IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-633

RODNEY TYRONE LOWE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Lowe's motion for post-conviction relief following a remand by this Court for an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"PCR" -- record on initial 3.850 appeal to this Court;

“T” -- transcripts during post conviction proceedings.

All other citations and references will be self explanatory

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE AND FACTS

On July 25, 1990, an Indian River County grand jury indicted Mr. Lowe for first-degree murder, attempted robbery, and possession of a firearm by a convicted felon (R. 1326-27). The State's theory of the case as evidenced by its opening statement and closing argument as well as the evidence it adduced was that Mr. Lowe, acting alone, was the sole perpetrator of the shooting of Donna Burnell. On April 12, 1991, a jury found Mr. Lowe guilty of first-degree murder and attempted robbery (R. 1807-08). On April 22, 1991, the jury recommended a sentence of death (R. 1309, 1833). On May 1, 1991, the Circuit Court sentenced Mr. Lowe to death for first-degree murder (R. 1318-24, 1845-56). On May 9, 1991, the Office of the State Attorney entered a nolle prosequi to the charge of possession of a firearm by a convicted felon (R. 1866).

On direct appeal, this Court affirmed Mr. Lowe's convictions and sentences. See Lowe v. State, 650 So. 2d 969 (Fla. 1994), cert. denied, 516 U.S. 887 (1995).

On March 18, 1997, Mr. Lowe filed his initial motion for post-conviction relief with request for leave to amend (PCR. 1-42). With leave of the lower court subsequent amendments were filed following public records litigation.

The lower court granted an evidentiary hearing on certain claims and the initial portion of the evidentiary hearing was held on January 7th through January 10th, 2003. On January 20, 2003, Mr. Lowe filed a supplemental amendment,

asserting that the State withheld Brady evidence that police had been told that Dwayne Blackmon, the State's star witness at trial, had admitted to killing the victim (PCR. 1615-1622). On February 11, 2003, additional evidence was heard in the form of testimony from Ben Carter. On April 25, 2003, an evidentiary hearing was held on the supplemental amendment. On June 20, 2003, Mr. Lowe filed second supplemental claim based upon the United States Supreme Court decision in Ring v. Arizona, 122 S. Ct. 2448 (2002) (PCR. 1696-1731). The parties thereafter submitted post-evidentiary hearing memoranda. On August 11, 2004, the lower court served a written order denying all of Mr. Lowe's remaining claims (PCR. 2041-2074).

On August 25, 2004, Mr. Lowe filed contemporaneously a motion for rehearing and an additional motion for post conviction relief based on the newly discovered evidence that in 2003, after the first evidentiary hearing, Blackmon had admitted to killing Donna Burnell to Lisa Grone (PCR. 2075-2105; 2106-2122).

On November 23, 2004, an evidentiary hearing was held in which Lisa Grone testified. On January 11, 2005, Mr. Lowe served a Rule 3.850 motion based on newly discovered witnesses, Maureen McQuade and David Stinson (PCR. 2470-2502). The State responded on February 4, 2005 (PCR. 2251-2546). On February 24, 2005, the lower court held a Case Management Conference to determine whether to hold an evidentiary hearing on the new witnesses, but did not

rule either way at that juncture.

On March 2, 2005, Mr. Lowe filed a further Rule 3.850 motion alleging that Blackmon had made yet further confessions to being the shooter, and that the State knew all along that Blackmon was the actual killer, suppressed this information, and allowed Blackmon to testify falsely against Mr. Lowe (PCR. 2549-2577).

On March 21, 2005 the State responded, conceding an evidentiary hearing. However the State's response crossed in the mail with an order issued by the lower court denying Mr. Lowe a new trial, but granting a new penalty phase (PCR. 2579-2590). This appeal of the denial of a new trial follows.

SUMMARY OF THE ARGUMENTS

1. Mr. Lowe is entitled to a new trial because, due to the ineffective assistance of trial counsel, the State's suppression of material exculpatory evidence and newly discovered evidence errors, the jury never knew that Dwayne Blackmon was the shooter.

2. Trial counsel was ineffective for failing to investigate the State's case that Mr. Lowe acted alone.

3. Due to trial counsel's ineffectiveness and the State's suppression of material exculpatory evidence, the State's star witness was not impeached.

4. Trial counsel was ineffective for failing to object to inflammatory and irrelevant evidence.

5. Trial counsel was ineffective for failing to challenge the introduction of Mr. Lowe's statement and failing to impeach Patricia White.

ARGUMENT

ARGUMENT I

MR. LOWE WAS DENIED AN ADVERSARIAL TESTING AT THE GUILT/INNOCENCE PHASE OF HIS CAPITAL TRIAL WHEN THE JURY DID NOT KNOW THAT DWAYNE BLACKMON WAS THE SHOOTER, DUE TO THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, THE STATE'S SUPPRESSION OF MATERIAL EXCULPATORY EVIDENCE, AND NEWLY DISCOVERED EVIDENCE

A. Introduction

The evidence presented to the jury by the State, combined with the State's arguments to the jury, establish that the jury's verdict finding Mr. Lowe guilty of first-degree murder was predicated on the jury concluding that Mr. Lowe acted alone and, therefore, was the person who killed Donna Burnell. Because the State so strongly entrenched its case for first-degree murder on this scenario, had the jury not believed that Mr. Lowe killed Donna Burnell, it cannot be said that the jury would have still convicted Mr. Lowe of first-degree murder. But for constitutional errors, including ineffective assistance of counsel, violations of Mr. Lowe's rights under Brady v. Maryland, 373 U.S. 83 (1963), and newly discovered evidence, the jury would have concluded that Mr. Lowe did not kill Mrs. Burnell.

Even though the trial court instructed the jury on alternative theories of first-

degree murder (R. 1116-18), in terms of the State's evidence and the State's argument to the jury, the State in Mr. Lowe's case based its case entirely on the theory that Mr. Lowe acted entirely on his own. The person the State entrusted with proving the State's case was Dwayne Blackmon. If the jury believed Dwayne Blackmon's testimony that Mr. Lowe acted alone, then the jury's guilty verdict necessarily was predicated only on the available theories of first-degree murder that require as an element that the defendant himself killed the victim.

The court instructed the jury in effect with four (4) distinct theories of first-degree murder (R. 1116-18). Two of the four theories allowed the jury to convict if the jury found that Mr. Lowe did not actually shoot and kill Donna Burnell. However, because the State presented evidence that, if believed by the jury, was **mutually exclusive** to the theory that someone other than Mr. Lowe shot and killed Donna Burnell, the fact that the jury found Mr. Lowe guilty of first-degree murder establishes that the jury necessarily predicated its verdict on a finding that Mr. Lowe shot Donna Burnell. Dwayne Blackmon's testimony both inculpated Mr. Lowe as the lone killer and exculpated himself (Blackmon) from any involvement in the crime. The jury could not logically have believed Blackmon's testimony that Mr. Lowe killed Donna Burnell and, at the same time, believed that Mr. Lowe was involved in the crime **but not the shooter**. Furthermore, the State argued that the videotaped "time period analysis" proved that it was impossible for

Blackmon and Sailor to have been involved in the crime (R. 1090). Therefore, the jury's verdict necessarily was predicated on a finding that Mr. Lowe himself shot and killed Donna Burnell.

In opening statements, the prosecutor told the jury that the State intended to present evidence in the form of Dwayne Blackmon's testimony that:

> [O]n the night or the evening of July 3rd . . . .the Defendant told him [Dwayne], "I went to rob that store. I shot the lady. I didn't get nothing, not even a pack of Newport cigarettes. Don't tell anybody."

(R. 435). The prosecutor also emphasized that the State intended to present evidence in the form of Detective Green's testimony and the videotape suggesting that it was impossible for Mr. Lowe to have picked up Blackmon and Sailor and then committed the crime with them (R. 438-39). Finally, the prosecutor told the jury about evidence suggesting that Blackmon had been in bed with a sore throat at the time of the murder (R. 439). In short, in its opening statement, the State set the stage and made perfectly clear to the jury that the State intended to establish at trial **not** that Rodney committed the crime with Dwayne Blackmon and Lorenzo Sailor, but that he committed the crime acting entirely alone.

The State called Dwayne Blackmon, who testified that, in the late afternoon on July 3, 1990, Mr. Lowe told Blackmon that he had tried to rob the Nu-Pack and

had shot the clerk (R. 934-35). Blackmon also testified that he was not involved.[1] (R. 920-30). Blackmon testified that he was asleep in bed with swollen tonsils (R. 931). Victoria Blackmon backed up Blackmon's alleged alibi by testifying that he was in bed with a sore throat (R. 895-96, 909-10, 911-14).

In addition, the State elicited significant testimony from Blackmon that strongly suggested that Mr. Lowe **premeditated** the murder. Blackmon testified that, prior to the murder, Mr. Lowe "**had talked about he would shoot somebody**" (R. 935). The court instructed the jury on the law applicable to the charge of premeditated first-degree murder. See (R. 1116-17).

Blackmon's testimony that Mr. Lowe "had talked about he would shoot somebody" was direct evidence of premeditation. Blackmon also testified that "I purchased a gun for Rod cause he said he needed a gun. He wanted one. He couldn't find any. I give it to him" (R. 918). The obvious inference from Blackmon's testimony was that Mr. Lowe "needed" a gun because he planned to use it in a robbery. The State obviously elicited this testimony from Blackmon in order to convince the jury that Mr. Lowe had a made a conscious decision to kill before the time of the Nu-Pack shooting. If the jury believed Dwayne Blackmon's testimony, the jury must have concluded that Mr. Lowe premeditated the murder of

[1]However, Blackmon admitted to the jury that he and Lorenzo Sailor had on two occasions just days prior to the crime, gone to the Nu-Pack with Mr. Lowe with the

Donna Burnell.

In guilt-phase closing arguments, the prosecutor at the outset told the jury, "Ladies and gentleman, **premeditation is very clear in this case**" (R. 1063). The prosecutor argued that the evidence presented by the State proved that Mr. Lowe killed Donna Burnell and that the murder was premeditated:

> Not only was the gun loaded when **the Defendant** entered the store, but prior to firing it doesn't fire without the trigger being pulled. And you can't hit your object unless you're aiming at your object. In this case Donna Burnell. And as you know **he's** standing from Donna Burnell, we know that **he** was less twelve [sic] inches and more than putting the gun against her chest. . . . . It takes thought, the squeezing of that trigger. Once on the top of the head. Once in the face. Once through the heart. Each time **he** had an opportunity to think and know as he used this gun what he was doing. Knowing that **he** was killing another human being.

(R. 1063-64) (emphasis added).

In the end the State implored the jury to believe Dwayne Blackmon's testimony: "He came in and told you what happened in this case" (R. 1099). The State urged that Blackmon's story should be believed when viewed in connection with the other evidence (R. 1099).

Because the State relied exclusively on the theory that Mr. Lowe shot and killed the victim, and because Blackmon's own testimony, as well as the State's

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intention of committing a robbery (R. 920-30).

argument regarding the "time period analysis" and Steven Leudtke's testimony, were mutually exclusive to the theory that someone other than Mr. Lowe shot Donna Burnell, the record necessarily reflects that the jury based its verdict on a finding that Mr. Lowe himself killed Donna Burnell.

The jury's guilty verdict clearly was predicated only on the available theories of first-degree murder that require as an element that the defendant himself killed the victim. Because the State so strongly entrenched its case for first-degree murder on this scenario, had the jury not believed that Mr. Lowe killed Donna Burnell, it cannot be said with confidence that the jury would have still convicted Mr. Lowe of first-degree murder. As discussed below, but for constitutional errors, including ineffective assistance of counsel, violations of Mr. Lowe's rights under Brady v. Maryland, 373 U.S. 83 (1963), and newly discovered evidence, the jury would have concluded that Mr. Lowe did not kill Donna Burnell.

B. Trial counsel was ineffective for failing to investigate and show that Dwayne Blackmon admitted to killing Donna Burnell

(a) Introduction

Trial counsel was ineffective for failing to present evidence in the form of testimony from Lisa Miller and Ben Carter that Dwayne Blackmon admitted to killing Donna Burnell. Because Mr. Long failed to discover and present this

evidence, the jury never learned that Blackmon had admitted to committing the murder. Had the jury known this, there is more than a reasonable probability that the outcome of the guilt-innocence phase of the trial would have been different. The lower court's finding that, although trial counsel afforded deficient performance there was not prejudice requiring a new trial, is in error.

(b) Dwayne Blackmon's confession to Lisa Miller

At the evidentiary hearing, Lisa Miller testified that a few months after the murder, and before Mr. Lowe's trial, she was with Dwayne Blackmon, Benjamin ("Ben") Carter (Dwayne Blackmon's cousin), Victoria Blackmon (Dwayne's wife), and Brenda Shuh (aka Brenda Mosely) (T. 712-13). At the time, she and Ben Carter were girlfriend and boyfriend (T. 709). They were all "hanging out" and talking at Dwayne and Ben's grandmother's house (T.712).

At some point, Dwayne and Victoria Blackmon got into an argument. Dwayne said, "I killed one bitch. I'll do it again." (T. 717). Dwayne then told Ben the details of the attempted robbery and shooting at the Nu-Pack (T. 718). As Lisa listened to Dwayne, it dawned on her that he was talking about the Nu-Pack murder that she previously had read about in the newspaper (T. 720). Dwayne said that he, Rodney and Lorenzo went to the store. Lisa described Dwayne's admission as follows:

> [Dwayne] said Rodney went to the soda case and was

> getting a soda out. He was at the counter. And all he said was, "She hesitated, so I shot her." He said Rodney dropped the soda and ran out of the store. And then he made a statement that, **"Them fools believe me," you know, "and now I'm gonna walk."**

(T. 718).

According to both Lisa Miller and her mother Cynthia, a few days later, and before Mr. Lowe's trial, Indian River County Sheriff Detective Phil Williams and another officer came to Lisa Miller's house to talk to Lisa about the Nu-Pack murder (T. 719). Lisa told Williams about what Dwayne had said about the murder (T. 720).

Subsequently, she spoke with several different law enforcement officers about Dwayne's admission, including Detective John Grimmich, Detective Parrish and, for a second time, Phil Williams (T. 720-723).

Lisa recalled that she spoke to Detective Grimmich in 1998 or 1999 when he came to her asking her if she had information on an unrelated case. He told her that he would look into it (T. 720-721). She spoke to Detective Parrish on two occasions, the first time prior to her speaking with Detective Grimmich and the second time in March of 2002 (T. 723).

In 2001 or 2002, Lisa Miller saw a newspaper article about Mr. Lowe (T. 724). This again made her upset and prompted her to try and contact Mr. Lowe's lawyers (T. 724). After she was unable to get into contact with his lawyers, she

contacted Phil Williams on the telephone to get advice on what she should do. She told him about the newspaper article regarding Mr. Lowe's case and asked him what she could do about the fact that Mr. Lowe was convicted of a murder that Dwayne Blackmon admitted to committing. Williams told her that there was nothing she could do "because it's hearsay and he was already convicted." (T. 725-726).

According to Matthew Dixon (per his affidavit admitted into evidence at the evidentiary hearing on behalf of Mr. Lowe by stipulation on April 25, 2003), since the year 1993, Lisa Miller on multiple occasions has told him that she was with Dwayne Blackmon when he confessed to shooting the victim in the Nu-Pack convenience store (PCR. 1675-79). He also has witnessed several occasions when Lisa Miller told local law enforcement officers that Dwayne Blackmon admitted in her presence to shooting the victim at the Nu-Pack. He does not know or recall the names of the officers. Id. Mr. Dixon does not know and has never met Mr. Lowe. Id.

(c) Dwayne Blackmon confessed to Benjamin Carter

Ben Carter, Dwayne Blackmon's cousin, corroborated Lisa Miller's testimony that Dwayne Blackmon admitted to killing Donna Burnell. When Ben, Lisa Miller, Dwayne, Victoria, and a girl named Brenda were at Ruby Mae Blackmon's house, Dwayne admitted that he had shot the clerk at the Nu-Pack

store (T. 1238). Dwayne stated, "in a threatening manner to some people that were [present]" that "he had shot and killed the lady and that he would do so again" (T. 1239). Ben also testified that Dwayne "numerous times" admitted to being involved in the Nu Pack murder (T. 1238).

(d) Trial counsel rendered deficient performance

Trial counsel's failure to investigate Lisa Miller and Ben Carter constituted deficient performance. Mr. Long rendered deficient performance by failing to discover and present evidence of Blackmon's admission at Mr. Lowe's capital trial. See Strickland v. Washington, 466 U.S. 668 (1984).

The record establishes that Ben Carter was a listed state witness. He was named in police reports and deposition statements. Had Mr. Long competently investigated Ben Carter, Mr. Long would have learned that Blackmon admitted in the presence of Ben Carter and Lisa Miller to killing Donna Burnell.[2] Had he known of this evidence, Mr. Long could have presented it at Mr. Lowe's trial. Mr. Long testified at the evidentiary hearing that, had he known of a witness who could have testified that Dwayne Blackmon was the person who killed Donna Burnell, he would have presented the evidence at trial (T. 572). The lower court correctly

[2]Post-conviction counsel's investigator Jeff Walsh, proffered how he discovered this evidence when he met with and talked to Ben Carter. Carter not only told him about Blackmon's admissions but led Mr. Walsh to Lisa Miller, who confirmed

found that Mr. Long's failure to investigate Ben Carter and Lisa Miller was deficient performance (PCR. 2048).

(e) Prejudice

The lower court denied relief on Mr. Lowe's claim of ineffectiveness at the guilt phase, notwithstanding its finding of deficient performance and prejudice in respect to the penalty phase. The lower court found that there was no "reasonable probability that, but for trial counsel's deficient performance, the outcome of the proceedings would have been different." (PCR. 2048)[3]. The lower court predicated its findings on the evidence presented of Mr. Lowe's fingerprints and his statement, and the fact that the jury was instructed on both premeditated murder and felony murder.

However, the lower court did not address the fact that the State's entire theory of the case was predicated on premeditation, based on its contention that Mr. Lowe acted alone and was the shooter. As noted in Argument I(A) supra, notwithstanding the jury instruction on felony murder, through the entire proceeding, the State immersed the jury in arguments and facts that supported pure premeditation, from the opening statement, to the presentation of Dwayne

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Carter's information (T. 790). Mr. Long would have learned of this evidence had he bothered to investigate Ben Carter.

Blackmon, and in closing argument.

In determining whether prejudice has ensued, this Court must analyze the impeachment value of the [un-investigated evidence] Mordenti v. State, 894 So. 2d 161, 170 (Fla. 2004) (discussing prejudice analysis in the context of a of a Brady violation). The materiality test for a Strickland claim is identical to the prejudice test for a Brady claim. See Strickler v. Greene, 527 U.S. 263 (1999). There is no doubt that this impeachment evidence against the State's star witness could have been

> persuasive for the defense when weighed against the State's case, especially when considered in the light of the heavy burden upon the State to prove guilt in a criminal case beyond any reasonable doubt and the legal requirement that the jury's verdict be unanimous. **In effect this means that only one juror finding reasonable doubt would change the verdict.**

Floyd v. State, 902 So. 2d 775, 785 (Fla, 2005) (discussing prejudice in Brady context) (emphasis added). The un-investigated evidence would

> not only have empowered the defense to discredit [Blackmon] but would also have stifled the prosecutor's fervid attempts to portray [Blackmon] as a believable witness. Specifically the [un-investigated] information would have cast doubt on the veracity of [Blackmon's] testimony.

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[3]However it is noteworthy that at the penalty phase, the lower court found their testimony "sufficiently credible to warrant consideration by a penalty phase jury" PCR. 2583.

(Mordenti 894 So. 2d at 171).

Mr. Lowe's case bears marked similarities to the case of Cardona v. State, 826 So. 2d 968 (Fla. 2002), in which this Court granted a new trial to Ms. Cardona based on a Brady violation. The Brady violation occurred when the State's star witness (and Ms. Cardona's co-defendant) was found to have made statements pre trial which were entirely inconsistent with her trial testimony, and suggested that she and not Ms. Cardona was the principle actor in the death of the child victim. Here, as in Cardona:

> Because of the State's reliance on [Blackmon] as its key witness both to obtain its conviction of first-degree murder and to argue for the death penalty ....impeaching [Blackmon] as to these material inconsistencies could have further undermined [Blackmon's] credibility before the jury and thus bolstered the defense's contention that [Blackmon] and not [Mr. Lowe] was the primary actor in the ...death of [the victim].

State v. Cardona, 826 So. 2d 968, 981 (Fla. 2002). As in Cardona the jury's assessment of the relative culpability of Blackmon as against that of Mr. Lowe could have affected the jury's decision on whether or not to return a first-degree murder conviction. There is more than a reasonable probability that at least one juror based his or her guilty verdict on premeditation alone, based inter alia on the testimony of the State's star witness Blackmon. The impeachment value of his confessions to Lisa Miller and Ben Carter is devastating to his credibility.

Contrary to the lower court's finding, prejudice has been established. Relief is warranted.

C. The State suppressed evidence that Dwayne Blackmon admitted to killing Donna Burnell

(a) Dwayne Blackmon's confessions to Lisa Miller and Michael Lee

As noted in Argument I(B) supra, Lisa Miller testified that before the trial, she told Detective Phil Williams and another officer that Dwayne Blackmon had confessed to the killings and that over the years she had repeatedly told Detective Williams, Detective Grimmich and Detective Parrish. Additionally the affidavit of Matthew Dixon also shows that Lisa Miller stated that she had in Mr. Dixon's presence telephoned an individual she identified as a law enforcement officer about Blackmon's confession to her (PCR. 1675-79). In addition to Lisa Miller's revelations, Michael Lee can show that the State was aware that Blackmon was the shooter but failed to turn over this evidence.

Michael Lee was in the Indian River County Jail awaiting trial on an unrelated charge during the pendency of the investigation into the death of Donna Burnell. During this time a detective came to talk to him about Dwayne Blackmon's involvement in the Nu Pack murder. The detective told Mr. Lee that **the police knew that Dwayne Blackmon was the shooter** in the case and that they needed Mr. Lee to say that Blackmon had confessed to him. The detective

offered an incentive in the form of a reduced sentence to Mr. Lee if he cooperated. At that point Blackmon had not made any admissions to Mr. Lee. Mr Lee declined to assist the detective. At some point thereafter, Michael Lee encountered Blackmon in the jail. Mr. Lee told Blackmon that Detective Rodriguez had asked Mr. Lee to say that Blackmon had confessed to the murder. Blackmon then stated that indeed he (Blackmon) was the actual shooter in the case. Blackmon further stated that he had voodoo "roots" and that he was protected by this. Mr. Lee believed that Blackmon was indeed protected by voodoo, because Mr. Lee's brother had informed on Blackmon in an unrelated matter and had become sick and died. Mr. Lee was very afraid of Blackmon's apparent voodoo protection, having witnessed what he understood to be evidence of its power over individuals who crossed Blackmon.

Mr. Lee was sentenced to 20 years in prison, which was reduced on appeal. See Lee v. State, 626 So. 2d, 1118 (Fla. 1993). Mr. Lee was later released from prison. He became aware that an investigator was searching for him in connection with the Rodney Lowe case. However at that time he had an outstanding warrant for his arrest and so he hid from the investigator and was not tracked down. Investigator Jeff Walsh testified to his unsuccessful attempts to find Mr. Lee at the January 2003 evidentiary hearing. See T. 792-793. In his Rule 3.850 motion filed on March 2, 2005, Mr. Lowe requested an evidentiary hearing on the Brady claim

as it related to Michael Lee, which the State conceded. However the lower court in the interim entered an order granting Mr. Lowe a new penalty phase but denying a new guilt phase.

(b) The State withheld evidence of Dwayne Blackmon's confessions and the State's knowledge that Blackmon was the killer from Mr. Lowe.

As evidenced by Lisa Miller and Michael Lee, the police clearly knew of this material exculpatory and impeachment evidence but failed to turn it over to the defense. Not only did the State withhold the evidence form Mr. Lowe, but they put on Blackmon's perjured testimony that he was not present at the crime scene. Mr. Lowe is entitled to a new trial. See Brady v. Maryland, 373 U.S. 83 (1963). Lisa Miller told then-detective Phil Williams about Blackmon's statements prior to Mr. Lowe's trial and again subsequent to the trial. She also told this information to Detective Joe Parrish, Detective John Grimmich, and other law enforcement officials on various other occasions. The State never disclosed the existence of this highly exculpatory and critical impeachment evidence to the defense.

In Cardona v. State, 826 So. 2d 968 (Fla. 2002), this Court reiterated the required showing for establishing a Brady violation:

> In order to establish a Brady violation, a defendant must prove:
>
> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed

> by the State, either willfully or inadvertently; and [3] prejudice must have ensued.
>
> Thus, not every instance where the State withholds favorable evidence will rise to the level of a Brady violation necessitating the granting of a new trial, but only those where there is a determination that the favorable evidence that was withheld resulted in prejudice. The determination of whether a Brady violation has occurred is subject to independent appellate review.

Cardona v. State, 826 So. 2d at 973 (citations omitted). The evidence that the State failed to disclose was clearly favorable to Mr. Lowe as it constituted both exculpatory and impeachment evidence. Dwayne Blackmon, who admitted at trial that less than a week before the shooting he had cased the store with the intention to commit armed robbery, testified that on the day and time of the shooting he was in bed with a sore throat. He also testified that later that same day, Mr. Lowe told him that he had gone to the store alone and shot the victim in an attempted robbery. Evidence that Blackmon told others that he himself had shot the victim is both exculpatory evidence and evidence that would have been used to impeach Blackmon's highly damaging testimony. See Section 90.608 (1), Fla. Stat. (1990).

Because Lisa Miller told law enforcement officers, both before and after Mr. Lowe's trial, that she heard Blackmon make these admissions, the State had a duty to disclose this evidence to the defense. The same applies equally to the disclosure to Michael Lee that the police knew that Blackmon was the shooter. The State

instead suppressed this evidence. The State's duty to disclose favorable evidence continues even after the imposition of Mr. Lowe convictions and sentence. See Smith v. Roberts, 115 F. 3d 818, 819-20 (10th Cir. 1997); See also Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) ("the duty to disclose [exculpatory information] is ongoing.").

This evidence is material to the defense and therefore the State's failure to disclose this evidence prejudiced the defense. In Cardona, this Court held:

> As we explained … "[a] showing of materiality 'does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal.'" Rather, as the United States Supreme Court has explained:
>
> The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."
>
> Strickler, 527 U.S. at 290. Further, the cumulative effect of the suppressed evidence must be considered when determining materiality.

Cardona, 826 So. 2d at 973-974 (citations omitted).

Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have

been different." United States v. Bagley, 473 U.S. 667, 680 (1985). To determine materiality, undisclosed evidence must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419 (1995). Such evidence must be disclosed regardless of a request by the defense, and the State has a duty to evaluate the point at which the evidence collectively reaches the level of materiality. Bagley, at 682. It is not the defendant's burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected such standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here. Had trial counsel gained possession of this material, he would have been able to cast reasonable doubt on the State's theory and impeach the State's witnesses. The outcome of Mr. Lowe's capital trial would have been different. The evidence suppressed by the State supports the theory that Blackmon and Sailor participated in the crime and that Mr. Lowe did not shoot the victim. Because the truth of a witness's testimony and a witness's motive for testifying are material questions of fact for the jury, the improper withholding of information regarding a witness's credibility is just as violative of the dictates of Brady as the withholding of information regarding a defendant's innocence. United States v. Bagley, 473 U.S. 667 (1985). Impeachment evidence of an important State witness is material

evidence that must be disclosed by the prosecution. See United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997). As a result, Mr. Lowe was precluded from effectively cross-examining key State witnesses and from effectively presenting a defense. The jury was deprived of relevant evidence with which to evaluate the evidence.

The lower court failed to grant relief based on Mr. Lowe's Brady claim. The court found the claim "without merit as credible evidence did not support this claim" (PCR. 2072). The court's credibility finding was, however predicated solely on the finding that Lisa Miller "is a multiple convicted felon and is currently incarcerated", and because the testimony of the detectives Parrish, Grimmich and Williams contradicted her testimony[4] (PCR.2073). However, the lower court never made a cumulative analysis of all the sources of Brady relating to the police's awareness of Blackmon being the main actor and actual shooter. The lower court did not address the affidavit of Matthew Dixon. The lower court never addressed the fact that Michael Lee was told by police that Blackmon was the killer[5]. Additionally, the credibility analysis should have been done as it would have been seen from the perspective of the jury. As the United States Supreme Court has

[4]This is in stark contrast to the court's finding that Ms. Miller's testimony was "sufficiently credible to warrant consideration by a penalty phase jury".
[5]The lower Court did not address the Brady aspect of Mr. Lowe's claim relating to Michael Lee.

explained the issue is whether **the jury** "would reasonably have been troubled" by the withheld information and whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." Kyles v. Whitley, 514 U.S. 419, 441-43 (1995). In Kyles, the lower court which presided over a post-conviction evidentiary proceeding found the Brady material unworthy of belief. See Kyles, 514 U.S. at 471 (Scalia, J., dissenting). The Kyles majority, however, determined that this credibility finding was not fatal to the Brady analysis because the lower court's post-trial credibility determination "could [not] possibly have effected **the jury's appraisal** of [the witness'] credibility **at the time of Kyles's trials**." Kyles at 450 n. 19 (emphasis added). Lisa Miller was not a convicted felon at the time of Mr. Lowe's trial. As both she and her mother Cynthia testified, she was a child in her teens. Mr. Lowe has established that he is entitled to a new trial.

D. Newly discovered evidence establishes that Dwayne Blackmon made yet further admissions to shooting and killing the victim. This evidence would produce an acquittal.

(a) Lisa Grone

Lisa Grone testified at the evidentiary hearing on November 23, 2004 that in 2003 she had been Dwayne Blackmon's girlfriend, from March until his death in August (T. 1373). She testified that during their relationship:

> [A]: [T]here was an article in the newspaper and it was

> like two columns long. I remember there was a picture on it, and his name was on it, and he told me to read it and I read it. And...it was saying that he killed somebody. You know they was going to try to say he killed somebody, and he told me that about 14 years ago there was Rodney and another guy. I think his name was Ben, Ben something, I don't know who – they went to Nu-Pack to rob the store and that Rodney went into the back – he said Ben stayed in the car and Rodney went into the back of the store to heat up a sandwich and it was like a robbery went bad and Dwayne said that he ended up shooting the lady and they were running out of the store.
>
> [Q] So Dwayne said Dwayne himself shot the lady, is that what you're saying?
>
> [A] Yes, ma'am.

(T. 1375).

As this evidence existed no earlier than March 2003, it could not have been previously discovered through exercise of due diligence and so could not have been presented earlier.

(b) Maureen McQuade

Maureen McQuade lived with Blackmon for a period of two and a half years in the late 1990s. During that time, he confessed that he was involved in a convenience store robbery in which a woman had been killed. Blackmon told Maureen that he was the one who had shot the woman, but that a man named Rodney Lowe had been sent to death row for the murder. During the time she

lived with Blackmon, Maureen was explicitly instructed by Blackmon not to speak with an investigator who came to the house in connection with the Rodney Lowe case. She feared Blackmon who was violent and abusive towards her. Moreover she knew that Blackmon was a confidential informant for the police and thus believed that she could not go forward to the police. See PCR. 2470-2499.

As McQuade was neither available nor willing to speak about this matter with Mr. Lowe's attorneys until December 2004, the evidence could not have been previously discovered through exercise of due diligence and so could not have been presented earlier.

(c) David Stinson

David Stinson knew Blackmon following Stinson's release from prison, which occurred after Mr. Lowe was tried and sentenced to death. At some time thereafter Blackmon confessed that he (Dwayne Blackmon) had shot Donna Burnell. Stinson was afraid to come forward because of Blackmon's reputation for violence and because Blackmon was known in the community as a confidential police informant. David Stinson believes that it is common knowledge in the locality that Blackmon was the shooter in the crime for which Mr. Lowe was sentenced to death. See PCR. 2500.

As Stinson was neither available nor willing to speak about this matter with Mr. Lowe's attorneys until December 2004, the evidence could not have been

previously discovered through exercise of due diligence and so could not have been presented earlier.

(d) The newly discovered evidence would probably have resulted in an acquittal

In Jones v. State, 709 So. 2d 512 (Fla. 1998), this Court held:

> Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence "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).
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Jones ["Jones I"]. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id. at 916.

Jones v. State, 709 So. 2d at 521. In light of the Jones criteria, had the evidence that Blackmon admitted to killing Donna Burnell been presented at trial, the jury probably would have acquitted Mr. Lowe of first-degree murder.

E. Cumulative Prejudice

The lower court granted a new penalty phase based in part on the testimony of Lisa Grone. It did not reach the evidence attested to by Maureen McQuade, David Stinson, or Michael Lee, finding that it would not rebut a conviction on the theory of felony murder. However as noted in Argument I(A) supra, the evidence

presented to the jury by the State, combined with the State's arguments to the jury, establish that the jury's verdict finding Mr. Lowe guilty of first-degree murder was necessarily predicated on the jury concluding that Mr. Lowe acted alone and, therefore, necessarily was the person who killed Donna Burnell. Because the State so strongly entrenched its case for first-degree murder on the lone gunman scenario, had the jury not believed that Mr. Lowe killed Donna Burnell, it cannot be said with any degree of confidence that the jury would have still convicted Mr. Lowe of first-degree murder.

The lower court acknowledged that evidence that Blackmon admitted to Miller and Carter that he killed the victim would have been admissible at Mr. Lowe's trial to impeach Blackmon's trial testimony. See PCR. 2048. The newly discovered evidence together with Michael Lee, Lisa Miller and Ben Carter's testimony, contradict Blackmon's trial testimony that Rodney Lowe admitted to attempting to rob the store alone and to shooting the victim. It also contradicts Blackmon's testimony that he was at home and in bed at the time the crime was committed. The evidence that Blackmon admitted to killing the victim shows that Blackmon's trial testimony was a complete fabrication and that none of his trial testimony is worthy of belief. Because the jury never knew of this shocking evidence, through no fault of Mr. Lowe, Mr. Lowe was denied a fair trial and denied a reliable adversarial testing of the evidence. This Court must consider the

cumulative effect of all the constitutional errors that occurred in this case. See Gunsby v. State, 670 So. 2d 920, 924 (Fla. 1996). Counsel's deficient performance presented in Argument I(B) supra must be viewed together with the numerous other instances of ineffective assistance detailed in Arguments II, III, IV infra, the State's Brady violations, and the newly discovered evidence. When so viewed, confidence in the outcome of Mr. Lowe's trial has been severely undermined. There is a more than reasonable probability of a different outcome. See Gunsby, 670 So. 2d at 924. All this evidence must be examined "collectively, not item by item." Kyles, v. Whitley, 514 U.S. at 436. "Cumulatively, the total picture in this case" compels this court to grant Mr. Lowe relief. Mordenti v. State, 894 So. 2d 161, 175 (Fla. 2004).

ARGUMENT II

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND CHALLENGE THE STATE'S CASE THAT MR. LOWE ACTED ALONE AND THE STATE WITHHELD EVIDENCE THAT MULTIPLE PARTIES WERE INVOLVED IN THE CRIME

A. Introduction

The United States Supreme Court has affirmed the right of a capital defendant to the effective assistance of counsel. In the case of Wiggins v. Smith 123 S. Ct. 2257 (2003), the Court reiterated:

> We established the legal principles that govern claims of ineffective assistance of counsel in Strickland

> v. Washington, 466 U.S. 668 (1984) citations omitted). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688.

Wiggins v. Smith, 123 S. Ct. 2527, 2535. The Supreme Court further held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 668 (citation omitted). Mr. Lowe has proven both deficient performance and prejudice at the evidentiary hearing, undermining the adversarial testing process at trial.

Wiggins clarifies the fact that applicable professional standards require such investigation. Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases (ABA Guidelines).[6]

[6]Wiggins refers to the version of the Guidelines that was promulgated in 1989. The ABA Guidelines were originally promulgated in 1989, and revised in 2003. The 2003 version of the guidelines spells out in more detail the reasonable professional norms that trial counsel should have utilized in the investigation of Mr. Lowe's case. However, notwithstanding the fact that Mr. Lowe's case was tried in 1991, there is no doubt as to the applicability of the 2003 Guidelines to his case. The United States Supreme Court has recently reaffirmed the applicability of the Guidelines to those cases tried before the Guidelines were promulgated. In Rompilla v. Beard, 1125 S. Ct 2456 (2005) in which case the trial took place in 1989 prior to the promulgation of either the 1989 or the 2003 Guidelines, the

Guideline 10.7 of the 2003 Guidelines is clear that counsel should conduct a "thorough and independent" investigation of the guilt phase case. See ABA Guideline 10.7 (2003). The Commentary to the Guideline is clear that the elements of an appropriate investigation include review of charging documents, potential witnesses, the police and prosecution, physical evidence and the crime scene. See Commentary to Guideline 10.7 (2003). As a result of counsel's failure to investigate the State's guilt phase case against Mr. Lowe, counsel was unable to formulate an adequate defense theory and thus was unable to conduct an effective challenge of the State's case.

B. Donna Burnell's dying declaration

As established at the evidentiary hearing, Sgt. Ewert, who was the first officer to arrive on the scene, reported that the victim, in her dying declaration, told him that she did not know the person who shot her (Defendant's Exhibit 1).

Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines to the case.

Furthermore, as the Sixth Circuit explained in Hamblin v. Mitchell, 354 F. 3d 482, (2003) "New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 guidelines the obligations of counsel. The 2003 ABA guidelines do not depart in principle or concept from Strickland [or] Wiggins." Hamblin 354 F. 3d at 487. The 2003 guidelines are applicable to cases tried before the 2003 Guidelines were promulgated since they merely explain in more detail the concepts promulgated previously. Thus the 2003 guidelines are applicable, as the Sixth Circuit found, to cases tried before they were promulgated in 2003 since they merely explain in more detail the concepts promulgated previously.

However, the record shows Mr. Lowe told police that he was "pretty good friends with" the victim when she worked at Fran's Market, which was close to where Mr. Lowe lived at one time (R. 704-05). Therefore, Donna Burnell's dying declaration to Sgt. Ewert, which the jury never knew about, constitutes exculpatory evidence.

Mr. Long was ineffective for failing to present this evidence. Sgt. Ewert testified on direct examination regarding his communication with the victim, but he failed to tell the jury of her response to him that she did not know the person who shot her (R. 541). Instead, Sgt. Ewert glossed over this detail, leaving the jury in the dark as to what had truly happened. He testified on direct examination that, when he found her:

> Told her to squeeze [my finger] once for no and twice for yes and then started questioning her. I asked her if I knew [sic] who I was she responded yes, by squeezing my finger once [sic] and rolled her eyes back and looked at me and then every time I asked thereafter I asked a question she responded very shallowly no, no, no, which was approximately three times.

(R. 541). In Mr. Long's only question on this issue on cross-examination, Mr. Long asked Sgt. Ewert if the victim gave her trio of negative responses to Ewert in response to questions asked by him (R. 546). Sgt. Ewert testified that they were (R. 546). However, Mr. Long failed to ask Sgt. Ewert to tell the jury what questions he asked of the victim that prompted her "no" responses. Had Mr. Long done so, Sgt. Ewert would have told the jury (as he reported in his sworn police

report written on the same day as the murder) that she answered him "no" when he asked her if she knew the person who had done this to her (Defendant's EH. Exhibit 1).

Mr. Long knew or reasonably should have known of both Sgt. Ewert's report of the victim's statement and Mr. Lowe's statement to police that he and the victim were friends. Yet, Mr. Long failed to elicit this exculpatory evidence during his cross-examination of Sgt. Ewert.

This fact was highly exculpatory evidence, but because trial counsel was ineffective in cross-examining Sgt. Ewert, the State used it against Mr. Lowe to argue the element of premeditation to support the first-degree murder conviction. In opening statements, the prosecutor emphasized that Mr. Lowe told the police that he knew the victim from when she worked at Fran's Market (R. 437). In closing arguments, the prosecutor reminded the jury that Mr. Lowe had told police that he and the victim were "pretty good friends" (R. 1081). The prosecutor then commented, "[I]t's a scary thought that this Defendant was good friends with a lady that he shot three times that he planned to rob" (R. 1081). [7]

Due to trial counsel's ineffectiveness, the exculpatory value of the victim's dying declaration to Sgt. Ewert was never presented to the jury. Had Mr. Lowe been the person who shot her, she would have likely indicated to Sgt. Ewert that

she did know who shot her. Had the victim's dying declaration been presented at trial, it would have nullified the State's theory that Mr. Lowe shot Mrs. Burnell. Because the jury never learned of this evidence, Mr. Lowe was denied an adversarial testing in the guilt-innocence phase of the trial.

Counsel had a duty to investigate and develop a theory of defense. Had he done so, he would have vigorously cross-examined Sgt. Eckert as to Donna Burnell's response. The lower court denied this claim as "meritless" (PCR. 2048). The lower court did not conduct a Wiggins analysis on the deficient performance aspect of this claim. The lower court's dismissal of the resultant prejudice is also erroneous. The lower court's analysis is predicated on the premise that just because Mr. Lowe knew Burnell, she would not necessarily have known who he was. While this logically may be possible, common sense dictates that the fact that Mr. Lowe knew Burnell, which the State relied upon, strongly suggests that Burnell also knew him. This inference is enough to cast doubt on the State's theory. The omission by trial counsel was prejudicial.[8] Additionally, the lower court erred in failing to do a cumulative analysis as required by Florida law. See Argument I(E) supra.

C. The "time period analysis" was inaccurate and scientifically unsound

[7]The State also noted this in penalty phase closing arguments. See R. 275.

In an attempt to prove that Mr. Lowe acted alone and shot the victim, the State presented evidence of Mr. Lowe's time card from work, which allegedly indicated that, on the morning in question, he clocked out of work at 9:58 a.m. and clocked back 36 minutes later at 10:34 a.m. (R. 666, 827). The shooting occurred sometime between 10:07 and 10:17 a.m. In an attempt to prove that Mr. Lowe could not have left work, picked up Blackmon and Sailor, gone to the Nu-Pack, dropped off Blackmon and Sailor, gone home, and returned to work within the 36 minutes Mr. Lowe was allegedly gone from work, police investigators conducted a "time period analysis" (R. 514).

This consisted of police officers themselves "re-creating" and timing the supposed routes under both Mr. Lowe's statement and the State's theory that he acted alone. The police videotaped these two "experiments". This evidence purportedly corroborated Dwayne Blackmon's testimony that he had nothing to do with the crime. The State further urged the jury to reject the possibility that Dwayne Blackmon and Lorenzo Sailor were involved in the crime based on the evidence of the "time period analysis" that was made by Detectives Green and Sinclair (R. 513-15).

The State argued that the "time period analysis" established that Mr. Lowe

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[8]It is also noteworthy that Dwayne Blackmon testified that he did not even know the store in which Burnell worked. See R. 923.

must have been the person who killed Donna Burnell because the "analysis" proved that Dwayne Blackmon and Lorenzo Sailor were not involved in the crime. In closing arguments, the prosecutor told the jury that, "[T]he police spent the time over two days making those videotapes for you to show that [Mr. Lowe's statement to police that Blackmon and Sailor were involved in the crime] could not be true." (R. 1090).

The State relied on this evidence not only to argue that Mr. Lowe's statements to police that Blackmon and Sailor were involved and that he did not kill the victim was not true, but to argue that the jury should believe Blackmon's testimony because it was corroborated by "all the other evidence" (R. 1099).

Mr. Long left the "time period analysis" evidence virtually unchallenged. As a result, the jury had no compelling reason to doubt that the evidence proved that Mr. Lowe acted alone and killed Donna Burnell. As established at the evidentiary hearing, Mr. Long failed to present available expert testimony that would have challenged the accuracy and reliability of the detectives' analysis. Had he done so, the jury likely would have rejected the evidence as unreliable. This would have seriously undermined the credibility of Dwayne Blackmon's testimony that he was not involved in the crime and that Mr. Lowe had told him that he killed Donna Burnell. Had the jury rejected the reliability of the "time period analysis," there is a reasonable probability, especially when considered with the other

evidence the jury never knew about, that the outcome of the trial would have been different.

At the evidentiary hearing, Mr. Lowe presented the testimony of Mr. Don A. Felicella. He is a state-licensed, professional engineer and has testified as an expert in traffic reconstruction (T. 635). Mr. Felicella testified that he conducted a substantive review of the instant "time period analysis" (T. 638). He concluded that the "analysis" relied on by the State in Mr. Lowe's trial was not valid due to a failure to follow accepted protocol, failure to properly document the analysis, and due to inconsistencies regarding times and speed (T. 630-642). Mr. Felicella opined that his analysis of the detectives' study creates a reasonable doubt as to the accuracy of the detectives' conclusion that the minimum time to drive the "multiple person" route was 54 or 55 minutes (T.645). Mr. Felicella noted that he submitted the "multiple person" route into two internet-based map service providers which resulted in times of between 33 and 39 minutes. (The State's evidence was that Mr. Lowe was clocked out of work for 36 minutes.) These times are an indication of the time it would take to travel these routes using an average speed.

Mr. Long testified that he made no attempt to have the time period analysis evidence excluded because he believed that the inculpatory nature of the evidence "could be taken care of on . . . cross-examination" (T. 488). However, he admitted

that the "analysis" "turned out to be more important than I thought it was going to be" and that he "didn't think the State was going to rely on it as much as they did" (T. 487-8). He also agreed that he would have moved to exclude the evidence but that he was not sure what he would have done to do so (T. 487-8). He agreed that expert assistance may have been helpful (T. 488).

Mr. Long was ineffective for failing to attack the "time period analysis" that the State used as proof that Mr. Lowe was the sole actor. Had he obtained expert assistance, Mr. Long would have been able to attack the reliability of the evidence in the eyes of the jury, and to have completely prevented admission of the evidence. Based on the expert opinion of Mr. Felicella, had Mr. Long filed a motion to exclude the evidence as unreliable, irrelevant, and unduly prejudicial, the trial court would have granted the motion. Even if the evidence had survived a defense motion to exclude, the jury would have placed little or no evidentiary value on the evidence had Mr. Felicella or another expert testified at trial. But for Mr. Long's deficient performance, there is a reasonable probability that the outcome of the trial would have been different.

The lower court found no deficient performance because the expert utilized by Mr. Lowe at the evidentiary hearing failed to establish that the time studies were unreliable, and because there is other evidence that Mr. Lowe was at the crime scene. The lower court misunderstood Mr. Lowe's argument. The issue

here is whether or not Mr. Lowe was the sole actor and thus the shooter in the crime. The existence of other evidence linking Mr. Lowe to the crime scene is not relevant to the issue of whether trial counsel was ineffective for failing to challenge the State's theory that Mr. Lowe was the sole actor.

The lower court also erred in finding that Mr. Lowe had not established that the time studies were unreliable merely because Mr. Felicella had not done such a study himself. As noted above, he testified that the time study was not conducted according to protocol. This was not just a matter of harmless deviations from protocol but substantive and real inaccuracies.[9] The lower court ignored the additional evidence of the time taken from Felicella's computer search. The lower court did not reach the prejudice prong of this issue. As noted supra, this should be considered cumulatively with the prejudice from the numerous other constitutional errors in Mr. Lowe's trial. See Argument I(E) supra.

D. Danny Butts' statements

[9]Mr. Felicella testified inter alia that the detective's study was flawed because in order to be accurate, a study should be based upon between six (6) and fifteen (15) "runs" of the route in question, while the detectives only did two runs of each route. He also testified to other flaws in the detectives' study, including the failure to break the route in question into segments based on traffic control devices; failure to conduct the study at the same time of day as the "real" route was run; failure to time the various delays encountered along each segment; failure to do the study at the same time of day as the true event; and failure to drive the routes as fast as possible.

Critical exculpatory evidence that Mr. Lowe did not kill Donna Burnell was never presented to the jury due to the State's suppression of evidence and trial counsel's ineffective assistance. The jury never knew that a child eyewitness to the shooting, Danny Butts, made multiple consistent statements that more than one person was involved in the crime. Had the State not violated Mr. Lowe's rights under Brady v. Maryland, 373 U.S. 83 (1963) and had trial counsel been effective, the jury would have known this fact and there is a reasonable probability that the outcome of the trial would have been different.

(1) Trial counsel was ineffective

Danny Butts, Donna Burnell's three-year and three-month old adopted child, was inside the Nu-Pack and witnessed the shooting. Around the time of the shooting, Steve Leudtke drove into the store parking lot and saw an African-American male with a beard and glasses come out of the store and walk toward a late model white car. A composite sketch based upon Leudtke's description showed a man with a full beard and clear glasses. Leudtke then went into the store, discovered the victim and called 911. A friend of the victim's, Debra Brooks, arrived shortly thereafter and took custody of the child. As Brooks was leaving the scene with Danny in her vehicle, Danny told her that:

> **Two peoples** came in; argued with Mommy and [sound effects] bang, bang, bang.

(Deposition of Debra Brooks, 1-17-91, p. 8). Danny's statement to Brooks clearly implied that more than one person was involved in the crime.

The State filed a motion in limine to exclude from evidence any statements by Danny Butts on the grounds that such statements constituted inadmissible hearsay and that Danny was not a competent witness. At the hearing on the motion in limine, the State presented testimony from the victim's husband and a family friend.[10] The court also viewed Danny's videotaped deposition. The defense presented no evidence at the hearing. The court concluded that Danny was not a competent witness and granted the State's motion to exclude evidence of Danny's statements (R. 402). As a result, the jury never learned that Danny Butt's had made exculpatory statements immediately following the shooting indicating that more than one person participated in the crime.

Danny's statements are consistent and corroborative of Dwayne Blackmon's admissions to being involved in the crime and to killing Donna Burnell and with Mr. Lowe's statement to police that Blackmon and Sailor were involved in the shooting. Had the defense been allowed to present this evidence, the outcome of the trial would have been different.

[10]At the evidentiary hearing the prosecutor suggested that Danny Butts, had "brain damage". This is not true. There was no testimony that he had brain damage. The testimony was that he had learning disabilities and suffered respiratory problems (apnea) (Supp. R. 209, 219).

Trial counsel failed to challenge the State's case on this matter. Counsel failed to present evidence at the hearing on the motion in limine that, in addition to Danny's statement to Brooks, Danny also made additional consistent statements to Steven Leudtke. Danny made these statements to Leudtke even closer in time to the shooting than Danny's statement to Brooks. Danny said to Leudtke at the scene several times: "bad guys, bad guys" and "bad guys did to my mommy" (12-11-90 Deposition Leudtke p. 22). This statement was completely consistent with Danny's subsequent statement to Brooks.

In each of these statements, to Leudtke and to Brooks, made by Danny immediately following the shooting, Danny asserted that there was more than one person involved in the crime. Trial counsel was ineffective for not presenting the statement Danny made to Leudtke at the hearing on the State's motion to exclude Danny's statements. Trial counsel was not even aware that Danny had made these statements to Leudtke even though Leudtke had so stated in his deposition. Trial counsel was wrong when he announced in open court that Danny's "two peoples" statement to Debra Brooks was "the **only** statement that [Danny] made relevant to the guilt or innocence of Rodney Lowe . . . ." (Supp. R p. 206) (emphasis added). If trial counsel had read Steven Leudtke's deposition, he would have known of Danny's statement to Leudtke, "bad **guys**, bad **guys**" and "bad **guys** did to my mommy." (Emphasis added).

Danny's additional statements to Leudtke that trial counsel did not know about were entirely consistent with Danny's statement to Brooks that "two peoples" had shot the victim. In both Danny's statement to Brooks and Danny's statement to Leudtke, Danny used plural phrases. The statement to Leudtke corroborates and makes more reliable Danny's similar statement to Brooks indicating that more than one person was involved in the crime. Trial counsel was ineffective by not presenting evidence of the additional statement by Danny to Leudtke in order to establish the competency of Danny to relate what he saw in the store. Due to trial counsel's ineffectiveness and the State's misconduct in suppressing evidence of additional statements by Danny also indicating that more than one person was involved in the crime, the trial court was unaware that, instead of making only a single statement suggesting more than one person was involved in the shooting, Danny had made separate and distinct statements in which he consistently indicated that he saw more than one person. The State's notion that Danny was incapable of relating what he had observed inside the Nu-Pack was not effectively challenged by trial counsel. Had all the available evidence been presented, including the statements withheld by the State, there is a reasonable probability that the outcome would have been different.

Of the single statement by Danny that the trial court considered, the trial court erred as a matter of law in excluding this evidence on the ground that Danny

was incompetent. However, trial counsel failed to preserve this error for appellate review. To the extent the trial court erred in excluding this evidence, trial counsel was rendered ineffective. The trial court found Danny incompetent to testify based upon Danny's alleged inability to correctly relate his observations (R. 402). This Court affirmed the trial court's ruling. See State v. Lowe, 650 So. 2d 969 (Fla. 1994).

However, a child does not have to be held competent to testify in order for the child's hearsay statements to be admitted into evidence. See Perez v. State, 536 So.2d 206 (Fla. 1988) cert. denied, 432 U.S. 923 (1989). Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. Idaho v. Wright, 497 U.S. 805, 815 (1990). Therefore, the trial court's finding that Danny was incompetent to testify did not preclude the admission of his statements through the testimony of Leudtke and Brooks. Trial counsel was ineffective for not raising this point with the trial court. Although this argument was raised on direct appeal, since trial counsel did not raise it at trial, it was not preserved for appellate review.

The trial court never ruled on whether Danny's statements met the requirements of the exited utterance exception to the rule against hearsay, and, for that reason, this Court did not reach that question. See Lowe v. State, 650 So. 2d 969, 976 (Fla. 1994) n. 6. Clearly, however, his statements fell into the excited

utterance exception. Danny's statements were made immediately after he saw his mother shot, while he was obviously still upset by the tragic event and before there was time to contrive or misrepresent. Section 90.803(2), Fla. Stat. (1989); State v. Jano, 524 So. 2d 660 (Fla. 1988).

Had trial counsel argued to the trial court that Danny's statements were admissible, presented to the trial court evidence of Danny's statements to Leudtke and effectively challenged the State's case on this matter, and had the State not withheld additional exculpatory statements by Danny, the jury would have learned that Danny saw more than one person in the store when his mother was shot. Danny's statements would have corroborated Mr. Lowe's statement to the police and discredited Dwayne Blackmon's testimony. Whether or not Mr. Lowe shot Mrs. Burnell was a factual determination crucial for the jury's assessment of Mr. Lowe's culpability relevant to both the guilt-innocence and penalty phases of the trial. The outcome of the trial would have been different.

Even though Mr. Long was not representing Mr. Lowe at the time of the hearing on the State's motion to exclude the child's statement, he was representing Mr. Lowe when the court announced its ruling on the motion in open court. The court specifically gave Mr. Long the opportunity to make further argument on the issue (R. 402). Mr. Long made none (R. 402). As a result, Mr. Long perpetuated the error of prior counsel by failing assert the fact that the child had made a

factually consistent statement to Steven Leudtke that more than one person was involved. He failed to argue that, even if the child was not competent to testify, his statements were admissible through Leudtke and Brooks as excited utterances. Mr. Long acknowledged at the evidentiary hearing that he was aware that Leudtke stated in his deposition that the child told him that more than one person was involved (T. 556).

The lower court denied this ineffectiveness claim as being procedurally barred and meritless, since the issue was raised on direct appeal. However whether or not the child was competent to testify is a separate and distinct issue from whether trial counsel should have investigated the multiple statements made by the child. The issue of the excited utterance is not the same as the issue of competence.

(2) The State suppressed evidence of Danny Butts' additional statement

At the evidentiary hearing, it was established that the State failed to disclose to the defense a handwritten note that said:

> Debra Brooke [sic]
>
> [telephone number and address]
>
> Friend of V - Came to store
> after shooting
>
> Spoke w/Danny (Vs son) - Danny

said two (2) men shoot Mommy 3x
2x in face 1x in chest

(Defendant's EH Exhibit 18; T. 825). The note was present in the State Attorney's Office file but was not turned over the defense (T.555).

The State convinced the trial court to exclude the statement Danny made to Debra Brooks that "two peoples" shot the victim on the basis that Danny was not competent to relate the events he witnessed in the store. Just as Danny's statements to Leudtke would have established that Danny was indeed competent to relate what he saw, these additional statements suppressed by the State would have reinforced this finding. Because of the State's suppression of evidence and trial counsel's ineffectiveness, the trial court knew of only one of Danny's statements when the trial court granted the State's motion in limine and concluded Danny was not a competent witness. Danny's separate statements were entirely consistent in that each indicated more than one person was involved in the shooting and, therefore, support the notion that Danny was indeed competent to relate his observations. Had the trial court known of these additional statements, the court would have found the child competent to testify. Had the jury known, the outcome of the trial would have been different. Danny's statements, which were not presented to the court or the jury as a result of the State's Brady violations and trial counsel's ineffectiveness, support the conclusion that Mr. Lowe did not kill the victim.

This evidence suppressed by the State was clearly exculpatory because it went to the issue of whether or not Mr. Lowe went to the Nu-Pack alone or with others. If the jury knew that the child saw more than one person in the store at the time of the crime, then the jury would have rejected the State's theory that Mr. Lowe acted alone.

Not only does the note detail that more than one person was involved in the crime, it also indicates that the child provided specific information as to the number of times the victim was shot as well as the actual location of the wounds. Mr. Long testified that had he known of the existence of this note, he would have used it to litigate the admissibility of the child's statements and, ultimately, presented the information to the jury (T. 559). The State's suppression of the note is a clear violation of Brady because the note contains evidence that is favorable and exculpatory to Mr. Lowe, the note was suppressed by the State, and the suppression of the note prejudiced Mr. Lowe. See Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002).

The lower court did not specifically address the Brady aspect of the Danny Butts statements. As noted in Argument I(E) supra, a cumulative prejudice analysis must be done.

E. Steven Leudtke's statements

The State further urged the jury to accept the lone gunman theory by arguing

that the single eye-witness, Steven Leudtke, saw the white car and:

> knows one thing for certain there's no one else in that car. No one else is in that white car. Not someone in the back seat. Not someone else in the front seat. There aren't these three people that the Defendant later claims committed this robbery.
>
> * * * *
>
> Mr. Leudtke told you that he was sure of only one thing. The white car and no one in it. And one person who was black leaving that store.

(R. 1077, 1079) (emphasis added).

Contrary to the prosecutor's argument to the jury, Leudtke did not testify that he "kn[e]w[] . . . for certain there [was] no one else in that car," rather, he testified simply that he did not see any one else in the white car and in fact conceded that he did not walk over and look at the car but just "glanced" at it (R. 556).[11] In so arguing, the State once again made clear to the jury that the State was relying on a single theory of the case - that Mr. Lowe acted alone and shot the victim.

In conjunction with its argument that Leudtke's testimony regarding the white car established that there was no one else at the scene but Mr. Lowe, the State paradoxically urged the jury to discount Leudtke's testimony that he had

[11]He of course would not have seen anyone in the car if people in the car were crouched down in the seats below his line of vision.

reported to police immediately after the shooting that the person he saw leaving the store had a full, scraggly beard. Whether or not the person Leudtke saw leaving the store had a beard was tremendously relevant to the identity of that person because the evidence at trial was unrefuted that Mr. Lowe at the time did not have a beard and that Lorenzo Sailor did (R. 875-76). If the person that Leudtke saw in fact had a beard, then the person could not have been Rodney Lowe.

Recognizing this fact, the State argued to the jury that Leudtke was somehow so traumatized and "emotionally upset" by the tragic event that his observation that the suspect had a beard was not reliable (R. 1077-78).[12] He therefore could not have been "traumatized" when he saw the suspect leaving the store. His description of the individual leaving the store was:

> A. [Leudtke] Black male, approximately five eight, five ten, about a hundred and fifty to a hundred and sixty-five pounds, light colored clothing, a dark ball cap, some type of glasses. And a scraggly beard. By scraggly I mean not full, not a full beard.
>
> Q. Okay. Are you sure about the beard?
>
> A. No sir.
>
> * * * *
>
> Q. [Trial counsel on cross] Now you - - today you

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[12]As even the prosecutor noted, at the moment Leudtke saw the suspect leaving the store, Leudtke did not know that anything bad had happened (R. 570).

> indicate that you aren't sure whether or not this man had a beard or not, but you were pretty sure right when you first started telling the police that day, weren't you, that the person had a beard.
>
> A. I think I made the statement I thought he had a beard for - - well, he had facial hair. And I said I thought he had a full, but scraggly beard.
>
> Q. Full, but scraggly beards. And, in fact, you did go down when the same day to the Sebastian Police Department and do one of those composite picture[s]?
>
> A. Yes sir.
>
> Q. And on the composite picture that you helped them make the person did have a full and scraggly beard.
>
> A. Yes sir.
>
> Q. And you were - - you were doing the best you could at that point to identify the person you - - who you had seen?
>
> A. Yes sir.

(R. 556-57, 562).

Trial counsel was ineffective for failing competently to cross-examine Steven Leudtke with regard to the live line-up conducted following Mr. Lowe's arrest on July 10, 1990. Leudtke testified on direct examination that he saw an African-American male with a beard and glasses, wearing a light colored shirt, lighter pants, and a dark cap, come out of the store and walk toward a late model white car. A composite sketch drawn based on Leudtke's description showed a

man with a full beard. He also testified that he thought the person looked familiar and that he previously had been to Gator Lumber where Mr. Lowe worked.

Following his arrest on July 10, 1990, police placed Mr. Lowe in a six-man line-up. The only evidence presented to the jury on this issue was Leudtke's minimal testimony on cross- examination that he viewed a line-up but could not make a positive identification (R. 566). Mr. Long failed to bring out on cross-examination the highly exculpatory fact that Mr. Lowe was in the line-up, that Leudtke actually identified two persons who were somewhat similar to the person he saw leaving the store, and that Mr. Lowe was not one of those persons (Deposition of Steven Leudtke 12-11-90, p. 33). Trial counsel's failure to elicit this exculpatory evidence on cross-examination was ineffective performance. See (R. 566).

Trial counsel was ineffective because he failed to bring out the very exculpatory fact that Mr. Lowe was in the line-up and that Mr. Lowe was not one of the two persons Leudtke believed "looked familiar." This would have cast serious doubt on the State's theory that the person Leudtke saw leaving the store was Mr. Lowe. The composite sketch was based on Leudtke's description of the person leaving the store. Dwayne Blackmon testified that the composite sketch, which had been published in the newspaper, was a sketch of Mr. Lowe (R. 737). Even though Leudtke indicated he could not positively identify the person he saw

leaving the store, the State used Leudtke's general description to suggest that Mr. Lowe was the person Leudtke saw. The fact that Leudtke in fact identified two other people in the line-up as looking somewhat similar to the person he saw would have cast serious doubt whether the person Leudtke saw was Mr. Lowe and, therefore, on the State's theory that Mr. Lowe was the only person at the store at the time of the shooting.

Mr. Long testified at the evidentiary hearing that the reason he did not raise this issue in his cross-examination of Leudtke was simply because Leudtke did not identify Mr. Lowe in the line-up or in open court as the person he saw leaving the store (T. 506-10). This is not an objectively reasonable explanation for failing to inform the jury that not only was Leudtke unable to identify Mr. Lowe as the person he saw, but also that two other persons in the line-up looked somewhat similar to the suspect. The lower court found no error because " the lineup was not used as evidence to convict" Mr. Lowe. See PCR. 2057. As noted above, it was indeed exculpatory. Additionally the lower court failed to do the requisite cumulative analysis as argued in Argument I(E) supra. A new trial is warranted.

ARGUMENT III

BECAUSE OF THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND THE STATE'S WITHHOLDING OF MATERIAL EVIDENCE CRITICAL IMPEACHMENT OF DWAYNE BLACKMON WAS NEVER PRESENTED TO THE JURY

A. Trial counsel failed to impeach Dwayne Blackmon with his affidavit

Dwayne Blackmon's testimony formed the foundation of the State's case because he provided the only direct evidence suggesting that Mr. Lowe killed Donna Burnell. As established at the evidentiary hearing, trial counsel inexplicably failed to impeach Blackmon with the affidavit Blackmon signed on October 26, 1990 (R. 1375-76). Mr. Long's failure to do so fell below an objective standard of reasonableness. See Strickland v. Washington, 466 U.S. 668, 688 (1984). Had Mr. Long impeached Blackmon with the affidavit, Mr. Long would have exposed Blackmon for having lied under oath and established for the jury that Blackmon was the type of individual who would commit perjury in the name of his own self-interest and at the expense of the truth in a capital murder case.

If the jury knew that Blackmon had lied under oath regarding this case, there is more than a reasonable probability that the jury would have rejected his testimony outright and, as a result, concluded that the State failed to establish that Mr. Lowe was the person who shot the victim.

On October 16, 1990, Dwayne Blackmon was arrested on unrelated charges. On that same day his wife, Victoria Blackmon, contacted John Unruh, one of two assistant public defenders who were then representing Mr. Lowe (R. Supp. Vol. 3, 499; R. Supp. Vol. 4, p. 554-56). According to Mr. Unruh's testimony on the State's motion to disqualify the public defender's office, Victoria Blackmon told

him that she and Dwayne Blackmon had lied when they told police that Mr. Lowe had killed the victim (R. Supp. Vol. 4, p. 554-56). Victoria told Mr. Unruh that Lorenzo Sailor was the person who shot the victim and that Dwayne and Victoria knew that Mr. Lowe did not do it (R. Supp. Vol. 4, p. 555, 556). She further stated that Dwayne told police that Mr. Lowe did it only because she and Dwayne were angry at Mr. Lowe over some other incident (R. Supp. Vol. 4, p. 555). She also said that they told police they would go to court but would not testify against Mr. Lowe. Id.

In response, police threatened her and Dwayne with jail if they did not testify against Mr. Lowe and told them there was a $10,000 reward. Id. Victoria also told Mr. Unruh that police told Dwayne that they would not have arrested him on a long-standing open VOP warrant if had he agreed to testify against Mr. Lowe and that police served the warrant only when Dwayne let police know he would not so testify. Id. Victoria asked Mr. Unruh to go to the jail and talk to Dwayne, which he did, along with Mr. Lowe's other attorney at the time, Assistant Public Defender Clifford Barnes. (R. Supp. Vol. 4, p. 556).

Mr. Unruh and Mr. Barnes met with Dwayne Blackmon that same day, October 16, 1990, and made it clear to him that they represented Mr. Lowe and not him and that they had come to see him solely because of Victoria's request and her allegations that police had seriously threatened her and Dwayne and made them

promises (R. Supp. Vol. 4, p. 556, 564-65). Mr. Unruh felt that, as counsel for Mr. Lowe, it was important to speak to Dwayne Blackmon about these allegations first relayed in the telephone conversation with Victoria Blackmon that law enforcement officials investigating the murder were threatening witnesses in order to secure testimony favorable to the State (R. Supp. Vol. 4, p. 564-55).

Dwayne Blackmon told Mr. Unruh about promises made by Chuck Green, Phil Williams, Paul Fafeita, and State Attorney investigator Steve Kirby, including promises of a $10,000 reward (R. Supp. Vol. 4, p. 567). Dwayne also told Mr. Unruh that Chuck Green had had the pending misdemeanor charges 'fixed' for him and Patricia White in order to show their rank and power.[13] Id. Dwayne also told Mr. Unruh that Green told Dwayne that Green had the judge "in his hip pocket". Dwayne also told Mr. Unruh that they threatened Dwayne and Victoria with jail if they did not testify against Mr. Lowe and had promised to get Dwayne ROR'd on his pending charges. Dwayne concluded by telling Mr. Unruh that he had more information to tell him but that he wanted to wait to see if Green and the others were going to come through on their promise to get him ROR'd (R. Supp. Vol. 4, p. 568).

[13]As detailed in Argument V infra, Patricia White testified at the evidentiary hearing that Chuck Green promised to "take care" of her DWLS and other charges (T. 678), and the record shows that the trial judge dismissed Patricia's DWLS

The next day, October 17, 1990, the Public Defender's Office was appointed to represent Dwayne Blackmon on pending charges unrelated to the Nu-Pack murder (R. Supp. Vol. 3, p. 499). Between October 19th and October 23, 1990, Dwayne and Victoria Blackmon called and left several messages for Mr. Unruh (R. Supp. Vol. 4, p. 568). On October 23, 1990, Mr. Unruh went to the jail and again met with Dwayne Blackmon. Id. Mr. Unruh at that time informed Mr. Blackmon that the Public Defender's Office had been appointed to represent him but that, due to the circumstances, they would likely have to withdraw (R. Supp. Vol. 4, p. 570). Blackmon responded that he wanted to keep the Public Defender's Office on his case because he wanted Mr. Unruh to file a motion to protect him from the threats and harassment by the law enforcement officials investigating the Lowe case. Id. Blackmon again told Mr. Unruh that he and his family were "constantly being harassed" and wanted Mr. Unruh to stay on his case. Id.

Blackmon then told Mr. Unruh that Lorenzo Sailor had told Blackmon that he (Lorenzo) had shot the victim (R. Supp. Vol. 4, p. 571). He also told Mr. Unruh that Mr. Lowe had said the same thing but that Blackmon knew Mr. Lowe was kidding. Id. Blackmon further stated to Mr. Unruh that he did not know who killed the victim because he was not there. Id. He again talked to Mr. Unruh about the

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charge because the citation was not timely deposited with the traffic violations bureau (R. 1454).

threats by Detective Green and Phil Williams if Blackmon didn't go to court and say that Mr. Lowe was the shooter, as well as the promises of reward money. He also stated that Green had told Blackmon that he would not get him ROR'd because it would be used against the State at trial if Green got him released. He also told Mr. Unruh that the judges who Green said the police had "in their pocket" were Judge Wild and Judge Balsiger. Id.

On October 25, 1990, Victoria Blackmon again called Mr. Unruh and told him that officers Phil Fafeita and Phil Williams had threatened her and that she knew of witnesses to these threats and to the ransacking of the house (R. Supp. Vol. 4, p. 572). She said also that Dwayne wanted Mr. Unruh to come and see him at the jail again. Id.

Mr. Unruh and Mr. Barnes met with Dwayne again at the jail on October 26, 1990 (Id.). Dwayne told Mr. Unruh that the day before, Detective Green had met with him and Dwayne told Green that Lorenzo had told Dwayne that Lorenzo had committed the murder but that Green responded that Green could not investigate that now (R. Supp. Vol. 4, p. 573). Dwayne swore to the affidavit at this time (R. 1375-76).

The affidavit was drafted based on "exact quotes" from Mr. Blackmon and Mr. Unruh's notes of his conversations with him (R. Supp. Vol. 4, p. 579-80). Before Mr. Blackmon signed the affidavit, "he read over it and agreed with all of it

and said there was no problem with it" (R. Supp. Vol. 4, p. 580). He never told Mr. Unruh that there was anything incorrect in the affidavit or gave any indication to Mr. Unruh that corrections were needed (R. Supp. Vol. 4, p. 580). Mr. Unruh never told Mr. Blackmon that he would make any changes to the affidavit. Id. Per Blackmon's request, Mr. Unruh filed on that day a Motion For Protective Order asking the court to order the Sebastian Police Department and the Indian River County Sheriff's Department "to cease and desist in the harassment, threatening and promising favors to witnesses" in Mr. Lowe's case (R. 1371-74). Blackmon's affidavit was filed with the motion (R. 1375-76).

The motion alleged that Dwayne and Victoria Blackmon were listed witnesses in the case who "have been systematically promised favors and reward money, threatened with prosecution on related and unrelated charges to this case, and otherwise harassed by Sheriff's Department and State Attorney personnel in an attempt to influence their testimony on this case" (R. 1371). The allegations made in the motion echoed the threats and promises outlined in Blackmon's affidavit and were in fact more specific in that the motion alleged specific conduct by named police officers, including Detective Green (R. 1371-73).

On October 29, 1990, Victoria Blackmon called Mr. Unruh and told him more about the threats and harassment by the police if she and Dwayne did not testify as the State wanted them to and provided Mr. Unruh with the names of

witnesses to the threats (R. Supp. Vol. 4, p. 574). Mr. Unruh planned to subpoena the witnesses for the anticipated hearing on the motion for a protective order (R. Supp. Vol. 4, p. 574-75). Victoria also told Unruh that they had been threatened with perjury (R. Supp. Vol. 4, p. 575).

Prior to the hearing on the motion for a protective order, the Public Offender's Office withdrew from Dwayne Blackmon's case (R. Supp. Vol. 4, p. 576). The motion for a protective order was never heard.

On November 14, 1990, the State Attorney's Office conducted a State Attorney investigative interview of Blackmon in which Assistant State Attorney Dan Vaughn placed Blackmon under oath and interviewed him regarding the facts contained in the affidavit (State's EH Exhibit 1). Detective Green was also present and participated in questioning Blackmon about the allegations in the affidavit, many of which effectively accused Sheriff's Office investigators, like Green, with witness tampering. As discussed below, in this sworn statement, Blackmon attempted to recant from his affidavit and accused the public defenders of forcing him to sign it even though some of the facts in the affidavit were, according to Blackmon, not true.

On January 21, 1991, the State filed a motion to disqualify the public defender's office based on the State's assertions that Mr. Lowe's public defenders harbored an actual conflict of interest due to their representations of both Mr.

Lowe and Mr. Blackmon.

The trial court called in Mr. Long for the purpose of advising Mr. Lowe on the issue of the public defenders' alleged conflict of interest. Thus Mr. Long was made aware of the existence of the facts relevant to Blackmon's affidavit (R. Supp. Vol. 4, p. 617-30). The public defenders moved to withdraw from Mr. Lowe's case and Mr. Lowe requested that the court appoint new counsel (R. Supp. Vol. 4, p. 624-25, 628). The court appointed Mr. Long to represent Mr. Lowe in his capital trial.

The record clearly establishes that the court appointed Mr. Long to represent Mr. Lowe at trial specifically for the purpose of assuring that Mr. Lowe would have conflict-free counsel who could competently cross-examine Blackmon concerning the facts contained in the affidavit (R. Supp. Vol. 4, p. 602-03, 618-19). Blackmon swore in the affidavit that law enforcement officers made serious threats against him and promises of legal and monetary assistance in order to persuade him to testify for the State in Mr. Lowe's trial (R. 1375-76). However, despite the fact that Blackmon's trial testimony inculpated Mr. Lowe with devastating effects, Mr. Long did not cross-examine Blackmon concerning his allegations contained in the affidavit. As evident from Mr. Long's testimony at the evidentiary hearing, Mr. Long had no strategic reason for this failure.

Had Mr. Long impeached Blackmon with the affidavit, Blackmon's

credibility would have been irrevocably destroyed. In the November 14, 1990, statement given at the State Attorney's Office, Blackmon stated that he told John Unruh that there were "problems" with the affidavit but Blackmon signed it anyway (State's EH Exhibit 1, p. 29). At the evidentiary hearing, Blackmon readily admitted to the falsity of portions of the affidavit. (T. 944). He then addressed each of the nine (9) statements within the affidavit that he had sworn under oath to be true on October 26, 1990. In statement (1) of his affidavit, Blackmon swore under oath:

> That members of the Indian River County Sheriff's Office have been aware of an arrest warrant for me previous to my arrest, but did not arrest me on this warrant until I indicated that I did not wish to testify as they wanted.

(R. 1375). This assertion sworn to by Mr. Blackmon discredits his trial testimony and impugned the credibility of the police investigators and the State's case as a whole because it suggests that police arrested Blackmon on an unrelated warrant as a coercive means to force him to testify "as [the State] wanted."

In his statement given at the State Attorney's Office on November 14, 1990, in which Blackmon was also under oath, Blackmon recanted the truth of his affidavit and stated that this allegation in the affidavit was not true (State's EH Exhibit 1, p. 16-17). Blackmon stated that he swore to this false allegation in his affidavit because Mr. Unruh told him to (State's EH Exhibit 1, p. 17).

At the evidentiary hearing, Blackmon, again under oath, testified that the statement in the affidavit was not true (T. 921). If Mr. Long had crossed-examined Blackmon at trial on this issue, the jury would have concluded either that the statement in the affidavit was true or that it was false.

If the jury concluded it to be true, they would have believed that the police arrested Blackmon on an unrelated warrant as a coercive means to force him to testify "as [the State] wanted". This conclusion would also require that the jury necessarily believe that, in both the November 14, 1990, sworn statement and his trial testimony (assuming he would have testified consistent with his evidentiary hearing testimony) Blackmon lied under oath by disavowing the affidavit.

If the jury believed that the statement in Blackmon's affidavit was false, then they would have believed that Blackmon signed the affidavit and gave an oath representing as true a statement he in reality knew to be false. This fact would still negatively impact Blackmon's credibility even if Blackmon claimed that he signed the affidavit and swore to its truth because Mr. Unruh told him to. No reasonable jury would have believed Blackmon's claim that an attorney like Mr. Unruh would direct a witness to sign an affidavit that the witness knew to be false. Even if the jury believed Blackmon's claim that Mr. Unruh directed him to lie in the affidavit, this scenario still required Blackmon to sign and swear to allegations of witness tampering against law enforcement authorities that Blackmon knew were not true.

Under any view, Blackmon's credibility with the jury would have been seriously undermined had Mr. Long impeached him with this allegation (1) in his affidavit.

In statement (2) of his affidavit, Blackmon swore under oath:

> That I was informed by these members of the Indian River County Sheriff's Office that I am being held in jail at this time simply to "baby sit" me until the trial of Rodney Lowe.

(R. 1375). This assertion sworn to by Mr. Blackmon discredits his trial testimony because it suggests that police kept Blackmon in jail for no other reason than to assure that Blackmon testifies at trial. It also suggests that police were implying a threat to hold Blackmon in jail if he did not agree to testify consistent with the State's theory of the case. In his statement given at the State Attorney's Office, Blackmon recanted the statement in the affidavit in part by disavowing that police referred to Mr. Lowe's trial (State's EH Exhibit 1, p. 17-18). Blackmon stated in his statement given at the State Attorney's Office that while police told him he could be "babysitted", the affidavit was false to the extent it states that the "babysitting" was for the purpose of holding him until Mr. Lowe's trial.

At the evidentiary hearing, Blackmon changed his mind again and testified that the statement in his affidavit was true (T. 917). If Mr. Long had crossed-examined Blackmon at trial on this issue, the jury, faced with Blackmon's re-affirmation of the affidavit, could have believed that police kept Blackmon in jail

"simply" to assure that he would testify for the State, a fact that impugns the credibility of Blackmon's trial testimony.

Additionally, the jury also would have noted that Blackmon apparently lied under oath on November 14, 1990, when he said that the affidavit was false to the extent that his affidavit stated that police said they were babysitting him for the purpose of holding him until Mr. Lowe's trial. Had Mr. Long explored the matter, and had Blackmon at trial re-affirmed the statement in affidavit that police told him they were holding him until "this" was over (meaning Mr. Lowe's trial), Blackmon's credibility would have further been damaged.

In statement (3) of his affidavit, Blackmon swore under oath:

> That members of the Indian River County Sheriff's Office have informed me that they would take care of my Driving With a Suspended License charge.

(R. 1375). This assertion sworn to by Mr. Blackmon discredited his trial testimony by suggesting that the main investigating law enforcement agency on Mr. Lowe's case offered to exert influence and control of Blackmon in order to secure favorable testimony by promising to eliminate criminal and/or traffic-related charges that Blackmon was facing at the time. In his statement given at the State Attorney's Office, Blackmon confirmed that the statement in the affidavit was "true, just as it's printed right here" (State's EH Exhibit 1, p. 19), although he also attempted to clarify the meaning of the statement - with the help of Detective

Chuck Green, who was present and participated in the questioning during the interview at the State Attorney's Office - by explaining that what happened was that he asked Detective Green if he could use the reward money he would receive for helping police in Mr. Lowe's case to pay his fine on his pending DWLS charge and that Green told him that he could not obtain the reward money for testifying against Mr. Lowe until after Mr. Lowe was convicted (State's EH Exhibit 1, p. 18-19). At the evidentiary hearing, Blackmon recanted the entire statement in the affidavit (T. 918).

Regardless of whether Blackmon's November 14, 1990, explanation is characterized as a "recantation" or a "clarification", Blackmon's explanation is not credible. No reasonable jury would believe that Blackmon would swear in the affidavit that police told him they would "take care of" his pending DWLS charge if all Blackmon really meant was that he could use his own reward money to pay his fine. The words "take care of " suggest that the police would take affirmative steps to resolve the charge, and not, as Blackmon claimed in his subsequent statement, that Blackmon himself could pay the fine using his own reward money. The jury would have been left not with the question of if Mr. Blackmon had lied under oath, but when did he lie under oath.

In statement (4) of the his affidavit, Blackmon swore under oath:

That these same law enforcement officers told me they

> could influence my and Patricia White's misdemeanor charges because they had Judges Balsiger and Wild "in our pocket."

(T. 919). This assertion sworn to by Mr. Blackmon, like statement (3) of the affidavit, discredits his trial testimony and the State's case in general by suggesting that the main investigating agency offered to exert influence and control over Blackmon and Patricia White in order to secure favorable testimony by promising to assist them on their pending misdemeanor charges.

In his subsequent statement given at the State Attorney's Office, Blackmon re-affirmed his affidavit except he clarified that it was only Chuck Green and no other officer who made the statement and that Green told him "they got influence with" the judges but did not specifically state the words "in their pocket" (State's EH Exhibit 1, p. 20-21).

At the evidentiary hearing, Blackmon did not answer the question posed to him of whether or not police made the alleged statement that they could influence the charges because police had influence over the judges (T. 919-20). All Blackmon would say is that it must not have been true that police had influence because he "went to jail" (T. 919). In his November 14, 1990, statement, Blackmon re-affirmed statement (4) in the affidavit save for minor details.

Mr. Long missed a valuable opportunity to inform Mr. Lowe's jury that, according to Mr. Blackmon's sworn statements, the lead investigator for the Indian

River Sheriff's Office, Chuck Green, offered to influence both Blackmon's and Patricia White's misdemeanor charges based on Green's asserted influence on local judges, including the trial judge. It therefore appears not to be a mere coincidence that Judge Wild dismissed her DWLS charge because police did not timely file the citation with the clerk (R. 1454).

In statement (5) of his affidavit, Blackmon swore under oath:

> That my fine for the DWLS charge was reported paid, but was not paid by me or my family members.

(R. 1375). This assertion sworn to by Mr. Blackmon implied that the Indian River Sheriff's Office fulfilled its promise reported by Blackmon in affidavit statement number (3) to "take care" of his DWLS charge by paying the fine for him. This assertion discredits Blackmon's trial testimony and the integrity of the State's witnesses and the entire investigation. In his subsequent statement given at the State Attorney's Office, Blackmon affirmed the statement in the affidavit to the extent that he knew that the fine had been paid and that he himself had not paid it, however, he recanted the affidavit's affirmative assertion that the fine "was not paid by . . . my family members." (R. 1375). In the statement given on November 14, 1990, Blackmon was asked:

> DV: [Assistant State Attorney Dan Vaughn] Okay. All right, so I guess at that time, as far as you knew, the fine for your charge was paid as far as you knew?

> DB. [Dwayne Blackmon]: Right. 'Cause they release me out of jail.
>
> DV: Okay, but you didn't know . . . (inaudible) . . . **did you know whether or not it had been paid by your family members[?]**
>
> DB: **No, I didn't know**.

(State's EH Exhibit 1 p. 21) (emphasis added). At the evidentiary hearing, Blackmon simply said "That ain't true" (T. 920).

Again, had Mr. Long raised this issue at trial, Mr. Lowe's jury would have concluded that, with respect the Blackmon's allegation in the affidavit that his fine was not paid by family members, he lied under oath either in his affidavit in the November 14, 1990, statement or at trial. Mr. Long's failure to raise this issue at trial with Mr. Blackmon squandered an opportunity to seriously undermine Mr. Blackmon's credibility.

In statement (6) of his affidavit, Blackmon swore under oath:

> That I have been repeatedly threatened with prosecution for perjury and also for charges related to the homicide of the victim in this case.

(R. 1376). This assertion sworn to by Mr. Blackmon constitutes classic impeachment evidence by suggesting the existence of a very strong motivation and influence on Blackmon to testify in favor of the State's case apart from whether or not his trial testimony was the truth. In his subsequent statement given at the State Attorney's Office, Blackmon complained that his statement in the affidavit was

"twisted" in that what really occurred was that Blackmon told Chuck Green he either was not going to testify or could "change my testimony" and Green responded that he could get charged with perjury (State's EH Exhibit 1, p. 22). As for the portion of the affidavit in which Blackmon swore that he had been "repeatedly threatened with . . . charges related to the homicide" (R. 1376), Blackmon recanted and stated emphatically that it was not true (State's EH Exhibit 1, p. 22).

At the evidentiary hearing, Blackmon testified that the entire statement in the affidavit was not true (T. 920). Most critical here is Blackmon's statement in the affidavit that state agents "repeatedly threatened" him with prosecuting him "for charges related to the homicide" (R. 1376). In his subsequent sworn statement, he recanted that particular part of the affidavit and tried to explain it away by claiming that did not read that part of the affidavit (". . . I didn't even much read this here when I signed the paper . . . .") (State's EH Exhibit 1, p. 22).

There can be no reason for counsel to have elected not to raise this particular issue during the cross-examination of Dwayne Blackmon. Furthermore, regarding the threats of perjury charges, while Blackmon for the most part re-affirmed the affidavit in his subsequent statement given on November 14, 1990, at the evidentiary hearing, he denied it altogether. There can be little doubt that the jury would have had compelling reason to find his trial testimony completely

unreliable.

In statements (7) and (8) of his affidavit, Mr. Blackmon swore under oath:

> 7) That I was threatened with 50 to 100 years in prison by these members of the Indian River County Sheriff's Office if I did not testify and cooperate in the State's case against Rodney Lowe.
>
> 8) That, similarly, I was also informed that I would "sit in the chair with Rodney" if I did not cooperate with law enforcement in this case.

(R. 1376). As with statement (6) in the affidavit, statements (7) and (8) constitute classic impeachment evidence by suggesting the existence of a very strong motivation and influence on Blackmon (50 to 100 years in prison, or death by electrocution) to testify against Mr. Lowe apart from whether or not his trial testimony was the truth.

In his subsequent statement given at the State Attorney's Office, Blackmon explained that Sebastian law enforcement officers simply told him that if he was charged with being an accessory to the murder, he could get 50 to 100 years and that Chuck Green told him that if he was charged with the murder itself he could "get the chair" (but not that he would "sit in the chair with Rodney") (State's EH Exhibit 1, p. 25-27). At the evidentiary hearing, Blackmon confirmed the whole of both statements (7) and (8) in the affidavit but for a few minor discrepancies. See (T. 921-2).

Blackmon never made any attempt to back off his assertion in his affidavit

that he was threatened by police with prosecution that could result in either 50 to 100 years in prison or death by electrocution if he did not "cooperate in the State's case against Rodney Lowe" or "cooperate with law enforcement in this case." Had Mr. Long raised this portion of the affidavit with Mr. Blackmon at trial, Mr. Blackmon apparently would have agreed that police threatened him with 50 to 100 years in prison or death by electrocution if Blackmon did not "cooperate in the State's case against Mr. Lowe." This would have established for Mr. Lowe's jury that Dwayne Blackmon had good reason to believe that his own life and liberty were at stake if he did not testify as the State wanted him to. However, the jury never knew this because Mr. Long failed to raise the matter at trial.

Finally, in statement (9) in his affidavit, Mr. Blackmon swore under oath:

> That I was repeatedly told that all I have to do is testify that Rodney Lowe committed the murder and I will get a $10,000.00 reward, by these members of the Indian River County Sheriff's Office.

(R. 1376). This assertion sworn to by Mr. Blackmon at the very least suggests that Mr. Blackmon had a pecuniary interest to testify for the State and against Mr. Lowe. In his subsequent statement given at the State Attorney's Office, Blackmon affirmed that Detective Green told him about a reward of $5,000 or $10,000 (State's EH Exhibit 1, p. 27-8). However, Blackmon disavowed any implication contained in the affidavit that the money was offered in consideration for testifying against Mr. Lowe regardless of the truth (State's EH Exhibit 1, p. 28-9). At the

evidentiary hearing, Blackmon renounced the whole of statement number (9) as "a lie" (T. 922).

The powerful impeachment value of the affidavit on Blackmon's credibility at trial rests in the fact that the affidavit suggests quite plainly that the $10,000 was consideration not for Blackmon testifying to the true events in this case but for him testifying explicitly that "Rodney Lowe committed the murder". While Blackmon attempted to back track from this in his subsequent sworn statement, no competent defense attorney in a capital murder case would affirmatively elect to not raise this particular issue during the cross-examination of Dwayne Blackmon.

While Blackmon attempted to clarify the affidavit in his subsequent statement given on November 14, 1990, at the evidentiary hearing, he denied it altogether. Again, there can be little doubt that the jury would have had compelling reason to find his trial testimony completely unreliable and refuse to believe anything that Mr. Blackmon testified to.

At the evidentiary hearing, Mr. Long agreed that Dwayne Blackmon was an important witness for the State and that he would have wanted to show him to be incredible in the eyes of the jury (T. 481). Mr. Long maintains the opinion that Blackmon was involved in the crime, but he could not recall having seen or considered Dwayne Blackmon's affidavit back in 1991 (T. 482), even though he admitted that he now recalled that the affidavit was the "root cause" of the public

defender having to withdraw and Mr. Long being appointed to represent Mr. Lowe (T. 576). Mr. Long testified that any reason that he could think of now as to why he did not use the affidavit would "be total speculation" (T. 485). He declined the offer to review Blackmon's trial testimony, indicating that to do so would not help him recall why he failed to raise the issue of the affidavit (T.485).

Even If Mr. Long had testified that he knew that he did not raise the issue because Blackmon had recanted the affidavit in Blackmon's subsequent sworn statement, he still was ineffective for not raising the issue to impeach Blackmon's trial testimony. Mr. Blackmon's credibility would have been impugned even more so if the jury knew that he had sworn under oath to facts in the affidavit and then, less than a month later, sworn under oath that those facts he had previously sworn to were not true after all. Any "recantation" by Mr. Blackmon of the facts he swore to in the affidavit itself seriously undermines his credibility.

In the November 14, 1990 statement, Blackmon affirmed some portions of his allegations in the affidavit and recanted other portions. For the reasons previously discussed, there was simply no strategic reason for Long's failure to attack Blackmon's credibility on this issue. Even in the face of Blackmon's explanation that he signed and swore to allegations of serious witness tampering that he knew to be false only because Mr. Unruh promised to "correct" the affidavit, Mr. Long's failure to raise the issue constituted objectively deficient

performance. Given that Blackmon's testimony was damaging to the defense in so many respects and given that, had Long pursued the matter, Blackmon's credibility would have been severely damaged if not outright eradicated, the possibility that Blackmon would try to blame Mr. Unruh if confronted with the affidavit at trial simply cannot justify Long's failure to attack Blackmon's credibility on this issue.

Additionally, there would have been no harm to Mr. Lowe or the defense in the eyes of the jury had Blackmon tried to blame Mr. Unruh for Blackmon's false statements in the affidavit. More than likely the jury would not believe Blackmon and treat his attempt to deny his falsehoods by blaming Mr. Unruh as more of Mr. Blackmon's lies. Even if the jury gave any credence to Blackmon's accusation against Mr. Unruh, this would have placed into question Mr. Unruh's ethics and credibility, not Mr. Lowe's. The fact remains under any version of events that Mr. Blackmon signed and swore to an affidavit containing facts that, according to Blackmon's later sworn statements, he knew to be false. At the evidentiary hearing, Mr. Long provided absolutely no objectively reasonable reason for his failure to raise this issue during his cross-examination of the State's star witness.

There is more than a reasonable probability that Mr. Long's failure to take advantage of the available opportunity to shatter Blackmon's credibility affected the outcome of the trial. Judge Wild clearly recognized the importance of defense impeachment of Blackmon with his affidavit when the Judge noted that the

pertinent question raised by the State in its motion to disqualify the public defenders was "whether [the public defenders are] going to represent Mr. Lowe and use the Affidavit or whether someone else is going to represent Mr. Lowe and use the affidavit" (Supp. R. Vol. 2, p. 192). Later, Judge Wild, in discussing the importance of the defense cross-examining Blackmon on the contents of his affidavit, recognized that "if the jury believes Mr. Blackmon, Mr. Lowe is going to get convicted." (Supp. R. Vol. 2, p. 194). Judge Wild later opined, "Well . . . I don't see how you [the public defenders] could not use the Affidavit if [Blackmon] takes the stand" (Supp. R. Vol. 2, p. 196). Judge Wild's assessment of this issue is clearly correct.

ABA Guideline 5.1(B) (2) (h) (2003) requires that trial counsel be skilled "in the elements of trial advocacy such as jury selection, cross-examination of witnesses and opening and closing statements." Mr. Long did not demonstrate such skills. In Davis v. Alaska, 415 U.S. 308 (1974), the Supreme Court emphasized the extreme importance of a criminal defendant's Sixth Amendment right to cross-examine adverse witnesses though impeachment. See Davis, 415 U.S. at 315-17. Mr. Long failed to fulfill his duty as counsel by failing to cross-examine Blackmon on this matter.

In contrast to the trial court, the lower court found "the effectiveness of the affidavit for impeachment purposes is questionable" (PCR. 2053), and that it

would not refute the evidence that connected Mr. Lowe to the crime. However the lower court failed to conduct a cumulative analysis of the impeachment value of this material with all the other constitutional errors outlined herein. See Argument I(E) supra. It also ignores the fact that the entire state's theory was based on Mr. Lowe acting alone and being the shooter. Relief is warranted.

B. The state withheld evidence that Dwayne Blackmon was a paid police informant

The State withheld evidence that Dwayne Blackmon was a paid informant for the Sebastian Police Department. This evidence goes directly to the credibility of the State's star witness. The State withheld this critical impeachment evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). To the extent trial counsel knew of and failed to present this evidence or failed to discover this evidence through the exercise of due diligence, trial counsel was ineffective.

Ben Carter testified that Blackmon worked as a confidential informant for officers of the Sebastian Police Department from 1989 to around 1992 (T. 775). The officers paid Blackmon to look for and recover property that had been stolen from houses and to provide the police with information about "people that have broken into houses". Mr. Carter knew this because he had actually been with Blackmon on a few occasions in which Blackmon handed property over to police and, in return, the police would give him money and receipts. Mr. Carter also

testified that he believed that Blackmon would actually tell police he could recover stolen property that Blackmon himself already possessed (T. 775). Thus, the jury never knew not only that Mr. Blackmon worked as a paid informant for the police, but that he fraudulently provided to police property he illegally obtained under the guise of having "recovered" stolen property. Thus the jury was once again deprived of critical impeachment evidence against Dwayne Blackmon.

The lower court denied this claim based on the fact that Mr. Lowe merely presented evidence from Ben Carter that he was with Blackmon at a time when Blackmon gave information. However the lower court did not revisit this issue with the new evidence of Maureen McQuade and David Stinson who both attested that Blackmon was a confidential informant. See Argument I(C) supra. The lower court further failed to find prejudice. Again the lower court failed to do a cumulative analysis with all the other impeachment evidence against Blackmon. Relief is warranted.

ARGUMENT IV

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IRRELEVANT AND INFLAMMATORY EVIDENCE

A. The PSI

Trial counsel was ineffective for failing to properly object to the admission into evidence of Mr. Lowe's Pre-Sentence Investigation report ("PSI") for his prior

robbery conviction and to letters from his mother that included her many assessments of Mr. Lowe's crimes and sins and her strong exhortations for him to return to the Jehovah Witness faith.

The PSI and the letters were found in a box containing Mr. Lowe's personal property. The evidence showed that the sunglasses also admitted into evidence had been found in this box. Trial counsel made a relevancy objection to the contents of the box which the trial court overruled (R. 863-5). This Court on direct appeal affirmed the trial court's ruling and concluded that the contents of the box were relevant to establish that Mr. Lowe also owned the sunglasses. This Court concluded that Mr. Long's relevancy objection was properly overruled by the trial court. The Court pointed out that "the wording of the objection indicates that counsel was certainly aware of the nature of the remaining contents of the box at the time of the objection but no objection was made on the basis of prejudice from the PSI and the mother's letters." Lowe v. State, 650 So. 2d 969, 974 (Fla. 1995). However, Mr. Long's testimony at the evidentiary hearing establishes that he did not know that the box contained either the PSI or the letters (T. 495-6).[14] Mr.

[14]This shows that this Court's conclusion that Mr. Long knew that the PSI and letters were in the box was just assumption. The Court's reliance on the "wording of the objection" is tenuous given that the only items Mr. Long mentions in his objection are a "Big Ben clock", a Bible, and birthday cards (R. 864). Had Mr. Long truly known that the PSI and letters were in the box, he would have, as he testified at the evidentiary hearing, "raised cane" (T. 497). This Court obviously

Long's evidentiary hearing testimony now establishes without question that he in fact did not know those items were in the box.[15] For this reason, Mr. Long was ineffective because, as this Court also noted on direct appeal, Mr. Long failed to object that the PSI and the letters were prejudicial. Mr. Long testified at the evidentiary hearing that he did not know that the box entered into evidence contained Mr. Lowe's PSI, and that had he known he would have "raised cane" on the grounds that the information in the PSI was extremely prejudicial to Mr. Lowe. See T. 496-7.

Mr. Long asserted that the PSI was in the box due to an intentional act on the part of the State to show the jury inadmissible and prejudicial evidence. However, regardless of the State's role in this episode, Mr. Long rendered deficient performance by failing to discover the PSI in the box. Mr. Long's allegations against the State do not excuse his failure to discover the PSI before the box was admitted into evidence.[16] Similarly, Mr. Long's failure to discover the letters from

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did not have the benefit of Mr. Long's evidentiary hearing testimony when it assumed on direct appeal that Mr. Long was aware of the nature of the remaining consents of the box. Lowe at 974.

[15]If Mr. Long knew that the PSI and the letters were in the box, he was ineffective for failing to object on prejudice grounds.

[16]Mr. Long's experience in the Gore case, as he recounted during his testimony, should have caused him to be diligent in making sure that there was nothing "hidden" in the box that should be excluded from evidence.

Mr. Lowe's mother was deficient performance. Mr. Long testified that he must not have read the letters or he would have objected to their admission (T. 497-8). The jury - **during its deliberations in the guilt-innocence phase of the trial** - learned that Mr. Lowe in another case had been charged with several serious crimes and that he was found guilty in that case of Burglary and Robbery. The contents of the box, were inadmissible, yet, were admitted into evidence due to defense counsel's ineffectiveness. See 90.404(2) (a); See Bryan v. State, 533 So. 2d 744 (Fla. 1988).

Even assuming that the PSI and the letters had a relevant purpose, had Mr. Long known of their existence and objected that the PSI and the letters were unduly prejudicial, the evidence would have been excluded. However, as this Court noted, counsel failed to object on this ground. Lowe, 650 So. 2d at 974.

Even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. § 90.403, Fla. Stat. (1989); see e.g. Williams v. State, 539 So. 2d 563 (Fla. 4th DCA 1989) (evidence that defendant had been arrested before and was on probation inadmissible under § 90.403). The extreme prejudice to Mr. Lowe caused by the PSI report and the letters from his mother far outweighed any possible relevancy.

Additionally, the contents of the box, including the PSI and the letters from Mr. Lowe's mother, were not relevant. The admission of the PSI and the letters served no purpose but to inflame the passions of the jury. See Section 90.404, Fla.

Stat. (1989). As this Court ruled, the purported relevance of the contents of the box was to establish that Mr. Lowe owned the sunglasses. However, this Court's conclusion that the contents of the box were relevant was explicitly premised on the finding that the sunglasses were relevant. Lowe v. State, 650 So.2d 969, 974. However, the sunglasses were not relevant because the person Leudtke saw was not wearing sunglasses. Through Mr. Long's ineffectiveness, this fact was not elicited at trial.

Trial counsel's general relevancy objection to the contents of the box, which was not premised at all on the fact that the sunglasses were not relevant, was ineffective. By failing to elicit the fact that the person Leudtke saw was not wearing sunglasses, counsel's general relevancy objection to the contents of the box, including the PSI and the letters, had to be overruled. The lower court found this claim to be procedurally barred and that this Court had already found the admission of the contents of the box harmless beyond a reasonable doubt. However as noted in Argument I(E) supra, this should be considered in a cumulative analysis with of all the other constitutional error detailed herein. Relief is warranted.

B. The sunglasses

Trial counsel also was ineffective for not effectively challenging or objecting to the introduction into evidence of a pair of sunglasses reported to have

been kept in the box of Mr. Lowe's personal items (R. 509-10). The sunglasses were irrelevant, misleading and prejudicial. The State offered the sunglasses in order to suggest to the jury that they were the glasses worn by the person Steven Leudtke saw leaving the Nu-Pack immediately after the shooting. The admission of the sunglasses severely prejudiced Mr. Lowe.

The State made a feature of the sunglasses during its examination of Deputy Sinclair (R. 509-510) and published the sunglasses to the jury (R. 510). Because of trial counsel's ineffectiveness, the jury never learned that the glasses worn by the person Leudtke saw leaving the Nu-Pack were not sunglasses. Trial counsel allowed the State to mislead the jury into believing that the sunglasses kept in the box, which the evidence suggested belonged to Mr. Lowe, were the glasses worn by the person Leudtke saw leaving the store. This misleading evidence incorrectly suggested that the person Leudtke saw leaving the store was Mr. Lowe. The box was relevant only to the extent that the contents suggested that Mr. Lowe was the owner of the sunglasses. See Lowe, 650 So. 2d at 974. If the sunglasses were not relevant, then the contents of the box were not relevant either. Had trial counsel effectively objected and challenged the admission of the sunglasses, neither the sunglasses, nor the box containing the PSI and letters would have been admitted into evidence. Trial counsel's ineffectiveness undermines confidence in the outcome.

At the evidentiary hearing, Mr. Long testified that he must have known that the sunglasses did not match the description of the glasses Steven Leudtke told police the suspect was wearing and must have intentionally not objected to the admission of the sunglasses so that he could argue this fact to the jury as a weakness in the State's case (T. 492-3).[17]

Mr. Long's strategy in not objecting to the sunglasses was reasonable only if the jury was presented with evidence that Steven Leudtke told police that the person he saw coming out of the store was not wearing sunglasses. In fact, no such evidence was presented. Mr. Long had the opportunity to elicit this evidence during Leudtke's cross-examination but failed to do so. Therefore, Mr. Long's strategy on this issue was not objectively reasonable under Strickland.

In the transcript of his statement to police given on the day of the shooting, which was provided to the defense and is contained in Mr. Long's files, Steven Leudtke specifically told police that the glasses worn by the person he saw leaving the store "weren't sunglasses" (Transcript of Steven Leudtke's Statement to Sebastian Police on 7-3-90 p. 1).

During direct examination by the State at trial, Leudtke testified that the person he saw coming out of the store was wearing "some type of glasses" (R.

[17]Mr. Long in fact did argue this to the jury in closing arguments. See R. 1053, 1055-56.

557). During his cross-examination of Leudtke, Mr. Long failed to elicit from him that he had in fact told police that the glasses the person wore were not sunglasses. Instead, Mr. Long elicited from Leudtke testimony that he did not tell the police that the glasses were wire-rimmed glasses. This testimony directly refutes Long's argument to the jury that, "[T]he eyewitness said . . . that the person had . . . wire rim glasses" (R. 1053). Long's cross-examination of Leudtke on this point was as follows:

> Q. Okay. Did you say that they were sunglasses?
>
> A. I don't think I said what kind of glasses they were.
>
> Q. Okay. But you did assist the officer who was doing the composite drawing and drawing the composite?
>
> A. Yes sir. Yes sir.
>
> Q. Okay. Did he give you several choices of different kinds of glasses?
>
> Q. Yes sir.

(R. 563).

Not only did Mr. Long fail to impeach Leudtke with his sworn statement to the police in which he said that the glasses the person was wearing were "not sunglasses," Long got Mr. Leudtke to tell the jury that he believed he never told the police that they were wire-rimmed glasses. As a result all the jury heard was that Leudtke saw the suspect with "some kind of glasses", that Leudtke testified

that he did not tell the police that the glasses were wire-rimmed, and that police found sunglasses in a box containing Mr. Lowe's possessions. Mr. Long's closing argument that the sunglasses did not match the description of the glasses Leudtke saw simply was not supported by the evidence and his failure to prevent the State from admitting the sunglasses into evidence was not objectively reasonable.

Since the person Leudtke saw was not wearing sunglasses, the sunglasses reportedly kept in the box containing Mr. Lowe's personal items did not tend to prove or disprove a material fact and, therefore, were irrelevant.[18] This fact would have established conclusively that the sunglasses were irrelevant. Trial counsel was ineffective for not challenging the State's evidence on this matter. The lower court's denial of this claim is erroneous for the same reasons as those articulated in Argument IV(B) supra.

C. The unredacted portions of Mr. Lowe's statement to police

Mr. Long was ineffective for failing to object to numerous prejudicial statements contained in Mr. Lowe's statement to police. Mr. Long filed a pretrial motion asking the court to exclude from Mr. Lowe's statement to police references

[18]This Court on direct appeal suggested that the sunglasses were relevant, State v. Lowe, 650 So. 2d 969, 974 (Fla. 1995), obviously, because of defense counsel's ineffectiveness in failing to elicit the fact that the person Leudtke saw was not wearing sunglasses. This Court, like the trial court and the jury, did not know that Leudtke specifically excluded sunglasses as the type of glasses worn by the person he saw leaving the Nu-Pack.

to his criminal history. The State agreed to redact certain portions of Mr. Lowe's statement (R. 399-402). When asked by the court, Mr. Long subsequently agreed that he was satisfied with these redactions (R. 679-80). However several highly prejudicial references to prior crimes, prior incarceration, and bad acts were not redacted, nor was Mr. Lowe's invocation of his Fifth Amendment right to counsel. Mr. Lowe was denied a fair trial because, as the result of trial counsel's deficient performance, the jury was informed during the guilt-innocence phase of the trial that Mr. Lowe had a prior criminal history, including robbery, and that he had invoked his Fifth Amendment right to counsel during his interrogation. Trial counsel was ineffective because he failed to object to the admission of this prejudicial evidence.

After initially talking to Detective Green and Investigator Kerby, Mr. Lowe invoked his Fifth Amendment right to counsel (State's trial Exh. 28; Supp. R. 1803). Subsequently, Mr. Lowe gave another statement to Green and Kerby after he was interrogated by Patricia White. At the beginning of the second interview with Kerby and Green, Investigator Kerby reminded Mr. Lowe (and thus, informed the jury) that he had previously asked for an attorney. This portion of the interview with Mr. Lowe was played for the jury (R. 757-58). ["I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may

not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." See Simpson v. State, 418 So. 2d 984 (Fla. 1982).

At the evidentiary hearing, Mr. Long defended his failure to keep this evidence from the jury because, according to Mr. Long, since there was no reference to Mr. Lowe refusing to talk without a lawyer present, there was no implication that he was invoking his Fifth Amendment right to counsel (T. 511-2). This flies in the face of common sense. The jury must have knew from the officers' questions that Mr. Lowe had invoked his right to remain silent and obtain a lawyer. Mr. Long explanation for not keeping this from the jury is not objectively reasonable under the Strickland test.

Mr. Long also was ineffective for allowing the State to present, in the form of Mr. Lowe's statement to police, highly inflammatory and prejudicial information regarding collateral criminal conduct, including the allegation that Mr. Lowe had "robbed people before." This prejudicial information, especially when combined with the highly prejudicial information contained in the PSI report and the letters from Mr. Lowe's mother, denied Mr. Lowe a fair trial. Mr. Long did not object to these portions of the statement, and, as the Supreme Court noted, failed to preserve this matter for appellate review. Lowe 650 So. 2d at 974.

The jury heard large portions of Mr. Lowe's interrogation. See R. 730-731. Additionally, trial counsel did not object to the following highly prejudicial

remarks made by Mr. Lowe's girlfriend, Patricia White when White was interrogating Mr. Lowe at the police station. (R. 752; Exh. 30). Mr. Long did not object to these portions of the interrogation even though these references that Mr. Lowe "robbed people before," had been to the "house", had “been around the tree (i.e. the criminal justice system) before" were highly prejudicial and inadmissable. Trial counsel was ineffective for allowing the jury to hear this prejudicial and irrelevant evidence. Section 90.404 (2) (a), Fla. Stat. (1989).

At the evidentiary hearing, Mr. Long addressed each of these unredacted portions of the interview. Regarding the officer’s berating of Mr. Lowe with the fact that he had “robbed people before” but that “something happened with this one”(R. 721-722), Mr. Long explained that he did not object because he read the officer’s statement as being a question to Mr. Lowe, rather than a statement (T. 516). Even were this a reasonable distinction that would justify allowing the jury to hear it, it is plainly an incorrect reading of the interview. These are clearly statements by the officer, not questions: “You robbed people before. Something wrong--something happened with this one.” The jury would reasonably have believed that police interviewing a murder suspect would have already gathered information on the suspect’s criminal history and would therefore have reason to believe that a police officer’s statement to the suspect regarding prior crimes would

be true.[19]

Regarding the reference to Mr. Lowe having "already been to the house and [knowing] what's gonna happen when [the victim] tells somebody who you are" (R. 717), Mr. Long agreed that the reference to "the house" could be a reference to prison but asserted that he did not recognize it as such (apparently because it was not preceded by the word "big") and therefore did not find it objectionable (T. 514).

Similarly, regarding the reference to Mr. Lowe having "been around the tree before" (R. 730-31), Mr. Long agreed that the reference could be construed as a reference to prior criminal proceedings or court proceedings (T. 518). However, he could not recall whether he recognized it as such at the time of trial and could not articulate why he did not object to it going before the jury (T. 518).

As for Patricia White's statements to Mr. Lowe that "I don't know what you're capable of. The things you told me that you did in the past I didn't think you were capable of doing" (R. 752), Mr. Long agreed that the statement could be construed as references to prior bad acts on the part of Mr. Lowe (T. 519-20). For this reason, he further admitted that, if he were to try the case again, he would seek

[19]This must be considered in conjunction with the jury having had Mr. Lowe's PSI to review during its guilt-innocence phase deliberations. The PSI not only set out his entire criminal history but also detailed the facts of the prior robbery. The jury

to have these statements redacted (T. 520).

Additionally, Mr. Lowe's statement is full of improper assertions of the officers' opinion of Mr. Lowe's guilt. The jury was permitted to hear the following statements by the interrogating officers:

> I can put you right there on the spot. Dead certain. Okay. I can put you right there (R. 719).
>
> [Y]ou shot her and she died. . . .I know you shot her. There's no question that you shot her. There wasn't anybody in there, but you. And you know it. And you know I know that cause I know I – that we know what we're talking about when we tell you these things . . . We got the evidence on you (R. 722).
>
> I know what happened . . . .I've got a witness that saw the person that came out of the store and it was you. I know that (R. 722-23).
>
> I know you were in the store . . . . (R. 723).
>
> You went in there and just saw her and blew her up right on the spot (R. 726).
>
> [I]f we go with what we're doing right now it's gonna go down just like I been telling you. You gonna come in there and kill her without ever saying boo to her.
>
> We've got a lady dead in cold blood in the store in front of a three year old kid . . . .
>
> [Y]ou walked in there and you killed her right in front of that--that child (R. 731).

Mr. Long testified that he did not believe that he had any grounds to move to

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was able to confirm for itself that the officer was correct in stating in the interview

have these portions of the interrogation redacted (T. 522). Mr. Long's decision was not objectively reasonable under Strickland. Opinion testimony as to the guilt or innocence of the defendant is not admissible. Farley v. State, 324 So. 2d 662 (Fla. 4th DCA 1975). The jury was just as likely to credit the opinions of the officers it deduces from a taped interview with the defendant as from improper opinions given by an officer in open court. In Blackwell v. State, 76 Fla. 124, 79 So. 731 (1918), convictions for first-degree murder were reversed when, without objection, the Sheriff had testified to his opinion that he had the evidence to convict the defendants. This Court noted that the Sheriff's opinion was so "flagrantly improper" that it should have been stricken by the trial court on its own motion. Id. at 739.

Furthermore, the interrogation contained several exhortations for Mr. Lowe to show remorse (R. 714, 717, 726). In each case, Mr. Lowe expressly stated he had no remorse because he did not shoot Donna Burnell (R. 726). This evidence showing that Mr. Lowe had no remorse was irrelevant and inflammatory and should not have been admitted. See Cruse v. State, 588 So. 2d 983, 990 (Fla. 1991) (evidence of lack of remorse is generally irrelevant). Mr. Long testified that he did not believe there existed grounds to have these portions redacted (T. 531-2).

Finally, the redacted transcript of the interrogation that was provided for the

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that Mr. Lowe had "robbed people before".

jury to read along with failed to redact Mr. Lowe's unequivocal invocation of his Fifth Amendment privilege to remain silent and have a lawyer and the end of the interrogation (T. 540). Mr. Long articulated no strategic reason for not assuring that this portion of the transcript provided to the jury was redacted. The lower court denied relief on this by stating that the issue was already decided on direct appeal and that it cannot be re-raised as ineffective assistance. However the lower court ignored the fact that trial counsel could not assert any strategic reason for at least some of these prejudicial statements. Moreover the lower court did not conduct a cumulative analysis as outlined in Argument I(E) supra.

D. The videotaped police "re-enactment" of the crime

Mr. Long was also ineffective for failing to object to the videotapes on the ground that the videotapes contained irrelevant and highly prejudicial recreations of the shooting inside the store and prejudicial commentary by the detectives. At the evidentiary hearing, Mr. Long testified that he did not make any objections to the videotapes because he must have not thought that there were grounds to do so (T. 489). The detectives' "recreation" of the events that allegedly occurred inside the Nu-Pack included a demonstration of the "perpetrator" picking up the hamburger wrapped in a wrapper that allegedly had on it Mr. Lowe's fingerprint, putting it in the microwave, and then shooting Mrs. Burnell. Not only did Mr. Long fail to object to this highly improper demonstration, trial counsel in closing

argument conceded that Detective Green's videotaped recreation accurately portrayed how the actual shooting occurred, and, by so conceding, implicated Mr. Lowe as the shooter. Mr. Lowe at no time agreed to such a concession by trial counsel. See R. 1112.

Mr. Long's concession to the accuracy of the videotaped "demonstration" of the crime virtually directed the jury to conclude that Mr. Lowe was the shooter. The demonstration showed the shooter putting the hamburger in the microwave - the hamburger with the wrapper that allegedly had on it Mr. Lowe's fingerprint. Mr. Long, by conceding to Detective Green's expertise, also effectively conceded to the accuracy and reliability of the videotapes. But for trial counsel's ineffectiveness, the outcome would have been different.

The videotapes also show Detective Green engaged in a running commentary that included numerous improper conclusions as to ultimate facts and instances of speculation and conjecture that were extremely prejudicial to Mr. Lowe. Mr. Long was ineffective for not objecting to this evidence. For example, in the videotape showing the detectives traveling from Gator Lumber to the Nu-Pack to Mr. Lowe's residence and back to Gator Lumber, Detective Green announced at the outset that, "We're going to be video taping the route taken by Mr. Rodney Lowe, the Defendant, on his way to the Nu[-]Pack grocery store" (R. 836). The videotape shows the detectives arriving at the Nu-Pack and going

inside. Once inside the store, the videotape shows the detectives "recreating" the shooting. Detective Green narrates his "reconstruction": "Took those items . . . . Placed a cheeseburger in the microwave, put the soda can down. Then went to the counter, bang, bang, bang. At that point he walked around to this side of the counter attempting to open the cash register . . ." etc. (R. 837).

In closing argument, the prosecutor talked to the jury as if the videotape showed an accurate reconstruction of the crime and argued highly prejudicial facts not in evidence. See (R. 1084-85). Mr. Long failed to object to these improper and prejudicial comments. The State relied on the inadmissible and unreliable comments by Detective Green recorded on the videotape to convince the jury that Mr. Lowe acted alone and, therefore, had to have been the person who shot Mrs. Burnell. As noted above, trial counsel himself urged the jury to view as accurate Detective Green's "recreation" of the shooting in the store. Had trial counsel instead objected to and challenged this evidence, the outcome of Mr. Lowe's trial would have been different. The lower court did not address this issue.

ARGUMENT V

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE ADMISSIBILITY OF MR. LOWE'S STATEMENT, WHICH WAS OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS, AND FOR FAILING TO IMPEACH PATRICIA WHITE

At the evidentiary hearing Patricia White (now known as Patricia Shegog)

recanted her previous testimony and testified that police asked her to obtain a confession from Mr. Lowe when she and Mr. Lowe were being questioned after Mr. Lowe's arrest. This evidence establishes that Mr. Lowe's statement was obtained in violation of his right against self-incrimination. The jury's verdict was therefore grounded on this inadmissible, and highly prejudicial evidence.

Prior to the trial, Mr. Lowe moved for the trial court to suppress his statement to police given on the day he was arrested. He argued that police obtained his confession in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and in violation of Art. I, §§ 2, 9, 12, 16, 17 and 23 of the Florida Constitution. Mr. Lowe argued that his confession should be suppressed as the product of custodial interrogation instigated after Mr. Lowe invoked his Fifth Amendment right to counsel.

The evidence presented at the motion to suppress hearing showed that Mr. Lowe and his girlfriend, Patricia White, went to the police station to talk with police about some bad checks that had been written on Mr. Lowe's account. Investigator Kerby of the State Attorneys Office and Detective Green of the Indian River Sheriff's Office arrived at the station to question Mr. Lowe about the Nu-Pack shooting. Police placed Mr. Lowe and Ms. White in separate rooms. Kerby and Green then confronted him with evidence they had gathered. Mr. Lowe denied involvement in the shooting and eventually invoked his right to counsel.

During this interrogation of Mr. Lowe, Ms. White was in a nearby room and heard much of the conversation between police and Mr. Lowe. As a result, she became very upset. Detective Divincenzo then moved Ms. White to an area further away from the room in which Green and Kerby were interrogating Mr. Lowe. After Mr. Lowe asked to speak with counsel, Kerby left the room and met with Ms. White. Subsequently, she went into the room and berated and cajoled Mr. Lowe into stating that he was involved in the crime (although he maintained to her throughout that he was not the person who shot Donna Burnell). The police recorded this conversation between White and Mr. Lowe.

The significant issue argued at the suppression hearing and on direct appeal was whether or not police asked Patricia White to try and get Mr. Lowe to confess or whether she herself requested to speak with him. In affirming Mr. Lowe's conviction and sentence, this Court concluded that police did not employ Patricia White as an agent to coerce a confession. Lowe v. State, 650 So. 2d 969, 974 (Fla. 1994). This Court relied on her specific testimony in response to the prosecutor's leading and compound testimonial questions. Id.

This Court concluded that "her conversation with Lowe was not prompted by the police." Id. The Court relied on Arizona v. Mauro, 481 U.S. 520 (1987), which, in affirming the lower court's refusal to suppress the defendant's incriminating statements made to the defendant's wife at the police station, found

significant the fact that police did not put the wife in the room in order to seek incriminating responses, that there was no psychological ploy on the part of police, and that the defendant was not subjected to direct questioning. Id. at 526.

Patricia's recantation of her previous testimony has now established that police did not merely ask her to obtain a confession from Mr. Lowe, but, in fact, pressured her into doing so through promises to make her pending legal troubles "go away." Thus, Mr. Lowe's incriminating statements to police were obtained in violation of his right against self-incrimination because police obtained the statement by subjecting Mr. Lowe to compelling influences, psychological ploys, and direct questioning. See Mauro at 529.

At the evidentiary hearing, Patricia testified that police at first told her about alleged evidence they had against Mr. Lowe and then told her "they wanted me to go in and get Rodney to confess" (T. 678-9). Police had called her and Mr. Lowe down to the station because of worthless checks. Id. Patricia faced serious charges for writing thousands of dollars of worthless checks. Id. Detective Green told her that if she would "go in there and get [Mr. Lowe] to confess, that this stuff would go away" (T. 678-9). Patricia was 17 years old, pregnant, and scared, so she did what Green asked her to do (T. 681).

The trial record corroborates Patricia's testimony that Green offered and in fact carried out his promise of making her DWLS charge go away. The record

establishes that the trial judge, Judge Wild, dismissed Patricia's DWLS charge on October 4, 1990 because the citation was not timely deposited with the traffic violations bureau (R. 1454). Similarly, the State never pursued the worthless check charges against her. Id.

Because of the intense pressure placed on Patricia by police, especially Detective Green's offers to remove the threat of criminal charges and admonitions to her not to tell anyone, she testified on the motion to suppress that police did not ask her to get Mr. Lowe to confess (T. 682). This was in contrast to her sworn deposition testimony:

> Q. Okay. So then after they got through with Rodney, did they come in and talk to you?
>
> A. [Ms. White] They came in and got me and I was really upset and crying and they---- they took me back there and put on a tape recorder and started asking me questions.
>
> * * * *
>
> A. They ended up asking me if I would go in there in the room with him while they recorded it and try to get him to tell me what happened. So, I said fine.
>
> Q. Okay. So, who--who asked you to do that?
>
> A. Green.
>
> Q. Do you recall his exact words?
>
> A. No.
>
> Q. The best that you can recall?

> A**.** Just that they wanted me to go in there. That they know he was there and that he's denying everything and they think since, uh, me and him were so close that if I go in there and try to get him to confess, that he would but they would be listening in.

(Deposition of Patricia White p. 93-4).

Mr. Long inexplicably failed to impeach Patricia with her deposition testimony when she testified at the suppression hearing that she asked to talk to Mr. Lowe and that police (R. 323; 331-33). Patricia has now recanted her previous trial testimony unequivocally. Because police solicited her to go in and try to get Mr. Lowe to confess and promised to make her pending DWLS and worthless check charges "go away", Mr. Lowe's statement to the police was obtained in violation of his Fifth Amendment right against self-incrimination. See Mauro.

The lower court denied relief on this claim finding Patricia to be "unreliable" (PCR. 2058). However the lower court's credibility finding at the evidentiary hearing is not binding here. See Argument I supra; Kyles v. Whitley, 514 U.S. 419, 441-43 (1995). Mr. Lowe is entitled to a new trial.

CONCLUSION

Mr. Lowe respectfully requests this Court to vacate his convictions and grant him a new trial and grant any other relief the Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Leslie Campbell, Office of the Attorney General, 1515 N. Flagler Drive, Fl. 9, West Palm Beach, Florida 33401 on December 29, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210 (a) (2) of the Florida Rules of Appellate Procedure.

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