IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-860

JAMES GUZMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Guzman's postconviction motion.

References to the record from the post conviction hearing include a page number and are of the form, e.g., (PC-R. 123). References to the record of Mr. Guzman's retrial include a page number and are of the form, e.g., (R. 123). All other references are self explanatory or explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Guzman has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved and the gravity of the penalty. Mr. Guzman, through counsel, accordingly urges that the Court permit oral argument.

PROCEDURAL HISTORY

The judgment and sentence considered by this appeal were entered by the Circuit Court of the Seventh Judicial Circuit, in and for, Volusia County.

On January 7, 1992, the Volusia County Grand Jury indicted Mr. Guzman for first degree murder and robbery. (R. 1992 277). The jury convicted Mr. Guzman of first-degree murder and robbery with a deadly weapon on September 24, 1992. (R. 1992 577). On September 29, 1992, the advisory panel recommended a sentence of death by a vote of 10-2 (R. 1992 600).

On Mr. Guzman's direct appeal, this Court reversed Mr. Guzman's convictions and sentence. *Guzman v. State*, 644 So. 2d 996, 1000 (Fla. 1994). This Court found that the trial court's failure to allow Mr. Guzman's trial counsel to withdraw despite a conflict of interest denied Mr. Guzman the "right to conflict-free counsel as required by the Sixth Amendment of the United States Constitution." *Id.* at 999.

In 1996, Mr. Guzman proceeded to a non-jury trial. (R. 1996 1246-47). The trial judge sentenced Mr. Guzman to death for the first-degree murder conviction without a recommendation from an advisory panel. (R. 1996 2368). On direct appeal, this Court affirmed both the convictions and sentence. *Guzman v. State*, 721 So. 2d 1155 (Fla. 1998). The United States Supreme Court denied certiorari

on May 3, 1999. *Guzman v. Florida*, 119 S. Ct 1583 (1999).

Following the United States Supreme Court's denial of certiorari, Mr. Guzman sought postconviction relief in the circuit court. Mr. Guzman filed a motion for postconviction relief under Rule 3.850.

The circuit court held an evidentiary hearing on this motion in October of 2001 and denied Mr. Guzman all relief. This appeal follows.

STATEMENT OF THE FACTS

On August 12, 1991, officers of the Daytona Beach Police Department responded to the Imperial Hotel in Daytona Beach. (R. 1330). They discovered a body later identified as David Colvin lying face down on a bed within one of the hotel rooms. (R. 1330). He had received multiple stab wounds. (R. 1330). From August 12, 1991, until November 23, 1991, the police investigation uncovered no evidence which implicated Mr. Guzman in the death of David Colvin. (R. 1502, 1503). On August 12, 1991, police interviewed Martha Cronin at the Imperial Hotel and she provided a statement which did not implicate Mr. Guzman. (R. 1526).

After Martha Cronin's November 23, 1991 arrest for violation of probation on prostitution charges, Martha Cronin changed her story and gave a statement to the police claiming that Mr. Guzman had confessed to her that he had killed David Colvin. (R. 1531). As will be demonstrated below, the testimony of Martha Cronin

was essential to the state's case against Mr. Guzman, and the facts and circumstances of her changed testimony were the subject of several claims in Mr. Guzman's motion for postconviction relief.

(a) MARTHA CRONIN:

The state obtained a first degree murder conviction against Mr. Guzman primarily through the testimony of state witness Martha Cronin, an admitted prostitute and crack cocaine addict. Martha Cronin did not implicate Mr. Guzman in any way in her initial statements to the police.

Ms. Cronin testified at Mr. Guzman's trial that in August of 1991 she lived at the Imperial Hotel in Daytona Beach, where she worked as a prostitute. (R. 1653). She developed a relationship with Mr. Guzman. (R. 1653). Both she and Mr. Guzman used crack cocaine extensively during this period of time. (R. 1836). She fell in love with Mr. Guzman and had intimate sexual relations with him. (R. 1637). At trial, Ms. Cronin testified that Mr. Guzman related to her prior to David Colvin's murder that Colvin would be easy to rob because he drank a lot and usually had a lot of money. (R. 1639). She testified Mr. Guzman also told her that if he ever robbed anyone, he would have to kill them and that Mr. Guzman had owned a knife. (R. 1640-41).

Martha Cronin testified that on August 10, 1991 she returned to her hotel

room around 7:00 AM after working the previous evening as prostitute. (R. 1642,43). She then took a shower and laid down. (R. 1643). Mr. Guzman called and said he was going to drive David Colvin to the bank. (R. 1644). Mr. Guzman returned to the room after 11:00 AM and said he had gone to breakfast and had some drinks at the Office Bar. (R. 1645). He said he was going to help David Colvin move and had his car keys with him. (R. 1646). Ms. Cronin then went out and worked as a prostitute during the lunch period. (R. 1649). At about 2:30 or 3:00 Mr. Guzman came back to the room. (R. 1649). He appeared upset and had a garbage bag with white rags inside. (R. 1650). She assumed he went to throw the garbage bag away in the dumpster, although she did not see him do it. (R. 1651).

She testified that Mr. Guzman sat down next to her and said "I did it". (R. 1652). She asked him what he meant and he said "I killed David". (R. 1654). She said Mr. Guzman gave her two different versions of what happened. (R. 1654). The first one was that David Colvin was passed out and he was trying to take his money and when Colvin woke up he hit him, knocked him out, and stabbed him with a samurai sword. (R. 1655). Mr. Guzman then showed her a ring and some cash he had taken from David Colvin. (R. 1655). Ms. Cronin identified the ring at trial. (R. 1655).

According to Ms. Cronin, Mr. Guzman then asked her what he should do

with the ring, and she said get rid of it. (R. 1656). He told her that he killed David Colvin for her. (R. 1658). Mr. Guzman then left and returned with $150.00 cash and two or three hundred dollars worth of crack cocaine. (R. 1659). She said she and Mr. Guzman smoked the crack over the next several days. (R. 1660). They then discussed what to say when the police came around, and Mr. Guzman told her to say she was not there. (R. 1661). She and Mr. Guzman left the Imperial Hotel and moved to Ridgewood Avenue. (R. 1663). Later, Mr. Guzman said he had fought with David Colvin and he killed him with a sword. (R. 1664).

In November of 1991 Ms. Cronin was arrested for violation of probation for soliciting for prostitution. (R. 1666). She asked the arresting officers if they wanted to know who killed David Colvin. (R. 1666). She mentioned the ring and the sword and then Detective Allison Sylvester came to speak with her. (R. 1661). She asked the Detective for a deal and testified to the events surrounding her arrest and changed testimony as follows;

> Q. And what did they do with you?
> A. They took me back to the police station and called Allison Sylvester.
>
> Q. The case detective in this case.
> A. Yes Sir.
>
> Q. Did you tell Allison Sylvester that you wanted a deal and you were going to talk about the murder?

A. Of course.

Q. And was the deal reference to your own case?
A. Yes.

Q. Did you in fact, Ma'am, ever get a deal?
A. No.

Q. What happened after you talked to Allison Sylvester?
A. Well, they put me in a motel for protection, I guess.

Q. All right. And ma'am, while you were in that motel, did you continue to engage in prostitution and use of crack cocaine?
A. Yes, I did.

Q. Is it fair to say that was not part of your agreement with Detective Sylvester?
A. No sir, it was not.

Q. Okay. Ma'am, why did you chose to talk to the police only when you were arrested in late November of 1991?
A. I don't understand the question.

Q. Why did you pick that time to tell the police about the murder of David Colvin?
A. I was tired of going to jail and watching him walk away, knowing what he had done.

(R. 1668).

On cross examination, Ms. Cronin admitted to using crack cocaine on a daily basis from 1989 through July 19, 1993. (R. 1683). The police questioned her

on August 12, 1991 and she said nothing about Mr. Guzman's alleged confession. (R. 1688). She admitted to writing a letter to Mr. Guzman in December of 1991 stating that she "went off the deep end" when she found out Mr. Guzman was seeing another woman and if she could not have him, no other woman would. (R. 1696). She further stated in the letter that she "called Allison and told her what she wanted to hear and where you were." (R. 1696). She further testified that in August of 1991 Mr. Guzman helped David Colvin move from one room to another at the Imperial Motor Lodge. (R. 1727). In September of 1991 she ran into Allison Sylvester a couple of times on the street and never told her that Mr. Guzman had confessed to her or had anything to do with Mr. Colvin's death. (R. 1732)

(b) ALLISON SYLVESTER:

Allison Sylvester of the Daytona Beach Police Department was the lead Detective on the case. She was called to the Imperial Hotel on August 12, 1991. (R. 1328). She saw the body of a white male laying face down on a bed inside a hotel room with pillows on top of him. (R. 1330). A sword was propped up in light fixture above the bed. (R. 1330). A black limousine belonging to David Colvin was parked in front of the hotel. (R. 1493). She interviewed Mr. Guzman and Martha Cronin on August 12, 1991. (R. 1495). Mr. Guzman related that he knew the victim and had previously helped him move from one room to another within

the hotel. (R. 1496). He further related that sometime prior to the body being found he had accompanied the victim to a bar and to a restaurant. (R. 1496). He had driven the victim's car at that time. (R. 1497). Mr. Guzman then gave a written statement to Detective Sylvester where he stated:

> I helped Dave move from 205 to 216 either on Wed or Thursday. And next I took him to eat at IHOP because he called me and wanted me to drive. And so I did. And then we went to a bar. I tried to get in touch with him after those days and have not been able to get in touch with him. Yes. I know Dave.

(R. 1499).

Allison Sylvester also interviewed Martha Cronin on August 12, 1991 and she did "not offer anything of substance at that time". (R. 1501). Detective Sylvester then commented on the ensuing investigation, and Martha Cronin's prominent role, from August 12, 1991 until Mr. Guzman was arrested on December 13, 1991:

> Q. During that time, ma'am, please describe the general tone of your investigation throughout the months in trying to determine who the perpetrator was ? What exactly were you and your agents doing?
> A. We continued to follow up on any information that came in. And we continued to do that until the time that we received substantial information which would have been the end of November.

Q. And where did that information come from?
A. Martha Cronin.

Q. Ma'am, let me ask you this. During the period of time from August until the end of November, when you said substantial information came from Martha Cronin, had you focused on James Guzman as the sole suspect to the exclusion of all others?
A. No

(R. 1502-03) (*emphasis added*)

Detective Sylvester further testified that in late November 1991, Martha Cronin was located by police due to an outstanding warrant on prostitution charges, and she told the arresting officers that "she had information that she wanted to provide" (R. 1503). When Detective Sylvester first interviewed Martha Cronin on August 12, 1991, she never told her that Mr. Guzman had confessed to her. (R. 1526). On September 24, 1991 Detective Sylvester met with Martha Cronin and she related she had no information about the homicide. (R. 1530). On November 23, 1991 Martha Cronin was arrested for violation of probation and for the first time changed her story claiming Mr. Guzman had confessed to her. (R. 1531). Martha Cronin stated she wanted a deal, and Detective Sylvester called the State Attorney's Office, who informed her that she should arrest Martha Cronin. (R. 1571).

Instead of jail, Detective Sylvester took Martha Cronin to a hotel. (R. 1532). The police "lost contact" with Ms. Cronin while she was staying at the hotel and engaged in prostitution and using crack cocaine. (R. 1533). Detective Sylvester testified that she had an "agreement" with Martha Cronin for free room and lodging at the hotel. (R. 1551). Following her arrest for violating the deal she had made with Detective Sylvester, Martha Cronin was then released on her own recognizance on December 5, 1991, after Thomas Lane appeared in court on her behalf, falsely claiming to be her brother. (R. 1552). Detective Sylvester then testified on redirect examination by the state about the parameters of her arrangement with witness Martha Cronin. As will be demonstrated later in this brief, this testimony was a lie. The prosecutor elicited the following false testimony from Detective Sylvester:

> Q. Detective Sylvester, did you, in fact, personally offer Martha Cronin any deals whatsoever in exchange for her testimony against James Guzman?
> A. No, I did not.
>
> Q. Are you aware of any member of law enforcement or the State Attorney's Office offering any deals to Martha Cronin for her testimony against Mr. Guzman?
> A. No.

(R. 1559).

(c) THE RING:

The state produced testimony at Mr. Guzman's trial that he sold a ring

belonging to David Colvin to Leroy Gadson on August 10, 1991. Mr. Gadson testified he was contacted by Mr. Guzman around 4:00 or 5:00 on the afternoon of August 10, 1991. (R. 1820). Mr. Guzman told him he "had something" he wanted to show him. (R. 1822). Mr. Guzman came to his house about 20 minutes later and showed him a "nice gold ring with lots of diamonds in it". (R. 1824). He gave him $250.00 and cocaine for the ring. (R. 1826). Either later that night or the next day Guzman came back and got more money and drugs. (R. 1830). In November of 1991 Mr. Gadson was arrested for drug charges and gave the ring to Detective Sylvester. (R. 1836). At that time he had given the ring to John Cerca. (R. 1832).

Two different factual versions of how Mr. Guzman came into possession of David Colvin's ring on August 10, 1991 were presented at Mr. Guzman's trial; one from Mr. Guzman and one from Martha Cronin. Martha Cronin's version, as she testified to at trial, was that Mr. Guzman showed her the ring when he came back to the hotel room and confessed to killing David Colvin. (R. 1655).

In contradiction, Mr. Guzman testified that on August 10, 1991, after going to the Shell gas station, the Office Bar and the International House of Pancakes with David Colvin, he returned to the hotel room where he stayed with Martha Cronin. (R. 2110). In the afternoon Martha Cronin gave him $50.00 after turning a trick in the hotel room and she left to go buy drugs from Curtis Wallace. (R. 2111).

According to Mr. Guzman's trial testimony, Martha Cronin returned with Curtis Wallace around 2:30 or 3:00 that afternoon. (R. 2112). Martha Cronin had a ring and said Curtis Wallace wanted to trade it for crack cocaine. (R. 2112). Mr. Guzman did not recognize it as David Colvin's ring. (R. 2113). Curtis Wallace said he wanted an "eight ball he could juggle"(referring to an amount of crack cocaine) in exchange for the ring. (R. 2114). Acting for Mr. Wallace, Mr. Guzman then called Leroy Gadson and met him at his house. (R. 2115). Mr. Gadson looked at the ring and paid him $250.00 and an eight-ball. (R. 2116). Mr. Guzman returned to the hotel and gave Curtis Wallace half the eight-ball and told him he would give him the rest later. (R. 2117). Curtis Wallace then broke a piece of the drugs off for Martha Cronin and left the room. (R. 2117).

Mr. Guzman and Martha Cronin then smoked the cocaine, and she left to go get more from Curtis Wallace. (R. 2118). Mr. Guzman went to his apartment and called Leroy Gadson again. (R. 2120). Mr. Guzman went and got the rest of the drugs from Leroy Gadson and returned to the Imperial Hotel where he gave Mr. Wallace the rest of the drugs. (R. 2122).

Mr. Guzman admitted he had David Colvin's ring on August 10, 1991, and that he sold the ring to Leroy Gadson. The incriminating character of the ring evidence was established solely through the testimony of admitted cocaine addict

and prostitute Martha Cronin. Without her testimony, the ring evidence was not incriminating, as Mr. Guzman testified he got the ring from Curtis Wallace, whom the record reveals was a viable suspect based upon other evidence introduced at the trial.

(d) THE FINGERPRINT

Florida Department of Law Enforcement lab analyst Michael Rafferty testified at Mr. Guzman's trial. (R. 1338). He reviewed the crime scene in order to collect evidence. (R. 1339). He noted what appeared to be blood stains on the telephone in the room and placed the phone into evidence. (R. 1339). Fingerprints lifted from the handset of the phone were later identified as Mr. Guzman's at the crime lab. (R. 1625). Contrary to the lower court's order denying 3.850 relief, there were NO BLOODY FINGERPRINTS ON THE PHONE. (R. 1663). The state produced no evidence at the trial of a bloody fingerprint lifted from the phone. The fingerprint was merely lifted from the phone which had blood on it on other parts.

Furthermore, the evidence of Mr. Guzman's fingerprint on the phone in David Colvin's hotel room was not at all incriminating. Mr. Guzman testified he helped David Colvin move from room 114 to room 205. (R. 2096). He used the phone in Mr. Colvin's room at that time. (R. 2096). Other witness's called at the

trial corroborate Mr. Guzman's testimony. Thomas Conway, who worked at the Imperial Hotel and was the person who called the police after finding Mr. Colvin's body in his room, testified that Guzman had helped Mr. Colvin move into his room. (R. 1324). Even Martha Cronin testified that Mr. Guzman had called her from David Colvin's room. (R. 1644). Therefore, the existence of Mr. Guzman's fingerprints on the handset of the telephone was not evidence that he had anything to do with the murder of David Colvin.

(e) THE SNITCH:

The state presented testimony of jail house snitch Paul Rogers at Mr. Guzman's trial. Mr. Rogers testified that he met Mr. Guzman at the Volusia County Jail. (R. 1897). They shared the same cell for a couple of weeks and became friends. (R. 1897). He testified that Mr. Guzman said he drove a limousine for David Colvin. (R. 1905). He said that his girlfriend Terri (Martha Cronin's alias) was wanting to go out and hook and he said he had the key to David Colvin's room and he was going to rob him and get money. (R. 1905). He told Terri he was going to rob him so she would not have to hook. (1906). He went to David Colvin's room, opened the door, went through the drawers and David woke up. (R. 1906). There was a samurai sword hanging over the dresser on the wall. (R. 1907). He said he hit him with the sword 10 or 11 times. (R. 1908). He cleaned up

the sword and put everything in the dumpster. (R. 1909).

On cross examination, Mr. Roger's admitted he had been convicted of felony seven times. (R. 1929). He also admitted to signing an affidavit on August 29, 1992 where he stated "**I told the Assistant DA that I am not going to say shit and they brought me back - and they brought me back over from the Volusia County Correctional Facility. Guzman never confessed to me. I'm not going to testify against him."** (R. 1930, *emphasis added*). He also admitted on cross that Mr. Guzman kept court papers in his room and his cell was open. (R. 1935). Mr. Guzman verified this when he testified that he kept his court papers in his foot locker, and Mr. Rogers had access to them. (R. 2163).

This jail house snitch testimony was notoriously unreliable in light of the witness' criminal history and his motivation to fabricate testimony to help his own cause. In this case, the credibility of snitch Rogers was further damaged by the signing of an affidavit where he specifically stated Mr. Guzman had not confessed to him. Mr. Rogers also had access to Mr. Guzman's court papers where he could have learned of the factual allegations of Mr. Guzman's case. Viewing this witnesses' testimony as corroboration of the testimony of admitted crack cocaine addict and prostitute Martha Cronin was dubious at best.

(f) OTHER SUSPECTS IN THE MURDER OF DAVID COLVIN:

At Mr. Guzman's trial both state and defense witnesses testified to facts which implicated persons other than Mr. Guzman in the murder of David Colvin. State witness James Yarborough, an employee of the Imperial Hotel, testified that he witnessed David Colvin having an argument with someone in his room at the hotel. (R. 1483). The person was named James (not Mr. Guzman who was also named James) and was living in room 107 of the hotel. (R. 1485). James entered Mr. Colvin's room with an open knife and Mr. Colvin drew his sword to defend himself. (R. 1483). Mr. Yarborough entered the room and broke up the altercation. (R. 1485). Detective Allison Sylvester testified that she obtained information in her investigation that persons named Holt or Moore had an altercation with David Colvin in his hotel room during which either Holt or Moore were armed with a knife. (R. 1542).

Detective Sylvester also testified that on August 12, 1991 she interviewed Curtis Wallace at the Imperial Hotel. (R. 1518). Curtis Wallace stated "if a ring was missing I probably know who did it". (R. 1519). This was before the police had mentioned to anyone, including Mr. Wallace, that David Colvin's ring was missing. (R. 1519).

Antonio Lee told Detective Sylvester that he had seen David Colvin alive at the Coke machine at the hotel on Saturday night. (R. 1521). He also told Detective

Sylvester that Curtis Wallace had confessed to him that he killed David Colvin. (R. 1529). Lee related that Curtis Wallace had beaten Colvin and taken his ring and money. (R. 1530). Lee further stated that he saw Curtis Wallace leaving Mr. Colvin's room with a pipe with black tape wrapped around it, and Curtis Wallace later had bruised knuckles. (R. 1565, 1839). Wallace also threatened to kill Lee if he testified against him. (R. 1568).

Detective Jimmy Flynt of the Daytona Beach Police Department testified that on August 13, 1991 he spoke to Curtis Wallace who told him he had seen David Colvin alive at the Coke machine on Saturday night. (R. 2010). Antonio Lee also told Detective Flynt that he saw David Colvin alive by the Coke machine on Saturday night. (R. 2112)

(g) THE LACK OF PHYSICAL EVIDENCE:

The state produced no physical evidence at Mr. Guzman's trial which linked him to the murder of David Colvin. In fact, the physical evidence introduced at the trial pointed at no particular suspect and in some respects contradicted the state's theory that Mr. Guzman killed David Colvin. The lack of physical evidence is as follows:

(1) The dumpster: Martha Cronin testified that when Mr. Guzman came back to his room he had a garbage bag full of rags. (R. 1650). She said he went to

throw the rags away, but did not see him do it. (R. 1651). State snitch Paul Rogers testified James Guzman told him he cleaned up the room and took everything to the dumpster. (R. 1909). However, Thomas Conway, who worked at the Imperial Hotel, testified that the police searched the dumpster on August 12, 1991 and found nothing. (R. 1323). Most importantly, he stated the dumpster was full at the time, and was emptied only twice a week. (R. 1323). If Martha Cronin and Paul Rogers offered truthful testimony, the police should have found this garbage bag full of bloody rags in the dumpster. The police found nothing.

(2) No blood or fingerprints were discovered on the sword found in David Colvin's room. FDLE agent Michael Rafferty testified he tested the sword for prints and blood and none were found. (R. 1357).

(3) The state could not prove that either the knife taken from Mr. Guzman or the sword was the murder weapon in this case. The state expert stated that the wounds inflicted on David Colvin were consistent with **any** knife at least 3 or 4 inches in length. (R. 1437). The state expert could not identify the exact murder weapon used. (R. 1453).

(4) Blood hair and saliva samples were taken from Mr. Guzman and nothing was matched to anything found in David Colvin's room. (R. 1559).

EVIDENTIARY HEARING FACTS

(a) THE LIES AND DECEIT BY THE STATE:

The lies and deceit by the state regarding the payment of $500.00 to Martha Cronin began in the discovery process of the case and continued through the presentation of blatantly false testimony and argument at Mr. Guzman's trial. On June 25, 1996 the defense made a very specific discovery demand upon the state. This demand was entitled "Motion for Disclosure of Impeaching Information" and requested the following from the state:

> 1. The substance of any and all statements, agreements, offers or discussions had with any of the state's witnesses or a suggestion of leniency, compensation, assurance not to prosecute, assurance to proceed only on certain causes, or any other offer or benefit accruing to said individual whatsoever in exchange for their cooperation, assistance of testimony in the trial herein;
> 2. Any and all consideration given to or made on behalf of government witnesses. By "consideration" Defendant refers to absolutely anything of value or use including but not limited to immunity grants, witness fees, special witness fees, transportation assistance, assistance or favorable treatment with respect to any civil, tax court, or administrative dispute with plaintiff, and anything else which could arguably create an interest or bias in favor of the State or against the defense or act as an inducement to testify or color testimony.

(PC-R Defense Exhibit # 6)

In direct response to the specific discovery demand , the state filed a written

response on December 2, 1996 which stated:

> Martha Cronin has been subpoenaed as a witness for trial in this cause, and as such has use immunity for her testimony. There are no further agreements, assurances of non prosecution or leniency, offers, benefits or understandings between the State of Florida and Martha Cronin.

(PC-R Defense Exhibit 7).

Trial counsel for Mr. Guzman, Gerard Keating, testified at the evidentiary hearing that he felt Martha Cronin was the state's "key witness". (PC-R 234). He felt that impeaching the credibility of Martha Cronin was important in demonstrating reasonable doubt in Mr. Guzman's case. (PC-R 235). In order to gather impeachment evidence against the state's key witness, counsel Keating filed the above specific discovery demand on the state for any benefit given to Martha Cronin including, but not limited to, immunity grants, witness fees, special witness fees, and transportation assistance. (PC-R 237). Mr. Keating relied upon the representation by the state that key state witness Martha Cronin had not been paid any benefit. (PC-R 238). He testified that had the state provided any information about payment of compensation to key witness Martha Cronin, it would have been valuable impeachment evidence and he would have used it in his cross examination and arguments. (PC-R 242-43).

(b) The undisclosed $500.00 pay-off.

Postconviction investigation in Mr. Guzman's case revealed that the state's written representation that no compensation had been provided to key witness Martha Cronin, as well as the trial testimony of Martha Cronin and Allison Sylvester, and the arguments of the prosecutor at trial, were false or misleading.

The truth of this matter finally came out at the evidentiary hearing wherein Detective Allison Sylvester testified that on January 3, 1992, she visited Martha Cronin at the Volusia County jail and paid her the sum of $500.00 by money order. (PC-R Defense Exhibit 9). The state had caused to be offered a reward for information about a man who had been stabbed to death in his hotel room. (PC-R 185). Two separate newspaper articles in Volusia County advertised the reward offer from the state on August 16, 1991. (PC-R 185). Detective Sylvester testified at the evidentiary hearing that she could not recall when she discussed the reward money with Ms. Cronin, but it was sometime after her initial statement on August 12, 1991, and January 3, 1992, when the $500.00 was paid to Ms. Cronin. (PC-R 187). No police report filed by Detective Sylvester ever mentioned any discussion with Martha Cronin about the reward money or the actual payment to her of the $500.00. (PC-R 187).

The uncontroverted facts presented at the evidentiary hearing establish : (1) State witness and admitted prostitute and cocaine addict Martha Cronin's initial

statement to Detective Allison Sylvester regarding the murder of David Colvin did not implicate Mr. Guzman in any way. (2) On August 16, 1991 the state published a $500.00 reward for information on the case in two major newspapers within Volusia County. (3) After the reward money was offered within the public domain, Martha Cronin changed her statement to Detective Allison Sylvester on November 23, 1991, and for the first time implicated Mr. Guzman. (4) After Martha Cronin changed her statement to the police, Detective Allison Sylvester paid her the sum of $500.00 by delivery of a money order to the Volusia County Jail on January 3, 1991. (5) Despite specific discovery demands by the defense requesting information on any benefit or compensation of any kind given to state witness Martha Cronin, the fact of the $500.00 payment to her by Detective Sylvester was never disclosed by the state and was affirmatively denied. (6) The state presented false testimony and argument at Mr. Guzman's trial by failing to reveal that Detective Sylvester had paid witness Martha Cronin $500.00.

(B) THE BAD FAITH DESTRUCTION OF POTENTIALLY EXCULPATORY EVIDENCE

In Mr. Guzman's case, the police collected a Caucasian hair found laying on the back of David Colvin's thigh. A photograph of Mr. Colvin's thigh, with the hair depicted therein, was introduced at the evidentiary hearing. (PC-R defense

exhibit # 2). The evidence was labeled by the police as Q-103. (PC-R 43). Computer records from the Daytona Beach Police Department evidence room establish that the hair was destroyed by officer Francis Thompson on November 10, 1992. (PC-R 43-44). The notation on the computerized record from the police department indicated that the destruction of the hair was "per ASA Vince Patrucco." (PC-R 43).

At the evidentiary hearing, witnesses from the Daytona Beach Police Department evidence room testified as to the proper procedures for the destruction of physical evidence in a homicide case. They testified that evidence in a homicide case should not be destroyed for 50 years or longer unless the defendant was executed. (PC-R 35). Furthermore, evidence in a homicide case is stored separately from all other evidence with the case number and victims name attached to avoid co-mingling with other evidence in other cases. (PC-R 36). Before evidence is destroyed there must be written request from the Office of the State Attorney. (PC-R 36). No evidence can be destroyed without a court order. (PC-R 38). Once the State Attorney's Office requests the destruction of evidence, it is placed in a yellow bin with the other evidence from other cases until a court order for its destruction can be obtained. (PC-R 38). A court order for destruction of evidence would typically contain authorization to destroy all the evidence in the bin

and would list each item of evidence. (PC-R 39). The evidence is then brought to Halifax Hospital where it is destroyed in the presence of two witnesses, who fill out sworn affidavits. (PC-R 39). These destructions or "burnings" take place around three or four times a year. (PC-R 40).

The testimony and documentary evidence introduced at the evidentiary hearing also established that none of the rules and regulations of the Daytona Beach Police Department required for the destruction of evidence of evidence were followed by Officer Francis Thompson when he destroyed the Caucasian hair found by the police on David Colvin's thigh. The Office of the State Attorney never requested the destruction of the Caucasian hair found by the police on David Colvin's thigh. (PC-R 75, 92). No court order was ever obtained or issued authorizing the destruction of the Caucasian hair found on the back of David Colvin's thigh. (PC-R 92). No affidavit was ever issued stating that the hair evidence was destroyed in the presence of two witnesses. (PC-R 75). The evidence introduced at the evidentiary hearing established that the Caucasian hair found on the back of David Colvin's thigh was destroyed by Officer Francis Thompson of the Daytona Beach Police Department without any legal authorization or justification.

Testimony and documentary evidence introduced at the evidentiary hearing

also established that from 1989 until 1994 Officer Francis Thompson of the Daytona Beach Police Department engaged in gross criminal misconduct by stealing items from the evidence room at the Daytona Beach Police Department.

In 1996 Officer Thompson was convicted in Federal Court in the Eastern District of Pennsylvania for stealing items from the evidence room at the Daytona Beach Police Department and then sending them to his nephew in Pennsylvania for sale and distribution. (PC-R Defense Exhibit # 8 - a copy of the clerk's file from Officer Thompson's federal conviction). One of the counts for which he was convicted involved the theft and distribution of cocaine from the evidence room in state case number 91-32541. (PC-R 98). The white powdery substance in case number 91-32451 was listed as destroyed by Francis Thompson on November 18, 1992 as reflected on an affidavit and court order of destruction (PC-R 97). According to the indictment for which Officer Thompson was convicted, the cocaine was not destroyed that day, but rather had been sent by Officer Thompson to his nephew in Pennsylvania for sale and distribution in Pennsylvania. The destruction order which alleged that the cocaine had been destroyed also contained several items of evidence from Mr. Guzman's case, including sheets and bedspreads. (PC-R 75). There was no request by the Office of the State Attorney or court order authorizing the destruction of this evidence from Mr. Guzman's

case. (PC-R 92). This unauthorized and unlawful destruction of evidence in the Guzman case occurred only six days after Officer Thompson destroyed the hair evidence found on the back of David Colvin's thigh.

The hair found on the back of David Colvin's thigh has been forever destroyed by the illegal actions of Officer Francis Thompson of the Daytona Beach Police Department. On September 6, 2001, Mr. Guzman filed a motion to have this hair evidence subjected to DNA testing. Mr. Guzman's opportunity to test this potentially exculpatory evidence was eliminated by Officer Thompson's bad faith destruction. The evidence introduced at the evidentiary hearing also established that the state never disclosed to Mr. Guzman's trial counsel that this unlawful destruction of the hair evidence had taken place. (PC-R 247, 248)

SUMMARY OF THE ARGUMENTS

Mr. Guzman appeals to this Court for the justice that was denied him by the lower court's order denying his motion for postconviction. Mr. Guzman's conviction and death sentence violated the constitution of this State and of this Nation. Accordingly, Mr. Guzman's conviction and death sentence must not stand and this Court should grant Mr. Guzman all relief requested throughout this appeal.

In Argument One, Mr. Guzman raises the gross denial his rights under United States Constitution that occurred when members of the "prosecution team" lied,

deceived and misled, not just Mr. Guzman, but Mr. Guzman's attorney and the Judge who heard this case. The "prosecution team" paid money to key state witness Martha Cronin creating a reasonable likelihood that the state witnesses' false testimony **could have** affected the judgment of the jury. Under *Giglio*, this must not stand.

In Argument Two, Mr. Guzman argues that the same failure to disclose the "prosecution team's" payment of essential state witness Martha Cronin for her testimony constituted a violation of *Brady v. Maryland*. Just as the State's failure to correct the lies of Martha Cronin and its failure to disclose the same to Mr. Guzman warrants relief under *Giglio* and *Napue*, relief is also required under *Brady*. The evidence at issue was favorable to Mr. Guzman because it was impeaching and the evidence was willfully suppressed by the State. Prejudice did ensue.

In Argument Three, Mr. Guzman argues that he was denied due process by the destruction of crucial exculpatory evidence that should have remained in the evidence room of the Daytona Police Department. This evidence was destroyed by then Officer Francis Thompson of that department. Officer Thompson was convicted of narcotics offenses and is now in federal prison. Before going to prison, Officer Thompson fabricated the authorization for the destruction of hair

evidence that was destroyed and could have exonerated Mr. Guzman. Accordingly, this Court should grant relief.

Lastly, in Argument Four, Mr. Guzman argues that he was denied the effective assistance of counsel through prosecutorial misconduct which led to his conviction and ultimately his sentence of death. For the reasons discussed in this section this Court should grant Mr. Guzman a new trial, penalty phase or both.

At the close of this brief, the injustice that led to the wrongful conviction and death sentence will be known and relief necessary. Accordingly, Mr. Guzman asks for all relief he prays for or that this Court may deem appropriate.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR GUZMAN'S CLAIM THAT THE STATE PRESENTED FALSE OR MISLEADING TESTIMONY AND ARGUMENT AT MR. GUZMAN'S TRIAL IN VIOLATION OF *GIGLIO V. UNITED STATES* AND *NAPUE V. ILLINOIS*

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State* , 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court. This claim was presented in Mr. Guzman's 3.850 motion.

THE *GIGLIO* STANDARD

In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (U.S. 1971), the Court held that when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within rule that suppression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution. Giglio was convicted of passing forged money orders. *Id.* at 764. A Government witness testified he worked for the bank and supplied Giglio with customer signature cards so he could use them to commit the forgeries. *Id.* At trial, defense counsel cross-examined the witness concerning possible agreements for prosecutorial leniency:

> Q. They told you might not be prosecuted?
> A. I believe I still could be prosecuted.
>
> Q. Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?
> A. Not at this particular time.
>
> Q. To this date have you been charged with any crime?
> A. Not that I know of, unless they are still going to prosecute.

Id.

In summation, the Government attorney stated that the witness received no promise that he would not be indicted. *Id.* It was revealed, after Giglio's Motion

for New Trial based upon newly discovered evidence, that a prosecutor had made a promise to the witness that he would not be prosecuted if he testified in Giglio's trial. *Id.* The prosecutor who actually tried the case was unaware of this promise to the Government's witness. *Id.* The Court held:

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 1217 (1959), we said 'the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' *Id.*, 269, 79 S.Ct., at 1177. Thereafter, Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence of credibility falls within this general rule. *Napue*, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever a combing of the prosecutors files after trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . . United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required if the false evidence could, in any reasonable likelihood, have affected the judgment of the jury. *Napue at 271, 79 S.Ct., at 1178.*

> Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of an understanding or agreement as to future prosecution would be relevant to his credibility and the jury was entitled to know of it.

Id. at 765,766

A Giglio claim is established if a defendant shows (1) Presentation of false testimony (2) that the prosecutor knew was false; and (3) the statement was material. (See *Ventura v. State*, 774 So.2d 553, 562 (Fla. 2001) (Quoting *Robinson v. State*, 707 So.2d 688, 693 (Fla. 1998)).

The matter of materiality has been the subject of much litigation in the area of a Giglio claim. Courts often mistakenly apply the Brady v. Maryland standard of materiality when addressing a Giglio claim. Since application of the proper materiality standard is important for this Court's de-novo review of Mr. Guzman's Giglio claim, a discussion of the distinction between Giglio materiality and Brady materiality is warranted.

Where there has been a suppression of favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed.2d 215 (1963), the nondisclosed evidence is material: "if there is a reasonable probability that, had the

evidence been disclosed, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. *United States v. Bagely*, 473 U.S. 667, 682, 105 S.Ct 3375, 3383, 87 L.Ed. 481 (1985). A different and more defense friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony. Where either of those events has happened, the falsehood is deemed material "if there is **any** reasonable likelihood that the false testimony **could have** affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (emphasis added); Giglio, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 164 (1972); *Napue v. Illinois*, 360 U.S. 254, 271, 79 S. Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959). As the Supreme Court has held, this standard of materiality is equivalent to the *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), "harmless error beyond a reasonable doubt' standard. *Bagely*, 473 U.S. at 679.

The lower court applied the incorrect standard in denying Mr. Guzman's *Giglio* claim. In the order denying *Giglio* relief the lower court stated "Therefore, this court finds that there is not a reasonable probability that had the information regarding the $500.00 reward paid to Cronin been disclosed, the result of the

proceeding would have been different. . . . Further, this Court finds that this statement regarding the $500.00 reward being paid to Martha Cronin is immaterial because there is not a reasonable probability that the false evidence would put the whole case in such a different light as to undermine the confidence in the verdict." (PC-R 932).

The lower court fell into the trap of erroneously applying the *Brady* materiality standard to Mr. Guzman's *Giglio* claim. Mr. Guzman urges this Court not to fall into the same trap. A proper de-novo review of this claim by this Court requires application of the more "defense friendly" materiality standard of *Giglio.*

THE FALSE TESTIMONY AND ARGUMENT

The state presented false testimony and argument at Mr. Guzman's trial. The lower court's order denying Mr. Guzman's *Giglio* claim does not dispute this fact.

Facts introduced at the evidentiary hearing established that on January 3, 1992, Detective Allison Sylvester of the Daytona Beach Police Department paid to Martha Cronin the sum of $500.00 by way of money order while Ms. Cronin was incarcerated at the Volusia County Jail. (PC-R Defense Exhibit #9). The fact of this payment was never disclosed to the defense.

The falsehoods regarding the payment of $500.00 to known prostitute and crack cocaine addict Martha Cronin began in the discovery process and continued

through the presentation of false testimony and argument at Mr. Guzman's trial. On June 25, 1996 the defense made a very specific discovery demand upon the State. This demand was entitled "Motion for disclosure of impeaching information' and requested that the State reveal any benefits provided to several state witnesses, and specifically named Martha Cronin. The motion defined benefits as "absolutely anything of value or use, including, but not limited to immunity grants, witness fees, special witness fees, transportation fees, assistance or favorable treatment or request in any criminal, civil, tax court, or administrative dispute." (PC-R Defense Exhibit # 6).

On December 2, 1996, the state filed a Bill of Particulars, failing to disclose Detective Sylvester's $500.00 payment to Martha Cronin as follows:

> Martha Cronin has been subpoenaed as a witness for trial in this cause, and as such has use immunity for her testimony. There are no further agreements, assurances of non prosecution or leniency, offers, benefits, or understandings between the State of Florida and Martha Cronin.

PC-R Defense Exhibit #7.

The falsehoods regarding the payment of $500.00 to Martha Cronin continued at Mr. Guzman's trial through the presentation of false testimony from Detective Allison Sylvester and Martha Cronin, and through the false argument of

the prosecutor to the court during closing.

Lead Detective Allison Sylvester testified at Mr. Guzman's trial that she had an "agreement" with Martha Cronin for free lodging at a hotel and food, but that Martha Cronin violated her "agreement" by engaging in prostitution. (PC-R 1551). After being cross examined by defense counsel as to the "agreement" she made with Martha Cronin, Detective Sylvester falsely testified as follows:

> Q. Detective Sylvester, did you, in fact, personally offer Martha Cronin any deals whatsoever in exchange for her testimony against James Guzman?
> A. No, I did not.
>
> Q. Are you aware of law enforcement, or the State Attorney's Office, offering any deals to Martha Cronin in exchange for her testimony against James Guzman?
> A. No.

(R. 1559).

State witness Martha Cronin also provided false testimony concerning her "agreement" with Detective Allison Sylvester as follows:

> Q. And what did they do with you?
> A. They took me back to the police station and called Allison Sylvester.
>
> Q. The case detective in the case.
> A. Yes sir.
>
> Q. Did you tell Allison Sylvester that you wanted a deal and you were going to talk about the murder?

A. Of course.

Q. What happened after you talked to Allison Sylvester?
A. Well, they put me in a motel room for protection I guess.

Q. All right. And Ma'am, while you were in that motel, did you continue to engage in prostitution and use crack cocaine?
A. yes, I did.

Q. Is it fair to say that was not part of your agreement with Allison Sylvester?
A. No sir, it was not.

Q. Okay. Ma'am, why did you choose to talk to the police only when you were arrested in late November of 1991?
A. I don't understand the question.

Q. Why did you pick that time to tell the police about the murder of David Colvin?
A. I was tired of watching him walk away, knowing what he had done.

(R. 1668).

The prosecutor presented false argument to the lower court during closing argument at Mr. Guzman's trial by stating:

> Allison Sylvester, your honor, testified that, in essence, Martha Cronin had no deal, and that the only deal from Martha Cronin was that she went to a motel room rather than jail that night.

(R. 2255).

The record demonstrates that the state presented a false pre-trial Bill of Particulars denying that Martha Cronin had been provided any benefits defined as "absolutely anything of value or use" which failed to reveal the payment of $500.00 to Martha Cronin by lead Detective Allison Sylvester. The state further presented falsehoods at trial through the testimony of Martha Cronin and Allison Sylvester, both of whom testified that the "agreement" with Martha Cronin was for a hotel room and food, and failed to mention Detective Sylvester's payment of $500.00 to Martha Cronin while she was incarcerated at the Volusia County Jail. The prosecutor then presented false argument to the court that the only agreement with Martha Cronin was for a hotel room and food. The first prong of *Giglio*, presentation of false testimony, has been established by Mr. Guzman via the record and evidence presented at the evidentiary hearing.

THE "KNOWING" ELEMENT OF *GIGLIO*

To establish *Giglio* claim, the defendant need not prove that the particular prosecuting attorney in the case had personal knowledge of the false testimony or argument. In Mr. Guzman's case, prosecutor Wayne Chalu testified at the evidentiary hearing that he had no knowledge of the payment of $500.00 to state witness Martha Cronin by lead Detective Allison Sylvester. (PC-R 135). Mr. Guzman has no evidence to dispute Mr. Chalu's testimony. However, the lack of

knowledge of prosecutor Chalu is not relevant to Mr. Guzman's *Giglio* claim. The knowledge component of *Giglio* is established if a member of the "prosecution team" is aware of the falsehoods.

In *Smith v. Florida*, 410 F.2d 1349 (Fifth Cir. 1969), the police knew a Government witness testified falsely whether he had been offered deal. The prosecutor was unaware of the deal and the falsity of the witnesses testimony. *Id.* at 1349. The Fifth Circuit Court held:

> The police are also part of the prosecution, and the taint on the trial is no less if they, rather that the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to the guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. The cruelest lies are often told in silence. If the police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging. The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of material information, the states failure is not on that account excused.

Id. at 1350-51.

Other cases also hold that information known to the police, but not to the prosecutor, satisfies the "knowledge" component of either a Brady or Giglio claim.

(See *Kyles v. Whitely*, 514 U.S. 419, 115 S.Ct. 1555 (U.S. 1995) (prosecutor responsible for duty under Brady to disclose favorable evidence to the defendant regardless of whether police investigators failed to inform the prosecutor of the evidence, as the prosecutor can establish procedures to ensure communication of all relevant information on each case to every lawyer who deals with it); *Bragg v. Norris*, 128 F. Supp.2d 587 (U.S. Dist. Ct. E. D. Ark. 2000)(When considering "knowing" use of perjured testimony, courts may decline to draw distinction between the police agents and prosecutors and focus instead on a "prosecution team" which includes both investigation and prosecutorial arms); Gorham v. State, 597 So.2d 782 (Fla 1992)(State Attorney is charged with constructive knowledge and possession of evidence withheld by other state agencies, such as law enforcement).

The record in Mr. Guzman's case establishes that Detective Allison Sylvester had knowledge of the falsity of Martha Cronin's testimony and also presented false testimony herself. Since she was a member of the "prosecution team" as the Lead Detective in Mr. Guzman's case, the knowledge component of *Giglio* was established. The presentation of false testimony and argument was not excused because Prosecutor Chalu was also the victim of the police suppression of the material information of the $500.00 payment to Martha Cronin by Lead Detective

Allison Sylvester.

MATERIALITY

As stated earlier, a falsehood is deemed material in a *Giglio* claim if there is any reasonable likelihood that he false testimony could have affected the judgment of the trier of fact. In situations where there is "extensive corroborating evidence" or "overwhelming evidence of guilt" independent of the witnesses testimony, the falsehood may be deemed not material. (See *Francis v. State*, 473 So.2d 672 9Fla. 1985); *Ventura v. State* , 794 So.2d 553 (Fla. 2001); *Lewis v. State*, 497 So.2d 1162 (Fla. 3rd DCA 1986)).

Accordingly, in order to decide the materiality component Mr. Guzman's *Giglio* claim it is important to (1) assess the impeachment value of Detective Sylvester's $500.00 payment to Martha Cronin and (2) examine the evidence against Guzman to determine whether the state presented "extensive corroboration" of Martha Cronin's testimony or evidence establishing "overwhelming evidence of guilt."

(I) The impeachment value of the $500.00 payment.

An examination of the record in Mr. Guzman's case reveals that Detective Sylvester's payment of $500.00 to Martha Cronin while she was incarcerated at the Volusia County Jail had tremendous impeachment value. In order to appreciate the

impact of the $500.00 payment on Martha Cronin's credibility it is necessary to review the timing of the payment relative to Martha Cronin's changed testimony.

Detective Sylvester first interviewed Martha Cronin concerning the death of David Colvin on August 12, 1991. (R. 1526). At that time Martha Cronin did not tell Detective Sylvester that Mr. Guzman had confessed to her or that she had any information concerning the death of David Colvin. (R. 1526). On September 24, 1991 Detective Sylvester again met with Martha Cronin. (R. 1530). Ms. Cronin again related to Detective Sylvester that she had no information regarding the death of David Colvin. (R. 1530). It was not until November 23, 1991, after her arrest on prostitution charges, that Martha Cronin told Detective Sylvester that Mr. Guzman had confessed to her. (R. 1531). Why did Martha Cronin change her story? According to her, she was "tired of going to jail and watching him walk away, knowing what he had done." (R. 1668).

The facts presented at the evidentiary hearing support a different motivation for Martha Cronin to change her story - the $500.00 reward. On August 16, 1991, four days after Martha Cronin was interviewed by Detective Sylvester and did not provide any information which implicated Mr. Guzman, the state placed an advertisement in the two major newspapers in Volusia County offering a $500.00 reward for information about a man who had been stabbed in his hotel room. (PC-

R 185, Defense Exhibit # 10). It was not until after this reward money was offered that Martha Cronin came forward and changed her testimony and claim that Mr. Guzman had confessed to her.

Furthermore, during the period of time in which Martha Cronin changed her story and claimed Mr. Guzman confessed to her, she was desperate for money to support her crack cocaine addiction. She repeatedly testified at Mr. Guzman's trial that in this time frame she was addicted to crack cocaine.:

> Q. Would it be fair to say that from 1989 through July 19, 1993 you used crack cocaine on a daily basis?
> A. Yes.

(R. 1683, 1684).

She further testified she was willing to engage in prostitution while in police custody in order to obtain money to buy crack:

> Q. When youre back at the beachside motel, you couldn't honor your agreement with Allison Sylvester because you had to go back to work. Right?
> A. Yes.
>
> Q. And, you wanted to get high?
> A. That's why you worked.
>
> Q. So you were willing to breach your agreement with Detective Sylvester to get high?
> A. Yes, I did not know they were watching.

(R. 1251).

Martha Cronin admitted at trial that she was a crack cocaine addict and prostitute. She was desperate for money to support her crack cocaine habit. She sold her body to obtain money so she could smoke crack cocaine. When the police set her up in a hotel room, she continued to engage in prostitution to get money to buy crack. She would surely sell out Mr. Guzman to obtain $500.00 to buy crack.

It would be a mistake to conclude that the $500.00 payment to Martha Cronin would have been just another avenue of impeachment against an already discredited witness. To the contrary, the $500.00 payment would have provided substantial and specific evidence of motivation for her to lie against Mr. Guzman. Based on the timing of the reward offer and the ultimate payment to Ms. Cronin by Detective Sylvester, it would have had devastating impeachment value against the state's key witness. Due to the false testimony and argument of counsel, which failed to reveal the $500.00 payment, the trier of fact was deprived of a full assessment of the credibility of key state witness Martha Cronin. The defense was completely misled concerning the payment to Ms. Cronin in the discovery process when the state filed a written Bill of Particulars specifically denying any benefit had been provided to her. Mr. Guzman urges this Court to find that the falsehoods

presented by the state regarding the payment of $500.00 to Martha Cronin were material as there exists a reasonable likelihood that the false testimony could have affected the judgment of the trier of fact.

THE LACK OF "EXTENSIVE CORROBORATING EVIDENCE" OR "OVERWHELMING EVIDENCE OF GUILT"

The state presented very little evidence at Mr. Guzman's trial which provided corroboration of Martha Cronin's testimony. The lower court found corroboration of Martha Cronin's testimony in the states' case against Mr. Guzman based upon (1) Paul Roger's testimony was "remarkably similar" (2) Mr. Guzman possessed Colvin's ring and traded it for drugs and money (3) Dr. Steiner testified at trial that the sword and Mr. Guzman's survival knife were consistent with the murder weapon.

Apparently the lower court confused sufficiency of the evidence to a first degree murder conviction with "overwhelming evidence of guilt' or "extensive corroboration of the state's key witness" in the context of a *Giglio* claim. Nevertheless, the evidence cited by the lower court does not provide adequate "extensive corroboration" of Ms. Cronin's testimony or "overwhelming evidence of guilt" to justify a denial of Mr. Guzman's *Giglio* claim.

(i) The testimony of Paul Rogers

The state presented testimony from jail house snitch Paul Rogers. Mr. Rogers testified that he met Mr. Guzman at the Volusia County jail. (R. 1897). They shared the same cell for a couple of weeks and became friends. (R. 1897). He testified that Mr. Guzman said he drove a limousine for David Colvin. (R. 1905). He said Mr. Guzman told him that his girlfriend Terri (Martha Cronin's alias) was wanting to go out and hook and he said he had the key to David Colvin's room and he was going to rob him and get money. (R. 1905). According to Mr. Rogers, Mr. Guzman told him that he went to Colvin's room, opened the door, went through the drawers and David woke up. (R. 1906). There was a samurai sword hanging over the dresser drawer on the wall. (R. 1907). He said he hit him with the sword 10 or 11 times. (R. 1908). He cleaned everything up and put it in the dumpster. (R. 1909).

Mr. Roger's credibility was severely damaged on cross examination. He admitted to seven prior felony convictions. Most importantly, he also admitted that on August 29, 1992, prior to his trial testimony against Mr. Guzman, he signed and affidavit where he stated "I told the Assistant DA that I am not going to say shit and they brought me back - and they brought me back from the Volusia County Correctional Facility. Guzman never confessed to me. I am not going to testify against him." (R. 1930, *emphasis added*). He also admitted on cross

examination that Mr. Guzman kept his court papers in his foot locker in his cell, and Mr. Rogers had access to them. (R. 2163).

The testimony of seven time convicted felon Paul Rogers, who previously signed an affidavit stating that Mr. Guzman never confessed to him, and who had access to Mr. Guzman's court papers and opportunity to familiarize himself with the facts of the case, cannot fairly be characterized as either "extensive corroboration" of Martha Cronin's testimony or "overwhelming evidence of guilt." Mr. Roger's trial testimony provides no legal basis to deny Mr. Guzman's *Giglio* claim.

(ii) The Ring

The state produced testimony at Mr. Guzman's trial that he sold a ring belonging to David Colvin to Leroy Gadson on August 10, 1991. (R. 1820, 1822. 1824, 1826).

Two different factual versions explaining how Mr. Guzman came into possession of the ring were presented at Mr. Guzman's trial; one from Mr. Guzman and one from Martha Cronin. Martha Cronin's version, as she testified to at trial, was that Mr. Guzman showed her the ring when he came back to the hotel room and confessed to killing David Colvin. (R. 1655).

In contradiction, Mr. Guzman testified that on August 10, 1991, after going

to the Shell gas station, the Office Bar and the International House of Pancakes with David Colvin, he returned to the hotel room where he stayed with Martha Cronin. (R. 2110). In the afternoon Martha Cronin gave him $50.00 after turning a trick in the hotel room, and she left to go buy drugs from Curtis Wallace. (R. 2111).

According to Mr. Guzman's trial testimony, Martha Cronin returned with Curtis Wallace around 2:30 or 3:00 that afternoon. (R. 2112). Mr. Guzman did not recognize it as David Colvin's ring. (R. 2113). Curtis Wallace said he wanted an "eight ball he could juggle" (referring to an amount of crack cocaine) in exchange for the ring. (2114). Acting for Mr. Wallace, Mr. Guzman then called Leroy Gadson and met him at his house. (R. 2115). Mr. Gadson looked at the ring and paid him $250.00 and an "eight ball." (R. 2116). Mr. Guzman returned to the hotel and gave Curtis Wallace half the "eight ball" and told him he would get the rest later. (R. 2117). Curtis Wallace then broke a piece off for Martha Cronin and left the room. (R. 2117).

Mr. Guzman and Martha Cronin then smoked the cocaine, and she left to go get more from Curtis Wallace. (R. 2118). Mr. Guzman then went to his apartment and called Leroy Gadson again. (R. 2120). Mr. Guzman then went and got the rest of the drugs from Leroy Gadson and returned to the Imperial Hotel where he gave the drugs to Curtis Wallace. (R. 2122).

Mr. Guzman admitted he had David Colvin's ring on August 10, 1991 and that he sold the ring to Leroy Gadson for drugs and money. The incriminating character of the ring was established solely through the testimony of admitted cocaine addict and prostitute Martha Cronin. Without her testimony, the ring was not incriminating, as Mr. Guzman testified he got the ring from Curtis Wallace, whom the record reveals was a viable suspect to David Colvin's murder. Since the possession and sale of the ring was also consistent with Mr. Guzman's innocence, it establishes neither "extensive corroboration" of Martha Cronin's testimony or "overwhelming evidence of guilt." Therefore, the ring evidence provides no legal basis to deny Mr. Guzman's *Giglio* claim.

(iii) The knife and sword

The lower court's order relies upon the testimony of Dr. Steiner regarding the knife and the sword to provide "corroboration" of Martha Cronin's testimony. However, a review of Dr. Steiner's trial testimony refutes the lower court's finding. Dr. Steiner testified that the wounds inflicted on Mr. Colvin were consistent with <u>any</u> knife at least three or four inches in length. (R. 1437). He also testified that he could not identify the exact weapon used. (R. 1453).

Dr. Steiner's testimony did not provide any meaningful linkage between the sword, the hunting knife, and the wounds sustained by David Colvin. He could not

specifically attribute the wounds to either the sword or the hunting knife. Therefore, the testimony of Dr. Steiner does not provide either "extensive corroboration" of Martha Cronin's testimony or establish "overwhelming evidence of guilt". His testimony does not provide any legal basis to deny Mr. Guzman's *Giglio* claim.

None of the evidence cited by the lower court establish "extensive corroboration" of witness Martha Cronin's testimony or "overwhelming evidence of guilt." Since an overall assessment of the quantity of evidence against Mr. Guzman is necessary for a de-novo review of the materiality component of the *Giglio* claim, other evidence which points to lack of corroboration of Martha Cronin's testimony should also be considered. This other evidence involves (1)other possible suspects and (2) an absence of physical evidence.

(I) Other possible suspects.

At Mr. Guzman's trial both state and defense witnesses testified to facts which implicated persons other than Mr. Guzman in the murder of David Colvin. State witness James Yarborough, an employee of the Imperial Hotel, testified that he witnessed David Colvin having an argument with someone in his room at the hotel. (R. 1483). The person was named James (not Mr. Guzman who was also named James) and was living in room 107 of the hotel. (R. 1485). James entered Mr. Colvin's room with an open knife and Mr. Colvin drew his sword to defend

himself. (R. 1483). Mr. Yarborough entered the room and broke up the altercation. (R. 1485). Detective Allison Sylvester testified that she obtained information in her investigation that persons named Holt or Moore had an altercation with David Colvin in his hotel room during which either Holt or Moore were armed with a knife. (R. 1542).

Detective Sylvester also testified that on August 12, 1991 she interviewed Curtis Wallace at the Imperial Hotel. (R. 1518). Curtis Wallace stated "if a ring was missing I probably know who did it". (R. 1519). This was before the police had mentioned to anyone, including Mr. Wallace, that David Colvin's ring was missing. (R. 1519).

Antonio Lee told Detective Sylvester that he had seen David Colvin alive at the Coke machine at the hotel on Saturday night. (R. 1521). He also told Detective Sylvester that Curtis Wallace had confessed to him that he killed David Colvin. (R. 1529). Lee related that Curtis Wallace had beaten Colvin and taken his ring and money. (R. 1530). Lee further stated that he saw Curtis Wallace leaving Mr. Colvin's room with a pipe with black tape wrapped around it, and Curtis Wallace later had bruised knuckles. (R. 1565, 1839). Wallace also threatened to kill Lee if he testified against him. (R. 1568).

Detective Jimmy Flynt of the Daytona Beach Police Department testified that

on August 13, 1991 he spoke to Curtis Wallace who told him he had seen David Colvin alive at the Coke machine on Saturday night. (R. 2010). Antonio Lee also told Detective Flynt that he saw David Colvin alive by the Coke machine on Saturday night. (R. 2112)

(ii) Absence of physical evidence

(1) The dumpster: Martha Cronin testified that when Mr. Guzman came back to his room he had a garbage bag full of rags. (R. 1650). She said he went to throw the rags away, but did not see him do it. (R. 1651). State snitch Paul Rogers testified James Guzman told him he cleaned up the room and took everything to the dumpster. (R. 1909). However, Thomas Conway, who worked at the Imperial Hotel, testified that the police searched the dumpster on August 12, 1991 and found nothing. (R. 1323). Most importantly, he stated the dumpster was full at the time, and was emptied only twice a week. (R. 1323). If Martha Cronin and Paul Rogers offered truthful testimony, the police should have found this garbage bag full of bloody rags in the dumpster. The police found nothing.

(2) No blood or fingerprints were discovered on the sword found in David Colvin's room. FDLE agent Michael Rafferty testified he tested the sword for prints and blood and none were found. (R. 1357).

(3) Blood hair and saliva samples were taken from Mr. Guzman and nothing

was matched to anything found in David Colvin's room. (R. 1559).

Taking into account the full record in Mr. Guzman's case, the state did not present evidence which established either "significant corroboration" of Martha Cronin's testimony or "overwhelming evidence of guilt." Instead, the state of the evidence against Mr. Guzman was weak with little or no corroborating evidence of Martha Cronin's testimony. Therefore, the state's false testimony and argument at Mr. Guzman's trial meets the *Giglio* criteria for materiality. Mr. Guzman has established all the requisite elements for a *Giglio* claim. He is entitled to relief and moves this Court to vacate his Judgment and Sentence and order a new trial.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. GUZMAN'S CLAIM THAT THE STATE COMMITTED A *BRADY* VIOLATION BY FAILING TO DISCLOSE TO THE DEFENSE THAT STATE WITNESS MARTHA CRONIN HAD BEEN PAID $500.00 BY DETECTIVE ALLISON SYLVESTER

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State,* 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court. This claim

was presented bt Mr. Guzman in claim 5(a) of his 3.850 motion.

THE *BRADY* CLAIM

Claim One of Appellant's Brief asserts the lower court erred by denying Mr. Guzman's *Giglio* claim based on the presentation of false testimony and argument concerning the payment of $500.00 to state witness Martha Cronin. As stated in Claim One, Mr. Guzman asserts he is entitled to application of the more "defense friendly" materiality standard of *Giglio.* However, should this Court disagree, then Mr. Guzman hereby alleges he is also entitled to relief due to a *Brady* violation committed by the State withholding from the defense that Martha Cronin had been paid the sum of $500.00.

Apart from the prosecution's duty to not put on false evidence and testimony, imposed by *Napue* and *Giglio,* the prosecution also has a duty under *Brady v. Maryland,* to disclose favorable evidence to the accused whether requested by the accused or not. 373 U.S. 83, 87 (1963). As the Court stated: "We hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Id.* The Court later held "that the duty to disclose such evidence is applicable even though there has been no request by the accused."

Strickler v. Greene, 527 U.S. 263, 280 (1999); citing *United States v. Agurs*, 427 U.S. 97, 107 (1976). "[T]he duty encompasses impeachment evidence as well as exculpatory evidence." Id.; citing *United States v. Bagley*, 473 U.S. 667, 676 (1985).

"There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching, that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. *Id.* at 281-82.

The Court detailed four aspects of materiality or prejudice for a Brady claim under *U.S. v. Bagley*, 473 U.S. 667, (1985), in *Kyles v. Whitely*, 514 U.S. 419, 434 (1995). One, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of a reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant. *Id.* citing *Bagley*, at 682. "Bagley's touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial worthy of confidence." *Id.*

The second aspect of *Bagley* materiality is that it is not a sufficiency of the evidence test. *Id.* The third is that once a reviewing court applying *Bagley* has found a constitutional error there is no need for further harmless-error review. *Id.* Fourth, the State's disclosure obligation turns on the cumulative effect of all of all suppressed evidence favorable to the defense, not on the evidence considered item by item. *Id.* For a *Brady* claim, "the rule encompasses evidence 'known only to police investigators and not to the prosecutor.'" *Strickler*, 527 U.S. 280-81.

In Mr. Guzman's case, the defense made a specific discovery demand upon the state relating to any compensation paid to several state witnesses, including Martha Cronin. The motion specifically requested the following information: This demand was entitled "Motion for Disclosure of Impeaching Information" and requested the following from the state:

> 1. The substance of any and all statements, agreements, offers or discussions had with any of the state's witnesses or a suggestion of leniency, compensation, assurance not to prosecute, assurance to proceed only on certain causes, or any other offer or benefit accruing to said individual whatsoever in exchange for their cooperation, assistance of testimony in the trial herein;
> 2. Any and all consideration given to or made on behalf of government witnesses. By "consideration" Defendant refers to absolutely anything of value or use including but not limited to

> immunity grants, witness fees, special witness fees, transportation assistance, assistance or favorable treatment with respect to any civil, tax court, or administrative dispute with plaintiff, and anything else which could arguably create an interest or bias in favor of the State or against the defense or act as an inducement to testify or color testimony.

PC-R Defense Exhibit # 6)

In direct response to the specific discovery demand , the state filed a written response on December 2, 1996 which stated:

> Martha Cronin has been subpoenaed as a witness for trial in this cause, and as such has use immunity for her testimony. There are no further agreements, assurances of non prosecution or leniency, offers, benefits or understandings between the State of Florida and Martha Cronin.

(PC-R Defense Exhibit 7).

Evidence introduced at the evidentiary hearing established that on January 3, 1992, Detective Sylvester paid Martha Cronin the sum of $500.00 by money order while Ms. Cronin was incarcerated in the Volusia County jail. (PC-R. Defense Exhibit # 9). The state never informed Mr. Guzman's trial counsel that Detective Sylvester had paid Martha Cronin $500.00. (PC-R 238, 240, 241).

Since the evidence of the $500.00 payment was favorable to Mr. Guzman for impeachment of key state witness Martha Cronin, and the state suppressed the evidence, the first two prongs of a *Brady* violation have been satisfied. The last

prong is materiality. The proper materiality standard is whether, in the absence of disclosure of the evidence of the $500.00 payment, did Mr. Guzman receive a fair trial worthy of confidence.

For all the reasons put forth in the materiality portion of the *Giglio* claim outlined in Claim One, Mr. Guzman did not receive a fair trial worthy of confidence. The failure to disclose the $500.00 payment to Martha Cronin meets the materiality standard of *Brady* . Since all of the components of a *Brady* violation were satisfied by Mr. Guzman, the lower court erred in denying the claim. Mr. Guzman moves this Court to reverse the lower court and vacate his Judgement and Conviction and order a new trial.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. GUZMAN'S CLAIM THAT THE STATE COMMITTED A DUE PROCESS VIOLATION BY DESTROYING POTENTIALLY EXCULPATORY EVIDENCE IN BAD FAITH.

Mr. Guzman raised several claims in his 3.850 motion relating to the destruction of hair evidence by the state. Claims XII, XIII, and XIV of the Amended 3.850 motion alleged that Mr. Guzman was deprived of due process by the State's bad faith destruction of exculpatory evidence, that the state committed a

Brady violation by failing to disclose to Mr. Guzman that the hair evidence had been destroyed and that Mr. Guzman's trial counsel was ineffective for failing to ascertain that the hair evidence had been destroyed. (PC-R 839-843).

Mr. Guzman presented extensive evidence at the evidentiary hearing concerning the facts and circumstances surrounding the destruction of the hair evidence.

THE BAD FAITH DESTRUCTION OF EVIDENCE

In Mr. Guzman's case, the police collected a Caucasian hair found lying on the back of David Colvin's thigh. A photograph of Mr. Colvin's thigh, with the hair depicted therein, was introduced at the evidentiary hearing. (PC-R defense exhibit # 2). The evidence was labeled by the police as Q-103. (PC-R 43). Computer records from the Daytona Beach Police Department evidence room establish that the hair was destroyed by officer Francis Thompson on November 10, 1992. (PC-R 43,44). The notation on the computerized record from the police department indicated that the destruction of the hair was "per ASA Vince Patrucco." (PC-R 43).

At the evidentiary hearing, witnesses from the Daytona Beach Police Department evidence room testified as to the proper procedures for the destruction of physical evidence in a homicide case. They testified that evidence in a homicide

case should not be destroyed for 50 years or longer unless the defendant was executed. (PC-R 35). Furthermore, evidence in a homicide case is stored separately from all other evidence with the case number and victim's name attached to avoid co-mingling with other evidence in other cases. (PC-R 36). Before evidence is destroyed there must be written request from the Office of the State Attorney. (PC-R 36). No evidence can be destroyed without a court order. (PC-R 38). Once the State Attorney's Office requests the destruction of evidence, it is placed in a yellow bin with the other evidence from other cases until a court order for its destruction can be obtained. (PC-R 38). A court order for destruction of evidence would typically contain authorization to destroy all the evidence in the bin and would list each item of evidence. (PC-R 39). The evidence is then brought to Halifax Hospital where it is destroyed in the presence of two witnesses, who fill out sworn affidavits. (PC-R 39). These destructions or "burnings" take place around three or four times a year. (PC-R 40).

The testimony and documentary evidence introduced at the evidentiary hearing also established that none of the rules and regulations of the Daytona Beach Police Department required for the destruction of evidence of evidence were followed by Officer Francis Thompson when he destroyed the Caucasian hair found by the police on David Colvin's thigh. The Office of the State Attorney

never requested the destruction of the Caucasian hair found by the police on David Colvin's thigh. (PC-R 75, 92). No court order was ever obtained or issued authorizing the destruction of the Caucasian hair found on the back of David Colvin's thigh. (PC-R 92). No affidavit was ever issued stating that the hair evidence was destroyed in the presence of two witnesses. (PC-R 75). The evidence introduced at the evidentiary hearing established that the Caucasian hair found on the back of David Colvin's thigh was destroyed by Officer Francis Thompson of the Daytona Beach Police Department without any legal authorization or justification.

Testimony and documentary evidence introduced at the evidentiary hearing also established that from 1989 until 1994 Officer Francis Thompson of the Daytona Beach Police Department engaged in gross criminal misconduct by stealing items from the evidence room at the Daytona Beach Police Department. In 1996 Officer Thompson was convicted in Federal Court in the Eastern District of Pennsylvania for stealing items from the evidence room at the Daytona Beach Police Department and then sending them to his nephew in Pennsylvania for sale and distribution. (PC-R Defense Exhibit # 8 - a copy of the clerk's file from Officer Thompson's Federal conviction). One of the counts for which he was convicted involved the theft and distribution of cocaine from the evidence room in

state case number 91-32541. (PC-R 98).

The white powdery substance in case number 91-32451 was listed as destroyed by Francis Thompson on November 18, 1992 as reflected on an affidavit and court order of destruction (PC-R 97). According to the indictment for which Officer Thompson was convicted, the cocaine was not destroyed that day, but rather had been sent by Officer Thompson to his nephew in Pennsylvania for sale and distribution in Pennsylvania. (PC-R defense exhibit 8). The destruction order which alleged that the cocaine had been destroyed also contained several items of evidence from Mr. Guzman's case, including sheets and bedspreads. (PC-R 53-57). There was no request by the Office of the State Attorney or court order authorizing the destruction of this evidence from Mr. Guzman's case. (PC-R 53-55). This unauthorized and unlawful destruction of evidence in the Guzman case occurred only six days after Officer Thompson destroyed the hair evidence found on the back of David Colvin's thigh.

The hair found on the back of David Colvin's thigh has been forever destroyed by the illegal actions of Officer Francis Thompson of the Daytona Beach Police Department. On September 6, 2001, Mr. Guzman filed a motion to have this hair evidence subjected to DNA testing. (PC-R 828-29). Mr. Guzman's opportunity to test this potentially exculpatory evidence was eliminated by Officer

Thompson's bad faith destruction. The evidence introduced at the evidentiary hearing also established that the state never disclosed to Mr. Guzman's trial counsel that this unlawful destruction of the hair evidence had taken place. (PC-R 247, 248)

THE LOWER COURT'S ORDER

The lower court found that claim XII, the bad faith destruction of evidence claim, was procedurally barred and that the defense had failed to show that the hair evidence had been destroyed in bad faith. (PC-R 933-937).

The lower court erred in finding that claim XII of the Amended Complaint was procedurally barred. The trigger for discovery that the hair evidence was destroyed was the September 6, 2001 Motion for DNA testing. (PC-R 828-829). It was not until the state filed the written response on September 10, 2001 stating that the hair evidence had been destroyed in November of 1992. (PC-R 830-835). Prior to that time, not even the Assistant State Attorney's who prosecuted Mr. Guzman, nor the lead Detective in the case had any knowledge that the hair evidence had been destroyed. (PC-R 142-43, 174-75).

It was erroneous to hold the defense to knowledge of the destruction of evidence that was hidden even from the prosecutors and law enforcement officers involved in Mr. Guzman's case. Furthermore, even when the State did formally

respond to the DNA motion, no mention was made at that time that the hair evidence had been destroyed by Officer Thompson, who was serving time in federal prison for selling items from the Daytona Beach evidence room. (PC-R 830-835). The defense was given no clue, and had no reason to suspect, that the officer in charge of the evidence room at the Daytona Beach Police Department had felonious intentions to steal and destroy items therein.

Additionally, the due process violation asserted by Mr. Guzman relates to the denial of his *current* right to conduct DNA testing. This right was not available at the time of Mr. Guzman's trial. Only with the passage of Florida's DNA statute, Florida statute 925.11 (enacted October 1, 2001), did the opportunity for DNA testing become available for Mr. Guzman. Accordingly, this claim was not procedurally barred.

As to the merits of the bad faith destruction claim the lower court stated:

> Based upon the evidence presented, bad faith by the State has not been shown. This evidence only shows that the hair evidence from the defendant's case has been permanently lost from the Daytona Beach Police Department's evidence room since 1995. There was no evidence presented that Thompson, or anyone else, actually destroyed the hair evidence. The hair evidence is only assumed to have been destroyed based on the computer entries. Nor was there any evidence presented that Thompson or the police, by there conduct,

> indicated that the hair evidence could form the basis for exonerating the defendant. In fact, the lead detective testified that based upon the condition of the body, i.e. several incise wounds on the head, and the crime scene, i.e. hair on thigh the same color and length as victim's head hair, it appeared to be cut rather than pulled from root, and blood spatter on walls and victims legs, she assumed the hair evidence was from the victim. See October 22, 2001 Evidentiary hearing Transcripts at 201-203. Further, the lead detective testified that she submitted the hair evidence to FDLE for testing. See October 22, 2001 Evidentiary hearing Transcripts at 209-11. However, the April 2, 1992 FDLE report stated that no hair comparison had been performed because there were not adequate hair standards. See id, see also Defendant's Exhibit # 5. The detective testified that it was not possible at the time of the report to obtain adequate hair standards for comparison because the victim had already been buried.* See id; see also State's trial exhibit # 13 (death certificate, signed August 12, 1991, showing the victim was cremated). Finally, the lead detective stated the hair evidence was not significant in this case. See id. at 211. See also October 23, 2001 Evidentiary hearing Transcripts at 249; 301 (trial counsel did not attach much significance to the hair evidence because the victims skull had been shattered and fragments of the skull were dislodged and found in other parts of the room). Therefore, the failure to preserve hair evidence is not a denial of due process of law.

(PC-R 936, 937). *(David Colvin was actually cremated).

The lower court's order finding that the hair evidence had not been destroyed in bad faith was erroneous in many different respects. First of all, the

initial finding that "[t]his evidence only shows that the hair evidence has been permanently lost from the Daytona Beach Police Department's evidence room since 1995. There was no evidence presented that Thompson, or anyone else, actually destroyed the evidence" is totally unsupported by the record.

In the November 10, 2001 response to DNA testing the state asserted:

> That the Caucasian hair found on the decedent's left thigh at the crime scene appears to have been destroyed pursuant to a court order. The undersigned, upon receipt of the Defendant's motion, requested that the evidence custodian for the Daytona Beach Police Department attempt to determine whether the hair in question still in existence. Afer conducting a computer search and a manual search, the evidence custodian reported that the item could not be located at their agency and, according to their records, was destroyed in November, 1992.

(PC-R 831).

The evidence introduced at the evidentiary hearing established that the state's assertions, with the exception of the representation concerning a court order for destruction, were accurate. Contrary to the lower court's order, the testimony and documents introduced at the evidentiary hearing conclusively proved that the hair evidence was destroyed by Officer Thompson on November 10, 1992.

Fiona Goodyear, a crime lab technician at FDLE, testified that from 1986 until 1998 she worked for the Daytona Beach Police Department. (PC-R 26). She

started working in the evidence room in April of 1992. (PC-R 26). As to the computer records concerning the destruction of the hair evidence in Mr. Guzman's case she testified concerning defense exhibit # 3 as follows:

> Q. Okay. Well, what is the – the date of entry on that particular computer screen printout?
> A. November 10, 1992.
>
> Q. And does it have a screen name?
> A. Yes, sir.
>
> Q. And what is the case number?
> A. 91-022222.
>
> Q. Okay.
> A. And it's followed by a 75 that I'm not familiar with.
>
> Q. Does that describe apiece of evidence?
> A. Yes, sir.
>
> Q. And what is the description of the evidence?
> A. "Q-103, white envelope, swabs, hair scrapings."
>
> Q. And does it state what happened to that particular piece of evidence?
> A. "Destroyed."
>
> Q. And how do you know that by looking at the computer screen?
> A. Custody location - - it states, "destroyed."
>
> Q. Thats because it says five on there, the number five? This was - -
> A. Oh, I'm sorry.

Q. It's okay. Disposition five would mean destroyed?
A. Yeah, Yes. Sir.

Q. And does it give a reason fro the destruction?
A. In the comment, "Per ASA Vince Patrucco."

Q. By looking at this document, can you tell who it was who destroyed that piece of evidence?
A. No, sir.

Q. Does it have a number on the - -
A. for entry - -

Q. - employee?
A. Yes.

Q. Clerk number?
A. Yes; 55943.

Q. Whose clerk number was that?
A. Francis Thompson.

(PC-R 43, 44).

Marilyn Conlon testified she has been the evidence supervisor at the Daytona Beach Police Department since 1994. (PC-R 69). She said she was asked in September of 2001 to search the property room at the Daytona Beach Police Department to look for item Q-103, the hair evidence in the Guzman case. (PC-R 70). She stated that according to the computer records at the Daytona Beach Police Department evidence room , item Q-103 had been destroyed by clerk number 55943, on November 10, 1992. (PC-R 72).

Despite this unequivocal testimony by present and former employees of the Daytona Beach Police Department that the computer records show that the hair evidence in the Guzman case was destroyed on November 10, 1992 by Officer Francis Thompson of the Daytona Beach Police Department, somehow, the lower court found that there was "no evidence presented that Thompson or anyone else destroyed the hair evidence." (PC-R 936). The finding was erroneous as all available records show the evidence was destroyed by Officer Thompson on November 10, 1992.

The lower court finding that the hair evidence was not destroyed in bad faith, was also erroneous. In *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, (U.S. 1988), the Court held that the failure to preserve the victim's clothing and semen samples was not a violation of due process without a showing of bad faith on the part of the police. The Court stated:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in

treatment is found in the observation by the Court in *Trombetta*, 467 U.S. , at 486, 104 S.Ct. , at 2532, that "whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose content are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of our Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and preserve all material that might be conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e. those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

In this case, the police collected the rectal swab and clothing on the night of the crime; respondent was not taken into custody until six weeks later. The failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worse be described as negligent. None of this information was concealed from the respondent at trial, and the evidence - - such as it was - - was made available to respondent's expert who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion - - and we agree - - that there was no suggestion of

> bad faith on the part of the police. It follows, therefore, from what we have said, that there was no violation of the Due Process Clause.

Id. at 337.

Mr. Guzman is entitled to a new trial when the holding of the court in *Youngblood* is applied to his case. Clearly the Court held that where the police act in bad faith, destruction of potentially exculpatory evidence is a violation of the Due Process Clause. In Mr. Guzman's case, the evidence was destroyed without any request from the Office of the State Attorney, no Court Order was obtained for the destruction of the evidence, and no affidavit was prepared witnessing the destruction. The destruction of the hair evidence was done in total violation of the rules and procedures of Daytona Beach Police Department evidence room . Also, the evidence was destroyed by Officer Thompson who was convicted of stealing items from the evidence room and distributing them to his brother-in-law in Pennsylvania. These facts establish bad faith.

The lower court's finding that the evidence was not destroyed in bad faith was based on the fact that the lead Detective testified the hair appeared to be cut and she assumed the hair was the victim's. However, no one can look at a human hair and determine who it belongs to without scientific testing. Detective Sylvester admitted as such at the evidentiary hearing when she testified:

> Q. Ms. Sylvester, are you saying that you're able to sit here in this courtroom and look at this hair and be able to tell us who the hair belonged to?
> A. I'm able to tell you what my presumption was at the time that I was doing the investigation.
>
> Q. And in order to confirm your presumption, you would have to have the hair tested, correct?
> A. Correct.
>
> Q. And there's no way to make a visual observation of someone's hair and make a visual determination of who the hair belonged to, is there?
> A. I wouldn't think so.

(PC-R 204-05)

Since the reasons cited by the lower court for denying claim XII of his Amended 3.850 Motion are legally erroneous or not factually supported by the evidence in the record, Mr. Guzman moves this Court to reverse the denial by the lower court, Vacate his Judgment and Sentence, and Order a new trial.

As to Claims XIII and XIV, Mr. Guzman further asserts that the lower Court erred in denying these claims. Claim XIII was based upon a *Brady* violation for the State's failure to disclose to the State that the hair evidence had been destroyed. The lower court erred in finding that no *Brady* violation had occurred, based on the fact that the defense could have determined the existence of the destruction of the hair evidence through due diligence. (PC-R 938). The record in this case reveals

that none of the prosecuting attorneys or police officers involved in Mr. Guzman's case knew that the hair evidence had been destroyed. (PC-R 142-43, 174-75). Nothing in the record would have provided a basis for any notice whatsoever to defense counsel that this evidence was destroyed. Therefore, absent clairvoyance, the defense would have had no reason to investigate whether an officer was criminally destroying or stealing various evidence from the Daytona Beach Police Department.

The lower court also erred in finding that the materiality component of *Brady* was not satisfied by the nondisclosure by the state of the destruction of the hair evidence. (PC-R 938, 939). The stated reasons by the lower court were (1) no due process showing of bad faith in failing to preserve the evidence occurred ; (2) the primary theory of defense at trial was that Curtis Wallace, a black male, was the real killer, rather than Defendant ;(3) there was no evidence that Thompson or the police, by there conduct, indicated that the hair evidence could form a basis for exonerating Defendant.

Reason one has already been previously addressed in this brief. As to reasons two and three, the lower court assumed that, in order to be exonerating, the hair evidence would have to be matched to Curtis Wallace. However, the purpose of the DNA testing sought by the defense on the hair would be to either (1) prove

the hair was not David Colvin's or (2) prove it belonged to someone else besides Mr. Guzman or Mr. Colvin. This would be done by a DNA test on the hair, not a hair comparison as previously attempted by Allison Sylvester. The lack of another hair standard would not preclude a DNA test. A DNA test proving the hair was not Mr. Colvin's or Mr. Guzman would clearly show someone other than Guzman killed David Colvin. Specific identity of the actual killer would not be required - - only that it was NOT Mr. Guzman. Mr. Guzman does not have the burden of proving who the real killer was, just that he did not do it. He was deprived of that opportunity by the destruction of the hair evidence.

Furthermore, there were more alternative suspects than Curtis Wallace. State witness James Yarborough, an employee of the Imperial Hotel, testified that he witnessed David Colvin having an argument with someone in his room at the hotel. (R. 1483). The person was named James (not Guzman who was also named James) and was living in room 107 of the hotel. (R. 1485). James entered Mr. Colvin's room with an open knife and Mr. Colvin drew his sword to defend himself. (R. 1483). Mr. Yarborough entered the room and broke up the altercation. (R. 1485). Even the lower court's misguided premise that Curtis Wallace was the only alternative suspect was incorrect. Accordingly, all the reasons cited by the lower court for denying claim XIII of the Amended 3.850 Motion were erroneous.

Mr. Guzman urges this Court to reverse the lower court, vacate his Judgment and Sentence, and order a new trial.

Mr. Guzman has outlined his reasons that he is entitled to relief for the Bad faith destruction of the hair evidence, and the *Brady* violation of failing to disclose the unauthorized destruction. If this Court finds that trial counsel should have discovered, through due diligence, that the hair evidence had been destroyed by Officer Thompson, then Mr. Guzman urges this Court find he is entitled to relief for ineffective assistance of counsel. In that event, counsel would have been ineffective for failing to file appropriate pre-trial motions to dismiss for outrageous governmental misconduct and violation of due process related to the destruction of the hair evidence. Based on the facts surrounding the destruction, there was a reasonable probability the outcome of the proceedings would have been different if counsel had discovered the unlawful destruction and filed appropriate motions to dismiss.

The ineffectiveness of failing to discover the unlawful destruction also deprived Mr. Guzman the opportunity to present to the trier of fact this instance of gross police misconduct to impeach the integrity of the overall police investigation in the case. Since both prongs of the *Strickland* standard, ineffectiveness and prejudice, have been established, Mr. Guzman was entitled to relief. The lower

court erred in denying Claim XIV of the amended complaint. Mr. Guzman urges the Court to reverse the lower court, vacate his Judgement and Sentence, and order a new trial.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. GUZMAN'S CLAIM THAT HE WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, DUE TO PROSECUTORIAL MISCONDUCT, WHICH RENDERED THE OUTCOME OF HIS TRIAL UNRELIABLE. THE STATE ENCOURAGED AND PRESENTED MISLEADING EVIDENCE AND IMPROPER ARGUMENT TO THE TRIER OF FACT.

This Court has held that when improper conduct by a prosecutor "permeates" a case, relief is proper. *Ruiz v. State*, 743 So. 2d 1 (Fla. 1999); *Garcia v. State*, 622 So. 2d 1324 (Fla. 1993); *Nowitzke v. State*, 572 So. 2d 1346 (Fla.1990). The state's presentation of false and misleading testimony, in addition to improper, inflammatory argument, denied Mr. Guzman his fundamental right to a fair trial.

The prosecutors' actions, both individually and cumulatively, deprived Mr. Guzman of his fundamental right to a fair trial. The prosecutor repeatedly made inflammatory, improper, and prejudicial comments during his examination of witnesses and at opening and closing argument of both phases of trial. As a result of these comments and actions, the trier of fact was allowed to hear inadmissable

and prejudicial evidence, thus denying Mr. Guzman his fundamental right to a fair trial.

On redirect examination of Martha Cronin regarding a letter she had written to Mr. Guzman, the prosecutor improperly brought out the fact that Cronin had been administered a polygraph examination:

> Q (by MR. CHALU): Ma'am, also in this letter is a reference to the police waiting for a polygraph?
>
> A: Yes.
>
> Q: Was that a polygraph you took ma'am?
>
> A: Yes, it was.
>
> Q: You know what the result of that polygraph was?
>
> A: No.

(R. 1778). At that point in the testimony, defense counsel objected to questions about the results of the polygraph examination. The objection was sustained.

The prosecutor engaged in misconduct by eliciting this highly prejudicial evidence. Although the letter was inappropriately and improperly introduced into evidence by defense counsel, the letter on its face merely refers to a polygraph, without reference to whom it was administered by or to. The prosecutor compounded trial counsel's ineffectiveness in introducing the relevant portion of

the letter by inappropriately delving into the details of the polygraph examination.

The prosecutor was clearly aware that this testimony regarding a polygraph examination taken by a witness against Mr. Guzman was improper. The trial court found such evidence inadmissable when it later stated, "I'll sustain the objection. Polygraphs are not – I'm not going to have polygraphs begin to get into the record in this case." (R. 1779). Despite the court's statement on this point, the polygraph examination was already thoroughly in the record due to defense counsel's ineffectiveness and the prosecutor's misconduct.

During his direct examination of witness James Yarborough, the prosecutor elicited improper and inadmissable evidence of a collateral crime. Yarborough, who had been a resident of the Imperial Motel in August, 1991, was questioned about prior contact with Mr. Guzman:

> Q (by MR. CHALU): Okay. Had you personally had any contact with the defendant prior to Mr. Colvin being killed? Had you had any contact with this gentleman here?
>
> A: Yes. I met him once.
>
> Q: All right, sir. What was that about?
>
> A: At the time, I was living in room 109. I had one of my little sons living with me. And he approached me about drugs. And I told him I didn't mess around. And I left it at that. Because I didn't.

(R. 1477). At that point, a proper objection was taken and sustained as to the admission of a collateral crime. The prosecutor attempted to distance himself from this improper evidence by stating to the trial court that the answer was non-responsive to his question. However, it is clear that the answer was unequivocally responsive to the question. The prosecutor's statement to the contrary is false.

This evidence of a collateral crime was clearly inadmissable and the prosecutor's elicitation of it was calculated to demonize Mr. Guzman further and interject issues irrelevant to the trial. Such misconduct denied Mr. Guzman the fundamental right to a fair trial.

The prosecutor's actions and comments at Mr. Guzman's trial rendered the proceeding fundamentally unfair. and comments in Mr. Guzman's case "so infected [his] trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. Dechristoforo* 416 U.S. 636, 642, 94 S.Ct. 1868, 1871 (1974). While singular incidents of impropriety may sometimes not result in a denial of due process, when, as in Mr. Guzman's case a certain critical mass of misconduct is reached, due process is thwarted.

The prosecutor's numerous improper comments, inflammatory arguments, and impermissible actions fatally infected Mr. Guzman's trial and render the verdict and death sentence unreliable. Mr. Guzman's trial was fundamentally unfair,

because the prosecutor's comments, arguments, and action compromised the integrity of the judicial system at its core. In analyzing this claim, this Court must also look to the cumulative impact of the prosecutorial misconduct, including the *Giglio* claim involving nondisclosure of the $500.00 payment to Martha Cronin. Confidence in the outcome of Mr. Guzman's trial was severely undermined by the prosecutor's actions, and 3.850 relief was warranted. The lower court erred in denying this claim.

CONCLUSION

For the reasons stated throughout this brief this Court should grant all relief for which Mr. Guzman prays.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this 1st day of October

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing INITIAL BRIEF OF APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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