiced by counsel's failure to assert this claim.

2. Marital Statements.

At trial, statements made by Mr. Mordenti to Gail during the time that they were married were introduced without objection. One of these statements was cited as significant by this Court. Mordenti v. State, 630 So.2d 1080, 1082 (Fla. 1994) ("[Gail] testified that Mordenti had a number of guns that he kept as "throw away" pieces and that she knew he was associated some shady 'people"). However, these statements were objectionable because of marital privilege.[77] Trial counsel failed to object at trial. Mr. Atti testified at the evidentiary hearing that it "just didn't occur to him" (PC-T. 569) and Mr. Watts stated it was an oversight (PC-T 917).

In rejecting this allegation, the lower court:

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[77]Mr. Mordenti does contest the truthfulness of Gail's testimony in this regard. However, according to her testimony this was subject to the marital privilege. Further, this Court on direct appeal specifically considered and relied upon Gail's testimony as to this.

> Defendant has failed to conclusively demonstrate that the testimony presented by Gail Mordenti were privileged statements subject to husband-wife privilege, as Gail Mordenti and Michael Mordenti were together several years prior to their marriage. As Defendant has failed to meet his burden, he is not entitled to relief upon this allegation.

(PC-R 1407). The circuit court's analysis did not apply the proper Strickland prejudice analysis.

3. **Inadmissible Co-conspirator Statements**.

Marge Garberson (an ex-girlfriend of Mr. Royston) testified at Mr. Mordenti's trial to statements Larry had made to her asking her to either shoot or stab Thelma. They were introduced without objection even though they were inadmissible hearsay since they were not statements of a co-conspirator in the course of the conspiracy alleged between Gail, Larry, and Michael Mordenti. Mr. Atti testified he couldn't "imagine a reason for not objecting." (PC-T. 569).

The lower court did not address this aspect of the claim despite the testimony from the hearing. The circuit court erred in this regard.

4. Immunity.

Trial counsel failed to discover the true nature of Gail's immunity, which was use immunity as opposed to the total immunity she claimed. If the State did not breach its obligation under due process by failing to correct the inaccurate testimony, then counsel was ineffective for failing to learn the true nature of the immunity. Mr. Atti and Mr. Watts both testified they believed Gail had total immunity and

were never told differently (PC-T. 539; 916). Gail's reference to her total immunity at trial was never corrected on the record or in their presence (PC-T. 541).

The circuit court denied and stated:

> The Court finds that defense counsel, Mr. John Atti, did cross-examine Gail Mordenti at trial and brought out the fact that if she testified falsely, then she could be prosecuted for perjury. Ms. Mordenti, on her own, then testified that she could also be prosecuted as an accessory, implying an accessory to the murder. The Court can make this assumption that Gail Mordenti was referring to an accessory to murder because earlier in her testimony during direct examination, Ms. Mordenti testified that Defendant kept telling her that she was an accessory, as guilty as he was to the murder, and if he got "the chair," so would she.

The court further held:

> From pages 701 to 705 of the trial transcript, the Court finds that counsel, Mr. Atti, questioned Gail Mordenti extensively in reference to her grant of immunity. Counsel did not elicit whether Ms. Mordenti specifically received use or transaction immunity. However, Ms. Mordenti indicated that if she lied, she would be charged as an accessory, for which she testified earlier that she understood that an accessory meant that she was as guilty to [sic] the murder as Michael Mordenti. The jury heard this testimony and could then evaluate her credibility. As such, the Court finds this specific allegation is without merit, as counsel did not act deficiently.

The circuit court's analysis failed to consider the prejudice to Mr. Mordenti as was explained in Argument I of this brief.

5. Gail's Prior Inconsistent Statement.

Mr. Atti rendered ineffective assistance when he did not know how to introduce Gail's prior inconsistent sworn testimony indicating that she obtained possession of the gun and bullets prior to the homicide. Even though he believed

that this prior statement was pivotal to the defense, he simply was not knowledgeable in basic law regarding how to get the statement admitted. Mr. Atti testified, "I thought that was part of the evidence before the jury" (PC-T 565). It was not and he was precluded from referring to it. It was "the end of my closing" (PC-T 565). Mr. Atti felt it was "absolutely essential" to attack on Gail's credibility (R. 563). Yet, he couldn't get it in because he didn't show it to the witness (PC-T. 562).

6. Failure to Retain Expert-Metallurgy.

Mr. Atti failed to get his own metallurgist to analyze the bullets or the adequacy of the FBI database and whether it supported the FBI's conclusions (PC-T. 570-571). The defense also failed to make a Frye objection. Obtaining a metallurgist would have been a back up to his failure to get Gail's inconsistent statements admitted. The metallurgy evidence would have provided another way to impeach the only possible physical evidence linking Mr. Mordenti to the crime even if one believes Gail's statement that Michael Mordenti gave her the gun to begin with.

7. The 13 Minute Cell Phone Call.

The defense possessed a deposition of Ray Cabral indicating that Michael Mordenti had called him in May of 1989 about buying a boat that he was trying to sell as a favor to Gail. At the evidentiary hearing, Mr. Atti testified that he had Ray Cabral's sworn testimony that prior counsel obtained

(PC-T. 527). He did not have, Ms. Cox's notes of an interview of Gail wherein she discusses a boat that Larry was trying to sell. Mr. Watts said he (Mr. Watts)couldn't account for the phone call, and the information was important and made sense because of the type of business Mr. Mordenti had, selling cars and boats (PC-T. 915). Counsel's performance was deficient in not presenting the available evidence.

8. Failure to Prepare for Gail's Testimony.

The defense also failed to adequately prepare for Gail's testimony. Mr. Atti testified:

> I attempted to depose her, I believe, my recollection is on a number of occasions. For some reason she was not able to make it. The only contact I had with her was a few days before trial, a deposition in this building in Karen Cox's office that I was – I believe it was a Friday night, relatively late. It was July 4th weekend, if I remember correctly. That was my first and only contact with her prior to trial.

(PC-T. 584).

Mr. Watts testified they took Gail's deposition the Friday before trial and realized "it was apparent we were to late (PC-T. 898). He documented his file to memorialize his conversations with Mr. Atti about wanting a continuance all the way up until the trial started (D-Ex. 65).

The defense also possessed numerous documents of Gail's dire financial conditions and potential criminal and civil liability at the time of her April 11th luncheon with Larry Royston. Counsel's performance in this regard was deficient.

The circuit court stated:

in reviewing the transcripts, the Court finds that Gail Mordenti did testify at trial that she had to file bankruptcy, and she did have a financial interest in the murder of Thelma Royston as Michael Mordenti gave her proceeds from his payment for the murder.

* * * *

Defendant acted effectively in bringing before the jury the fact that Gail Mordenti had financial troubles, and she testified that she was desperate to find someone to murder Larry Royston's wife as she would profit financially from the murder and be able to carry on her fledgling business. The trier of fact, the jury, had the ability to then weigh this testimony, and evaluate her financial motive for the murder of Thelma Royston.

Defendant also maintains that counsel failed to bring out the fact that Gail Mordenti had been sued and eventually filed bankruptcy due to her financial troubles. This allegation is without merit as well:

> Q. You testified that you had borrowed approximately five to six thousand dollars from Michael Mordenti, from the money that you had given him from Larry Royston for the it; is that correct?
>
> A. Yes.
>
> Q. When you say "borrowed", did you pay the money back?
>
> A. No.
>
> Q. Okay. Isn't it a fact that Michael Mordenti gave you the money because you asked him for it, because you needed it to pay bills?
>
> A. I asked him for it, yes, because I had bills that I had to pay.
>
> Q. Isn't it a fact that it was given to you rather than borrowed?
>
> A. If I ever got back on my feet I was going to pay it back to him, but I ended up having to claim bankruptcy.

Defendant points out that Gail Mordenti was involved in numerous financial lawsuits, and counsel was

> ineffective by failing to bring many of these to the forefront during trial. The Court, however, finds no deficiency on the part of counsel as **many of the lawsuits, entered into evidence during the evidentiary hearing, occurred after both the conspiracy and murder.** For example, *Fortune Savings v. Automotion* was filed in July 1989, and a counterclaim was filed by Jack Gartley against his co-partner, Gail Mordenti, in October 1989. The murder of Thelma Royston occurred June 1989. Furthermore, Gail Mordenti admitted and testified that she needed the money, and that she gained from the murder of Thelma Royston. As such, Defendant's allegation that counsel failed to bring forth these lawsuits is not prejudicial, and Defendant is not entitled to relief upon this allegation.

(PCR 1389-1390)(emphasis added).

The circuit court ignored the fact that Gail was being investigated for grand theft of money from Fortune Savings Bank in April of 1989 (D-Ex. 58). Additionally, all though some of the suits were filed after the homicide, Gail's financial predicaments certainly began earlier. For example, Great Western filed it's foreclosure action in December of 1989, but this was due to at least one past due payment in July prior to Great Western resorting to foreclosure (D-Ex. 54).

The lower court also ruled:

> Based on the foregoing, the Court does not find a deficiency on the part of counsel for the failure to bring out before the jury Gail Mordenti's financial woes. Rather, the Court finds, after reviewing the original trial transcript, that counsel effectively painted a picture of Ms. Mordenti's financial difficulties, and the fact that she expected and, ultimately, did profit from the murder of Thelma Royston. As such, Defendant is not entitled to relief upon this allegation.

(PCR 1390-91). The lower court overlooks the fact that the

documents could and should have been used to reveal Gail Mordenti Milligan's true character, true motives, and true extent of her financial pressures prior to the murder.

9. Jack Gartley.

The defense failed to use available evidence to establish romantic involvement between Gail Mordenti Milligan and Larry Royston. This was an "oversight" (PC-T. 920). Of course the state's failure to disclose the information they learned of the relationship from Mr. Trevena, hindered counsel's ability to investigate the issue and present evidence of it. Jack Gartley would have provided specific evidence that Gail was untruthful about an effort to recruit him to commit the murder. Counsel's performance was deficient and Mr. Mordenti was prejudiced.

10. Gail's Statement that Gartley "is an albatross around my Neck".

The defense also possessed Gail's April 12th statement to law enforcement that Jack Gartley was an "albatross around her neck" (D-Ex. 58). This would have impeached Gail's credibility when she testified at trial that she solicited Jack Gartley, the albatross around her neck, to commit the murder and cast further doubt upon her credibility. Mr. Mordenti was prejudiced by the defense failure to do so.

11. Failure to Talk to Prior Defense Investigator.

Even though the defense possessed sworn statements taken and conducted by predecessor counsel's investigator, Steven

Millwee, defense counsel never talked to Mr. Millwee to learn about the context in which the depositions were given (PC-T. 555). Not all of the evidence learned through an investigation is contained in the statements (PC-T. 355-356). As a result, the defense was unprepared for the State's use of the depositions to impeach witnesses by asserting that the witnesses were lying when they claimed to have told Mr. Millwee information that did not appear in the four corners of the statements. Mr. Mordenti was prejudiced by counsel's failure to talk to Mr. Millwee.

12. Failure as to Lynn Bouchard.

The defense did not contact Lynn Bouchard until mid-June just before trial. Mr. Watts wrote a letter on June 28, 1991 to Lynn asking her to get in touch with him. The letter reflects he did not have prior contact with Lynn (PC-T. 923). Mr. Watts testified the letter went out to her "not even 2 weeks before trial" (PC-T. 927).[78] The defense at trial decided not call Ms. Bouchard because the attorneys did not have an adequate handle on the facts regarding her purchase of the car from Michael Mordenti or the fact that she worked the night of the murder and waited on Mr. Mordenti and Ms. Lee, she just did not clock-in.

The circuit court found that Ms. Bouchard was "a

[78]Mr. Watts who has tried many death cases, stated "you never have enough time" but ususally enough to be able to say you did your best, but here he was walking in without a net." (PC-T. 927).

seemingly good witness for Mr. Mordenti." Thus, the court made a finding that Ms. Bouchard was credible when she testified that she waited on Mr. Mordenti on the night and at the time Thelma was murdered. That finding is supported by competent and substantial evidence and should not be disturbed on appeal. The circuit court held that defense counsel testified he did investigate the alibi witness and that it was a deliberate decision not to call Ms. Lynn Bouchard.

The circuit court's ruling that the defense decision not to call Lynn as a witness was defective in that it failed to consider that counsel's decison was the product of a failure to timely investigate. To be reasonable the decision must be informed. Regarding Lynn Bouchard, the defense was not informed and not prepared. Mr. Mordenti was prejudiced by the failure to call this witness.

13. Maria Rotering.

The defense neglected to locate Maria Rotering who could have corroborated Lynn Bouchard's testimony. The failure to locate Maria Rotering was due to the late preparation of the defense's case. Counsel was deficient. The circuit court failed to properly analyze this claim.

14. Michael Milligan.

Richard Watts was forced to do discovery depositions that he was not prepared for. As a result, Mr. Watts failed to know that Michael Milligan was Gail's live-in boyfriend on March 8, 1990, when he was questioning Det. Baker about

arresting Gail on March 8th. Because of this lack of knowledge, he failed to ask pertinent questions about Milligan, a potential suspect and "never sorted it out" (PC-T. 896-897). Mr. Mordenti's defense was prejudiced by counsel's failure to fully know the case.

15. Horace Barnes.

The defense's only preparation for Horace Barnes' testimony was a five minutes conducted without a court reporter right before Mr. Barnes' took the witness stand (PC-T. 745-751). Mr. Atti in cross-examining Mr. Barnes failed to ask any questions designed to elicit Mr. Barnes bias against Mr. Mordenti and efforts to gain benefit from the State.

16. Failure to Present FBI Agent Barry Carmody.

The defense unreasonably failed to present Barry Carmody at either the guilt or penalty phases of the trial to impeach Mr. Barnes and to explain that Mr. Mordenti's involvement with a bank robber was the assistance he provided the FBI in catching the bank robber. There was no strategy in failing to present this evidence (PC-T. 547; 931). Mr. Mordenti was prejudiced by the jury not being told this significant evidence.

17. Steve Cook.

The defense unreasonably failed to call Steve Cook to corroborate Anna Lee's testimony. Mr. Atti could not think of a reason for not calling Mr. Cook (PC-T. 579). Mr. Mordenti was prejudiced as a result of the failure to present this

corroborating evidence.

18. Failure to Seek Continuance.

The defense unreasonably failed to ask for a continuance of the trial. Richard Watts knew that the defense was not prepared for trial (PC-T. 898) and Mr. Watts kept asking Mr. Atti to continue it up until trial and documented his file about it (D-Ex. 65). Mr. Mordenti was prejudiced for counsel's failure to request the much needed continuance.

D. Cumulative Consideration.

The circuit failed to cumulative evaluate the prejudice that Mr. Mordenti suffered as a result of counsel's deficient performance. The circuit court also failed to consider the ineffectiveness claim cumulatively with the Brady claim. Certainly, no consideration was giving to the cumulative effect at both the guilt and penalty phases of the trial. Proper analysis warrants Rule 3.850 relief.

ARGUMENT III

THE TRIAL COURT ERRED IN ALLOWING AND CONSIDERING THE TESTIMONY OF ASSISTANT ATTORNEY GENERAL EMPLOYEE PAULA MONTLARY, FORMERLY A MEMBER OF MR. MORDENTI'S DEFENSE TEAM. THE "CHINESE WALL" WAS PENETRATED.

The circuit court erroneously introduced and considered evidence that the State obtained in violation of the attorney-client privilege. Paula Montlary was part of the trial defense team. In 2001, she was employed with the Attorney General's Office in Tampa. She had been hired with the understanding that a Chinese wall would preclude her from any involvement with or knowledge of Mr. Mordenti's case. After

the evidentiary hearing recessed on September 11, 2001, a breach of the Chinese wall occurred, and the Assistant State Attorney learned that Ms. Montlary possessed information. Thereafter, Ms. Montlary gave information in an effort to assist the State against Mr. Mordenti over Mr. Mordenti's objection. In denying relief on the ineffectiveness claim, the circuit court specifically cited to and relied upon Ms. Montlary's testimony. The circuit court erred. The testimony was obtained as a result of a breach in the Chinese wall and in violation of the attonrey-client privilege. Reversal is warranted.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING MR. MORDENTI'S CLAIM THAT HE WAS DENIED AN ADVERSARIAL TESTING AT THE PENALTY PHASE AND SENTENCING.

The defense counsel's performance was deficient at the penalty phase. Counsel's performance was deficient in failing to call Barry Carmody and Dr. Fireman. Dr. Fireman provided defense counsel information that Mr. Mordenti maintained his innocence, was depressed about being wrongly accused and did not exhibit or possess homicidal energy. Agent Carmody possessed compelling mitigation of Mr. Mordenti's assistance in apprehending a bank robber, Mr. Barnes. This was significant and compelling evidence to present in addition to the evidence that was presented. Counsel's failure to present this evidence was due to neglect and oversight. State v. Lewis, 2002 WL 31769281 (Fla. Dec. 12, 2002). This was

deficient performance that prejudiced Mr. Mordenti.

ARGUMENT V

THE TRIAL COURT ERRED IN SUMMARILY DENYING MANY OF MR. MORDENTI'S CLAIMS. THE DENIAL OF THE CLAIMS INDIVIDUALLY AND AS A WHOLE WAS ERROR AND DENIED MR. MORDENTI DUE PROCESS OF LAW.

The lower court erred in summarily denying the following claims Claim IV - Admission of Hearsay Evidence (PCR. 1188); Claim VII - Trial counsel's failure to Effectively Conduct Voir Dire; Claim (PCR. 1189); and Claim XI- Admission of statements of co-conspirators (PCR. 1197-1198). In denying these claims the lower court ruled that Mr. Mordenti failed to establish prejudice. However an appropriate review of these claims and counsel's deficient performance necessarily requires a cumulative analysis. See e.g. Cherry v. State, 659 So.2d 1069, 1074 (Fla. 1995) (remanding for an evidentiary hearing based upon cumulative effect of several ineffective assistance of counsel claims).

The trial court should have held an evidentiary hearing on these claims regarding trial counsel's ineffectiveness. Failure to do so denied Mr. Mordenti due process of law and a full and fair evidentiary hearing. Johnson v. Singletary, 647 So.2d 106 (Fla. 1994); Provenzano v. State, 750 So.2d 597 (Fla. 1999). The lower court also erred in summarily denying Claim VIII- Trial Counsel's Failure to Properly Assert Batson and Neil, ruling that counsel's failure to object must be so prejudicial that the defendant was denied a fair trial relying

upon Martinez v. State, 655 So. 2d 166 (Fla. DCA 1995) (PCR. 1194). Martinez, however, dealt with an allegation that seated jurors were biased against the defendant. Martinez at 168. Mr. Mordenti's claim on the other hand, is based upon his constitutional right to have his jury made up of a fair cross representation of the community and trial counsel's failure to properly object and require the state to make a showing of race-neutral reasons for striking jurors. During selection of the jury that was to try Mr. Mordenti, the prosecutor attempted to strike prospective juror Ruby Cutler for cause. The judge denied that request (R. 228). The prosecutor then exercised a peremptory challenge to excuse Ms. Cutler, whereupon the following discussion took place among the court and counsel for the State and counsel for the defense:

> THE COURT: Ruby Cutler.
>
> Mr. Atti?
>
> MR. ATTI: She's okay, Judge.
>
> MS. COX: Your Honor, we're going to strike her.
>
> MR. WATTS: Could I ask for a reason? She's a negro.
>
> THE COURT: Okay. You need to give me some reason why the defense feels that the challenge is being exercised for racial reasons.
>
> MR. WATTS: I can't, Judge, sorry. I'll withdraw that request.
>
> THE COURT: Okay. The only--you only reason for saying that is that she is black?
>
> MR. WATTS: She's a Negro. I can't go any

> further than that, Judge. I can anticipate the State's response, so I won't even request that. We'll move on. Thank you.

(R. 237-238).

Trial counsel's failure to pursue his objection was ineffective representation. Trial counsel failed to inform himself of the requirements of State v. Neil, 457 So. 2d 481 (Fla. 1984), and Batson v. Kentucky, 476 U.S. 79 (1986), both of which should have been central to his argument in the trial court. Had he known these fundamental cases, he would have known what to request of the court. Failure to know such basic law is deficient performance and unreasonable.

It is also well settled law that the presence of one or more blacks on a jury does not save the state from a Neil/Batson mistrial. Foster v. State, 557 So. 2d 634 (Fla. 2nd DCA 1990); Smith v. State, 571 So. 2d 16 (Fla. 2nd DCA 1990); Smith v. State, 574 So. 2d 1195 (Fla. 3rd DCA 1991); United States v. David, 803 F.2d 1567 (11th Cir. 1986); United States v. Battles, 836 F.2d. 1084 (8th Cir. 1987); and Fleming v. Kemp, 794 F.2d 1478, 1483 (11th Cir. 1986).

Trial counsel was unaware of the basics of the law in this area, that "the command of Batson is to eliminate, not merely minimize, racial discrimination in jury selection," David, 803 F.2d at 1571. Had trial counsel informed himself of the basics in this area he would have been aware of his obligations under Slappy, 522 So. 2d at 20. The law requires more of trial counsel than merely making his motion and settling back to an observer role or giving up. "Thus it is important that the defendant come forward with facts, not

just numbers alone, when asking the (circuit) court to find a prima facie case," United States v. Moore, 895 F.2d 484, 485 (8th Cir. 1990)(emphasis in original). Trial counsel must actively "contest these reasons" offered by the state for peremptory challenges against black jurors, Happ v. State, 596 So.2d 991 (Fla. 1992).

Examining a prosecutor's questions and statements during voir dire are a relevant part of this inquiry, Battle, 836 F.2d at 1085. "[A] pattern of discriminatory strikes, the prosecutor's statements during voir dire suggesting discriminatory purpose, or the fact that white persons were chosen for the petit jury who seemed to have the same qualities as stricken black venire persons" all can be considered, United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990). The government's use of peremptory challenges in other cases against other defendants may also be relevant, United States v. Gordon, 817 F.2d 1538, 1541-1542 (11th Cir. 1987). In order to meet the requirement of race neutrality "the proffered reasons must bear some relationship to the case at bar. If the government offers explanations that are facially neutral, a defendant may nevertheless show purposeful discrimination by proving the explanation pretextual," United States v. Joe, 928 F.2d 99, 102 (4th Cir. 1991). If trial counsel had acted effectively he would have notified the court of the need for a Batson hearing and challenged any reasons advanced by the state. Then the Neil process could have proceeded as intended. "The trial court may not simply accept, at face value, the state's rebuttal. Rather, the State's explanation must be an uncontested fact, supported by the record, or supported by

observations of the trial judge placed in the record." Williams v. State, 547 So.2d 179, 180 (Fla. 4th DCA 1989). Accordingly, the lower court erred in summarily denying this claim.

Finally the lower court erred in summarily denying Claim XVII - Failure to present Skipper evidence (PCR 1203). In Mr. Mordenti's post conviction motion, he alleged that trial counsel rendered ineffective assistance of counsel for failing to present evidence of the entire period of time that he was out on bond until his trial through sentencing. Mr. Mordenti was initially placed on house arrest but was then taken off and allowed to resume his normal schedule. In fact, he was even issued a driving permit. He demonstrated good behavior pending his trial while out on bond. The failure to present this evidence denied Mr. Mordenti a reliable sentencing determination in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Skipper v. South Carolina, 476 U.S. 1 (1986).

The United States Supreme Court has held that a jury must be permitted to consider, as mitigating, any evidence concerning a defendant's background and record for a basis for a sentence less than death. Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586 (1978). The failure of trial counsel to investigate and present this evidence denied Mr. Mordenti the effective assistance of counsel at trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Garcia v. State, 622 So.2d 1325 (Fla. 1993).

The files and records do not conclusively rebut Mr. Mordenti's claim. Consequently, the lower court erred in failing to grant an evidentiary hearing on this claim and consider it.

Individually and collectively, the circuit court's summary denial of these claims denied Mr. Mordenti a full and fair evidentiary hearing and due process.

ARGUMENT VI

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. MORDENTI'S NEWLY DISCOVERED EVIDENCE CLAIM AND ERRED IN FAILING TO ADDRESS EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING SUPPORTING THIS CLAIM.

Mr. Mordenti has asserted his claim in the alternative, i.e., either the evidence supported his Giglio, Brady, ineffective assistance of counsel claims and/or his claim of newly discovered evidence vending his conviction and sentence constitutionally unreliable. Jones v. State, 709 So. 2d 512 (Fla. 1988). (PC-R. 1325). The circuit court failed to assess evidence presented at the evidentiary hearing regarding the revelation of Horace Barnes' false trial testimony, Agent Malone's false or misleading testimony regarding hair evidence, and Jack Riley's testimony regarding metallurgy and the bullets. The lower court erred in failing to address this claim and this evidence. Mr. Mordenti was denied due process and a full and fair evidentiary hearing as a result.

CONCLUSION

For all of the foregoing reasons, this Court should grant Mr. Mordenti a new trial. A terrible injustice will continue if it does not.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail, postage prepaid, to Robert Landry, Assistant Attorney General, Department of Legal Affairs, Westwood Building, 7th Floor, 2002 North Lois Avenue, Tampa, Florida 33607 this 19th day of December, 2002.

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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