IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1689

LOWER TRIBUNAL No. 91-373-CFB

ANTONIO LEBARON MELTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

D. TODD DOSS
Florida Bar No. 0910384

725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Melton's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Melton's claims after a limited evidentiary hearing.

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

"R." – Record on direct appeal to this Court;

"R2." - Record on direct appeal to the First District Court of Appeal;

"PCR." - Record on appeal after postconviction proceedings;

"T." – Transcript of postconviction evidentiary hearing;

"D-Ex." - Defense exhibits entered at the evidentiary hearing and made part of the postconviction record on appeal;

"S-Ex." - State exhibits entered at the evidentiary hearing and made part of the postconviction record on appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Melton has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in

this case, given the seriousness of the claims involved. Mr. Melton, through counsel, urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On February 5, 1991, Mr. Melton was charged by indictment for first degree murder and armed robbery with a firearm (R. 1117). After pleading not guilty to both counts of the indictment, Mr. Melton was tried before a jury. Mr. Melton's jury returned verdicts of guilty of first degree felony murder and robbery with a firearm, on January 30, 1992 (R. 895-6, 1275-6). Following a penalty phase, the jury recommended death by a vote of eight (8) to four (4) (R. 1112, 1285). On May 19, 1992 the trial court imposed a sentence of death for the murder and life imprisonment on the armed robbery (R. 1380-1401, 1413-22).

On direct appeal, the Florida Supreme Court affirmed Mr. Melton's convictions and sentences. Melton v. State, 638 So. 2d 927 (Fla. 1994). Mr. Melton filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 31, 1994. Melton v. Florida, 513 U.S. 970, 115 S. Ct. 441, 130 L.Ed2d 352 (1994).

Mr. Melton's initial Fla. R. Crim. P. 3.850 motion was filed on January 16, 1996 (PCR. 74-200). An amended motion was filed on July 5, 2001 (PCR. 907-1083). Following a Huff hearing on October 18, 2001, the circuit court granted a limited evidentiary hearing on several of Mr. Melton's claims (PCR.

1191-93). On February 11, 2002, Mr. Melton amended his Rule 3.850 motion (PCR. 1365-1558). On February 13-15, 2002, the circuit court held an evidentiary hearing. On March 23, 2004, the circuit court issued an order denying relief (PCR. 1937-2018). On July 27, 2004, the circuit court denied Mr. Melton's motion for rehearing (PCR. 2026-2033). This appeal follows.

STATEMENT OF THE FACTS

TRIAL PROCEEDINGS

On January 23, 1991, Bendleon Lewis and Antonio Melton were arrested for killing pawn shop owner George Carter. They were caught inside the pawn shop immediately after Mr. Carter was shot (R. 501-2). Mr. Lewis stated that Mr. Melton alone had shot Mr. Carter, while Mr. Lewis was in another part of the pawn shop (R. 636). Mr. Melton stated that Mr. Carter's gun went off during a struggle for control of the weapon (R. 691-5).

On March 15, 1991, Ben Lewis gave a statement to the authorities implicating Mr. Melton and a man named Tony Houston in the killing of cab driver Ricky Saylor (T. 54, 57-8, 203).

Mr. Melton was subsequently tried for the murder of Mr. Saylor. On September 13, 1991, the jury found Mr. Melton guilty of the murder of Ricky Saylor. On November 6, 1991, Mr. Melton received two life sentences for the murder and armed robbery of

Mr. Saylor (R. 924).

Mr. Melton's conviction in the Saylor case did not rest on any physical evidence from the crime scene.[1] Mr. Melton's conviction was not secured through any eyewitness testimony. The only direct evidence to convict Mr. Melton of first degree murder and robbery was the testimony of co-defendant Tony Houston (R2 396-401) and Ben Lewis, who was not charged in the murder.[2]

Subsequent to Mr. Melton's conviction in the Saylor case, the State utilized this conviction to secure a death sentence for Mr. Melton in the present proceedings, the George Carter murder. In its sentencing order, the trial court relied on two

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[1]The only physical evidence tying anyone to the scene was a fingerprint belonging to Tony Houston found on the back seat passenger door of the cab (R2. 337).

[2]Mr. Houston pled guilty to Second Degree Murder.

aggravating circumstances, pecuniary gain and the prior violent felony from the Saylor case (R. 1394-5).

Regarding the aggravating factor of a prior violent felony, the trial court found:

> 1. The defendant was previously convicted of another capital felony and of a felony involving the use or threat of violence to the person. The evidence established conclusively and beyond any reasonable doubt that the defendant was previously convicted of first degree murder and armed robbery. In that case, as in this case, the victim was killed by a shot to the head while the defendant was participating in the robbery of the victim. In both cases, the evidence established that the defendant fired the fatal shots. The violent crimes of which defendant were convicted were extremely violent and life-threatening, and resulted in the death of the victim. They were committed with no pretense of moral justification, for pecuniary gain, and with disregard to the life of the victim. The Court gives great weight to this aggravating circumstance.

(R. 1395).

While addressing the issue of mitigating circumstances, the court gave no weight to the defense's argument of disparate treatment of co-defendants, the defendant's domination by co-defendant Ben Lewis, or that the death of Mr. Carter occurred under accidental circumstances:

> 3. Lenient treatment or disparate sentences, actual and inchoate, given to co-defendants. The Court finds that no mitigating circumstance in this regard was proved by the greater weight of the evidence. Co-defendant Bendeleon Lewis has not been sentenced in this case. There can be little doubt that Bendeleon Lewis expects and will receive some

degree of leniency (certainly less than a death sentence) for his cooperation, and considering the fact that the evidence conclusively establishes the defendant, and not Bendeleon Lewis, as the trigger man who committed the actual killing in this case. There are legitimate reasons for imposition of a lesser sentence on Bendeleon Lewis, and such lesser sentence would not be disparate or constitute a mitigating circumstance.

Not charging or prosecuting Bendeleon Lewis in the death of Ricky Saylor is not lenient treatment and does not constitute a mitigating circumstance. The greater weight of the evidence proves that the State does not have sufficient valid evidence to do so; nor does failure of the State to prosecute Bendeleon Lewis for perjury. Sentencing of co-defendant Tony Houston in the prior case to twenty years imprisonment is not lenient or disparate treatment in <u>that</u> case, and would not be a mitigating circumstance in <u>this</u> case if it were. Again, in the prior case, Antonio Melton was proved to be the trigger man, not co-defendant Tony Houston, and legitimate reasons existed for differing sentences.

4. Defendant's domination by co-defendant, Bendeleon Lewis. This circumstance is not proved by the greater weight of the evidence, and has only the defendant's testimony to support it. The evidence is clear that the defendant voluntarily participated in this robbery and in fact armed himself with a firearm which he personally carried into the store to facilitate the robbery. There is no doubt from the evidence that he acted of his own volition and as a willing participant in the robbery. Defendant did not act under the substantial domination of any other person.

5. The death of Mr. Carter occurring under accidental circumstances. This circumstance was not proved by the greater weight of the evidence. It is supported only by the defendant's testimony and is inconsistent with most of the other evidence in this case. Mr. Carter had every right to resist, but the reliable evidence indicates that he did not do so –

> only the defendant's testimony. It is difficult to believe that, in a struggle, the victim was "accidentally" shot in the exact spot in the head that would produce immediate death. In the trial phase of the case, the jury had a reasonable doubt as to whether the killing was premeditated. However, in the penalty phase of the trial, it is evident that the jury rejected any contention that the shooting was "accidental" in recommending death by an eight to four vote.

(R. 1397-99).

THE POSTCONVICTION EVIDENTIARY HEARING[3]

During the postconviction evidentiary hearing, testimony was presented regarding the ineffective assistance of counsel at the penalty phase.

Frankie Stoutemire, Sr. is the father of Antonio Melton (T. 549). He testified that he was in the service when Antonio was raised (T. 558). While Mr. Stoutemire would have visits with Antonio (T. 559-60), Antonio's mother was living with David Booker at the time (T. 560).[4] It seems that every time Mr. Stoutemire came home to see his son, Antonio's mother would get repercussions from David Booker (T. 561).

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[3]Mr. Melton's evidentiary hearing was consolidated with his noncapital case, 91-1219 (PCR. 1937).

[4]They lived in the projects (T. 562).

Mr. Stoutemire had heard that Booker was abusing Antonio's mother (T. 560).[5] This led to a confrontation with Booker. Mr. Stoutemire told him that "if he ever touched my son, it was going to be me and him out on the street." (T. 560).

Mr. Stoutemire recalled a conversation where Antonio told him he was out of school and couldn't get a real job (T. 563). Mr. Stoutemire advised him to join the service and get out of town (T. 563). Antonio shook his head and that was the last time Mr. Stoutemire saw him (T. 563). According to Mr. Stoutemire, the religion that Antonio's mom believed in did not agree with going into the military (T. 563). Antonio's mom had raised him, so Mr. Stoutemire backed off (T. 563). Mr. Stoutemire lamented that Antonio didn't have any guidance his whole life (T. 564).[6]

Latricia Davis, Mr. Melton's mother, testified that the family had lived in subsidized housing called Truman Arms (T. 661-2), which was a rough, bad place (T. 662). Ms. Davis was strict with Antonio because she didn't want him turning out like a lot of the young people that she was seeing around (T. 663). She did what she could being a single, working parent (T. 663).

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[5]He also knew that Booker was a heroin addict (T. 561).

[6]Mr. Stoutemire also testified to names of potential

Ms. Davis had been married to David Booker, who had a drug problem (T. 666). This caused many problems at home, and Mr. Booker was verbally and physically abusive (T. 667).

Later on during Antonio's youth, Ms. Davis became active in the Jehova's Witness Church (T. 669). She tried to get Antonio to live that type of lifestyle, because it was best for him (T. 669). This involved keeping him away from school activities (T. 670).

Finally, Ms. Davis took Antonio out of school when he was 16 because of the bad associations that he was exposed to (T. 664). Ben Lewis was one of the people that Ms. Davis didn't want her son hanging around with at school (T. 666). Antonio looked up to these kids because he was sheltered and they had so much street knowledge (T. 664). Ben Lewis, for example, seemed so much wiser and street smart (T. 666).

When Antonio was 16, Ms. Davis got married and moved to Mobile (T. 663). Antonio stayed with his grandmother and aunt in Pensacola (T. 665).

Ms. Davis spoke to trial counsel prior to those proceedings (T. 668). Counsel didn't ask about Ms. Davis trying to keep Antonio away from unsupervised children in the projects (T.

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witnesses that he had provided to postconviction counsel.

668). According to Ms. Davis, postconviction counsel asked about more details than trial counsel (T. 684).

Margaret Parker, Mr. Melton's aunt, testified that Mr. Melton would sometimes stay with her after he was 16 years old (T. 746). Ms. Parker noted that after Antonio's mom moved, he was out more often (T. 748). According to Ms. Parker, Antonio was less mature than other children his age (T. 752), and he trusted other kids (T. 753). Ms. Parker observed that in regard to Antonio, Ben Lewis, and Tony Houston, it was Houston who seemed to be the leader of the group, then Lewis (T. 749). [7] No one from Antonio's defense team ever spoke to Ms. Parker (T. 750-1). Had they done so, she would have spoken to them about the information she provided during her testimony (T. 754).

Lawrence Gilgun, a clinical psychologist, evaluated Mr. Melton on January, 28, 1992, approximately one week before Mr. Melton's trial (T. 310). Dr. Gilgun acknowledged that this was not standard practice, and that usually, he would be involved at least two months before trial (T. 310).

Dr. Gilgun noted that his bill did not reflect any discussions with the trial attorney (T. 311, D-Ex. 11). He would have recorded a face to face meeting on his bill (T. 311).

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[7]Lewis and Houston were bother older than Antonio (T. 749).

While Dr. Gilgun did not recall independently what records were provided to him, he spoke of evaluating school records and depositions in his penalty phase testimony (T. 312). However, he was not provided with Mr. Melton's statement to the police, nor did he speak to any of Mr. Melton's family or friends (T. 312). Trial counsel did not supply any of this information to him, nor any information about Mr. Melton's upbringing (T. 312).[8]

Dr. Gilgun did not know what trial counsel's plan was regarding the penalty phase (T. 339). Usually, he discusses these things with the attorney (T. 340). Dr. Gilgun concluded that if he had been given more information, he could have potentially given more mitigation (T. 341).

Dr. Henry Dee is a clinical psychologist with a subspecialty in clinical neuropsychology (T. 367). Dr. Dee saw Mr. Melton in January, 1996 and again in November, 2001 for approximately 14 hours (T. 369-70). During this time, he conducted a neuropsychological evaluation and extensive

[8]Dr. Gilgun explained that the importance of other materials is for corroboration (T. 313). Also, these material help him to structure his interview and to elicit more information (T. 313).

interviewing (T. 370). Mr. Melton was very open and seemed to be genuinely remorseful (T. 379).[9]

Dr. Dee reviewed discovery materials, school records, juvenile records, a previous evaluation by Dr. Gilgun, the Florida Supreme Court appeal, and witness testimony at the penalty phase of the Carter trial (T. 370-1). Dr. Dee spoke to Mr. Melton's mother, his aunt Margaret Faye Johnson, Latricia Davis and his father, Mr. Stoutemire (T. 380). Dr. Dee believes that this material is necessary to investigate the issue of mitigation, and it is also helpful to have independent corroborative evidence (T. 371).

While Mr. Melton didn't have any brain damage, Dr. Dee did find evidence of other mitigation (T. 372). Mr. Melton had an unusual childhood (T. 373). He was in a sense overprotected (T. 373). Dr. Dee explained that Mr. Melton's mother was a Jehova's Witness and she involved him in this religion (T. 373). While Mr. Melton had been a gifted athlete when he was younger, his mother forced him to give it up and be more and more involved in intensive Bible study (T. 373). Also, she withdrew him from athletics in part because she didn't care for the influence of

[9]Mr. Melton denied any involvement in the Saylor case (T. 379).

peers (T. 374). By the time he reached middle adolescence, Mr. Melton was fairly isolated from his peers (T. 374).[10]

With regard to emotional maturity, Mr. Melton was a strikingly immature boy for 18 (T. 381). By the time he entered high school, he had almost no social contact (T. 381). Dr. Dee felt that Mr. Melton could be easily manipulated (T. 383). That's why his mother didn't want him around the locker room and withdrew him from football (T. 383).[11]

Mr. Melton went from a situation of being isolated and/or in the church to being with a bunch of criminals by the time he got to high school (T. 374). Mr. Melton immediately fell in with these people (T. 374). He began to skip school, use drugs, and talk back (T. 374).

As a result of this, Ms. Davis withdrew her son from school at age 16 (T. 374). She gave him a choice of either conforming to everything she believed in or to move out (T. 375). From then until the time he was arrested, Mr. Melton would sometimes be with his grandmother or aunt (T. 375). During the two years

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[10]Dr. Dee explained that Ms. Davis worked a lot to support Mr. Melton and his brother (T. 373). Thus, from a fairly young age, Antonio was taking care of his brother after school (T. 373).

[11]Mr. Melton viewed Mr. Lewis and Mr. Houston as more sophisticated than himself (T. 383).

prior to his arrest, Mr. Melton had essentially no supervision (T. 378).

Dr. Dee commented that Mr. Melton's stepfather was a very harsh man (T. 375). He was abusive towards Ms. Davis in front of Antonio (T. 376), to the point where he broke her arm (T. 376). Mr. Melton's stepfather used heroin and would bring other women into the house in front of him (T. 376). It was frankly grossly immoral conduct and probably shocking to a young child (T. 376).

Dr. Dee testified that Mr. Melton's father did not have much contact with him (T. 376). He went into the Service for about three years at the time Mr. Melton was born (T. 376). He injured his back badly and had to have a series of operations (T. 376-7). By the time he returned, his son was already an adolescent and living with his grandmother (T. 377). Unfortunately, Mr. Melton's only male role model was an abusive heroin addict (T. 377).

Dr. Dee testified that Mr. Melton has an IQ of 98 (T. 390). While Dr. Dee made several errors in the scoring, the mistakes are not significant (T. 415). Mr. Melton's IQ was in the normal range (T. 409), and Dr. Dee made nothing of those results (T. 415).

The Honorable Terry Terrell is presently a circuit court judge (T. 153). Prior to that, he was the chief assistant public defender for the First Judicial Circuit of Florida (T. 154). He worked for the Public Defender's Office for fifteen years (T. 154). Judge Terrell was first assigned to represent Mr. Melton on the Carter case (T. 155), where he was charged with first degree murder and armed robbery (T. 155). Judge Terrell also represented Mr. Melton when he was arrested for the Saylor murder (T. 155).

Judge Terrell testified that his trial schedule was busy back in 1991 and 1992 (T. 183-4). While he retained a psychologist, Dr. Gilgun, to evaluate Mr. Melton (T. 183), this evaluation occurred a week before trial (T. 186). This was not Judge Terrell's standard practice in preparing for a penalty phase (T. 186). Judge Terrell did not recall if there was any reason for that timing (T. 187).

If Judge Terrell had information that Mr. Melton's mother lived with a heroin addict during Mr. Melton's youth, he may have presented it if it had an impact on Mr. Melton's development (T. 187). He also likely would have presented an expert who could testify to Mr. Melton being raised in a church with no exposure to criminal elements until age 16 (T. 188).

Judge Terrell possibly would have presented information that Mr. Melton was new to the streets in comparison to Mr. Lewis (T. 188). This is particularly true given that Mr. Melton was 17 years old when Mr. Saylor was killed (T. 188). If Judge Terrell had known it at the time, he would have presented Mr. Lewis' reduced charge to the jury as it goes to proportionality (T. 189). The witness would also have presented Mr. Houston's 20-year sentence in the Saylor case to the jury during the Carter penalty phase (T. 189).

Judge Terrell called Mr. Melton's mother, Ms. Davis, to bring out Antonio's background, for what value it had (T. 247). He did not consult with anyone in the Melton family regarding any religious activities as it might impact on Mr. Melton's development (T. 247). He did not at the time consider this to be other than a personal family issue (T. 247).

Additionally, during the evidentiary hearing six individuals were called to testify regarding separate statements made to them by Ben Lewis while in the Escambia County Jail.[12] The first witness, David Sumler, came into contact with Ben

[12]Postconviction counsel also called Terry Rhines, a CCRC investigator, to testify to his efforts to locate these witnesses (T. 526-540).

Lewis in 1991 (T. 420).[13] During a conversation, Mr. Lewis stated that he and Tony Houston shot a taxi driver and that Mr. Melton wasn't there at the time (T. 420).[14] According to Mr. Sumler, Mr. Lewis was bragging in the cell, which contained 24 other inmates (T. 435). Everyone in the cell knew what Mr. Lewis was doing (T. 433).

Subsequently, someone from law enforcement came to see Mr. Sumler (T. 430).[15] He was asked whether Mr. Lewis had said anything about Mr. Melton being at the scene where the taxi driver got shot (T. 430). Mr. Sumler related the same information (T. 430). To his knowledge the officer who interviewed him was obtaining information to present to the courts on his [Melton's] behalf (T. 439).

Mr. Sumler is presently incarcerated for aggravated battery and is serving 24 years, with a release date of 2012 (T. 439, 444). Additionally, he testified that he has nineteen prior felony convictions (T. 448).

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[13]Mr. Sumler testified that he has known Ben Lewis, Tony Houston and Antonio Melton since they were little children in the neighborhood (T. 437).

[14]Mr. Lewis did not specifically say who shot the taxicab driver, only that Mr. Melton was not there and he and Mr. Houston were (T. 435).

[15]The witness did not recall who it was specifically that

The second witness to testify regarding a statement made to him by Ben Lewis while in the Escambia County Jail was Paul Sinkfield.[16] Mr. Sinkfield recalls that during this conversation,[17] Mr. Lewis confided in him about two robberies and murders (T. 452-3).[18] Mr. Lewis stated that he robbed and killed a cab driver with T.H. [Tony Houston] (T. 453).[19] Mr. Lewis said he himself shot the cab driver because "he was just nervous, got excited and shot him" (T. 454).

Mr. Lewis also told Mr. Sinkfield about the pawn shop murder (T. 455). He said that he got into a struggle with the owner, that Mr. Melton ran over to help and that's when the gun went off and killed the victim (T. 456). During the time of this conversation, Mr. Lewis was very worried; he was facing life in prison for murder (T. 457).

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came to see him or how they got his name (T. 430).

[16]Mr. Sinkfield testified that he has about 20 felony convictions (T. 461).

[17]This conversation occurred in 1990 or 1991 (T. 451-2).

[18]Mr. Sinkfield testified that this conversation took place in a private room and that to his knowledge, no one else could hear the conversation (T. 460). However, Mr. Sinkfield was not always in the same cell with Mr. Lewis and doesn't know who he was talking to when he was in the other cell (T. 476-7).

[19]Mr. Lewis mentioned that he was with Mr. Melton earlier in the day (T. 454).

On a subsequent occasion, Mr. Sinkfield saw Mr. Lewis in the holding cell (T. 458). Mr. Lewis said he was relieved, that he had spoken to his attorney, and that he was going to get a deal (T. 458).

Mr. Sinkfield knew Ben Lewis from the streets of Pensacola (T. 450), where he was involved in selling drugs (T. 451), and Mr. Lewis was into robbing drug dealers with a pistol (T. 451).[20] Mr. Sinkfield only knew Tony Houston by his reputation, which is bad (T. 464).

Mr. Sinkfield first met Antonio Melton in the Escambia County Jail in 1991 (T. 464-5), which was after his conversation with Mr. Lewis (T. 473). Mr. Sinkfield did not reveal the conversation he had with Mr. Lewis to Mr. Melton (T. 474).

Mr. Sinkfield first revealed Mr. Lewis' confession to Terry Rhines, a CCRC Investigator, at Wakulla CI about two weeks prior to his testimony at the evidentiary hearing (T. 459). He would most likely not have been willing to testify in 1991 because he had his own issues to worry about (T. 460, 480), no one had ever

[20]Mr. Lewis never robbed Mr. Sinkfield or vice versa (T. 463).

asked him to testify (T. 471), and he wouldn't want to hurt either Antonio or Ben (T. 471).[21]

Additionally, Mr. Sinkfield was unaware this information could help Mr. Melton (T. 466). Mr. Melton never discussed his charges with Mr. Sinkfield (T. 478). As far as he knew, Mr. Melton was guilty of an armed robbery in the pawn shop case where a man died (T. 475).

Lance Byrd also came into contact with Ben Lewis in the early 1990's at the Escambia County Jail (T. 485).[22] Mr. Lewis discussed the pawnshop case and was wondering if there was any way he could get out of the murder charge (T. 486). Mr. Lewis said that his lawyer told him if he could come up with something else, he could probably get a lesser sentence (T. 487).

Mr. Lewis said he knew about the taxicab murder (T. 488), and that he was going to tell his lawyer that Melton had done it (T. 488, 499). Mr. Lewis didn't say who did kill the taxicab driver (T. 499), but he did admit that Melton had left and that he and Houston were still there (T. 488, 500). While Mr. Lewis

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[21]In response to the State's attempt to impeach him, Mr. Sinkfield volunteered to take a lie detector test (T. 466).

[22] Mr. Byrd also knew Lewis prior to their contact in the jail (T. 485).

told the witness this information in private, Mr. Byrd doesn't know what Lewis told other people (T. 503).

In the mid 90s, when Mr. Byrd was incarcerated at Lake Butler, a lawyer or investigator from Tallahassee came to talk to him about these cases (T. 489-90).[23] Mr. Byrd told him that he didn't know anything and did not want to be involved (T. 490). He finally spoke to Mr. Melton's legal team after they told him there was a hearing coming up, and if he knew anything, this would be the last hearing he would be able to help (T. 491).

Next, Alphonso McCary testified to his conversation with Mr. Lewis in the Escambia County Jail.[24] Mr. McCary had been in a cell with Antonio Melton, during which time Mr. Melton told him that Lewis was trying to put a murder charge on him (T. 507). When Mr. McCary asked Mr. Lewis about this, Lewis said that they came to him with a deal and he was trying to protect himself (T. 507).[25] However, Lewis, who seemed to be upset about

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[23]During his testimony, Mr. Byrd testified that he is presently in jail for a pending case on a robbery charge (T. 492), and that he has been in and out of jail pretty regularly for the last ten years (T. 493-4).

[24]Mr. McCary acknowledged during his testimony that he had been convicted of five to ten felonies (T. 515).

[25]Mr. McCary was friends with both Mr. Lewis and Mr. Melton

what he was doing to Mr. Melton, said that after this was all over with, he would straighten out what he had done wrong (T. 507-8).

Mr. Lewis proceeded to state that Mr. Melton didn't know anything about the cab murder, but that he was trying to save himself now and it was better Antonio than him (T. 508).

Mr. McCary later saw Mr. Lewis years later at Century Correctional Institution (T. 509). Lewis again reiterated that he would help Antonio when he got out (T. 509). Mr. McCary didn't tell anyone about this because Lewis told him he was going to clear it up; he figured that he was going to be a man of his word (T. 518). Mr. McCary came forward now because he felt it was time to step up (T. 522).

The fifth witness to testify about jailhouse conversations with Ben Lewis was Bruce Crutchfield. Mr. Crutchfield was in the Escambia County Jail in early 1991 when he came into contact with Ben Lewis.[26] Mr. Lewis was hysterical, having a hard time coping with the reality of the situation and was in total agony (T. 592). Mr. Lewis confessed that he had shot a taxi driver

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and had known them for many years before 1991 (T. 516-17).

[26]Mr. Crutchfield was waiting to be sentenced on a firearm and aggravated battery charge (T. 591).

and couldn't believe what he had done (T. 592).[27] Mr. Crutchfield told him to keep his mouth shut, that if he needed to confess, he should confess to God (T. 592-3).[28] Mr. Crutchfield remembered this conversation because "when somebody walks up to you and tells you that they done something like that and they are sitting there beating their head on the wall and they are sitting there and you're talking to them, you don't forget it." (T. 622).

During cross-examination by the State, Mr. Crutchfield could not recall if he knew Ricky Saylor (T. 612).[29] He does recall Cary Saylor, but doesn't remember if Cary Saylor had him arrested on a charge (T. 614). The witness has nothing against the Saylor family (T. 614) and had no knowledge of who the victim was in Mr. Lewis' confession (T. 631).

Mr. Crutchfield didn't tell on Lewis because that would make him a snitch (T. 616). He is testifying today because an innocent man is going to die for what someone else did (T. 623). Mr. Crutchfield acknowledged that he has been convicted of about

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[27]Mr. Lewis said he was by himself when he killed the cab driver (T. 593).

[28]In fact, however, Mr. Lewis confessed to a lot of different people in the cell (T. 625-6).

[29]Mr. Saylor was the victim in the taxicab case.

20 felonies (T. 604), and he had been a white supremacist who "believes that we should be with our own people" (T. 608).

The final witness to testify about a jailhouse confession by Mr. Lewis was Fred Harris. Mr. Harris, who is presently incarcerated in state prison (T. 632), was in the Escambia County Jail in 1990 and 1991 (T. 632-3).[30] Ben Lewis, who was a friend of his (T. 633), told him that in the pawn shop case, he, Mr. Melton and the victim were wrestling, the gun went off, and the owner was shot (T. 635).

Mr. Lewis was scared and needed some advice from Mr. Harris (T. 636). In response, Mr. Harris told him that he needed to do what he had to in order to save himself (T. 636). Mr. Lewis responded that he was going to state that Mr. Melton was the triggerman in the pawn shop case (T. 636).[31] According to Mr. Harris, this conversation was private (T. 647).[32]

With regard to the aforementioned witnesses, Judge Terrell testified that if he had testimony from an inmate that Mr. Lewis stated that he, Mr. Carter and Mr. Melton were all struggling

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[30]Mr. Harris testified that he has approximately 12 felony convictions (T. 651).

[31] Mr. Lewis stated that the pawn shop owner was holding the gun when it went off (T. 647).

[32]Also, Lewis never spoke to the witness about the taxicab

when the gun discharged, he would have presented this testimony (T. 172). This would have given the witness something to present that would reduce culpability (T. 172).

Judge Terrell did not send an investigator to the Escambia County Jail to interview the cellmates of Ben Lewis (T. 713). Judge Terrell testified that he did not have any strategic reason for not doing this (T. 182-3). He did not recall doing any independent investigative requests in this case (T. 712). Judge Terrell had snitch cases before and these kinds of inquiries had been uniformly unproductive (T. 713). That is the only reason he could think of that he would not have done it (T. 713). After reviewing everything, Judge Terrell concluded that he should have given it a try (T. 713-14); he should have interviewed friends of Ben Lewis (T. 244).

According to Judge Terrell, Mr. Melton absolutely denied involvement in the Saylor murder case (T. 156-7). He never wavered on this (T. 156).[33] In the Carter case, Judge Terrell recalls that the only two aggravating circumstances were the prior crime of violence, which was Mr. Saylor's homicide, and the felony was committed for the purpose of pecuniary gain (T.

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murder (T. 638).

[33]Mr. Melton did not deny his involvement in the Carter case (T. 156).

157). If the State only proved pecuniary gain, it would have been highly unlikely if not nonexistent that Mr. Melton would be eligible for the death penalty (T. 158).

In addition to the aforementioned testimony, a significant portion of the evidentiary hearing focused on various exhibits introduced into evidence. D-Ex. 1 is a letter to Judge Terrell from Joseph Schiller dated August 9, 1991, and copied to John Spencer and Sam Hall (PCR. 1694-5).[34] The letter states:

> In order to reach a settlement on this case, I would like to propose the following disposition of the taxicab murder case:
>
> Melton would plead guilty to the armed robbery and first degree murder charge on the taxicab case. The State would not seek the death penalty and make a binding recommendation of life. The Court would adjudicate him guilty of the armed robbery and sentence Melton to 25 years on that count. The Court would withhold adjudication of guilt on the murder count and pass it until October for sentencing, or

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[34]Mr. Schiller was the primary prosecutor in the Saylor case (T. 140). Mr. Spencer was the primary prosecutor in the Carter case (T. 140). Sam Hall tried the Saylor case with Judge Terrell (T. 190)

> after the disposition and sentencing of the Carter case.
>
> We would then try the Carter case and if it gets to the penalty phase, we could only introduce the prior armed robbery conviction. There would be no mention of the other count nor could the Court consider the taxicab murder case in sentencing because Melton still would not be adjudicated at that time of the murder.
>
> You, likewise, if it gets that far in the Carter case, could argue to the jury in the penalty phase as you have done so eloquently in the past, that your client already has 25 years and a life recommendation will ensure that he serves at least 50 years and there is no possible way he could be a threat to society again, etc.etc.
>
> Although I haven't cleared this with the victim's family in the taxicab case, I believe they would be in agreement because it gives the State some additional evidence in aggravation in the Carter case. If your client is agreeable to this proposition, let me know and I will discuss it with them.

While Mr. Schiller was not sure if he ever sent the letter (T. 109), Judge Terrell recalls receiving a copy of it (T. 193). Judge Terrell stated that Mr. Melton did not accept the offer (T. 193).

D-Ex. 2 is a subpoena to Ben Lewis to appear before Mike Patterson and John Spencer at the State Attorney's Office to testify (PCR. 1696).[35] Mr. Schiller testified that it is a John Doe subpoena and it doesn't state which case it is related to

[35]Mr. Patterson is an assistant state attorney.

(T. 109-10).[36] According to Mr. Schiller, this is a state attorney subpoena and it is standard procedure, particularly if in an investigation, "they don't want other people to see the subpoena and know he's coming down to testify about a certain defendant, or if he's in jail with that same person." (T. 112-13). Mr. Schiller didn't know if part of the intent would be to make sure that Judge Terrell didn't know about the interview of Mr. Melton's co-defendant during the pendency of Mr. Melton's capital case (T. 113).[37]

As to D-Ex. 2, Judge Terrell saw this for the first time about eight days prior to his evidentiary hearing testimony (T. 203). He was not aware that Mr. Lewis had been issued a state attorney subpoena under a false name (T. 204).[38] Judge Terrell would not have been able to find this subpoena in the clerk's office (T. 204). Judge Terrell arguably would have used this to show that Mr. Lewis expected to receive a benefit for his testimony (T. 205).

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[36]Mr. Schiller didn't know if he was present for the interview (T. 110).

[37]Mr. Spencer testified that he does not have an independent recollection of what occurred pursuant to the subpoena (T. 359).

[38]Mr. Melton had been charged with capital murder at the time of the subpoena (T. 204).

Judge Terrell did recall that Mr. Lewis hade been talking, but he doesn't recall if he specifically knew about the interview with Mr. Patterson (T. 238). Judge Terrell was later shown D-Ex. 13, which is a supplemental offense report by Officer Tom O'Neal[39] (T. 689, PCR. 1731-1734).[40] It states that Ben Lewis was issued a subpoena to give information in the case (T. 690). It has other language about the Carter case and Lewis making statements (T 690). However, there is nothing in there to give Judge Terrell a lead as to whether or not Mr. Lewis approached the State to provide information to give favorable treatment (T. 691). Judge Terrell testified as follows:

> Q. Now, on cross-examination of Mr. Schiller, within the confines of one of his questions, he indicated that you knew that Mr. Lewis had given a statement, had been subpoenaed to the State Attorney's

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[39]Officer O'Neal was a deputy sheriff in Escambia County in 1990 (T. 45). He was assigned to the homicide investigation of Ricky Saylor (T. 46).

[40]Judge Terrell had this report in his file (T. 689).

Office and had given a statement, and that you did know that, at some point you came to know that?

A. Yes.

Q. Now, is there a categorical difference between Mr. Lewis being subpoenaed and forced to provide information or Mr. Lewis volunteering the information in an attempt to get favorable treatment? How would that have affected your strategy?

A. Significantly different argument.

Q. And if you would have known –

A. And facts.

Q. Different facts. If you would have known that Mr. Lewis, in fact, approached the State with information, would you have argued that to the jury?

A. Yes.

(T. 735-6).

D-Ex. 3 is a handwritten numbered list of things to do (PCR. 1697).[41] Mr. Schiller identified the handwriting as his (T. 115). He stated that these were notes to remind himself to do certain things on the Saylor case (T. 115). There are checkmarks in the margins by some of the numbers (T. 115, PCR. 1697). Mr. Schiller has no idea as to why he checked them (T. 115).

[41]The second page of D-Ex. 3 is missing from the record. A motion to supplement the record with that page will be

On the list of things to do, one of the items is to locate Summerlin (T. 114). Mr. Schiller testified that he had never spoken to Summerlin, and that he first learned of Summerlin during the deposition when Mr. O'Neal testified (T. 115-16). Mr. Schiller had no knowledge that the man's name was actually Sumler, and he had no knowledge of David Sumler prior to the Saylor trial (T. 116-18).[42] If the witness had knowledge that Mr. Lewis told Sumler that Houston had shot the taxicab driver, he would have turned this information over to Judge Terrell (T. 118). According to Mr. Schiller, Summerlin was not a C.I. (T. 117). He was just an inmate that O'Neal got wind of somehow (T. 117).

D-Ex. 4 is a waiver of speedy trial by Tony Houston, signed on August 28, 1991 (PCR. 1698). Mr. Schiller affixed his signature to this waiver of speedy trial (T. 129). He acknowledged that this had to do with Mr. Houston testifying against Mr. Melton in the taxicab case (T. 130). Mr. Schiller needed Mr. Houston to waive speedy trial in order for him to provide testimony against Mr. Melton in Mr. Saylor's case (T. 130). At the time, they were in negotiations with Mr. Houston

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forthcoming.

[42]Mr. Spencer also testified that he had no recollection of having spoken with David Sumler or Summerlin (T. 364).

to agree to a plea (T. 131). Mr. Houston rejected the offer of 10-25 years (T. 131-2). Yet, Mr. Houston decided to testify against Mr. Melton without a plea (T. 131-2). After he testified, Mr. Houston signed the plea agreement (T. 132).

Judge Terrell noted that D-Ex. 4 was executed just a couple of weeks before the Saylor trial (T. 200). He testified that it is somewhat unusual for a prosecutor to affix his signature to that form (T. 200). He has never seen it done before (T. 200-1). Judge Terrell testified that it might support the theory that Mr. Houston expected a benefit for providing his testimony against Mr. Melton in the Saylor case (T. 201). Judge Terrell acknowledged that the document was available in the court file (T. 252). He testified that he should have presented this to the jury and doesn't recall a strategic reason for not doing so (T. 201-2).

D-Ex. 5 is a written plea agreement (PCR. 1699-1701). The agreement was executed by Mr. Houston on October 9, 1991 (PCR. 1701). The agreement was typed on August 28th, the same day that Mr. Houston waived his speedy trial rights (T. 134, PCR. 1701). It appears that Judge Terrell had an unexecuted copy at the time of the trial in Mr. Saylor's case (T. 207).

D-Ex. 9 is the same plea agreement (PCR. 1710-12), with a

few exceptions. John Spencer testified that it appears to be his signature at the bottom of page two of the agreement, with the date of November 13th handwritten over the date of August of 1991 (T. 349).[43] There are three other signature blocks, but they are not signed (T. 350). Mr. Spencer explains the discrepancy by stating he signed D-Ex. 9 as a memento as to when the sentencing actually took place (T. 351). It has no significance whatsoever. (T. 352). It was signed the same day as D-Ex. 5 (T. 352).

Mr. Spencer did not know if the waiver of speedy trial was part of the consideration for the plea agreement (T. 354). Mr. Schiller was lead counsel and the witness was not privy to all of the conversations between Mr. Schiller, Mr. Houston and Mr. Houston's attorney (T. 354). Yet, Mr. Spencer signed the plea agreement (T. 356).

D-Ex. 6 are notes by Judge Terrell regarding the deposition of Bruce Frazier (T. 160, PCR. 1702-05). The notes reflect that Frazier was reporting to Don West that Lewis was in his cell talking (T. 160). Judge Terrell didn't ask for the deposition, which was taken on the eve of trial, to be transcribed because he didn't think it would be fruitful (T. 221).

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[43]Mr. Houston was sentenced November 13th, 1991 (T. 350).

D-Ex. 7 is a Florida Department of Corrections post sentence investigation report of Ben Lewis, dated July 21, 1992 (T. 177-8; PCR. 1706-08). The relevant portion of D-Ex. 7 states, "After Mr. Carter opened the safe he apparently began struggling with Melton. Melton and Lewis then struck the victim, knocking him to the floor." (PCR. 1706).

Judge Terrell saw this document for the first time the day before his testimony (T. 177). This report, which would have been produced after the completion of Judge Terrell's representation of Mr. Melton (T. 179), arguably would have been corroborative of witness' testimony who indicated that Mr. Lewis said that he, Mr. Melton and the victim were involved in a struggle (T. 179). It also arguably would have corroborated Mr. Melton's statement that he first gave to law enforcement when he was first arrested (T. 179).

D-Ex. 10 is a billing statement by attorney Jim Jenkins that was provided to the county for his representation of Ben Lewis in the Carter case (T. 292, PCR. 1713-1724). Mr. Jenkins testified he first saw Mr. Lewis at the jail after he was appointed (T. 283).[44] He thought the evidence was overwhelming

[44]Mr. Lewis was arrested on January 23, 1991 (T. 292).

and believes that the next time he saw Mr. Lewis, he suggested he cooperate (T. 283).

Mr. Jenkins testified that he approached the State about Mr. Lewis' cooperation and any benefit he might receive (T. 285). His bill reflects a February 14, 1991 phone conference with the State Attorney's Office (PCR. 1713). Mr. Jenkins proceeded to tell Mr. Lewis that his cooperation in this case alone would probably not be sufficient, but that if he had any information on any other crimes, he might want to come forward (T. 285-6). Mr. Jenkins testified that these events occurred early in his representation of Mr. Lewis (T. 286).

The next time Mr. Jenkins saw Mr. Lewis at the jail, probably a week or two later, Mr. Lewis had information about Mr. Melton regarding the Saylor homicide (T. 286-287). Mr. Jenkins told Mr. Lewis that if the information rose to a sufficient level, it might work out for something less than a life sentence (T. 290). Mr. Jenkins believes he gave this information to either Mr. Schiller or Mr. Spencer (T. 289). The State told Mr. Jenkins that his client's cooperation would be considered in resolving his case but there was no agreement (T. 291, 303).[45]

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[45]Mr. Jenkins was hoping for a reduction to second degree

Mr. Jenkins' bill reflects the following contact with the State prior to Mr. Lewis' interview on March 15, 1991, pursuant to the John Doe subpoena: On February 14, 1991, a phone conference with the State Attorney's Office for fifteen minutes; on February 25, 1991, phone calls to Tom O'Neal, Mike Patterson and John Spencer, for a total of forty-five minutes; on February 26, 1991, a phone call to Mike Patterson and a phone call from Tom O'Neal for a total of thirty minutes; on February 27, 1991, a phone call to Tom O'Neal for fifteen minutes; on February 28, 1991, a phone conference with Mike Patterson and a phone call to Tom O'Neal for a total of fifteen minutes; on March 1, 1991, phone conferences with Mike Patterson, John Spencer and Tom O'Neal for a total of one hour and thirty minutes; on March 5, 1991, phone calls to John Spencer and Tom O'Neal, and a phone call from Tom O'Neal for a total of thirty minutes; on March 6, 1991, a phone call to John Spencer and a meeting with John Spencer for a total of thirty minutes; on March 12, 1991, a phone call from Tom O'Neal for six minutes; on March 14, 1991, a phone call from Tom O'Neal for less than twelve minutes (PCR. 1713-15).[46]

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murder (T. 291).

[46]Mr. Schiller does not dispute Jenkins' billing records about their meetings (T. 784).

Judge Terrell called Mr. Jenkins to testify during the penalty phase of the Carter case (T. 172). Judge Terrell wanted to bring to the jury's attention the benefit for Mr. Lewis to place responsibility solely on Mr. Melton and to argue proportionality (T. 172). It would have been helpful to present the information that Mr. Jenkins had suggested to Mr. Lewis (T. 173). Further, Judge Terrell testified that had he known about all the conversations Jenkins had with Tom O'Neal, Mr. Spencer and Mike Patterson prior to Lewis' statement implicating Melton, he likely would have wanted to bring forward this information to the jury:

> Q. (By Mr. Strand) Now, you had indicated that you had put Mr. Jenkins on in the trial in Mr. Saylor's case and also in the penalty phase, the Carter case, and you indicated what your strategy was. If you had known that Mr. Jenkins had had telephone conversations and meetings with Tom O'Neal beginning February 25th, 1991, I guess -- we have conversations on February 25th, 26th, 27th, 28th, March 1st, March 5th, March 12th, March 14th, and March 15th --all of those dates conversations Mr. Jenkins had had with Thomas O'Neal, would you have presented that information to the jury?
>
> A. If I understood it to be about this case or these cases, I should have.
>
> Q. And particularly the understanding that Mr. Lewis never gave his statement implicating Mr. Melton until March 19th?
>
> A. Exactly.
>
> Q. Now, if you would have known that Mr. Jenkins had conversations with John Spencer, Mike

> Patterson on February 25th, with Mike Patterson on February 26th, with John Spencer, Mike Patterson on March 1st, with John Spencer on March 5th, with John Spencer on March 6th, all of these conversations prior to Mr. Lewis giving a statement implicating Mr. Melton in the -- Mr. Saylor's murder, would you have wanted that information to be brought forward to the jury?
>
> A. Likely so.
>
> Q. And what would be the reason that you would have wanted the information relative to the conversations that Mr. Jenkins with Mr. O'Neal and Mr. Spencer and Mr. Patterson, why would you have wanted the jury to know about those conversations, at least that they had happened?
>
> A. If it could establish that there were ongoing discussions that could suggest that Mr. Lewis was at risk of serious punishment and might benefit from cooperating with the State; if there was a total lack of information about Mr. Saylor's death and any alleged involvement of Mr. Melton in that incident; or any other factor that might establish a motivation for Mr. Lewis to falsely accuse Mr. Melton, those, I think, would all be serious matters that should have been presented to the trier of fact if they could be established.

(T. 180-81).

S-Ex.1 is a set of notes by Officer O'Neal (T. 51, PCR. 1560-65). These are notes that he made during interviews at the jail and with Ben Lewis (T. 51).

Initially, Officer O'Neal did not have any suspects in the Saylor case (T. 47). He was aware of the subsequent homicide at Carter's Pawnshop (T. 47) and as a result, he spoke to Ben Lewis, who was apprehended coming out of the pawnshop (T. 47).

Officer O'Neal interviewed Mr. Lewis about other homicides, to which he indicated he had no knowledge (T. 47-48).

After receiving information that Mr. Lewis was making comments about the pawnshop murder and also a murder involving a cabdriver (T. 49), Officer O'Neal interviewed Bruce Frazier "and a subject that was originally identified as a Summerlin, later confirmed to be a Sumler." (T. 49).[47] With regard to Summerlin, no recorded statement was taken, but the Officer did take notes (T. 51).[48] According to the notes, Lewis told Summerlin that his partner had shot the cab driver and that Lewis had admitted being there (T. 51-2). The word "Melton" was scratched out from the notes and replaced by "partner":

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[47]During these interviews, Officer O'Neal was accompanied by Don West from FDLE, as he had been first contacted by the aforementioned people (T. 50).

[48]The interview was on February 25, 1991 (T. 53).

Q. Okay. Now in your notes there, you have the word, looks like, Melton scratched out and the word partner wrote in there.

A. Yes, sir.

Q. Do you recall why that happened or how that happened?

A. Because I was thinking his partner being Melton but Summerlin did not specifically say Melton, so I took it out.

Q. Okay. Did he use the word partner?

A. Yes, sir.

(T. 52).

Officer O'Neal was of the opinion that during his deposition, Judge Terrell had copies of his notes, which comprise S-Ex. 1 (T. 61-2). He recalled seeing Mr. Schiller handing copies of the notes to Judge Terrell during the deposition (T. 75). However, Officer O'Neal did not know if the document with Mr. Melton's name scratched out was in the packet of notes handed to Judge Terrell (T. 76).

Judge Terrell believed that he first saw page one of S-Ex. 1 on the day prior to his testimony at the evidentiary hearing (T. 161, 163).[49] Judge Terrell could have made an argument that because Melton's name was scratched out, that Lewis had

[49]Judge Terrell did not recall seeing the note in his files

indicated to Mr. Summerlin that it was someone else, not Melton (T. 264). This note would have been relevant to Mr. Melton's defense (T. 161), in that it could demonstrate that Mr. Lewis had created information (T. 162-3). The fact that the note was dated February 25th, and that Mr. Lewis' interview was on March 19th, was very relevant (T. 163).

Also, with this note, Judge Terrell would have done further investigation (T. 164).

> Q. Now, if you had received this note prior to the trial in Mr. Saylor's case, would it have led you to any further investigation?
>
> A. I would expect so.
>
> Q. And what type of investigation would that be, sir?
>
> A. Well, finding out who the individual was who had a statement from Mr. Lewis saying that his partner, allegedly not Melton, had shot the cabbie, meaning Mr. Saylor, at the minimum.
>
> Q. And if you would have known that the individual who made that statement was incarcerated with Mr. Lewis at the Escambia County Jail when the statement was made, would you have considered that fact in forming your investigation?
>
> A. I should.

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on the Melton cases (T. 163-4).

Q. And if you would have received that note, would you have attempted to interview Mr. -- the individual who wrote that?

A. If I had the note, certainly, and if I knew who the individual was, yes.

Q. And would you have began an investigation to attempt to corroborate this individual's statement?

A. I should have.

Q. If you would have had it, sir, would you have?

A. I would think with this information, yes.

(T. 164-5). Had Mr. Lewis made similar statements to other inmates, Judge Terrell would have presented their testimony (T. 169, 170).

On cross-examination, after further review of the O'Neal deposition, Judge Terrell acknowledged that it appears that he had seen the notes and was aware of Mr. Summerlin (T. 225). Ultimately, in reading back the deposition transcript, Judge Terrell believed that Mr. O'Neal disclosed the content of these notes but did not provide the notes themselves (T. 265). Whether or not he saw the note, Judge Terrell should have attempted to find Mr. Sumler (T. 266).

S-Ex. 8 is a criminal history composite of Ben Lewis (PCR. 1681-1691). Paulette Sanders, who is employed by the State

Attorney's Office, ran an NCIC request on Mr. Lewis (T. 768). The report was moved into evidence (T. 770).

S-Ex. 9 is a judgement and sentence, dated November 12, 1980, for Bruce Crutchfield for making and uttering forged instruments (PCR. 1692-3). Kerry Saylor, the brother of Ricky Saylor (T. 775), testified that Mr. Crutchfield provided him with phony checks (T. 773). Mr. Saylor got caught and told the police about Mr. Crutchfield (T. 774).[50] Mr. Crutchfield was subsequently arrested (T. 775).

SUMMARY OF ARGUMENT

1. Mr. Melton was deprived of the effective assistance of counsel at the penalty phase of his capital trial when counsel unreasonably failed to present evidence of compelling and substantial mitigating circumstances. Counsel failed to provide his client with a competent psychiatric evaluation. Counsel failed to sufficiently challenge the weight of Mr. Melton's prior violent felony conviction. These deficiencies prejudiced Mr. Melton, particularly in light of the fact that only two aggravating circumstances were presented.

2. The postconviction court improperly considered "lack of remorse" in its order denying relief. The postconviction

[50]Mr. Saylor was arrested in 1978.

proceedings did not occur before an impartial tribunal. The lower court's actions necessitate that a new hearing be conducted before an impartial tribunal. At a minimum, the lower court's findings should be given no consideration by this Court.

3. Mr. Melton was denied due process by the State's withholding of a wealth of materially exculpatory evidence. The State failed to disclose favorable information obtained during an interview with David Sumler. The State failed to disclose evidence of negotiations and deals with Mr. Melton's co-defendants. Moreover, the State knowingly presented false or misleading evidence and/or argument at Mr. Melton's trial in order to obtain a conviction and sentence of death. A cumulative analysis of the withheld evidence undermines confidence in the outcome of the proceedings.

4. Mr. Melton was deprived of the effective assistance of counsel during the guilt phase of his trial. Counsel's performance was deficient in failing to obtain information which would have impeached Mr. Lewis' testimony at trial. Counsel was deficient in failing to interview Mr. Lewis' cellmates. Counsel was deficient in failing to adequately investigate the true nature and extent of Mr. Lewis' negotiations with the State. These deficiencies prejudiced Mr. Melton, 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.

5. Newly discovered evidence demonstrates that Mr. Melton probably would not have received a death sentence. This evidence established Mr. Lewis' false testimony at trial, it minimizes the culpability of Mr. Melton, and it would have neutralized or rebutted the prior violent felony conviction. 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, Mr. Melton would probably have received a life sentence.

6. An invalid prior conviction was introduced into evidence at Mr. Melton's penalty phase proceedings, in violation of Johnson v. Mississippi.

7. The prosecutor's misconduct during the course of Mr. Melton's case rendered his conviction and death sentence fundamentally unfair and unreliable. The State encouraged and presented misleading evidence and improper argument to the jury. Mr. Melton's trial counsel was ineffective for failing to object.

8. During the jury selection process, the State

unconstitutionally exercised its peremptory challenges in violation of Mr. Melton's constitutional rights.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); Stephens v. State, 748 So.2d 1028 (Fla. 1999).

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. MELTON'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS ALSO RENDERED INEFFECTIVE BY ACTIONS OF THE PROSECUTION.

A. The Legal Standard

As explained by the United States Supreme Court, an ineffective assistance of counsel claim is comprised of two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

In Williams, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase of a capital case 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 in her concurring opinion explained "trial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation," and as a result this was a "failure to conduct the requisite, diligent investigation." Id.

More recently, in Wiggins v. Smith, 123 S.Ct. 2527 (2003), the Supreme Court discussed counsel's decision to limit the scope of the investigation into potential mitigating evidence and the reasonableness of counsel's investigation. The Court stated:

> [A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Wiggins, 123 S. Ct. at 2538.

B. Lay Witnesses and Expert Testimony

Judge Terrell failed in his duty to provide effective legal representation for his client at the penalty phase. There was a wealth of mitigation that trial counsel never presented because his inadequate investigation failed to discover it. What mitigation he did know of, he never fully presented. This evidence would have offset the two aggravating circumstances presented by the State and would have also established the following numerous mitigating circumstances:

That Mr. Melton grew up in the projects called Truman Arms, which was a rough, bad place (T. 562, 661-2, 662); that his father, Frankie Stoutemire, Sr., was in the service when Antonio was raised (T. 558), and that he did not have much contact with Antonio (T. 376); that by the time he returned, his son was already an adolescent and living with his grandmother (T. 377); that Mr. Melton's stepfather, David Booker, was a very harsh man (T. 375); that David Booker had a heroin drug problem and would bring other women into the house in front of Antonio (T. 376, 666); that Mr. Booker's drug addiction caused many problems at home, and Mr. Booker was verbally and physically abusive toward Antonio's mother in front of Antonio, to the point where he broke her arm (T. 376, 560,667); that whenever Mr. Stoutemire

would have visits with Antonio (T. 559-60), Antonio's mother would get repercussions from David Booker (T. 561); that later on during Antonio's youth, Ms. Davis became active in the Jehova's Witness Church (T. 669); that she tried to get Antonio to live that type of lifestyle (T. 373, 669); that Mr. Melton was in a sense overprotected (T. 373); that this involved keeping him away from school activities (T. 670); that while Mr. Melton had been a gifted athlete when he was younger, his mother forced him to give it up and be more and more involved in intensive Bible study (T. 373); also, that she withdrew him from athletics in part because she didn't care for the influence of peers (T. 374); that by the time Antonio reached middle adolescence, he was fairly isolated from his peers (T. 374); that with regard to emotional maturity, Mr. Melton was a strikingly immature boy for 18 (T. 381); that by the time he entered high school, he had almost no social contact (T. 381); that Mr. Melton could be easily manipulated (T. 383); that he went from a situation of being isolated and/or in the church to being with a bunch of criminals by the time he got to high school (T. 374); that Mr. Melton immediately fell in with this crowd (T. 374); that he began to skip school, use drugs, and talk back (T. 374); that Ms. Davis took him out of school when

he was 16 because of the bad associations that he was exposed to (T. 374,664); that Ben Lewis was one of the people that Ms. Davis didn't want her son hanging around with at school (T. 666); that in regard to Antonio, Ben Lewis, and Tony Houston, it was Houston who seemed to be the leader of the group, then Lewis (T. 749); that Mr. Melton viewed Lewis and Houston as more sophisticated (T. 383); that he looked up to these kids because he was sheltered and they had so much street knowledge (T. 664); that when Antonio was 16, Ms. Davis got married and moved to Mobile (T. 663); that Antonio stayed with his grandmother and aunt in Pensacola (T. 665, 746); that from then until the time he was arrested, Mr. Melton had essentially no supervision (T. 378); that he didn't have any guidance his whole life (T. 564); and that Mr. Melton's only male role model was an abusive heroin addict (T. 377).

Judge Terrell conceded that if he had information that Mr. Melton's mother lived with a heroin addict during Mr. Melton's youth, he may have presented it if it had an impact on Mr. Melton's development (T. 187). Further, he possibly would have presented information that Mr. Melton was new to the streets in comparison to Lewis (T. 188). This is particularly true given that Melton was 17 years old when Mr. Saylor was killed (T.

188). Judge Terrell did not consult with anyone in the Melton family regarding any religious activities as it might impact Mr. Melton's development (T. 247). He did not at the time consider that to be other than a personal family issue (T. 247).

With regard to mental health expert testimony, Judge Terrell failed to have Mr. Melton evaluated by mental health expert Dr. Lawrence Gilgun until a week before his trial for Mr. Carter's murder (T. 310). Dr. Gilgun testified that he could not recall being involved in any other capital felony cases where he wasn't called in at least two months prior to trial (T. 310). Judge Terrell testified that it was not his standard practice to wait that long and had no strategic reason for doing so (T. 186). Neither Judge Terrell nor Dr. Gilgun had any notes or documentation indicating any discussion of Mr. Melton's case whatsoever, and both testified that had such consultation occurred, they would have made note of it (T. 187, 311).

Dr. Gilgun did not speak to any of Mr. Melton's family or friends (T. 312). Judge Terrell did not supply any of this information to him, nor any information about Mr. Melton's upbringing (T. 312).[51] Dr. Gilgun did not know what Judge

[51]Dr. Gilgun explained that the importance of other materials is for corroboration (T. 313). Also, these material help him to structure his interview and to elicit more

Terrell's plan was as far as the penalty phase (T. 339). Usually, he discusses these things with the attorney (T. 340). Dr. Gilgun concluded that if he had been given more information, he could have potentially given more mitigation (T. 341).

During the postconviction evidentiary hearing, counsel presented the testimony of Dr. Dee, who is a clinical psychologist with a subspecialty in clinical neuropsychology (T. 367). Dr. Dee reviewed discovery materials, school records, juvenile records, a previous evaluation by Dr. Gilgun, the Florida Supreme Court appeal, and witness testimony at the penalty phase of the Carter trial (T. 370-1). Dr. Dee spoke to Mr. Melton's mother, his aunt Margaret Faye Johnson, Latricia Davis and his father, Mr. Stoutemire (T. 380). Dr. Dee believes that this material is necessary to investigate the issue of mitigation, and it is also helpful to have independent corroborative evidence (T. 371). Had Judge Terrell adequately prepared his expert, he would have been able to present an accurate picture of Mr. Melton's life.[52]

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information (T. 313).

[52]Judge Terrell conceded that he likely would have presented an expert who could testify to Mr. Melton being raised in a church with no exposure to criminal elements until age 16 (T. 188).

In its order denying relief, the lower court recognized trial counsel's inadequacies regarding Dr. Gilgun:

> Dr. Gilgun did testify in the penalty phase, although his testimony appears extremely short (covering only 13 transcript pages)(CC 988-1000). While the number of transcript pages for one's testimony is not dispositive on the issue at hand, the penalty phase testimony and the evidence revealed in the evidentiary hearing clearly show that trial defense counsel did not spend an extensive amount of time in the investigation and preparation of mental health-related mitigation evidence. TDC[53] provided Dr. Gilgun with only Defendant's school records and numerous depositions for purposes of his evaluation of Defendant and testimony at trial; TDC did not provide copies of Defendant's statements to police, the arrest report or any police reports, or any information about Defendant's family or friends (CC 991-92)(EH 312-13, 338) nor any information about Defendant's stepfather other than from Defendant himself (i.e. information that the stepfather was a heroin addict and had abused Defendant's mother)(EH 320-21, 332). In the evidentiary hearing, Dr. Gilgun confirmed that he did not speak with any of Defendant's family or friends during the course of his pretrial evaluation of Defendant. (EH 312).
>
> heroin addict and had abused Defendant's mother)(EH 320-21, 332). In the evidentiary hearing, Dr. Gilgun confirmed that he did not speak with any of Defendant's family or friends during the course of his pretrial evaluation of Defendant. (EH 312).

(PCR. 1967-68)

However, the lower court proceeded to deny relief on this issue:

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[53]Trial Defense Counsel.

> The strongest evidence presented and argument made by the Defendant against his trial counsel on this issue is that the mental health expert retained by the defense counsel, Dr. Larry Gilgun, was not retained until a week before trial. **Also, it does not appear that defense counsel consulted with this expert to a great degree directly before presenting his testimony, nor discussed with him any specific trial strategy.** There was no explanation offered by defense counsel as to why he waited until a short time before the trial to retain Dr. Gilgun for his evaluation of the Defendant. Regardless of when the Doctor was retained, the significant point is that he was retained and was provided with sufficient materials with which to do an evaluation of the Defendant. There was also enough time to allow for the appropriate testing to assist the doctor in reaching his opinions. Ultimately, at the evidentiary hearing it was not established that Dr. Gilgun was deprived of any significant information which would have changed or magnified the scope of his testimony during the penalty phase.

(PCR. 1973)(emphasis added).

* * * *

> This court concludes that the defense counsel's decision regarding what evidence to present at trial was completely reasonable. Furthermore, to the extent that trial counsel erred in any respect, it would still be necessary for the Defendant to demonstrate that but for those errors he probably would have received a life sentence. *See* Gaskin v. State, 822 So. 2d 1243 (Fla 2002). In the instant case, this Court finds that any additional information that the Defendant suggests could be presented to a jury is nothing more than cumulative information that was already considered and rejected by the trial court and none of the additional information presented through the evidentiary hearing was such as to undermine this Court's confidence in the outcome of the original proceedings.

(T. 1976).

While the lower court recognized counsel's deficiencies in dealing with Dr. Gilgun, its conclusion that "the significant point is that he was retained and was provided with sufficient materials with which to do an evaluation of the Defendant" is erroneous. Simply retaining a mental health expert does not insulate a trial attorney from an ineffective assistance of counsel claim. A criminal defendant is constitutionally entitled to competent and appropriate expert psychiatric assistance when the State makes his mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). What is required is a "psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background. Kenley v. Armontrout, 937 F.2d 1298 (8th Cir.

1991); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984); United States v. Fessel, 531 F.2d 1275 (5th Cir. 1979); Mason v. State, 489 So. 2d 734 (Fla. 1986).

In Mr. Melton's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of a defense." Ake, 105 S.Ct. at 1096.

Dr. Gilgun was not provided with sufficient materials with which to do an evaluation of the Defendant. Consequently, had he been given more information, he could have potentially given more mitigation (T. 341). His testimony at trial pales into comparison to that of Dr. Dee's testimony at the evidentiary hearing.

At the penalty phase, Dr. Gilgun testified that Mr. Melton was of normal intelligence (R. 992), that Mr. Melton's grades in school went down because he viewed school as a recreation type thing and was not paying attention (R. 994), that he abused drugs and alcohol on a daily basis (R. 995), that he dropped out

of school in the 11th grade (R. 995), that Mr. Melton has average levels in spelling and arithmetic and a low average in reading (R. 996), that he suffered from no major psychiatric disorder or emotional defect and that he suffered from no mental illness (R. 997), that he seems to be a good candidate for rehabilitation (R. 997-8) and that his childhood was characterized as mostly happy (R. 998). A very brief redirect examination provided the only glimpse of testimony which the jury should have heard:

> Q. (By Mr. Terrell) Did he give you a family history?
>
> A. He did.
>
> Q. Was there any indication that he had a problem with having any male role models in his life?
>
> A. That was a problem for him. His father had left the situation early on and he had a stepfather who was not a positive influence at all, and he was in and out of the family situation.
>
> Q. That's the stepfather?
>
> A. Yes.

(R. 999).

Contrary to Dr. Gilgun, Dr. Dee, armed with a complete family history, was able to present a thorough picture of Mr. Melton's life, beginning with the absence of his father to his abusive heroin addicted step-father; moving on to his mother's

religious conversion and desire to shield Antonio from outside influences; this having the effect of Mr. Melton developing into an extremely immature youth who could be easily manipulated by his peers; resulting in his mother withdrawing him from school at age 16; then upon her moving away, Mr. Melton having virtually no supervision prior to his arrest.

Testimony similar to that of Dr. Dee would have given the jury insight into who Mr. Melton was and how he ended up in this dire situation. Further, trial counsel could have more forcefully shown, with the available information, that Mr. Melton's mental and emotional maturity at the time of the crime was a mitigating factor. Had counsel performed effectively, there is a reasonable probability that the outcome of the proceedings would have been different.

Similarly, while Antonio, his mother,[54] father and grandmother each briefly testified at the evidentiary hearing, the jury was not given a complete picture of Mr. Melton's life and the reasons for his lack of mature development, which left him easily susceptible to negative influences.

The evidence presented at the evidentiary hearing is precisely what the United States Supreme Court had in mind when

it wrote Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). The Lockett Court was concerned that unless the sentencer could consider "[c]ompassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendants will be treated not as unique human beings, but as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The evidence would have made a difference between life and death in this case.

C. Jailhouse Witnesses

Trial counsel also failed to sufficiently challenge the weight of Mr. Melton's prior violent felony conviction. This is a case in which there were only two aggravating circumstances, pecuniary gain and the prior violent felony. The trial court gave great weight to the prior violent felony:

> 1. The defendant was previously convicted of another capital felony and of a felony involving the use or threat of violence to the person. The evidence established conclusively and beyond any reasonable doubt that the defendant was previously convicted of first degree murder and armed robbery. In that case,

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[54]Antonio's mother testified via videotape (R. 1014).

> as in this case, the victim was killed by a shot to the head while the defendant was participating in the robbery of the victim. In both cases, the evidence established that the defendant fired the fatal shots. The violent crimes of which defendant were convicted were extremely violent and life-threatening, and resulted in the death of the victim. They were committed with no pretense of moral justification, for pecuniary gain, and with disregard to the life of the victim. The Court gives great weight to this aggravating circumstance.

(R. 1395).

Judge Terrell clearly understood the significance of having a prior violent felony murder conviction. Presentation of evidence that Mr. Melton had previously been convicted of another robbery-murder was devastating to the defense's plea for a life sentence, as was demonstrated in defense counsel's closing remarks to the jury at the penalty phase:

> MR. TERRELL: What do you say at a point like this? We were in a terrible dilemma [sic] in this case. It started out long ago. It started out with as far as you were concerned picking you as jurors. We are there trying to ask you these questions to determine if you could be fair about the issue of guilt or innocence. You said that you could be. We had to ask you about the things that would determine whether or not you were qualified to sit as jurors relating to penalty phase, if one should come about. And the dilemma [sic] we were in was, my God, we have got a client convicted of a separate murder and a robbery. How can we get a fair jury about guilt or innocence in this case and still get a fair jury for the question of whether or not this young man should die? We tried to explore those issues with you and there was no way to do that well.
>
> Obviously by the look on the faces of some of you

> this morning, I don't think I did it very well, and I don't know how to do it better than what I did. **I know Mrs. Ehrhart and Mrs. Pace, some of you folks were clearly shocked this morning when you heard in the opening statement that Mr. Melton had been convicted of another murder charge. How can you possibly, how can you possibly be asked to recommend that a person already convicted of a separate killing in a robbery, how can you possibly ask to recommend life for a person like that?** Well, we're now in that posture of having to do that. And it's not a posture that I feel comfortable with, but the real question is -- and why we made the opening statement to you and why we went through the process of all this evidence here is to get you to feel the flavor of what that's about. You know, I sit here and I think in my mind, you know, how can anyone recommend life in that situation? And on its bare bones facts, you sit there and you say, well, gosh, there is really not much way anybody can do that. But then when you start to look behind it and see what this process is all about and see what they are trying to get you to do, then I think you can understand that we can come in here in good faith and ask you to recommend a life sentence for this young man even though he has been convicted of a separate unrelated killing.

(R. 1083-1084)(emphasis added).

Moreover, to make matters worse, the prosecution introduced details of the prior violent felony conviction though the testimony of Mr. Schiller. Among other things, Mr. Schiller testified that there was no evidence whatsoever that anyone other than Antonio Melton was the triggerman (R. 939-40).[55]

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[55]Mr. Schiller made this statement after it was brought out that the jury in the Saylor case rejected the question of premeditated murder and circled the words "felony murder" for

Had Judge Terrell conducted an adequate investigation, he would have been able to neutralize the weight of the prior violent felony.

During the evidentiary hearing, there was extensive testimony by former Escambia County jail inmates regarding statements made by Ben Lewis in regard to the prior violent felony. Ben Lewis told David Sumler that he and Tony Houston shot a taxi driver and that Mr. Melton wasn't there at the time (T. 420). Ben Lewis told Paul Sinkfield that he robbed and killed a cab driver with T.H. [Tony Houston] (T. 453); that he himself shot the cab driver because "he was just nervous, got excited and shot him" (T. 454). Ben Lewis told Lance Byrd that, according to his lawyer, if he could come up with something else, he could probably get a lesser sentence [in the Carter case] (T. 487). Lewis told Byrd that he knew about the taxicab murder (T. 488), and that he was going to tell his lawyer that Melton had done it (T. 488, 499). Lewis didn't say who did kill the taxicab driver (T. 499), but he did admit that Melton had left and that he and Houston were still there (T. 488, 500).

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count I (R. 925-6). Mr. Schiller had acknowledged that he thinks the question the jury had was whether or not someone else could have used the gun during the cab robbery (R. 938).

Ben Lewis admitted to Alphonso McCary that Antonio Melton didn't know anything about the cab murder, but that he was trying to save himself now and it was better Antonio than him (T. 508). However, Lewis said that after this was all over with, he would straighten out what he had done wrong (T. 507-8). Mr. McCary later saw Mr. Lewis years later at Century Correctional Institution (T. 509). Lewis said he was almost done with his time, and as soon as he was done he would help Antonio (T. 509). Mr. McCary testified, "Well, you need to do that, man, I said, because you've got a man in there for something that he didn't do." (T. 509). Lewis reiterated that he would "take care of it." (T. 509).

Ben Lewis also confessed to Bruce Crutchfield that he had shot a taxi driver and couldn't believe what he had done (T. 592). Mr. Lewis said he was by himself when he killed the cab driver (T. 593).

At the time of the Saylor and Carter trials, Judge Terrell was the Chief Assistant Public Defender with a heavy workload, particularly toward the end of 1991 and early 1992 (T. 184). For example, in the four months between the Saylor and Carter trials Judge Terrell had at least nine felony trials, with at least two of those being first degree murder cases (T. 184-5).

When Judge Terrell received the information from Bruce Frazier about Lewis talking in the jail, Judge Terrell was “very busy.” However, even with his busy schedule, Judge Terrell testified that he “should have” interviewed inmates (T. 186). He had no tactical or strategic reason for not interviewing Lewis’ associates and/or cellmates (T. 183, 714). Judge Terrell also testified that Officer O’Neal’s notes would have and should have led to further investigation in an attempt to corroborate Mr. Sumler’s statements (T. 164-5, 246).

> Q. Now, if you had received this note prior to the trial in Mr. Saylor’s case, would it have led you to any further investigation?
>
> A. I would expect so.
>
> Q. And what type of investigation would that be, sir?
>
> A. Well, finding out who the individual was who had a statement from Mr. Lewis saying that his partner, allegedly not Melton, had shot the cabbie, meaning Mr. Saylor, at the minimum.
>
> Q. And if you would have known that the individual who made that statement was incarcerated with Mr. Lewis at the Escambia County Jail when the statement was made, would you have considered that fact in forming your investigation?
>
> A. I should.
>
> Q. And if you would have received that note, would you have attempted to interview Mr. -- the individual who wrote that?
>
> A. If I had the note, certainly, and if I knew

who the individual was, yes.

Q. And would you have began an investigation to attempt to corroborate this individual's statement?

A. I should have.

Q. If you would have had it, sir, would you have?

A. I would think with this information, yes.

(T. 164-5). Judge Terrell testified that whether he had seen Officer O'Neal's notes or not, he should have attempted to find David Sumler and interview him (T. 265-6).

Additionally, testimony from two former cellmates of Ben Lewis would have impeached the trial testimony of Mr. Lewis regarding the Carter homicide and would have supported Mr. Melton's testimony. Ben Lewis told Mr. Sinkfield that he got into a struggle with the owner, that Mr. Melton ran over to help and that's when the gun went off and killed the victim (T. 456). Ben Lewis told Fred Harris that he, Mr. Melton and the victim were wrestling, the gun went off, and the owner was shot (T. 635).

The defense's theory at trial was predicated upon the argument that George Carter was shot accidentally during a struggle. The State's main witness, Ben Lewis, described a different sequence of events:

Q. At this point did Mr. Carter make any resistance,

done anything at all to thwart y'all or try to hinder you or he cooperated fully?

A. Yeah, he cooperated.

Q. What was he saying?

A. He wasn't saying nothing.

Q. Was there -- Did you see a fight or a scuffle or anything between Mr. Melton and Mr. Carter?

A. No, sir.

Q. Did Mr. Carter do anything that you saw or say anything aggressive or in a fighting manner?

A. No, sir.

(R. 637).

Judge Terrell acknowledged the relevance of the information from Sinkfield and Harris:

Q. Now, if -- turning to Mr. Carter's case, do you recall where Mr. Lewis said he was when the shot that was fired that killed Mr. Carter -- what he testified to at the trial?

A. As I recall, he was in the back near the safe.

Q. And that was his trial testimony?

A. As I recall.

Q. And did you have any strategy as to -- during your examination of Mr. Lewis on the Carter as to trying to attack that testimony?

A. Yes.

Q. And what were you trying to do, sir?

A. From working with Mr. Melton, it was my understanding that they were all engaged in the struggle and that -- including Mr. Lewis and Mr. Melton and Mr. Carter, and that during the course of the struggle, a gun discharged resulting in Mr. Carter's death. And if they all three were involved in that kind of an altercation, that would once again hopefully satisfy the jury that this was not a premeditated murder but an accidental killing during the course of the robbery.

Q. And would that type of conclusion, in your opinion, would it have assisted the jury in making a penalty phase determination also?

A. It would certainly be presented in that context.

Q. As to relative culpability?

A. Yes.

Q. So --

A. And aggravation of how -- whether or not this was a decision to take a human being's life, which is understandably more serious and worthy of, you know, arguably greater punishment. And when I use the accident, I'm using that in the argumentative context, not that necessarily it would be an accident, since introducing a gun into a robbery is itself a very foolish thing. Committing a robbery is a crime. But that it would certainly arguably give me something to present that would reduce culpability and hopefully reduce the potential for the imposition of the death penalty.

Q. With that strategy in mind, if there had been -- if you had the testimony of an inmate from the Escambia County Jail where Mr. Lewis had stated to them that in fact all three of them were struggling -- Mr. Carter, Mr. Lewis, and Mr. Melton -- when the gun discharged, and that Mr. Lewis had made this statement, would you have presented that testimony? Would you have presented it?

A. Yes.

Q. Now, also in keeping with the penalty phase in Mr. Carter's case, in fact, did you call Mr. Jenkins during the penalty phase?

A. Yes.

Q. And do you recall what reason was -- what the reason was for that?

A. Once again, to bring to the jury's attention the point that there was a potential benefit for Mr. Lewis to place responsibility solely on Mr. Melton and to hopefully convince the jury on a proportionality concept that Mr. Lewis, although arguably equally involved, was likely going to receive a substantially reduced amount of punishment that should be waived by them in deciding whether or not Mr. Melton deserved the ultimate punishment.

Q. And in pursuing that strategy with presenting Mr. Jenkins' testimony, would it have been helpful to you to be able to present the information that he had suggested to Mr. Lewis?

A. Yes.

Q. That he developed further evidence against Mr. Melton?

A. Yes.

Q. And that -- would you have presented that type of testimony if you would have had it during the penalty phase?

A. Yes.

(T. 170-3).[56] Judge Terrell again conceded that he had no

[56]At no time during Mr. Jenkins' deposition or testimony did

strategic reason for not putting forth any of the aforementioned evidence:

> Q. (By Mr. Strand) I guess, finally, I don't know if I asked the question in the appropriate form, but before I had indicated that there were -- and I guess I'll have to ask the question in two parts. If at the time of trial you would have had individuals available to testify that while Mr. Bendleon Lewis was in the jail that he stated that he was going to tell his attorney and law enforcement that Mr. Melton was involved in the taxicab case and he was going to do that in order to attempt to gain favorable treatment on his pawn shop case, would you have had a tactical or strategic reason for not presenting that evidence?
>
> A. I can't think of any.
>
> Q. If you had had testimony available to you from individuals who were willing to testify that Mr. Lewis stated in the jail that in fact he was struggling with Mr. Carter and had struck Mr. Carter when the gun went off and Mr. Carter was killed, would you have had a tactical or strategic reason for not presenting that evidence?
>
> A. Once again, I cannot think of any, considering the strategy that we had taken in the trial itself.
>
> Q. Are you saying that would have fit hand in glove with your strategy?

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trial counsel question Mr. Jenkins as to how his client came forward with the evidence against Mr. Melton in Mr. Saylor's case.

A. Exactly.

(T. 209-10).

With regard to the jailhouse testimony involving the Saylor case, the lower court stated:

> A large part of Defendant's attack on his death sentence in the pawn shop murder case centers around his contention that his conviction for the taxi cab murder is invalid. The Court agrees with the State that Defendant is not entitled to relief on his rule 3.850 motion attacking his taxi cab murder conviction, therefore, his primary attack on his death sentence is undermined. Accordingly, given the taxi cab murder stands, the prior violent felony aggravator is valid.
>
> Defendant suggests, however, that because hearsay testimony is admissible at the penalty phase, his NDE[57] inmate testimony would have been admissible at the penalty phase if it had been available at that time, and its introduction would have probably resulted in a different sentence. The shortcoming of this argument is that residual or lingering doubt is not a valid mitigator. See e.g. Darling v. State, 800 So. 2d 145, 162 (Fla. 2002)("We have repeatedly observed that residual doubt is not an appropriate mitigating circumstance.") If a defendant cannot argue lingering doubt about the crime for which he is being sentenced, he certainly cannot argue lingering doubt about a prior violent felony conviction. Thus, Defendant cannot demonstrate that any of his NDE about Lewis' alleged statements concerning the taxicab murder would be admissible at any sentencing hearing in the pawnshop murder case. Obviously, if it would not be admissible, it cannot warrant a resentencing.

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[57]Newly discovered evidence.

(T. 1961). The lower court's ruling, that the alleged statements concerning the taxicab murder would not be admissible, is erroneous.[58] Mr. Melton's argument is not based on lingering doubt, but rather that trial counsel failed to introduce evidence which would have neutralized, negated or rebutted a weighty aggravating factor. "[I]nvestigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Wiggins, 123 S.Ct. at 2527. (emphasis on original)(citations omitted). In a sentencing proceeding, "[t]he basic concerns of counsel during a capital sentencing proceeding are to **neutralize the aggravating factors advanced by the state**, and to present mitigating evidence." Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994), cert. denied, 115 S. Ct. 499 (1994)(emphasis added).[59]

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[58]The lower court failed to address this issue as an ineffective assistance of counsel claim. It only addressed it as a newly discovered evidence claim.

[59]Moreover, the State opened the door to such testimony in the penalty phase when Mr. Schiller testified that there was no evidence whatsoever that anyone other than the defendant was the triggerman (R. 939-40), and that no evidence had been developed that would justify the prosecution of Ben Lewis for robbery and

Recently, in Rompilla v. Beard, 2005 U.S. LEXIS 4846 (June 20, 2005), the United States Supreme Court found trial counsel ineffective for failing to review the circumstances of a prior violent felony conviction which the State was going to utilize as an aggravating circumstance. As the Court explained:

> Nor is there any merit to the United States's contention that further enquiry into the prior conviction file would have been fruitless because the sole reason the transcript was being introduced was to establish the aggravator that Rompilla had committed prior violent felonies. Brief for United States as *Amicus Curiae* 30. The Government maintains that because the transcript would incontrovertibly establish the fact that Rompilla had committed a violent felony, the defense could not have expected to rebut that aggravator through further investigation of the file. **That analysis ignores the fact that the sentencing jury was required to weigh aggravating factors against mitigating factors. We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest.**

Rompilla, 2005 U.S. LEXIS 4846 at 23, n5 (emphasis added).

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murder in the death of Ricky Saylor (R. 963).

Here, although trial counsel represented Mr. Melton on both this capital offense and Mr. Saylor's murder, trial counsel failed to present evidence to rebut or neutralize the aggravating conviction,[60] evidence that called into question the credibility of his codefendant, his role in the perpetration of these offenses, and his motivation in assisting the State to secure a death sentence for Antonio Melton. Had trial counsel interviewed the people who shared cells with Mr. Lewis, there is a reasonable probability that the outcome of the proceedings would have been different.

In conjunction with other evidence trial counsel failed to investigate, the aforementioned testimony would have gone far in rebutting the prior violent felony aggravator and guiding the jury in determining the appropriate weight to give the aggravator, in providing compelling nonstatutory mitigation, in illustrating the incongruity in the relative culpability of these young men, and in procuring a life sentence for Mr. Melton.

"Counsel's errors deprived [Mr. Melton] of a reliable penalty phase proceeding." Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995). Mr. Melton respectfully requests that this

[60]The only aggravators found by the Court in sentencing Mr. Melton to death were pecuniary gain and the prior violent felony.

Court reverse the lower court's order and order a new penalty phase.

ARGUMENT II

THE POSTCONVICTION COURT'S IMPROPER CONSIDERATION OF "LACK OF REMORSE" IN ITS ORDER DENYING RELIEF DEPRIVED MR. MELTON OF DUE PROCESS AND HIS RIGHT TO A FULL AND FAIR HEARING.

In concluding that Mr. Melton was not entitled to penalty phase relief, the postconviction court stated:

> In the penalty phase, the Defendant steadfastly denied his involvement in the Saylor murder. **It is this Court's belief that the steadfast denial of his involvement in the Saylor murder may have been one of the strongest condemning factors against him during the penalty phase. The complete denial of culpability must, of necessity, reflect a complete lack of remorse regarding the death of Ricky Saylor.** The judge and the jury had before it the overwhelming aggravating factor of the Defendant's murder of another human being prior to the murder of Mr. Carter. Defense counsel was at an overwhelming disadvantage and this Court finds that he presented the best evidence and argument that could be made for the benefit of the Defendant.

(PCR. 1976)(emphasis added). Because Mr. Melton refuses to admit culpability for a crime he has always maintained he did not commit, there was no possibility of the postconviction court granting him a fair hearing. Mr. Melton's proceedings did not occur before an impartial tribunal.

The lower court improperly considered a nonstatutory aggravating factor in denying relief. This Court has repeatedly

stated that lack of remorse is a nonstatutory aggravating circumstance and cannot be considered in a capital sentencing. See e.g., Shellito v. State, 701 So. 2d 837, 842 (Fla. 1997), Colina v. State, 570 So. 2d 929 (Fla. 1990), Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985), Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983).

The lower court's actions necessitate that a new hearing be conducted before an impartial tribunal. At the minimum, the lower court's findings should be given no consideration by this Court.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. MELTON'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE.

A. The Legal Standard

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.[61] 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

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[61]"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, 540 U.S. 668, 124 S. Ct. 1256, 1263, 157 L.Ed2d 1166 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."

782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988). As this Court has said:

> [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).

Id. at 1275.

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. Guzman v. State, 868 So. 2d 498 (Fla. 2003); Mordenti v. State, 894 So. 2d 161 (Fla. 2004). In Guzman, this Court explained, "[t]he State as beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Id. at 507. 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.[62] 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

[62]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 (Fla. 1993).

deliberate deception of court and jury'").[63]

B. Failure to Disclose Favorable Information

S-Ex.1 is a set of notes by Officer O'Neal (T. 51, PCR. 1560-65). These are notes that he made during interviews at the jail and with Ben Lewis (T. 51).

After receiving information that Mr. Lewis was making comments about the pawnshop murder and also a murder involving a cabdriver (T. 49), Officer O'Neal interviewed Bruce Frazier "and a subject that was originally identified as a Summerlin, later confirmed to be a Sumler." (T. 49).[64] With regard to Summerlin, no recorded statement was taken, but the Officer did take notes (T. 51).[65] According to the notes, Lewis told Summerlin that his

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

[64]During the evidentiary hearing, Officer O'Neal testified that he was accompanied by Don West from FDLE, as he had been first contacted by the aforementioned people (T. 50).

[65]The interview was on February 25, 1991 (T. 53).

partner had shot the cab driver and that Lewis had admitted being there (T. 51-2). The word “Melton” was scratched out from the notes and replaced by “partner”:

> Q. Okay. Now in your notes there, you have the word, looks like, Melton scratched out and the word partner wrote in there.
>
> A. Yes, sir.
>
> Q. Do you recall why that happened or how that happened?
>
> A. Because I was thinking his partner being Melton but Summerlin did not specifically say Melton, so I took it out.
>
> Q. Okay. Did he use the word partner?
>
> A. Yes, sir.

(T. 52).

Officer O’Neal was of the opinion that during his deposition, Judge Terrell had copies of his notes, which comprise S-Ex. 1 (T. 61-2). He recalled seeing Mr. Schiller handing copies of the notes to Judge Terrell during the deposition (T. 75). However, Officer O’Neal did not know if the document with Mr. Melton’s name scratched out was in the packet of notes handed to Judge Terrell (T. 76).

Judge Terrell believed that he first saw page one of S-Ex. 1 on the day prior to his testimony at the evidentiary hearing (T. 161, 163). On cross-examination, after further review of

the O'Neal deposition, Judge Terrell conceded that it appears that he had seen the notes and was aware of Mr. Summerlin (T. 225). Ultimately, in reading back the deposition transcript, Judge Terrell believed that Officer O'Neal disclosed the content of these notes but did not provide the notes themselves (T. 265).[66]

In its order denying relief on the Saylor 3.850 motion, the trial court stated that, "In regards to subclaim 1(a), said claim is without merit because the evidentiary hearing demonstrates that trial defense counsel knew the names in question through the deposition of Officer O'Neal." (PCR. 2000).[67]

First, truthful testimony by Officer O'Neal would have apprised counsel of the true nature of Mr. Sumler's statement.[68] During a conversation, Mr. Lewis told Mr. Sumler that he and Tony Houston shot a taxi driver and that Mr. Melton wasn't there

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[66]Judge Terrell did not recall seeing the note in his files on the Melton cases (T. 163-4).

[67]Counsel refers to the order in the noncapital case because the lower court failed to address this issue in its order denying relief in this case.

[68]A State Attorney's pre-trial "to-do" list indicates the importance of this information, with one item reading, "locate Summerlin." (T. 114).

at the time (T. 420).[69] According to Mr. Sumler, Mr. Lewis was bragging in the cell, which contained 24 other inmates (T. 435). Everyone in the cell knew what Mr. Lewis was doing (T. 433). Mr. Sumler related the same information to law enforcement when they came to see him (T. 430).[70]

The Brady violation here is not simply that the physical notes were not turned over to trial counsel. The violation includes the fact that crucial exculpatory information was not turned over to trial counsel, information that could not be gleaned from Officer O'Neal's notes, reports, or deposition. The State never told Mr. Melton or his counsel that Lewis admitted to Sumler that Mr. Melton was not involved in Mr. Saylor's murder, a crime for which the State subsequently convicted Mr. Melton and Lewis was never charged.

There is nothing in the notes, Officer O'Neal's deposition or any report to indicate that David Sumler ever affirmatively told any law enforcement officer that Ben Lewis said Mr. Melton was not involved with Mr. Saylor's murder. The prosecution conceded in questioning trial counsel during the evidentiary

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[69]Mr. Lewis did not specifically say who shot the taxicab driver, only that Mr. Melton was not there and he and Mr. Houston were (T. 435).

[70]This testimony explains why Officer O'Neal scratched out

hearing that trial counsel had no information prior to Mr. Melton's trials that anyone ever said Mr. Melton didn't shoot the cab driver (T. 721). Trial counsel did not have this crucial information, but the State did. Even inmate David Sumler testified that he thought the information he was giving to law enforcement would be in some way presented to help Mr. Melton (T. 439).

Secondly, Officer O'Neal mentioned the name David Summerlin in the deposition, not David Sumler. While Officer O'Neal testified at the evidentiary hearing that the name was later confirmed as Sumler (T. at 49), this information was never relayed to trial counsel at any time subsequent to the deposition. The State's use of an incorrect name would have stunted any investigation by trial counsel.[71] Moreover, Officer O'Neal failed to reveal that Don West was present for this statement by Sumler. As such, trial counsel would have been unaware that he could have questioned Mr. West about the validity of the name or the statement.[72]

"Melton" and replaced it with "partner" in his notes.

[71]The State conceded in its questioning of trial counsel that "it would have been a futile effort [to try to locate David Summerlin] because there was no David Summerlin in the county jail." (T. 720).

[72]Don West was not listed as a witness in this case.

In addition, in Officer O'Neal's notes, Lewis told Mr. Sumler that he "was going to talk to [law enforcement] if not freed on pawn killing." (PCR. 269.) Trial counsel testified that he would have used that information to demonstrate that Lewis had fabricated information and, particularly because this statement was made prior to Mr. Melton's arrest for Mr. Saylor's murder, that Mr. Melton was not involved in Mr. Saylor's death as Lewis says in his later statements (PCR. 162-3).

The State, inadvertently or otherwise, withheld information about Mr. Sumler's statements. The prejudice to Mr. Melton resulting from the non-disclosure is obvious. Trial counsel would have impeached the credibility of Mr. Lewis during the trial and would have effectively neutralized the aggravating factor of a prior violent felony during the penalty phase (See Argument I). Moreover, had trial counsel interviewed Sumler, he would have known that Mr. Lewis was talking to everyone in the cell. As counsel testified, this would have led him to interview other cellmates who had also been privy to statements by Lewis.

The State also failed to disclose evidence of negotiations and anticipated deals with Mr. Melton's co-defendants, evidence which would have been invaluable in impeaching them. Officer

O'Neal's April 9, 1991, report indicates that the State contacted Mr. Lewis after hearing that he was talking in the jail about another murder:

> Shortly thereafter, information was received from inmates within the Escambia County Jail that Bendleon Lewis was making comments and had spoken about not only the Carter Pawn Shop murder, but about a murder involving a cab driver also. After being contacted by inmates within the Jail, I contacted Assistant State Attorney Mike Patterson and spoke with him about the information that I had received. Through Mike Patterson, and later, Assistant State Attorney John Spencer, Bendleon Lewis' court appointed attorney, James Jenkins was contacted and a subpoena was issued to Bendleon Lewis on 3/15/91 and with his attorney present, Lewis gave information on this crime.

(D-Ex. 13, PCR. 1733.) In fact, James Jenkins' billing statements indicate that he contacted Officer O'Neal and the State Attorney's Office about interviewing his client. Mr. Jenkins' testified at the evidentiary hearing that he told his client that his cooperation on the pawn case alone would not be sufficient, and that he encouraged Mr. Lewis to divulge any information about other crimes (T. 283, 285, 287-8). Lewis supplied that information at their next meeting, and Mr. Jenkins approached the State with the information in the hopes of garnering favorable treatment for his client (T. 287-8).

From the time he was first appointed on February 5, 1991, to the time of the State interview with his client on March 15,

1991, Mr. Jenkins had contact with Officer O'Neal and/or the State Attorneys Office multiple times: On February 14, 1991, a phone conference with the State Attorney's Office for fifteen minutes; on February 25, 1991, phone calls to Tom O'Neal, Mike Patterson and John Spencer, for a total of forty-five minutes; on February 26, 1991, a phone call to Mike Patterson and a phone call from Tom O'Neal for a total of thirty minutes; on February 27, 1991, a phone call to Tom O'Neal for fifteen minutes; on February 28, 1991, a phone conference with Mike Patterson and a phone call to Tom O'Neal for a total of fifteen minutes; on March 1, 1991, phone conferences with Mike Patterson, John Spencer and Tom O'Neal for a total of one hour and thirty minutes; on March 5, 1991, phone calls to John Spencer and Tom O'Neal, and a phone call from Tome O'Neal for a total of thirty minutes; on March 6, 1991, a phone call to John Spencer and a meeting with John Spencer for a total of thirty minutes; on March 12, 1991, a phone call from Tom O'Neal for six minutes; and on March 14, 1991, a phone call from Tom O'Neal for less than twelve minutes (PCR. 1713-15).

The lower court denied relief on this issue, stating:

> Defendant makes a salient point in his argument that attorney Jim Jenkins initiated calls to the State Attorney's Office on behalf of his client Mr. Lewis. This Court finds that it is not that significant who contacted who first; obviously, there were discussions

> about Lewis testifying in exchange for a benefit and he had the fervent desire to do so. However, Defendant's trial counsel was aware that there had been discussions and that Lewis had no deal, but did have an expectation of a benefit in exchange for his testimony. Trial defense counsel examined Lewis about these matters on direct examination in the taxi driver case (NC 505), and examined Lewis' counsel on direct examination at the penalty phase of the pawn shop case (CC 977-987).

(PCR. 1959)(citation omitted). Contrary to the lower court's order, it is very significant that Mr. Lewis' attorney initiated this process. The court, in its order, ignores the extent of the contact between the parties and the facts underlying how and when Mr. Lewis pointed the finger at Melton for the Saylor murder.

Judge Terrell called Mr. Jenkins to testify during the penalty phase (T. 172). Judge Terrell wanted to bring to the jury's attention the benefit for Mr. Lewis to place responsibility solely on Mr. Melton and to argue proportionality (T. 172). It would have been helpful to present the information that Mr. Jenkins had suggested to Mr. Lewis (T. 173).[73] Further, Judge Terrell testified that had he known about all the conversations Jenkins had with Tom O'Neal, Mr. Spencer and Mike

[73]If trial counsel had known that Mr. Jenkins suggested that Lewis come forward with additional information to try to gain favorable treatment, trial counsel would have presented it (T. 165).

Patterson prior to his statement implicating Melton, he likely would have wanted to bring forward this information to the jury.

Q. (By Mr. Strand) Now, you had indicated that you had put Mr. Jenkins on in the trial in Mr. Saylor's case and also in the penalty phase, the Carter case, and you indicated what your strategy was. If you had known that Mr. Jenkins had had telephone conversations and meetings with Tom O'Neal beginning February 25th, 1991, I guess -- we have conversations on February 25th, 26th, 27th, 28th, March 1st, March 5th, March 12th, March 14th, and March 15th --all of those dates conversations Mr. Jenkins had had with Thomas O'Neal, would you have presented that information to the jury?

A. If I understood it to be about this case or these cases, I should have.

Q. And particularly the understanding that Mr. Lewis never gave his statement implicating Mr. Melton until March 19th?

A. Exactly.

Q. Now, if you would have known that Mr. Jenkins had conversations with John Spencer, Mike Patterson on February 25th, with Mike Patterson on February 26th, with John Spencer, Mike Patterson on March 1st, with John Spencer on March 5th, with John Spencer on March 6th, all of these conversations prior to Mr. Lewis giving a statement implicating Mr. Melton in the -- Mr. Saylor's murder, would you have wanted that information to be brought forward to the jury?

A. Likely so.

Q. And what would be the reason that you would have wanted the information relative to the conversations that Mr. Jenkins with Mr. O'Neal and Mr. Spencer and Mr. Patterson, why would you have wanted the jury to know about those conversations, at least that they had happened?

> A. If it could establish that there were ongoing discussions that could suggest that Mr. Lewis was at risk of serious punishment and might benefit from cooperating with the State; if there was a total lack of information about Mr. Saylor's death and any alleged involvement of Mr. Melton in that incident; or any other factor that might establish a motivation for Mr. Lewis to falsely accuse Mr. Melton, those, I think, would all be serious matters that should have been presented to the trier of fact if they could be established.

(T. 180-81).

Trial counsel, Judge Terrell, testified that there was nothing in the report to give him any indication that Lewis approached the State to provide information to gain favorable treatment, nor was there any such indication in Officer O'Neal's deposition (T. 691, 694). Trial counsel also testified that he relied upon Officer O'Neal's report and deposition in preparing his trial strategy for both trials, and in preparing for the deposition of James Jenkins (T. 695, 697). If either the report or deposition had indicated Lewis, through Mr. Jenkins, had approached the State to gain favorable treatment, trial counsel would and should have questioned Mr. Jenkins about it, and he would have further questioned Officer O'Neal (T. 698).

Mr. Houston's trial attorney, James Johnson, was also trying to secure favorable treatment for his client. In fact, trial counsel was given a copy of a proposed plea agreement with

Mr. Houston (T. 207). This plea agreement was typed and bears the date of August 28, 1991 (D-Ex. 5, PCR. 1701). However, Mr. Houston did not execute the agreement on that day, but instead waited until October 9, 1991, after he testified against Mr. Melton in the Saylor trial (D-Ex. 5, PCR. 1701). Houston did sign a Waiver of Speedy Trial on August 28, 1991, as did Mr. Schiller (D-Ex. 4, PCR. 1698). Mr. Schiller testified that he signed the waiver to make sure Houston signed it, and that they needed Mr. Houston to waive speedy trial for him to testify against Mr. Melton (T. 129, 130). Mr. Schiller also said it was difficult dealing with Mr. Johnson, that Houston refused to sign the plea agreement, and that Mr. Johnson said his client would testify without the plea agreement (T. 131).

Trial counsel testified that it was unusual for an Assistant State Attorney to affix his signature to a speedy trial waiver, and in fact he could not recall that ever being done in any of his cases during his 15 years at the Public Defender’s Office (T. 200-201). Trial counsel had no recollection of being present for Mr. Houston’s Waiver of Speedy Trial. However, during the Saylor trial, Melton’s trial counsel advised Judge Geeker, “Judge, I was in front of Judge Tarbuck on this last docket day, and [Houston] went in and he and Schiller

and Johnston went in the back and discussed all this and he did not plea at that time." (T. 268-269, R. 426-427).

Contrary to the court's finding,[74] the evidence demonstrates that there was an agreement, that it is clear that by signing the waiver of speedy trial Houston was giving at least part performance on the plea agreement. Mr. Spencer testified that by the very language of the plea agreement, executing a Waiver of Speedy Trial was a condition of the plea (T. 357). It is equally clear that Mr. Houston would not have testified against Mr. Melton and implicated himself if he did not expect a benefit in return. As Mr. Schiller said, Houston was represented by "an experienced trial lawyer." (T. 133). Certainly an experienced trial lawyer would not have his client testify against a co-defendant unless he knew there was a plea offer, a sure thing, waiting as soon as his client stepped off the stand. Whether the cause was State action or simply the contrariness of an experienced defense attorney, whether or not there was technically or legally a deal when Houston took the stand, the end result is the same. Tony Houston testified against Antonio Melton, fully expecting to get a reduced sentence in exchange

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[74]In denying this issue, the lower court found that this was not material, because "[a]lthough there was no finalized deal, the fact that Houston hoped for a benefit from his testimony was

for his testimony, and the jury never knew of the full extent of his expectations, only generally, and thus his motive to lie.

Again, the prejudice to Mr. Melton is clear. Had the jury known the true extent of both co-defendants' negotiations with the State, of Mr. Lewis' machinations and demonstrated ability and motive to lie, the testimony of the State's star witness against Mr. Melton would have been exposed as a self-serving fraud upon the Court and jury.

If the State possessed exculpatory information and it did not disclose this information, a new trial is warranted where the non-disclosure undermines confidence in the outcome of the trial. In making this determination "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So.2d at 385.[75] This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446.

Without this information, trial counsel was seriously

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something he expressly admitted." (PCR. 1958).

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

"handicapped" in his representation of Mr. Melton. Rogers, 782 So.2d at 385. Furthermore, 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. Here, confidence in the reliability of the conviction and sentence is undermined.

C. Uncorrected False and/or Misleading Testimony

During Mr. Melton's trial proceedings, the State knowingly presented false or at least misleading arguments. During closing arguments at the guilt phase, the State argued:

> MR. SCHILLER: Thank you, Judge. **Mr. Lewis was subpoenaed here yesterday. In other words, he didn't come voluntarily to the proceedings.** You can see he was in custody anyway, but he was subpoenaed here. And under the law, if the State Attorney's Office, of course, that being Mr. Spencer and I in this case, subpoena a witness **so he's compelled to give testimony under oath** about the criminal conduct of his–his statement given at the time has what we'd call use immunity, that statement cannot be used against him. And the defense raised this issue yesterday and I want to be sure it's clear, Ben Lewis does not have immunity for this crime. He's under prosecution. The actual things he said yesterday cannot be used against him is all in that statement and he's here under subpoena.

(R. 795)(emphasis added). Here, the State misrepresents the degree of coercion it had exerted on Mr. Lewis when it stated

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2000); Way v. State, 760 So.2d 903 (Fla. 2000).

that Mr. Lewis didn't come voluntarily. In fact, it was Ben Lewis through his attorney who engineered the deal and volunteered information. Contrary to the State's assertion, Mr. Lewis was a voluntary and willing participant.

Later, the State presented an argument that goes beyond misrepresentation:

> Also as shown there's no deals for Mr. Lewis. Mr. Spencer very carefully developed the evidence and showed y'all that there's been no promises made to Lewis, there's no special deals, **no plea negotiations** with him. He stands on his own in this case.

(R. 795-796)(emphasis added). There should be no dispute that there were plea negotiations in this case. Jim Jenkins' testimony and bill accurately disputes this statement. Here, the State clearly violated the dictates of Giglio and Gray.

Another example of false and misleading testimony occurred during the pretrial deposition of Officer O'Neal (S-Ex. 2, PCR. 1614). As argued above, Officer O'Neal failed to reveal a complete and accurate depiction of his conversation with David Sumler, he provided the defense with an incorrect last name of Sumler, and he failed to reveal that Don West was present for this interview.

The State knowingly presented a false argument during the penalty phase when Mr. Schiller testified that there was no

evidence whatsoever that anyone other than Antonio Melton was the triggerman (in the Saylor case) (R. 939-40). This statement is contrary to the fact that David Sumler had told them Lewis said Mr. Melton wasn't even there. For the State to represent to the jury that there was no evidence at all that anyone other than Antonio Melton shot Ricky Saylor, when David Sumler had told them Lewis said Mr. Melton wasn't even there, is simply untrue.

D. Cumulative Consideration

Mr. Melton's counsel was affirmatively misled by the false and/or misleading testimony given in deposition and at trial. When the State failed to correct the testimony, defense counsel had every reason to believe that the State was in compliance with its constitutional obligations. Strickler v. Greene, 527 U.S. 263, 281 (1999). "The State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless error beyond a reasonable doubt." Guzman v. State, 868 So. 2d 498 (Fla. 2003). Otherwise, a new trial is required.

The United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles

v. Whitley, 514 U.S. at 436; Young v. State, 739 So.2d at 559.[76] In Lightbourne v. State, 742 So. 238 (Fla. 1999), this Court, in explaining the analysis to be used when evaluating a successive motion for postconviction relief, reiterated the need for a cumulative analysis:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision**.
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was

[76] This Court has also held that cumulative consideration must be given to evidence that trial counsel unreasonably failed to discover and present at the capital trial. Lightbourne v. State, 742 So. 238 (Fla. 1999). Thus, this argument must be evaluated cumulatively with Arguments I and III.

> introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995)**.

Lightbourne, 742 So. 2d at 247-248(emphasis added)(citations omitted).

Clearly, a cumulative analysis of all of the withheld evidence undermines confidence in the outcome of the trial and requires that this Court grant a new trial. Justice demands that Mr. Melton receive a new trial. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Huggins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001).

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. MELTON'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS ALSO RENDERED INEFFECTIVE BY ACTIONS OF THE PROSECUTION.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States 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.

466 U.S. 668, 685 (1984). 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. Accordingly, defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where defense counsel fails in his obligations and renders deficient performance, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).[76]

Mr. Melton has raised several issues as violating Brady and Giglio, and as constituting newly discovered evidence. Should this Court find that any or all of the documents and information in the State's possession were disclosed or available to Mr. Melton's trial counsel, trial counsel's performance in not using and presenting this information contained therein to Mr. Melton's jury was deficient. Smith v. Wainwright, 799 F.2d 1442

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[76] Various types of state interference with counsel's performance may also violate the Sixth Amendment and give rise to a presumption of prejudice. Strickland, 466 U.S. at 686, 692. See United States v. Cronic, 466 U.S. 648, 659-660 (1984).

(11th Cir. 1986).

Testimony from the evidentiary hearing would have impeached the trial testimony of Mr. Lewis regarding the Carter homicide and would have supported Mr. Melton's trial testimony. Ben Lewis told Mr. Sinkfield that he got into a struggle with the owner, that Mr. Melton ran over to help and that's when the gun went off and killed the victim (T. 456). Ben Lewis told Fred Harris that he, Mr. Melton and the victim were wrestling, the gun went off, and the owner was shot (T. 635).

The defense's theory at trial was predicated upon the argument that George Carter was shot accidentally during a struggle. The State's main witness, Ben Lewis, described a different sequence of events:

> Q. At this point did Mr. Carter make any resistance, done anything at all to thwart y'all or try to hinder you or he cooperated fully?
>
> A. Yeah, he cooperated.
>
> Q. What was he saying?
>
> A. He wasn't saying nothing.
>
> Q. Was there -- Did you see a fight or a scuffle or anything between Mr. Melton and Mr. Carter?
>
> A. No, sir.
>
> Q. Did Mr. Carter do anything that you saw or say anything aggressive or in a fighting manner?

A. No, sir.

(R. 637).

Judge Terrell acknowledged the relevance of this information:

> Q. Now, if -- turning to Mr. Carter's case, do you recall where Mr. Lewis said he was when the shot that was fired that killed Mr. Carter -- what he testified to at the trial?
>
> A. As I recall, he was in the back near the safe.
>
> Q. And that was his trial testimony?
>
> A. As I recall.
>
> Q. And did you have any strategy as to -- during your examination of Mr. Lewis on the Carter as to trying to attack that testimony?
>
> A. Yes.
> Q. And what were you trying to do, sir?
>
> A. From working with Mr. Melton, it was my understanding that they were all engaged in the struggle and that -- including Mr. Lewis and Mr. Melton and Mr. Carter, and that during the course of the struggle, a gun discharged resulting in Mr. Carter's death. And if they all three were involved in that kind of an altercation, that would once again hopefully satisfy the jury that this was not a premeditated murder but an accidental killing during the course of the robbery.

(T. 170-1).

Judge Terrell conceded that he had no strategic reason for not putting forth this evidence:

> Q. If you had had testimony available to you

> from individuals who were willing to testify that Mr. Lewis stated in the jail that in fact he was struggling with Mr. Carter and had struck Mr. Carter when the gun went off and Mr. Carter was killed, would you have had a tactical or strategic reason for not presenting that evidence?
>
> A. Once again, I cannot think of any, considering the strategy that we had taken in the trial itself.
>
> Q. Are you saying that would have fit hand in glove with your strategy?
>
> A. Exactly.

(T. 209-10). Trial counsel acknowledged that he should have interviewed the jailhouse cellmates (T. 244). Trial counsel's deficient performance prejudiced Mr. Melton.

Counsel was ineffective in failing to adequately investigate the true nature and extent of Mr. Lewis' negotiations with the State. If either Officer O'Neal's report or deposition had indicated Lewis, through Mr. Jenkins, had approached the State to gain favorable treatment, trial counsel would and should have questioned Mr. Jenkins about it, and he would have further questioned Officer O'Neal (T. 698). Further, if he had known that Mr. Jenkins suggested that Lewis come forward with additional information to try to gain favorable treatment, trial counsel would have presented it (T. 165). Judge Terrell testified that had he known about all the

conversations Jenkins had with Tom O'Neal, Mr. Spencer and Mike Patterson prior to his statement implicating Melton, he likely would have wanted to bring forward this information to the jury (T. 180-1).

To the extent trial counsel should have been aware of this information, counsel was ineffective. The machinations which took place prior were powerful evidence which the jury could have considered in determining whether the state's offer to Mr. Lewis was so enticing he would be willing to lie to reap the benefits. A thorough investigation of the deals and offers were of the utmost importance in this case.

In its order denying relief, the lower court stated:

> Applying the foregoing ineffective assistance of counsel analysis here and having fully considered Defendant's First and Second Amended Rule 3.850 Motions and the evidence (including the sworn testimony of TDC) and argument at the evidentiary hearing, this Court finds that Defendant has failed to prove the two elements for IAC under Strickland on **claims 3 and 6 related to the guilt phase.** Further, this Court finds that TDC was justified in his actions (to include his trial strategy and tactics) in the guilt phase. Accordingly, this Court concludes that TDC was not ineffective in the guilt phase and, therefore, claims 3 and 6 are denied to the extent that they relate to the guilt phase.

(T. 1964)(emphasis in original).

In stating that Judge Terrell "was justified in his actions (to include his trial strategy and tactics) in the guilt phase,"

the lower court ignored that Judge Terrell conceded that these are things he should have done, and he had no strategic reason for not doing so.

Counsel was ineffective in failing to adequately investigate and discover the wealth of information proving that Mr. Lewis was offered a deal as payment for testifying in a manner which supported the State's guilt phase case. Although Mr. Lewis testified he had no deal, he ended up serving only ten years in prison for his involvement in two robberies where the victim was killed.

Although the facts underlying Mr. Melton's claims are raised under alternative legal theories -- i.e., Brady, Giglio, newly discovered evidence and ineffective assistance of counsel -- the cumulative effect of those facts in light of the record as a whole must nevertheless be assessed. As with Brady error, 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. Melton's jury, either because the State failed to disclose, because trial counsel failed to discover, or because this evidence is newly discovered, confidence in the reliability of

the outcome is undermined.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. MELTON'S NEWLY DISCOVERED EVIDENCE CLAIM. MR. MELTON'S CONVICTION AND SENTENCE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. ALTERNATIVELY, TO THE EXTENT THAT TRIAL COUNSEL FAILED TO DISCOVER THIS EVIDENCE, TRIAL COUNSEL WAS INEFFECTIVE.

Newly discovered evidence warrants a new trial where it establishes that had the jury known of the new evidence it probably would have returned a life sentence. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). The new Jones evidence must be evaluated cumulatively with the Brady evidence and the evidence that counsel failed to discover. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); State v. Gunsby, 670 So.2d 920 (Fla. 1996).

In Mr. Melton's case, a different result would probably be produced. As discussed earlier, six former Escambia County jail inmates testified that Mr. Lewis confessed to them that he had lied or was going to lie about his involvement and/or Mr. Melton's involvement in the Saylor and Carter killings. Five of these people testified that Lewis told them Mr. Melton wasn't even present when Mr. Saylor was killed, and Lewis admitted to two of these men that he, Ben Lewis, had personally murdered

Ricky Saylor. Had a jury heard this testimony there can be no doubt that Mr. Melton would have received a life sentence in the penalty phase.[77]

Moreover, two of the inmates, Sinkfield and Harris, testified that Ben Lewis told them that he, Mr. Melton and the victim were involved in a struggle when the gun went off, killing Mr. Carter (T. 456, 635).

With regard to Sinkfield and Harris, in denying this claim, the lower court indicated that since Mr. Melton testified he was the shooter, the jury would not have found them credible, and therefore the jury would not credit their testimony that there was a struggle (PCR. 1961-2).

Mr. Melton's testimony at trial that there was a struggle is consistent with the testimony of Sinkfield and Harris. The lower court essentially finds that because not all of Mr. Lewis' confession was consistent with what came out at trial, then the jury would not have believed the witnesses. The lower court ignores the more likely probability that Mr. Lewis was a liar, was not credible in his testimony, and that his testimony should have been rejected. Sinkfield and Harris were stating what they were told. They were not the ones making up stories and

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[77]The lower court's finding that this testimony would not

negotiating deals. They had nothing to gain from their testimony, unlike Mr. Lewis. This information would have given Judge Terrell something to present that would reduce culpability (T. 172).

Additionally, newly discovered evidence established that after Mr. Melton was convicted and sentenced in both the Saylor and Carter cases, Mr. Lewis gave a statement to the Department of Corrections that was inconsistent with his testimony against Mr. Melton at the Carter trial and closer to Mr. Melton's version of events.[78] In Lewis' postsentence investigation report, it is stated that:

> After Mr. Carter opened the safe he **apparently began struggling with Melton. Melton and Lewis then struck the victim, knocking him to the floor.** Lewis was placing cash and jewelry in a bag when Melton fired his weapon, striking Mr. Carter in his head, the bullet exiting under his chin.

(D-Ex. 7, PCR. 1706-7)(emphasis added). During the trial, Lewis

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have been admissible is erroneous (See Argument I).

[78]The report was prepared on July 21, 1992. There is no reference to when the information in the report was gathered.

testified that there was never a struggle between Mr. Carter and Mr. Melton, that Mr. Carter always cooperated, and Lewis denied ever striking Mr. Carter (R. 637, 652, 653).

Judge Terrell testified that he first saw Lewis' post-sentence investigation report on February 12, 2002, the day before his testimony at the evidentiary hearing (T. 177). The statement contained in this report is not only inconsistent with Lewis' sworn testimony but also arguably corroborative of Lewis' inculpatory statements to his cellmates and of Mr. Melton's own statements (T. 178-9).

With regard to the post-sentence investigation report, the lower court found that it would be inadmissible and hearsay, that it was prepared by a Corrections Officer, and that it "is a rather large leap to assume that this information came from Lewis." (PCR. 1962).

The lower court ignores the fact that either Lewis was the source of the information, or the Corrections Probation Officer had to get the information from another State agent. Either Lewis made a contradictory statement to the probation officer, or the State had information from some other source contradicting his testimony. Either way, this information was pertinent to Mr. Melton's case.

Here, the new evidence both impeaches Lewis' trial testimony and reduces Mr. Melton's culpability. 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. Melton's penalty phase. The jury probably would have returned a life sentence had it known of the wealth of exculpatory evidence. Mr. Melton is entitled to relief.

ARGUMENT VI

AN INVALID PRIOR CONVICTION WAS INTRODUCED INTO EVIDENCE AT MR. MELTON'S PENALTY PHASE PROCEEDINGS TO ESTABLISH THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE IN VIOLATION OF JOHNSON V. MISSISSIPPI, 486 U.S. 578 (1988).

Mr. Melton's death sentence was rendered in violation of his right to a rational, reliable and fundamentally fair determination of penalty. The trial court sentenced Mr. Melton to death based on a constitutionally invalid and factually false prior conviction, the Saylor murder.

At the time of Mr. Melton's jury trial on his underlying murder conviction, Mr. Melton's rights were violated because the State withheld evidence which was material and exculpatory in nature, critical evidence was not presented to the jury, and the State knowingly allowed the jury to hear false evidence in its

place. Mr. Melton's attorney in the prior conviction rendered ineffective assistance of counsel, thus violating the Sixth, Eighth and Fourteenth amendments to the United States Constitution. Additionally, newly discovered evidence establishes Mr. Melton's innocence of the underlying felony.

Mr. Melton is presently appealing the denial of postconviction relief regarding the Saylor case to the First District Court of Appeal. Should he obtain relief there, he will petition this Court for relief of his conviction and sentence.

ARGUMENT VII

THE PROSECUTORS' MISCONDUCT DURING THE COURSE OF MR. MELTON'S CASE RENDERED MR. MELTON'S CONVICTION AND SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE STATE ENCOURAGED AND PRESENTED MISLEADING EVIDENCE AND IMPROPER ARGUMENT TO THE JURY. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

Unchallenged prosecutorial argument during Mr. Melton's trial violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The prosecutor's arguments were fraught with improper and misleading comments. Defense counsel's failure to object to these comments constituted ineffective assistance of counsel. No reasonable tactic exists

for this failure.[79]

Closing argument "must not be used to inflame the minds and passions of the jurors so that [the] verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). On more than one occasion during closing arguments, the State fostered sympathy for the victim. The prosecutor described the circumstances of the crime such that it appealed to the jury's sympathy, bias, passion, and prejudice: The victim was "needlessly beaten on or about the face" (R. 785); "savagely beaten . . . about the face" (R. 792); "beat . . . on and about the face" (R. 793).

The prosecutor also made an impermissible "golden rule" argument when he described the victim's death, "He executes Mr. Carter while Mr. Carter is on his knees pleading, please don't shoot me. He executes Mr. Carter summarily at point blank, gunshot wound to the head." (R. 810-811). Further, the prosecutor argued that the victim, "was a dead man the moment the defendant . . . walked in the front door of . . . (the) Pawn Shop . . ." (R. 811). These comments are all prejudicial, and

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[79]The lower court erroneously denied this issue as

made more so considering the fact that the victim's death was not caused by premeditated design.

The prosecution improperly vouched for the credibility of the police witnesses and their testimony.

> Then we come to the testimony of (the officers) and this was obviously a situation where (the officers) were at the right spot at the right time to perform very, very admirably and level headed, and you just can't expect more professional conduct, I don't think, on behalf of the police department.

(R. 787).

During the guilt phase closing, the prosecutor speculated as to why Mr. Melton kept the victim's gun and put the gun Lewis had given him back in Lewis' black bag:

> He gives the one with one bullet to Lewis, then puts it back in the bag. Why would he do that? Obviously he wanted a fully loaded gun rather than a gun with one bullet.

(R. 810).

Mr. Melton testified and was subject to cross-examination by the prosecutor, but was never asked why he switched guns. Further, there was no evidence indicating that either Melton or Lewis had any idea that the victim's gun was fully loaded. In rebuttal argument, the State came up with a new theory:

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procedurally barred.

> I submit to you the reason that there was the transfer from the Parker gun to Mr. Carter's gun, that that was the murder weapon, is because the defendant did not want the murder weapon traced back to Carter, to Lewis, to him and that's why they switched the guns.

(R. 854). This argument was not only speculative, the State Knew it was false. Phillip Parker, the young man who supplied the gun, had just turned 16 a few days before Mr. Carter was killed, so obviously the gun was not registered in his name. In his deposition of January 3, 1992, Parker stated that he "bought it off the street" a month or two before this happened. Tracing a gun to an anonymous person buying and selling guns illegally on the street, and from that person to Parker, and from Parker to Lewis to Melton seems an unlikely prospect.

The prosecutor mischaracterized the testimony of Klaus Groeger, one of the two witnesses from the marine business next door to the pawn shop. According to the prosecutor:

> Mr. Groeger also testified that when he was along the middle of the wall, because this wall borders Wills Marine, he could hear similar screams or words to the effect apparently by Mr. Carter, don't kick me anymore, I'm already down. Because he heard those similar words, too.

(R. 786). In fact, Mr. Groeger said that he was unable to make out any words, only "screaming" or "hollering" and "noise." (R. 492-3).

In discussing the testimony of the ballistics expert

regarding the trigger pull, the prosecutor said the amount of pull required was “normal,” and “So this was not a gun with a hair trigger that could easily go off by accident.” (R. 789). This assessment of hair triggers was not in the expert testimony or any other evidence.

The prosecutor tried to bolster the medical examiner’s testimony:

> Fenner McConnell is not an ordinary doctor, he’s not an ordinary pathologist. He’s the medical examiner for the Florida First Judicial Circuit. As a medical examiner his special training–he has special forensic training, which is just this type of thing. And he’s well experienced in these matters having–under the law it’s his duty to perform autopsies in criminal cases and give opinions based on them.

(R. 789-790).

This bolstering is particularly damaging because the prosecutor solicited expert opinions from the medical examiner that were outside his realm of expertise, opinions about the distance from the gun to the victim’s head that the witness by his own admission was not qualified to render (R. 554). The prosecutor’s comments in closing further misled the jury and greatly prejudiced Mr. Melton:

> He said he can’t say for sure–I’ll be clear, I’m not saying Dr. McConnell said it was shot point blank, but he said in his opinion as an expert, as a forensic pathologist, that’s what makes him different from other pathologist, that gun was shot at point blank range of four to twelve inches away. In other words,

> the physical evidence itself doesn't fit with the defendant's testimony either.

(R. 808).

During the penalty phase closing, the prosecutor asked the jurors to "fulfill your duties by recommending to this Court the appropriate punishment for this murder, that Antonio Lebaron Melton be sentenced to die." (R. 1082). The prosecutor also stated, "... [t]he only proper recommendation to this court is a recommendation of death." (R. 1082). Suggestions that it is a juror's duty to sentence a defendant to death are impermissible. See Pacifico v. State, 642 So. 2d 1178 (1994); Urbin v, State, 714 So. 2d 411 (Fla. 1998).

The cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). "Although this legal precept -- and indeed the rule of objective, dispassionate law in general -- may sometimes be hard to abide, the alternative, -- a court ruled by emotion -- is far worse." Jones v. State, 705 So. 2d 1364, 1367 (Fla. 1998). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also Ruiz v. State,

743 So. 2d 1, 4 (Fla. 1999)("The role of counsel in closing argument is to assist the jury in analyzing the evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence."). To the extent that trial counsel failed to object, this constitutes deficient performance which prejudiced Mr. Melton.

ARGUMENT VIII

MR. MELTON WAS TRIED BY A PETIT JURY WHICH WAS NOT A FAIR CROSS-SECTION OF THE COMMUNITY. THERE WAS AN UNCONSTITUTIONAL SYSTEMATIC EXCLUSION OF A SIGNIFICANT PORTION OF THE NON-WHITE POPULATION FROM THE JURY POOL, AND MR. MELTON WAS DEPRIVED OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

Discriminatory selection of a jury venire may be challenged under the Sixth Amendment's requirement that the venire reflect a fair cross-section of the community. Duren v. Missouri, 439 U.S. 357 (1979). A criminal defendant has standing to present a fair cross-section challenge whether or not he or she is a member of the excluded class. Duren, 439 U.S. at 359 n. 1. See Swain v. Alabama, 380 U.S. 202 (1965); Melton v. Louisiana, 419 U.S. 522 (1975).

Discriminatory selection of a jury venire may also be challenged under the Equal Protection Clause of the Fourteenth Amendment. Castaneda v. Partida, 430 U.S. 482 (1977). Absent

evidence of systematic long-term under representation, a defendant may establish a prima facie case upon a showing that members of his or her race were substantially under represented from the particular venire from which the jury was drawn and that this venire was selected under a practice providing an opportunity for discrimination. Batson v. Kentucky, 476 U.S. 79, 95, 106 S.Ct. 1712, 1722, 90 L.Ed.2d 69 (1986), see Washington v. Davis, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976).

The State unconstitutionally exercised its peremptory challenges to discriminate on the basis of race, gender, and national origin in violation of Mr. Melton's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and of the Florida Constitution. Batson v. Kentucky, 476 U.S. 79, 130 (1986); J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994).

Here, the defendant, Antonio Melton, and his co-defendants, are African-American males. The victim was a white male. During jury selection, the prosecutor sought to individually voir dire five of the six African-American women on the petit jury (Rosetta King (R. 184-190); Lila Mae Hopkins (R. 191-200); Ms. Willie Williams (R. 238-241); Emma Campbell (R. 261-266);

Doris Stanley (R. 329-334). As a result of the interrogations, the State struck Ms. King and Ms. Hopkins, over the objection of the defense (R. 190, 200). Trial counsel noted that the State's predilection for grilling African-American prospective jurors appeared to be more than mere coincidence. However, the court seem unperturbed, "I did note when we went down a string all of them there at one time, there were four blacks on the jury who almost in sequence pretty well disqualified themselves." (R. 192).

Shortly thereafter, the prosecutor moved to strike another African-American juror, Ms. Willie Williams. In explaining the use of a peremptory strike, the Assistant State Attorney stated,

> Judge, Willie Williams asked the question in response to -- the question was in response to has any member ever been prosecuted by the State Attorney's Office, and she responded I think her cousin who she later on acknowledged was like her brother, was prosecuted by the State Attorney's Office for drugs. I would peremptorily challenge her at this point, except that I do not want to run the possibility of -- I believe she's a black juror. I want to make sure the record is clear that she is being challenged on the basis of possible feelings against the State Attorney's Office as opposed to the fact due to she is a black juror. We'll challenge her for cause at this point.

(R. 239). Defense counsel objected to the State's cause challenge (R. 239), and the Court sustained the objection.

Although the Assistant State Attorney appeared to have but

a passing recollection of the race and gender of the prospective jurors, his jury notes belie this. The prosecutor meticulously noted every African-American female juror. He made no similar notations identifying any other race and or gender. In fact, it is only after reviewing the prosecutor's trial notes did it become apparent that Ms. Emma Campbell was an African-American. After the State indicated that it questioned Ms. Campbell's ability to sit as a juror due to health problems, the defense relented, and Ms. Campbell was excused (R. 266).

In this case, the racial composition of the jury is not evident from the record. The lower court denied this issue without an evidentiary hearing, stating that this was a direct appeal issue. Contrary to the lower court's determination, there are facts outside of the record which need to be developed at an evidentiary hearing. The failure to make an accurate record of the race, gender, and national origins of the jury venire members made it impossible for Mr. Melton to obtain reliable appellate review of this claim. To the extent trial counsel did not properly preserve this claim, Mr. Melton received ineffective assistance of counsel.

CONCLUSION

Mr. Melton submits that relief is warranted in the form of

a new trial and/or a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail, postage prepaid, to Charmaine Millsaps, Office of the Attorney General, 400 South Monroe Street, PL-01, Tallahassee, FL 32399-6536 this 12th day of August, 2005.

CERTIFICATE OF FONT

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

D. TODD DOSS
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181
COUNSEL FOR APPELLANT