IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC03-454

DERRICK TYRONE SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Smith appeals the circuit court's denial of his Rule 3.850 motion following an evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page numbers following the abbreviations:

"R1.___."	-Record on direct appeal following the 1983 trial;
"R2__."	-Record on direct appeal following the 1990 retrial;
"PC-R__."	-Current record on appeal from 2002 post-conviction hearing;
"D-Ex.__."	-Defense exhibits entered at the 2002 evidentiary hearing and made a part of the post-conviction record on appeal. Given the length of a number of the exhibits, reference will often include citation to the bate stamped page number in the form of "bsp __". The bate stamped page numbers were placed upon documents received from the State Attorney's Office pursuant to public records requests. Within the exhibits, the bate stamped pages do not necessarily appear in order.
"S-Ex.__"	-State exhibits entered at the 2002 evidentiary hearing and made part of the post-conviction record on appeal.

REQUEST FOR ORAL ARGUMENT

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

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INTRODUCTION

The State's case against Derrick Smith was seemingly airtight.[1] Derrick Johnson, Mr. Smith's co-defendant testified that he was with Mr. Smith participating in a robbery of Mr. Songer, a cab driver, when he saw Mr. Smith shoot Mr. Songer. Melvin Jones testified that he witnessed the shooting while in route to his residence a half of a block away; he said he saw Derrick Smith shoot the cab driver as Derrick Johnson fled the scene. As corroboration, the State presented David McGruder who had observed two men get into Mr. Songer's cab at the Hogley Wogley Bar-B-Q.[2] His testimony was that even though he could not identify Derrick Smith in the courtroom, he had picked his photo from a photo-pack lineup shortly after the shooting (R2. 881).

While maintaining Mr. Smith's innocence, the defense at his first trial alleged that Johnson and Jones had been in a holding cell together shortly after the homicide and had worked on a story to incriminate Mr. Smith. During the defense's cross-examination of Johnson and Jones, both denied

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[1]Mr. Smith was first tried in 1983, and after this Court reversed his conviction, retried in 1990. At issue in these proceedings is the constitutionality of the retrial.

[2]The State also called Mellow Jones to corroborate her husband's story as to the time that he arrived home.

discussing the case (R1. 1536), or even conversing about the case (R1. 1693-94). Since both Jones and Johnson had denied a meeting and no other evidence was available to prove otherwise, counsel's questioning at the retrial was generic. But again, Jones denied ever talking to Johnson (R2. 996-97).[3]

In collateral proceedings, a wealth of new information surfaced that cast grave doubt upon the credibility of all three of these witnesses (Johnson, Jones and McGruder) and the veracity of their stories. At the evidentiary hearing in 2002, the State acknowledged that during the time period of Mr. Smith's case, the Pinellas State Attorney's Office relied upon Miller v. State, 360 So.2d 46 (Fla. 2nd DCA 1978), as defining its discovery duties.[4] Under Miller, police reports were not discoverable except for those portions containing verbatim statements from witnesses listed by the State (PC-R.

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[3]At the retrial, the defense did call Larry Martin as a witness. He testified that Derrick Johnson had told him while they were incarcerated together that Derrick Smith had not shot the cab driver (R2. 1257-59).

[4]The prosecutor at the retrial did concede during his testimony that Rule 3.220 was amended effective July 1, 1989, prior to Mr. Smith's retrial (PC-R. 4810). In re Amendment to Fla. R. Crim. Pro. 3.220, 550 So.2d 1097 (Fla. 1989). Under the amended rule, all police reports were discoverable. Miller was effectively overturned. Yet, the prosecutor at the retrial did not recall complying with the amended rule (PC-R. 3971).

4812-13). The police reports provided to the defense in Mr. Smith's case were subject to a "Millerizing" process after which a small number of redacted reports were found to be discoverable and disclosed (R1. 26-61).[5]

However, not just police reports were withheld from the defense. During the post-conviction evidentiary hearing, the 1983 trial prosecutor, Tom Hogan, acknowledged using his state attorney subpoena power to obtain sworn testimony from numerous witnesses. Hogan prepared documents, each entitled "Synopsis," summarizing the sworn testimony of the witnesses who appeared before him.[6] According to Hogan, testimony obtained pursuant to a state attorney subpoena was absolutely privileged and not discoverable (PC-R. 4855-56). Glenn

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[5]The packet of police reports that were made part of the record of the original trial in 1983 (R1. 26-61) were introduced into evidence as D-Ex. #12. Introduced as D-Ex. #2 was a packet of those same police reports with passages marked with an "X" and the word "out" appearing. These had been obtained from the State Attorney's Office pursuant to Chapter 119, and reflected the redacting process employed by the State. Other police reports (not correlating to any that were disclosed to the defense at trial, but which were obtained from the State Attorney's Office pursuant to Chapter 119) were introduced as D-Ex. #3 and #19.

Prior to the 1990 trial, the State relied upon the discovery turned over in 1983 as satisfying its discovery obligation as to the retrial (D-Ex. #1, bsp 96). In the proceedings below, the State did not contest the fact that it "withheld" material pursuant to Miller (PC-R. 3971).

[6]A number of these "Synopsis" was introduced as D-Ex. #10.

Martin, the prosecutor from the 1990 trial, agreed that such testimony was not discoverable and was not disclosed to the defense (PC-R. 4833).

As a result of the State Attorney's policy, a wealth of documents was not revealed to the defense. Contained therein, was significant exculpatory information. First, the excised portion of a redacted report indicated that Melvin Jones "who lives on Fairfield Ave. So. in the 3000 block and who has warrants on him pending allegedly" was a suspect due to his residence's proximity to the shooting (D-Ex. #2, bsp 4736). The fact that Melvin Jones was a suspect gave him a motive to want Derrick Smith convicted; it constituted impeachment.

Second, Hogan's undisclosed summary of Derrick Johnson's statements to him, "D.J. says [] the first time he ever saw Melvin Jones 7/11/83 in a holding cell before prelim [sic] and Melvin **Jones showed D.J. map and said** [] **he would help D.J.** at trial" (PC-R. 4860, 4878; D-Ex. #8)(emphasis added).[7] Contrary to their trial testimony, Johnson and Jones met in a holding cell, Jones showed Johnson a map of the crime scene,

[7]Mr. Smith's first trial commenced on November 1, 1983, months after the July 11th meeting between Johnson and Jones. At that time, Johnson denied "discuss[ing] this case at all with a Melvin Jones" (R1. 1536), and Jones denied "ever ha[ving] a conversation with Mr. Johnson about [Jones'] testimony" (R1. 1693).

and said he would help Johnson at trial.[8] Johnson's acknowledgment of a July 11th encounter with Jones in which he was shown Jones' map of the crime scene was not disclosed to Mr. Smith's trial attorneys, even though the defense at the first trial maintained that Johnson and Jones met and conspired against Mr. Smith. Clearly, this undisclosed information was favorable to the defense.

Third, the State failed to disclose that Melvin Jones' residence was visited twice by officers conducting neighborhood canvasses in the hours after the shooting. Jones had testified that only one officer had stop at the residence and talked to his wife.[9] This visit was shortly after Jones

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[8]Jones was arrested on unrelated charges on June 13, 1983, nearly three months after the shooting of Mr. Songer, the cab driver. He faced seventeen felony charges (R2. 998). Four days later, he met with the State to bargain for a deal in exchange for his testimony against Mr. Smith. At the meeting, Jones gave what he later claimed was a false account of what he had said he witnessed at Fairfield and 30th St. the night Mr. Songer was shot. Weeks after the June 17th meeting, Jones wrote an undated letter to the attention of Tom Hogan at the State Attorney's Office, giving a new account that was now generally consistent with Johnson's version of the shooting. Included with this letter was a map of the crime scene.

Following his testimony against Mr. Smith in 1983, Jones was sentenced in his pending cases to concurrent three-year suspended sentences followed by two years probation (D-Ex. 16, 12/1/83 Sentence).

[9]The undisclosed police report about the first neighborhood canvass indicated the police officer obtained "NEGATIVE" results when he talked to a "Melow Jones," a "B/M" who provided a date of birth and stated that the residence did

had supposedly gotten home within minutes of witnessing the shooting, but the inquiring officer was provided no information regarding this. According to his testimony at both trials, Jones told his wife about the shooting after the police officer left. This testimony provided a relatively benign explanation for the failure to advise the officer of what Jones had just observed, i.e. Jones had not yet told his wife of his observations. Neither Jones nor his wife ever indicated that a second officer stopped by hours later and received no information about the shooting, even though by then according to Jones and his wife, she had been advised of her husband's account of the shooting.[10] This too was undisclosed information that was favorable to Mr. Smith's defense.

Fourth, the State did not disclose that prior to the second trial in 1990, Melvin Jones contacted a prosecutor regarding his testimony against Mr. Smith and sought to barter yet again. Jones advised the prosecutor that his 16-year-old

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not have a phone (Def. Ex 2, bsp 4736). At trial, Mellow Jones, a female, testified that she had answered the door. She did not indicate that the conversation lasted long enough to provided the office with a date of birth and answer his inquiry about a phone.

[10]The undisclosed report detailed a second neighborhood canvass at 8:30 a.m., and indicated that negative results were obtained from "Mellow Jones, BF" (D-Ex. #3, bsp 4701).

daughter had accused him of “sexual abuse which occurred 3-6 yrs ago” and that “[h]e’s afraid he’ll be arrested” (D-Ex. #6). According to the prosecutor, “[h]e’s willing to take a polygraph - wants to take polygraph” (Id.). Jones’ undisclosed fear of prosecution for sexual abuse constituted impeachment.

Finally, the State failed to disclose documents entitled “Synopsis” prepared by Hogan recording sworn testimony obtained pursuant to State Attorney subpoenas (D-Ex. #10). According to Hogan’s Synopsis of David McGruder’s sworn statement, “McGruder gave descriptions fitting both defendants in this case, however, he was unable to pick either of the defendants out of a photopak.” This contradicted McGruder’s trial testimony (R2. 862-63). Further, during the sworn statement obtained by Hogan, the description of the “shorter male” that supposedly matched Mr. Smith was recognized by Hogan to be off by “about a 30 pound weight difference” (D-Ex. #10, backside of bsp 0409). In yet another undisclosed police report (D-Ex. #3, bsp 4719), McGruder had given a description of the men he saw get into the cab as:

1. B/M, 22-23 yrs of age, **5'8" tall, 130 pounds**, med. build, dark skin, having a thin mustache & a short afro type hairdo. This subject was last observed to be wearing a red cloth type jacket, bluejeans & white sneakers.
2. B/M approx. 23 yrs of age 6' tall, 140 pounds,

> slim build, light skin, having a short cut type hairdo. Only clothing description reference to second individual was that he was wearing a pair of bluejeans & white sneakers.

(Emphasis added). In yet another undisclosed report dated March 24, 1983, the subject at large, Derrick Smith, was described as **"5'8" tall, 205 pounds, husky build"** (D-Ex. #3, bsp 4766) (emphasis added). These undisclosed reports read together show that at the time Mr. Smith weighed 75 pounds more than McGruder had described and that McGruder had been unable to identify Mr. Smith's photo as one the men getting into the cab; the reports constituted undisclosed impeachment.

Beyond the prosecution's failure to disclose a wealth of exculpatory material, the circuit court found that Mr. Smith's trial counsel rendered deficient performance when he failed to contact Vince Gibson, the person that Jones testified gave him the ride home and put him in the position to observe the shooting. According to Jones, Gibson dropped him off near his home moments before the cab drove up and the driver was shot before his eyes. However, Gibson testified at the evidentiary hearing that he had never given Jones a ride home. This unpresented evidence significantly undercut Jones' testimony.

Added together, the undisclosed and/or undiscovered evidence casts the case in a whole new light and undermines

confidence in the guilty verdict.

STATEMENT OF THE CASE

On May 24, 1983, Mr. Smith was indicted for the first degree murder of Jeffrey Songer on March 21, 1983. His co-defendant, Derrick Johnson, was permitted to plead to second degree murder in exchange for his testimony. Mr. Smith's case proceeded to trial on November 1, 1983. After convicting Mr. Smith, the jury recommended death by a vote of 7-5. On November 29, 1983, Mr. Smith was sentenced to death. On appeal, a new trial was ordered. Smith v. State, 492 So.2d 1063 (Fla. 1986).

On May 8, 1990, Mr. Smith's retrial began. He was once again convicted. On May 16, 1990, penalty phase proceedings were held. The jury recommended death by a vote of 8-4 (R2. 160). On July 13, 1990, Mr. Smith was again sentenced to death. The judge found two aggravating circumstances, in the course of a robbery and prior conviction of a violent felony. One statutory mitigator, no significant history of criminal activity, was found along with several non-statutory mitigators. This Court affirmed on appeal. Smith v. State, 641 So.2d 1319 (Fla. 1994).

Thereafter, Mr. Smith was provided with collateral counsel. Rule 3.850 proceedings were initiated. Public

records were sought and obtained. Ultimately, Mr. Smith submitted an Amended Motion to Vacate on September 18, 2000, detailing his claims for relief. After hearing oral arguments, the circuit court issued an order on January 3, 2002, denying many of Mr. Smith's claims. However, a limited evidentiary hearing was ordered as to several of the claims and/or portions of those claims.

The evidentiary hearing was conducted on July 23-26, 2002. During the hearing, Mr. Smith was precluded from presenting evidence in support of his Brady/Giglio claim that the circuit court believed was outside the scope of the limited hearing that had been granted (PC-R. 4928-31).[11] Nevertheless, evidence was presented without objection that the State in reliance on Miller v. State, 360 So.2d 46 (Fla. 2d DCA 1978), had not disclosed numerous police reports and had redacted those reports that were disclosed, and that the State did not disclose any documents entitled "Synopsis" that recorded sworn testimony obtained pursuant to a State Attorney subpoena. Evidence was also presented in support of Mr.

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[11]As to the Brady/Giglio claim, full evidentiary development was limited to the claims that 1) Jones and Johnson were permitted to present false and/or misleading testimony regarding their contact in jail, and 2) the State failed to disclose information regarding the polygraph examination of Jones.

Smith's ineffective assistance of counsel claims and in support of Mr. Smith's newly discovered evidence claim pursuant to Jones v. State, 591 So.2d 911 (1991).

Following the evidentiary hearing, the parties submitted written closing arguments. On February 10, 2003, the circuit court entered its order denying Mr. Smith relief. As to the contact between Jones and Johnson, the circuit court found that the evidence of this contact, documented in D-Ex. #8, "was favorable to the accused" (PC-R. 4093).[12] The court also found, "defense EX. 8 was not disclosed to the defense." (PC-R. 4093). But, the circuit court concluded that "although this undisclosed evidence would have undoubtedly had some value to the defense, it certainly would not have put the whole case in such a different light as to undermine confidence in the outcome." (PC-R. 4094).[13]

As to Mr. Smith's claim that a wealth of other exculpatory evidence in the State's possession should have

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[12]The circuit court elaborated, "the court recognizes that it may have provided some significance in terms of impeachment. Admittedly, Derrick Johnson and Melvin Jones were crucial witnesses for the State. It may have also aided defense counsel in pursuing a different defense theory" (PC-R. 4093).

[13]As to an undisclosed polygraph examination of Melvin Jones, the circuit court concluded that Mr. Smith had "failed to satisfy either the materiality or prejudice prongs." (PC-R. 4099).

been disclosed, the circuit court found that Mr. Smith had "not proven that the 'Millerizing' of these police reports was legally impermissible." (PC-R. 4095).[14] The circuit court found that the State had no obligation to disclose the prosecutor's notation that Melvin Jones had called the State prior to the retrial and discussed his fear that charges may be filed against him because his stepdaughter had alleged that he had sexually abused her.[15]

As to the State Attorney's "Synopsis" of sworn statements made by named witnesses in the case, the circuit court concluded that Mr. Smith "fails to meet his burden showing that defense counsel was entitled to disclosure of this internal investigatory report." (PC-R. 4096).[16]

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[14]The circuit court also stated that Mr. Smith "failed to adduce any evidence at the evidentiary hearing to support this claim." (PC-R. 4095). This overlooked the fact that the State's objections to supporting evidence were sustained on grounds that the evidence was outside the scope of the limited hearing.

[15]As to this potential sexual abuse charge, the court ruled that Mr. Smith had not established that the State had an obligation to disclose a handwritten note "regarding its investigatory work on a particular case regardless of its relevancy or materiality" (PC-R. 4096), quoting Carroll v. State, 815 So.2d 601, 620 (Fla. 2002). The court also said that Mr. Smith's claim about Jones fear of prosecution was undercut by the absence of evidence that "Melvin Jones was ever charged with this crime" (PC-R. 4096).

[16]The court did nonetheless proceed to address one specific aspect of one Synopsis concerning McGruder's

As to the ineffective assistance claim, the circuit court first addressed Mr. Smith's contention that trial counsel's performance was deficient in failing to contact Vince Gibson, the person that Jones testified drove him home just prior to the shooting. Gibson testified at the evidentiary hearing that he did not give Jones a ride home that night. The court found:

> it was deficient for counsel to have not inquired into whether Melvin Jones' story was credible, which would have included an investigation into whether Vince Gibson gave him a ride on the night of the homicide. At the very least, counsel's investigation should have involved an interview with Vince Gibson.

(PC-R. 4100). But yet again, the court said that its confidence was not undermined in the outcome.

As to the separate failure to adequately cross-examine

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testimony before the prosecutor that he could not pick either of the suspects out of a photographic lineup. Since this was inconsistent with McGruder's trial testimony, the court said, "[i]t goes without saying that this information would have been favorable to the defense" (PC-R. 4097). But, the court concluded that "[g]iven the doubt McGruder expressed, and the inconsistencies in his testimony," confidence was not undermined in the outcome (PC-R. 4097). The court did not address that portion of the Synposis noting that McGruder was off in his description by "about a 30 pound weight difference" (D-Ex. #10, backside of bsp 409).

Despite recognizing McGruder's incredibility at trial, the court later in its order relied upon McGruder's trial testimony as a basis for finding no prejudice as to counsel's deficient performance in failing to investigate Jones' claim that "Vince Gibson" gave Jones the ride home that put him in the position to see the shooting.

Mellow Jones, the court found that Mr. Smith had failed to prove this claim (PC-R. 4101). The court did not address the police reports introduced into evidence regarding the neighborhood canvasses showing that two different officers on two occasions had contact with Mellow Jones. Nor did the court address D-Ex. #6 which reflected that prior to the second trial, Melvin and Mellow Jones were attempting to reconcile despite the claim of Mellow's daughter that Melvin had sexually abused her.

As to the ineffectiveness claim relating to the bullet lead compositional analysis conducted by the FBI, the circuit court concluded, "the court is not convinced that Sanders was deficient in failing to more thoroughly challenge the State's expert witnesses on the bullet lead comparison testing." (PC-R. 4103).

As to the penalty phase ineffectiveness claim, the court concluded that 1) the unpresented mitigation was cumulative to that which was presented; 2) to the extent that it was not, it did not outweigh the aggravators; and 3) counsel made a tactical decision to not present the evidence (PC-R. 4111).

The circuit court also rejected Mr. Smith's claim premised upon Jones v. State (PC-R. 4112-13).

Finally, as to Mr. Smith's claim that the Brady/Giglio,

ineffective assistance of counsel, and Jones claims considered cumulatively, warranted relief, the circuit court concluded that since: "[E]ach and every claim is either refuted by the record or without merit. It therefore follows that a cumulative error claim is without merit." (PC-R. 4113).

Following the denial of relief, Mr. Smith filed a notice of appeal to this Court.

STATEMENT OF THE FACTS

A. The homicide.

On March 21, 1983, a Yellow Cab dispatcher sent cab driver, Jeffrey Songer, to pick up a fare at the Hogley Wogley Bar-B-Q in the 900 block of So. 9th St. in St. Petersburg (R2. 697-702).

Songer called in to report that he was taking the fare to Fairfield and 31st Street. A few minutes later, Songer placed a coded distress call. The dispatcher contacted police and sent a second cab driver, Charles Montgomery, to the location given as the fare's destination (R2. 703).

Montgomery arrived to find Songer's cab parked in the 3100 block of So. Fairfield. The lights were on, the engine was running, and the driver's door was open (R2. 708-10). Songer was lying face down, 68 feet from the cab. Songer's wallet and a money pouch containing $145.62 were still with

him (R2. 767-68).

Police officers soon arrived, and it was determined that Songer died from a single gun shot wound which penetrated through the back and exited through the chest. Both lungs and the aorta were damaged (R2. 950-52). On Songer's shoulder, a small lead fragment was found (R2. 775-78).

B. The investigation.

On March 21, 1983, Officer Trusilo responded to the scene of the shooting after hearing the initial call of suspicious circumstances. Trusilo conducted a neighborhood canvas that included visiting 2918 So. Fairfield Ave. and speaking to "Melow Jones B/M 3/20/52" with negative results.[17]

Officer Krause went to the Hogley Wogley where Songer had picked up his last fare. There, he located David McGruder who indicated he observed two black men getting into a Yellow Cab. According to Krause, "the witness stated he might be able to I.D. the subjects, and the witness McGruder appeared very nervous, and appeared to writer that he was afraid to give writer a description or all the information he knew, and kept

[17]The first page of Trusilo's report was disclosed (R1. 49). The second page detailing the neighborhood canvas was not provided to the defense (D-Ex. #2, bsp 4736).

looking around the store" (D-Ex. #3, bsp 4740).[18] Attached to Krause's report were two subject description sheets based upon McGruder's statements (D-Ex. #3, bsp 4741-42).

Officer Goodrich wrote a report summarizing his initial response to the call from the Yellow Cab dispatcher and his subsequent investigation during the next few hours.[19] Goodrich noted that leads suggested someone named Darryl Grant was a suspect. Goodrich then stated, "he may be a possible suspect as well as a Melvin Johnson who lives on Fairfield Ave. So. in the 3000 block and who has warrants pending allegedly. This also conveyed to San Marco and Rossi" (D-Ex. #2, bsp 4945).[20] In his report, Goodrich also noted that descriptions of two black male suspects had been obtained from McGruder. One subject was "5'8", 160 lbs, slight mustache, long sleeve red jacket, blue jeans" and the other was "6' short afro, blue

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[18]Officer Krause's handwritten report and its attachments were not provided to the defense (D-Ex. #12).

[19]A portion of this report was disclosed to the defense (R1. 44-45). Before it was turned over to the defense, the portions of the report discussing various suspects and the descriptions obtained from McGruder were redacted (D-Ex. #2, bsp 4944).

[20]At the evidentiary hearing, it was recognized that Goodrich mistakenly wrote "Johnson" when he in fact was referring to Melvin Jones who lived at 2918 Fairfield Ave. So. and who had warrants outstanding for his arrest (PC-R. 4095).

jeans" (D-Ex. #2, 4944).[21]

Later, on March 21, 1983, Det. Rossi re-interviewed McGruder. According to Rossi's report, McGruder gave the following descriptions of the two suspects:

> 1. B/M, 22-23 yrs of age, 5'8" tall, **130 pounds**, med. build, dark skin, having a thin mustache & a short afro type hairdo. This subject was last observed to be wearing a red cloth type jacket, bluejeans & white sneakers.
> 2. B/M approx. 23 yrs of age 6' tall, 140 pounds, slim build, light skin, having a short cut type hairdo. Only clothing description reference to second individual was that he was wearing a pair of blue jeans & white sneakers.

(D-Ex. #3, bsp 4719)(emphasis added).[22] At 8:00 a.m. on March 21st, Rossi went to McGruder's residence and showed him photographs of possible suspects with negative results.[23]

On March 21, 1983, at 8:30 a.m, another neighborhood canvas was conducted at the crime scene. This time Det. Grigsby went to 2918 So. Fairfield and spoke to "Mellow Jones,

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[21]This reported description varies from the weight estimate provided in other police reports, but is still over 40 pounds less than Mr. Smith's weight at the time (D-Ex. #3, bsp 4766).

[22]The weight description of the suspects given to Rossi was much less than what Goodrich had reported that McGruder told him, and over 70 pounds less than Mr. Smith's weight at the time.

[23]Det. Rossi's police report regarding this was not provided to the defense (D-Ex. #12)(the disclosed police reports).

BF" with negative results.[24]

On March 21, 1983, at 8:55 p.m., Det. Feathers was doing follow up investigation when he received information that a confidential informant claimed to have information (D-Ex. #3, bsp 4711).[25] Feathers then interviewed the CI, who indicated that another individual, Tracy, knew one of the two black males involved in the shooting. The male suspect had told Tracy that the cab driver got out of the cab and ran off. According to the informant, Tracy possibly worked as a Tampa school teacher and lived at 2303 So. 11th St.

On March 21, 1983, at 11:55 p.m., Feathers went to the address and located Tracy, who was in fact a transvestite named Herbert Sanders (D-Ex. #3, bsp 4713).[26] Sanders agreed to accompany the police to the station to give a statement. He said that he had a conversation with Derrick Johnson at 3:15 p.m., in which Johnson had reported that he "heard from people that a cab driver got shot" after being picked up on So. 9th St. (D-Ex. #3, bsp 4714). Sanders identified for

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[24]This report was not disclosed at trial (D-Ex. #12)(the disclosed police reports).

[25]The police report detailing this part of the investigation was not disclosed to trial counsel (See D-Ex. #12, the disclosed police reports).

[26]This report was also undisclosed.

Feathers the neighborhood where Johnson's mother lived.

On March 22, 1983, at 2:00 p.m., Det. San Marco found Johnson at his home (D-Ex. #3, bsp 4768).[27] San Marco told Johnson that he believed that Johnson had information about the homicide. Johnson appeared nervous. He told San Marco that he and Derrick Smith had gotten in the cab at the Hogley Wogley. When they arrived at their destination, Johnson reached in his pocket for the fare. The cab driver exited the cab to open the driver's side rear car door, where Smith was sitting. Johnson got out of the passenger side and walked around to the driver side. Then, he noticed that Smith had a gun. According to Johnson, the driver turned and ran, and Smith started to run after him and then stopped and fired one shot. Johnson also took off running and did not see whether the cab driver was hit.[28]

Johnson was asked to accompany San Marco to the station, where "[b]efore any further questioning" Johnson was advised of his rights. He again provided "basically the same information" regarding the shooting (D-Ex. #3, bsp 4769). He said he did not know what happened to the cab driver until the

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[27]This report was also undisclosed.

[28]Clearly under this version of the facts, Derrick Johnson was denying any personal criminal culpability.

next day. Johnson then gave San Marco a written statement. Johnson was asked to submit to a polygraph, and he agreed. The examiner concluded that Johnson was being untruthful.[29] Johnson was re-interviewed. He now said that he knew that Smith had a gun, although he still claimed that he did not know that there would be a robbery or a shooting. "Because of the information gained from JOHNSON throughout the evening hrs. of 22 Mar 1983, he was not arrested & at approx 0100 hrs. on 23 Mar 1983 he was transported back to his residence by this writer & det. ROSSI." (D-Ex. #3, bsp 4771).[30]

At 0100 hours on March 23, 1983, a first degree murder warrant was issued for Derrick Smith. An undisclosed police report detailing the March 22nd statements of Johnson noted that "[t]he shooter of the vic in this incident has been identified as a one DERRICK TYRONE SMITH, B/M, DOB 8/7/62, address unk at this time, 5'8" tall, **205 pounds**, husky built,

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[29]Reports concerning a series of polygraph examinations given to Derrick Johnson were not disclosed prior to Mr. Smith's first trial. However, prior to the retrial, three reports from the polygraph examiner (dated 3/22/83, 4/04/83, and 4/30/83) were disclosed on July 1, 1988 (D-Ex. #1, bsp 25).

[30]This police report indicated that prior to returning Johnson to his residence, the prosecuting attorney, Tom Hogan, obtained "testimony" from Johnson. This report contained in D-Ex. #3 was not provided to Mr. Smith's counsel (See D-Ex. #12, the disclosed police reports).

goes by the street name of 'RE-RUN'" (D-Ex. #3, bsp 4766)(emphasis added).

On April 1, 1983, police went by Johnson's residence and discovered that he was not home. "[I]t was then decided to pickup [Johnson] and bring him to the station for further interview." Johnson was located at a bar "and was driven down to the [police department]." (D-Ex. #3, bsp 4803).[31]

After Johnson arrived at the police station, he was advised of his rights and waived them. Johnson made another statement in which he acknowledged having been with Smith earlier than previously stated. However, he assured the police "this was the absolute truth & the reason he did not tell us about being with RE-RUN earlier in the NAME OF THE GAME LOUNGE was because he was afraid he would be implicated in the [armed robbery]." (D-Ex. #19, page 3). Johnson then agreed to take another polygraph on which he again showed deception.[32] Thereupon, Johnson was re-interviewed. At this time, Johnson said that he knew that a robbery was going to

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[31]This April 1, 1983, report by Det. Feathers was not disclosed.

[32]The results the polygraph were not disclosed at Mr. Smith's first trial, but were disclosed on July 1, 1988, before Mr. Smith's retrial along with a two-page report by Det. Pic (D-Ex. #1, bsp 25). The six-page report by San Marco with Johnson's statements during the exam was never disclosed (D-Ex. #19).

occur before he got in the cab (D-Ex. #19, page 6). Johnson was then placed under arrest.

A "Synopsis" of the State Attorney investigation during the time period March 31st - April 4, 1983 was transcribed on April 5, 1983 (D-Ex. #10, bsp 409). This document recorded that David McGruder "did appear at the investigation and testified" (D-Ex. #10, bsp 409). The "Synopsis" noted that McGruder's description of the individual believed to be Mr. Smith had "about a 30 pound weight difference." The "Synopsis" also recorded that McGruder "**was unable to pick either of the defendants** out of a photopak." (D-Ex. #10, bsp 409)(emphasis added). This synopsis, like all others, was viewed as not discoverable because it was part of the State Attorney investigative process and thus not disclosed to Mr. Smith or his counsel at trial (PC-R. 4833, 4855; R1. 709).

On April 7, 1983, Derrick Smith was located in the Hillsborough County Jail. He had been arrested in Tampa on March 23, 1983, for possession of marijuana. The jail was provided with a copy of the warrant and Mr. Smith was transported to the St. Petersburg police department where he was questioned and denied involvement in the crime.[33]

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[33]The police report regarding the questioning of Mr. Smith was redacted when it was disclosed to the defense. The portion discussing Mr. Smith's invocation of his right to

An undisclosed police report dated April 22, 1983, concluded with the following observation, "[s]ince writer's last supplement report, additional investigation has been done in order to determine who is actually responsible for the shooting of the taix cab driver. **As of the date of this supplement report, it still appears to be up in the air as to who the actual shooter is**" (D-Ex. #3, bsp 4805-06)(emphasis added).[34]

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counsel was deleted (D-Ex. #2, bsp 4903; D-Ex. #12, page 26a). The redacted facts (the invocation of silence) came out unexpectedly during the trial, and lead this Court to reverse Mr. Smith's initial conviction. This Court found that the police violated Mr. Smith's rights by questioning him after he initially invoked his rights. Smith v. State, 492 So.2d at 1067. In Mr. Smith's statement that this Court suppressed, Mr. Smith indicated that he did not get in the cab with Johnson and was not involved in the robbery or the shooting of the cab driver (D-Ex. #2, bsp 4904).

Of course, the prejudice arising from this particular non-disclosure was cured by this Court's reversal of Mr. Smith's initial conviction. However, the obviously intentional redaction speaks volumes about either the State's understanding of its Brady obligation and/or its willingness to disregard it.

[34]According to the "Synopsis" of the state attorney investigation conducted by Hogan and transcribed on April 26, 1983, Richard Davis appeared on April 25, 1983, and gave sworn testimony that "Derrick Johnson has told him that he, Derrick Johnson shot the cab driver" (D-Ex. #10, bsp 390-91). This synopsis, like all others, were viewed as not discoverable and thus not disclosed to Mr. Smith nor his counsel at trial (PC-R. 4833, 4855; R1. 709). In fact, Hogan argued during the first trial, "they [the defense] aren't privy to any State Attorney's investigation as to whatever statements Richard Davis may have made at the State Attorney's investigation" (R1. 854).

C. The adversarial process.

On May 9, 1983, Mr. Smith requested an adversarial preliminary hearing (R1. 15). Following the May 23rd indictment, an adversarial preliminary hearing was conducted on June 23, 1983 (R1. 64). At the hearing, the State called Johnson, Mr. Smith's co-defendant, to testify. With counsel present, Johnson voluntarily testified against Mr. Smith indicating that he did not "expect to benefit as a result of his testimony" (R1. 84).

Meanwhile, Melvin Jones was arrested on outstanding warrants involving unrelated charges on June 13, 1983, nearly three months after Songer was killed.[35] He was facing seventeen felony charges (R2. 998). Through his attorney, Jones contacted the St. Petersburg police advising that he had information about the homicide (R1. 815). Jones met with Det.

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[35] D-Ex. #2 contains the unedited police reports that were in the State Attorney's files. D-Ex. #2, bsp 4943-46, reflects that shortly after the shooting of Mr. Songer the police identified "Melvin Johnson" as a suspect. He had outstanding warrants and lived at the intersection of Fairfield and 30th St. This matched Jones' trial testimony that he had outstanding warrants and lived several house down from the intersection of Fairfield and 30th St. But, the portion of the report regarding "Melvin Johnson" was redacted and not disclosed under the "Millerizing" process used by the State Attorney's Office in the 1980's (PC-R. 4812-13). Clearly, Jones was an original suspect in Mr. Songer's shooting. A defense attorney armed with the undisclosed police report would have been able to elicit that fact before the jury.

San Marco on June 17, 1983, and, according to Jones, gave a false story regarding the murder (R1. 1681).[36] Jones testified at trial that he gave San Marco a false story because he did not like the deal being offered in exchange for the information (R1. 1680-81).[37] He thought his statement was worth "no prison time, or something like that" (R1. 1681). Since that was not on the table, Jones "decided not to tell San Marco what [he] knew" (R1. 1681).

As revealed in documents disclosed during post-conviction proceedings, Johnson was visited at the jail by an investigator with the State Attorney on July 5, 1983 (PC-R. 4861; D-Ex. 8, bsp 4235). In 2002, Hogan did not recall what

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[36] Curiously, no reports documenting this event or Jones' false story have ever been disclosed by the State.

[37] San Marco was deposed on July 21, 1983. During his deposition, he was asked if other witnesses had contacted him following the conclusion of his investigation. When San Marco answered "yes," the prosecutor, Hogan, interjected and explained that the contact came from an individual that "I'm currently investigating. I just got this information. I was first contacted a few weeks ago and I have just been re-contacted yesterday by this individual and he is still under arrest by the State Attorney's Office and, as soon as that's resolved, Mr. Smith will be afforded everything I know about him, but I'm right in the middle of investigating him at this point, so there is nothing else I can tell you about it at this time." (R1. 693). In 2002, Hogan confirmed that this discussion concerned Melvin Jones (PC-R. 4859). Thus, Hogan was contacted by Jones the day before the deposition, July 20, 1983, about four weeks after the June 17th meeting with San Marco.

was the purpose of this meeting with Johnson. Hogan did recall personally meeting with Johnson before Mr. Smith's trial, but was unsure how many such meetings occurred (PC-R. 4861-62).

According to Johnson's undisclosed statement to Hogan, "1st time he ever saw Melvin Jones [was] 7/11/83 in a holding cell before the prelim [when] Melvin Jones showed D.J. map and said he would help D.J. at trial" (D-Ex. 8, bsp 4234).[38] Johnson, who was called to testify in 2002 by the State, said that he had met with Jones in a holding cell about four months after his March arrest (PC-R. 5371). The day he met Jones and they "had a brief conversation," Jones "[s]howed [Johnson] the map that he had of the crime scene" (PC-R. 5359). Johnson testified that the handwritten map of the crime scene that was sent by Jones to Hogan, "look[ed] similar" to the one Jones showed him during their "brief conversation" (PC-R. 5373; D-Ex. #11, bsp 4243).

Sometime between Jones' meeting with San Marco on June 17th and San Marco's deposition on July 21st, Jones sent an undated letter to the State Attorney's Office, "attn T. Hogan"

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[38]This statement was memorialized in a note written by Hogan on a CID Investigation request form (PC-R. 4877-78). Hogan's note memorializing Johnson's statement was not disclosed to the defense prior to either of Mr. Smith's trials (PC-R. 4840).

with a return of “Melvin Jones #302” (PC-R. 4840, 4876, S-Ex. 2).[39] A copy was also sent to the public defender’s office that Jones understood was representing Johnson (R1. 785, 780). This letter gave a new account of what Jones had observed that was generally consistent with Johnson’s account (D-Ex. 8, bsp 4240-43). The letter included a map of the crime scene. In the letter, Jones mentioned his earlier meeting with San Marco and the false story he provided. Jones also claimed in the letter that he called “Homicide” about two nights after the shooting, told them he had information but that he could not come forward until he took care of his outstanding warrants.[40] No police reports have been disclosed that document this call despite the existence of several other reports documenting a variety of phoned-in leads, none of which concern a possible eyewitness.

In the letter, Jones stated that he was on his way home

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[39]An undated jail log prepared after Jones had spent 95 days in jail indicated that Jones was first placed in pod 302 of the Pinellas County Jail on June 26, 1983 (PC-R. 4877, D-Ex. 8, bsp 4233). The log did not indicate that Jones was subsequently moved out of pod #302 during the next 95 days.

According to Hogan’s statement at the July 21st deposition of San Marco, he had been contacted the day before (the 20th) by a witness that Hogan acknowledged in 2002 was Jones (PC-R. 4859).

[40] Jones did not mention in the letter either of the police officers who, while canvassing the neighborhood searching for witnesses, twice visited his home.

when he saw the shooting.[41] Jones described what he supposedly witnessed, including seeing Derrick Smith shoot Jeffrey Songer, the direction Smith and co-defendant Johnson ran after the shooting, what both defendants were wearing, and a detailed description of the gun supposedly used by Smith (D-Ex. 11).

On August 11, 1983, McGruder was deposed. He was asked if he had been able to identify the individuals he had seen get in the cab. McGruder responded, "Yeah." Then he indicated that he had not "pick[ed] out two individuals" (R1. 566). Hogan explained to a perplexed defense attorney, "He picked out Smith, but not Johnson. Two separate photo-paks." (R1. 567).[42]

On August 22, 1983, Johnson pled to a reduced charge of second degree murder (PC-R. 4870).[43] That same day, Hogan requested that arrangements be made "to have defendant Melvin

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[41]Later, in a deposition, Jones explained that on the night of the shooting he had been with a friend named "Vincent Gibson" at 27th St. and 18th Ave. in St. Petersburg and that this individual gave Jones a ride home, dropping him off near the murder scene (R1. 787-88).

[42]Hogan's statement is at odds with the summary of McGruder's testimony in an undisclosed "Synopsis" (D-Ex. 10, bsp 409).

[43]Johnson was released on life parole in 1991 after testifying at Mr. Smith's 1990 retrial (PC-R. 5364-66).

Jones brought over for investigation in the above case [Derrick Tyrone Smith]" (D-Ex. 13, bsp 4239). A notation on the document indicated that the "invest scheduled for 8/30/83." Another notation indicated that arrangements were not made in time and that the investigation would have to be rescheduled.

On September 12, 1983, Hogan interviewed Jones (D-Ex. 14; PC-R. 4867). After the interview, Hogan wrote on a CID Investigation request form, "Please determine whether a witness in the above case has had any extensive contact with or shared a cell with Derrick Joseph Johnson since their arrests." Hogan indicated that he need the results before his interview of Johnson on "9/19/83" (D-Ex. 8, bsp 4234).

On September 19, 1983, Hogan recorded Johnson's statement that a July 11th meeting with Jones had occurred and that Jones had showed Johnson a map "and said he would help D.J. at trial" (D-Ex. 8, bsp 4234; PC-R. 4877-78). However, this statement was not disclosed to either Mr. Smith or his trial counsel.

Mr. Smith's counsel took Jones' deposition on September 26, 1983. During the deposition, Jones testified that he had never been "incarcerated in the same place" with Derrick Johnson (R1. 780). While being asked about his knowledge of

the witnesses in the case, Jones stated, “I never talked to nobody about this case.” (R1. 783). Hogan was present for this deposition and never corrected Jones’ testimony.

At the first trial in November of 1983, during the cross-examination of co-defendant Johnson, Mr. Smith’s counsel asked Johnson whether he had “ever discussed this case with Melvin Jones” (R1. 1536). Johnson replied, “No, I never have.” (R1. 1536). In redirect, Hogan asked, “Mr. Johnson, when did you become aware of who Mr. Jones, Mr. Melvin Jones is?” (R1. 1539). Johnson replied, “I believe it was the day you and your assistant came to talk to me.” (R1. 1539). According to Johnson, this was “[t]he week before last.” (R1. 1539).[44]

During Melvin Jones’ trial testimony in 1983, Hogan asked Jones about the letter he sent to the State and whether Jones had “contact at that time with Derrick Johnson”; Jones denied any such contact (R1. 1682).[45] In cross, Jones was asked, “Have you ever had a conversation with Mr. Johnson about your testimony here today?” (R1. 1693). Jones answered, “No, I

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[44]Given that this examination was occurring the second week of November, “[t]he week before last” would indicated that Johnson learned of Melvin Jones the last week of October. However, Hogan’s note recording Johnson’s words regarding a July 11th meeting with Melvin Jones was written on September 19, 1983.

[45]After the first trial began, the State administered Jones a polygraph examination which he failed (D-Ex. #20).

didn't." (R1. 1693). The State did nothing to correct Jones' misleading and/or erroneous answers (R1. 1693).

Det. San Marco testified at the 1983 trial that he showed McGruder "a photo-pak" that contained a photograph of Mr. Smith (R1. 1342). According to San Marco, McGruder "was able to pick out the photograph of Derrick Tyrone Smith" (R1. 1341). McGruder said that the photo "looked like the shorter of the two individuals" (R1. 1345). McGruder was then asked to sign and date the photo (R1. 1346).[46]

McGruder testified at the 1983 trial that he recalled San Marco talking with him and showing some pictures (R1. 1613). McGruder identified the photo-pak previously introduced into evidence and said that he picked out one photo "because that was the man who came into the establishment that night" (R1. 1617).

Leading up to Mr. Smith's second trial, Mr. Smith's counsel filed a demand for exculpatory material (D-Ex. #1, bsp 98). In paragraph three of the demand, Mr. Smith requested, "Statements by any person tending to discredit in any fashion

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[46]The date placed upon the back of the photograph was April 8, 1983, several days subsequent to the undisclosed April 5, 1983, "Synopsis" reporting that McGruder appeared before the prosecutor and while giving sworn testimony "was unable to pick either of the defendants out of a photopak." (D-Ex. 10, bsp 409).

statements by that person or any other witness." The State's response told counsel to rely on the discovery presented at the first trial (D-Ex. #1, bsp 96). Nothing was turned over before the second trial regarding the contact between Jones and Johnson, even though the State made several other discovery disclosures before the trial began (D-Ex. #1; PC-R. 4816-22; R2. 57). Thus, defense counsel was left with basically the discovery from the first trial, the depositions, and the trial testimony to use to prepare Mr. Smith's case for trial.

Melvin Jones testified at the 1990 retrial that on the evening of March 20, 1983, he was with Vincent Gibson who drove him to a block from his home and dropped him off (R2. 973-75). Jones had some outstanding warrants and wanted to make sure that the police did not have his house staked out (R2. 975). As he was watching for cops and making his way home, he witnessed a cab pull up and stop (R2. 977). He saw the cab driver get out of the cab and start running (R2. 978-80). He saw two other guys get out of the car; one from the passenger side and one from the seat behind the driver (R2. 978-81). The person seated behind the cab driver jumped out, started chasing the cab driver, and shot him (R2. 981-82). Jones identified Derrick Smith as the person he saw shoot the

cab driver (R2. 985). Jones then ran to his house where his wife, Mellow Jones opened the door (R2. 987-88). He got home at "exactly 12:43" (R2. 988). Soon, a female police officer knocked at the door and conversed with Jones' wife. After the officer left, Jones told his wife that he had just witnessed a shooting (R2. 988). Jones further testified that in November of 1983, he saw Mr. Smith in the jail and that Mr. Smith threatened to kill him and his family (R2. 989).

During cross, Jones acknowledged writing the State and the public defender a letter in order "to let [them] know who actually done it" (R2. 992). Jones testified that he "never bargained with the State" to try "to get any breaks on [his] own sentence" (R2. 992-93). But, he admitted that the prosecutor did appear at his sentencing and testify on his behalf (R2. 1000).[47] He also conceded that his attorney had

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[47]Following his testimony against Mr. Smith in 1983, Jones was sentenced in his pending cases to concurrent three-year suspended sentences followed by two years probation (D-Ex. 16, 12/1/83 Sentence). On January 17, 1984, Jones was not in custody and claimed to have witnessed Clinton and Nathaniel Jackson on their way to rob a hardware store. Jackson v. State, 575 So. 2d 181 (Fla. 1991). By December 19, 1984, Jones was back in custody in the same case numbers seeking a bond reduction (D-Ex. 16, 12/19/84 Motion for Bond Reduction). His bond was revoked and he was arrested on a capias on April 23, 1985 (D-Ex. 16). On August 25, 1985, Jones was sentenced to three years of incarceration followed by two years of probation (D-Ex. 16, 8/25/85 Order).

In his 1990 testimony, Jones was asked during cross how much time he got on all the seventeen felony charges he was

approached San Marco to try to "work a deal" (R2. 1004). When San Marco's response was unsatisfactory, Jones told an "altered" story (R2. 1004). He said in the altered version "the cab was turned a different way" (R2. 1002). When pressed on whether he told a false story to the police, Jones stated, "Well, I didn't really tell a story at all. Someone came in and asked me some questions. I answered a few of his questions. Then I stopped answering his questions. That's what happened." (R2. 1005).

Derrick Johnson testified at the 1990 retrial. He indicated that in the evening of March 20 he was with Mr. Smith (1114-18). As the night wore on, they began discussing robbing a cab (R2. 1126). They went to the Hogley Wogley Bar-

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facing in 1983. Jones replied, "I did three years" (R2. 998). When defense counsel tried to pursue the matter the State objected. At side bar, counsel explained, "I think it's a reasonable inference that can be drawn from the evidence that he's facing seventeen or eighteen years and he only gets three years that he did, in fact, get a break in exchange for his testimony (R2. 999). The prosecutor, Martin, responded, "after the Smith trial he has got four and a half to five and a half, and he was sentenced to three plus two, one below the guidelines" (R2. 999). The judge then permitted additional questioning. Jones then was asked "you did, in fact, get a break on your sentence", and he replied, "I don't think so, but you can say so" (R2. 1000).

However, defense counsel was precluded from asking Jones about testifying for the State as an eyewitness in the murder case against Clinton Jackson in 1984. The prosecutor, Martin, argued that "he was sentenced after he testified in Smith and Clinton Jackson. So whatever deal he got was based on both" (R2. 1001).

B-Q to use the pay phone to call a cab (R2. 1127-28). Johnson testified that Mr. Smith actually made the call (R2. 1129). While waiting for the cab, Johnson testified that they discussed their plan to rob the driver (R2. 1129-30). There "was a mutual agreement" (R2. 1130). Because the cab was taking so long arriving, Mr. Smith placed a second call for a cab (R2. 1131). Johnson testified that Mr. Smith was armed with a pistol that he was carrying in his waistband (R2. 1132). When the cab arrived, Johnson got in the front passenger seat and Mr. Smith got into the backseat and "moved in to be in back of [the cab driver]." (R2. 1133). When the cab was directed to stop, it did (R2. 1139). Johnson said that he got out and walked around to the driver's side while reaching in his pocket for the fare (R2. 1140). The cab driver got out and opened the back door for Mr. Smith. When Johnson got to the driver side of the car, he saw "Mr. Smith was standing there with the gun out. He had it dangling down more or less." (R2. 1141). The cab driver then asked "was there a problem and that he didn't want any trouble" (R2. 1142). All three of them were standing there on the driver's side of the cab. Johnson said that he "didn't want any trouble either" (R2. 1142). Johnson testified that the cab driver then took off running (R2. 1142). So Johnson "turned

and ran," "more or less in the opposite direction" (R2. 1143). When Johnson noticed that Mr. Smith was not running with him, he stopped and turned around (R2. 1143). He saw Mr. Smith "come to a halt. And as he came to a halt, he raised the pistol and fired one shot" (R2. 1143). Johnson indicated that he heard the cab driver curse, and then began running again (R2. 1144).

At the 1990 retrial, McGruder testified that the day after the incident, police officers came to talk to him (R2. 862). One of the officers was San Marco who showed him some photographs. He said that he picked out one of the photos as being the man he saw get into the cab (R2. 862-63). He then signed and dated the back of the photograph (R2. 863). He testified that he had doubts about whether the man in the photograph was the person he saw get in the cab, and that he told San Marco about those doubts in 1983 (R2. 880). He explained that he signed the back of a photo because "[t]hat's the one I picked out." He answered "yes" when asked by the prosecutor whether he was sure at the time that the photo showed the man he saw get into the cab (R2. 881-82). When questioned by defense counsel, McGruder incongruously affirmed his earlier statement "that there was some doubt in [his] mind when [he] picked this picture out in 1983" (R2. 883).

After the State rested, the defense called Larry Martin as a witness (R2. 1257). He testified that while he was jailed with Derrick Johnson, Johnson told him that "Derrick Smith was not the individual that did the shooting" (R2. 1258). Johnson did not further explain "anything about what Derrick Johnson's role" was or "who actually did the shooting" (R2. 1258-59).

In his closing argument, defense counsel told the jury:

> I would suggest to you that the crucial witnesses in the case of all of the evidence we heard comes down to three, three that the State presented, that's David McGruder, Derrick Johnson and Melvin Jones. Those are the three witness that tell you something about who shot the cab driver.
>
> Now, David McGruder was working in the Hogley Wogley at the time. What can you say about David McGruder? He seems like a nice fellow, hard-working fellow, I guess. He appears to be honestly trying to be honest. I'm not suggesting he's up here lying his teeth off because he has nothing better to do or anything like that. But I guess to put it politely as possible, Mr. McGruder's a little slow on the uptake, and he's someone who seems to be very easy to lead, to lead into saying what you want him to say. It's not that he's trying to lie. It's just that he's easy to convince. It's easy to convince him this is what he saw or this is what he heard.
>
> You recall we went back and forth at one point where the State was asking him, Are you sure this is the guy? He said yeah. I said, Didn't you just say you weren't sure this was the guy; there's a doubt in your mind? Yeah. Then the State would get back up there. Are you sure that's him? Yeah. Didn't you say there was a doubt? Yeah, I did.
>
> He's just easy to confuse. He's easy to lead into things. What does David McGruder tell you? What did he testify to? Well, there were two guys at the Hogley Wogley. One of them came in and used

the phone, the other guy stayed outside. The first guy went out, came back in the bar, and used the phone again, and asked for a glass of water and went back outside again. A few minutes later, a cab pulled up. Then he also tells you he saw one guy get in the cab in the front seat and the other guy get in the cab in the back seat.

Now, when he testified here today, he said it was the same guy that came in the store both times, used the phone both times. And he picked out a picture, I guess, about seventeen days or so after this supposedly happened. As I recall the dates, it would have been March 21st, I believe. That picture is dated April the 8th. That's about 17 days. I guess, 18 days.

He picks out a picture that he says is the guy that came in the store twice. The State tells you that's a picture of Derrick Smith. I don't know if that's Derrick Smith or not. We didn't have anybody to say it was a picture of Derrick Smith.

Anyway, they say it's a picture of Derrick Smith. You'll have to decide whether that's Derrick Smith or not. Of course, they showed him several other photopacks. You didn't hear anything about whether Melvin Jones' pictures was in any of those photopacks. That's interesting.

* * *

The other two State witnesses, the other two people that are important here, of course, are Derrick Johnson and Melvin Jones. Mr. Martin [the prosecutor] was pointing out to you that Derrick Johnson and Melvin Jones had an opportunity to observe and know what they testified to, and their testimony indicates they had an accurate memory - - they seemed to have an accurate memory.

Well, I would suggest to you, ladies and gentlemen, there's a certain similarity to that, a certain boot-strapping, as we call it.

The reason we can say they seemed to have an accurate memory, they seemed to have an opportunity to observe or know what they were testifying to is because that's what they said. In effect, they said, yeah, I had an opportunity to observe, and this is what I observed. I remember very well. This is what I observed, and I remember it. In others words, they're bolstering their own

credibility, if you accept that kind of argument.

The fact is, these two witnesses are not credible witnesses at all. Derrick Johnson, if you believe his testimony is an accomplice here. I suggest to you his primary concern was to escape as much of the blame as possible and pass the blame on somebody else.

* * *

He was up there saying, I didn't know it was going to happen. I didn't notice where we were going. I didn't know what we were going to do. Back in 1983, he said under oath **he was the one that gave the cab driver this address, 3130 30th Street South or whatever it was.**

And it is interesting to note that address is about four blocks from Derrick Johnson's house and about a block from Melvin Jones' house. Maybe that's just a coincidence. Just a coincidence.

Of course, it's really a benefit to poor old Melvin, good citizen Melvin, who's ducking through the alley ways, trying to hide from the police with all his warrants, needing some kind of a break from the State, needing something to get himself out this mess. And isn't lucky for Melvin that on this particular night this murder goes down right in front of him. He gets a perfect view of it. He gets a little something he can bargain with, a little something he can catch a break with. And Derrick Johnson steers the cab right over to where he is. Isn't that lucky for Melvin Jones?

* * *

Then we have Larry Martin telling you that Derrick Johnson told him that Derrick Smith didn't have anything to do with it. He wouldn't tell him anything else. He wouldn't tell him anything else, but he didn't [sic] tell him that Derrick Smith didn't have anything to do with it.

Now, what possible benefit has Larry Martin got to get out this? He's going to come in here and commit perjury for what? For what? What possible benefit he's got? Is he getting some break on some pending charges? Not likely. He's testifying as a defense witness. He's got some ax to grind; some cross to bear? Is he looking to minimize his own participation in this? No.

There's no evidence he had anything to do with it. He's just a poor slum [sic] over there, another inmate over there in the jail with Derrick Johnson talking about their cases, as inmates very often do. Larry Martin has nothing to do with this case. He's just somebody who happened to overhear something. What motive has he got to lie? Absolutely nothing. Absolutely none.

That brings us to Melvin Jones. I talked a little bit about Melvin Jones already. Melvin Jones has 24 felony convictions. I believe he said he - - I don't know how many arrest warrants he had pending at the time this supposedly happened. He eventually ended up pleading to 14 felonies. After he came forward with this testimony, he pleads to 14 felonies and he gets three years in the Department of Corrections.

But he's not expecting any break. He wasn't asking for any break. He's coming forward as a good citizen because Melvin Jones knows that is a citizen's obligation. If you have information regarding a serious crime, you have to come forward and tell the police what you know because that is your obligation as a citizen. It's part of our duty as members of this great country, blah, blah, blah.

* * *

So what does Melvin Jones do, good citizen Melvin? Does he come forward with what he knows? That's his obligation as a citizen. That's his only purpose here. Does he tell Detective San Marco what he knows? No. Didn't tell a lie. He just altered the facts. Altered the facts. Melvin would have made a good press secretary for Richard Nixon. It's not lying. He's altering the facts.

Of course eventually, old Melvin does manage to have himself a little deal, and he gets the State Attorney in there for him when he's sentenced, and here he is. There he is. Is Melvin expecting any preferential treatment for his testimony? Oh, no. No. No. He's just doing his duty. He's just doing his duty.

That, ladies and gentlemen, I suggest to you, is the heart of the State's case. **Those are the crucial witness we have here; David McGruder, Derrick Johnson, Melvin Jones**.

(R2. 1327-41)(emphasis added).

In the State's rebuttal argument, the prosecutor argued;

> Mr. Sanders [defense counsel] said that there were only three - - "crucial" was his word - - witnesses for the State. I submit to you every one of those witnesses was crucial. Mr. Sanders singled out three of the more important witnesses, and three witnesses, who two of them have criminal records. One of them, Mr. McGruder.
>
> It was very obvious to everyone in the courtroom that Mr. McGruder is not the brightest person that has ever taken the witness stand and tried to tell what he remembered.
>
> * * *
>
> Believe me, the State of Florida wishes that Mr. McGruder was a little smarter than he was, and could remember and answer questions a little better than he did.
>
> But what did he say? What did he say? **He said that man walked in** and used the phone in his business when he was there, **and he saw him**. It's just like that.
>
> * * *
>
> Now Mr. Sanders got up here and argued two versions, two very, very inconsistent versions of how this all could have gone down that you should believe and find that man not guilty. **One thing he was trying to say is that somehow Derrick Johnson and Melvin Jones, the guy hiding behind the bushes, plotted [] this together.**
>
> Well, **first of all, they didn't even know each other**. Derrick Johnson didn't know who Melvin Jones was. Melvin Jones heard of, by nickname, by street names, Derrick Johnson. **But what possible motive** - - and think of **how ludicrous that scenario really is.** Derrick Johnson says, I'm going to plan a robbery and set up my buddy Smith; and we're going [to] get in this cab, and I'm just going to happen to direct it to right where Melvin Jones is hiding behind the tree.
>
> To follow the argument put forth by Mr. Sanders, you would have to believe that that's what happened; **two of them were in league** from the very beginning,

> **which is totally ludicrous**. And then he's trying to tell you that in the same argument that Melvin Jones came up with all this to get himself a break. **Well, he did get himself some time off his sentence. That was never denied. He didn't think much of it. He sort of shot everybody a dirty look and said, Well, yeah, I did three years. He didn't think much of that break that he got**.

(R2. 1345-50)(emphasis added).

D. The post-conviction testimony.

Tom Hogan testified at the 2002 hearing that he had been advised that a meeting between Johnson and Jones occurred on July 11, 1983:

> Q It's Number 8, actually. In reference to Number 8, I'm turning to page 004234 which makes reference to the meeting in the holding cell on July 11th, 1983, do you recall determining that in fact that meeting in the holding cell was possible?
>
> A Based on the documents I've looked at here today, I would say yes.
>
> Q That in fact both individuals had court that day could easily have met in the holding cell on the way to court?
>
> A Could have.
>
> Q It indicates that the map was shown to Derrick [Johnson]?
>
> A Yes.

(PC-R. 4894-95).

Hogan had no memory of disclosing this information to defense counsel (Tr. 79, missing from ROA). The prosecutor

from the second trial, Glenn Martin, had no memory of disclosing this information either, although he was aware during the retrial of the July 11th meeting between Jones and Johnson (PC-R. 4840).

At the evidentiary hearing, Martin testified that in the 1980's the State Attorney's Office "Millerized" police reports before disclosing them to defense counsel.

> Q You used the phrase Miller-ize?
>
> A Yes, sir.
>
> Q When you use that, it sounds like you're taking a case name and turning it into a verb?
>
> A It was - - correct. It was the acronym that we placed on what we had to do to police reports before they were sent out is the term that we used to the secretary, you know, send out the Miller portion of the police reports. It was how we designated what should or should not go out.
>
> Q And is that from a case?
>
> A That is correct.
>
> Q And what - - do you know the case cite off the top of your head?
>
> A No, sir, I do not.
>
> Q I'm assuming it was Miller v. State?
>
> A Or State v. Miller.

(PC-R. 4812-13). The "Millerized" police reports that were disclosed to Mr. Smith's counsel were introduced as D-Ex. #12. The unredacted versions appearing in the State Attorney's file

were introduced as D-Ex. #2 and #3. By comparing the three exhibits, what was not disclosed can be ascertained.

In addition to "Millerizing," the State Attorney's Office had a policy that statements obtained during a state attorney investigation were privileged and not subject to disclosure. Hogan testified that he believed that statements obtained in the course of a state attorney investigation were privileged and would not have been disclosed (R1. 709, PC-R. 4855-56). Similarly, Martin testified that "internal memorandums by an investigator, or [ ] work product by the attorney who memorialized" conversations "were not required to be turned over" and were not turned over (PC-R. 4833).

At the 2002 hearing, the State called Derrick Johnson. He said that the map sent to Hogan had more details on it than the map did when Jones showed it to Johnson (PC-R. 5373). According to Johnson, he and Jones "had a very brief conversation" at their July 11, 1983, meeting (PC-R. 5359). At the time, Johnson had been having discussions with the prosecutor:

> A I mean what we went through was whether or not I was telling the truth, that was basically what the conversation was about because you have to remember it was my word against his, so I'm quite sure they wanted to be sure that the person they were placing on trial was the person who pulled the trigger, and that was what I understood from the conversations.

Q So it was just your word against Mr. Smith's?

A As far - - as far as I understood; yes.

Q And - -

A Because you have to remember we were there.

Q Until Mr. Jones came forward?

A Well, exactly when he came forward, I don't know.

Q So is Mr. Jones sort of a tie-breaker?

A You'll have to ask them. I don't know if he was a tie-breaker or not. I know I gave truthful testimony in this situation.

Q But do you recall if you discussed Melvin Jones' testimony with Tom Hogan?

A Not really, you know - - his testimony? No. I doubt very seriously we ever discussed that.

Q Your conversation with Melvin Jones?

A No.

(PC-R. 5382-83).

At the time of the "brief conversation" with Jones, several people had already approached Johnson in order to get information that they could use to help themselves to a deal with the State:

> [W]hat you have to understand that he wasn't the first person, though he was the first person with a scene of the crime to try in one way or another intervene on this case, so by then, I was quite aware that people were looking for a way may be to get out of jail on their - - through the case . . .

.

(PC-R. 5379).

At the evidentiary hearing, Mr. Smith called Ventura Gibson to testify.[48] Mr. Gibson testified that he knew Jones because they had shared work space in the past, but they were not friends (PC-R. 4903). Regarding Jones' claim that he was with Gibson the night of the murder, and that Gibson had given him a ride home, Gibson testified:

> Q Try to bring you back, Mr. Gibson, to March of 1983. Specifically, do you remember at some point in 1983 do you remember a cab driver being shot and killed on Fairfield Avenue?
>
> A I read it in the paper.
>
> Q You read it in the paper after it happened?
>
> A Yes.
>
> Q The following day?
>
> A The following day.
>
> Q Now, we already established that you know Melvin; correct?
>
> A Yes.
>
> Q That would be Melvin Jones, for the record, your Honor. Was Melvin Jones over at your house or your brother's house on 27th Street and 18th Avenue?

---

[48] Although the name Jones gave (Vincent Gibson), Ventura and Vincent are clearly the same person as the circuit court found. For example, Jones testified that "Vincent" lived at 27th Street and 18th Ave., and Ventura Gibson testified that he had once lived at 27th and 18th (PC-R. 4903).

A Not as I can recall.

Q And I mean specifically around the time that the cab driver was killed?

A No.

Q Do you recall ever taking Melvin Jones from 27th Street and 18th Avenue over to Fairfield Avenue South?

A No, I can not.

Q Do you ever recall taking Melvin Jones -- or driving him anywhere?

A No.

(PC-R. 4905) (emphasis added).

During the State's cross-examination, Mr. Gibson's testified:

Q And just so the record is clear, your testimony today is you do not recall whether or not you gave Melvin Jones a ride in March of 1983; isn't that your testimony today?

A Yes, I did not give him a ride.

Q No, sir. I'm asking you on direct examination didn't you say you do not recall?

A I do not recall giving him a ride; no.

Q You could have, but you don't recall?

A No, I did not give him a ride.

* * *

Q Mr. Gibson, would it refresh your recollection if this court reporter read back your answer regarding whether or not you recall ever

taking Melvin Jones to the area of Fairfield Avenue in March of '83, would that help you?

A I don't remember taking Melvin to Fairfield.

COURT REPORTER: I didn't hear him. Speak up, sir.

THE WITNESS: I don't remember taking Melvin to no Fairfield Avenue.

* * *

Q All right. You're not saying it didn't happen, just 19 years later today you do not recall; is that correct?

A I'm not taking Melvin nowhere.

Q Melvin Jones had a cabinet shop next to your tile shop; did he not?

A To my uncle tile shop; yes.

Q All right. And it would not be unusual for Melvin Jones because he knew you to ask you for a ride, that's not something that would be usual; would it?

A Yes, it would. I know Melvin was working on -- they had their own transportation, I wouldn't be taking Melvin nowhere.

(PC-R. 4908-10; 4913-14)(emphasis added).

Despite Jones' statement identifying the person who drove him on the night of the shooting, Mr. Smith's trial attorney made no effort to locate this key witness:

Q One question I neglected to ask. I lost my train of thought. In reference to Ventura Gibson [sic] or Vince Gibson, a person who Melvin Jones

> testified had given him a ride on the night of the homicide, do you recall making any effort to locate him?
>
> A Not that I recall.
>
> Q Do you recall having a particular reason for not trying to locate him?
>
> A No. Again, that's -- as I look at it now, that's certainly something we should have looked into, no question about that, and I don't remember -- I don't remember even thinking about it.

(PC-R. 4949).

Mr. Smith also called Charles Hill as a witness. Hill talked with Derrick Johnson in prison at Belle Glades two different times in 1985 (PC-R. 5062). Hill had been convicted and sentenced to the custody of the Department of Corrections. Hill passed through Belle Glades on those two occasions while being transferred by DOC from one institution to another (PC-R. 5061). Hill had known Johnson from the street prior to their incarcerations. Hill's first talk with Johnson at Belle Glades was sometime around March 20-21 1985, in the recreation yard.[49] Johnson told Hill that he had shot Mr. Songer:

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[49]Hill testified that he was in Belle Glades prison around March 20, 1985 (PC-R. 5061). Inmate records showed that Hill was at Belle Glades on March 20-21, 1985 (S-Ex. #21). These records indicated that Hill was at Belle Glades again on August 13, 1985 (PC-R. 5451, 5515-16). Johnson was present at Belle Glades on both occasions; inmate records showed that he was there from March 26, 1984 until October 29, 1985 (PC-R. 5452-53, S-Ex. 22).

> He was telling me that he was sorry to fuck Rerun around like that, but he was just taken out of prison. He had to do what he had to do. He was the one that did the cab driver. He said Rerun did not do the cab driver.

(PC-R. 5066). Johnson stated to Hill that he had to pin the murder on Mr. Smith, because it was "his only ticket out" (PC-R. 5082). When Hill met Johnson at Belle Glades a second time, Johnson reiterated what he had told Hill previously (PC-R. 5066).

SUMMARY OF THE ARGUMENTS

1. Mr. Smith was denied due process by the State's withholding of a wealth of materially exculpatory evidence and by the State's knowing presentation of false or misleading evidence and/or argument. The State withheld favorable evidence of a July 11, 1983, meeting between Melvin Jones and Derrick Johnson at which Jones said "he would help D.J. at trial." The State withheld evidence that Melvin Jones was one of the original suspects in the case. The State withheld evidence that police went to the Jones' residence twice in the course of neighborhood canvassing, not once as Jones and his wife testified. The State withheld evidence that at the time of Mr. Smith's retrial he was "afraid he'll be arrested" on sexual abuse charges. The State withheld evidence that the "eyewitness" (David McGruder) could not pick Mr. Smith's photo

out of a photopak, in direct conflict to his testimony and the State's closing argument, and that McGruder's estimate of the suspect's weight was off between 75 and 30 pounds from Mr. Smith's weight at the time. The State intentionally deceived the defense, the court and the jury regarding Jones' pre-trial promise to help Johnson, calling the defense's claim of collaboration between Johnson and Jones "totally ludicrous." The State intentionally deceived the defense, the court and the jury regarding the fact that Jones received a suspended sentence, i.e. no prison time, after coming forward as a witness against Mr. Smith in 1983. The withheld exculpatory evidence presented at the evidentiary hearing must be evaluated cumulatively for prejudice, but the circuit court failed to conduct this analysis. When the proper analysis is conducted, it is clear that a new trial must be ordered.

2. Mr. Smith was deprived of a full and fair evidentiary hearing when the circuit court summarily denied many aspects of Mr. Smith's Brady/Giglio claim and precluded the presentation of evidence to demonstrate the prejudice resulting from the failure to disclose favorable evidence and/or the intentional deception of the defense, the court and the jury. Under controlling precedent, the prejudice analysis is supposed to be conducted cumulatively. However by

erroneously excluding the evidence, the circuit court precluded itself from conducting the proper cumulative analysis.

3. Mr. Smith was deprived of the effective assistance of counsel during the guilt phase of his capital trial. Counsel's performance was deficient in failing to investigate Melvin Jones' story and to locate Ventura Gibson who refuted Jones' claim that Gibson drove him home the night of the Songer homicide and left him in a position to witness the shooting. Counsel's performance was deficient in failing to expose the conclusion of the State's bullet lead examiner as an unsupportable overstatement. Counsel's performance was deficient in inexplicably failing to present the testimony of Dina Watkins and/or other witnesses who saw Mr. Smith at Norm's Bar across the street from the Hoggly-Woggly at or near the time that Derrick Johnson claimed that Mr. Smith got in the victim's cab. These deficiencies prejudiced Mr. Smith, particularly when considered in conjunction with the prejudice resulting from the State's failure to disclose favorable evidence and/or its intentional deception of the defense, the court and the jury.

4. Newly discovered evidence demonstrating that Johnson admitted in 1985 that his testimony at Mr. Smith's 1983 trial

was false and was "his only ticket out" establishes that Mr. Smith is entitled to a new trial, particularly when considered cumulatively with the favorable evidence the State failed to disclose and with the favorable evidence that defense counsel unreasonably failed to discover and present.

5. Mr. Smith received the ineffective assistance of counsel at the penalty phase of his trial when counsel unreasonably failed to investigate and present a wealth of mitigating evidence.

ARGUMENT

ARGUMENT I

MR. SMITH WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN ADEQUATE ADVERSARIAL TESTING WHEN THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR KNOWINGLY PRESENTED FALSE OR MISLEADING EVIDENCE AND/OR ARGUMENT AT HIS CAPITAL TRIAL.

A. Introduction

The Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused" violates due process. Brady v. Maryland, 373 U.S. 83, 87 (1963); Kyles v. Whitley, 514 U.S. 419, 437 (1995); Strickler v. Greene, 527 U.S. 263, 281-82 (1999). In Hoffman v. State, 800 So. 2d 174 (Fla. 2001), this Court stated:

> This argument [that the defense should have figured out that exculpatory evidence existed] is flawed in light of **Strickler and Kyles**, which squarely **place**

> **the burden on the State to disclose to the defendant all information in its possession that is exculpatory**. In failing to do so, the State committed a Brady violation when it did not disclose the results of the hair analysis pertaining to the defendant.
>
> However, in order to be entitled to relief based on this nondisclosure, Hoffman must demonstrate that the defense was prejudiced by the State's suppression of evidence.

Id. at 179 (emphasis added). A due process violation is established when a three-part test is met:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. at 281-82.[50] Prejudice is shown when confidence in the reliability of the conviction is undermined as a result of the prosecutor's failure to disclose favorable information. Cardona v. State, 826 So.2d 968 (Fla. 2002); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988). As this Court has said:

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[50]"When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275.

> [W]here the State commits a discovery violation, the standard for deeming the violation harmless is extraordinarily high. A defendant is presumed to be procedurally prejudiced "if there is a reasonable probability that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." Pomeranz v. State, 703 So. 2d 465, 468 (Fla. 1997) (quoting State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995)). Indeed, "only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." Id.

Cox v. State, 819 So. 2d 705, 712 (Fla. 2002).[51]

However, where it is shown that the State intentionally misled the defense and/or the trier of fact, the due process violation warrants a reversal unless the State proves that the violation was harmless beyond a reasonable doubt.[52] Guzman v. State, 868 So. 2d 498 (Fla. 2003); Mordenti v. State, — So. 2d — (Fla. Dec. 16, 2004). In Guzman, this Court explained, "[t]he State as beneficiary of the Giglio violation, bears the

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[51]The circuit court ignored Cox v. State. The court found that the undisclosed meeting between Johnson and Jones on July 11th "may have also aided defense counsel in pursuing a different defense theory" (PC-R. 4093), but nonetheless denied relief.

[52]The Supreme Court has recognized that a dispute has arisen as to whether an intentional deception claim (Giglio) made under the due process clause is separate and distinct from a failure to disclose claim (Brady) also made under the due process clause. Banks v. Dretke, 124 S.Ct. 1256, 1271 n. 11 (2004). Having recognized the unresolved issue, the Court left the question unanswered. Id.("we need not decide whether a Giglio claim, to warrant adjudication, must be separately pleaded").

burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Id. at 507.[53] This Court noted that this is a "more defense friendly standard" than the one applied where it is not shown that the State's actions were deliberate.[54] See Giglio v. United States, 405 U.S. 150, 153 (1972)(the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'"); Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)(due process "forbade the prosecution to engage in 'a deliberate deception of court and jury'").[55]

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[53]This standard was derived from the decision of the Supreme Court that in cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." United States v. Bagley, 473 U.S. 667, 679 n. 9 (1985).

[54]A prosecutor must not knowingly rely on false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957) (principles of Mooney violated where prosecutor deliberately "gave the jury the false impression that [witness's] relationship with [defendant's] wife was nothing more than casual friendship"). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993).

[55]This Court has stated "[t]ruth is critical in the operation of our judicial system." Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001).

In denying Mr. Smith's due process claim, the circuit court made numerous legal errors that are subject to *de novo* review by this Court. Rogers v. State, 782 So.2d at 377. Despite the evidence that the prosecutors believed that Miller v. State, 360 So. 2d 46 (Fla. 2nd DCA 1978), set forth the entirety of its discovery obligation, the circuit court erroneously ruled that Mr. Smith had "not proven that the 'Millerizing' of these police reports was legally impermissible" (PC-R. 4095).[56] While finding favorable evidence was not disclosed, the court erroneously failed to find "prejudice" from the various non-disclosures by the State (PC-R. 4093-97). The circuit court further failed to conduct any real cumulative analysis of the prejudice arising from the non-disclosures, saying "each and every claim is either refuted by the record or without merit. It therefore follows that a cumulative error is without merit." (PC-R. 4113).[57]

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[56]It was also uncontested that Miller was effectively overturned when the Florida Rules of Criminal Procedure were amended effective July 1, 1989, prior to Mr. Smith's retrial.

[57]It is hard to imagine a more clear violation of the cumulative analysis outlined in Kyles v. Whitley, 514 U.S. at 437. As this Court has recently noted, proper cumulative analysis means consideration of those non-disclosures that "standing alone [are] insufficient to warrant a new trial," but when consider cumulatively undermine confidence in the outcome of the trial. Mordenti v. State, Slip Op. at 28. The language of the order denying Mr. Smith relief is the antipathy of the proper analysis; it assumes that individual

The circuit court failed to address several key aspects of Mr. Smith's allegations and the evidence presented in support of them. Finally, the court addressed only some of Mr. Smith's due process arguments under Giglio, and as to the ones addressed, its denial of relief was tainted by errors of law.

B. Failure to disclose favorable information.

1. *The Undisclosed Contact Between Jones and Johnson*

The prosecutor at Mr. Smith's trial learned that Melvin Jones met with Derrick Johnson in a hold cell on July 11, 1984, showed Johnson a hand drawn map of the crime scene, and told Johnson that he (Jones) would help him (Johnson) at trial (D-Ex. #8, bsp 4234).[58] The circuit court specifically found

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violations that do not warrant relief cannot warrant relief when considered together.

[58]To truly understand the significance of the July 11th meeting, a timeline for that summer should be constructed:

March 21th – homicide occurs
March 22nd – Johnson first interviewed
April 1st – Johnson arrested
April 7th – Smith arrested
May 24th – Smith indicted
June 13th – Jones arrested on unrelated charges
June 17th – Jones tried to negotiate a deal with Det. San Marco for info on Smith case, but info was bad
June 23rd – Smith prelim at which Johnson testified without a deal or any expected benefit
July 5th – SA Investigator met with Johnson
July 11th – Jones told Johnson that "he will help him"
July 21st – Hogan said a new witness contacted him

this information was not disclosed and that it was favorable to the defense, elements one and two of the Strickler three-part test. In fact, the State conceded these elements were present below.

The circuit court denied relief saying, "although this undisclosed evidence **would have undoubtedly had some value to the defense**, it certainly would not have put the whole case in such a different light as to undermine confidence in the verdict." (PC-R. 4095) (emphasis added). Having factually found that the evidence was favorable to Mr. Smith, the court failed to properly apply the legal standard concerning whether the undisclosed favorable evidence undermines confidence in the outcome of the trial. A *de novo* review of the circuit court's application of the materiality standard demonstrates the court's error.

Without knowledge of the July 11th meeting and Jones' vow to help Johnson, counsel's inquiry into the veracity of Jones

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on the 20th; later said the new witness was Jones
Aug 22nd – Johnson pled to second degree murder
Sept 12th – Hogan interviewed Jones; same day sought an investigation of Johnson's contact with Jones
Sept 19th – Hogan interviewed Johnson, and recorded Johnson's statement regarding July 11th meeting
Nov 1st – Smith's trial began; during trial both Jones and Johnson denied contact with the other

and Johnson's stories was more than "handicapped." Rogers, 782 So.2d at 385. When both Jones and Johnson swore that they did not meet or converse about the case, counsel had no means of developing evidence to support his theory of defense – collaboration between Johnson and Jones to pin the shooting on Mr. Smith.[59]

Further, without this information, counsel was limited in his ability to impeach the "thoroughness" and "good faith" of the State's investigation of this case. Kyles, 514 U.S. at 446. Had Johnson's statement regarding the meeting been disclosed, defense counsel could have more effectively cross-examined the police regarding the failure to verify Jones'

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[59]Mr. Smith's defense was that he was not in the cab and did not participate in the robbery and/or murder. His only explanation for the matching testimony from Johnson and Jones was that they collaborated somehow and came up with a story that placed most of the culpability upon Mr. Smith and allowed Johnson to escape the death penalty and deal down to second degree murder. Mr. Smith was not in a position to know if Johnson and Jones committed the murder together or if Johnson committed the murder alone. Either way, it was clear that Johnson's ticket out was to pass the buck. Yet, the evidence that most supported Mr. Smith's defense regarding the testimony of Johnson and Jones was kept from him. Johnson could not get a deal with the State until he produced a witness to corroborate his story. After meeting an investigator from the State Attorney's Office on July 5th and failing to get a deal for himself, Johnson met with Jones on July 11th at which time Jones promised to help. Soon thereafter, the prosecutor received a letter from Jones (apparently on July 20th), and struck a deal with Johnson. Together, Johnson, Jones, and the prosecutor then sent Mr. Smith to death row.

story regarding how he ended up at the scene of the murder.[60] When Jones came forward with his story, he told the police that an individual named "Vince" had dropped him off that night. Yet, the police did not check out this crucial part of Jones' story.[61] Id. at 445 ("Beanie's statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police.").

On the same day that a meeting between Jones and Hogan occurred, (D-Ex. #8, #14), Hogan requested that his investigator determine whether or not Jones ever had "extensive contact with or shared a cell with" Johnson. He wanted the information before he spoke with Johnson at a meeting planned for the next week. Obviously, the prosecutor

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[60] Of course, the State did not disclose the police reports regarding a neighborhood canvas that resulted in two different police officers at different times speaking to Mellow Jones about whether she had seen or heard anything in connection with the shooting death of Mr. Songer (D-Ex. #2, #3). The first interview occurred shortly after the shooting and showed that the officer obtained from Mellow her vital statistics and lack of a phone. The second officer spoke to Mellow the next morning, supposedly after Jones had told her that he had witnessed the shooting. These undisclosed reports clearly impeach the Jones' testimony regarding the events following the shooting of Mr. Songer.

[61] In 2002, "Vince" testified that no one, including the police, ever came to verify Jones' story (PC-R. 4905-06).

was concerned. But neither his concern nor the fruits of that concern were shared with the defense.[62]

Finally, the undisclosed information regarding the July 11th meeting constituted impeachment plain and simple. Counsel could have demonstrated that Johnson and Jones were lying, or at the very least obfuscating, when they testified that they had not met and did not discuss the case. This classic impeachment evidence of the State's two main witnesses would have undermined their credibility while supporting the defense's theory that the two had colluded. The undisclosed statement of a material witness (Johnson) casts the case in a whole new light and undermines confidence in the reliability of the result without it.[63] Mordenti v. State, Slip Op. at 17

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[62]Further evidence of the State's concern lies in the fact that, after the first trial began, the State had Jones take a polygraph examination (D-Ex. #20). The State never told Mr. Smith's counsel about this polygraph, nor the fact that Jones was not found to have passed.

[63]The prejudice can most clearly be seen when examining the closing arguments. The undisclosed information provides the evidence needed to support defense counsel's argument and answer the prosecutor's rebuttal ("One thing [defense counsel] was trying to say is that somehow Derrick Johnson and Melvin Jones, the guy hiding behind the bushes, plotted [ ] this together. Well, first of all, they didn't even know each other. * * * But what possible motive - - and think of how ludicrous that scenario really is")(R2. 1349-50). Kyles at 449 n. 19 ("Exposure to Beanie's own words, even though through cross-examination of the police officers, would have made the defense's case more plausible and reduced its vulnerability to credibility attack.").

("as we consider the importance of Gail's credibility and the inconsistencies revealed in the undisclosed date book, we conclude there is a reasonable probability that this evidence 'put[s] the whole case is such a different light as to undermine confidence in the verdict.' Strickler, 527 U.S. at 290(quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995).").

2. *Undisclosed Police Reports*

In denying relief the circuit court concluded, "CCRC has not proven that the 'Millerizing' of these police reports was legally impermissible."[64] This conclusion is erroneous as a matter of law. Fla. R. Crim Pro. 3.220 at the time of the 1990 retrial had been amended to require the disclosure of "all police and investigative reports of any kind prepared in connection with the case."[65] In 1990, Florida law required the disclosure of the all of the police reports in an unredacted form.

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[64]In circuit court, the State did not contest that these police reports were undisclosed. In the State's closing argument, it asserted, "Defendant has established nothing in the possibly undiscovered reports reflecting anything material under Brady." (PC-R. 3971).

However, the State did at times object to presentation of evidence to support Mr. Smith's claim that the non-disclosure of the police reports constituted a Brady violation. The objections were sustained on the basis that the evidentiary hearing granted was limited (PC-R. 4928-31). See Argument II.

[65]Rule 3.220 was amended to include this requirement on July 1, 1989, well before Mr. Smith's 1990 retrial.

Further, Brady and its progeny required the prosecutor to go through the police reports and disclose any information favorable to the defense contained therein. Mordenti v. State, Slip Op. at 12 ("To comply with Brady, the individual prosecutor has a duty to learn of any favorable evidence and to disclose that evidence to the defense"). Yet, there was no evidence presented that a Brady review of the police reports was ever conducted. The prosecutors mechanically engaged in a "Millerizing" process, as though "Millerizing" was the extent of its discovery obligation.

Thus, the only questions before this Court are 1) whether the undisclosed information was favorable to the defense, and 2) whether the failure to disclose either the police reports or the favorable information contained therein undermines confidence in the reliability of the outcome of the trial occurring without disclosure of the favorable information.

a. Melvin Jones, a suspect

The State argued in circuit court that the nondisclosure of the police report revealing that Melvin Jones was "initially mentioned as [a] possible suspect" was insignificant because "Defendant has not shown either that the evidence was favorable to him nor admissible as impeachment of Jones." (PC-R. 3972). This undisclosed report states in

pertinent part, “he may be a possible suspect as well as Melvin Johnson who lives on Fairfield Ave. So. in the 3000 block and who has warrants on him pending allegedly” (D-Ex. #2, bsp 4736).

As has been explained, “[i]n determining whether prejudiced has ensued, this Court must analyze the impeachment value of the undisclosed evidence.” Mordenti v. State, Slip Op. at 13. The fact that Melvin Jones was a suspect gave him a motive to want to make sure that Derrick Smith got convicted.[66] Kyles at 442 n. 13 (“the Brady evidence would have revealed at least two motives for Beanie to come forward:

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[66]Jones ultimately placed himself at the scene of the crime at the time the crime occurred. Certainly if Jones committed this murder with Johnson, he would have been present at the murder and would have been aware of what happened. He could have easily replaced himself with Mr. Smith when recounting the events. If Jones had committed the murder with Johnson, he would have been motivated to help Johnson in order to keep Johnson from implicating him. This would be one explanation for his statement to Johnson on July 11, 1983, that “he would help D.J. at trial” (D-Ex. #8).

The State tried to refute this possibility by arguing below, “Defendant was identified by the independent eyewitness McGruder as having entered the cab.” (PC-R. 3972). In this argument, the State overlooked D-Ex. #10 – the undisclosed “Synopsis” prepared by Hogan recounting the McGruder’s sworn statement, “McGruder gave descriptions fitting both defendants in this case, however, he was unable to pick either of the defendants out of a photopak.” This was contrary to McGruder’s trial testimony (R2. 862-63). Perhaps more significantly, Hogan noted that McGruder’s description of Mr. Smith was in fact off by at least 30 pounds (another undisclosed report showed that another description given by McGruder was off by over 70 lbs.)(D-Ex. #3, bsp 4719).

he was interested in reward money and he was worried that he was already a suspect in Dye's murder"). As such, it is impeachment evidence that Mr. Smith was entitled to present. It also constituted impeachment of the police investigation into the murder because apparently no investigation of Melvin Jones, a listed suspect, was conducted despite two neighborhood canvasses that included his residence. Kyles at 447 ("By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence").

b. Mellow Jones

An undisclosed police report indicated that shortly after the homicide a neighborhood canvass was conducted. The list of house contacted included the following:

> 2918 Fairfield Ave. So. No phone
> Melow Jones B/M 3/20/52
> NEGATIVE

(D-Ex. #2, bsp 4736). This report set forth that the "Melow" who answered the door was a black male who provided a birth date and indicated in a conversation that there was no phone at the address. This report certainly could have been used to raise questions as to whether it was Melvin who answered the door and misidentified himself; but at a minimum, it was

inconsistent with Mellow's trial testimony regarding what she discussed with the police officer.

Another undisclosed police report contained the following:

> On 3/21/83, at approximately 0830 hours writer conducted a neighborhood [ ] of the following locations with negative results.
>
> * * *
>
> Mellow Jones, BF 2918 Fairfield Ave So. no phone
>
> * * *

(D-Ex. #3, bsp 4701).

Mellow Jones testified that Melvin Jones had gotten home before the police officers' visit in the "late night, early morning" (R2. 1014). She was mad at Melvin because he had forgotten her birthday and thus had not paid attention to him when he told her that he had witnessed a murder and that was why she did not tell the police.[67] She claimed she was merely

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[67]Another undisclosed "Investigative Report" prepared by the State Attorney's Investigator dated July 6, 1988, provided a contradictory, but undisclosed, statement from Mellow Jones:

> Mellow advised she does recall the day in question when a cab driver was murdered down the street, although she does not recall the specific date. Mellow advised that Melvin had come home during the late evening or early morning hours. Mellow advised that she was half asleep when Melvin came home, however, she believes it was 20 minutes to 30 minutes prior to receiving a knock on the door. Mellow answered the door and found it to be a St. Petersburg Police Officer who advised her that someone had been shot nearby and was asking if she had heard anything to which she stated she had not.

asked if she heard "the noise" (R2. 1014). But, the reports clearly established that she was asked more than that one question. The second report revealed that she was interviewed at 8:30 a.m., which according to her testimony was after her anger with Melvin had subsided. These reports were entirely contradictory to Melvin's testimony and constituted valuable impeachment of both Mellow and Melvin and their stories (R2. 988-91).

c. Melvin's Undisclosed Fear of Sexual Abuse Charge

At the time of Jones' testimony against Mr. Smith in 1990, Jones was facing a possible charge of sexual abuse of a child (D-Ex. #6). A undisclosed handwritten note dated 8/9/89 on the stationary of prosecutor, Mary McKeown, stated:[68]

> TC from Melvin Jones,
> His daughter, Elizabeth Jones age 16 (already has a child of her own) has accused him of sexual abuse which occurred 3-6 yrs ago.
>
> ---
>
> After the police officer left, Melvin told her that he had seen two guys shoot a cab driver. It should be noted that she was upset at the time and did not know that whoever had been shot was dead. She advised that Melvin did not go into any details as to the crime itself, however, he did state he was behind a tree when he saw it.

(D-Ex. #5). This report contains numerous inconsistencies that could have been used to impeach Ms. Jones had it been disclosed.

[68]In 1989, Ms. McKeown was an assigned prosecutor on Mr. Smith's case (PC-R. 4808).

> He's trying to get back with mother, Elizabeth doesn't like it, has made allegations. He's willing to take polygraph. Wants her to take polygraph. He's afraid he'll be arrested. No legal advise given.

(D-Ex. #6, bsp 1565).[69]

As to this note, the circuit court acknowledged that the note and the information contained therein was not disclosed, but denied relief saying "[t]his claim must fail, however, because CCRC has not shown that the State was legally obligated to disclose this handwritten note." (PC-R. 4096). The circuit court sought to bolster its conclusion by noting

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[69]Also undisclosed was a Synopsis prepared by Glen Martin on April 20, 1989, that detailed Jones' sworn statement to him on April 19, 1989. In this statement, Jones indicated that he had several violations of probation currently pending with the State Attorney's Office, and a "GT" (D-Ex. #7). He indicated that he "was somewhat disappointed in [the prior assistance provided] and [had] hoped that the State could have done a little bit more for him." According to the Synopsis, "Melvin Jones indicated that he is hopeful that the State will speak in his behalf, however, he indicated that the State has made no specific promises to him whatsoever re[garding] how these case will be disposed."

Jones also discussed the circumstances by which he came forward in the "Clinton Jackson case." According to Martin, "Melvin stated that when he learned that the police were looking for a black truck that was normally in his possession as being the suspect vehicle in this case, that he did contact the SPPD and inform the PD as to the names of the indivs who were in the possession of his black pick-up truck at the time of the homicide." (D-Ex. #7). This undisclosed statement revealed that Jones had been a suspect in the Clinton Jackson when he came forward as a purported eyewitness, just as the undisclosed police report revealed that he was a suspect in the Songer homicide. This obvious pattern could have been used to impeach Jones, had it been disclosed.

"the record fails to reflect that Melvin Jones was ever charged with this crime. Accordingly, this Brady claim must fail." (PC-R. 4096).

This conclusion is erroneous as a matter of law. In 1989, Jones was "afraid he'll be arrested." This was in advance of the second trial. It revealed a motive on Jones' behalf to curry favor with the State.[70] As such, the defense was entitled to question Jones regarding his fear of arrest. Davis v. Alaska, 415 U.S. 308 (1974). The failure to disclose this evidence warrants a new trial. Gorham v. State, 597 So.2d 782, 785 (Fla. 1992), quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)("As the Court stated, 'the jury's estimate of the truthfulness and reliability of a given

[70]After testifying against Mr. Smith in November of 1983, Jones received a suspended sentence and was released from custody. In January of 1984, he claimed to have witnessed Clinton and Nathaniel Jackson on their way to a robbery in which the victim was shot and killed. Jones testified against Clinton Jackson in his 1985 trial. By then, Jones was back in custody in the same cases that he had received a suspended sentence seeking a bond reduction (D-Ex. 16, 12/19/84 Motion for Bond Reduction). When Clinton's case was reversed and remanded for a new trial, Jones who was on the street with no pending charges was unavailable to testify. Jackson v. State, 575 So. 2d 181 (Fla. 1991). Later, he was picked up on a probation violation and a grand theft charge. While those charges were pending, in April of 1989 he met with prosecutor-Martin and discussed testifying at Mr. Smith's retrial (D-Ex. 7). He later called prosecutor-McKeown in August of 1989 and discussed his fear of the sexual assault charges. With charges and potential charges pending against him, Jones showed up and testified against Mr. Smith in 1990.

witness may be well determinative of guilt or innocence, and it is upon such subtle facts as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend'"). Moreover, the fact that this was a statement made to a prosecutor and recorded in handwritten notes did not alleviate the prosecutor's obligation to disclose it. Mordenti v. State, Slip Op. at 24-26 (Brady violations found in the failure to disclose statements made by witnesses to prosecutor recorded in handwritten notations). Here too, impeachment evidence was not disclosed to the defense.

d. Undisclosed Synopsis of McGruder's Testimony

The 1983 prosecutor, Tom Hogan, prepared a "Synopsis" of his investigation (D-Ex. #10) wherein he recounted sworn testimony obtained pursuant to State Attorney subpoenas. According to a "Synopsis" that included McGruder's testimony, "McGruder gave descriptions fitting both defendants in this case, however, he was unable to pick either of the defendants out of a photopak." This contradicted McGruder's testimony at the retrial (R2. 862-63). Further, according to the "Synopsis", the description of the "shorter male" that supposedly correlated to Mr. Smith was off by "about a 30 pound weight difference" (D-Ex. #10, the back of bsp 409).

In denying relief, the circuit court found that the Synopsis was not disclosed, but observed that as to the undisclosed information regarding McGruder, "[**i]t goes without saying that this information would have been favorable to the defense**." (PC-R. 4097)(emphasis added). Nevertheless, the circuit court concluded that, "CCRC fails to meet its burden showing that defense counsel was entitled to disclosure of this internal investigatory report." (PC-R. 4096).[71] This conclusion was erroneous as a matter of law. Mordenti v. State, Slip Op. at 24-26 (Brady violations found in the failure to disclose statements made by witnesses to prosecutor recorded in handwritten notations).[72]

Alternatively, the circuit court ruled that confidence was not undermined in the outcome because McGruder was impeached at trial ("the jury heard the inconsistencies in McGruder's testimony")(PC-R. 4097). In Banks v. Dretke, 124

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[71]In the circuit court, the State maintained that the "Synopsis" was not only not disclosed, but was in fact not discoverable.

[72]The circuit court's conclusion that there was no obligation to disclose McGruder's statements is also erroneous under Fla. R. Crim. Pro. 3.220. In 1990, Rule 3.220 required the disclosure of statements of witnesses "summarized in any writing." McGruder was a witness listed by the State and called by the State at Mr. Smith's retrial. Clearly, Rule 3.220 required the disclosure of the written summary of McGruder's sworn statement.

S.Ct. at 1278, the Supreme Court addressed a similar contention by the State seeking to uphold a death sentence – "The State argues that 'Farr was heavily impeached [at trial],' rendering the informant status 'merely cumulative.' [Citation]. The record suggests otherwise." The Court then proceeded to demonstrate from the record that the State had used the impeachment to its advantage arguing that it showed that the witness "had been 'open and honest with [the jury] in every way.'" Id. at 1279.

So to here, the State tried to argue McGruder's inconsistencies to its advantage:

> Believe me, the State of Florida wishes that Mr. McGruder was a little smarter than he was, and could remember and answer questions a little better than he did. But what did he say? What did he say? He said that man walked in and used the phone in his business when he was there, and he saw him.

(R2. 1345-46).[73] Moreover, the State relied upon McGruder's

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[73]At trial, McGruder testified:

> Q. Is that the guy you saw get in the cab that night?
> A. Yes.
> Q. Are you sure about that?
> A. I'm not sure.
> Q. Were you sure then?
> A. Yes
> Q. Is it now, seven years later, you're not sure?
> A. No.
> Q. Well, then you're going to have to explain. Why aren't you sure?
> A. It's been seven years that – I don't know – you

testimony in 2002 to argue that confidence was not undermined in the verdict by the undisclosed favorable evidence ("Defendant was identified by the independent eyewitness McGruder as having entered the cab")(PC-R. 3972).[74]

Yet, the undisclosed sworn statement seriously impeached McGruder's testimony. According to Hogan's "Synopsis", McGruder "was unable to pick either of the defendants out of photopak" (D-Ex. #10, back of bsp 409). Thus, contrary to the State's closing argument to the jury and contrary to the State's argument in collateral proceedings, McGruder did not identify Mr. Smith, and described someone who weighed somewhere between 30 and 75 pounds less than Mr. Smith weighed. Better or more favorable evidence destroying the significance of McGruder's testimony is hard to imagine. Kyles at 441 ("Disclosure of [eyewitnesses'] statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. To begin with, the value of two of those witnesses would have been

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know, remember.
(R2. 881).

[74]The State also argued against Rule 3.850 relief on Mr. Smith's ineffective assistance of counsel claim regarding the failure to call Ventura Gipson as a witness saying, "Mr. McGruder, the clerk at the Hogley-Wogley Barbecue placed Defendant entering the back of the cab and Johnson the front passenger seat." (PC-R. 3979).

substantially reduced or destroyed").

The prejudice analysis must be conducted cumulatively with consideration of the prejudicial impact of other failures to disclose exculpatory evidence.[75] The prejudice to Mr. Smith is obvious from the cumulative consideration of the undisclosed McGruder statement with the other failures to disclose favorable evidence. The observation of the Supreme Court in Banks applies here: "On the record before us, one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the defense." 124 S. Ct. at 1197. A new trial is warranted when all of the State's failures to disclose favorable information are considered cumulatively.

e. Undisclosed Police Reports Regarding Polygraphs

At the 2002 hearing, it was also established that the police reports concerning Jones' polygraphs were not turned over to the defense. San Marco's report of April 3, 1983, was

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[75]In one undisclosed police report appearing as part of Def. Exh. #3, bsp 4719, Mr. McGruder gave a description of the individuals he saw get into the cab as, "B/M, 22-23 yrs of age, 5'8" tall, 130 pounds, med. build," and "B/M approx. 23 yrs of age 6' tall, 140 pounds, slim build". In another undisclosed report included in Def. Exh. #3, bsp 4766, Derrick Tyrone Smith was described as 5' 8" tall, 205 pounds, husky build. Thus, Mr. Smith weighed 75 pounds more than Mr. McGruder had described.

not disclosed (PC-R. 5395; D-Ex. #19). This report included Johnson's statements made during the course of the polygraph. One of his statements was that "this was the absolute truth & the reason he did not tell us about being with RE-RUN earlier in the NAME OF THE GAMR LOUNGE was because he was afraid he would be implicated in the AR." This statement revealed Johnson's real motivation and if disclosed would have provided impeachment of Johnson.

It was also shown that the State did not disclose to Mr. Smith's counsel that a polygraph of Jones was given on November 3, 1983, after Mr. Smith's trial had commenced (D-Ex. #20; 5458). The undisclosed report of the polygraph stated, "Subj. Has aleged [sic] through testimony to the state attorney that he was an eye witness to this homicide. JONES had previously agreed to voluntarily submit to a polygraph examination **to help establish the truthful [sic] of his written statement and credibility to his pending testimony**." (D-Ex. 20)(emphasis added). This undisclosed report would have provided the defense with additional impeachment of Jones. When all of the undisclosed evidence is considered cumulatively, a new trial is required.

C. Intentional deception of defense and trier of fact.

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

At the 2002 hearing, Mr. Smith presented documents from the State's files disclosed pursuant to Chapter 119. These included the investigative memo, dated 9-12-83, containing Hogan's directive to investigate the contact between Jones and Johnson (Def. Exh. #8). The memo included a note stating:

> D.J. says 1st time he ever saw Melvin Jones 7-11-83 in holding cell before prelim - Melvin Jones showed D.J. map and said he would help D.J. at trial.

In 2002, Hogan acknowledged that he wrote the note memorializing Johnson's statement (PC-R. 4877-78).[76]

In 2002, Hogan confirmed that he had been advised that the meeting between Johnson and Jones occurred on July 11, 1983 (PC-R. 4894-97). Hogan had no memory of disclosing this information (Tr. 79, page missing from ROA). The prosecutor from the second trial, Glenn Martin, knew of the July 11th meeting, but had no memory of disclosing it to Mr. Smith's counsel (PC-R. 4840). Mr. Smith's attorney from his first trial, Tom Donnelly, testified that he had no memory of receiving this information (PC-R. 5391-93). Mr. Smith's

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[76]Johnson, who was called to testify at the 2002 evidentiary hearing by the State, acknowledged that he "met Jones" the day he had a court hearing in his case (PC-R. 5372). He explained "I think at the second preliminary that's when discussion had begun" (PC-R. 5371). Johnson confirmed that the "discussion" occurred with Jones and that Jones showed him a map. State's Exhibit #3 showed that Johnson had a pretrial hearing on 7-11-83.

attorney from his second trial, Richard Sanders testified that he did not receive information from the State regarding a meeting between Jones and Johnson (PC-R. 4934-35).

Before the first trial even began, Mr. Smith's counsel took Jones' deposition on September 26, 1983. During the deposition, Jones gave false and/or misleading answers regarding his incarceration with Johnson and regarding discussions of the case with others (R1. 780; 783). At the first trial, during the cross-examination of Johnson, Mr. Smith's counsel asked Johnson whether he had discussed the case with Jones (R1. 1536). Johnson replied that he had not. A similar question was asked during Jones' testimony. Jones denied the contact, and the State did nothing to correct Jones' misleading answer (R1. 1693)

Leading up to the second trial, Mr. Smith's counsel filed a demand for exculpatory material (D-Ex. #1, bsp 98). In paragraph three of the demand, Mr. Smith requested, "Statements by any person tending to discredit in any fashion statements by that person or any other witness." The State responded that counsel should rely on the discovery presented at the first trial (D-Ex. #1, bsp 96). Nothing was turned over before the second trial about the contact between Jones and Johnson, even though the prosecutor was aware of it (D-Ex.

#1; PC-R. 4816-22; R2. 57).

Donnelly, the defense counsel at the first trial, explained the significance of the undisclosed contact:

> Q Why did you -- why were you inquiring about that? What was the purpose of trying to find about contact between those two individuals?
>
> A The question becomes what contact they had was to see whether the testimony is independent testimony, if they're getting together before they testify, whether it's a collaborative effort; that kind of thing.
>
> Q And were you also trying to see a source or a basis for what Melvin Jones was saying?
>
> A That’s correct.
>
> Q Other than actually having been there?
>
> A That’s right.
>
> Q Were you given any information to indicate that there had been such contact?
>
> A Not to my -- not to my recollection; no.
>
> Q And the transcript I showed you, in fact, Mr. Johnson indicated there had not been discussion?
>
> A That’s correct. That's what this transcript says.
>
> Q Had you known of any -- had you known of the notes in Exhibit 8, is that something that would have been pursued?
>
> A Yes, because that would have -- we would have been able to impeach the testimony of Mr. Johnson with this note and it would have shown that Mr. Johnson had presented false testimony in front of the jury.

Q And does that also, then, not only impeach Mr. Johnson but could you use it to impeach Mr. Jones as well?

A Yes. If Mr. Jones said the same thing as Mr. Johnson did, which would have been inconsistent with this note; yes, we could have.

(PC-R. 5392-93).

Mr. Sanders, Mr. Smith's counsel at the retrial, testified:

Q Is that information that you would have used had you had it?

A Yes.

Q And can you explain?

A Well, Melvin Jones and Derrick Johnson had -- were together in the jail in a sense they could talk to each other, that would have provided an alternative explanation for where Melvin Jones got his information that he testified about at trial, because in the absence of some second powers, there's only two possible ways Melvin Jones could have known what he testified about; either he saw it or somebody told it to him. And I had no information that there was anyone who could've told it to him, or presumably the only ones that could have told it to him would be another eyewitness, and, of course, that would be either Derrick Johnson or whoever else was involved.

So I certainly would have liked to have known that they were at some point, at least at one point in the same area of the jail where they could have talked to each other.

(PC-R. 4934). Sanders testified that the State's case rested on Jones and Johnson (PC-R. 4936). Clearly, the undisclosed meeting between the State's two main witnesses was material to

the case.

Mr. Smith's counsel were affirmatively misled by the false and/or misleading testimony given by Jones and Johnson. Counsel specifically asked Jones and Johnson regarding contact between them, and counsel was repeatedly told that there was none. Both Hogan and Martin were aware of Johnson's statement that there was a meeting on July 11th at which Jones told Johnson that "he would help D.J. at trial." Yet, neither informed Mr. Smith's counsel of Johnson's contradictory statement.[77] Banks v. Dretke, 124 S.Ct. at 1275 ("[p]rosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation."); Garcia v. State, 622 So. 2d at 1331 (prosecutors "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts."). When the State failed to correct the testimony and disclose Johnson's statement about his July 11th meeting with Jones, counsel had every reason to believe that there was no evidence

[77]In fact in his closing argument at the 1990 trial, the prosecutor relied upon the false or at the very least misleading testimony in asking the jury to convict Mr. Smith ("One thing [defense counsel] was trying to say is that somehow Derrick Johnson and Melvin Jones, the guy hiding behind the bushes, plotted and [planned] this together. **Well, first of all, they didn't even know each other**.")(R2. 1349)(emphasis added).

of such a meeting.[78] Banks v. Dretke, 124 S.Ct. at 1275 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). When it is demonstrated that the State intentionally misled the defense and/or the trier of fact, the due process violation warrants a reversal unless the State proves that the due process violation was harmless beyond a reasonable doubt.[79] Guzman v. State, 868 So. 2d 498 (Fla. 2003); Mordenti v. State, — So. 2d — (Fla. December 16, 2004).

In addition to the intentional false or misleading evidence regarding the July 11th meeting, the State affirmatively deceived Mr. Smith's counsel regarding the consideration that Jones received in 1983 for his testimony

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[78] Of course, the State redacted the police reports that were disclosed, and deleted reference to the fact that "Melvin Johnson," who had outstanding warrants and lived near the intersection of 30th St. and Fairfield, was the initial suspect in the shooting of Mr. Songer.

[79] The United States Supreme Court has recognized that a dispute has arisen as to whether an intentional deception claim (Giglio) made under the due process clause is separate and distinct from a failure to disclose claim (Brady) also made under the due process clause. Banks v. Dretke, 124 S.Ct. 1256, 1271 n. 11 (2004). Having recognized the unresolved issue, the Court left the question unanswered. Id.("we need not decide whether a Giglio claim, to warrant adjudication, must be separately pleaded"). However, here, Mr. Smith pled both Brady and Giglio violations occurred.

against Mr. Smith. After Mr. Smith's 1983 trial, Jones received a three-year suspended sentence followed by two years probation. It was only after he got into additional trouble that in 1985 he was ordered incarcerated for three years. Jones was permitted to suggest to Mr. Smith's jury that he really did not get much of deal because he had to serve three years (R2. 1000). Prosecutor-Martin falsely told the judge and defense counsel that Jones was not sentenced until after he had also testified against Clinton Jackson and that he then received three years incarceration followed by two years probation (R2. 999, 1001). This was patently false (D-Ex. 16, 12/1/83 Sentence).

The prosecutor argued to the jury, "[Jones] did get himself some time off his sentence. That was never denied. He didn't think much of it. He sort of shot everybody a dirty look and said, Well, yeah, I did three years. He didn't think much of that break that he got." (R2. 1345-50). Thus, the jury was affirmatively misled to believe that after coming forward against Mr. Smith, Jones got a sentence of three years incarceration. However in fact, he received a suspended three-year sentence.

Here, the State cannot meet this burden and demonstrate that its intentional deception of the defense, the court and

the jury was harmless beyond a reasonable doubt. A new trial is required.

2. Cumulative consideration.

The circuit court never gave cumulative consideration to the numerous instances of false and/or misleading evidence and argument. Cumulative consideration is required. Mordenti v. State. When the proper cumulative consideration is given, it is clear that Rule 3.850 relief must issue. The State's case depended upon three witness – Johnson, Jones, and McGruder. The State had in its possession evidence that each had testified in a false manner or at the very least misleading. Cumulative consideration shows the undisclosed evidence when taken together impeached all three of these witnesses leaving no untainted evidence to insure continued confidence in the reliability of the jury's verdict.

ARGUMENT II

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN LIMITING THE EVIDENTIARY HEARING AND REFUSING TO PERMIT MR. SMITH TO PRESENT ALL OF THE EVIDENCE OF BRADY/GIGLIO VIOLATIONS THAT WERE TO BE EVALUATED CUMULATIVELY WITH THE EVIDENCE PRESENTED UNDER THE DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT.

The circuit court summarily denied various aspects of the Brady/Giglio claim contained in Mr. Smith's Rule 3.850 motion. A circuit court considering whether a Rule

3.850 movant is entitled to an evidentiary hearing, "must" accept as true the movant's factual allegations. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989)("Accepting the allegations concerning Chavers and Carson at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing with respect to whether there was a Brady violation"). "Under rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). *Accord* Patton v. State, 784 So. 2d 380, 386 (Fla. 2000); Arbelaez v. State, 775 So. 2d 909, 914-15 (Fla. 2000).

Here, the court determined that Mr. Smith was entitled to an evidentiary hearing on only a portion of his Brady-Giglio claim. Full evidentiary development was confined to the claims that 1) Jones and Johnson provided false and/or misleading testimony regarding their contact in jail in light of the handwritten note in the State's files indicating that Johnson had reported a July 11th meeting with Jones, and 2) the State failed to disclose information regarding the polygraph examination of Jones.

In 2002, considerable evidence was presented showing that favorable evidence was not disclosed to Mr. Smith's counsel beyond the two items on which the hearing was ordered. However, some evidence drew an objection from the State that it was beyond the scope of the hearing (PC-R. 4928). The objections were sustained, and Mr. Smith's counsel was instructed, "do take pains for the rest of the four days to let me know if we're not addressing an issue that I previously granted permission exclusively, that you're also attempting to slip in something that I've already previously ruled on and attempting to address it yet again" (PC-R. 4932). To the argument that all of the allegedly undisclosed favorable evidence must be presented in order to permit proper cumulative consideration, the court responded, "I've determined that the other matters weren't prejudicial to the Defendant, weren't errors, and were not the basis for an evidentiary hearing. It would have made no sense to -- to grant specific items if I was going to let you deal with everything no matter what we already addressed" (PC-R. 4933).[80]

[80]The court in denying relief following the evidentiary hearing did address some of Mr. Smith's claims that were beyond the limited scope of the hearing. However, Mr. Smith

Given that there was favorable evidence that was in the State's possession and that was not provided to the defense, and given that uncorrected false and misleading testimony was presented before the jury, all of the undisclosed favorable evidence must be evaluated cumulatively. Mordenti v. State. However, the circuit court did not properly evaluate the due process violations when it limited the evidence. It is clear that the court could not consider cumulatively those matters that it excluded from the hearing through its rulings. The court by limiting the hearing ensured that it could not conduct a proper cumulative analysis. Without the evidence, Mr. Smith's claims could not be cumulatively evaluated. Mordenti v. State, Slip Op. at 28. As a result, the evidentiary hearing was neither full nor fair. If a new trial is not granted on the basis of Argument I, then a new evidentiary hearing must be ordered.

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in his closing argument had urged the court to consider matters that did make it into evidence that was beyond the limited matters that the hearing had been granted on (PC-R. 3918 n.12). The court's consideration after the hearing of the undisclosed favorable information that was permitted to be introduced without objection cannot cure the error of improperly excluding additional evidence of undisclosed favorable information.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING MR. SMITH'S CLAIM THAT HE WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO AN ADEQUATE ADVERSARIAL TESTING AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF THE TRIAL.

A. Introduction

In Strickland v. Washington, 466 U.S. 668, 685 (1984), the Supreme Court explained that under the Sixth Amendment, "a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." In order to insure that a constitutionally adequate adversarial testing, and hence a fair trial, occur, defense counsel must provide the accused with effective assistance. Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 685. Where defense counsel fails in his obligations and renders deficient performance, a new trial is required if confidence is undermined in the outcome.[81]

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[81]To the extent that this Court were to find contrary to the circuit court's determination of historical fact that any or all of the documents and information in the State's possession were disclosed or available to Mr. Smith's trial counsel, counsel's performance in not using and presenting those documents or the information contained therein to Mr. Smith's jury was deficient. State v. Gunsby, 670 So.2d 920 (Fla. 1996); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

To the extent that the facts underlying Mr. Smith's claims are raised under alternative legal theories as to which actor in the process failed -- i.e., Brady, Giglio, and ineffective assistance of counsel -- the paramount issue is whether Mr. Smith received a constitutional adequate adversarial testing under the Sixth Amendment. Therefore, the cumulative effect of those facts in light of the record as a whole must be assessed. Mordenti v. State. The effects of the deficient performance must be evaluated cumulatively to determine whether the result of the trial produced a reliable outcome. When such consideration is given to the wealth of exculpatory evidence that did not reach Mr. Smith's jury, either because the State failed to disclose or because trial counsel failed to discover, confidence in the reliability of the outcome is undermined.

B. Undiscovered Witness - Ventura Gibson

At both trials, Melvin Jones testified that he witnessed the shooting of Jeffrey Songer and that Mr. Smith was the triggerman. Jones was arrested on outstanding warrants on June 13, 1983, nearly three months after the shooting of Songer. Through his attorney, Jones contacted the police and indicated that he had information regarding the homicide. Dissatisfied with the consideration offered by the police,

Jones gave an "altered" version of the facts that was not true. Subsequently, he wrote the prosecutor indicating that he was on his way home the evening of the murder when he witnessed the shooting. Later in a deposition, Jones explained that the night of the shooting he had been with Vincent Gibson on 27th St. and 18th Ave. in St. Petersburg. Jones further explained that Gibson gave Jones a ride home that night, dropping him off near the murder scene (R1. 787-88). Jones described what he supposedly witnessed, including seeing Mr. Smith shoot Songer, the direction Mr. Smith and co-defendant Johnson ran after the shooting, what both defendants were wearing, and a detailed description of the gun supposedly used by Smith. Jones' trial testimony tracked the story told in the deposition (R1. 1671-73; R2. 973-75).

In 2002, Mr. Smith presented the testimony of Ventura Gipson.[82] He testified that he in fact knew Jones because they had shared work space in the past, but he also testified that they were not friends (PC-R. 4903). Regarding Jones' claim that he was with Gibson the night of the murder, and that Gibson had given him a ride home, Gibson testified:

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[82] Although the name Jones gave (Vincent Gibson), Ventura is clearly the same person. For example, Jones testified that "Vincent" lived at 27th Street and 18th Ave., and Ventura Gibson testified at the evidentiary hearing that he had once lived at 27th and 18th (PC-R. 4903).

Q Try to bring you back, Mr. Gibson, to March of 1983. Specifically, do you remember at some point in 1983 do you remember a cab driver being shot and killed on Fairfield Avenue?

A I read it in the paper.

Q You read it in the paper after it happened?

A Yes.

Q The following day?

A The following day.

Q Now, we already established that you know Melvin; correct?

A Yes.

Q That would be Melvin Jones, for the record, your Honor. Was Melvin Jones over at your house or your brother's house on 27th Street and 18th Avenue?

A Not as I can recall.

Q And I mean specifically around the time that the cab driver was killed?

A No.

Q Do you recall ever taking Melvin Jones from 27th Street and 18th Avenue over to Fairfield Avenue South?

A No, I can not.

Q Do you ever recall taking Melvin Jones -- or driving him anywhere?

A No.

(PC-R. 4904-05) (emphasis added).

During the State’s cross-examination, Gibson testified:

Q And just so the record is clear, your testimony today is you do not recall whether or not you gave Melvin Jones a ride in March of 1983; isn't that your testimony today?

A Yes, I did not give him a ride.

Q No, sir. I'm asking you on direct examination didn't you say you do not recall?

A I do not recall giving him a ride; no.

Q You could have, but you don't recall?

A No, I did not give him a ride.

* * *

Q Mr. Gibson, would it refresh your recollection if this court reporter read back your answer regarding whether or not you recall ever taking Melvin Jones to the area of Fairfield Avenue in March of '83, would that help you?

A I don't remember taking Melvin to Fairfield.

COURT REPORTER: I didn't hear him. Speak up, sir.

THE WITNESS: I don't remember taking Melvin to no Fairfield Avenue.

* * *

Q All right. You're not saying it didn't happen, just 19 years later today you do not recall; is that correct?

A I'm not taking Melvin nowhere.

Q Melvin Jones had a cabinet shop next to your tile shop; did he not?

A To my uncle tile shop; yes.

> **Q All right. And it would not be unusual for Melvin Jones because he knew you to ask you for a ride, that's not something that would be usual; would it?**
>
> **A Yes, it would. I know Melvin was working on -- they had their own transportation, I wouldn't be taking Melvin nowhere.**

(Tr. 128-29; 132; 133) (emphasis added).

Despite Jones' statement identifying the person who drove him on the night of the shooting, Mr. Smith's trial counsel made no effort to locate this key witness:

> Q One question I neglected to ask. I lost my train of thought. In reference to Ventura Gibson or Vince Gibson, a person who Melvin Jones testified had given him a ride on the night of the homicide, do you recall making any effort to locate him?
>
> A Not that I recall.
>
> Q Do you recall having a particular reason for not trying to locate him?
>
> A No. Again, that's -- as I look at it now, that's certainly something we should have looked into, no question about that, and I don't remember -- I don't remember even thinking about it.

(PC-R. 4949).[83]

The circuit court found that trial counsel's performance

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[83] Of course, counsel was not provided with the portion of a police report indicating that "Melvin Johnson" with outstanding warrants who lived near the intersection of 30th and Fairfield was the original suspect in the shooting. In determining whether Mr. Smith received a constitutionally adequate adversarial testing, cumulative consideration must given to the impact of the State's failure to disclose along with counsel's failure to adequately investigate.

in this regard was deficient:

> [I]t was deficient for counsel to have not inquired into whether Melvin Jones' story was credible, which would have included an investigation into whether Vince Gibson gave him a ride on the night of the homicide. At the very least, counsel's investigation should have involved an interview with Vince Gibson.

(PC-R. 4100).

This finding is support by the record. There was ample reason for Mr. Sanders to investigate every aspect of Jones' story. In fact, doing so seemed a necessity considering Mr. Sanders' belief that the State's entire case rested on Jones and Johnson (PC-R. 4936). As Johnson himself acknowledged at the hearing, the prosecutor (Hogan) did not know whether to believe him until Jones sent his letter and map to Hogan (PC-R. 5382).

Had Sanders sought to locate Gibson, who had lived in St. Petersburg his entire life, he would have been easy to find. Sanders could have located Gibson in the same way that he was located over 10 years later, by starting at 27th St. and 18th Ave. in St. Petersburg. Had Sanders found Gibson, he would have had powerful testimony to use at Mr. Smith's trial, exposing Jones' false story (PC-R. 4906).

Despite finding counsel's performance deficient, the court concluded that Mr. Smith was not prejudiced. This

conclusion is a legal one subject to *de novo* review. Stephens v. State, 748 So.2d 1028 (Fla. 1999). When properly analyzed, it is clear that trial counsel's deficient performance prejudiced Mr. Smith.

Jones' testimony was the tie-breaker. It broke the stand off during which Derrick Smith and Derrick Johnson told two completely different stories. Until Jones came along and sided with Johnson, law enforcement did not know whom to believe. The State repeatedly cited Jones' account to the jury in their closing arguments, including the claim that Jones saw Mr. Smith with the gun after the shooting (R2. 1295, 1298, 1301-5). Had trial counsel discovered and presented Gibson's testimony, Jones' credibility would have been severely damaged. Mr. Smith's counsel would have been able to attack the thoroughness and good faith of the State's investigation, including their decision not to verify essential elements of Jones' story. Kyles, 514 U.S. at 447. Counsel would have been able to point to some evidence to support his argument that Jones' story was false and that he had colluded with Johnson.[84] Counsel could even have argued

[84] During Jones' deposition, when asked how he knew Mr. Smith's real name, Jones stated that he learned it from an investigator working for the Public Defender's Office, and he had the conversation with this public defender investigator before he wrote the letter to Tom Hogan (R1. 808-09). As the

that Jones was actually the individual who was with Johnson, not Mr. Smith, and that Jones was covering for Johnson, the real trigger-man, in exchange for Johnson putting Mr. Smith at the murder scene instead of Jones.[85] Clearly, Mr. Smith was prejudiced by trial counsel's ineffectiveness and was denied a constitutionally adequate adversarial testing.

C. Unchallenged Junk Science -- Bullet Lead Analysis

At Mr. Smith's trial, the State presented the testimony of FBI chemist, Donald Havekost. He conducted a compositional analysis of a lead fragment found on the victim, presumably part of the bullet that killed him.[86] Havekost also analyzed two bullets that the police had collected from Mr. Smith's uncle, Roy Cone.[87] Based on his analysis, Havekost concluded that the quantity of various elements in the bullets and the

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record demonstrates, Johnson was represented by the Public Defender's Office.

[85] It was Jones who, at the time of the murder, was living near the murder scene. It was Jones who was lying about how he ended up being at the murder scene that night. And, had the State fulfilled their constitutional obligations, counsel would have also been able to argue to the jury that Jones was, in fact, an initial suspect in this murder.

[86] The actual bullet that killed Songer was never found.

[87] Cone had testified that he purchased a gun and box of bullets approximately ten years before the murder, that his gun had turned up missing at some inexact point in time, but the box of bullets was not missing.

lead fragment matched. Accordingly, Havekost drew the conclusion that the lead used to make the bullets and the lead used to make the lead fragmented "originated from a common source" (R2. 1071). At the conclusion of his direct examination, Havekost testified:

> Q As we increase and add more elements that we can show are materially indistinguishable, what does that do to the odds that there are any boxes with those five elements.
>
> A And if you are able to – well, in the early days, we felt if we could characterize three elements that the possibility of there being a mistake was very remote. If you can quantitate (sic) four elements, five elements, in my opinion, **you've reduced the chance to essentially nothing – that they match by chance**.

(R2. 1083) (emphasis added).[88] Mr. Smith's counsel failed to

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[88] At the 2002 hearing, the State's own expert, Charles Peters, was not willing to commit to the opinion that simply because you can quantify more elements, the chance of an overlap is "essentially nothing":

> Q So in this instance we have Q-1 which is unknown fragment, and we're talking about the chances of it coming from the box with Q-2 and Q-3. Would you say it's fair to say the chance that it came from another box, a different box than this box is zero, next to nothing?
>
> A Well, I don't think that's what he was saying here. He was saying that you're asking -- was asking about the additional elements adding to it, do you think the distinctiveness of this source, I -- I don't really see where the box from his answer was being dealt with here.
>
> Q Okay. And that's based upon your background, your knowledge, your expertise, that's how you read his answer; right?
>
> A Yes.

challenge this conclusion that there was no chance that there were other boxes with materially indistinguishable levels of the five elements that Havekost tested (PC-R. 5347). Counsel did not cross-examine Havekost concerning this conclusion. Counsel's performance was deficient.

Havekost's testimony that the odds of another box having bullets with materially indistinguishable bullets was reduced "to essentially nothing" could easily have been refuted. But, counsel failed to obtain the assistance of a metallurgist to advise him regarding bullet-lead analysis He was thus totally unprepared to cross-examine Havekost and expose the absence of scientific support for Havekost's conclusion presented to the jury that there was no chance that there were other boxes of bullets that matched the fragments compositional analysis.[89] Counsel failed to obtain the assistance of a real metallurgist to advise him regarding the significance of a "match." He was thus totally unprepared to cross-examine Havekost and expose the absence of scientific support for the conclusion presented

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Q Do you know how the jury read his answer?
A No.
(PC-R. 5346-47).

[89] Counsel did request and receive funds to hire a firearms or ballistics expert (PC-R. 5456; S-Ex. #23, #24) but merely contacted "a clearinghouse sort of agency" (PC-R. 5455), and was advised no "problems" were seen in "what the FBI expert had done" (PC-R. 5455).

to the jury that there was no chance that there were other boxes of bullets that matched the fragments compositional analysis.

Havekost's opinion misled the jury about the significance of the compositional analysis that he conducted. His testimony amounted to junk science. Mr. Sanders' failure to learn the science and/or seek expert assistance, allowed Havekost's misleading testimony to go unchallenged.

At the 2002 hearing, Mr. Smith presented the testimony of metallurgist Dr. Erik Randich, who explained how misleading Havekost's testimony was:

> So, in fact, these bullets could have come from a common, single source of lead. **But saying that they did is a totally unfounded statement.**

(PC-R. 5223) (emphasis added). Dr. Randich also explained the lack of science behind Mr. Havekost's unsupportable conclusion. (PC-R. 5228-30).

The murder weapon was never located in this case, but the State used Havekost's misleading testimony to connect Mr. Smith to it anyway. The State had no evidence that Mr. Smith had stolen his uncle's gun. The uncle, Cone, really had little idea when the gun disappeared. The State relied on the FBI testimony during their arguments to the jury, using words and phrases like "boggles the mind," "it can't be done," and

"infinitesimal" to describe the odds that the lead fragment and bullets could have come from a different source (R2. 1304-05; 1348). Counsel's actions amounted to a tacit endorsement of Havekost's conclusions (R2. 1326). Mr. Smith was prejudiced as a result.

D. Other Instances of Deficient Conduct.

Mr. Smith's trial counsel failed to challenge for cause jurors who expressed bias in favor of imposing a sentence of death upon a conviction of first degree murder (R2. 634-35, 645-46, 657). The failure to strike jurors who are biased in favor of the death penalty is deficient performance.

Trial counsel's performance was deficient in his failure to adequately investigate potential "alibi" witnesses, Khan Campbell and James Hawkins, who saw Mr. Smith at Norm's Bar, located across the street from the Hogley-Wogley at 11:30 PM on March 20, 1983. Mr. Sanders accepted the State's representations regarding hospital records allegedly demonstrating that the witnesses were in error regarding their recollection of seeing Mr. Smith on the night of the homicide. The witness said that they remembered the date because at noon on March 20, 1983, Hawkins and Campbell had taken Campbell's pregnant girlfriend, Dylan Walters, to a hospital emergency room and left her there. The State produced a hospital record

showing that Walters was treated in an emergency room at 3:20 PM on March 28, 1983. However, a careful examination of the hospital record would have demonstrated that on March 28th Campbell was accompanied by her grandmother, Freddie Mae Hampton, not James Hawkins (PC-R. 2251). After receiving this hospital record, Mr. Sanders abandoned the defense and refused to call the witnesses because of a gut feeling that they were not telling the truth. However, Dina Watkins had testified in 1983 that she was at Norm's Bar that night and saw Mr. Smith outside of the bar around midnight (R1. 1959-79). Inexplicably, Mr. Sanders neither called her, nor sought to introduce her prior testimony.

Counsel was also deficient in failing to object to improper comments made by the State in its closing arguments.

E. Cumulative Consideration.

The circuit court failed to cumulatively evaluate the prejudice to Mr. Smith that flowed from counsel's deficient performance. The court also failed to cumulatively consider the ineffectiveness claim with the Brady claim. No consideration was giving to the cumulative effect of the prosecution's failures and defense counsel's failures to insure an adequate adversarial testing. Proper analysis warrants a new trial.

ARGUMENT IV

NEWLY-DISCOVERED EVIDENCE SHOWS THAT MR. SMITH IS INNOCENT.

Newly-discovered evidence of innocence warrants a new trial where it establishes that had the jury known of the new evidence it probably would have found a reasonable doubt as to the defendant's guilt and thus acquitted. Jones v. State, 591 So. 2d 911 (Fla. 1991). Impeachment evidence qualifies under Jones v. State as evidence of innocence where it demonstrates that the jury would probably have reached a different result. State v. Mills, 788 So.2d 249 (Fla. 2001). However, the new Jones evidence must be evaluated cumulatively with the Brady evidence and the evidence that counsel failed to discover undermines confidence in the guilty verdict. Mordenti v. State; State v. Gunsby. Mr. Smith's conviction cannot stand.

While incarcerated at Belle Glades Correctional Institution, Derrick Johnson confessed to Charles Hill that he was the person who shot victim Jeffrey Songer. Johnson told Hill that he placed the blame on Mr. Smith in order to save himself.

At the time of the murder, Charles Hill knew both Derrick Johnson and Derrick Smith (PC-R. 5046-47). He knew Johnson by his street-name "New York", and Derrick Smith by his street-name "Rerun" (PC-R. 5046-47). Hill associated with a group of

friends in St. Petersburg that included Mr. Smith, as well as Johnson, Diane Jenkins, Ronnie Jones, Rodney Davis, and others (PC-R. 5047-48).[90] Hill first became acquainted with Johnson in the early 1980's. The two of them would play basketball together, and would sometimes hang out at different bars or at Sheila Jenkins' house (PC-R. 5087).

In 1985, after Derrick Smith was first convicted of this crime, Hill encountered Johnson at Belle Glades on two different occasions in 1985 (PC-R. 5064).[91] Hill had been convicted and sentenced to imprisonment. Hill passed through Belle Glades on those two occasions while being transferred by DOC from one institution to another (PC-R. 5064). Hill's first conversation with Johnson at Belle Glades was sometime

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[90] Diane Jenkins corroborated this. In her testimony, she mentioned many of the same people as hanging out together, including Charles Hill, Rodney Davis, and Derrick Johnson (PC-R. 5398-99). Rodney Davis also corroborated this. He testified that Charles Hill and Derrick Johnson knew each other, and that he knew each of them (PC-R. 5428).

[91] Derrick Johnson who had been given life parole in 1991 after testifying at Mr. Smith's 1990 retrial was called as a witness by the State at the 2002 hearing (PC-R. 5364-66). He testified that he did not know Charles Hill (PC-R. 5355). Johnson said that while incarcerated he "became familiar" with the group of friends to whom Hill had referred, but he had not known them on the street (PC-R. 5360).

Johnson testified that he was at Belle Glades Correctional Institution for five or six months (PC-R. 5367). However, prison records demonstrated that Johnson was actually at Belle Glades for over eighteen months, from March of 1984 until October of 1985 (PC-R. 5452, S-Ex. #22).

around March 20 1985, out in the recreation yard (PC-R. 5061).[92] At this time, Johnson told Hill that he had shot Songer. Hill explained:

> He was telling me that he was sorry to fuck Rerun around like that, but he was just taken [a ticket] out of prison. He had to do what he had to do. He was the one that did the cab driver. He said Rerun did not do the cab driver.

(PC-R. 5066). Johnson stated to Hill that he had to pin the murder on Mr. Smith, because "that was his only ticket out" (PC-R. 5082). When Hill encountered Johnson at Belle Glades a second time, Johnson reiterated what he had told Hill previously (PC-R. 5066).

Here, the new evidence both impeaches Johnson's trial testimony and exculpates Mr. Smith. When considered cumulatively with the evidence of a Brady violation and the evidence of ineffective assistance of counsel, confidence is undermined in the reliability of the outcome of Mr. Smith's trial. The jury probably would have acquitted had it known of the wealth of exculpatory evidence. A new trial is required.

ARGUMENT V

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[92]Inmate records were introduced showing that Hill was at Belle Glades on March 20-21, 1985, and again on August 13, 1985 (PC-R. 5451, 5515-16, S-Ex. #21). Johnson was present at Belle Glade both times; inmate records showed that he at Belle Glades from March 26, 1984 all the way until October 29, 1985 (PC-R. 5452, S-Ex. #22).

MR. SMITH RECEIVED INEFFECTIVE ASSISTANT OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

A. Introduction

"To establish ineffectiveness, a 'defendant must show that counsel's performance fell below an objective standard of reasonableness.'" Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland, 466 U.S. at 688. In Williams, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase until a week before trial, "failed to conduct an investigation that would have uncovered extensive records," "failed to seek prison records," and "failed to return phone calls of a certified public accountant." 120 S.Ct. at 1514. Justice O'Connor explained "trial counsel failed to conduct an investigation that would have uncovered substantial amounts of mitigation," and this was a "failure to conduct the requisite, diligent investigation." 120 S.Ct. at 1524.

As to the prejudice prong, the Supreme Court has recently detailed a number of significant factors in the context of a capital penalty phase. *First*, to determine prejudice from the unreasonable failure to investigate and present favorable and/or mitigating evidence, "we reweigh the evidence in aggravation against the *totality* of available mitigating

evidence." Wiggins v. Smith, 123 S.Ct 2357, 2542 (2003)(emphasis added); see also Williams, 120 S.Ct at 1495 (court is required to conduct an "assessment of the totality of the omitted evidence" and then to "evaluate the totality of the available mitigation evidence–both that adduced at trial, and the evidence adduced in the habeas proceeding")(emphasis added). If "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] moral culpability," Wiggins, 123 S.Ct. at 2544, quoting Williams, 102 S.Ct. at 1495, then prejudice has been shown. *Second*, every defendant has "a right–indeed a constitutionally protected right–to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer," Williams, 120 S.Ct. at 1513, regardless of the strength of the State's case, the heinous nature of the offense, or the severity of the aggravators. Williams, 120 S.Ct. at 1515. *Third*, for a fact to be mitigating it does not have to be relevant to the crime – any of "the diverse frailties of humankind," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), which might counsel in favor of a sentence less than death, Lockett v. Ohio, 438 U.S. 586 (1978), are mitigating. Williams, 120 S.Ct at 1495.

B. Deficient Performance

Trial counsel failed in his duty to conduct an adequate and reasonable investigation of available mitigation and evidence which negated aggravation. Mr. Sanders explained in 2002:

> It's certainly true that I don't know - - since I don't know what I could have found had I looked harder, I don't know what else I could have presented, but to me, there's no doubt that I should have looked harder. Now, whether there's something else out there to find that would have been significant enough to have possibly changed his outcome, that, I don't know because I don't know what I didn't find. But to me, I did not pursue certain possible avenues that could have possibly led to fruitful significant evidence that I should have and could have pursued.

(PC-R. 5014). Mr. Sanders stated:

> I think - - the only way I could try to explain it is I kind of got this case prepackaged, it had already been tried once and it was almost like doing an appeal. You've got - - here's the facts you're dealing with, now make the best out of it you can. And I guess I didn't - - I didn't look at it - - I'm trying to think of a better expression than thinking outside of the box. I guess I didn't stand outside the case and look at it differently than what it was presented before, I guess is the way I explained it, although I don't know if that makes any sense.

(PC-R. 4946).

C. Prejudice

No evidence was presented of Mr. Smith's childhood in New Jersey with his six siblings and his drug-addicted mother. The poverty and deprivation constituted mitigation that the jury should have heard (PC-R. 5486-92, 5496-98). When Mr.

Smith was eleven years old, he witnessed his mother die of a drug overdose (PC-R. 5490-91). After his mother's death, Mr. Smith and his siblings were forced to go to St. Petersburg, Florida to live with their aunt and uncle. Mr. Smith was unhappy about the move, and would periodically run away back to New Jersey (PC-R. 5505). No evidence was presented regarding Mr. Smith's drug habit. For at least three years before the instant offense, Mr. Smith was using huge quantities of drugs almost every day (PC-R. 5398, 5418-19).

In early 1983, Mr. Smith's condition deteriorated further. He began having problems with his longtime girlfriend, Sheila (PC-R. 5423). He got fired from his job. Mr. Smith was left without a home. These factors, along with Mr. Smith's dysfunctional years in New Jersey, significantly impaired Mr. Smith.[93] Had Mr. Sanders presented this information in 1990, he could have knocked out the only two aggravating circumstances found in this case. At the very least, it would have significantly diminished their weight. The same testimony would have also established numerous mitigators: 1) under the influence of extreme mental or

[93] Dr. Toomer provided extensive testimony as to how Mr. Smith's developmental problems growing up effected him throughout his life.

emotional disturbance; 2) relative culpability;[94] 3) impaired capacity; 4) poverty; 5) childhood trauma at finding his mother dead; 6) dysfunctional familial drug abuse; 7) deprivation of food; 8) drug abuse; and 9) lack of stability. Mr. Smith was prejudiced by counsel's failure to investigate and prepare for the penalty phase proceedings.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Smith respectfully urges the Court to reverse the lower court and vacate the denial Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to the Office of the Attorney

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[94]The State asserted during the guilt phase that Derrick Smith, not Derrick Johnson, was the shooter (R2. 772). Much of the undisclosed evidence undermined the State's case on this point. This Court has repeatedly acknowledged the principle that the relative culpability and punishment of a codefendant is an important factor to be considered in determining a capital defendant's sentence. See, e.g., McDonald v. State, 743 So. 2d 501 (Fla. 1999), Fernandez v. State, 730 So. 2d 277 (Fla. 1999), Jennings v. State, 718 So. 2d 144 (Fla. 1998), Howell v. State, 707 So. 2d 674 (Fla. 1998), Gordon v. State, 704 So. 2d 107 (Fla. 1997), Puccio v. State, 701 So. 2d 858 (Fla. 1997), Cole v. State, 701 So. 2d 845 (Fla. 1997).

General, Westwood Center, 7th Floor, 2002 North Lois Avenue, Tampa, Florida 33607 on January 18, 2005.

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CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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