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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"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.

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REPLY ARGUMENT I

A. Giglio Violation

1. Legal Standard

In its Answer Brief, the State relies upon Rose v. State, 774 So. 2d 629, 635 (Fla. 2000), as establishing that for Giglio error to be reversible the false or misleading nature of the evidence "put[s] the case in such a different light as to undermine confidence in the verdict." Answer Brief at 28. However, this Court has recently recognized that the language in Rose was erroneous:

> We recede from Rose and Trepal [v. State, 846 So. 2d 405, 425 (Fla. 2003)] to the extent that they stand for the incorrect legal principle that the "materiality" prongs of Brady and Giglio are the same.

Guzman v. State, 28 Fla. L. Weekly S829, 2003 Fla. LEXIS 1993 *16 (Fla. 2003). This Court proceeded to explain, "[t]he State as beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Id. at *18. This Court explained that this is a "more defense friendly standard" than the one used by the State in its Answer Brief or by the circuit court below. Id. at *19.

Moreover, the circuit court employed the wrong standard in reviewing Mr. Mordenti's Giglio claim as well. The circuit

court relied upon this Court's formulation of the Giglio standard that was set forth in Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001). (PC-R. 1409). However, in Guzman, this Court specifically recognized that the Giglio test set forth in Ventura v. State was erroneous in that it employed the materiality standard from Brady as applicable to Giglio claims instead of requiring the State to prove that the presentation of false or misleading evidence was harmless beyond a reasonable doubt.

The State in its Answer Brief also misrepresents the import of the decision in Alcorta v. Texas, 365 U.S. 28 (1957), cited in the Initial Brief. Answer Brief at 29. In Alcorta, the United States Supreme Court held that to establish a due process violation it was not necessary to prove that the challenged testimony was technically false. Due process was violated where the testimony in question "taken as a whole, **gave the jury the false impression** that his relationship with petitioner's wife was nothing more than casual friendship. This testimony was elicited by the prosecutor who knew of the illicit intercourse between [the witness] and petitioner's wife." Alcorta v. Texas, 365 U.S. at 31 (emphasis added). As has been explained elsewhere, "[t]he term 'false evidence' includes the 'introduction of

specific misleading evidence important to the prosecution's case in chief . . . .' Donnelly v. DeChristoforo, 416 U.S. 637, 638 (1974)." Troedell v. Wainwright, 667 F. Supp. 1456 (S.D. Fla 1986).

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

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

As to Mr. Mordenti's claim that the prosecutor made false representations to the jury regarding his February 1990 statement to law enforcement, the State in its Answer Brief "denies that there was any prosecutorial misconduct or a denial of due process." Answer Brief at 25. In support of this assertion, the State relies upon Detective King's trial testimony that on July 13, 1989, Mr. Mordenti was questioned about a June 7th phone call from Larry Royston's mobile phone and indicated that "[h]e had never heard of the Roystons and didn't know anything about it" (R. 497).[1]

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[1]Det. King's quoted testimony concerned the July 13, 1989, statement which was before Gail Mordenti Milligan advised Mr. Mordenti that she had arranged for her daughter, Wendy, to work for Larry Royston (R. 363, D-Ex. 26, at 17). According to the police report Det. King wrote about the July 13th interview, Mr. Mordenti told him that he did "not remember getting a call from [Gail] on 7 Jun 89. He would have been in the office that day." Mr. Mordenti did represent that "[h]is ex-wife, Gail, calls almost daily as they are both in the car business" (D-Ex. 8). Mr. Mordenti's interview occurred the day after Gail Mordenti Milligan was interviewed on July 12th, and "when questioned about making a 13 minute phone call on 7 June 89" from Larry Royston's mobile phone, she then said "she

However, King's testimony as to Mr. Mordenti's statement in July of 1989 hardly constitutes support for the accuracy of the Ms. Cox's closing argument at the trial, wherein 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)(emphasis added).[2] The prosecutor relied on her false argument to conclude her initial closing:

> The 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)(emphasis added).

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has made calls on Larry's mobile phone" and that "the reason she made the phone call and if it was on the mobile it was in reference to antique cars" (D-Ex. 7).

[2]The reference to Mr. Mordenti's telephone conversation with Gail is regarding the March 8th phone call she made after she allegedly received immunity. The phone call was made at the direction of law enforcement while Gail was acting as an agent of the State seeking to elicit an incriminating statement from Mr. Mordenti.

The prosecutor acknowledged at the 2001 evidentiary hearing that at trial she had possession of D-Ex. 5, a police report, introduced at the evidentiary hearing (PC-T. 23). 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).

The prosecutor deliberately misrepresented Mr. Mordenti's February 1990 statement to the police to then falsely argue 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). Miller v. Pate, 386 U.S. 1, 6 (1967)(due process violated where "[t]he prosecution deliberately misrepresented the truth").[3]

[3]The State also cites in its Answer Brief the testimony of Det. Kroll as supporting the accuracy of the prosecutor's argument. Kroll testified in a proffer outside the jury's presence that on the day of Mr. Mordenti's arrest the police arranged for a meeting between Mr. Mordenti and Mr. Royston in the booking process. Kroll testified, "Well, I had Mr. Royston by the arm. We were walking out, and Mr. Mordenti was coming in, and I said something to the effect, 'Oh, Larry, here is Michael Mordenti. What a small world.' And Mr. Royston said, 'Never seen this man before in my life.' And Mr. Mordenti says, 'I don't know what you're talking about.'

b. *Regarding Gail's Immunity*

The State in its Answer Brief fails to address the fact that the jury and even this Court on direct appeal were misled by Gail Mordenti Milligan's false testimony as to the extent of her immunity, and by the prosecutor's closing argument, "She has immunity for this crime" (R. 1193). After reviewing the record, including the testimony of Gail Mordenti Milligan and the prosecutor's closing argument, this Court indicated in its direct appeal opinion, "[f]or her testimony, Gail Mordenti was offered complete immunity." Mordenti v. State, 630 So. 2d 1080, 1083 (Fla. 1994). In fact, Gail testified at trial, "as long as I told the truth, that I had total immunity" (R. 661). The trial prosecutor stated in her closing, "she has immunity for this crime" (R. 1193).

And we walked out, and that was it." (R. 577). After the defense withdrew its objection to this testimony, Kroll's only testimony before the jury regarding this meeting was that Michael Mordenti encountered Mr. Royston "at the Pinellas County Jail booking area on March 8th, 1990." During this encounter, "Did that person, Michael Mordenti, ever acknowledge in any way that he knew Larry Royston? A. No, he didn't." (R. 581). Kroll's testimony has nothing to do with the February 1990 statement by Mr. Mordenti, and it does not bolster any contention that the prosecutor's argument was proper under the Fourteenth Amendment. There was absolutely no evidence presented at trial that Mr. Mordenti had ever met Mr. Royston face-to-face. But more importantly, the State was aware that Mr. Mordenti had acknowledged to the police in February 1990 that Gail had talked to him about Larry Royston, and he knew that Wendy, his step-daughter, had worked for Royston starting sometime after the murder.

In its Answer Brief, the State asserts that Gail Mordenti Milligan was told and understood "that if she didn't tell the truth she could be prosecuted for murder and conspiracy." Answer Brief at 13. Again later, the State says, "[s]he understood that if she didn't tell the truth she could be prosecuted for the crime of first degree murder." Answer Brief at 27. But of course, that is the definition of transactional immunity. And that is the immunity that she was not provided.[4]

Moreover, the use immunity that Gail received resulted from the State Attorney subpoena that was served upon her. However, Gail testified at trial that 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

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[4]It is not clear from its Answer Brief that the State understands the difference between "transactional" immunity (which Gail did not have) and "use" immunity (which was extended to Gail by virtue of testifying pursuant to a subpoena). Use immunity covers statements and means that the statements protected by the immunity will not be used in a criminal prosecution, except in a prosecution for perjury. Since Gail only had use immunity, the State was free to charge her with first degree murder at any time.

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). Gail explained that “Lee Atkinson [a prosecutor] read a paper to me and explained to me exactly what immunity meant; that **I would not be prosecuted as long as I told the whole truth**; that if I lied about anything, or I left anything out, that I could then be prosecuted. **But as long as I told the truth, that I had total immunity**.” (R. 661)(emphasis added).[5]

The trial prosecutor did not correct this false testimony. The police did not have the power to bestow immunity. The subpoena that was served carried use immunity with it. And Lee Atkinson did not grant Gail any immunity. As he explained at the 2001 evidentiary hearing, “she had use immunity by virtue of that subpoena” (PC-T. 252). “Once I put her under oath, pursuant to that subpoena, and started the process of taking that sworn testimony, she had immunity for its use against her for any purpose” (PC-T. 253). Mr. Atkinson testified:

> Any other agreement with any witness that we would

[5]This testimony that she had “total immunity” was elicited in direct examination by the trial prosecutor, Ms. Cox.

> have had in any homicide, particularly a capital case, would have been in writing, either in a specific contract or in a plea bargain that was placed on the record in front of a Judge. * * * In this instance, to my knowledge, **Ms. Mordenti would have had explained to her that she was not immune from prosecution**, and, in fact, unless she got something in writing to the contrary, what she got is what's reflected in the statute, use immunity.

(PC-T. 255)(emphasis added). He categorically concluded, "**the fact was she was not receiving any transactional immunity, nor was she promised any transactional immunity**" (PC-T. 255)(emphasis added).

The trial prosecutor, Ms. Cox, was aware that Gail had not been granted "total" immunity. In 2001, **she testified that Gail only had "use immunity."** (PC-T. 26). Gail had no immunity "other than what immunity being under subpoena covers." (PC-T. 69). Yet, Ms. Cox argued to Mr. Mordenti's jury, "**She has immunity for this crime**." (R. 1193)(emphasis added).

But in addition, the State knew from a police report that it was Gail who sought to negotiate with the police regarding immunity from prosecution. Det. Baker testified in 2001:

> 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).

At Mr. Mordenti's trial, the prosecutor did not correct the false and misleading testimony. In fact, she relied upon it as evidence enhancing Gail's credibility. 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)(emphasis added).[6] 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.

[6]Gail received the use immunity that accompanied the State Attorney subpoena served upon her. Thus, the immunity that she actually received was promised long before the police served the subpoena. The prosecutor's closing falsely suggests that the immunity was negotiated.

1193)(emphasis added).[7] And the prosecutor affirmatively advised the jury that Gail "has immunity for this crime" (R. 1193).[8]

The testimony and the representation in the closing argument were knowingly false. Due process was violated. Miller v. Pate, 386 U.S. at 6 (due process violated where "[t]he prosecution deliberately misrepresented the truth").[9] Under Guzman, this false testimony and argument was not harmless beyond a reasonable doubt.[10]

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

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[7]In fact, Gail already had use immunity. It was extended when she was served with the State Attorney subpoena. The prosecutor's argument is false.

[8]Of course, this absolved the prosecutor in the eyes of the jurors of any moral obligation to prosecute Gail as an accessory to first degree murder. It was made to appear to the jury that the State had to grant Gail immunity from prosecution for the crimes she committed in order to get her testimony. The phantom "total immunity" was used to vouch for Gail's credibility as well as the trial prosecutor's integrity.

[9]The State in its Answer Brief cites Gail's allegation that Mr. Mordenti had told her in the months following the murder that she could be prosecuted as an accessory to murder (Answer Brief at 27). But this testimony has nothing to do with Gail's representation of the scope of the immunity that she received in March of 1990.

[10]Judge Tharpe did not evaluate this claim under the Giglio standard; he only addressed whether trial counsel was deficient in failing discover and present in cross-examination the true scope of the immunity (PC-R. 1386-87).

The State asserts that the prosecutor properly argued "that the phone records showed Royston made numerous phone calls to T & D." Answer Brief at 31. Actually, over Mr. Atti's objection, the prosecutor argued in her closing 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). The representation made in the closing was that Gail was working at T & D in May 1989.[11] This was necessary to show that the phone calls to T & D were of any relevance and to bolster Gail's claim that Royston was calling to pressure her to arrange the murder. The value of the phone records is reduced to zero if Gail was not there when the phone calls were made.[12] Defense counsel

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[11]The prosecutor knew that Gail did not commence working at T & D until June 1st. The prosecutor was present at Gail's deposition conducted on July 5, 1991, on the eve of trial. In the deposition, Gail testified she started working at T & D Auto "June 1st" (D-Ex. 26 at 94). Certainly, Judge Tharpe overlooked Gail's testimony in her pre-trial deposition that was introduced at the evidentiary hearing when he indicated that Mr. Mordenti had failed to demonstrate that the trial prosecutor knew that Gail started working at T & D on June 1st (PC-R. 1412).

[12]The significance of the date on which Gail began at T&D was not lost upon the prosecutor. Notes in Ms. Cox's

specifically objected to the argument, saying that Gail did not start working at T & D until June. 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 was that she started working there around June 1st." (R. 1252-53). The objection was erroneously overruled. In her 2001 testimony, Gail reiterated that she started June 1st. The prosecutor's argument was false.[13]

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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. Yet, Gail advised the State and the defense during her July 5, 1991, deposition that she started at T & D Auto on June 1st of 1989 (D-Ex. 26 at 94).

[13]The trial prosecutor argued in her initial closing:

> Now, you are also going to have the phone records. You can look at them, and you'll see that during this period of time Gail was being called constantly by Larry Royston from his cellular phone, not only at her home, but he called Ted's [sic] Auto and Marine during the month of May up until June 7th seventeen times. And towards the end of May he called her twice on the 22nd of May; three times of the 26th of May; two times on the 30th of May; on the 31st of May; two times on the 2nd of June; two times on the 6th of June, and once on the 7th of June.

(R. 1186). In rebuttal argument, the trial prosecutor argued, "In May -- Gail Mordenti was working there in May" (R. 1254).

The circuit court denied relief as to this false assertion, saying, "Defendant has failed to demonstrate that the statement of when Gail Mordenti started working at T & D was material." (PC-R. 1412). However, this Court made it clear in Guzman that it is the State's burden to prove that the false argument was harmless beyond a reasonable doubt. This has not been demonstrated by the State. The false argument was made during the closing argument to provide false corroboration to Gail's testimony which was the sole basis for the conviction.

d. *When Gail Received the Gun and Bullets*

As the State acknowledges in its Answer Brief, the

However, the May phone calls to T & D Auto were not to Gail, as Gail had advised the prosecutor during her deposition when she testified that she did not work at T & D Auto until June 1, 1989 (D-Ex. 26 at 94). The prosecutor presented this false argument to provide false corroboration of Gail's story.

The prosecutor also used this false argument in another way. In her closing, she argued:

> And for a time, she tells you that she was involved in his preparation for this crime, for the murder of Thelma Royston. She was unemployed. She had huge debts and she was basically desperate. And so for a time, the prospect of going into business with Larry Royston was enough for her to go out and look for someone to do this unspeakable act.
>
> But that time passed. **It passed May 1st when she started with T & D. She had a job. She had an income. She still had debts, but she was no longer interested**.

(R. 1187)(emphasis added). This argument was false. And the prosecutor, who had sat through Gail's July 5th deposition, knew it was false.

circuit court found that as to the false evidence regarding Gail's pre-trial statement that she received the gun and the bullets before the murder, "[t]his 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." Answer Brief at 32, quoting circuit court order at PC-R. 1416. Clearly, the circuit court imposed the burden upon Mr. Mordenti to establish prejudice. However, this Court explained in Guzman v. State, "[t]he State as beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Guzman, 2003 Fla. LEXIS 1993 at *18.

In arguing that no prejudice flowed from the false evidence, the State says, "it matters not whether Mordenti provided the gun to Gail before or after the homicide; it was not the murder weapon." Answer Brief at 34. However, at trial, the State introduced expert testimony 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).[14] The State was contending that Gail's testimony on the point was essential to establish who had possession of the gun and the accompanying bullets at the time of the homicide. In her closing argument, the trial prosecutor falsely argued, "[b]ut those bullets came from him. Gail says he gave her that gun loaded, so the bullets that were recovered from Gail's gun came from Michael Mordenti" (R. 1254). That was why defense counsel described the true evidence that the jury did not hear as "absolutely pivotal."[15] (PC-R. 563-64).[16]

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[14]If this evidence did not matter, as the State now contends, then why bring an FBI agent to testify at trial regarding the alleged compositional match?

[15]The pivotal nature of Gail's prior inconsistent statement that she received the gun and the bullets before the murder is corroborated by what transpired during Mr. Atti's closing. When Mr. Atti attempted to make reference to Gail's prior inconsistent testimony that she received the gun and the bullets prior to the murder, the trial prosecutor objected before Mr. Atti was able to refer to the prior inconsistent statement (R. 1223-24). The trial prosecutor was successful in convincing the presiding judge to preclude Mr. Atti from referring to the fact that Gail Mordenti Milligan previously swore that she received the gun and the bullets before the murder (1233-34).

[16]The State makes a vague allegation in its brief that "Appellant has failed to establish that witness's testimony was knowingly false or to establish that the prosecutor knew it to be false." Answer Brief at 34. However, the circuit accepted as a matter of fact that the prosecutor knew that the testimony was either false or misleading and designed to preclude the defense from presenting Gail's prior sworn testimony that she received the gun and the bullets prior to the homicide. (PC-R. 1415-16). This is because the prosecutor's handwritten notes clearly show that she was aware

The circuit court denied relief, saying, "Defendant has failed to prove that this was a 'material' fact as it is not alleged that 'the gun' was the murder weapon." (R. 1416). However, this Court made it clear in Guzman that it is the State's burden to prove that the false argument was harmless beyond a reasonable doubt. The false evidence was used to tie in the relevance of the FBI lead bullet analysis. Certainly, the State cannot demonstrate that the introduction of FBI testimony regarding a compositional match between the bullets with the gun and the bullet removed from the victim's body was harmless beyond a reasonable doubt.

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

As to Gail's testimony that Mr. Mordenti was involved with bank robbers,[17] the State says no due process violation occurred because the testimony was technically true, since Mr. Mordenti was assisting the FBI to locate, apprehend and prosecute Horace Barnes, a bank robber (Answer Brief at 35).

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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."

[17]The actual testimony Gail provided was that Mr. Mordenti "Because of the murder, he 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 difference between being involved with bank robbers and being involved with the FBI trying to catch bank robbers is apparently lost on the State. The clear inference was that Mr. Mordenti was assisting the bank robbers, not that he was assisting the FBI.[18] This was presented in conjunction with 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.

Further use of this misleading representation was made by the prosecution to lead the jury to erroneous inferences. In her closing argument, the prosecutor replayed the tape of Gail's phone call to Mr. Mordenti that was made as an agent of the State on March 8, 1990. Before replaying the tape, the prosecutor told the jury to listen because "he's very cagey on that phone conversation, he never admits anything flat-out, but **you can read between the lines**, and you can see from what he says and how he says it that he's involved. **And he knows what's going on, and he's concerned**" (R. 1196)(emphasis added).

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[18]In Det. Baker's March 7, 1990, police report he articulated Mr. Mordenti's February 20, 1990, statement regarding this as, "[Mordenti] states he is involved with the FBI reference a bank robbery. States that FBI Agent Barry Carmody, phone 228-7661, is the one he is dealing with. Note: This was confirmed by writer." D-Ex. 5.

During the taped conversation that was introduced into evidence at trial, the following exchange occurred:

> [GAIL]: Well, Michael, I've got a subpoena from the State Attorney's Office. I mean, we're not - - you know, they're not playing games here. I mean, you know - -
>
> [MR. MORDENTI]: What do you want me to say? I don't know what to tell you. **I was just talking to my friend**. He's sitting right here now. He told me that they are also gonna subpoena Michael [Milligan].
>
> [GAIL]: Michael who?
>
> [MR. MORDENTI]: Your Michael [Milligan].
>
> [GAIL]: My Michael?
>
> [MR. MORDENTI]: That's what I heard.
>
> [GAIL]: They're going to subpoena him for what?
>
> [MR. MORDENTI]: **That's what I heard**.
>
> [GAIL]: Oh, Michael, I am really upset about this, you know.
>
> [MR. MORDENTI]: Stay cool. There's nothing to worry about. You didn't do anything.
>
> [GAIL]: Well, yeah, if they subpoena Michael, Michael's crazy.
>
> * * *
>
> [GAIL]: Now, (sigh) what if - - what if - - yeah, but what if - - you know, I don't know. What if they have information that I - -
>
> [MR. MORDENTI]: **They have nothing**.
>
> [GAIL]: They have nothing?
>
> [MR. MORDENTI]: **Nothing.**
>
> [GAIL]: **That's what your friend says**?
>
> [MR. MORDENTI]: They're on a fishing expedition, as usual.
>
> [GAIL]: You're sure?
>
> [MR. MORDENTI]: They - - positive. They figured - - I don't want too say too much on this phone. I'd rather - - why don't you meet me at the sale tonight, and I'll tell you everything point blank.

(PC-T. 1055-56, 1060)(emphasis added).[19] What Gail knew and what the prosecutor knew, but what the jury did not know, was that the "friend" was the FBI agent, Barry Carmody, who Mr. Mordenti was assisting and who was sitting in Mr. Mordenti's office when Gail called (PC-T. 284). Mr. Mordenti's inside knowledge came from law enforcement because Mr. Mordenti was a good guy assisting the guys in the white hats, not because he was helping criminals, i.e. bank robbers.[20] The evidence

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[19]Throughout the Answer Brief, the State relies upon Mr. Mordenti's comments in this conversation as demonstrating "appellant's desire that Gail not be cooperative with police and that she not contact Royston." Answer Brief at 53. The comments are equally consistent with an innocent Mr. Mordenti, having been advised by Gail that she was not involved, telling Gail to stay cool and not overreact and create a problem, just like any criminal defense lawyer advising a hysterical client would do.

[20]In fact, Det. Baker's March 7, 1990, report reveals that Det. Baker arranged a meeting on March 7th with Lee Atkinson and Barry Carmody to inform them what they had recently learned in the investigation. This was that on February 19, 1990, "'word on the street' was that the ex-boyfriend of Gail [Milligan] was talking about Larry Royston asking Gail to find someone to kill his wife." (D-Ex. 5, at 5). During the ensuing follow up investigation it was learned from Thomas George on February 23, 1990, that "Gail had a lot of money in late June and was broke before this. [Thomas] [s]tates he asked Gail how she came into this money and she said Mike, her boyfriend, had given it to her." (D-Ex. 5, at 3). The police also talked to Lynn Lewis on February 23, 1990, and she advised that "Glen [Donnell] told her Gail had contacted him reference Larry Royston wanting her to find a hit man to kill his wife" (D-Ex. 5, at 4). The police also talked to Glen Donnell on March 6, 1990, and he advised that "Larry and Gail had a relationship and it wasn't in reference to selling cars" (D-Ex. 5, at 5). Glen indicated that "he thought it unusual

regarding Mr. Mordenti's "involvement" with bank robbers,"taken as a whole, **gave the jury the false impression.**" Alcorta v. Texas, 365 U.S. at 31 (emphasis added). The jury was specifically told by the prosecutor to "read between the lines" (R. 1196). This was clearly for the purpose of getting the jury to make false inferences regarding Mr. Mordenti's comments in the taped statement. Due process was violated by "the 'introduction of specific misleading evidence important to the prosecution's case in chief . . . .' Donnelly v. DeChristoforo, 416 U.S. 637, 638 (1974)." Troedell v. Wainwright, 667 F. Supp. 1456 (S.D. Fla 1986). Certainly, this was not harmless beyond a reasonable doubt.

f. *Horace Barnes & Tracey Leslie*

As to the presentation of Horace Barnes' false testimony, the State focuses upon this Court's direct appeal discussion of Mr. Barnes' testimony that Mr. Mordenti had indicated that

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because Mike [Milligan] and Gail were going together at the time" (Id.). Glen also indicated that he was talking with Gail approximately two weeks before the murder and told her that he "didn't know where he was going to get the funds to cover expenses when Gail made the comment, 'Well Larry is looking to have his wife murdered or offed and is willing to pay $10,000 to have it done.'" (Id.). Glen further advised that "he believes Gail is involved in this murder, because Gail knows a retired hit man from Massachusetts" (Id.). As a result of this interview, surveillance of the residence of Gail and Michael Milligan was undertaken.

he was in the mob. Answer Brief at 36. This Court found the admission of Barnes' testimony to be error, but ruled that "the elimination of the cellmate's testimony would not have changed the outcome." Mordenti v. State, 630 So. 2d at 1085.

Clearly, this Court was misled by the State as to who Horace Barnes was and his relationship with Mr. Mordenti. **He was not a cellmate of Mr. Mordenti.** He was a bank robber who was apprehended and prosecuted by federal authorities as a result of the assistance provided by Mr. Mordenti. Barnes in fact testified to more than merely the "mob" comment. He testified that he was federally incarcerated as a result of a federal prosecution in Tampa (R. 746). He testified that he was receiving no consideration for his testimony and that he was not "promised anything" for his testimony (R. 746). He testified that he knew Michael Mordenti, and he identified him in the courtroom (R. 746). He testified that he met Michael Mordenti in October or November of 1989 (R. 747). According to Barnes, Mr. Mordenti identified himself by letting Barnes "know that he was in the mob" (R. 747). He testified that he went to see Mr. Mordenti "at his car lot in St. Petersburg" (R. 750). He testified that he went there with a Joel Darden and observed "Darden purchase a gun from Mr. Mordenti" (R. 750).

The trial prosecutor presented Barnes as demonstrative evidence of the "shady" people that Mr. Mordenti was "involved with." This was clearly meant to corroborate Gail's testimony to that effect. During her closing, Ms. Cox told the jury "read between the lines" (R. 1196). Ms. Cox had presented Mr. Mordenti's jury with a whole litany of false innuendos, all designed to portray Mr. Mordenti as a mobster, a gun dealer, a hit man, and a liar. The false innuendos provided support for Gail's testimony that Mr. Mordenti had "throw away pieces" and he "was dealing with some people that were shady." Mordenti v. State, 630 So. 2d at 1084.[21]

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[21]In arguing against a motion for new trial filed on the basis of Mr. Barnes' testimony that Mr. Mordenti was in the mob, Ms. Cox articulated the reason she presented Barnes' testimony:

> I think it's relevant for the reasons alleged at the time because it goes to show that his association with an enterprise that would allow him to get someone at short notice so corroborates Gail Mordenti's versions of how the crime occurred because according to Gail Mordenti, the morning of the crime is when it had to have been planned unbenounced [sic] to her, but that phone call that was made by Larry Royston from T & D's Auto and Marine where she was working to Michael Mordenti must have been the pivotal conversation and then that evening he's there with somebody else. So that went to corroborate or to show that he had the means to commit this crime or to have access to someone else.

(R. 1557).

In 2001, Mr. Barnes was called as a witness by Mr. Mordenti and not only acknowledged that his story was entirely made up to get back at Mr. Mordenti for helping the FBI apprehend him, but also revealed that Ms. Cox had in fact promised him consideration

for his testimony (PC-T. 294-97).[22]

Not only did the State use the false evidence to assassinate Mr. Mordenti's character, its lies and manipulation of the evidence itself impeaches the credibility of the prosecution's actions in the case. Kyles v. Whitley, 514 U.S. 419, 446 (1995). Due process was violated. "The prosecution deliberately misrepresented the truth," thereby violating due process. Miller v. Pate, 386 U.S. at 6. Given

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[22]Barnes' testimony in 2001 is corroborated by a report written by Det. Baker regarding his interview of Barnes on March 7, 1990. In the report, Det. Baker stated of his interview of Barnes, "[i]t was apparent Barnes wanted a piece of Mordenti because he burned him and his girlfriend" D-Ex. 10, at 3).

Barnes' 2001 testimony is also corroborated by a handwritten note by one of the trial prosecutors that had written in big letters, "Get state charges taken care of while Tracey is here" (D-Ex. 60). Tracey referred to Tracey Leslie, Horace Barnes' girlfriend and co-defendant in the bank robbery case (PC-T. 703). Barnes' 2001 testimony is also corroborated by a note from Tracey Leslie dated 4/10/91 that Ms. Cox conceded "would appear that - - she is thanking [Ms. Cox] for help on state charges" (PC-T. 721).

Barnes testified in 2001 that he received a contact visit with Tracey Leslie in exchange for his testimony (PC-T. 296). Ms. Cox acknowledged that Barnes and his girlfriend may have been permitted to talk in a holding cell (PC-T. 686, 704).

the manner in which Ms. Cox asked the jury to "read between the lines," the deliberate misrepresentation of the truth cannot be shown by the State to be harmless beyond a reasonable doubt.

h. *Hotel Name*

In a motion for new trial, Mr. Mordenti's attorneys complained that they were never given the name of this hotel and believed that a Richardson violation occurred (R. 1561). In its Answer Brief the State asserts that because "there was no false testimony," there can be no due process violation under Giglio. However, the United States Supreme Court has held otherwise. In Gray v. Netherland, 518 U.S. at 165, the Supreme Court found deliberate deception of defense counsel qualified as a due process violation under the Giglio line of cases. Here, the defense attorneys were deliberately deceived, as trial counsel explained in a written a memo 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).

3. Cumulative consideration.

The State does not address, let alone contest, Mr. Mordenti's argument that the circuit court erred in failing to give cumulative consideration to the numerous instances of false and/or misleading evidence and argument. These

instances of false and/or misleading evidence and argument compounded each other. A new trial is required.

B. Brady claim

1. Legal Standard

The State argues that "due diligence" is an element of a Brady claim that the defense must prove. However, in a footnote, the State says, "whether the test is deemed three-fold or four-fold or whether the distinction is termed a semantic difference makes no difference. As explained in the test, appellant is not entitled to relief. The lower court analysis did not improperly turn on defense 'diligence.'" Answer Brief at 43 n. 12. Thus, the State seems to concede that "diligence" of trial counsel is not at issue, even though the State erroneously maintains that it is an element of a Brady claim.[23]

[23]Despite the State's refusal to recognize that there is no "diligence" element to a Brady claim, the Supreme Court has clearly stated that diligence is not a required element of a Brady claim. Strickler, 527 U.S. at 281. The State's effort to inject ambiguity into the Strickler opinion is premised upon a citation to footnote 33 in that opinion. However, an examination of the text of the opinion and the footnote clearly demonstrates that the Court is addressing there the "diligence" element of the cause/prejudice analysis that permits a federal habeas petitioner to overcome a state court procedural default. Strickler, 527 U.S. at 288 ("In the context of a Brady claim, a defendant cannot conduct the 'reasonable and diligent investigation' mandated by McCleskey to preclude a finding of procedural default when the evidence is in the hands of a the State").

2. The Circuit Court Misstated and Misapplied the Law.

The State does not address, let alone contest, Mr. Mordenti's argument that the circuit court erred in failing to give cumulative consideration to the numerous documents and the multitude of information withheld by the State. The Supreme Court held in Kyles v. Whitley, 514 U.S. 419, 446 (1995), that withheld exculpatory information 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).

3. The Withheld Exculpatory Evidence.

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

The State does not contest that Gail Mordenti Milligan's date book was in the possession of the trial prosecutor and was not disclosed to Mr. Mordenti's trial counsel. The only question at issue is whether this nondisclosure was material within the meaning of Kyles.

Of course under Kyles, the required evaluation must be conducted of all of the withheld exculpatory evidence, a matter conveniently overlooked by the State. Ignoring that requirement for the moment, it is also clear that the State fails to address the full impact of the information contained in the date book on Gail's trial testimony. As the trial

prosecutor testified in 2001, Gail's credibility "was a very important issue, yes, it was" (PC-T. 714). She also conceded, "if there were statements under oath that she made that were not true," that constituted "impeachment" of Gail's testimony (PC-T. 714-15).

The importance of Gail's credibility is also revealed by the trial prosecutor's closing argument. At the outset of the closing, the trial prosecutor said:

> So, really the only issue in this case is whether or not Michael Mordenti is the man involved.
>
> Michael Mordenti is the one who conspired with Larry Royston and caused Thelma Royston's death on June 7th, 1989. The only law that I'm going to specifically discuss with you that is important for you to listen to is the judge is going to tell you that a juror may believe or disbelieve any or all of the testimony of a witness, and that's your sole job.
>
> So, just the fact that someone comes in here and states under oath that something happened doesn't mean that you have to believe it. It's your job to judge the credibility of the witnesses.
>
> And I hope during this trial I've assisted you in your job, and assisted you in evaluating the credibility of the witnesses who have come and testified under oath.

(R. 1177-78). The prosecutor's initial closing ended with an argument that the case came down to a question of who was telling the truth, Gail Mordenti Milligan or Michael Mordenti:

> The 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 the truth.

(R. 1201)(emphasis added).

The date book that was in the prosecutor's possession establishes that Gail Mordenti Milligan's testimony was filled with falsehoods and that the trial prosecutor had not assisted anyone in receiving the necessary information to fully evaluate Gail's credibility.

The date book revealed that the luncheon between Gail and Larry Royston at which the solicitation of murder happened was April 11, 1989. Thus, no actions in the furtherance of the murder occurred prior to April 11th. This means the following testimony was demonstrably false as to its stated timing:

> – After she left her job with Automotion in February of 1989, Gail needed to find work, so she called Larry Royston and arranged the luncheon for "either late February, or the beginning of March" in order to see if he would invest in a business (R. 609-10).
>
> – After Larry revealed that he had no money to invest unless and until his wife was killed, Gail approached "three people" about killing Royston's wife (R. 612). The three individuals, Jack Gartley, Jerry Carter, and Bill "it's Rosenthal or Rosenfield" were approached "within a couple weeks," – "I think, in February, the beginning of March, and it was probably within a couple of weeks after that" (R. 675).
>
> – When those three individuals turned her solicitation down, Gail called Michael Mordenti who indicated that his interest (R. 614). Gail called Larry to tell him, but he instructed her that he did not want to know the name of the man who was going

to do it.[24] These conversations happened after the start of March (R. 616), but before Gail accompanied Mr. Mordenti to a motel near Larry's residence that occurred before the end of March (R. 677).

– In preparation for the murder Gail met Mr. Mordenti at a "Perkins Pancake House" (R. 617), and then rode in his car in the daylight to check out the lay out of Larry's residence (R. 619). This occurred before a night time trip that in turn occurred before the end of March (R. 677).

– Before the end of March of 1989 (R. 677), Mr. Mordenti picked up Gail at 1:30 a.m. (R. 620) and drove to a motel near Larry's residence and checked in (R. 620). After spending time in the motel room, Gail took Mr. Mordenti to near Larry's house so he could check it out for a couple of hours (R. 621). Gail picked him up at about six a.m. and returned home (R. 625).

– When she and Mr. Mordenti went to the motel before the end of March, Michael Milligan who moved in with her "either the end of March or beginning of April" (R. 677), was not living with Gail (R. 682).

– When she and Mr. Mordenti went to the motel before the end of March, Gail's daughter Wendy and her boyfriend were living with Gail (R. 680), and according to her deposition Wendy lived with Gail while they both worked at Automotion (D-Ex. 26, at 12).

– After the night that occurred before the end of March when they checked into the motel, Mr. Mordenti advised that the murder could not be done and that he would not do it (R. 625, 627), and Gail relayed this to Larry who refused to accept this answer, so Gail told Larry to stop calling her (R. 627).

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[24]At the evidentiary hearing in 2001, when confronted with the April 11th entry in her date book, Gail got tripped up in her story and testified that she told Larry to contact Jack Gartley, "[b]ecause I didn't know anyone, and Jack supposedly was connected. I told him to talk to Jack, that Jack would probably know people" (PC-T. 1103). This was in direct conflict with her trial testimony that Larry did not want to know who was committing the murder and that she was the one who contacted Jack Gartley.

The fact that Gail's testimony could have been shown to be untruthful in light of the date book that she had given to the trial prosecutor raises questions about the seriousness with which the prosecutor took Gail's promise to provide truthful testimony pursuant to her immunity. It provides a basis for turning around the principle theme of the prosecutor's closing:

> The 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 the truth**.

(R. 1201)(emphasis added).

But the date book does more than impeach Gail and the State's case. Its disclosure is necessary to conduct meaningful investigation for evidence that refutes that the events that Gail claimed happened. By not revealing to the defense the one item in its possession that demonstrated that Gail's time line was completely false, the State effectively shut down the defense's ability to link up other evidence that showed the events did not happen. For example, the date book reveals that Gail was living with Michael Milligan by the time of the April 11th luncheon (Q. And when was it that you started living with Michael Milligan? A. It was either the end of March or beginning of April." (R. 677)). This fact

casts new light on the credibility of Gail's claim that several weeks later Michael Mordenti came over at 1:30 a.m. to get her out of bed and take her to a motel (PC-T. 905). Certainly, it makes Michael Milligan an absolutely critical witness, as trial counsel testified in 2001 (PC-T. 905-08).

Similarly, the April 11th date suddenly links the luncheon with Gail's pre-scheduled interview on April 12th, when she gave a taped statement regarding Fortune Bank's claim that it was owed $191,812.00 by Automotion, Inc., pursuant to an agreement that Gail Mordenti signed as vice-president of Automotion in August of 1988 (PC-T. 1067, D-Ex. 58). In her taped statement of April 12, 1989, Gail blamed Jack Gartley for the missing money. In this taped statement Gail indicated that while she was vice-president of Automotion she lost money in the business. She initially invested $25,000, then she wrote an additional $7,000 in checks from her father's account, she took $11,000 in cash advances from her credit cards, she borrowed $12,000 against her house, she charge another $1500 on her gas credit cards, and she placed a lien against a 1970 Corvette for $10,000. The only money she received was $500 a week beginning in September until she left the business in February. Gail stated on April 12, 1989, "I want to at this time express my concern over my reputation and

the slur on my capacity to sell your vehicles. Jack [Gartley] has been an albatross around my neck" (D-Ex. 58). Gail then proceeded to make an offer: "I feel that I probably have information concerning the disposition of specific cars if the bank would be interested and requested specifics" (D-Ex. 58).[25]

In its Answer Brief, the State notes that on August 31, 1989, the Pinellas County State Attorney decided the missing $191,812.00 was a civil matter, and the criminal investigation was closed (Answer Brief at 45). Of course, this was over two months after Thelma Royston was murdered. It has nothing to do with whether it strains credulity that Gail after the April 11th luncheon and after the April 12th taped statement indicating that Jack Gartley was "an albatross around [Gail's] neck" would go to him and try to hire him to kill Thelma Royston. The circumstances of Gail's relationship with Jack Gartley were demonstrably different at the time of the April 11th luncheon than they were in late February or early March when Gail testified at trial that she contacted Jack Gartley.[26]

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[25]Based upon Gail's taped statement the Pinellas County Sheriff's Office opened a grand theft case file. The offense report shows that Gail Mordenti was again interviewed on May 4, 1989, with her attorney, James Low, present. In this interview, she indicated she had invested $55,000.00 into Automotion that she lost.

[26]Further, it changes the circumstances of what testimony Jack Gartley could provide. As a witness, he could have

But the date book contained additional information. It contained entries on June 7, 1989, the day of Thelma Royston's murder. As to the June 7th entries, the State argues, "[n]othing in the record establishes that this entry in the date book was favorable to the defendant (either exculpatory or for impeachment)." Answer Brief at 47. The State does not address the fact Gail that testified that the entry "Call on ticket for Michael" refers to Michael Milligan, the man she was living with and would marry in April of 1990 shortly after giving her immunized statement to law enforcement (PC-T. 1063). This was also the man who prior to Gail's March 8, 1990, statement the police suspected was the person that she had hired to commit the murder, the man who fit the

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provided the details of the circumstances of his relationship with Gail after April 11th. When he was called at the 2001 evidentiary hearing, he testified that Gail Mordenti "never" approached him for help in killing Thelma Royston (PC-T. 869, 878). He further indicated that due to the fact that Gail had cleaned out the business before her departure in February of 1989, which he discovered after she left (PC-T. 867), and due to Fortune Bank's law suit, he was forced to declare bankruptcy (PC-T. 871).

According to Jack Gartley, Larry Royston approached him in late May of 1989, and told him that he wanted to murder his wife (PC-T. 864-65, 880). Gartley also testified that he was aware that Larry Royston was "dating" Gail (PC-T. 868). In fact, he double-dated with them on three separate occasions (PC-T. 868).

Jack Gartley also testified in 2001 that Gail had told him numerous times that she "wanted to have [Mr. Mordenti's] knees broke because she wanted to hire somebody to kill him" (PC-T. 869, 883).

description of the suspect seen near the Royston residence shortly before the murder (D-Ex. 5, at 3, PC-T. 797, 1055, 1088).[27] 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.

The date book casts a whole new light on the case and upon Gail's credibility and whether she was telling the truth beyond any reasonable doubt (R. 1201). Under Kyles and Strickler, confidence is undermined in the outcome, and a new trial is warranted.

b. Undisclosed Interview of Michael Milligan.

The State in its Answer Brief does not acknowledge that Michael Milligan was the man with whom Gail was living at the time of the murder and at the time that Gail was picked up for questioning; he was the man who the police suspected was the hit man (PC-T. 905, D-Ex. 66). Clearly, the State had an obligation under the Florida Rules of Criminal Procedure to disclose Michael Milligan's name and any statements that he provided.

The State further fails to acknowledge that the

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[27]Det. Baker testified in 2001 that prior to the March 8, 1990, statement given by Gail, "Michael Mordenti was, in fact, not a suspect in the homicide" (PC-T. 790).

prosecutors interviewed Michael Milligan and took an oral statement from him. The State possessed notes of that statement (D-Ex. 14), but the statement was not disclosed to Mr. Mordenti's counsel. The only question under Kyles is whether confidence is undermined in the outcome, considering the undisclosed information contained in that statement cumulatively with the other undisclosed evidence.

The State does not address the notes of the undisclosed statement in the context of the other undisclosed information as is required under due process.[28] The State attempts to discount the Milligan statement by focusing on the sketchiness of Ms. Cox's note taking (Answer Brief at 48). However, the note in question stated:

> *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). There was no bank robbery in "6/89"; there was a murder of Thelma Royston. When this notation is considered cumulatively with the April 11th and the

[28]The State does make the bizarre assertion that the Michael being referred to in the notes is Michael Mordenti. The notes from the Michael Milligan interview are clearly denoted as from a meeting on 2/10/91 with "Michael Lee Milligan DOB 11/26/53" (D-Ex. 14). Moreover, the prosecutors acknowledged at the evidentiary hearing that in fact the interview was of "Michael Milligan" (PC-T. 40).

June 7th entries of Gail's date book, it clearly establishes matters that defense counsel needed to know and investigate in 1991, as trial counsel testified (PC-T. 905-08). However, contrary to the obligation under due process, the trial prosecutor did not disclose the notes and the date book, and Mr. Mordenti was deprived of the ability to have his trial attorneys conduct timely investigation into these matters to be prepared to either thoroughly present his case or thoroughly confront the State's witnesses. These undisclosed items considered cumulatively cast a whole new light on the case.

c. Undisclosed Interviews of Gail.

The State tries to deflect the fact that the State did not disclose statements obtained from its star witness, Gail Mordenti, in violation of the Florida Rules of Criminal Procedure, by asserting that "[i]f, as he claims, the thirteen minute phone call involved an innocent explanation of a potential boat sale, Mordenti who talked to Royston would have the information and could testify about it if desired." Answer Brief at 53. This position was rejected in Brady v. Maryland, 363 U.S. 83, 84 (1963), where the undisclosed statement was the co-defendant's acknowledgment that he was the actual killer, a fact that Mr. Brady knew. Nonetheless,

the United States Supreme Court held that the nondisclosure violated due process.

Further, the State refuses to consider the undisclosed statements from Gail cumulatively with the other withheld evidence. For example, the State had talked to John Trevena, a listed witness, and learned that in fact, Mr. Royston was trying to sell a boat that had been used in a movie. 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). This undisclosed information could have led Mr. Mordenti's counsel to obtain specifics from Mr. Trevena as to documentation that existed to prove this fact and to impeach Gail's contrary trial testimony.[29]

d. Statement of Royston's Attorney.

[29]The State quotes that portion of the note indicating that Gail "[t]ook Mike Flynn (Mordenti's boss) to A/C garage to show him engines. This was after murder". Answer Brief at 52. The state fails to recognize that Mike Flynn was Milligan's boss, as the undisclosed notes from Michael Milligan's interview demonstrates. It also would have provided defense counsel leads on how to prove that there was a boat that Mr. Royston was trying to sell.

The State completely ignores the fact that the State through ex parte contact with the judge obtained access to information that was withheld from Mr. Mordenti's counsel. Such an unlevel playing field offends the constitutional guarantee of fundamental fairness. Dillbeck v. State, 643 So.2d 1027, 1030 (Fla. 1994)("No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensbury's rules, while the other fights ungloved."). Mr. Mordenti's counsel was denied and is still being denied access to the information that the State received and the opportunity to obtain admissible evidence because the attorney-privilege was circumvented for the State, but is still being enforced against Mr. Mordenti and his counsel.

CONCLUSION

For all of the foregoing reasons and those stated in his Initial Brief, this Court should vacate the circuit court's order denying Mr. Mordenti's Rule 3.850 and order a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Robert Landry, Assistant Attorney General, 3507 Frontage Road, Suite 200, Tampa, FL 33607, on January 14, 2004.

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

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