IN THE SUPREME COURT OF FLORIDA

ROBIN LEE ARCHER,

Appellant,

vs.

FSC Case No. SC04-451
LT Case No. 1991 CF 000606A

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Appellant, ROBIN LEE ARCHER, was the defendant in the trial court below and will be referred to herein as “Appellant” or by his proper name. Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as “the State." **At Archer’s evidentiary hearing, the trial court agreed to take judicial notice of the trial, resentencing, and post-conviction records of Patrick Bonifay.** (PC-A VII 990-93). Thus, the following conventions will be used to reference the various records in these cases:

Archer’s trial record -- (TR-A [vol. #] [page #]).

Bonifay’s trial record -- (TR-B [vol. #] [page #]).

Archer’s resentencing record -- (RS-A [vol. #] [page #]).

Bonifay’s resentencing record -- (RS-B [vol. #] [page #]).

Archer’s post-conviction record -- (PC-A [vol. #] [page #]).

Bonifay's post-conviction record -- (PC-B [vol. #] [page #]).

STATEMENT OF THE CASE AND FACTS

A. The crimes

On January 27, 1991, at 12:09 a.m., Deputy Carl Chapman of the Escambia County Sheriff's Office was dispatched to Trout Auto Parts at 5590 North W Street in Pensacola. (TR-A I 103-04). Deputy Chapman found the side door of the business ajar and the clerk, Billy Coker, lying dead behind the counter. (TR-A I 104). Crime scene technicians later found the front door to the business securely locked. They also found evidence of a robbery. (TR-A I 107-17). A security camera aimed at the front counter and drive-up window recorded two masked individuals, one of whom was Caucasian, enter the store through the drive-up window, cut the locks on the night deposit box, and leave four minutes later. (TR-A II 247-50). It did not record the shooting of the clerk, however, because the security equipment intermittently switched to a second camera in the warehouse. (TR-A II 249). An autopsy of the victim revealed four gunshot wounds: two to the left side of the head, one to the back below the scapula, and one to the chest. (TR-A II 231-32).

B. The investigation

A few days after the robbery/murder, Escambia County Sheriff's Investigator Thomas O'Neal focused on Kelly Bland as a suspect. (PCR-A VIII 1167). Investigator O'Neal testified at Archer's post-conviction evidentiary hearing that Bland was given use immunity by the State Attorney's Office in exchange for information about the Trout case. (PCR-A VIII 1167-68). In a statement recorded by O'Neal, Bland admitted supplying Patrick Bonifay with the gun used to kill Billy Coker. (PCR-A VIII 1167-68). Bland also admitted to committing a burglary, along with Bonifay, Clifford Barth, Eric White, and George Wynn, four weeks prior to the Trout robbery/murder, at a business called All Pro Sound, which was 1.5 miles from the Trout Auto Parts store. (PCR-A VII 1136-39; VIII 1167-68).

While in jail on the Trout case, Patrick Bonifay, who was 17 years old at the time, also gave a recorded statement regarding the All Pro Sound case, wherein he revealed that Wynn waited in Barth's truck at the back door to the business while Bonifay, White, and Bland broke the glass in the front door, entered the business, and stole $17,730 worth of equipment. Bonifay's step-father, who worked at the business, had given Bonifay the alarm code to facilitate the burglary. (PCR-A VIII 1143-44). Bonifay, Barth, White, and Wynn, but not Bland, were all

arrested and charged with the All Pro Sound burglary and grand theft. (PCR-A VIII 1141).

Bonifay was convicted and sentenced in the All Pro Sound case on the day of his Spencer hearing in the Trout case, well after his testimony in Archer's trial. (PCR-A VIII 1164). Barth pled no contest on June 11, 1991, prior to his testimony in Archer's trial. (PCR-A VIII 1165). Wynn's prosecution was deferred by agreement until October 9, 1992, well after his testimony in Archer's trial. (PCR-A VIII 1164).

Archer's prosecutor, Michael Patterson, who also prosecuted Bonifay, Barth, and Fordham in the Trout case, could not recall at Archer's evidentiary hearing whether he knew about these witnesses' involvement in the All Pro Sound case and, if so, whether he provided such information to Archer's trial attorney. (PCR-A VII 1103-05, 1108, 1112). Likewise, Investigator Sanderson could not recall providing his reports in the All Pro Sound case to the State Attorney's Office, nor could Investigator O'Neal recall telling the prosecution about the All Pro Sound case, since, in his opinion, there was nothing in Bland's statement relevant to the Trout case. (PCR-A VIII 1163, 1170, 1172). As a result, Archer's trial counsel, Brian Lang, was unaware of these witnesses' involvement in this burglary, or

their pending or resolved prosecutions, at the time they testified against Archer in the Trout case.[1] (PCR-A VII 1030).

Patrick Bonifay also confessed his involvement in the Trout robbery/murder to the police. In the recorded version of his statement, Bonifay alleged that Archer wanted him to "do a hit on a person." (TR-B II 231). Specifically, Archer wanted him to kill the clerk who was working at Trout on Friday night because the clerk had gotten Archer fired. According to Bonifay, Archer first told him to ask the clerk for a clutch for a 1985 Nissan, so the clerk would have to go into the warehouse to get the part. Meanwhile, Bonifay was supposed to crawl

[1] Similarly, Mr. Lang could not recall at Archer's evidentiary hearing whether he was aware of Bonifay's prior arrest and pending prosecution for a burglary and aggravated battery in Mississippi. (PCR-A VII 1037). The prosecutor also could not recall whether he investigated the Mississippi case and obtained records in relation thereto. (PCR-A VII 1092). However, he used the Mississippi arrest to impeach Bonifay in his penalty phase, which occurred immediately after Archer's guilt phase, to show that Bonifay was capable of committing crimes without Archer's involvement. (PCR-A VII 1092-93; TR-B III 432-34).

through the drive-thru window and when the clerk returned he was supposed to "shoot the clerk in the head." Bonifay could then cut the locks off the night deposit box, steal the money to make it look like a robbery, and exit through the back door where someone would be waiting with a car. After providing this information, however, Archer "changed his mind" and told Bonifay to "walk up there and shoot him and kill him." (TA-B II 231-33).

Based on this alleged "plan," Bonifay enlisted the aid of Eddie Fordham and Cliff Barth, all of whom went to the Trout store on Friday night in Fordham's Mustang. Once at the store, Bonifay walked up to the drive-through window, but "couldn't do it," so they left. The next morning, Archer allegedly berated Bonifay for backing out. Archer told Bonifay that the clerk would be there that night and that Bonifay should go back and do the job. In exchange, Bonifay was expecting "a lot of money. Enough money to where [he] wouldn't have to worry about anything else anymore." (TA-B II 234-35).

As directed, Bonifay, Barth, and Fordham went back to the Trout store on Saturday night around 11:45 p.m. in Fordham's father's S-10 Blazer. Bonifay walked up to the window, but the clerk saw him before he could put on his ski mask, so Bonifay pulled out the gun he had gotten from Kelly Bland and aimed it

at the clerk, who had turned to answer the phone. At that point, Barth grabbed Bonifay's shoulder, and the gun "went off." The clerk fell, and Barth yelled, "You didn't kill him. You didn't kill him." According to Bonifay, Barth then grabbed the gun and shot the clerk once.[2] (TR-B II 235-36).

After donning ski masks, Bonifay and Barth crawled through the window. The clerk was talking about his kids. Barth was not strong enough to cut the locks off the night deposit box, so Bonifay handed Barth the gun and cut the locks off with a pair of bolt cutters Bonifay had gotten from Kelly Bland. Then Bonifay took the gun back and started to leave when Barth said, "Patrick, kill him." Because the clerk had seen his face and now knew his name, Bonifay decided that he had to kill the clerk, so he shot him twice in the head, and he and Barth left through the back door as planned. In the car, Bonifay stuck his gun in Barth's face, angry that Barth had said his name and forced him to kill the clerk. (TA-B II 236-37).

From the store, the three drove to an undescribed location and counted the money. Bonifay and Barth each received $700, while Fordham received $663. On the way to take Barth home,

[2] Barth has consistently denied shooting the clerk. (TR-B II 285; TR-A II 207-08).

they threw the checks in a ditch full of water. Bonifay and Fordham then drove to Fordham's home and went to sleep. Bonifay later gave the gun back to Bland and told him to get rid of it because he had used it in the robbery/murder at Trout. Archer came over to Bonifay's a few days later, laughing because Bonifay had killed the wrong clerk. Archer refused to pay him any money because of it. Bonifay was going to "jump on him," but decided not to "because of what might happen." At the end of his recorded statement, Bonifay asked Investigator O'Neal to "make sure [his] family [was] protected . . . and [his] girlfriend," implying that he was afraid of Archer. (TR-B II 238, 241-42, 244).

Archer was immediately arrested, but gave no statement to the police. On February 26, 1991, he was indicted, along with Bonifay, Barth, and Fordham, for the murder and armed robbery of Billy Coker, and the grand theft of the money from the Trout store.[3] (TR-A IV 489-90).

[3] On August 28, 1991, Larry Fordham was convicted by a jury of first-degree murder, armed robbery, and grand theft. He was

C. The trials

later sentenced to life imprisonment, a concurrent 75 years in prison, and a concurrent five years in prison. (PC-A VII 1000-01). On August 29, 1991, Clifford Barth pled guilty to his involvement in the robbery/murder in exchange for the State not seeking the death penalty, and he later received a life sentence. (PC-A VII 980, 983).

In mid-July 1991, two juries were selected from the same venire, one for Bonifay's trial, which was to be held first, and one for Archer's, which was to immediately follow Bonifay's. (TR-A Supp. 582-670; I 19-64). At Bonifay's ensuing trial, the State's theory was that Bonifay devised a plan to rob Trout Auto Parts. Archer assisted in the planning, which included the death of the clerk, because Archer harbored animosity against Dan Wells, whom he thought contributed to his firing from Trout 10 months prior.[4] (TR-B I 123-32). To support its theory of prosecution, the State offered the following testimony: (1) Dan Wells, the clerk on duty at Trout on Friday night, related an unnerving encounter with a customer just prior to closing time. (TR-B I 185-90). He also testified that there was "ill-will" between himself and Archer.[5] (TR-B I 192); (2) Jennifer Morris Tatum, who was Kelly Bland's girlfriend, testified that Bonifay

[4] Bonifay's defense, on the other hand, was that he was merely carrying out the instructions of Archer. Archer was older, had significant influence over Bonifay, and had threatened Bonifay's family if he did not go through with the plan. In closing argument, Bonifay's attorney likened Archer to Saddam Hussein (America was in the midst of the Persian Gulf War) and alleged that Archer "sent these kids out to fight the war with threats[:] if you don't go out and kill these faceless Americans your family is in jeopardy." (TR-B 133-35, 330-31).

[5] Wells believed that he was instrumental in getting Archer fired from Trout. (TR-B I 194). However, Timothy Eaton, Trout's general manager, testified that Dan Wells was not involved in the firing of Archer. (TR-B I 184).

came by several days prior to the robbery/murder asking Bland where the gun was. Bonifay later confessed to her his involvement in the robbery/murder.[6] (TR-B II 200-03); (3) Kelly Bland testified that Bonifay asked him for a gun to "go shoot it." Bland took a gun by Bonifay's house, but Bonifay was not home, so Bland gave it to Archer to give to Bonifay. Bonifay returned the gun to him after the robbery/murder and told Bland to get rid of it and why. (TR-B II 208-13); (4) Investigator O'Neal played Bonifay's taped statement for the jury. (TR-B II 231-44); and (5) Clifford Barth testified that Bonifay called him on the Thursday prior to the crime and said he wanted to rob the Trout store, that they could get as much as $20,000. The plan was to get the clerk to go into the back room, then they would go inside and Bonifay would hold the gun on the clerk while Barth got the money.[7] According to Barth, they were not going to shoot the clerk unless they had to. Barth then described both their aborted attempt on Friday night and their commission of the crime on Saturday night. (TR-B II 266-80).

[6] Bonifay told Tatum that they went there to rob the store, but the clerk saw his face and they had to kill him. (TR-B II 203).

[7] According to Barth, Bonifay never attributed the plan to Archer. Rather, Bonifay said that Archer told him where everything was in the store, but Bonifay "didn't say that [Archer] set it up or nothing." (TR-B II 285).

In his closing argument to Bonifay's jury, the prosecutor asserted that "[t]he threats against Mr. Bonifay . . . is [sic] a story that this man made up, one of many stories this man made up in an effort to avoid responsibility for what he knew he did." (TR-B II 337). Patterson further argued that "Mr. Bonifay planned to rob Trout Auto Parts. He enlisted the help of Mr. Barth. He enlisted the help of Mr. Fordham. He did it with the help and aid of Mr. Archer. . . . You should convict the defendant now based on the evidence that . . . establishes beyond any possible doubt . . . that he intentionally killed Mr. Coker, that he robbed Trout Auto Parts and that he stole the money." (TR-B II 342-43, 344).

Within hours of the State's closing argument in Bonifay's case, Archer's trial began.[8] Naturally, the State's focus shifted to make Archer at least an equally, if not more, culpable co-defendant.[9] Thus, his theory, as presented to the jury, was that Archer was a principal in the robbery/murder: Archer and Bonifay planned it together, there was ill-will

[8] The judge sealed the verdicts rendered by Bonifay's jury so as not to prejudice Archer's jury. (TR-B II 373-76). Thus, none of the parties knew whether the jury had found Bonifay guilty.

[9] Patterson admittedly wanted to establish the CCP aggravating factor, which required proof of heightened premeditation. (PCR-A VII 1075).

between Archer and Dan Wells, the intended victim, and Archer's benefit in participating was "revenge." (TR-A I 83-84).

To support this theory, the prosecutor called Patrick Bonifay as a witness. For the first time, Bonifay testified that Archer came to his house the Thursday before the robbery/murder and showed him a "briefcase full of money."[10] Archer told Bonifay he wanted him to "do a job," i.e., murder the clerk working at Trout on Friday night. (TR-A I 126). Archer wanted the clerk killed because, according to Bonifay, "[t]he man got him fired and messed up something, and [Archer] had hated him ever since." (TR-A I 129). In order to make it look like a robbery, instead of a murder, Archer allegedly told Bonifay to ask the clerk for a Nissan clutch assembly so he would have to go into the warehouse to get it. Bonifay could then climb in the drive-thru window, unlock the front door to let in his accomplice, and shoot the clerk when he returned. Archer warned him that the store had security cameras. (TR-A I 126-28).

[10] Bonifay claimed that he had told Investigator O'Neal about the briefcase of money; it was simply not on the taped version of his statement. (TR-A I 144). Investigator O'Neal denied that Bonifay ever mentioned it. (TR-A II 251).

Bonifay testified that he had been in the Trout store once or twice before, but did not know where they kept their money. Nor did he know that the other Trout stores in town deposited their daily proceeds in a locked box on the wall of the W Street store.[11] (TR-A I 128). Bonifay also testified that he asked Kelly Bland to find him a handgun, which Kelly did and gave to Archer, who in turn gave it to Bonifay.[12] (TR-A I 128).

Regarding the aborted attempt to rob the store on Friday night, Bonifay's testimony mirrored his pre-trial statement to the police. (TR-A I 129). Bonifay likewise testified that when Archer came to Bonifay's house on Saturday, Archer began yelling at him for backing out. He then testified, admittedly for the first time, that he told Archer he would not kill for money, at

[11] Both Robin Archer and his cousin, Richard, testified that they were at another Trout location with Bonifay when Bonifay asked what the locked, green box was on the wall. Robin and Richard told Bonifay that the stores deposit their proceeds in these boxes overnight. (TR-A II 354-55). Rodney Archer, who worked at the W Street Trout store in 1990, also testified that the function of the green box on the wall was no secret. Customers asked about it all the time. (TR-A II 268-69, 348).

[12] Bland did not testify at Archer's trial. Moreover, Investigator O'Neal testified that Bland did not mention in his taped statement that he gave the gun to Archer. (TR-A II 222). Nor did Clifford Barth mention in his taped statement that they got the gun from Archer. (TR-A II 253). However, Barth testified at Archer's trial that on Friday night he and Bonifay and Fordham drove to where Archer was staying. Archer came outside, and he and Bonifay went to Archer's truck. Bonifay returned with a gun. (TR-A II 204).

which point Archer threatened the lives of Bonifay's mother and girlfriend if he did not complete the job. (TR-A I 130, 162).

Allegedly because of the threat, Bonifay called Barth and Fordham, and the three returned to the Trout store on Saturday night. Bonifay's testimony regarding the robbery and murder essentially mirrored his pre-trial statement to the police. (TR-A I 130-35). On cross-examination, however, Bonifay insisted that he did not want to kill the clerk, even though that was his alleged purpose for being there. He did so, he said, because he was afraid of Archer--his "gun, his associates"--particularly after Archer had threatened his family. (TR-A I 146, 148, 149, 154, 163).

Archer's attorney cross-examined Bonifay about the briefcase full of money, which Bonifay described as a briefcase of $50 bills, totaling $500,000. Bonifay conceded, however, that Archer had not worked in almost a year, that his girlfriend was supporting him, and that he was staying with different people because he had no money for an apartment.[13] (TR-A I 137-40).

[13] On redirect, the prosecutor was allowed to elicit over objection that Bonifay believed Archer had another source of

income sufficient to generate a significant amount of cash. (TR-A I 166). The inference was clear that Archer sold marijuana to support himself, and thus had money to pay Bonifay to kill the clerk at Trout.

Following Bonifay's testimony, the General Manager for Trout Auto Parts testified that he fired Archer in March 1990 and that Dan Wells, who was Archer's alleged intended victim, had nothing to do with getting him fired. (TR-A I 174-75). Wells, who was the clerk on duty at Trout on Friday night, testified that he felt somewhat responsible for getting Archer fired from Trout, and that although Archer had never threatened him, he felt threatened by Archer. (TR-A I 182-85).

George Wynn testified that Bonifay called him on Friday night and asked him to drive them to Trout, so they could rob the store. Bonifay told him that "it might involve killing somebody." Bonifay also said that Archer "asked him to do that and he wanted one person killed" because "he had problems with him at work." Bonifay claimed that Archer had told him that there would be one person in the store, the doors would be locked, and they would have to go in through the window. Wynn declined to be the getaway driver and tried to talk Bonifay out of it. (TR-A I 192-93). On Sunday, Bonifay called and described the robbery/murder in detail. He did not say that Barth shot the clerk, nor did he ever mention the $500,000 that Archer had offered him. (TR-A I 194-96).

Next, Clifford Barth, who was 17 years old at the time of the crime, testified that Bonifay called him on Thursday and

asked him to help rob the Trout Auto Parts store on W Street. Bonifay never told him the reason they were going was to shoot the clerk. Rather, Bonifay told him that Archer used to work for Trout and had told him where Trout kept the money that the other stores deposit there. Barth then recounted their trip to see Wynn, their trip to obtain a gun from Archer, and their aborted attempt to rob the store on Friday night. On Saturday, Bonifay called Barth again and said he wanted do it that night, "because Archer said it would be a good day to do it." Barth recounted the details of the robbery and murder, but denied ever shooting the clerk. (TR-A 202-11).

Daniel Webber was the State's next witness. Webber was the roommate of Archer's cousin, Rick. Archer had been staying with Webber and Rick for several weeks when the robbery/murder occurred, because Archer did not have anywhere else to stay. On the Sunday following the crime, Webber came home and found Archer asleep on the couch. When a news report about the robbery/murder came on the television, Archer woke up and asked Webber about it. Archer said he thought he knew who had committed it, that he had told them how to do it. Archer detailed the information he gave the unidentified perpetrators. (TR-A II 212-15).

In his own defense, Robin Archer testified that Timothy Eaton had fired him from Trout for "[p]oor work performance." He believed that he and Dan Wells had gotten along well, and he had no indication that Wells was involved in his firing. (TR-A II 261-64). He also got along well with Bonifay's mother and stepfather, with whom he stayed for several days in January 1991. He hardly knew Bonifay's girlfriend, Rachel, and denied threatening to harm either Bonifay's mother or his girlfriend. (TR-A II 275-76). Archer also denied offering Bonifay any money to kill Dan Wells. Archer had no job, was being supported by his girlfriend, who worked at Popeye's, and had no access to $500,000.[14] (TR-A II 277-78, 290). He further denied accepting a gun from Kelly Bland and giving it to Bonifay. (TR-A II 303). As for his comments to Daniel Webber, Archer admitted telling Webber that he thought he knew who robbed the Trout store and how someone could do it, but he denied that he told anyone to rob the store. (TR-A II 286-88, 300). He was not sure why Bonifay would implicate him in the crime, except that Bonifay had threatened to "get even" for Archer's refusal to take him to

[14] Archer's girlfriend, Patricia Gibbs, confirmed that she supported Archer financially, because he had no money and no job. (TR-A II 311-13).

buy a pound of marijuana several days before the robbery/murder.[15] (TR-A II 290-92).

In his closing argument to Archer's jury, the prosecutor stressed the law on principals and described the robbery/murder as a "classic inside job." (TR-A II 366-68). He then alleged that Archer knew Bonifay was going to rob the store and kill the clerk, that his benefit was revenge in seeing the store robbed and the clerk killed, and that Archer helped Bonifay commit the crime by offering him money to "pull it off," by giving Bonifay details about the store layout and security to facilitate the robbery/murder, and by providing Bonifay with a gun. (TR-A II 369-78). "Patrick Bonifay was a loaded gun . . . pointed at Trout Auto Parts, and that loaded gun killed Billy Coker because of Robin Archer. That's why Billy Coker is dead." (TR-A 374).

The jury's verdicts, rendered after two-and-a-half hours of deliberation, were sealed until the following day. (TR-A III 433-36). The next morning, Bonifay's verdicts were published in open court, followed immediately by Archer's verdicts. Both Bonifay and Archer were found guilty as charged of first-degree

[15] Archer's girlfriend testified that she overheard Bonifay threaten to "get even" with Archer for Archer's refusal to take him to buy drugs. (TR-A II 322).

premeditated and/or felony murder, armed robbery, and grand theft. (TR-B II 378-80; TR-A III 437-39). Immediately thereafter, Bonifay's penalty phase began.

D. The penalty phases and final sentencings

The State presented no additional evidence at Bonifay's penalty phase. On his own behalf, Bonifay presented the testimony of his mother and a mental health counselor at the jail. Bonifay also testified on his own behalf, telling his jury, for the first time, about Archer hiring him to "hurt this man." (PC-B III 418). Bonifay claimed that Archer was a drug dealer and that he was afraid of Archer and his "associates." (PC-B III 419-20). Bonifay was supposed to go to Trout on Friday night "to do it for the money and [he] didn't, so [Archer] got mad." (PC-B III 420). Archer had offered him "[a] bunch of money in a briefcase. He said $500,000." But Bonifay did not complete the job, so Archer "got mad and he told me he was going to kill my mom and my girlfriend if I didn't do it." (PC-B III 420). When asked if he knew why Archer wanted the clerk dead, Bonifay proposed, for the first time, his "idea":

> It was a bunch of dealers working at Trout and they were all laundering their money through the business, and Robbie didn't get along with one of them. So one

> of them got him fired and he had no way to prove his income. So he hated the guy and he messed up the whole operation and stuff.

(TR-B III 422). Archer had never told Bonifay about the money laundering; Bonifay just "knew that." (TR-B III 427-28).

In closing argument to Bonifay's jury, the State urged the jury to find that Bonifay had committed the murder during the course of a robbery, for pecuniary gain, in a cold, calculated and premeditated manner, and in a heinous, atrocious, or cruel manner. (TR-B III 465-68). Bonifay's attorney, on the other hand, urged the jury to find in mitigation that Bonifay had acted under the substantial domination of Archer, that he had acted under the influence of an extreme mental or emotional disturbance, that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, that he was only 17 years old when he committed the crime, that he had cooperated with the police, that he was remorseful, that he had been physically and sexually abused as a child, and that he could be rehabilitated. (TR-B III 468-75). The jury recommended death by a vote of ten to two. (TR-B III 481).

Immediately thereafter, Archer's penalty phase began. The State called Cliff Barth to remind the jury of the events

following their entry into Trout Auto Parts on Saturday night, which culminated in Bonifay shooting Billy Coker to death. (TR-A III 454-56). In mitigation, the defense called Archer's girlfriend, Patricia Gibbs, and his mother, Frances Archer. (TR-A III 456-61, 461-66). In closing arguments, the State urged the jury to find in aggravation that the murder occurred during the commission of a robbery, and that it was committed in a cold, calculated and premeditated manner, as well as in a heinous, atrocious, or cruel manner. (TR-A III 466-69). The defense urged in mitigation that Archer had no significant history of prior criminal activity, that he was an accomplice to a murder and that his participation was relatively minor, that he was acting under the influence of an extreme mental or emotional disturbance, that his capacity to appreciate the criminality of his conduct was substantially impaired, and that he was only 26 years old at the time of the crime. (TR-A III 469-77). The jury recommended death by a vote of seven to five. (TR-A III 484).

In sentencing Bonifay to death, Judge Lacey Collier found the four aggravating factors proposed by the State. In mitigation, he considered only Bonifay's age at the time of the crime, but concluded that Bonifay was "mentally and emotionally mature." (TR-B V 625). As nonstatutory mitigation, the court

found that Bonifay had had an unhappy childhood and that he had demonstrated good attitude and conduct while incarcerated before trial, to which it gave little weight. (TR-B V 625). In rejecting the "substantial domination" mitigator, the court stated:

> The only evidence suggesting mental pressure is the self-serving assertions of defendant who offers that he was acting under some vague and veiled threat to the safety of his family and girl friend. No other witnesses nor one shred of other evidence was heard or seen that even remotely indicated duress. He also had ample opportunity to get away from the alleged threat if he had wanted to do so. As described, his actions in setting up the robbery and murder demonstrated a cool, confident person, individually dedicated to the task at hand. His demeanor at trial indicated to this Court that he is not one to be threatened.

(TR-B V 624).

In sentencing Archer to death, Judge Collier found the three aggravating factors proposed by the State. In mitigation, it found that Archer had no significant history of prior criminal activity and that he was a loving son to his parents and a good family member and friend. The court assigned no particular weight to any of these factors. (TR-A IV 543-49).

E. The appeals

Archer raised four issues on appeal: (1) the trial court erred in denying his motion for judgment of acquittal because

the murder of Billy Coker was an act independent of the agreed upon plan to kill Daniel Wells; (2) the court erred in instructing upon and finding the existence of the HAC aggravating factor; (3) the court erred in instructing upon and finding the existence of the CCP aggravating factor; and (4) the court erred in converting several of the statutory mitigating factors into nonstatutory aggravating factors. (FSC case no. 78,701; initial brief of appellant). This Court found the first issue unpreserved and, alternatively, without merit. Archer v. State, 613 So. 2d 446, 447-48 (Fla. 1993). It vacated Archer's sentence, however, because the trial court erred in instructing the jury on the HAC aggravating factor, since it could not be applied to Archer vicariously. Id. at 448. Bonifay's sentence was later vacated, as well, because the facts did not support the HAC aggravating factor. Bonifay v. State, 626 So. 2d 1310 (Fla. 1993).

F. The resentencings

At Archer's resentencing, Bonifay refused to testify, asserting his Fifth Amendment privilege, so the State read his previous testimony into evidence. (RS-A II 304-05, 330-80). The jury again recommended death by a vote of seven to five, and the trial court followed the jury's recommendation, finding the felony murder and CCP aggravating factors. (RS-A I 89, 140-42).

In mitigation, it found that Archer had no significant history of prior criminal activity, to which it gave "significant weight," and that Archer had been a good family member to his grandmother, to which the court gave "some weight." (RS-A I 142-44).

Bonifay chose not to testify in his own behalf at his resentencing. The jury again recommended a sentence of death by a vote of ten to two, and the trial court followed that recommendation, finding in aggravation that Bonifay committed the murder during a robbery and for pecuniary gain and in a cold, calculated, and premeditated manner. (RS-B I 40, 104-06). In rejecting the "substantial domination" mitigating factor, the trial court stated:

> The evidence that Bonifay acted in response to the threats of Robin Archer comes primarily from the self-serving statements of the defendant. Certainly, Robin Archer concocted the scheme with revenge in mind, and he procured the defendant to carry it out. However, Bonifay admits he was willing to kill this man for whatever money was in the suitcase. He got Barth and Fordham involved; he got the gun, the ski masks, the bullets, the bolt cutters; and he told the others where to park the car, how to gain entry, where the cash boxes were located, and how to exit the store.
>
> Bonifay testified that when Archer learned he had not carried out the plan the first night, Archer became angry and told him he was going to kill Bonifay's mom and

> girlfriend if he did not do it. Upon further questioning, he testified that Archer actually said, "Do you like your mom and Ray?" When Bonifay asked what he meant, Archer said "to take it like you want to." Bonifay says he interpreted this to mean that he was going to have them killed.
>
> However, no such threat was present the first night when Bonifay recruited Fordham and Barth and gathered the tools needed to carry out the plan. His actions in preparing for and carrying out the murderous scheme reflect a clear, cool, and crafty mind, singularly dedicated to the diabolical plan. No credible evidence exists to support his claim that he fired four lethal shots into the body of Billy Wayne Coker in response to the substantial domination of Robin Archer.

(RS-B I 107-08).

G. The resentencing appeals

In a four-to-three decision, this Court affirmed Archer's sentence of death, despite an unconstitutionally vague CCP instruction, finding that each element of the aggravator existed under any definition of the terms. Archer v. State, 673 So. 2d 17, 19-20 (Fla. 1996). In a unanimous decision, this Court affirmed Bonifay's sentence of death, as well. Bonifay v. State, 680 So. 2d 413 (Fla. 1996).

H. The post-conviction proceedings

On September 1, 1997, through CCRC-South, Archer filed a "shell" Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend. (PCR II 151-234).

Following litigation over public records, Archer filed a Second Amended Motion on February 22, 2000.[16] (PCR V 571-654). In this Second Amended Motion, Archer raised the following 21 claims for relief:

I. Giglio/Brady violations

A. The State knowingly presented false testimony in the guilt phase of Archer's original trial, namely, testimony by Patrick Bonifay that Archer threatened to harm Bonifay's mother and girlfriend if Bonifay did not kill Archer's former manager at Trout Auto Parts Store;

B. The State disputed Bonifay's claim in his own trial that he committed the murder because Archer threatened him, but then argued in Archer's subsequent trial that Bonifay committed the robbery/murder solely because of Archer's threat;

C. The State withheld material, exculpatory information from Brian Lang, Archer's original trial counsel, namely,

[16] There does not appear in the record a First Amended Motion.

1. that Bonifay had committed without Archer six months before the Trout robbery/murder an armed burglary in Mississippi in which the victim was stabbed;
2. that Bonifay and others involved in the Trout robbery/murder had burglarized All Pro Sound without Archer a month before the Trout robbery/murder;
3. that David Bland, who testified against Archer, had been granted immunity by the State for his involvement in the All Pro Sound case in exchange for his testimony against Archer in the Trout case;
4. that Bonifay was the ringleader of the All Pro Sound burglary, having obtained a key to the store from his stepfather, who worked there; and
5. that Clifford Barth testified in Bonifay's trial (which occurred prior to Archer's trial) that Bonifay had asked Barth to testify falsely that Bonifay was intoxicated at the time of the crime and that Archer

threatened Bonifay into committing the Trout robbery/murder;

6. that the intended victim, Daniel Wells, had initially been a suspect in the Trout case, contrary to a police report in the Trout case, as evidenced by the police's administration of a polygraph to Wells;

7. that Wells made statements during the polygraph that Archer's trial counsel could have used to impeach his testimony at trial;

8. that Daniel Webber, who testified against Archer, had two pending charges of violation of probation at the time he testified against Archer;

9. that Wells, the intended target of the alleged contract killing, had told police that he had previously seen the individual who had approached him the night before the robbery/murder at Trout;

II. There was no claim 2 in the motion;

III. Brian Lang, Archer's original trial counsel, rendered constitutionally ineffective

assistance of counsel in the guilt phase of Archer's trial by

A. failing to impeach Daniel Webber with his felony conviction and pending VOP charges;

B. by failing to discover and use as impeachment Bonifay's, Wynn's, and Barth's involvement in the All Pro Sound burglary case, which was pending at the time of Archer's trial;

C. by failing to elicit from Barth that Bonifay asked him to lie regarding Archer's involvement in the Trout case;

D. by failing to depose Bonifay and Barth before their testimony in Archer's trial;

IV. Brian Lang rendered constitutionally ineffective assistance of counsel in the guilt phase of Archer's trial by failing to seek a change of venue in the face of massive pretrial publicity;

V. Newly discovered evidence established Archer's innocence:

A. while Bonifay and Barth were housed together at the juvenile detention center and later at the county jail, Bonifay suggested that they tell police that Archer hired them to commit the Trout robbery/murder;

B. Bonifay has told another death row inmate

1. that he and David Kelly Bland had planned the robbery of the Trout Auto Parts store, had cased the store prior to the robbery, and had obtained the gun, all without Archer's involvement, but claimed that they obtained the gun from Archer;

2. that he (Bonifay) was angry at Archer because Archer had refused to help him buy a quantity of marijuana, which Bonifay intended to sell and use the proceeds to buy Archer's truck;

3. that Bonifay shot the victim because he (Coker) had seen Bonifay's face and because Clifford Barth had spoken Bonifay's name in the victim's presence;

4. that Bonifay had concocted his testimony about Archer having a briefcase containing $500,000, based on a movie he had seen;

5. that Bonifay had lied at his own trial about being threatened by Archer because he was confused on cross-examination and felt he needed to explain his involvement;

C. Fordham would have testified that

1. on the night of the Trout robbery Bonifay told him that he needed to go to Trout to make a drug deal and to collect money;

2. Bonifay told him that he killed the clerk to "see what it was like";

3. he and Bonifay never discussed Archer's involvement;

4. Bonifay told him that he (Bonifay) was angry at Archer because Archer refused to help him buy a quantity of marijuana for Bonifay to sell;

D. The prosecutor encouraged Fordham to present false testimony at Archer's trial about Archer's involvement in the robbery/murder in exchange for a plea deal;

VI. Brian Lang rendered constitutionally ineffective assistance of counsel in the guilt phase of Archer's trial by

A. failing to strike for cause Juror Hughes;

B. failing to strike peremptorily Juror Hughes;

VII. Spiro Kypreos, Archer's resentencing counsel, rendered constitutionally ineffective assistance of counsel in the penalty phase of Archer's trial by failing

to discover and present mitigating evidence, particularly mental health mitigation;

VIII. Archer is innocent of first-degree murder;

IX. Archer is innocent of the death penalty;

X. The penalty phase jury instructions shifted the burden to the defense to prove that death was not an appropriate penalty;

XI. The trial court improperly instructed the jury on the standard by which to judge expert testimony;

XII. Archer's jury was not given adequate guidance as to what was necessary to establish the presence of an aggravator;

XIII. Archer's death sentence was predicated upon an automatic aggravator, namely, that the murder was committed during a robbery;

XIV. Archer's penalty phase jury was given misleading instructions that diminished its role in rendering its advisory verdict;

XV. Archer was denied the right in post-conviction to interview the jurors in his case to determine if constitutional error was present;

XVI. Archer's sentencing jury was given an unconstitutionally vague instruction on the cold, calculated, and premeditated aggravating factor;

XVII. Florida's capital sentencing statute is unconstitutional on its face and as applied;

XVIII. Cumulative errors in Archer's original trial and resentencing deprived him of a fundamentally fair trial;

XIX. Archer is insane and cannot be executed;

XX. Archer was denied a fair trial because the State was allowed to admit gruesome and prejudicial photographs;

XXI. Amendments to the Florida death penalty statute that allow a choice between electrocution and lethal injection is being applied to Archer in an *ex post facto* manner.

(PCR V 571-674).

In its response, the State conceded that an evidentiary hearing was warranted on Claims I, III, IV, V, VI, and VII. All other claims, it alleged, were procedurally barred or without merit. (PCR V 656-670). Following the Huff hearing, collateral

counsel moved to amend Claim XV with excerpts from the record to support his claim. (PCR V 727-30). On May 15, 2001, the trial court granted an evidentiary hearing on Claims I, III, IV, V, VI, and VII. It found Claims IX, X, XI, XII, XIII, XIV, XVI, XVII, and XX procedurally barred; Claim XIX not ripe for review; and Claim XXI moot. It granted Archer's motion to supplement Claim XV and included it in the claims to be considered at the evidentiary hearing. Finally, it took Claims VIII and XVIII, the cumulative error arguments, under advisement pending the outcome of the evidentiary hearing. (PCR V 741-42).

On January 2, 2002, collateral counsel filed an addendum to Claim V (newly discovered evidence), alleging that Bonifay had recently informed the trial court at his own post-conviction Huff hearing that he had lied about Archer's involvement in the robbery/murder, that Archer never asked him or threatened him to kill Coker, and that there was never a briefcase full of money. (PCR V 743-50).

On January 8, 2002, Archer's evidentiary hearing commenced. By agreement of the parties, the expert witnesses to support Claim VII were called first. Dr. Earnest Bordini, a forensic psychologist and neuropsychologist, interviewed Archer and performed mental health testing at collateral counsel's request. (PCR VI 772-82). Among other things, Dr. Bordini testified

that Archer failed the third grade and lost interest in school. (PCR VI 787-88). He later dropped out of school in the eighth grade when he was 16 years old and was thereafter employed at a variety of jobs, including one at Trout Auto Parts. (PCR VI 790-92). Despite his employment history, Archer described himself as lazy and was living with a girlfriend who supported him at the time of the Trout robbery/murder. (PCR VI 792-93). As the likely result of two serious head injuries, Archer had suffered damage to his right frontal lobe, which resulted in verbal memory deficits, a short attention span, and difficultly sustaining motivation. (PCR VI 795-822). Dr. Bordini described Archer as passive and nonconfrontational, and as someone who did not fit the profile of one who would commit occupational violence, as was alleged in this case. (PCR VI 836-39).

Dr. James Larson, a forensic psychologist, was called by the State. Dr. Larson had evaluated Archer in 1993 in preparation for his resentencing. Because of Archer's documented head injuries and test scores, Larson suggested that resentencing counsel engage a neuropsychologist, which he did. Dr. Karen Hagerott, a forensic neuropsychologist, who also testified for the State at the evidentiary hearing, evaluated Archer and, in consultation with Larson, informed resentencing counsel that they found no evidence to support either of the two statutory

mental health mitigating factors. As a result, they were not called to testify at Archer's resentencing proceeding. (PCR VI 853-886, 896-913).

Collateral counsel then called Spiro Kypreos, Archer's resentencing counsel. Mr. Kypreos had read all of the previous trial transcripts of all the co-defendants and found the State's theories inconsistent regarding the relative culpabilities of Archer and Bonifay. (PCR VI 919). In Bonifay's trial, the State argued that Bonifay acted independently of Archer, but in Archer's trial, the State argued that Bonifay was afraid of Archer because Archer had threatened him. (PCR VI 919-21).

Mr. Kypreos also testified that he was aware of Bonifay's Mississippi case, but chose not to use it because he did not want the jury to think that Archer was hanging out with "thugs" who were capable of hurting their victims. (PCR VI 938, 945). However, he was not aware of the All Pro Sound case. He would have used Wynn's involvement in it to show that Wynn was Bonifay's partner in crime and had a reason to perpetuate Bonifay's lie regarding the reason for the Trout robbery/murder. (PCR VI 947-48). Although evidence of the All Pro Sound case would have impeached Barth, who was the best witness to impeach Bonifay, Kypreos still would have used it to further impeach

Bonifay, who was the only witness to support the State's contract-killing theory. (PCR VI 948-50).

Further, Kypreos testified that he was not aware that Daniel Webber had pending charges at the time of trial, but he doubted he would have impeached Webber with his criminal conviction because Webber's testimony was not that harmful to Archer's case. (PCR VI 944). Further, while he was not aware that the police had administered a polygraph to the intended victim, Daniel Wells, he did not know how he would have used the information had he known about it. (PCR VI 939-41). Finally, Kypreos testified that he was aware of, and had used, evidence that Bonifay had asked Barth to lie and say that Bonifay was drunk or high at the time of the crime and that Archer had put them up to the robbery. (PCR VI 942).

Archer's next witness was Patrick Bonifay.[17] Against his attorney's advice, and after extensive warnings by the trial court, Bonifay testified that he had lied during his testimony against Archer regarding Archer's threat to harm his mother and girlfriend if he did not kill the clerk at Trout. (PC-A VII

[17] During his incarceration, Bonifay had converted to the Muslim faith and had changed his name to Nabil Taqqi Ya'qub Musaaleh. For the sake of clarity, his given name will be used herein.

969-79; VIII 1175-85, 1191). He fabricated the threat to shift attention from himself to someone else:

> I had a detective sitting there talking to me about the electric chair. I was 17 years old, I was high, I didn't want to die, and it was hard for me to believe that someone could really understand what had really happened. So the first thing that came to my mind was to shift the blame onto someone else.

(PC-A VIII 1191-93). As for the briefcase full of money, Bonifay made that up, too: "The story that I came up with was a murder for hire and, of course, if there's a murder for hire, there has to be a payment." (PC-A VIII 1192).

Cliff Barth then testified that while he and Bonifay were incarcerated together at the Juvenile Detention Center after their arrests, Bonifay asked Barth to say that Archer was going to pay Bonifay to kill the clerk. Barth refused, "[b]ecause it was false." (PC-A VII 981-82, 990).

Brian Lang was Archer's next witness relevant to his motion. Lang was Archer's original trial attorney. Lang testified that he was not aware prior to trial of the All Pro Sound case. (PC-A VII 1030). Had he been aware of it, however, he probably would have used it. (PC-A VII 1031, 1038, 1055). As for the Mississippi case, Archer mentioned it during the State's cross-examination of him, but Lang could not remember whether he knew

anything about it. Again, had he known about it, he may have used it as impeachment evidence. (PC-A VII 1037, 1054-55).

Collateral counsel next called Archer's and Bonifay's prosecutor, Michael Patterson, as a witness.[18] Mr. Patterson testified that his theory regarding Archer's involvement in the crimes was that Archer "assisted." (PC-A VII 1074). However, he wanted to prove the CCP aggravating factor. (PC-A VII 1075). Just prior to Archer's trial, Bonifay's attorney approached Patterson and indicated that Bonifay wanted to testify against Archer. With the understanding that the State would not negotiate Bonifay's sentence, Patterson decided to put Bonifay on the stand. (PC-A VII 1076). He did not, however, have any substantive discussion with Bonifay prior to calling him as a witness. (PC-A VII 1077, 1116, 1121).

When Bonifay testified regarding the briefcase full of money and the threat, Patterson did not believe him and did not think the jury believed him either. (PC-A VII 1079-80, 1106, 1121-22). Regarding the All Pro Sound case, Patterson testified that he could not recall whether he knew about Bonifay's, Barth's, and Wynn's involvement and, if so, whether he provided such information to Archer's trial attorney. (PCR-A VII 1103-05,

[18] A different attorney prosecuted Bonifay's and Archer's resentencing proceedings.

1108, 1112). Nor could he recall whether he investigated the Mississippi case, but he conceded that he may have done so while investigating Bonifay's prior criminal history. (PCR-A VII 1092, 1101). On cross-examination by the State, he admitted, in fact, that he knew about Bonifay's Mississippi arrest, but was having difficulty obtaining any paperwork relating to it. (PC-A VII 1113). Patterson also conceded that he had used his knowledge of the case to impeach Bonifay in his penalty phase, which occurred the day after Archer's trial. (PC-A VII 1092-93).

Following the evidentiary hearing and memoranda by counsel, the trial court denied Claims I, III-VIII, XV, and XVIII. (PC-A X 1503-34). Appellant is appealing only Claims I, V, and VIII.

SUMMARY OF ARGUMENT

Robin Archer is factually innocent of first-degree murder, armed robbery, and grand theft. He was convicted as a principal based upon the admittedly false testimony of the main perpetrator, Patrick Bonifay, a juvenile who is no longer eligible for the death penalty. According to Bonifay's testimony at the evidentiary hearing, Archer never offered him money to kill anyone, never asked him to kill the clerk at Trout Auto Parts, and never threatened to harm Bonifay's family if he

did not. Bonifay created the murder-for-hire scenario, naming Archer as the ringleader, in order to shift responsibility to someone else. Given the context in which Bonifay recanted, the inconsistencies in his statements before and during trial, and the independent corroborating evidence to support his recantation, the trial court erred in finding Bonifay's recanted testimony not credible. Not only does competent, substantial evidence exist in the record to establish Bonifay's credibility, but his testimony has changed to such an extent as to render probable a different verdict on retrial. Therefore, a new trial should be granted on Archer's newly discovered evidence claim.

A new trial is also warranted based upon the prosecutor's admission that he believed Bonifay was lying when he testified that Archer offered him half a million dollars to kill the clerk at Trout and later threatened to harm Bonifay's family if he did not complete the job. The prosecutor candidly made no attempt to discover what Bonifay's testimony would be prior to calling him as a witness, and then allowed him to testify falsely without correcting the false nature of the testimony. Immediately thereafter, he argued in Bonifay's penalty phase that Bonifay was lying about the extent of Archer's involvement, in order to refute the "substantial domination" mitigating factor. Since there was no other credible evidence to establish

Archer as a principal, there is a reasonable likelihood that Bonifay's false testimony could have affected the judgment of the jury. Therefore, Archer's conviction must be set aside based upon a Giglio violation.

Finally, impeaching the credibility of Bonifay, Barth, and Wynn at trial was a main defense objective. The State, however, withheld critical impeachment evidence that could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. At the time these witnesses testified, Barth had pled guilty in the All Pro Sound case, and Wynn had had his case deferred by agreement with the prosecutor. Besides impeaching Barth and Wynn, evidence of the burglary, as well as evidence of another burglary and aggravated battery Bonifay had committed in Mississippi, would have shown that Bonifay was capable of committing crimes without Archer. As a result, it would have refuted Bonifay's claim that he was merely acting under Archer's domination and control when he robbed and killed Billy Coker. When considered cumulatively, as the law requires, the State's Brady violation warrants the reversal of Archer's convictions and a new trial.

ARGUMENT

ISSUE I

NEWLY DISCOVERED EVIDENCE BASED ON THE MATERIAL RECANTATION OF THE STATE'S KEY WITNESS ESTABLISHES ROBIN ARCHER'S FACTUAL INNOCENCE IN THE ROBBERY AND MURDER OF BILLY COKER.

Patrick Bonifay, along with Clifford Barth and Eddie Fordham, indisputably robbed and murdered Billy Coker at Trout Auto Parts on January 26, 1991. Bonifay and Barth were the active perpetrators, with Bonifay the actual shooter, and Fordham was the getaway driver. Robin Archer was never present at the scene and has never been alleged to have been at the scene. Because of his absence, the State was forced to rely upon the legal concept of principals to prove Archer's culpability. As a result, Patrick Bonifay became the State's key witness. He was the only witness who could allege that Archer (1) "[k]new what was going to happen," (2)"[i]ntended to participate actively or by sharing in an expected benefit," and (3) "[a]ctually did something by which he intended to help commit the crime[s]." Fla. Jury Instr. in Crim. Cases 3.01 (1981).

A. Bonifay's trial testimony against Archer

At Archer's trial, Bonifay revealed for the first time that Archer showed him a "briefcase full of money" on Thursday night and asked him to kill the clerk who would be working at Trout Auto Parts on Friday night. According to Bonifay, Archer wanted the clerk killed because "[t]he man got him fired and messed up something, and [Archer] had hated him ever since."[19] (TR-A I 129). Bonifay then testified that Archer told him to make it look like a robbery, instead of a murder, and that he gave Bonifay inside information on how to rob the store. (TR-A I 126-28).

According to Bonifay, he then recruited Cliff Barth and Eddie Fordham the following day to help him commit the robbery/murder. However, when Bonifay walked up to the service window at Trout to initiate the robbery, he "couldn't do it," so

[19] Eleven months had passed since Archer had been fired from Trout for poor work performance. (TR-A I 174; II 263-64). Although Dan Wells, the alleged intended victim, testified that he "felt threatened" by Archer and believed that Archer suspected he had something to do with Archer being fired, several witnesses testified that they knew of no hard feelings between Archer and Wells. (TR-A I 177; II 311-12, 346). At the evidentiary hearing, Dr. Earnest Bordini, a forensic neuropsychologist with experience in workplace violence, testified that Archer was a passive, non-confrontational person who did not fit the profile of a person likely to retaliate with workplace violence. (PC-A VI 836-39).

they left.[20] The next day, Archer was at Bonifay's house when the following conversation allegedly took place:

> A. [BY BONIFAY] [Archer] came in. I was in the bedroom and he came in and was yelling at me and all mad telling me you don't back out on something like that, screaming at me. And I told him I wasn't going to kill somebody for money. And he said oh, you're not. And I said no, I'm not. He said you like your mom and Rae. And I said what's that supposed to mean. And he said you take it like you want to and walked out.
>
> Q. [BY THE PROSECUTOR] How did you take it?
>
> A. He would hurt my mother and my girlfriend.
>
> Q. If what?
>
> A. If I did not do what he told me.
>
> Q. So what happened that night, Saturday night?
>
> A. I called my friends and told them that, all that stuff, and I didn't tell them

[20] Bonifay denied that the reason he "couldn't do it" was because the clerk heard him cock his gun at the service window, but the clerk testified that he heard a gun cock and quickly closed the window. (TR-A I 152, 180-81). George Wynn and Cliff Barth both testified that Bonifay told them he cocked the gun and scared the clerk. (TR-A I 197, 205).

about the threat. I just told them that we had to go do it.

(TR-A I 130) (emphasis added).

Later that night, the same three--Bonifay, Barth, and Fordham--went back to the Trout store. After Bonifay wounded the clerk, gained entry into the store, and stole the day's proceeds from the night drop box, he claimed that he killed the clerk not for the money Archer had promised him, nor because the clerk had seen his face and knew his name, but because of Archer's threat:

> I jumped down from the counter and, you know, I wanted to go because then I could just tell Robin that I had shot the man and he just - you know, he didn't die, and then everything would be okay, you know, and he would say well, you tried, and then he wouldn't hurt nobody.
>
> And then Cliff [Barth], he said, Patrick, kill him. And I don't know why he called out my name. He just - he said Patrick, kill him, and then I like freaked out because I knew he knew my name now and I knew he had seen me. So Cliff came around the back of me, and I put the gun to his head and turned the other way and I pulled the trigger twice and turned around and ran.
>
> * * * *
>
> Q. [BY DEFENSE COUNSEL] But you're telling these ladies and gentlemen of the jury that you killed him because you're afraid of Robin Archer, is that right?
>
> A. I told you that the reason I did it was because everything was messed up, and he

knew my name, and if I didn't do it, he might live and know who I was, and Robbie would come back. If I did do it, Robbie would leave me alone, and everything would be okay.

Q. Well, then what you're saying, sir, is that you killed him because you're afraid of Robin Archer, is that what you're saying?

A. Yes, sir.

* * * *

Q. So you weren't planning on killing the man after all, were you?

A. (Indicates in the negative.)

* * * *

Q. You weren't going to kill him, were you?

A. Didn't want to.

Q. But that was the whole purpose of going in there, wasn't it, just to kill the man for Robin Archer, because Robin Archer told you to because he had a suitcase full of money?

A. The first night that was the reason.

Q. You didn't think you were going to get that suitcase full of money, the half million dollars, unless you killed him, were you?

A. I didn't think I was going to get it if I did it Saturday night.

Q. So you were going to get a half million dollars if you did it Friday night,

but you weren't going to get it if you did it Saturday.

A. Right.

Q. Because it was a different man?

A. No.

Q. Then why weren't you going to get a half million dollars the second night?

A. Because I backed out the first night, and he was pissed off at me and he said either you do it or you lose your girlfriend and your mom.

* * * *

Q. And you're telling the ladies and gentlemen of the jury that he threatened harm to your mother and your girlfriend if you didn't go back and kill that man at the store?

A. Right.

Q. And you did it?

A. Right.

Q. Because of what he said?

A. Right.

(TR-A I 132-33, 148-49, 153-54, 154-55, 156) (emphasis added).

B. Archer's rebuttal at trial

Testifying on his own behalf, Archer specifically denied that he had offered Bonifay money or that he had asked Bonifay to kill a clerk at Trout. He also denied helping Bonifay plan the robbery/murder, and he denied threatening the lives of

Bonifay's mother and girlfriend if Bonifay did not commit the crimes. (TR-A II 276-78, 290).

C. The lack of corroborating evidence at trial

Patrick Bonifay was the only witness who supported the State's theory that Archer was guilty as a principal. George Wynn testified that Bonifay asked him on Friday night to be the getaway driver. Although Bonifay told him that Archer wanted him to kill the clerk, the details of the plan to rob the store, and Archer's alleged involvement in the plan, came solely from Bonifay. Wynn had never spoken to Archer. (TR-A I 192-93).

Bonifay also recruited Cliff Barth on Friday night to rob Trout. According to Barth, Bonifay told him that Archer used to work at Trout and had provided information about how to rob the store, but, again, all of the allegations of Archer's involvement came from Bonifay. (TR-A II 202-03). Critically, Bonifay never told Barth that the reason they were going to the store was to kill the clerk. (TR-A II 211). Nor did Bonifay tell him that Archer offered to pay Bonifay to rob the store or that Archer threatened to harm Bonifay's family if he did not do so.

The only testimony from Barth that circumstantially linked Archer to the crime was his testimony that he and Bonifay and Fordham went to where Archer was staying on Friday night. When

they arrived, Bonifay got out of the car and spoke to Archer in the yard. At one point, Archer leaned inside his truck. When Bonifay returned to the car, he had a gun. (TR-A II 204). However, Barth did not see Archer hand Bonifay the gun (TR-A II 208), nor was Barth able to identify the murder weapon, which the police recovered from Kelly Bland (TR-A II 219), as the gun he saw Bonifay return with. (TR-A II 235-36).

Finally, Daniel Webber, with whom Archer was staying at the time of the robbery/murder, testified that he came home Sunday night and found Archer asleep on the couch. Webber caught the tail end of a news report regarding the robbery/murder on the television, at which point Archer woke up and asked Webber what was said. Webber told him. Archer then remarked to Webber that he thought he knew who had committed the crime, that he had told them "how to do it." Webber testified repeatedly that Archer did not say he told the unidentified perpetrators to do it; rather, Archer said he told them how to do it. Archer then described to Webber how one might rob the store, which included shooting the clerk.[21] (TR-A II 212-14, 215-16, 255-60).

D. Bonifay's recantation

[21] Webber later told Richard Archer, who was Webber's roommate and Robin's cousin, that Robin had told him he knew who was involved in the robbery/murder at Trout because "he told them how they could get in there, but he didn't say he had

On February 26, 2001, during the Huff hearing in Bonifay's own pending post-conviction case, Bonifay spontaneously asked to address the court and, against his attorney's advice, made the following statement exonerating Archer in the robbery/murder:[22]

> This month, Your Honor, has been ten years of this going on. And the truth is, I'm tired, and there was no contract, there was no suitcase full of money, there was no hit. There was a robbery. And I'm going to have to stand before [Allah] on judgment day and answer for one man's blood on my hands. I ain't going to answer for two. I'm not acknowledging having nothing to do with the robbery. There was no contract. There was no hit. That's just something I made up trying to get away from getting in trouble, putting it on somebody else.
>
> I was a kid. I was [high]. They started talking about the chair. Let me get this up off me. I'm standing before [Allah] with one man's blood on my hands, not two.

---

anything to do with it." (TR-A II 356).

[22] Judge Lacey Collier had presided over Bonifay's and Archer's original trials. Following the two defendants' successful appeals, the Honorable Michael Jones presided over their re-sentencings and later re-sentenced both Bonifay and Archer to death. As a result, Judge Jones was presiding over both Bonifay's and Archer's pending post-conviction proceedings when Bonifay made this statement.

> I can't do it. I've been doing it for ten years. I'm tired. That's it.

(PC-A V 745-46).

When the State informed Archer's collateral counsel of Bonifay's statements to the court, counsel moved to supplement Archer's post-conviction motion with Bonifay's recantation. (PC-A V 743-49). At Archer's evidentiary hearing in January 2002, Bonifay testified on Archer's behalf and repeated his prior recantation:

> Q. [BY DEFENSE COUNSEL] Do you recall making a statement . . . to law enforcement?
>
> A. [BY BONIFAY] Yes, I do.
>
> Q. Did you indicate to law enforcement, either on the record or off the record, that you were scared that something could happen to your girlfriend or to your mom?
>
> A. Yes.
>
> Q. Was that a true statement?
>
> A. No. It was a fabrication.
>
> Q. And in that statement, did you indicate that you were afraid that Mr. Archer was gonna do something to them?
>
> A. Yes.
>
> Q. Why did you make up that fabrication?
>
> A. In an attempt by me to -- to shove responsibility, to get pressure off of me onto someone else. I understood -- I understood, at that point, what I was facing

because I had a detective sitting there talking to me about the electric chair. I was 17 years old, I was high, I didn't want to die, and it was hard for me to believe that someone could really understand what had really happened. So the first thing that came to my mind was to shift the blame onto someone else.

Q. You told the detectives that you were offered a lot of money by Mr. Archer to do this, right?

A. Correct.

Q. Was that a true statement?

A. No, it was not.

Q. Why did you come up with that story?

A. The story that I came up with was a murder for hire and, of course, if there's a murder for hire, there has to be a payment.

Q. Did you tell the police or did you tell the jury at some time that Robin was angry because you didn't pull off the robbery?

A. I believe at his trial I testified to that.

Q. Was that true?

A. No, it was not.

Q. Why did you say that?

A. It was in line with the lie that I was making up.

(PC-A VIII 1191-93).

E. The trial court erroneously concluded that Bonifay's recantation was not newly discovered evidence

For a court to set aside a conviction based upon newly discovered evidence, two requirements must be met. First, in order for the evidence to be considered newly discovered, it "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994). In denying this claim, Judge Jones concluded that Bonifay's recanted testimony did not qualify as newly discovered evidence:

> First of all, the underlying facts now alleged by Bonifay were actually known to the Defendant at the time of his original trial. In fact, the defendant testified at his trial in 1991 that he did not offer to pay Bonifay. He claimed that he did not have any issues with Dan Wells [the alleged intended victim]. And, Defendant testified that he did not threaten Bonifay or his mother or girlfriend. As the facts underlying the alleged newly discovered evidence were actually known to the Defendant or counsel at the time of trial, the evidence does not qualify as newly discovered.

(PC-A X 1524-25) (citations and footnote omitted).

Neither the record nor logic supports the trial court's conclusion. It is not the underlying facts, per se, that constitute newly discovered evidence. Rather, it is the

inherent falsity of Bonifay's original testimony. Of course Archer knew Bonifay's trial testimony was false, but the court did not, and the jury did not. Thus, it is Bonifay's admission that his trial testimony was false that was unknown at the time of trial and could not have been discovered with due diligence. As a result, the trial court's finding in this regard was erroneous. See Lightbourne v. State, 841 So. 2d 431, 439 (Fla. 2003) (reaffirming that recanted testimony can be considered newly discovered evidence); Robinson v. State, 707 So. 2d 688, 691 n.4 (Fla. 1998) ("We note that the trial court properly held an evidentiary hearing on Fields' recanted testimony because his affidavit qualifies as newly discovered evidence.").

F. The record does not support the trial court's finding that Bonifay's recanted testimony was not credible

The second requirement for establishing a newly discovered evidence claim is that the evidence must be of such a nature that it would "probably produce an acquittal on retrial." Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). Before reaching such a conclusion, the trial court must "'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 introduced at the trial.'" Id. (quoting Jones v. State, 591 So. 2d 91, 915 (1991)). Thus, a

cumulative analysis of newly discovered evidence is required. Roberts v. State, 840 So. 2d 962 (Fla. 2002).

In performing this analysis, the trial court should first consider whether the evidence would have been admissible at trial. Jones, 709 So. 2d at 521-22 (citations omitted). If it would have been admissible, then an evaluation of its weight would depend upon whether the evidence affects the merits of the case or is merely impeachment evidence, and whether the evidence is cumulative to other evidence in the case. Id. Finally, the trial court should consider "the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence." Id. When the newly discovered evidence includes testimony of witnesses who witnessed events at the time of the crime, the trial court may consider "both the length of the delay and the reason the witness failed to come forward sooner." Id. "Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted." Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994).

In rejecting Archer's newly discovered evidence claim, the trial court concluded that Bonifay's recanted testimony was "not credible." (PC-A X 1524, 1525). To support its finding, the trial court relied upon Florida Jury Instruction in Criminal

Cases 2.04 to "provide a framework for [its] credibility analysis":

> Did Bonifay seem to have an accurate memory? His memory seemed more accurate in 1991. Was Bonifay honest and straightforward in answering the attorney's [sic] questions? He seemed to be hedging often during his testimony, but more so in his recantation. Did Bonifay have an interest in how the case should be decided? If this was not a planned murder but simply a robbery gone bad, then Bonifay is probably not eligible for the death penalty, so his recantation could potentially affect the imposition of the death penalty against Bonifay. Did Bonifay at some other time make a statement that is inconsistent with the recantation? Bonifay's first three statements about this murder consistently pointed to Defendant as the mastermind, contrary to his recantation. Has Bonifay been convicted of a crime? Bonifay is on death row.

(PC-A X 1525).

This Court has repeatedly stated that it "will not substitute its judgment for that of the trial court on issues of credibility" so long as the decision is supported by competent, substantial evidence. Johnson v. State, 769 So. 2d 990, 1000 (Fla. 2000). Archer submits that the record does not support the trial court's finding. First, Judge Jones did not preside over the original trials, and Bonifay did not testify at either of the resentencings. Rather, the state read his prior testimony into the record. Thus, Judge Jones has no legitimate basis upon which to say:

> Did Bonifay seem to have an accurate memory? His memory seemed more accurate in 1991. Was Bonifay honest and straightforward in answering the attorney's [sic] questions? He seemed to be hedging often during his testimony, but more so in his recantation.

(PC-A X 1525).

Second, the trial court did not consider the context in which Bonifay recanted his testimony. "[C]ommon sense dictates that the trial judge, in order to make a just decision, must be able to look at all the evidence presented in the case that affects the testimony of the recanting witness. The context in which the statements are made is crucial to gauge the credibility of the witness." State v. Spaziano, 692 So. 2d 174, 177 (Fla. 1997).

1. Bonifay recanted during his own post-conviction hearing

Bonifay recanted independently of Archer's post-conviction case. Bonifay was in the middle of his own post-conviction proceedings when he spontaneously addressed Judge Jones, against his attorney's advice, and recanted the testimony he gave at Archer's trial. While he may have been aware that Archer's post-conviction proceedings were on-going as well, there has never been a suggestion that Archer in any way prompted Bonifay's recantation. In fact, Bonifay testified at Archer's evidentiary hearing that nobody suggested that he make a

statement, and that he made it of his own free will. (PC-A VII 968). Moreover, Archer had already filed his final amended 3.850 motion, and the court had already held a Huff hearing in the case by the time Bonifay recanted. (PC-A V 571-654, 680-772). Only after the State contacted Archer's collateral counsel and informed him of Bonifay's recantation did counsel amend Archer's 3.850 motion to include this claim. (PC-A V 743-50).

2. Bonifay testified against his own interest

At Archer's evidentiary hearing, Judge Jones cautioned Bonifay repeatedly that his testimony could be used against him in later proceedings. Judge Jones reminded Bonifay that his post-conviction motion was still pending and that his attorney had advised him not to testify on Archer's behalf. (PC-A VII 970-72). Ultimately, the court suspended Bonifay's testimony until Bonifay's collateral counsel could be present. (PC-A VII 973-77). When his attorney arrived, the Court discussed the issue with Mr. Farrar and noted the potential negative consequences of Bonifay's testimony:

> [T]here are a number of different possibilities for adverse use of any testimony that he might give, including . . . use[] against him in [a] new trial. . . [or in] a new penalty-phase. I then also advised him that another potential use was that it could supplement the post-conviction

> relief hearing evidence and could be used, one way, frankly, would be to make a determination, notwithstanding any errors -- it's not prejudicial because, clearly, you know, there are these admissions which exist and . . . [the] potential for conviction is high.

(PC-A VIII 1180). Thereafter, the court questioned Bonifay about his desire to testify over his attorney's advice and ultimately concluded that his decision to do so was "free and voluntary and knowing."[23] (PC-A VIII 1182-85).

3. Contrary to the trial court's findings, Bonifay's confession and trial testimony were not consistent

In denying relief on this claim, the trial court detailed Bonifay's pre-trial statement to the police, his testimony at Archer's trial, and his testimony during his original penalty phase proceeding to show that Bonifay's testimony remained

[23] Judge Jones denied this claim, in part, because he believed that Bonifay would benefit were his recanted testimony deemed credible and material. However, it is highly speculative that Bonifay would no longer be eligible for the death penalty. It remains arguable, were Bonifay not a juvenile, that both the felony murder aggravator and the CCP aggravator would remain viable, the latter based upon a witness elimination theory, rather than a murder for hire theory.

consistent throughout. (PC-A X 1526-27). However, the record conclusively shows that Bonifay's story was not consistent. In his statement to the police, Bonifay mentioned that he was expecting "a lot of money," but he never mentioned its source. (TR-B II 235). He specifically never mentioned Archer showing him a briefcase full of money. Nor did Bonifay ever tell the police that he killed the clerk because Archer had threatened to harm his family. He did ask Investigator O'Neal to protect his family, but the investigator believed that Bonifay feared Archer because Bonifay was inculpating him in the crimes, not because of some previous threat. (TR-B II 244, 251-52).

In his trial testimony against Archer, Bonifay embellished the statement he gave to the police, adding to his story the existence of the briefcase full of money and Archer's threat against his family. Then, in his own penalty phase proceeding, Bonifay embellished it again by speculating why Archer wanted Dan Wells killed:

> It was a bunch of dealers working at Trout and they were all laundering their money through the business, and Robbie didn't get along with one of them. So one of them got him fired and he had no way to prove his income. So he hated the guy and he messed up the whole operation and stuff.

(TR-B III 422).

Despite these critical inconsistencies, the trial court concluded that "[b]ased on the Court's experience, common sense, and personal observations of Patrick Bonifay, the Court is satisfied that his new testimony is false. After listening to Mr. Bonifay, observing his demeanor, and analyzing his testimony, the Court does not believe his recantation." (PC-A X 1528). See Johnson, 769 So. 2d at 999 (quoting identical language from trial court's order denying relief).

4. The trial court ignored independent corroborating evidence that established Bonifay's credibility

Critically, the trial court failed to perform a cumulative analysis of the newly discovered evidence as required by this Court. Specifically, Judge Jones failed to mention, much less analyze, the independent corroborating evidence that supported Bonifay's recantation. See Spaziano, 692 So. 2d at 176 ("Apart from the recantation testimony offered directly by DiLisio, independent corroborating evidence was introduced that lent credence to DiLisio's description of the events leading up to his original statements."); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994) (remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to

establish the trustworthiness of [the newly discovered evidence]").

Several factors bolster the credibility of Bonifay's recantation. First, were Bonifay trying to eliminate Archer completely as a participant, he could have testified that Archer had nothing to do with the robbery/murder. Instead, Bonifay recanted the murder-for-hire aspect of his story, including the threat Archer allegedly made toward his mother and girlfriend, but maintained that Archer gave him inside information on how to rob the store. That left Archer tangentially tied to the crime.

Second, the prosecutor in both cases testified at Archer's evidentiary hearing that he believed Bonifay was lying when Bonifay testified at Archer's trial regarding the threat:

> Q. [BY COLLATERAL COUNSEL] You believed in your heart that what Mr. Bonifay was saying about the threat was untruthful, correct?
>
> A. [BY MR. PATTERSON] Yeah. I think the greater weight of the evidence was that that was not correct. And that's true of other little parts of Mr. Bonifay's testimony. There were other parts of it that I think in an effort to absolve himself, he honed probably what really happened. I have no direct evidence that

> that threat did not occur. I did not have any testimony or other evidence of any kind that the threat didn't occur when I put him on the stand. But I thought the greater weight of the evidence was that it was not so. And that's not why the crime happened.

(PC-A VII 1079, 1082, 1106) (emphasis added).

Third, the prosecutor took inconsistent positions between Bonifay's trial, Archer's trial, and Bonifay's penalty phase proceeding regarding the briefcase full of money and the threat. Bonifay's defense during his own trial was that he was merely carrying out the instructions of Archer. Archer was older, had significant influence over Bonifay, and had threatened Bonifay's family if he did not go through with the plan. (TR-B I 133-35). The prosecutor vigorously disputed Bonifay's defense and made the following comments in closing argument:

> The threats against Mr. Bonifay . . . is [sic] a story that this man made up, one of many stories this man made up in an effort to avoid responsibility for what he knew he did. . . . There's not one shred of evidence at all, not one word of testimony, not one physical exhibit before you to indicate Mr.

Archer ever threatened Bonifay to do this crime.

(TR-B II 337, 339) (emphasis added).

At Archer's ensuing trial, however, the prosecutor allowed Bonifay to testify to the briefcase full of money and to the threat, despite his belief that such testimony was false. (TR-A I 126, 130; PC-A VII 1079, 1082-84). Although the prosecutor did not stress that testimony in his closing arguments, the jury nevertheless convicted Archer, and both the trial court, and this Court, relied heavily on Bonifay's testimony to support Archer's convictions and sentence of death.

Terminally, the day after Bonifay testified for the State in Archer's trial, Bonifay testified on his own behalf in his penalty phase proceeding. Once again, the prosecutor vigorously challenged Bonifay's testimony regarding the briefcase full of money and the threat. (TR-B III 426-28, 430-31, 432-34, 440-42, 445-46). These inconsistent positions by the State undermine the trial court's finding that Bonifay's previous statements were consistent and more credible than his recantation. See Jacobs v. Scott, 513 U.S. 1067, 1068 (1995) (Stevens, J., dissenting) ("[F]or a sovereign State represented by the same lawyer to take flatly inconsistent positions in two different cases - and to insist on the imposition of the death penalty

after repudiating the factual basis for that sentence - surely raises a serious question of prosecutorial misconduct. In my opinion, it would be fundamentally unfair to execute a person on the basis of a factual determination that the State has formally disavowed.").

Fourth, Investigator O'Neal, who questioned Bonifay prior to his arrest, testified in Archer's trial that Bonifay never mentioned Archer showing him a "briefcase full of money."[24] (TR-A II 251). Investigator O'Neal also testified in Bonifay's trial that Bonifay never mentioned to him any threat Archer allegedly made toward Bonifay's mother and girlfriend.[25] (TR-B II 251).

Fifth, Cliff Barth testified at Bonifay's trial that Bonifay never mentioned any threat by Archer when Bonifay called him on Saturday to make a second attempt. (TR-B II 283). In fact, Bonifay had asked Barth to lie about the threat:

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[24] Bonifay did comment in his taped confession that he was expecting "a lot of money. Enough money to where [he] wouldn't have to worry about anything else anymore" (TR-B II 235), but he never mentioned Archer showing him a "briefcase full of money," perhaps $500,000, as payment for killing the clerk, which was his testimony at trial. (TR-A I 126; II 251).

[25] Bonifay did express fear for his family's safety, but only because he was informing on Archer. He never told the investigator that he killed the clerk because Archer had threatened him, which was Bonifay's testimony at trial. (TR-B II 251-52).

Q. [BY THE STATE] And these threats that you were asked about, has Mr. Bonifay ever talked to you about your testimony about threats from Robin?

A. [BY BARTH] Yeah, he told me since we have been in jail that he was threatened but --

Q. Did he say anything about your testimony about that?

A. He told me I think one time when I first got arrested that I should say that I was threatened, too.

Q. By Robin Archer?

A. Uh-huh.

Q. Were you ever threatened?

A. Huh-uh.

(TR-B II 286-87).

At Archer's evidentiary hearing, Barth also testified that Bonifay asked him to lie about Archer paying them to kill the clerk:

Q. [BY COLLATERAL COUNSEL] Can you tell the Court what, if anything, you discussed?

A. [BY BARTH] Well, when we were in the Detention Center Patrick came up with this idea about Archer, you know. He wanted me to tell everybody that Archer paid us to do this or paid him to do the killing or whatever and basically wanted us to lie about it.

Q. Did he ever come up with a story about he had been offered money by Archer?

> A. Yes, sir, it was part of the story that he wanted me to tell, you know, say that he was, that he was going to get paid or we were going to get paid several thousand dollars or a hundred thousand dollars or I don't remember the exact amount it was to do this and, you know, he just wanted to make that up to try to get the heat off him and I and try to put it on Archer because he was older and all.
>
> * * * *
>
> Q. And did you agree and cooperate and repeat that story?
>
> A. No, sir.
>
> Q. Why not?
>
> A. Because it was false.

(PC-A VII 982, 990).

The trial court failed to recognize any of this independent corroborating evidence in performing its cumulative analysis. Instead, it focused on the perceived consistency of Bonifay's testimony between his statement to the police, his testimony at Archer's trial, and his testimony at his own penalty phase proceeding. However, Bonifay's statements were not consistent, and the corroborating evidence establishes that Bonifay's recanted testimony was more credible than his trial testimony.

G. Bonifay's testimony would likely produce an acquittal on retrial

Had the trial court performed its analysis properly, not only would it have found Bonifay's recantation credible, but it

would have concluded that Bonifay's testimony was relevant and material to the merits of the case and that it would probably produce an acquittal on retrial. As this Court has previously stated, when a witness's testimony will change to such an extent as to render probable a different verdict on retrial, a new trial should be granted. Armstrong, 642 So. 2d at 735.

Without anyone other than Archer to dispute his allegations at Archer's trial, Bonifay singlehandedly sealed not only Archer's convictions, but also his death sentence. Although the jury did not detail the evidence upon which it relied to convict Archer, the trial court's sentencing order reveals the bases for its sentencing decision:

> This is the classic case of murder for hire, a contract murder, an execution. Archer sought out Patrick Bonifay for the purpose of avenging his firing from Trout Auto Parts [sic] employment by killing the one that [sic] he felt [was] responsible. Whether payment was to be the money taken in the robbery or a satchel of money as claimed by Bonifay, the deal was struck. Archer concocted the plan to get in, the use of ski masks to thwart the video, the bolt cutters to open the concealed cash box, and the smart way to exit. He aided in securing a gun, even delivering it to Bonifay himself.
>
> This plan proceeded over a period of several days--ample time for reflection. Even after the first attempt failed, Archer

> directed and insisted that Bonifay try again and go through with the murder. . . .

(TR-A IV 544-45) (emphasis added).

In affirming Archer's convictions, this Court, too, relied heavily on Bonifay's trial testimony:

> According to the testimony presented at trial, Archer was fired from his job at an auto parts store in March 1990. The following January he convinced his cousin, seventeen-year-old Pat Bonifay, to kill the clerk he apparently blamed for his having been fired. Bonifay testified that Archer told him to rob the store to hide the motive for the killing and to wear a ski mask and gloves and also told him the location of the store's cash box and emergency exit. Bonifay borrowed a handgun from a friend who gave the gun to Archer to give to Bonifay.
>
> Bonifay talked two friends into helping him, and the trio went to the parts store on Friday night, January 24, 1991. Bonifay could not go through with the murder, however, and they left the store. The next day Archer got after Bonifay for not killing the clerk, and the trio went back to the store that night. Bonifay shot the clerk and he and one of his friends crawled into the store through the night parts window. After opening the cash boxes, Bonifay shot

> the clerk in the head twice as he lay on the floor begging for his life. Archer later refused to pay Bonifay because he killed the wrong clerk.

Archer v. State, 613 So. 2d 446, 447 (Fla. 1993) (emphasis added).

Finally, this Court affirmed Archer's re-sentence of death, despite an erroneous CCP instruction, relying largely on Bonifay's testimony to establish that all four elements would exist under any definition of the terms:

> The first element is that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. This was a contract murder, which is by its very nature calm. The facts of the murder itself proved the existence of a careful plan and prearranged design to kill beyond a reasonable doubt. Archer not only hired Patrick Bonifay, his cousin, to commit the murder but also wanted Bonifay to disguise the murder as a robbery. To this end, Archer provided Bonifay with a plan which included a description of the store security system and the location of the store's cash box and emergency exit. Archer not only detailed what Bonifay should say to the clerk and when to shoot him, but Archer secured the gun and delivered it to Bonifay. Moreover, once Bonifay returned after killing the wrong clerk, Archer refused to pay him on the agreement. Under these facts, we find that the murder resulted from a careful plan and prearranged design beyond a reasonable doubt.

> Archer's acts were not only calm and careful, but they exhibited heightened premeditation over and above what is required for an aggravated first-degree murder. This contract murder proceeded over a period of several days and included an aborted attempt. Finally, Archer's actions clearly do not demonstrate any pretense of moral or legal justification.

Archer v. State, 673 So. 2d 17, 19-20 (Fla. 1996) (emphasis added).

Archer's convictions and sentence rest entirely on the testimony of the actual perpetrator, a 17-year-old who is no longer eligible for the death penalty. Patrick Bonifay spontaneously recanted his testimony against Archer during his own post-conviction proceedings. Given the context in which he recanted and the independent corroborating evidence to support the credibility of his recanted testimony, this Court should reverse Archer's convictions and order a new trial. Bonifay's testimony on retrial would change to such an extent as to render probable a different verdict. Armstrong, 642 So. 2d at 735. Therefore, a new trial is warranted. See Mordenti v. State, 894 So. 2d 161 (Fla. 2004) (ordering new trial based on cumulative analysis of Brady and Giglio claims where falsity of witness' testimony, established by recantation, "could have impacted the jury's determination of Mordenti's character when deliberating"); State v. Spaziano, 692 So. 2d 174 (Fla. 1997)

(affirming trial court's decision to grant new trial where independent corroborating evidence supported credibility of recantation of state's star witness).

ISSUE II

ARCHER WAS DENIED A FUNDAMENTALLY FAIR TRIAL WHEN THE STATE KNOWINGLY PRESENTED FALSE TESTIMONY THAT AFFECTED THE JURY'S VERDICTS.

Both this Court and the United States Supreme Court have consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. See Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); accord Mooney v. Holohan, 294 U.S. 103 (1935); Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003); Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue, 360 U.S. at 269. In each of these cases, a strict standard of materiality was applied, "not just because they involve prosecutorial misconduct, but because they involve a corruption

of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 104 (1976).

A. The false testimony

As excerpted in detail in Issue I, supra, Patrick Bonifay testified at Archer's trial that Archer showed him a "briefcase full of money" on Thursday night and asked him to kill the clerk who would be working at Trout Auto Parts on Friday night. According to Bonifay, Archer wanted the clerk killed because "[t]he man got him fired and messed up something, and [Archer] had hated him ever since." (TR-A I 129). Bonifay then testified that Archer told him to make it look like a robbery, instead of a murder, and gave him inside information on how to rob the store. (TR-A I 126-28).

Following Bonifay's aborted attempt on Friday night, Archer allegedly threatened to harm Bonifay's mother and girlfriend if he did not complete the job. (TR-A I 130). As a result, Bonifay testified repeatedly that the reason he killed the clerk was because of Archer's threat. (TR-A I 132-33, 146-49, 154, 163). Although Archer denied offering Bonifay money to kill the clerk, helping Bonifay to plan the robbery/murder, and threatening the lives of Bonifay's mother and girlfriend (TR-A II 276-78, 290), the jury nevertheless convicted Archer of first-degree murder as a principal. (TR-A IV 512-13). This

Court affirmed his convictions, relying heavily on Bonifay's testimony. See Archer v. State, 613 So. 2d 446, 447 (Fla. 1993).

In 2001, during Bonifay's post-conviction proceeding, Bonifay spontaneously announced to Judge Jones that "[t]here was no contract. There was no hit. That's just something I made up trying to get away from getting in trouble, putting it on somebody else." (PC-A V 745-46). Archer subsequently amended his post-conviction motion and called Bonifay as a witness at his evidentiary hearing. There, Bonifay expounded upon his recantation:

> Q. [BY DEFENSE COUNSEL] Do you recall making a statement . . . to law enforcement?
>
> A. [BY BONIFAY] Yes, I do.
>
> Q. Did you indicate to law enforcement, either on the record or off the record, that you were scared that something could happen to your girlfriend or to your mom?
>
> A. Yes.
>
> Q. Was that a true statement?
>
> A. No. It was a fabrication.
>
> Q. And in that statement, did you indicate that you were afraid that Mr. Archer was gonna do something to them?
>
> A. Yes.
>
> Q. Why did you make up that fabrication?

A. In an attempt by me to -- to shove responsibility, to get pressure off of me onto someone else. I understood -- I understood, at that point, what I was facing because I had a detective sitting there talking to me about the electric chair. I was 17 years old, I was high, I didn't want to die, and it was hard for me to believe that someone could really understand what had really happened. So the first thing that came to my mind was to shift the blame onto someone else.

Q. You told the detectives that you were offered a lot of money by Mr. Archer to do this, right?

A. Correct.

Q. Was that a true statement?

A. No, it was not.

Q. Why did you come up with that story?

A. The story that I came up with was a murder for hire and, of course, if there's a murder for hire, there has to be a payment.

Q. Did you tell the police or did you tell the jury at some time that Robin was angry because you didn't pull off the robbery?

A. I believe at his trial I testified to that.

Q. Was that true?

A. No, it was not.

Q. Why did you say that?

A. It was in line with the lie that I was making up.

(PC-A VIII 1191-93).

In denying this claim, the trial court found as follows regarding the falsity of Bonifay's original testimony:

> To sustain the first prong of [the Giglio] test, Defendant "must show that the testimony was, indeed, perjured. Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." U.S. v. Griley, 814 F.2d 967, 971 (4th Cir. 1986) (citations omitted). . . .
>
> * * * *
>
> Defendant simply cannot prove that Bonifay lied about these matters. Bonifay made several statements concerning the alleged threats and money, and in some statements he claimed they existed and in other statements he did not disclose one or both of them. There is no way to ascertain on which occasion Bonifay was actually telling the truth.

(PC-A X 1520-21).

This conclusion is inconsistent with the court's findings in relation to the newly discovered evidence claim. Regarding Bonifay's recantation, the trial court found that Bonifay's pretrial statement to the police, his testimony at Archer's trial, and his testimony at his own penalty phase were all generally consistent with one another, thereby rendering the recanted testimony inconsistent and not credible. (PC-A X 1526-

28). Now, in relation to this claim, the trial court found that all of Bonifay's statements were inconsistent and that "[t]here is no way to ascertain on which occasion Bonifay was actually telling the truth." (PC-A X 1521). If Bonifay's previous statements were inconsistent, which Archer alleges is the case, then Bonifay's recanted testimony further undermines confidence in the outcome of his trial. A capital murder conviction should not rest on the inconsistent statements, later recanted, of the actual perpetrator.

Moreover, as discussed in Issue I, supra, there was independent corroborating evidence to support the veracity of Bonifay's recantation. First, Bonifay did not completely deny Archer's involvement, as he could have were he lying. Second, the prosecutor testified at Archer's evidentiary hearing that he believed Bonifay was lying when Bonifay testified at Archer's trial. Third, the prosecutor took inconsistent positions between Bonifay's trial, Archer's trial, and Bonifay's penalty phase regarding the existence of the briefcase full of money and the threat. Fourth, Investigator O'Neal denied that Bonifay ever mentioned Archer showing him a "briefcase full of money" or claiming that he killed the clerk because Archer threatened to harm his mother and girlfriend. (TR-A II 251; TR-B II 251). Finally, Cliff Barth testified that Bonifay never mentioned

Archer's alleged threat when Bonifay called him on Saturday to make a second attempt. (TR-B II 283). In fact, Bonifay later asked Barth to lie about it, as well as about the briefcase full of money. (TR-B II 286-87; PC-A VII 982, 990).

In performing the cumulative analysis required for a Giglio claim, the trial court failed to consider the independent evidence that corroborated Bonifay's recantation. The court's inconsistent conclusion is simply not supported by the record. Thus, its finding that Bonifay's trial testimony was not false should be rejected. See Johnson v. State, 769 So. 2d 990, 1000 (Fla. 2000) (providing that where trial court's judgment on issue of credibility is not supported by competent, substantial evidence, supreme court can make alternative finding).

B. The State knew the testimony was false

To establish a Giglio violation, Archer was required to prove not only that Bonifay's trial testimony was false, but that the State knew, or should have known, that the testimony was false. See Agurs, 427 U.S. at 103 (describing a Giglio violation as one in which the prosecution's case included perjured testimony "and that the prosecution knew, or should have known, of the perjury"); Trepal v. State, 846 So. 2d 405, 425 (2003) ("Giglio holds that a conviction based on false or perjured testimony, which the prosecution knew or should have

known was false, violates due process when such information is material."); see also Westley v. Johnson, 83 F.3d 714, 726 (5th Cir. 1996) (holding that appellant must show that (1) the testimony was false, (2) the testimony was material to the verdict, and (3) the prosecutor knew or believed the testimony to be false). A Giglio violation occurs, as well, "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue, 360 U.S. at 269.

At Archer's evidentiary hearing, the prosecutor, Michael Patterson, admitted that he believed Bonifay's testimony regarding the briefcase full of money and the threat was false:

> Q. [BY COLLATERAL COUNSEL] You put on testimony from Mr. Bonifay in Mr. Archer's [trial] that . . . Mr. Archer allegedly made a threat against Mr. Bonifay's mother and girlfriend if Mr. Bonifay didn't do this crime. Do you recall that?
>
> A. That was Mr. Bonifay's testimony, yes, sir.
>
> * * * *
>
> Q. You knew, sir, when you put that testimony on, in your heart that that was untrue?
>
> A. You know, to go into my heart, it was the State's theory of the case in Mr. Bonifay's trial and in Mr. Archer's trial that the act was not committed as a result of threats. So, yes, I did not believe that that's why this crime was committed.
>
> * * * *

Q. Did you ever inform Mr. Lang that you believed that that true -- testimony was untruthful with respect to the threat?

A. I cannot remember a specific instance, but it would not surprise me if I had.

Q. Did you attempt to correct in your closing argument with the jury that threat as being not credible testimony?

A. The greater weight of the evidence, I believe, was that the threat was not credible. It was clear to me from the proceedings that that was made evident to the jury. I do think I told the jury that Mr. Bonifay or a portion of Mr. Bonifay's testimony was about as credible as Mr. Archer's.

* * * *

Q. You believed in your heart that what Mr. Bonifay was saying about the threat was untruthful, correct?

A. Yeah. I think the greater weight of the evidence was that that was not correct. And that's true of other little parts of Mr. Bonifay's testimony. There were other parts of it that I think in an effort to absolve himself, he honed probably what really happened. I have no direct evidence that that threat did not occur. I did not have any testimony or other evidence

> of any kind that the threat didn't occur when I put him on the stand. But I thought the greater weight of the evidence was that it was not so. And that's not why the crime happened.

(PC-A VII 1079, 1082, 1106).

In denying this claim, the trial court made the following findings regarding the State's knowledge that Bonifay's testimony was false:

> The prosecutor was not a party to the conversations involving the threats or money, so [he] has no personal knowledge of whether Bonifay was telling the truth about them. This is a stark contrast to the cases cited *supra*, in which the prosecutors had personal knowledge of the falsity of the testimony because the testimony pertained to agreements between the witness and the state. Defendant claims that he met his burden of showing that the prosecutor knew Bonifay was lying because the prosecutor testified at the evidentiary hearing that he personally did not believe Bonifay's testimony about the threats. However, disbelieving a witness does not equate to knowing that a witness is lying. Defendant has not shown that the prosecutor knew the statement was a lie.

(PC-A X 1522).

Once again, neither the record nor the law supports the trial court's finding. As explained long ago, the prosecutor is

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

In the present case, the prosecutor called Patrick Bonifay as a state witness. In doing so, he implicitly vouched for the credibility of Bonifay as his witness:

> [T]he general rule that parties may not cross-examine and impeach their own witnesses[,] § 90.608, Fla. Stat., . . . "resulted from a belief that the party who calls a witness to testify vouches to the court and jury for the credibility of that witness."[12]

[12] The rule against a party impeaching his own witness, sometimes called the "voucher rule," is retained in Section 90.608(1). The drafters of the [Florida Evidence] Code considered repealing the common law rule and allowing a party to impeach his own witness; however, they determined that generally counsel should not call a witness whom he knew was not

> testifying truthfully and proceed to impeach that person. C. Ehrhardt, Florida Evidence § 608.2, at 298 (2d ed. 1984).

Shere v. State, 579 So. 2d 86, 91 (1991) (quoting C. Ehrhardt, Florida Evidence § 608.2, at 298 (2d ed. 1984)).

Because the prosecutor was vouching for Bonifay's credibility, he had a duty to discover what his witness would testify to when called. See United States v. Lyons, 352 F. Supp. 2d 1231, 1244 n.16 (M.D. Fla. 2004) ("Fundamentally, unaccountable behavior plagued the Government's case. For example, in regard to Torrey Clements, another felon witness, the Government has not produced a single report, note, or document that would indicate that any Government agent checked out, or documented, Clements' story before putting him on the stand. . . . The Government has a duty to establish procedures and regulations to insure communication of all relevant information on each case to every lawyer who deals with it. See Giglio, 405 U.S. at 154. Proper and verifiable vetting should be performed on every witness the Government sees fit to call at trial."). In the present case, the prosecutor admittedly made no attempt to do so, preferring to cloak himself in willful blindness:

> Q. [BY THE STATE] Okay. Up to this time, I believe it's your testimony that you

had not talked to Mr. Bonifay about him testifying in the Archer case?

A. [BY MR. PATTERSON] That's correct.

Q. So the first time that Mr. Bonifay came forward as a witness in any of the proceedings would have been in the Archer guilt phase?

A. That's correct.

Q. Do you recall how that came about?

A. My recollection is that literally in a hallway, in one of the secured hallways, his attorney, with him standing there, said he wants to testify. I basically said if he wants to testify, it's not -- or the State is not going to change its position or offer anything in return for testimony, and I believe he indicated, I believe, he wants to testify anyway, or something to that effect, and I put him on the stand.

Q. You were not exactly certain what he was going to say, were you?

A. I don't believe I pretried him in any way. Now, again, that was, you know, 10 or 11 years ago, but I do not believe I had any substantive discussion with Mr. Bonifay before he testified.

Q. So whatever he said, and the credibility thereof, would be entirely up to the jury to make a determination.

A. Yes, sir.

Q. You had no outside knowledge or any way to make an evaluation of credibility of what he was going to say?

> A. I suspect I had the same tools the jury had to weigh his credibility and to determine what aspects of his testimony were believable and were not.

(PC-A VII 1115-16).

When asked at the evidentiary hearing if he would knowingly introduce false or misleading testimony, Mr. Patterson admitted that he would introduce testimony that was mixed with truth and falsity if the majority of the testimony supported the State's case:

> Q. [BY COLLATERAL COUNSEL] Sir, you would never put on testimony that you believed to be false, correct?
>
> A. I certainly would never try and mislead the court or the jury with false testimony. I cannot say that every word of every witness that I've ever put on the stand was correct.
>
> Q. Sir, but you would not knowingly put on testimony that you believed to be false, would you?
>
> A. I cannot say that's not true. It's not untypical in cases, particularly where co-defendants testify, that some of what they say is something that I think the State would feel is credible and some of what they say may not be.
>
> Q. Sir, the question really isn't necessarily what's credible or believable. The question is, would you knowingly put on testimony that you believed to be untrue?
>
> A. I think it's the same answer. If I knew that it was false, that is to say if I were a witness to something and I knew it

> was false, no. But would I put on testimony that I thought the greater weight of the evidence probably was that that specific fact was not so, but the overwhelming importance of other facts that were testifying to -- I mean, that's the nature of testimony. Some of it fits the facts and some of it doesn't.

(PC-R VII 1077-78).

Despite the prosecutor's candid admissions, the trial court rejected Archer's evidence in support of this claim. Once again, however, it failed to consider the following independent corroborating evidence that supported Archer's assertion that the prosecutor knew Bonifay's testimony was false.

1. The prosecutor consciously decided not to call Eddie Fordham as a witness

At the evidentiary hearing, Mr. Patterson admitted that he personally interviewed Eddie Fordham, the getaway driver, and consciously decided not to call Fordham as a witness against Archer because he believed "the substance of his testimony, the overwhelming substance of his testimony [was] false." (PC-A VII 1078-79). Yet, he put Bonifay on the witness stand without knowing what he was going to say, and then did nothing to correct those parts of Bonifay's testimony that he believed were false.

2. The prosecutor took inconsistent positions regarding Bonifay's testimony

As discussed previously in this issue and in Issue I, supra, the prosecutor took inconsistent positions regarding Bonifay's testimony. At Bonifay's trial, he made a point to elicit from Investigator O'Neal that Bonifay had never mentioned any threat Archer allegedly made toward Bonifay's mother and girlfriend. (TR-B II 251). And when Clifford Barth testified that Bonifay never mentioned Archer's alleged threat when he called on Saturday, the State elicited from Barth that Bonifay had, in fact, asked him to lie about it. (TR-B II 286-87). Finally, in closing argument, the prosecutor asserted that "[t]he threats against Mr. Bonifay . . . is [sic] a story that this man made up, one of many stories this man made up in an effort to avoid responsibility for what he knew he did. . . . There's not one shred of evidence at all, not one word of testimony, not one physical exhibit before you to indicate Mr. Archer ever threatened Bonifay to do this crime." (TR-B II 337, 339).

Within hours of the State's closing argument in Bonifay's case, the prosecutor called Bonifay as a witness against Archer. Although Bonifay had made a taped statement to the police prior to his arrest, he had never been deposed, nor had he testified in his own trial. Nevertheless, the prosecutor put him on the witness stand without first discussing his testimony and did not know what his testimony was going to be. Ultimately, Bonifay

testified that Archer offered him a briefcase full of money to kill the clerk at Trout, and that he killed the clerk because Archer threatened to harm his family if he did not do so, statements he had never made before.

The following day, at Bonifay's immediately ensuing penalty phase, the prosecutor, once again, vigorously disputed Bonifay's claim that he killed the clerk at Trout Auto Parts because of Archer's threat toward Bonifay's mother and girlfriend. (TR-B III 426-28, 430-31, 432-34, 440-42, 445-46). These inconsistent positions by the State not only establish that the prosecutor knew, or should have known, that Bonifay's testimony in Archer's trial was false, but they also undermine the trial court's finding to the contrary.

3. Clifford Barth testified that Bonifay asked him to lie about Archer offering Bonifay money to kill the clerk

At Archer's evidentiary hearing, Clifford Barth testified that while he and Bonifay were housed together in the Juvenile Detention Center, Bonifay asked Barth to lie about Archer's involvement:

> Q. [BY DEFENSE COUNSEL] Can you tell the Court what, if anything, you discussed?
>
> A. [BY BARTH] Well, when we were in the Detention Center Patrick came up with this idea about Archer, you know. He wanted me to tell everybody that Archer paid us to do this or paid him to do the killing or

> whatever and basically wanted us to lie about it.
>
> Q. Did he ever come up with a story about he had been offered money by Archer?
>
> A. Yes, sir, it was part of the story that he wanted me to tell, you know, say that he was, that he was going to get paid or we were going to get paid several thousand dollars or a hundred thousand dollars or I don't remember the exact amount it was to do this and, you know, he just wanted to make that up to try to get the heat off him and I and try to put it on Archer because he was older and all.
>
> * * * *
>
> Q. And did you agree and cooperate and repeat that story?
>
> A. No, sir.
>
> Q. Why not?
>
> A. Because it was false.

(PC-A VII 982, 990).

C. The false testimony affected the jury's verdict

Once a defendant shows that the State knowingly presented perjured testimony, the burden shifts to the State, as the beneficiary of the violation, "to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Guzman v. State, 868 So. 2d 498, 506 (Fla. 2004) (citing United States v. Bagley, 473 U.S. 667, 679-80 n.9 (1985)). In other words, the State bears the burden of showing

that there is no "reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. (quoting Agurs, 427 U.S. at 103)).

Despite this Court's clarification of the proper materiality standard in Guzman, Judge Jones applied the less defense-friendly Brady standard articulated in Ventura, 794 So. 2d 553, 562 (Fla. 2001). (PC-A X 1520-24). As a result, he concluded that

> [e]ven assuming that Bonifay's statements about the money and Defendant's threats were perjured, the statements were not material in that their absence would not have put the whole case in a different light. This is because Bonifay was substantially impeached, especially as to the threats and the money. Trial counsel and [the] prosecutor both testified at the evidentiary hearing that they felt like the jury did not believe Bonifay on those points so his testimony about the threats and money actually helped Defendant. Finally, Defendant's guilt did not turn on whether he threatened or offered to pay Bonifay, because neither of these actions is required in order to be convicted as a principal.

(PC-A X 1523) (record cites omitted).

Once again, the record does not support the trial court's findings. Despite defense counsel's attempts to impeach Bonifay's testimony, and despite the prosecutor's and defense counsel's speculation that the jury did not believe Bonifay's testimony regarding the money and threat, the jury nevertheless

convicted Archer of first-degree murder, armed robbery, and grand theft. It also recommended a sentence of death. While no one knows the evidence upon which it relied to convict, both Judge Collier and Judge Jones, as well as this Court, relied heavily on Bonifay's testimony regarding the money and the threat to sustain Archer's convictions and death sentence. See (TR-A IV 544-45) ("This is the classic case of murder for hire, a contract murder, an execution. . . . Whether payment was to be the money taken in the robbery or a satchel of money as claimed by Bonifay, the deal was struck. . . . Even after the first attempt failed, Archer directed and insisted that Bonifay try again and go through with the murder."); Archer v. State, 613 So. 2d 446, 447 (Fla. 1993) ("[Archer] convinced his cousin, seventeen-year-old Pat Bonifay, to kill the clerk he apparently blamed for his having been fired. . . . Bonifay could not go through with the murder, however, and they left the store. The next day Archer got after Bonifay for not killing the clerk, and the trio went back to the store that night. . . . Archer later refused to pay Bonifay because he killed the wrong clerk."); (RS I 141) ("The merciless killing of Billy Wayne Coker is the classic case of 'murder for hire' - a contract murder, an execution. . . . Whether payment was to be the money taken in the robbery or a satchel of money as claimed by Bonifay, Archer

procured his cousin to kill the store clerk. . . . When the first attempt failed, Archer directed and insisted that Bonifay try again and go through with the murder."); Archer v. State, 673 So. 2d 17, 19-20 (Fla. 1996) ("This was a contract murder, which is by its very nature calm. . . . Archer not only hired Patrick Bonifay, his cousin, to commit the murder but also wanted Bonifay to disguise the murder as a robbery. . . . [O]nce Bonifay returned after killing the wrong clerk, Archer refused to pay him on the agreement.").

Bonifay was the only state witness who could establish that Archer knew Bonifay was going to rob the store and kill the clerk, that Archer intended to participate actively or share in an expected benefit, and that Archer actually did something by which he intended to help commit the crimes. He did so by testifying falsely that Archer offered him a "briefcase full of money" to kill the clerk and that he killed the clerk because Archer had threatened to kill Bonifay's mother and girlfriend if he did not do so.

Not only did the prosecutor not correct this false testimony, he bolstered it with inflammatory character evidence. Following defense counsel's attempt to impeach Bonifay's testimony, the prosecutor elicited the following, some of which was over defense counsel's objection:

Q. [BY THE PROSECUTOR] When you first talked to the police, did you tell them you were afraid of Robin Archer?

A. [BY BONIFAY] Yes, I did.

Q. Now, just a minute ago you pointed over to Robin Archer and said you weren't afraid of him. Is that true?

A. Physically, no, not of him.

Q. So what are you afraid of?

A. His gun, his associates.

* * * *

Q. Mr. Bonifay, you knew Mr. Archer wasn't working, didn't you?

A. Yes, sir.

Q. Knew he hadn't worked for some period of time, didn't you?

A. Yes, sir.

Q. Did he have a source of income other than his work?

A. Yes, he did.

Q. And did that source of income generate him significance [sic] amounts of cash?

A. Yes, it did.

Q. And you were aware of that?

A. Yes, I was.

(TR-A I 163-66). The obvious implication was that Archer was involved in something illegal that generated large sums of cash.

Coupled with Bonifay's testimony that he was afraid of Archer's "gun, his associates," the jury was left to infer that Archer was a dangerous, well-connected, and well-financed criminal, who could both afford to pay for a "hit" on the clerk and have Bonifay's family hurt or killed if Bonifay did not uphold his end of the bargain. Given that Bonifay's testimony was the linchpin in the State's case against Archer, there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." See Mordenti, 894 So. 2d at ___ ("Although on direct appeal we considered the impact of Barnes' single statement that Mordenti was 'in the mob' on the outcome of Mordenti's trial, we now know due to Barnes' recantation that his entire testimony was possibly false. The falsity of Barnes' entire testimony could have impacted the jury's determination of Mordenti's character when deliberating."). Therefore, Archer is entitled to a new trial.

ISSUE III

ARCHER WAS DENIED A FUNDAMENTALLY FAIR TRIAL WHEN THE STATE WITHHELD MATERIAL, EXCULPATORY EVIDENCE THAT NOW PUTS THE WHOLE CASE IN SUCH A DIFFERENT LIGHT THAT IT UNDERMINES CONFIDENCE IN THE VERDICT.

Patrick Bonifay formed the backbone of the State's case against Robin Archer. As discussed previously, Bonifay was the only witness who could establish that Archer was an equally culpable principal in the crimes. As a result, impeaching Bonifay's credibility was a main defense objective: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959). See also Mordenti v. State, 894 So. 2d 161 (Fla. 2004) (granting retrial based on Brady violation where "Gail's testimony and credibility were of significant consequence when we consider that no physical evidence was produced linking Mordenti to the crime. Ultimately, the entire case against Mordenti rose and fell on Gail's testimony."); Floyd v. State, 30 Fla. L. Weekly S192 (Fla. Mar. 24, 2005) (granting retrial based on Brady violation where "this was a circumstantial case in which the most damaging

evidence was arguably Floyd's confession through a jailhouse informant"). The State, however, withheld critical impeachment evidence that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 433-34 (1995). See also Strickler v. Greene, 527 U.S. 263 (1999) (confirming its analysis in Kyles). Therefore, Robin Archer deserves a new trial.

A. The State possessed favorable impeachment evidence

To establish a Brady violation, a defendant must first demonstrate that the State possessed information favorable to the accused because it was either exculpatory or impeaching. Brady v. Maryland, 373 U.S. 83 (1963); see also Kyles, 514 U.S. at 433-34; Banks v. Dretke, 540 U.S. 668 (2004). In the present case, the State knew that Bonifay had been arrested in Mississippi in May 1990 for his involvement in a burglary, during which someone was stabbed. (TR-B III 432-34). The State also knew that Bonifay, Cliff Barth, and George Wynn, all of whom testified against Archer, had burglarized a business not far from Trout a month before the Trout robbery/murder, stealing more than $17,000 worth of audio and video equipment. (PCR-A VII 1136-39, 1141-44; VIII 1167-68). There is no question the Archer's trial counsel could have used these witnesses'

involvement in these other crimes as impeachment evidence, particularly the fact that their cases were pending at the time they testified.

1. The All Pro Sound case

Several days after the robbery/murder, Thomas O'Neal, the lead investigator in the Trout case, focused on Kelly Bland as a suspect. (PCR-A VIII 1167). Investigator O'Neal testified at Archer's post-conviction evidentiary hearing that Bland was given use immunity by the State Attorney's Office in exchange for information about the Trout case.[26] (PCR-A VIII 1167-68). In a recorded statement to Investigator O'Neal, Bland admitted supplying Patrick Bonifay with the gun used to kill Billy Coker. (PCR-A VIII 1167-68). Bland also admitted to committing a burglary, along with Bonifay, Clifford Barth, Eric White, and George Wynn, four weeks prior to the Trout robbery/murder, at a

[26] Investigator Brooks Sanderson from the Escambia County Sheriff's Office also testified at Archer's evidentiary hearing that Bland had been given use immunity. (PCR-A VII 1138). Mr. Patterson, however, was not sure he knew pre-trial that his office had given Bland immunity. (PCR-A VII 1105).

business called All Pro Sound, which was 1.5 miles from the Trout Auto Parts store. (PCR-A VII 1136-39; VIII 1167-68, 1322-23).

While in jail on the Trout case, Patrick Bonifay also gave a statement regarding the All Pro Sound case. Bonifay revealed that Wynn waited in Barth's truck at the back door to the business while Bonifay, White, and Bland broke the glass in the front door, entered the business, and stole $17,730 worth of equipment. (PCR-A VIII 1143-44). Bonifay, Barth, White, and Wynn, but not Bland, were all arrested and charged with the All Pro Sound burglary and grand theft. (PCR-A VIII 1141). Bonifay was convicted and sentenced in the All Pro Sound case on the day of his Spencer hearing in the Trout case, well after his testimony in Archer's trial. (PCR-A VIII 1164). Barth pled no contest on June 11, 1991, a month prior to his testimony in Archer's trial. (PCR-A VIII 1165). Wynn's prosecution was deferred by agreement until October 9, 1992, well after his testimony in Archer's trial. (PCR-A VIII 1164). Bland did not testify against Archer.

Archer's prosecutor, Michael Patterson, who also prosecuted Bonifay, Barth, and Fordham in the Trout case, could not recall at Archer's evidentiary hearing whether he knew about these witnesses' involvement in the All Pro Sound case and, if so,

whether he provided such information to Archer's trial attorney. (PCR-A VII 1103-05, 1108, 1112). Investigator Sanderson testified that he could not recall providing his reports in the All Pro Sound case to the State Attorney's Office. Nor could Investigator O'Neal recall telling the prosecution about the All Pro Sound case, since, in his opinion, there was nothing in Bland's statement relevant to the Trout case. (PCR-A VIII 1163, 1170, 1172). However, the law is clear that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437. See also Gorham v. State, 597 So. 2d 782, 784 (Fla. 1992) (holding that prosecutor is charged with constructive knowledge of evidence withheld by other state agents, such as law enforcement officers).

2. The Mississippi case

According to police reports from Southaven Police Department in Southaven, Mississippi, dated May 5, 1990, Bonifay, two adult males, and a juvenile female were arrested for the burglary of the Bugs and Buggy store. During their escape, the two adult males attacked the store owner's son and a friend of his, stabbing him with a knife. Bonifay and the juvenile female drove away in a pickup truck and was observed by the police

throwing tools and car parts onto the highway. (PC-A VIII 1275-84).

When questioned by collateral counsel, Mr. Patterson could not recall whether he investigated the Mississippi case, but conceded that he may have done so while investigating Bonifay's prior criminal history. (PCR-A VII 1092). On cross-examination, however, he admitted that he knew about Bonifay's Mississippi arrest, but was having difficulty obtaining any paperwork relating to it:

> Q. [BY THE STATE] You don't recall ever seeing any reports or anything from South Haven?
>
> A. [BY MR. PATTERSON] No, sir. I want to -- you know, I believe -- it is my recollection that we were unable to get any paperwork from Mississippi. We knew that there was an offense there and maybe something that it was a burglary or that it involved violence or something, we knew something, but we were unable to get paperwork from there. I'm not certain about that, but I believe -- I don't think I have ever seen what you have that I think is Exhibit 5.

(PC-A VII 1113) (emphasis added).

The original trial records reflect that the prosecutor knew enough about the Mississippi case to impeach Bonifay during his penalty phase testimony with his involvement in the burglary. Within hours of arguing to Archer's jury that Archer was the mastermind in this murder-for-hire (TR-A 365-78), the prosecutor

impeached Bonifay with his involvement in the Mississippi case in order to show that Bonifay was capable of committing crimes without Archer's involvement:

> Q. [BY THE STATE] And the only reason you did this was because Mr. Archer made you do it, right?
>
> A. [BY BONIFAY] Yes, sir.
>
> Q. Well, have you ever been involved in any things that Mr. Archer didn't make you do?
>
> A. Yes, sir.
>
> * * * *
>
> Q. Mr. Bonifay, weren't you involved in a robbery in Mississippi?
>
> A. No, sir.
>
> Q. No? In which a man got stabbed?
>
> A. Involved in a burglary.
>
> Q. A burglary. Well, did someone get stabbed in this burglary?
>
> A. Yes, sir.
> * * * *
>
> Q. When did that occur?
>
> A. Awhile back last year.
>
> Q. Last year. Two months before this happened?
>
> A. No, sir, six or seven months.
>
> Q. Six or seven months before this happened. Robin Archer make you do that?

A. No, sir.

Q. So you're fully capable of doing this on your own, aren't you?

A. No, sir.

(TR-B III 432-34).

B. The State suppressed favorable impeachment evidence

Not only must a defendant prove that the State possessed favorable impeachment evidence, but he must also prove that the State willfully or inadvertently suppressed that evidence. Brady, 373 U.S. at 87. Archer's trial counsel, Brian Lang, testified at Archer's evidentiary hearing that he was not aware of the All Pro Sound case. (PC-A VII 1030). Had he been aware of it, however, he probably would have used it. (PC-A VII 1031, 1038, 1055). As for the Mississippi case, Archer mentioned it during the State's cross-examination of him, but Lang could not remember whether he knew anything about it. Again, had he known about it, he may have used it as impeachment evidence. (PC-A VII 1037, 1054-55).

In denying this claim, the trial court made the following findings:

> George Wynne did testify at Defendant's guilt and resentencing phases. However, even though Defendant's attorneys did not have the report, there was some knowledge of the All Pro case amongst the four defense attorneys. At the July 16, 1991 deposition

> of witness George Wynne, attended by all defense attorneys in this case except for Defendant's, Bonifay's attorney asked Wynne if he had "made a deal yet as far as the All Pro burglary thing." Wynne deposition at 23. In spite of the fact that three of the defense attorneys herein were in the room, there is no evidence that any of those attorneys pursued the All Pro case reports or used it for impeachment purposes at trial. The prosecutor has consistently testified that he does not believe he had the reports, and if he had, he would have turned them over in discovery.

(PC-A X 1516-17) (footnote omitted; emphasis added).

Neither the law nor common sense supports the trial court's conclusion that the State did not suppress favorable impeachment information. First, Archer's trial counsel was concededly not at Wynn's deposition, which was held two days prior to Archer's trial. Thus, the court should not have imputed knowledge of the existence of the All Pro Sound burglary to Archer's counsel when he was not even there. Second, Kyles and its progeny no longer place a "due diligence" requirement on defense counsel to attempt to discover the suppressed material. Rather, they "squarely place the burden on the State to disclose to the defendant all information in its possession that is exculpatory." Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001) (emphasis added). See also Allen v. State, 854 So. 2d 1255, 1259 (Fla. 2001) ("The defendant's duty to exercise due

diligence in reviewing Brady material applies only after the State discloses [its existence].").

C. Suppression of the evidence undermines confidence in the outcome

The third requirement for a Brady claim is establishing prejudice or materiality. Brady, 373 U.S. at 87. As stressed in Kyles, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." 519 U.S. 434. In fact, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. Further, Kyles stressed that "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. at 434-35. Rather, the defendant need only show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435. Finally, in determining materiality, the suppressed evidence must be "considered collectively, not item by item." Id. at 436.

In the present case, the fact that Bonifay had committed two burglaries within months of the Trout robbery/murder, one of which involved the stabbing of a witness, would have shown that Bonifay was capable of committing crimes without Archer's leadership or involvement. In fact, in the All Pro Sound burglary, Bonifay's step-father, who worked at the business, provided the key and the alarm code so that Bonifay could burglarize the store. (PCR-A VIII 1323). Moreover, the fact that the State had deferred the prosecution of George Wynn's case could have been used to show that Wynn had a reason to testify favorably for the State.

This type of impeachment material was at the heart of the Supreme Court's reversal in Kyles v. Whitley. In Kyles, an informant named Beanie called the police to report that he had bought a car from Kyles and feared that it belonged to Kyles' victim. 514 U.S. at 424. Beanie thereafter provided information linking Kyles to the car owner's murder. Id. By the State's own admission, Beanie was essential to its investigation and, indeed, "made the case" against Kyles. Id. at 445. The police failed to disclose, however, among other things, that Beanie had charges pending against him for a theft at the same Schwegmann's store and was a primary suspect in a similar robbery/murder. Beanie later confessed his involvement

in the similar murder, but was never charged in connection with it. "These were additional reasons for Beanie to ingratiate himself with the police and for the police to treat him with a suspicion they did not show." Id. at 422 n.13.

Similarly, in State v. Gunsby, 670 So. 2d 920 (1996), this Court vacated Gunsby's conviction based on a Brady violation, wherein the State suppressed information that the key eyewitness, Tony Awadallah, had adjudication withheld on four criminal charges in exchange for his testimony so that he would not be discredited on the witness stand as having been convicted of a felony. The State had also withheld evidence that Awadallah had been arrested on new charges of burglary and dealing in stolen property before trial and that those charges were pending at the time he testified. Finally, the State had suppressed evidence that another important state witness, Diane Williams, was arrested for violating her probation before testifying against Gunsby. Id. at 921-22. Cumulatively, the suppression of this evidence warranted a new trial. Id. at 923.

Unquestionably, the State possessed favorable impeachment evidence in the present case relating to the Mississippi case and the All Pro Sound case. Equally without doubt, the State failed to inform Archer's defense counsel about the existence of these cases and the status of the perpetrators' pending

prosecutions. When considered cumulatively, "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435. See also Banks v. Dretke, 540 U.S. 668 (2004) ("On the record before us, one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the [status of the key witness as a paid informant] been disclosed to the defense."); Giglio v. United States, 405 U.S. 150, 154-55 (1972) ("Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it."); Floyd v. State, 30 Fla. L. Weekly S192 (Fla. Mar. 24, 2005) (granting new trial based on Brady violations); Mordenti, 894 So. 2d 161 (Fla. 2004) (same); Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002) (same); Hoffman v. State, 800 So. 2d 174, 179-81 (Fla. 2001) (same); State v. Huggins, 788 So. 2d 238, 243 (Fla. 2001) (same); Rogers v. State, 782 So. 2d 373 (Fla. 2001) (same). Therefore, Archer is entitled to a new trial.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Appellant, ROBIN LEE ARCHER, respectfully requests that this Honorable Court reverse the trial court's denial of relief and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was hand delivered to Curtis French, Assistant Attorney General, The Capitol PL-01, Tallahassee, FL 32301; and was sent by United States mail, postage prepaid, to Robin Lee Archer, DC# 216728, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026, this 22nd day of April, 2005.

_____
SARA K. DYEHOUSE, ESQ.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

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SARA K. DYEHOUSE, ESQ.