IN THE SUPREME COURT OF FLORIDA

CASE NO. 06-539

MILFORD WADE BYRD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH 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 a post-conviction motion after an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

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

“1PC-R” -- record on appeal of denial of first Rule 3.850 motion;

"2PC-R" -- record on appeal of denial of this second Rule 3.850 motion;

“Supp2PC-R” -- supplemental record on appeal of denial of this second Rule 3.850 motion;

“Def. Ex.” and “St. Ex.” –- exhibits entered during the evidentiary hearing on this second Rule 3.850 motion.

REQUEST FOR ORAL ARGUMENT

Mr. Byrd 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. Byrd, through counsel, accordingly urges that the Court permit oral argument.

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INTRODUCTION

This case presents a classic example of the dangers to the reliability of an adversarial testing when the State buys testimony by providing a witness, in this case a co-defendant, a deal in order secure a criminal conviction. In this instance, the deal was particularly sweet. Ronald Sullivan, one of three people the State alleged to have participated in the murder of Debra Byrd, was allowed to plead to second degree murder and receive probation in exchange for his testimony against Mr. Byrd.[1]

But beyond the sweetheart deal, Sullivan was a known liar. The State contended at trial that Sullivan lied to police when he denied any knowledge of Ms. Byrd's murder when initially questioned on October 13, 1981. The State also contended that Sullivan lied in his sworn statement to law enforcement on October 27, 1981, when he denied any participation in the murder, and only reported an awareness that

[1]As reflected in the Criminal Report Affidavit filed on October 28, 1981, the State's theory of the case at that time was that Mr. Byrd hired two "unknown subject(s)" who committed the murder (R1701). In the Grand Jury Summary dated November 4, 1981, the State's case was set forth. The State's theory was that "Sullivan (a principal) and Endress (the triggerman)" killed Debra Byrd at a time for which Mr. Byrd had an alibi (2PC-R467). However in Sullivan's testimony for which he received probation, he claimed that Mr. Byrd was present and forced him, Sullivan, to participate in the murder (R421, 425).

Mr. Byrd was looking for someone to kill his wife. According to the State, the only time that Sullivan was worthy of belief was when he was called as a witness at Mr. Byrd's trial in July of 1982, and when he was subsequently called as a witness at James Endress' trial in September of 1983.[2]

In between those two trials and certainly unknown to Mr. Byrd's jury, the State challenged Sullivan's truthfulness at Sullivan's probation revocation hearing in June of 1983. There the State contended that he was a liar who could not be believed. Sullivan faced probation revocation because he allegedly sold hashish to undercover police in January of 1983. When Sullivan took the stand at the probation hearing, the following exchange occurred during the prosecutor's cross-examination:

[2]Mr. Byrd's jury also did not learn that on December 17, 1981, Sullivan told one detective to tell another detective that "he could give us Wade [Byrd] and Endress really good." (Supp. 2PC-R515). Instead, the State told the jury "[t]he first time we knew of what happened here is April 19th, when Ronald Sullivan, after being given probation, promised probation for truthful testimony, came and gave us a statement implicating Mr. Byrd in this homicide." (R1206).

Q You are an admitted liar, are you not?

MR. CURY: Objection. Outrageous.

MR LOPEZ: I can prove that, Judge.

THE COURT: Overruled.

BY MR. LOPEZ:

Q Did you not admit to Frank Johnson that you lied to the Tampa Police Department during the pendency of your murder [sic]?

A I don’t quite understand what you mean.

Q Let me direct your attention, sir, to October, 1981, when you were arrested by the Tampa Police Department for the charge of first-degree murder. Do you remember that?

A Yes, sir.

Q Did you give the police a statement that night?

A Yes, sir.

Q Was that statement a lie?

A Parts of it.

Q Okay. You are admitted liar, are you not?

A As far as you look at it, I guess I am.

(Def. Ex. 12 at 122-23; Supp. 2PC-R468-69). The prosecutor argued for revocation of Sullivan’s probation, asserting that not only was Sullivan’s testimony false, but that he had called

family members to have them lie for him.[3] "They do not want to see this young man go to prison." (Def. Ex. 12 at 128; Supp. 2PC-R473). The judge rejected the testimony of Sullivan and his family as untruthful and revoked his probation (Def. Ex. 12 at 139; Supp. 2PC-R484).

When he was called to testify at James Endress' trial in September of 1983, Sullivan admitted that he sold hash to undercover law enforcement officers on January 14, 1983. He admitted lying under oath at his revocation hearing. He explained that he lied because "I didn't want to receive a life sentence in prison." (2PC-R342). He also admitted that he refused to be deposed by Endress's counsel in August of 1983. He explained that "I figured the State would offer me a deal." The State did make an offer of a sentence reduction to 25 years. Sullivan rejected the offer "[b]ecause I figured they would offer me a better deal." When the State offered a maximum of 10 years, Sullivan finally agreed to testify against Endress (2PC-R342-43). Endress was convicted, but received a life sentence.

Until 2002, Endress, a convicted co-defendant, had refused to speak to any representative of Mr. Byrd (2PC-R1545). According to Endress, he was willing to meet in 2002

[3]According to the prosecutor, Sullivan had in fact suborned perjured testimony at the revocation hearing in order to avoid prison.

and discuss the case because "I've grown." (2PC-R1549).[4] In his meeting with an investigator for Mr. Byrd, Endress reported that Sullivan had lied in his testimony. Endress reported that the investigator may have understood that Endress was maintaining his complete innocence of the murder (2PC-R1546). Accordingly, Mr. Byrd filed his 3.851 motion relying on Endress' representations. However when he took the stand, an entirely new version of the facts were related - a version that could be used to cast Endress in a favorable light before the parole board. In essence, Endress took Sullivan's version, but said that he, Endress, played the part that Sullivan ascribed to himself, *i.e.* present, but forced to participate.

[4]It turned out that besides the alleged "growth" Endress faced an approaching parole hearing. After his September 25, 2002, testimony at Mr. Byrd's evidentiary hearing, it was revealed that just prior to taking the witness stand, Endress engaged in negotiations with the State concerning his looming parole hearing. Endress had consulted with his lawyer who read Mr. Byrd's motion to vacate and advised Endress that "Byrd didn't have a chance in hell and this was my only opportunity to help myself." (2PC-R1800). Endress' lawyer suggested that they see if the State would help him at his upcoming parole hearing. Endress understood that the State had agreed that the worst it would do was "to take a neutral stance and do nothing to harm me." (2PC-R1802). Endress' attorney told him that this was his only chance to help himself, but Endress did not decide whether he would testify until right before he took the stand (2PC-R1803). After his testimony was completed in 2002, Endress wrote the State to firm up his understanding of the State's position (2PC-R1805). However, the State ultimately opposed his parole in July of 2004, and his parole was delayed for 20 years (2PC-R1811).

While testifying in 2002, Endress provided new information that was favorable to Mr. Byrd and that had not been disclosed by the State previously. Endress testified that he had been questioned in late 1982 about a string of robberies (2PC-R1569). However, he invoked his right to remain silent. He understood, however, that there was something "like 13 robberies" and that Sullivan was a suspect in this series of robberies (2PC-R1568-69). Endress understood that no charges were filed against Sullivan in these robberies in exchange for Sullivan's testimony (PC-R1569).

Before Endress's trial, Sullivan told him he needed a lawyer and wrote to Endress's father asking for help getting a lawyer (2PC-R1571). Sullivan told Endress he was not going to testify against Endress, but then the day the trial was to start, Sullivan and the State agreed to a ten-year sentence in exchange for Sullivan's testimony (2PC-R1571-72).

In 2002, Endress also testified that he learned in 2002 from his father that the State had offered him a 7-year prison sentence in exchange for his testimony against Byrd (2PC-R1573, 1575). He did not know about the offer when it was made, and it was rejected by his attorney and his father (2PC-R1573-74).

After Mr. Endress' testimony was finished in the 2002 proceeding, Mr. Byrd's counsel informed the court that the testimony "opened up a whole lot of stuff" and asked for the opportunity to look into these matters. The request was granted. Thereafter, the State disclosed its files on armed robberies that occurred shortly before the murder of Debra Byrd in which Endress and Sullivan were identified as the perpetrators.

The evidentiary hearing resumed on February 10, 2004, when Mr. Byrd introduced the robbery files into evidence.[5] Mr. Byrd also called Willie Clarence Love to testify that in 1981, he was in the Hillsborough County jail, where he met Mr. Byrd, Mr. Endress and Mr. Sullivan (2PC-R1672-73). According to Love, Mr. Byrd did not tell Love anything about his case (2PC-

[5]Introduced as Def. Ex. 13 and Def. Ex. 14 were the State Attorney files on the two cases in which Endress and Sullivan had been identified. In Def. Ex. 13, Endress was positively identified by Mary Jane Taylor as the man who forced his way into her residence and stole $180.00 worth of jewelry on October 5, 1981. Ms. Taylor indicated that after taking her jewelry the man grabbed her around the neck and demanded that she strip. She managed to push him away and onto the bed, then she ran out of her house. The assailant gave chase, but was scared away when a neighbor responded to Ms. Taylor's screams.

Def. Ex. 14 concerns the September 26, 1981, robbery of Benjamin Parry, a night manager of a motel blocks from the Econo Lodge where Debra Byrd was murdered on October 13, 1981, while she was functioning as the night manager. Mr. Parry had positively identified Sullivan as the man who robbed him at gunpoint.

R1673), while Sullivan told Love, "I killed the 'B'[itch] and I'm not going to get any time at all" (2PC-R1673).

Love also testified that he and Endress had a number of conversations (2PC-R1674). As a result of those conversations, Love contacted the State Attorney's Office. Love was deposed and reported what Mr. Endress had told him (2PC-R1675).[6] After giving the deposition, Love was sent back into the prison system, where he again encountered Endress (2PC-R1676). Endress bragged that he had fed Love what he wanted Love to tell the prosecutors. Love testified that Endress "manipulated me and used me to say what he wanted me to say" (2PC-R1678). The prosecutor in 2002 asked if Endress ever said that his statements to Love were false (2PC-R1679-80). Love answered, "He never specifically said that, but he led me to believe that" (2PC-R1680).

At the beginning of the proceedings on February 10, 2004, the State disclosed that it had received a letter dated October 15, 2002, from Endress to his lawyer, Norm Canella, who forwarded the letter to the State (State Ex. 1; Supp2PC-R122). In this letter, Endress expressed his expectation and desire to receive benefit from the State for the

[6]In his 1983 deposition Love had testified that Endress had told him that Mr. Byrd had been trying to find someone to murder his wife for $10,000 (Supp2PC-R162).

testimony that he had provided on September 25, 2002 (Supp2PC-R1668-70).

The information that has cascaded forth as a result of Endress' decision in 2002 to speak for the first time to Mr. Byrd's counsel when considered cumulatively with the evidence presented in prior collateral proceedings demonstrates that Mr. Byrd's conviction and sentence of death violate the due process principles embodied in Bradshaw v. Stumpf, 545 U.S. 175 (2005); Giglio v. United States, 405 U.S. 150 (1972); and Brady v. Maryland, 373 U.S. 83 (1963).

It is certainly clear from the vantage point that this Court has today that Sullivan and Endress have had much to gain from the testimony that they have provided in the course of Mr. Byrd's case. Perhaps it does not take detailed study of Arthur Miller's play, *The Crucible*, to know that only the most principled will refuse to give false witness in order to save their lives and/or their freedom. And here, it is undeniable that in 1983 Sullivan perjured himself and suborned perjured testimony in an effort to keep his probation from being revoked and himself out of prison. But unfortunately, Mr. Byrd's jury was misled and deprived of the critical information necessary to a valid analysis of Sullivan's credibility.

In a case like Mr. Byrd's, where there is a dearth of physical evidence as to what happened and more precisely who did what, resolutions of questions of guilt and punishment comes to rest on the reliability of the unreliable. It is like building a house on a Saharan sand dune. It is either buried or toppled when wind blows and moves the sand. In light of its inherent unreliability, Mr. Byrd's death sentence is inconsistent with the principles embodied in the Eighth and Fourteenth Amendments.

STATEMENT OF THE CASE AND FACTS

Debra Faye Byrd, the wife of Milford Wade Byrd, was killed in the early morning hours of October 13, 1981, in the office of the Econo Travel Motor Lodge at 11414 N. Central in Tampa, Florida. Mr. Byrd and his wife managed the motel. Ms. Byrd was last seen alive by a motel patron at about 1:00 AM on October 13th (R275). A pathologist who examined the body the morning of the 13th estimated the time of death to have occurred between 9:00 PM and 3:00 AM (R767).

At the time, the police were aware of other recent nearby crimes. On September 26, 1981, at 5:45 a.m., a night auditor, Benjamin Parry, was robbed at gunpoint at a nearby Ramada Inn at 802 E. Busch Blvd. On October 5, 1981, at 9:30 p.m., Mary Jane Taylor was robbed by a man armed with a

knife who forced his way into her home at 805 E. 109th Ave. and stole $180.00 worth of jewelry (Def. Ex. 13; Supp2PC-R492). After Ronald Sullivan[7] and his friend James Endress became suspects in these three and other crimes, Mr. Parry positively identified Sullivan as the man who robbed him at gunpoint on September 26th (Def. Ex. 14; Supp2PC-R499).[8] Ms. Taylor identified Endress as the man who robbed her at knife point on October 5th (Def. Ex. 13; Supp2PC-R496).[9]

Starting in the middle of September of 1981, Sullivan and Endress had lived at the Econo Travel Motor Lodge

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[7]Ultimately, in exchange for his testimony against Mr. Byrd, Sullivan was permitted to plead to second degree murder and receive probation.

[8]After James Endress testified in September of 2002 that he and Sullivan were being investigated in 13 robberies in October of 1981(Supp2PC-R1566,1570), the State provided its files regarding the criminal proceedings concerning the September 26th and October 5th armed robberies. These files were later introduced into evidence (Def. Ex. 13, 14; Supp2PC-R487-500).

The file concerning the September 26th robbery at the Ramada Inn included a document summarizing the State Attorney Investigation into the case. This document was dated November 9, 1981, and indicated that Mr. Parry had positively identified a photo of Sullivan as the man who robbed him. However, no date was given for when the identification was made (Supp2PC-R499).

[9]Ms. Taylor indicated that after taking her jewelry the man grabbed her around the neck and demanded that she strip. She pushed him away and onto the bed and ran out of her house. The intruder gave chase, but was scared away when a neighbor responded to Ms. Taylor's screams. When shown a photopak on October 30, 1981, containing a picture of James Endress, Ms. Taylor picked him out as her assailant (Supp2PC-R496).

that was managed by the Byrd's (R385).[10] On October 27, 1981, Sullivan was arrested for a parole violation. During questioning the police brought up the murder of Debra Byrd and accused Sullivan of being involved (R434). In a sworn statement, Sullivan said that he knew that Mr. Byrd had been seeking someone to murder his wife, although Sullivan specifically and pointedly denied his own involvement in the murder (R436).[11]

Based upon Sullivan's statement, Mr. Byrd was arrested at 2:30 AM on October 28th without a warrant along with a woman, Jody Clymer, who was with him in his residence. The police kept Ms. Clymer at the police station while officers tried to talk to Mr. Byrd. The police made sure that Mr. Byrd knew that Ms. Clymer was being detained. The police provided Mr. Byrd with Miranda warnings, and he signed written acknowledgment. However, Mr. Byrd would not speak. For two and

[10]When questioned on the morning of October 13th, Sullivan said he had not heard anything and knew nothing (R434).

[11]The only statements to law enforcement that Mr. Byrd's jury were told had been given by Sullivan were his October 13th and October 27th statements. The State argued since it did not know what Sullivan would say really happened when it agreed in April of 1982 to give him probation in exchange for his testimony, his admission to be present for and participating in the murder with Mr. Byrd was more credible: "My point being, I don't think he has got any motive to come in here and purposely try to put somebody in prison or the electric chair. He would have been given probation either way." (R1207)

one half hours, Mr. Byrd maintained his silence while the police tried in vain to prompt a response. At 4:40 AM, Mr. Byrd asked to speak with Ms. Clymer (R687). His interrogators told him "that was not allowed" (R684). Mr. Byrd said he would talk if they let him speak to her. A police officer then went to Ms. Clymer with tears in his eyes and told her that Mr. Byrd's "guilt was eating him up" (R717). After shedding tears while talking with Ms. Clymer for five minutes, the police officer sent her into the interrogation room to be alone with Mr. Byrd (R687, 720). Six minutes later, Ms. Clymer was taken out of the interrogation room (R687). At that time, Mr. Byrd gave a statement implicating himself in the murder in order to insure Ms. Clymer's release from custody.

Mr. Byrd, along with Sullivan and Endress, were indicted for first degree murder on November 12, 1981 (R1702). The State's theory before the grand jury was that Mr. Byrd had hired Sullivan and Endress to kill his wife and that while Mr. Byrd was at a bottle club, Sullivan and Endress actually murdered Debra Byrd.

However by the time of the indictment, the police had located one of Endress's friends, Debra Williams.[12] She told

[12]Debra Williams gave the police a statement on November 6, 1981, in which she indicated that Endress had told her before his arrest that he and Sullivan beat and robbed Debra Byrd. Endress

the State that subsequent to the homicide but before Endress's arrest, he had advised her that he and Sullivan had robbed and beat Debra Byrd after which she was killed. Endress had not indicated to Ms. Williams that Mr. Byrd was involved in the robbery or the murder of Ms. Byrd.[13]

On January 6, 1982, the State filed its Notice of Discovery (R1728). In this notice, the State said, "Co-defendant Sullivan made statements to: Det. R.J. Reynolds." (R1729). The fifty-one page statement Sullivan made to Det. Reynolds occurred on October 28, 1981 (R2069). Besides it and the brief October 13th interview, the State gave no notice of any other statements by Sullivan.[14]

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indicated that he beat Ms. Byrd with numchucks which he left at Ms. Williams' trailer and which Ms. Williams turned over to the police. Endress also indicated that he and Sullivan were armed with a .38 equipped with a silencer. On November 12, 1981, Ms. Williams appeared before the grand jury and testified that Endress indicated that Sullivan was the person with him when they beat and robbed Ms. Byrd. Ms. Williams was called by the State at Endress's trial on September 22, 1983, and again testified to these admissions Endress made to her, i.e. that he and Sullivan had beaten and robbed Debra Byrd before Sullivan killed her. (Def. Ex. 15; Supp2PC-R. 506).

[13]Neither Endress nor Ms. Williams testified at Mr. Byrd's trial, so his jury was unaware of Endress' statements to her.

[14]In fact, a police report indicated that on December 17, 1981, Sullivan had advised a police officer if he was given a deal he could give the State Mr. Byrd and Endress "really good" (Supp2PC-R515).

On January 7, 1982, the Florida Parole Commission held a preliminary hearing on whether Sullivan violated his parole on a 1978 burglary conviction by robbing Benjamin Parry on September 26, 1981. Sullivan called Endress as an alibi witness. After answering some questions, Endress declined to answer further questions on the advice of counsel. Sullivan called his girlfriend, Regina Schiemelfining, to testify that they had spent the night of September 25, 1981, together at Endress's house.

In April of 1982, Sullivan pled to 2nd degree murder and received probation in return for his testimony against Mr. Byrd. All other criminal cases against Sullivan were dropped, including the September 26th robbery at the Ramada Inn. At Mr. Byrd's trial in July of 1982, Sullivan testified that Mr. Byrd hired Sullivan and Endress to kill Debra Byrd at a time for which Mr. Byrd could develop an alibi. Sullivan claimed that contrary to the plan, Mr. Byrd became impatient and returned to the motel and participated in the murder. The defense at trial was that Sullivan and Endress had committed the murder and that Mr. Byrd was not involved.[15] The jury returned a

[15]James Chestnut was called as a defense witness. He testified that he had been incarcerated with Sullivan who had advised him that he, Sullivan, shot Ms. Byrd and that Mr. Byrd was not there nor involved (R1028-29).

verdict of guilty on July 23, 1982, for first degree murder (R1282, 1899).

Mr. Byrd was prosecuted by Mark Ober and Manuel Lopez. The guilty verdict was used by Mark Ober's brother-in-law, James LaRussa, to obtain the proceeds from an insurance policy for Ms. Byrd's sister, Linda Latham. Mark Ober had in fact recommended that the victim's sister hire his brother-in-law to pursue the civil suit. Mark Ober's brother-in-law was able to collect a large contingency fee by virtue of Mr. Byrd's conviction. After the prosecutor's brother-in-law received this contingency fee, he gave Mark Ober nearly sixteen hundred dollars, approximately ten percent of the contingency fee (PC-R133-50).

Mr. Byrd's sentencing phase began July 27, 1982 (R1286). The jury returned an advisory sentence of death (R1349-50). Mr. Byrd was sentenced to death on August 13, 1982 (R1692). At the sentencing, Mr. Byrd's counsel, Frank Johnson, unsuccessfully offered new evidence that Ronald Sullivan had

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Francisco Garcia was also called as a defense witness. He testified that he had been incarcerated with Sullivan who had advised him that he, Sullivan, was going testify against Mr. Byrd in exchange for probation. Sullivan told Garcia that Mr. Byrd had not been involved in the murder and was in fact innocent, but in order to help himself he would testify otherwise. According to Garcia, Sullivan justified his actions by saying if he did not take the deal his partner would (R1056-57).

lied at Mr. Byrd's trial (R1678). At the conclusion of the sentencing hearing, Judge Alvarez discharged Mr. Byrd's trial counsel (R1694). Three months after a death sentence was imposed and trial counsel was discharged, the sentencing judge, Judge Alvarez, filed a written Sentencing Order on November 15, 1982 (R1982-1991). The ninth page of the written findings was revised on December 13, 1982 (Def. Ex. 3; Supp2PC-R743).

Meanwhile, on September 14, 1982, Mr. Lopez wrote the Florida Parole Commission and asked that Sullivan be reinstated on parole. Mr. Lopez noted that Sullivan had pled to second degree murder, that the armed robbery charge was dropped because Sullivan passed a polygraph, and that the State was not going to pursue another charge for grand theft.

On June 24, 1983, Mr. Lopez sought to revoke Sullivan's probation in a proceeding before Judge Alvarez. Mr. Lopez presented evidence that Sullivan had in January of 1983 sold marijuana to an undercover law enforcement officer. Sullivan and members of his family testified that he was not the person who sold marijuana to the officer. When Sullivan took the stand at the hearing, the following exchange occurred during Mr. Lopez's cross-examination of Sullivan:

Q You are an admitted liar, are you not?

MR. CURY: Objection. Outrageous.

MR LOPEZ: I can prove that, Judge.

THE COURT: Overruled.

BY MR. LOPEZ:

Q Did you not admit to Frank Johnson that you lied to the Tampa Police Department during the pendency of your murder [sic]?

A I don't quite understand what you mean.

Q Let me direct your attention, sir, to October, 1981, when you were arrested by the Tampa Police Department for the charge of first-degree murder. Do you remember that?

A Yes, sir.

Q Did you give the police a statement that night?

A Yes, sir.

Q Was that statement a lie?

A Parts of it.

Q Okay. You are admitted liar, are you not?

A As far as you look at it, I guess I am.

(Def. Ex. 12 at 122-23; Supp2PC-R468-69). During the redirect examination, Mr. Sullivan testified:

Q Did you take the stand to testify on behalf of the State in the one which Frank Johnson was questioning you on?

A Yes, sir.

Q Did the State vouch for you as a witness?

A Yes, sir.

Q Weren't you a critical witness in that trial?

A Yes, sir.

Q Did they call you a liar then when you took the stand –

A No.

Q – to send a man to the electric chair?

A No, sir.

Q They believed you then?

A Yes, sir.

Q You had conversations outside the courtroom with the State Attorney?

A Yes, sir, quite a few times.

Q They believed you then?

A Yes, sir.

Q They put you on the witness stand?

A Yes, sir.

Q Did they call you a liar when you were on the witness stand?

A No, sir.

(Def. Ex. 12 at 126; Supp2PC-R471).

Mr. Lopez argued for revocation of Sullivan's probation. Mr. Lopez stated that the testimony of Sullivan's family could be explained by one fact: "They do not want to see this young man go to prison." (Def. Ex. 12 at 128; Supp2PC-R473). The clear inference was that Sullivan and his family

lied on the witness stand in order to keep him from going to jail. Mr. Lopez concluded by saying:

> I believe that you gave this young man a great break, with our recommendation, of course, because you listened to us. You had serious reservations about doing that due to the circumstances of that murder, but you did it because we asked you to.
>
> You gave that gentleman, Mr. Sullivan, a break. He has abused his own rights, Judge. He has taken advantage of himself. In my humble opinion, you have no choice but to sentence him, if you find him guilty, to the maximum under the law and that's all I have to say.

(Def. Ex. 12 at 128-29; Supp2PC-R473-74).

After Judge Alvarez revoked Sullivan's probation, but before he imposed a sentence, Sullivan's attorney argued:

> I would say life imprisonment is sufficient. I would further argue that there is the expectation that the defendant testify in the Endress case. It is my judgment that not an angel, him or herself come from heaven, would have whatever it takes to testify after you take the whole of the life away.
>
> I would say, if I am to argue on behalf of my client, I would put myself in the shoes of my opposition and I would say to you, Your Honor, that you are inviting, respectfully, **you invite contempt and perjury when you cut the legs out from under a man when it's not necessary**.

(Def. Ex. 12 at 137-38; Supp2PC-R482-83)(emphasis added).

While imposing a life sentence, Judge Alvarez stated:

> Whether it was a sweet deal or not, I think the State offered you probation. I agreed to it. I had reservations about it because of the type of case it was, but I thought that you should be rewarded at that time for your testimony for the State of Florida. I

> think I rewarded you handsomely by placing you on probation but you have violated probation, and I don't think that defendants who are place on probation and then get violated for such a serious offense as this should receive a modification of probation, minimum time in the County Jail or minimal time in the Florida State Prison.

(Def. Ex. 12 at 139; Supp2PC-R484).

On September 23, 1983, Sullivan was called by the State as a witness at Endress' first degree murder trial. During this testimony, Sullivan admitted that he sold hash to undercover law enforcement officers on January 14, 1983. He admitted lying under oath at his revocation hearing. He explained that he lied because "I didn't want to receive a life sentence in prison." (2PC-R342). He also admitted that he refused to be deposed by Endress's counsel in August of 1983. He explained that "I figured the State would offer me a deal." The State did make an offer of a sentence reduction to 25 years. Sullivan rejected the offer "[b]ecause I figured they would offer me a better deal." When the State offered a maximum of 10 years, Sullivan agreed to testify against Endress (2PC-R342-43). Endress was convicted, but received a life sentence.

Meanwhile, Mr. Byrd had appealed from the judgment of conviction and sentence of death. Nearly two years after Endress' trial, this Court affirmed Mr. Byrd's conviction

and death sentence on November 14, 1985. Byrd v. State, 481 So. 2d 468 (Fla. 1985), cert. denied, 476 U.S. 1153 (1986).

Subsequently, Mr. Byrd sought post-conviction relief in the state courts pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. The circuit court conducted a limited evidentiary hearing on March 22-23, 1989, on only three of Mr. Byrd's claims. These were: 1) Mr. Byrd's claim regarding the benefit Mr. Ober's brother-in-law received from Mr. Byrd's conviction, 2) his claim that Brady v. Maryland was violated, and 3) his claim that he received ineffective assistance of counsel.[16] Mr. Byrd did not receive an evidentiary hearing on his claim that the prosecutors had violated Giglio v. United States, by knowingly making false arguments and presenting false evidence, and otherwise engaging in improper prosecutorial behavior. Mr. Byrd also did not receive an evidentiary hearing on any of his claims of ineffectiveness arising from the failure to make legal objections. All claims, except the three limited issues on which the evidentiary hearing was granted, were summarily denied. After the evidentiary hearing, the court issued an order denying relief on July 11, 1989 (PC-R344-353).[17]

[16]At the evidentiary hearing, it was established that trial counsel had lost Mr. Bryd's files (PC-R156).

[17]Mr. Byrd's Rule 3.850 post-conviction proceedings were presided over by Circuit Court Judge Richard Lazzara (PC-R1). Mr. Byrd's

Subsequently, Mr. Byrd's appeal to this Court was denied. Byrd v. State, 597 So. 2d 252 (Fla. 1992).

Mr. Byrd filed a petition for a writ of habeas corpus relief in 1992. However, that petition was subsequently dismissed without prejudice while Mr. Byrd petitioned this Court for a writ of habeas corpus. Ultimately, this Court denied that petition. Byrd v. Singletary, 655 So. 2d 67 (Fla. 1995), cert. denied, 516 U.S. 1175 (1996).

On March 25, 2002, Mr. Byrd filed a second Rule 3.850 motion (2PC-R153-77). In Claim I of that motion, Mr. Byrd alleged that he was denied a fair trial because either the State failed to disclose material, exculpatory evidence and/or the State presented false and misleading evidence and/or trial counsel provided ineffective assistance (2PC-R161-65). The claim was premised on the fact that in early 2002 Endress had for the first time spoken to a member of Mr. Byrd's legal team and had denied that Debra Byrd's murder occurred as Sullivan testified (2PC-R163-64). Claim II of the 2002 motion alleged that the trial judge had not independently weighed aggravating and mitigating circumstances because the State had prepared the

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second codefendant, James Endress, was represented in his federal habeas corpus proceedings by Bennie Lazzara, Jr., the brother of Judge Lazzara. Endress v. Dugger, 880 F.2d 1244 (11th Cir. 1989).

order sentencing Mr. Byrd to death (2PC-R166-71). Claim III raised an issue under Apprendi v. New Jersey, 530 U.S. 466 (2001) (2PC-R171-75).

After the State filed a response to Mr. Byrd's motion (2PC-R. 178-90), the circuit court heard oral argument (2PC-R. 1460 *et seq.*). Thereafter, the circuit court ordered an evidentiary hearing on Claims I and II (2PC-R276-77).

The evidentiary hearing commenced on September 25, 2002 (2PC-R1490). The first witnesses addressed Mr. Byrd's claim regarding the trial judge's sentencing order. Mark Ober, one of the trial prosecutors, testified that he had no recall regarding whether or not he was involved in drafting the sentencing order (2PC-R1498). The trial judge, Dennis Alvarez, identified Defense Def. Ex. 1 as a letter he received from Manuel Lopez, another trial prosecutor (2PC-R1502-04) (Def. Ex. 1; Supp2PC-R731). The letter was dated December 8, 1982, and it suggested that the judge "may want to clarify that part of your sentence because it does appear to be somewhat ambiguous" (Supp2PC-R731). Judge Alvarez identified Def. Ex. 2, which was titled as "Sentence", as the sentencing order in Mr. Byrd's case that was completed in November of 1982, but back dated to August 13, 1982 (2PC-R1504) (Def. Ex. 2; Supp2PC-R733). Judge Alvarez testified that he orally imposed the death sentence on August

13, 1982, but the sentencing order was not completed and filed until November 15, 1982 (2PC-R1504-05). Between the oral sentencing and the filing of the written document entitled "Sentence", Judge Alvarez had sentenced Ronald Sullivan to probation in October 1982 for his role in the murder (2PC-R1507).

In finding aggravating circumstances in Mr. Byrd's case, Judge Alvarez testified in 2002 that he had relied upon Sullivan's testimony at Mr. Byrd's trial because "I think his testimony, you know, was basically important for the state to prove their case. I definitely considered his testimony" (2PC-R1509). Judge Alvarez testified that Sullivan was "necessary" to Mr. Byrd's conviction and death sentence (2PC-R1525).

After the "Sentence" was filed on November 15, 1982, Judge Alvarez received Mr. Lopez's letter of December 8, 1982, suggesting that clarification was in order. Following receipt of this letter, Judge Alvarez issued a revision of page nine of his sentencing findings (2PC-R1509; Def. Ex. 3, Supp2PC-R744). Originally, page nine contained a sentence stating, "Therefore, the court finds that three aggravating circumstances exist and that mitigating circumstances exist which would mitigate the sentence imposed in this case by the court" (2PC-

R1509). Judge Alvarez testified that after receiving Mr. Lopez's letter, he revised that sentence to state, "no mitigating circumstances exist which would mitigate the sentence imposed in the case by the court" (2PC-R1510). The revision resulted from Mr. Lopez's letter (Id.). Judge Alvarez did not recall whether he held a hearing regarding the revision (Id.). He testified in 2002 that he believed that Mr. Byrd's attorney at that time was Frank Johnson, but then acknowledged that he had allowed Mr. Johnson to withdraw from the case on August 13, 1982 (2PC-R1510-11). Judge Alvarez did not recall whether he contacted Mr. Byrd's appellate counsel regarding the revision to the sentencing order, but concluded, "I probably did not" (2PC-R1511).

On cross-examination, Judge Alvarez testified that in drawing up the sentencing order, he listed each aggravating circumstance and stated whether or not there was evidence supporting each circumstance (2PC-R1513). He personally drafted the sentencing order (2PC-R1514). Neither Mr. Lopez nor Mr. Ober gave him a draft sentencing order (2PC-R1514). Judge Alvarez testified that he added the word "no" to the revised page because he had "found no mitigating circumstances whatsoever" (Id.).

On redirect, Judge Alvarez testified that Mr. Lopez's letter indicated that he did not believe the judge had found any mitigating circumstances (2PC-R1516). Based on the letter, Judge Alvarez revised the sentencing order to indicate that no mitigating circumstances were found (Id.). Yet, in his 2002 testimony Judge Alvarez acknowledged that he had in fact found one mitigating circumstance–-that Mr. Byrd had no significant history of criminal activity (Id.). Despite this, Judge Alvarez revised his sentencing order at the request of the prosecutor to indicate that there were no mitigating circumstances (2PC-R1517).

Manuel Lopez, the second trial prosecutor, testified in 2002 that he wrote to Judge Alvarez in December 1982 to point out that the sentencing order stated, "therefore, the court finds that three aggravating circumstances exist and that mitigating circumstances exist which would mitigate the sentence," but that did not reflect "my recollection regarding the mitigating evidence that the judge found" (2PC-R1535-36). After reviewing page seven of the sentencing order, where Judge Alvarez found a mitigating circumstance, Mr. Lopez acknowledged that his letter was in error in advising the judge that no mitigating circumstances had been found (2PC-R1538).

Mr. Lopez testified that he had copied his letter to the court file and to Frank Johnson (2PC-R1536). Mr. Lopez acknowledged that the record showed that Judge Alvarez granted Mr. Johnson's motion to withdraw on August 13, 1982 (2PC-R1537). Mr. Lopez did not recall providing his December 1982 letter to anyone else and did not recall any hearing being conducted after he sent the letter (Id.).

In the September of 2002 proceedings, James Endress was called as a court witness (2PC-R1543-44). When first questioned by Mr. Byrd's counsel, he testified that earlier in 2002, he had met with Jeff Walsh, an investigator working on Mr. Byrd's case (2PC-R1544). He indicated that years earlier, he had met with an attorney representing Mr. Byrd and told that attorney he did not want to be involved (2PC-R1544-45). Accordingly, Endress had invoked his "right to not talk" (2PC-R1545).

In his meeting with Mr. Walsh, Endress said Sullivan had lied about Endress and his involvement in the case (2PC-R1545). Endress advised Mr. Walsh that Sullivan had lied at Endress's trial about Endress's involvement in the crime (2PC-R1545-46).[18]

[18]Endress remembered that at his trial, Sullivan admitted that he had lied previously about his involvement in the murder (2PC-R. 1546).

In the State's examination, Endress testified that at his first meeting with Mr. Walsh, he had said he would agree to testify that Sullivan lied against Endress if Mr. Byrd would agree that if his appeals failed, before his execution he would provide an affidavit exonerating Endress (2PC-R1548). Endress claimed that several days later, Mr. Walsh returned and said that Mr. Byrd had agreed to this (2PC-R1549).

In his 2002 testimony, Endress admitted he was involved in the crime and he described how it occurred (2PC-R1550-57). According to his 2002 testimony, he helped Sullivan and his girlfriend get a room at the motel managed by Mr. Byrd and his wife (2PC-R1550-51). Endress testified that he and Sullivan got to know Mr. Byrd, and that one day Mr. Byrd asked Endress if he knew anyone who would kill his wife for him (2PC-R1551). Endress claimed that neither he nor Sullivan had any intention to do the murder, but nonetheless Endress and Sullivan told Mr. Byrd they would kill his wife in order "to see just how far we could milk the whole situation" (2PC-R1551). Endress claimed that Mr. Byrd offered them $10,000 to split between them if they commit the murder (2PC-R1551). Endress testified that Mr. Byrd gave them money to buy a gun, and that they built a silencer for it (2PC-R1551).

Endress testified that the murder was supposed to take place when Mr. Byrd was not at the motel (2PC-R1552). According to Endress, Mr. Byrd went out several times to various places in anticipation of establishing an alibi, but Endress and Sullivan kept giving him excuses for why they had not committed the murder (2PC-R1552).

Endress testified that one night, Mr. Byrd awoke Endress and Sullivan and said they were "going to do this right now" (2PC-R. 1553).[19] Endress said that Mr. Byrd gave the gun to Sullivan, and the three of them went to the motel office (2PC-R1554). According to Endress, Mr. Byrd called his wife out to the office, and Sullivan shot her (2PC-R1554). Endress testified that Sullivan then started hitting Ms. Byrd, and that Endress ran out of the office (2PC-R1554). Endress claimed that Mr. Byrd came out and told Endress to get back in the office (2PC-R1554). Endress said that he, Endress, was "kind of skiddish [sic]" and "scared" (2PC-R1554-55). Endress testified

[19]At Mr. Byrd's trial it was established through witnesses that Mr. Byrd was seen arriving at a bar, Rusty O'Reilly's, at 8:30 PM on October 12, 1981, and that he did not leave until sometime after 2:30 AM and last call on October 13, 1981 (R1078-80). A barmaid testified that he was there at 2:30 AM when she left to do her books, but gone when she returned at 3:10 AM.

A pathologist testified at trial that he first examined the victim's body at 9:30 AM on October 13th, and determined that the time of death "would be sometime between 9:00 o'clock the night before, that would be on the 12th, to about 3:00 a.m. on the morning of the 13th." (R767).

that Mr. Byrd choked his wife and called Sullivan over to choke her (2PC-R1555). Endress claimed that Mr. Byrd then called Endress over and "forced" him to choke his wife (2PC-R1555). Endress stated that Mr. Byrd took money bags and other things from under the counter to make it look like a robbery (2PC-R1555). Endress testified that Mr. Byrd washed blood off himself and changed his clothes (2PC-R1556-57), and that the three of them then drove to Land O' Lakes and disposed of the gun, Mr. Byrd's bloody clothes, the money bags and the silencer (2PC-R1557).

According to Endress' testimony in 2002, when Sullivan testified at Endress's trial, he lied when he claim that Endress shot Debra Byrd (2PC-R1558). Endress explained that Sullivan took "what I really did and said that he did it" in order "lessened [Sullivan's] guilt" (2PC-R1558).

Endress testified in 2002 that after he was arrested, the police kept asking him about "13 robberies," although "I had never robbed anything in my life" (2PC-R1560). In his testimony, Endress said that he did not remember any of these robberies ever being prosecuted and did not remember ever being arraigned for any of them (Id.).[20]

[20]While being questioned by the State, Endress acknowledged that he had met with the prosecutor twice before the commencement of the 2002 evidentiary hearing (2PC-R1562). One of the occasions

When again questioned by Mr. Byrd's counsel, Endress testified that he had been told that Sullivan was a suspect in the 13 robberies and that in exchange for his testimony they all went away (2PC-R1568-69).[21] Endress did not have any information that Sullivan had committed these robberies, but "wouldn't have put that passed [sic] him" (2PC-R1565). Before Endress's trial, Sullivan told him he needed a lawyer and wrote to Endress's father asking for help getting a lawyer (2PC-R1571). Sullivan told Endress he was not going to testify against him, but then the day the trial was to start, Sullivan and the State agreed to a ten-year sentence in exchange for his testimony (2PC-R1571-72).

Endress testified in September of 2002 that he learned a few months before his testimony that the State had offered him a 7-year prison sentence in exchange for his testimony against Mr. Byrd (2PC-R1573, 1575). Endress claimed

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was before he was transported to Hillsborough County to testify, and the second was the day before his testimony while he was housed at the county jail (2PC-R1562). No mention was made of a meeting shortly before he was brought in the courtroom to testify.

[21]Endress acknowledged in his testimony that he had not told Mr. Walsh, Mr. Byrd's investigator, the version of the facts that he related in his testimony. Instead, Endress told Mr. Walsh that "Sullivan was a liar and I don't know about this crime" (2PC-R1579). Accordingly, Endress testified that Mr. Walsh "surmised" that Endress was maintaining innocence of the crime.

that his father had just told him in 2002 of this offer. He did not know about the offer when it was made, and it was rejected by his attorney and his father without his knowledge (2PC-R1573-74).

In 2002, Endress testified that he would soon be coming up for parole; he said it would be in 14 to 16 months (2PC-R1574). According to his testimony on September 25, 2002, the State had told him that there was nothing they could do to help him get parole (2PC-R. 1575)("not so much as they will not, that they just - - there's nothing that they can do to help me").[22]

After Endress had testified, Mr. Byrd's counsel informed the court that the testimony "opened up a whole lot of stuff" and asked for the opportunity to look into those matters (2PC-R1588). The court stated that counsel could review the day's testimony and provide further information to the court or file a motion for an additional hearing (2PC-R1588).

Thereupon, Mr. Byrd called Jeff Walsh to testify. Mr. Walsh stated that he met with Endress in February 2002 (2PC-R1591). Endress was hesitant to talk, but he gave Mr. Walsh the impression that Endress had not been involved in the murder and

[22]As explained *infra*, this was a patently false representation that the State did not correct at the time it was uttered.

thus could tell him much about it (2PC-R1592). Endress told Mr. Walsh that Sullivan testified falsely at his trial and that he understood Sullivan did the same at Mr. Byrd's trial (2PC-R1592). Endress never indicated to Mr. Walsh that he was a participant in the crime (2PC-R1595-96). Endress talked generally about his own parole possibilities, saying he was hopeful of getting parole (2PC-R1593-94). Mr. Walsh returned a couple of days later to advise Endress that Mr. Byrd was going to plead the information obtained from him and list him as a witness (2PC-R1594). Mr. Walsh testified that Endress never asked for any kind of agreement, but was curious about what Mr. Byrd had to say (2PC-R1594). However, Mr. Walsh had never met Mr. Byrd and did not know (2PC-R1594-96).

On cross-examination, Mr. Walsh reiterated that he had never met Mr. Byrd (2PC-R1596-97). Mr. Walsh had no knowledge of Endress requesting that Mr. Byrd sign an affidavit exonerating Endress (2PC-R1597).

On November 12, 2002, Mr. Byrd filed a motion requesting discovery regarding some of the matters Endress had revealed at the evidentiary hearing (2PC-R300-06). In light of Endress's testimony that police questioned him about being involved in 13 robberies with Sullivan, the motion requested discovery regarding the robberies (2PC-R302-03). The motion

also requested discovery regarding the 7-year plea offer which Endress testified about and also as to Sullivan's attempt to sell his testimony to Endress and his family at the time of Endress's trial (2PC-R304-05). The court granted the motion and allowed 60 days for discovery (2PC-R1612).

On June 9, 2003, Mr. Byrd filed an amended Rule 3.850 motion which included facts from the September 25, 2002, evidentiary hearing, as well as facts resulting from investigation of the 2002 evidence (2PC-R324-50). On December 16, 2003, the court heard argument regarding the need to reopen the evidentiary hearing (2PC-R1632). On December 18, 2003, the court entered an order allowing the presentation of additional evidence (2PC-R493).

The reopened evidentiary hearing was conducted on February 10, 2004 (2PC-R1663). At the beginning of this hearing, the State disclosed two documents. The first document was a report written by Terry Delisle, a state attorney investigator who had accompanied the collateral prosecutor, Sharon Vollrath, when she met with Endress before the previous evidentiary hearing (2PC-R1667). The report stated that during the meeting, the State made no promises, threats or inducements to Endress (2PC-R1667-68). The second document was a letter dated October 15, 2002, from Endress to his trial attorney,

Norman Cannella (2PC-R1668). The letter asked Mr. Cannella to approach the State to see if the State would obtain an affidavit from Debra Byrd's family members stating that they did not object to Endress being paroled after he completed the 25-year mandatory part of his life sentence and to see if the State would ask the Parole Commission to give him a special interview to set his presumptive parole release date for April 2006 (2PC-R1668-69).

The prosecutor stated for the record that the State had done neither of those things (2PC-R1669). The prosecutor also stated that she and Mr. Ober, the elected State Attorney,[23] had discussed whether they should send a letter to the Parole Commission and "what that letter would say, whether it would be a recommendation or whether it would just detail what testimony Mr. Endress gave" (2PC-R1670).

Mr. Byrd's counsel noted for the record that Endress's letter also stated that he "did assist the state in this hearing and will agree to testify if necessary in the event that the state needs me in a federal habeas" (2PC-R1670). The

[23]Mr. Ober was one of the trial prosecutors in Mr. Byrd's case. When he testified in 1989 regarding his referring the victim's sister to his brother-in-law in connection with her efforts to obtain the insurance proceeds, Mr. Ober was no longer with the State Attorney's Office. However, years later he was elected to be the State Attorney for the 13th Judicial Circuit.

letter indicated that Endress thought he had "done something useful for the state and so he's trying to get something in exchange for that," but Mr. Byrd's counsel had no information at that time that the State had agreed to or promised anything to Endress (Id.).

Willie Clarence Love was called as a witness. He testified in 2002 that in 1981, he was in the Hillsborough County jail, where he met Mr. Byrd, Endress and Sullivan (2PC-R1672-73). Mr. Byrd did not tell Mr. Love anything about his case (2PC-R1673). However, Sullivan told Mr. Love, "I killed the 'B'[itch] and I'm not going to get any time at all" (2PC-R. 1673).

Mr. Love testified that he had a number of conversations with Endress about the case (2PC-R1674). As a result of those conversations, Mr. Love contacted the State Attorney's Office (Id.). Mr. Love was deposed and reported what Endress had told him (2PC-R1675).[24] After giving the deposition, Mr. Love was sent back into the prison system, where he again encountered Endress (2PC-R1676). They "had a conversation and basically he just made me look like a fool. . . . Everything I told you. I knew you was going to testify. You did what I

[24]In his 1983 deposition Love had testified that Endress had told him that Mr. Byrd had been trying to find someone to murder his wife for $10,000 (Supp2PC-R162).

wanted you to do" (2PC-R1677). Endress did not say whether what he had told Mr. Love was true or not, just that "what he told me was what he wanted me to tell the prosecutors" (Id.). Mr. Love testified that back in the jail in 1981, Mr. Love had told Endress that Endress was going to get a death sentence, but Endress believed he "wasn't going to get any death sentence or nothing out of it" (Id.). Mr. Love believed that Endress "manipulated me and used me to say what he wanted me to say" (2PC-R1678).

On cross-examination, the prosecutor asked Mr. Love whether he remembered saying anything else about Sullivan at his deposition (2PC-R1678). The prosecutor then read from page 12 of the deposition where Mr. Love testified, "We were discussing Endress. He asked me if I knew Endress and I said yes. . . . He said, well, that's the son of a bitch that's turning state's evidence against me. He said he didn't kill nobody. Him and Wade Byrd did it. He said they're lying on me" (2PC-R1678-79). Mr. Love did not deny that he gave this testimony in his deposition (2PC-R1679).

The prosecutor also asked whether Endress ever said that his statements to Mr. Love were false (2PC-R1679-80). Mr. Love answered, "He never specifically said that, but he led me to believe that" (2PC-r. 1680).

Mr. Love's 1982 deposition was introduced as Defense Exhibit 4 (2PC-R1680; 2PC-R201-46). In the deposition, Mr. Love testified that when he talked to Sullivan, he asked him how he felt about the murder and did it bother him (2PC-R. 207). Sullivan replied, "Well, no, man, it used to bother me but it don't bother me that much anymore" and "it was over with and it didn't bother him anymore" (Id.). Sullivan also said, "I killed the bitch, but I won't get any time. I'll get probation" (Id.).

In the 2004 proceedings, the State called Mr. Lopez, one of the trial prosecutor back to the stand (2PC-R1687). Mr. Lopez testified that early on in the case, the prosecutors decided to offer one of the codefendants a plea (2PC-R1688). Mr. Ober made some overtures to Henry Gonzales, who was Endress's attorney at the time, to see if Endress wanted to cooperate (Id.). Mr. Gonzales did not respond to the offers from Mr. Ober, so the prosecutors approached Sullivan, who agreed to cooperate (Id.). Mr. Lopez identified a letter dated June 2, 1982, from Mr. Lopez to Mr. Gonzales (2PC-R1689).[25] The letter offered Endress a plea to second-degree murder with a life sentence in exchange for Endress's testimony against Mr. Byrd (Id.). Mr. Gonzales did not respond to the offer (Id.).

[25]The State had worked out its deal with Sullivan in April of 1982.

Mr. Lopez testified that he never had a discussion with Mr. Ober or Mr. Salcines about offering Endress a seven-year sentence (2PC-R1690). Mr. Lopez testified that he never met with Endress's father (Id.). Mr. Lopez also testified that he was not aware of the "additional 13 robbery counts" against Sullivan being disposed of in exchange for Sullivan's testimony (Id.).

On cross-examination, Mr. Lopez testified that he was not involved in Mr. Byrd's prosecution until late March of 1982, which was about five months after the indictment (2PC-R1691-92). Mr. Lopez testified that in January of 1982, which was before he became involved in the case, he would not have been consulted regarding any plea negotiations (2PC-R1701). Mr. Lopez identified his April 19, 1982, handwritten note which stated that an offer was made to Sullivan for his cooperation (2PC-R1702). The offer was for second-degree murder in exchange for probation and truthful testimony (Id.). The offer also stated that the State would nol pros Sullivan's grand theft charge and drop the robbery charge if Sullivan passed a polygraph (Id.). Mr. Lopez had no way of knowing whether Mr. Salcines would have personally made a plea offer to Endress's father before Mr. Lopez was involved in the case (2PC-R1703).

The State called Mark Ober, the other trial prosecutor (2PC-R1705). Regarding whether he discussed any plea

offers for Endress with Mr. Lopez or Mr. Salcines, Mr. Ober testified, "I had no conversations regarding any offer to Endress other than to say that at some point in time the state attorney was very emphatic about not offering him anything" (2PC-R1707). Mr. Ober believed "Mr. Byrd was most culpable and Mr. Endress was second. Mr. Sullivan was third" (Id.). Mr. Ober did not remember the plea offer extended to Endress in Mr. Lopez's June 2, 1982, letter to Mr. Gonzales (Id.). Mr. Ober did recall having difficulty communicating with Mr. Gonzales: "He simply did not respond. And absent any further communication with him, we then resolved the case with Ronald Sullivan" (2PC-R1708). Mr. Salcines never indicated to Mr. Ober that he was going to or had made a seven-year offer to Endress's father (2PC-R1708-09). If Mr. Salcines had made such an offer, he would have disclosed it to Mr. Ober (2PC-R1709). Mr. Ober did not recall that the State made an agreement with Mr. Sullivan about clearing 13 robberies (2PC-R1710). Mr. Ober testified that at Mr. Byrd's trial, he cross-examined defense witness Francisco Garcia regarding whether Garcia had offered the State his testimony against Mr. Byrd because Garcia had sent Mr. Ober a letter extending such an offer (2PC-R1710-14).

On cross-examination, Mr. Ober read pages 1066 to 1067 of Mr. Byrd's trial record, in which Garcia read from the

letter he had sent to Mr. Ober (2PC-R1717-18). The letter made no reference to Mr. Byrd or Mr. Byrd's case (2PC-R. 1717-18). Mr. Ober reviewed a police report dated December 17, 1981, which described an interview with Sullivan and which said that Sullivan was being questioned about "burglaries" in the plural (2PC-R1719-20). Mr. Ober did not remember the "burglaries" (2PC-R1720-21). Mr. Ober assumed he had read that police report and hoped that his office had conducted follow-up investigation regarding Sullivan's statement that he knew where the gun was (2PC-R1721-22).

Mr. Ober testified that the prosecutor who presented Mr. Byrd's case to the grand jury was Tom Davidson (2PC-R. 1722-23). There could have been a time period before Mr. Ober and Mr. Lopez handled the case when things were going on that they did not know about (2PC-R1725). Mr. Davidson or Mr. Salcines could have done something on the case that Mr. Ober did not know about, but he doubted that occurred (2PC-R1726).

Mr. Ober remembered that after Mr. Cannella became Endress's attorney, the State Attorney's Office objected to his representation because Mr. Cannella had recently left the State Attorney's Office (2PC-R1728-29). While at the State Attorney's Office, Mr. Cannella had been involved in some plea negotiations regarding Endress and periodically asked Mr. Ober

and Mr. Lopez about the case, “suggest[ing] to us that we let Endress plead to something less than first degree murder” (2PC-R. 1729). Mr. Ober and Mr. Lopez told the State Attorney they “were uncomfortable with those comments and that contact,” and the State Attorney told them, “do not resolve the case by plea against Mr. Endress” (2PC-R. 1729-30).

At the February 2004 evidentiary hearing, Mr. Byrd introduced a number of exhibits. Defense Exhibit 5 is the deposition of James Endress, Sr., Endress’s father, which was taken on February 6, 2003 (Supp2PC-R199-214). Mr. Endress, Sr., who had been an executive with Tampa Electric in the early 1980's, testified that at the time of his trial, Endress was first represented by Henry Gonzales and then by Norman Cannella (2PC-R450). While Mr. Gonzales was representing Endress, the state attorney offered Mr. Endress, Sr. a reduction of Endress’s charge to second-degree murder and a seven-year prison sentence (2PC-R450-51). The offer was made by E.J. Salcines (2PC-R451). Mr. Endress, Sr. communicated the offer to Mr. Gonzales, who rejected it because he thought he could do better than that for Mr. Endress (2PC-R452). Sometime in the last year or six months, Mr. Endress, Sr. talked to his son about that offer, and Endress was surprised to hear about it (2PC-R454).

Mr. Endress, Sr. also testified that some time before his son's trial, Sullivan contacted him and "there was some discussion about me engaging an attorney to represent him" (2PC-R455). On cross-examination, Mr. Endress, Sr. testified that the meeting with Mr. Salcines occurred at Mr. Endress, Sr.'s office at Tampa Electric (2PC-R459). Mr. Endress, Sr. testified that H.L. Cobb, then the president of Tampa Electric, told him that Mr. Salcines was coming over and that Mr. Endress, Sr. was to meet with him (2PC-R459-60).

Defense Exhibit 6 is the deposition of E.J. Salcines, who was the State Attorney at the time of Endress's trial (Supp2PC-R217-242). Mr. Salcines testified that he had no present recollection of the case against Mr. Byrd, Endress and Sullivan (2PC-R1314). He had "a very vague recollection of having gone to TECO [Tampa Electric] to meet with some high-ranking official at TECO" (2PC-R1317). He could not remember who that person was and had no recollection of meeting with Mr. Endress, Sr. (2PC-R1317-18). Mr. Salcines testified that he would never have made a plea offer to anyone other than through an assistant state attorney (2PC-R1319). He would not negotiate with a defendant's family member (2PC-R1320).

Defense Exhibits 7 through 11 concerned the disbarment of Mr. Byrd's trial attorney, Frank Johnson (Def. Ex.

7, Johnson disbarment order, 2PC-R401; Def. Ex. 8, Petition For Disciplinary Resignation Without Leave To Reapply, 2PC-R402-06; Def. Ex. 9, transcript of disbarment proceedings, 2PC-R407-45; Def. Ex. 10, referee report on Johnson, Supp.2PC-R292-303; Def. Ex. 11, Florida Bar memorandum on Johnson disbarment, Supp2PC-R304-44). Mr. Johnson became licensed to practice on April 11, 1979, and worked for the State Attorney's Office from 1979 until 1981. Mr. Byrd's case was his first capital case as a defense attorney (PC-R160). On October 28, 2002, this Court granted Mr. Johnson's petition for disciplinary resignation without leave to seek readmission. In his Petition, Mr. Johnson detailed his extensive legal difficulties with the Grievance Committee of the Florida Bar. Besides the three matters pending in 2002, the Petition noted that Mr. Johnson had been sanctioned eight different times. Seven of those eight times were for failing to fulfill his obligations to his clients (See Def. Ex. 8; 2PC-R402). Counsel for the Florida Bar, William Thompson, described the basis for Mr. Johnson's sanctions: "It's a lack of diligence, a lack of ability" (Def. Ex. 9 at 20; 2PC-R407).

Defense Exhibit 12 is the transcript of Sullivan's probation revocation hearing conducted on June 24, 1983 (Supp2PC-R345-486). Defense Exhibit 13 is a composite of records regarding the 1981 armed robbery charge against Endress

(2PC-R. 1735; 2PC-R. 353-62). The State Attorney's summary of the evidence reports that at 9:30 p.m. on October 5, 1981, the following occurred:

> Mary Jane Taylor was home alone when she heard a knock on her door. She yelled through the door for the person to identify himself and the person responded, "Mike." Her boyfriend is named Mike and she has several friends with that name as well, so she began to open the door. The door opens out and after she had it partially opened the defendant, who was carrying a 4" knife with a red bandana covering his face cowboy style, pulled the door open the rest of the way and forced himself inside. The victim tried to run away from him at which time he caught her and ordered her to give him her jewerly [sic] and take off her clothing. She broke away from him, ran into the bedroom and was again caught by the suspect, who repeated the same things over again. This time she was able to break away and run out the front door and he chased her.
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> . . . .
>
> The victim relates that the suspect removed several items of jewerly [sic] from her dresser and that during the course of the struggle the bandana fell from his face and she was able to identify him. In addition, she was able to identify the defendant from a photo pak given to her by Detective Pinkerton and was able to identify the knife that was found on the defendant's person when he was arrested.

(2PC-R353-54). Defense Exhibit 14 is a composite of records regarding the 1981 armed robbery charge against Sullivan (2PC-R1735; 2PC-R364-67). The State Attorney's summary of the evidence reports that at 5:45 a.m. on September 26, 1981, the following occurred:

> [A]n unknown white male entered the Ramada Inn on Busch Blvd as the night auditor Benjamin Parry was behind the counter counting the evenings [sic] receipts. The defendant had a small firearm in his hand and demanded that Parry hand over all the money. As Parry was sliding the money to him Weiderer, another employee exited a back room. The defendant ordered him to lay down, which he did, as did Parry as well. The defendant then fled.
>
> Detective Pinkerton is acquainted with this defendant and this crime occurred in an area in which the defendant hangs out. He assembled a photo pak and Benjamin Parry was able to positively identify the photograph of Ronald Sullivan as the person who perpetrated this offense.

(2PC-R364).

Defense Exhibit 15 consists of Debra Williams' grand jury testimony of November 12, 1981, and her deposition of August 3, 1983 (2PC-R1736; 2PC-R369-99). Before the grand jury, Ms. Williams testified that on October 23, 1981, Endress said "he had a 38 and it had a silencer, and he was telling me how he made it" (2PC-R372). Endress said he and Sullivan made the silencer (Id.). Ms. Williams asked Endress if he murdered Ms. Byrd, "and he said no, he didn't, and then he started –- later on, started talking about how he did rob that motel, the Economizer –- he did rob it, and he took a bank bag full of money" (2PC-R373). Endress said he hit Ms. Byrd with numb-chucks, but did not kill her (Id.). Ms. Williams thought

Endress also said that Sullivan was “watching out” (2PC-R373-74).

Defense Exhibit 16 is a police report dated December 17, 1981 (Supp2PC-R514-15) Defense Exhibit 17 consists of the records regarding a grand theft charge against Sullivan (Supp2PC-R516-77).

On September 15, 2004, Mr. Byrd filed a motion to reopen the evidentiary hearing (2PC-R547-58). The motion noted that since the last hearing, the parties had deposed Francisco Garcia (2PC-R548). The motion also noted that since the February hearing, the court had authorized additional depositions in light of the State’s disclosure of a February 19, 2004, letter from Endress to Mr. Ober in which Endress stated, “As you are aware I assisted Ms. Vollrath and the State Attorney’s Office by testifying against Byrd a year or so ago. I was told then that by doing so, that I could count on the State Attorney’s Office speaking favorably on my behalf at my parole hearing.” Endress’s letter elaborated, “My wife related to me that you have spoken to Miss Vollrath and that your office intended to keep their end of our agreement.” Thus, the motion argued, according to Endress, he and someone from the State had made an agreement for his assistance at the September 2002 evidentiary hearing (2PC-R548). The parties deposed Endress,

his wife, Mr. Ober and Mr. Cannella. The motion argued that during these depositions, significant new evidence surfaced. The court heard argument on the motion and ordered that the evidentiary hearing be reopened (2PC-R1761-69).

At the reopened hearing held on November 5, 2004, Mr. Byrd introduced the deposition of Endress taken on June 29, 2004. In that deposition, Endress indicated that in 2002 he knew that he was soon facing a parole hearing at which he was hoping for favorable action. In his 2004 deposition, Endress testified that during his first conversation in 2002 with the prosecuting attorney, Sharon Vollrath, Endress stated, "you need to go talk to Mr. Ober because I'm not going to testify for nothing because I have to admit, which I've never admit[ted], put myself in this crime whatsoever. So for me to testify against Mr. Byrd, that means I have to implicate myself in something that I previously had not done and you need to go talk to Mr. Ober because I want to go home." (Def. Ex. 20; Supp2PC-R664). According to Endress, the prosecuting attorney told him in that meeting that "wasn't going to happen" (Supp2PC-R665). Thereafter, Endress was told that the Parole Commission could be informed of his testimony against Mr. Byrd, if he in fact so testified. Endress acknowledged his use of the word "agreement" in his February, 2004, letter to the State Attorney. Endress

explained what he meant by use of that word, “Agreement in as much as if they said the best that they could do for me, which was told to me, would possibly be to speak in my behalf at my parole hearing. To me that’s – if you tell me that, I take you at what you said.” (Supp2PC-R669).

Subsequent to his conversation with Ms. Vollrath, Endress talked to his attorney, Norman Canella, and was advised to testify for the State against Mr. Byrd. Endress indicated that Mr. Canella told him, “It’s [your] only chance to help [your]self, if it helps at all. You know, this is your only shot, you need to do what you gotta do.” (Supp2PC-R665).

Mr. Canella testified in his deposition, also introduced into evidence at the November 5, 2004, hearing, that “it was clear to [him] that [Endress] was obsessed with getting out” (Supp2PC-R724). According to Mr. Canella, that was not surprising, “I think anybody in that situation would be.” (Id.).

In his deposition, Endress had also indicated his understanding that his testimony in September of 2002 was at the State’s request, “Well, of course, if the State took me back to testify on the State’s behalf, yes, I feel that I assisted the State. You know, you [Mr. Byrd’s counsel] didn’t pull me back to testify for Mr. Byrd.” (Supp2PC-R670). When informed that in fact he was brought to the hearing in 2002 on behalf of Mr.

Byrd, Endress responded, “the last I knew, that I was a hostile witness for the State.” (Id.). Endress elaborated in contradiction to his September, 2002, testimony, that he did not believe that he was testifying for Mr. Byrd because the defense investigator to whom he spoke refused to advise him that Mr. Byrd would assist him (Supp2PC-R670, “I gave the – the guidelines that if he wanted my help this is what I wanted, just like we went over in court at the time. **That didn’t happen, wasn’t gonna happen, and –”**).

In his deposition, Endress revealed for the first time that he met with Ms. Vollrath “five minutes before I went in that room” (Supp2PC-R681). At that time, he again discussed with Ms. Vollrath what benefit he might obtain from the State. This meeting occurred in a jury room. (Supp2PC-R682). During this meeting, Endress was informed “there ain’t no deal and there ain’t gonna be no deal and I basically said then there ain’t gonna be no testimony.” (Supp2PC-R683). Then, Endress “was led to believe, let’s put it that way, that it had happened before, that the most that could – could or would happen would be to speak favorably on my behalf at my parole hearing.” (Supp2PC-R684). Thereafter, Endress did testify at the September of 2002 proceedings, and in his own words, he was a “witness for the State.” (Supp2PC-R670).

In his deposition, Endress testified that prior to his testimony in 2002, he was advised by the State that he faced a contempt of court conviction if he refused to testify (Supp2PC-R686, 697). Mr. Canella had also told Endress of the possibility of contempt charges if he refused to testify. Endress who was testifying at his June 29, 2004, deposition a couple weeks prior to his July 14th parole hearing indicated that he did not know whether "contempt" was viewed as "a major crime" that could affect his parole date one way or another (Supp2PC-R698).

After his September, 2002, testimony, Endress wrote Mr. Canella. In his deposition, he explained that the letter was an effort to extract from the State "[a] more firm agreement than just what was said to me." (Supp2PC-R674).

Following the denial of Endress' parole in July of 2004, Karyn Endess was deposed on July 20, 2004. This depostion was introduced as Def. Ex. 18 (Supp2PC-R624). Ms. Endress brought with her to the deposition emails that she had sent to herself in order to record contemporaneously her understanding of her conversations with Mark Ober and Sharon Vollrath on January 28, 2004. At the conclusion of her conversation with Mr. Ober on January 28th, Ms. Endress recorded, "He met with Sharon Vollrath yesterday and Mark said he would keep his word and tell the

parole commission that Jim assisted them." (Supp2PC-R645). At the conclusion of her conversation with Ms. Vollrath, Ms. Endress recorded, "Sharon said they would stick to their word and make the parole commission aware of his cooperation but were not sure at this point what form that would take." (Supp2PC-R646). Ms. Endress explained that as to the email regarding the conversation with Mr. Ober, "I would say if I wrote it that way that that [sic] was the words he used." (Supp2PC-R638). She explained her understanding of what was meant by the phrase, "will keep his word," was "[t]hat they would let the Parole Commission know that he [Endress] cooperated, and, again, that would have been viewed favorably." (Id.). As to the email regarding the conversation with Ms. Vollrath, Ms. Endress explained that the phrase "would stick to their word" was "their language" (Supp2PC-R639). Ms. Endress indicated that her understanding of when "their word" had been given was "when my husband was in the county jail" in connection with testifying in Mr. Byrd's case (Id.).

In his deposition, Endress did reveal that had received from his classification officer "a list from my own file where it had case numbers of crimes that I had no knowledge of. I mean, I didn't know that I had ever been charged with anything other than this crime here at the time." (Supp2PC-

R700). Following Endress' deposition, Mr. Byrd's counsel orally requested that the State provide this list of additional cases to Mr. Byrd's counsel.

Thereafter on July 14, 2004, the State mailed undersigned counsel a copy of a letter dated November 16, 1981, from the State Attorney's Office to the Sheriff of Hillsborough County announcing that an information would not be filed against James Endress concerning an attempted burglary that occurred on January 26, 1981 (Def. Ex. 21, Supp2PC-R706). This letter indicated that Endress had been arrested on September 23, 1981, several weeks before the Debra Byrd homicide. Prior to July 14, 2004, this document had not been provided to Mr. Byrd or his counsel. No additional information regarding this attempted burglary charge was provided to either Mr. Byrd or his counsel.

Beyond the attempted burglary concerning Endress, no list of additional cases that was testified to by Mr. Endress was provided to either Mr. Byrd or his counsel.

At the reopened evidentiary hearing conducted on November 5, 2004, Mr. Byrd also presented live testimony. The first witness was Karyn Endress, Endress's wife (2PC-R1775). Ms. Endress testified that Endress had his parole hearing in July 2004 (2PC-R1775). After Endress testified at the September 2002 evidentiary hearing and in anticipation of Endress's parole

hearing, Ms. Endress testified that she contacted the State Attorney's Office on January 28, 2004 (2PC-R1776). Ms. Endress spoke to Sharon Vollrath and Mark Ober (Id.). She memorialized those conversations in e-mails she sent to herself, and those e-mails had been attached to her 2004 deposition in Mr. Byrd's case (2PC-R1777). Her purpose in making these calls was to find out what position Ms. Vollrath and Mr. Ober would take regarding Endress's parole hearing (Id.). Endress had told her that he was hoping they would say something favorable (Id.). He based this hope on his 2002 testimony in Mr. Byrd's case (2PC-R1778). Ms. Vollrath told Ms. Endress "they would stick to their word and make the parole commission aware of my husband's cooperation" (Id.). Ms. Endress understood this to mean that the State had given its word to make the parole commission aware that Endress had testified for the State (Id.). Mr. Ober told Ms. Endress "that the worst they would do is do nothing" (2PC-R. 1779). Mr. Ober also told her "he would keep their word and tell the parole commission that [Mr. Endress] assisted them" (Id.). Ms. Endress understood this to mean that at some time, Mr. Ober had given his word to do this (Id). Ms. Endress's 2004 deposition with her e-mails attached to it was introduced as Defense Exhibit 18 (2PC-R. 1781).

On cross-examination, Ms. Endress testified that Endress believed that testifying at that hearing would be viewed favorable by the parole commission (2PC-R1783). Ms. Endress was never informed that there was an agreement between the State and Endress before his September 2002 testimony (2PC-R1784-85). In their January 28, 2004, phone conversation, Ms. Vollrath told Ms. Endress that the State Attorney's Office had not made a decision on what it would do, if anything (2PC-R1785-86). On January 28, 2004, Mr. Ober told Ms. Endress he would tell the parole commission that Endress had testified at the 2002 hearing (2PC-R1786). Mr. Ober did not say that his office would favorably recommend Endress's parole, although that was what Ms. Endress hoped they would do (Id.). Ms. Endress testified that she was not unhappy with the State Attorney's Office for opposing Endress's parole, but that she wished she had been told the truth (Id.). She was disappointed that the State opposed parole and that made her somewhat dissatisfied with the State (2PC-R1788).

On redirect, Ms. Endress testified that she did not attend the 2002 hearing at which Endress testified and had not read a transcript of his testimony, so her knowledge of that testimony was based only on what Endress had told her (2PC-R1789). Although she testified on cross-examination that she

knew of no "agreement" between Endress and the State regarding his 2002 testimony, the State had given its "word" that the parole commission would be made aware that Endress had cooperated (2PC-R1789-90). Mr. Ober had also told Ms. Endress that the worst the State would do is remain neutral, which to Ms. Endress meant they would neither recommend or oppose parole (2PC-R1790). If the State remained neutral, Ms. Endress testified, that would be better than the State opposing parole, so a neutral position from the State would have been of benefit to Endress (Id.). When Ms. Endress testified in her deposition that Ms. Vollrath told her the State had not decided what to do about Endress's parole, that referred to whether the State would send a favorable letter on Endress's behalf to the parole commission (2PC-R1792-93).

Endress again testified in November of 2004 (2PC-R1794). He stated that before his September 2002 testimony, he met with the State three times, once in prison, once at the county jail, and once at the courthouse right before he was brought into court to testify (2PC-R1796). In the meeting at the prison, Endress told the State he had "nothing to say unless you got some go home papers" (Id.). The State's response was "that wasn't going to happen" (2PC-R. 1797). After the State told Endress about the Rule 3.851 motion Mr. Byrd had filed,

Endress said he was not going to testify (Id.). The State told him they would have him brought back, and Endress told the State he still would not testify (Id.). After he was brought to the county jail, Ms. Vollrath served Endress with a subpoena (2PC-R1798). They had a conversation similar to the one at the prison, and Endress said he did not have anything to say (Id.). Endress had contacted Mr. Cannella, but had not yet talked to him (2PC-R1798-99). Ms. Vollrath asked if Endress had talked to Mr. Cannella, and when Endress said no, Ms. Vollrath said that Mr. Cannella was supposed to be seeing Endress later that day (2PC-R1799). Endress told Ms. Vollrath that he was ready to go home, and Ms. Vollrath told him that "the best, you know, that we'd ever be able to do would be to speak in your behalf at your parole hearing" (2PC-R1800-01). To Endress, that "wasn't acceptable" (2PC-R1801).

About an hour after Ms. Vollrath left, Mr. Cannella came to see Endress and recommended that Endress "do as the state asked, testify. That it was the only chance I was going to get to help myself" (Id.). Mr. Cannella said he had talked to someone at the State Attorney's Office and that he had read Mr. Byrd's motion (2PC-R. 1800). Mr. Cannella told Endress that "Byrd didn't have a chance in hell and this was my only opportunity to help myself" (Id.). Mr. Cannella was "already

aware" of Ms. Vollrath's statement that the best the State could do was speak on Endress's behalf at his parole hearing (2PC-R. 1801). Mr. Cannella told Endress, "this is your only chance" (Id.).

Endress met with Ms. Vollrath again, just before he testified in September 2002 (2PC-R1802-03). Ms. Vollrath "reiterated the fact that, you know, that's just the best they would do was speak in my parole hearing on my behalf" (2PC-R1803). That was ten minutes before Endress testified (Id.). Ms. Vollrath had previously told Endress that if he were held in contempt for refusing to testify, "that it's not going to look favorable to you" (2PC-R1804).

After he testified in September 2002, Endress wrote to Mr. Cannella, asking that Mr. Cannella find out what the State would do for Endress:

> I tried to get a better clarification because I had nothing in writing. I had no promise. I just had what somebody said, you know. And if you tell me something, then that's what I expect. But I still would have felt more comfortable with it in some type of writing or, you know, black and white.

(2PC-R1801-02). Endress wrote to Mr. Cannella on October 15, 2002 in an attempt to "[s]olidify what was just verbal" regarding Endress's understanding of what the State would do to assist him (2PC-R1804-05). After sending the letter, Endress

heard “[n]othing” until he was deposed in June 2004 (2PC-R1806). Endress identified State Exhibit 1 as the letter he wrote in October 2002 (2PC-R1807).

Endress wrote to Mr. Ober on February 16, 2004 (2PC-R1807) (Def. Ex. 19; 2PC-R635). The letter was an attempt to follow up from what had happened in September 2002, and Endress wrote the letter because his parole hearing was getting closer (2PC-R1808). Endress wanted the State to keep their agreement to “speak favorably in my behalf” (Id.). Endress believed he and the State had an agreement inasmuch as “if you tell me something, that’s what I expect” (2PC-R1808-09). Following the letter, Endress did not hear anything (2PC-R1809). Endress’s June 29, 2004, deposition was admitted as Defense Exhibit 20 (2PC-R1809) (Def. Ex. 20; 2PC-R579). Between his June 29, 2004, deposition and his July 14, 2004, parole hearing, Endress heard nothing from the State or from Mr. Cannella (2PC-R1810-11). He was represented at the parole hearing by Mr. Collins, who had talked to Ms. Vollrath (2PC-R1811). Ms. Vollrath told Mr. Collins that she did not know what position the State would take at Endress’s parole hearing (Id.). Endress did not know what position the State would take until the parole hearing, when the State “got me 20 years” (Id.).

Before the parole hearing, the Department of Corrections showed Endress a list of arrests and charges against him which had been nol prossed (2PC-R1812). Endress did not understand what they were (Id.). Mr. Byrd introduced Defense Exhibit 21, which was a document Mr. Byrd's counsel "received from the State Attorney's Office reflecting a nol-pros of an attempted burglary on November 16th, 1981" (2PC-R1812) (Def. Ex. 21; 2PC-R726). Endress testified that he was arrested in September 1981 for attempted burglary (2PC-R1813). Defense Exhibt 21 indicated that the date of the offense was January 26, 1981 (2PC-R1816). Endress testified he did not think he knew Sullivan at that time and did not know whether Sullivan was a suspect in any burglaries (2PC-R1816). Endress had met Sullivan a year or a year and a half before October 1981, but did not become closer friends with him until June or July of 1981 when Endress rented a motel room for Sullivan (2PC-R1817).

On cross-examination, Endress explained that when he testified in deposition that there was no agreement between him and the State Attorney's Office, he meant "[a] deal, formal is what I was trying to –- like in writing. To me that's what a deal is. My understanding of what a deal is" (2PC-R1820). Endress acknowledged his deposition testimony that there was no deal, promise or written agreement between him and the State

(2PC-R1820-24). Endress also acknowledged his deposition testimony that Ms. Vollrath had told him the most the State could do was send a letter to the parole commission and that he did not remember whether the letter would be favorable (2PC-R1823). Endress testified that no one from the State ever promised that they would recommend his parole release (2PC-R1824). At his parole hearing, the State mentioned that he testified at the 2002 hearing and also said "that I'd never be called again by the state . . . . They had no interest in me, didn't want any more from me. . . . [and] that the state had no interest in my testimony and that I would not be called back to testify for the State of Florida in Milford Wade Byrd's case" (2PC-R1826).

On redirect, Endress explained that his deposition testimony regarding no agreements with the State meant there was no "written agreement," so "it wasn't a written deal as I know deals are supposedly made" (2PC-R1827). Endress read from his February 16, 2004, letter to Mr. Ober: "My wife related to me that you had spoken to Ms. Vollrath and that your office intended to keep their end of our agreement" (2PC-R1827) (Def. Ex. 19; 2PC-R635). The word "agreement" in that letter referred to a verbal agreement that the State "would speak favorably on my behalf" (2PC-R1828). When he testified in

deposition that "nothing was promised to me in exchange for my testimony at that time," Mr. Endress meant that the State did not promise him he would get parole, but was referring to the State having said that the best they could do was speak favorably for him (Id.). Endress believed the State had told him they would do something and that they should have delivered (2PC-R1829). When he testified at deposition that "nothing was promised," Endress meant that he had nothing "in writing. Formal deal of any kind. I just had the best we can do for you is this" (2PC-R1829-30). He did have an expectation and that was the reason for his letters to Mr. Ober (2PC-R1830). He testified in 2002 because he thought it would help him "[t]o a degree. I mean that was part of it" (2PC-R1831).

The State called Mr. Ober (2PC-R1839). Mr. Ober testified that before the 2002 evidentiary hearing, Ms. Vollrath was unsure of what Endress's testimony would be and asked that he be called as a court's witness (2PC-R1846). Ms. Vollrath told Mr. Ober that Endress had asked for assistance with his parole hearing (2PC-R1846-47).[26] Ms. Vollrath told Mr. Ober she had told Endress that the most the State could do for him was to send a letter to the parole commission stating that Mr. Endress

[26]But neither Mr. Byrd nor his counsel were informed at the time of the September, 2002, or before, that Endress had sought assistance with his parole hearing.

had testified against Mr. Byrd (2PC-R1847). Mr. Ober did not dispute that Ms. Vollrath told him that her conversation with Endress about the parole hearing had occurred in the holding cell and that her conversation with Mr. Ober had occurred immediately after the 2002 hearing (PC-R1848). At that time, the State did not contemplate recommending that Endress be released on parole (2PC-R1849).

After the 2002 evidentiary hearing, Mr. Ober received a fax from Mr. Cannella, and attached to the fax was a letter dated October 15, 2002, from Endress to Mr. Cannella (2PC-R1849). The letter asked Mr. Cannella to try to secure an agreement with the State for Endress's 2002 testimony (2PC-R1850). Mr. Ober talked to Mr. Cannella and told him that if he was asked, Mr. Ober would tell the parole commission that Endress had testified against Mr. Byrd at the September 2002 evidentiary hearing (2PC-R1850). Mr. Ober did not tell Mr. Cannella that the State would favorably recommend Endress's release on parole (Id.).

Mr. Ober testified that he received a phone call from Ms. Endress on January 28, 2004 (2PC-R1852). Mr. Ober told Ms. Endress that he was aware Endress had testified in Mr. Byrd's case and that if it was requested, he would inform the parole commission that Endress had participated in Mr. Byrd's

case (2PC-R1853). He "made no specific promises to her whatsoever regarding a favorable" parole recommendation (2PC-R1853-54). He did not tell Ms. Endress that the worst the State would do was remain neutral at the parole hearing (2PC-R1854). He did not tell Ms. Endress that the State would recommend parole (2PC-R1856).

Mr. Ober received a letter from Endress in February 2004 (2PC-R1857). In the letter, Endress asked Mr. Ober to affirm their previous agreement and do more than stand neutral at the parole hearing (2PC-R1858). Endress stated he wanted the State "to live up to what he believed our agreement was or that there was, in fact, an agreement and that agreement was that we would –- the State Attorney's Office would speak favorably at his parole hearing" (Id.).

Norman Cannella testified that he represented Endress at his trial in 1983 (2PC-R1874). Mr. Cannella did not recall the 2002 evidentiary hearing in Mr. Byrd's case (2PC-R1875-76). Endress's October 2002 letter to Mr. Cannella, which made reference to Endress having met with Mr. Cannella, did not refresh Mr. Cannella's recollection regarding events in September 2002 (2PC-R1877). Mr. Cannella recalled meeting with Endress at Zephyrhills Correctional Institution, but did not recall when that meeting occurred other than that it occurred

before October 2002 (2PC-R1877). Mr. Cannella did not have any contact with Mr. Ober or Ms. Vollrath before meeting with Endress at Zephyrhills (Id.). Mr. Cannella did not recall meeting with Endress at the county jail (2PC-R1878). Mr. Cannella had no specific memory of the details discussed in the meeting at Zephyrhills, except that Endress "was interested in seeing what could be done to further his efforts to be paroled at the end of 25 years" (2PC-R1879). Endress "was obsessed with getting out" of prison and was trying to figure out ways of doing that (2PC-R. 1880). After sending Mr. Ober the letter Endress had written to Mr. Cannella, Mr. Cannella had a conversation with Mr. Ober in which Mr. Ober said he had received communications from Endress's wife and father (Id.). Mr. Cannella did not recall any conversations with Mr. Ober regarding what position the State would take at the parole hearing (2PC-R1881). Mr. Cannella "never asked Mr. Ober to do a thing with regard to securing any consideration for" Mr. Endress (Id.). Mr. Cannella thought he and Endress might "have discussed the fact that if he was inclined to testify in Mr. Byrd's proceedings that he indeed should do that" (2PC-R1882). Mr. Cannella recalled that he visited Endress at his father's request because the father had told Endress not to testify (2PC-

R1882-83). Mr. Cannella's 2004 deposition was admitted as Defense Exhibit 22 (2PC-R1884) (Def. Ex. 22; 2PC-R641).

On cross-examination, Mr. Cannella testified that he did not reach any agreement with the State that the State would recommend Endress's parole (2PC-R. 1884). Endress did not tell Mr. Cannella that there was such an agreement (Id.). Endress's testimony that Ms. Vollrath had told him Mr. Cannella would be coming to see Endress was "absurd" (2PC-R1885).

The parties filed closing memoranda (2PC-R498-534, 535-45, 745-65; Supp2PC-R25-45). The court entered an order denying relief (2PC-R797-835). This Court granted Mr. Byrd's motion for a belated appeal.

SUMMARY OF THE ARGUMENT

1. Mr. Byrd was deprived of his rights under the Due Process Clause of the Fourteenth Amendment and under the Eighth Amendment when the prosecutors took inconsistent positions as to the credibility of Mr. Byrd's co-defendant, Ronald Sullivan, at Mr. Byrd's trial when the State relied upon Sullivan's credibility to obtain a sentence of death and at Sullivan's revocation of probation hearing when the State maintained that Sullivan was a liar and unworthy of belief.

2. Mr. Byrd was deprived of his due process rights under Giglio, Brady, and Strickland v. Washington when the State presented false and/or misleading evidence as to whether Sullivan had advised the State of whether he would incriminate Mr. Byrd prior to agreeing to probation in exchange for his testimony and as to Sullivan's credibility generally, and when the State withheld favorable information regarding other criminal activity that Sullivan and Endress had engaged in which would have supported the defense's contention that they committed the murder, and when Mr. Byrd received ineffective assistance of counsel in light of information available now that was not available in 1989. Mr. Byrd's claim is cognizable at this time because the new information generally flowed from Endress's decision in 2002 to speak to Mr. Byrd's counsel for

the first time. The new information establishes a manifest injustice arising from Mr. Byrd's sentence of death.

3. Due process was violated when the sentencing judge entertained a letter from the prosecuting attorney that was not provided to Mr. Byrd nor his counsel that asked the judge to find that no mitigating circumstances were present in Mr. Byrd's case. Mr. Byrd was prejudiced by the due process violation when the sentencing judge made the changes in his written findings that the prosecutor sought in his *ex parte* letter.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). The denial of Brady and Giglio claims involve mixed question of law and fact which are subject to *de novo* review by this Court. Rogers v. State, 782 So.2d 373, 377 (Fla. 2001). The circuit court denied relief on Mr. Byrd's Brady and Giglio claims after conducting an evidentiary hearing. The circuit court's legal analysis is subject to *de novo* review by the Court.

ARGUMENT

ARGUMENT I

MR. BYRD WAS DEPRIVED OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE PROSECUTION PRESENTED THE TESTIMONY OF CO-DEFENDANT SULLIVAN AGAINST MR. BYRD ARGUING THAT SULLIVAN WAS CREDIBLE AND RELYING UPON HIS TESTIMONY TO OBTAIN A CONVICTION AND A DEATH SENTENCE, AND THEN ARGUED LESS THAN A YEAR LATER IN A PROCEEDING TO REVOKE SULLIVAN'S PROBATION THAT SULLIVAN WAS A LIAR WHO HAD PROVIDED FALSE TESTIMONY TO THE COURT AND SUBORNED THE PERJURED TESTIMONY OF HIS FAMILY MEMBERS ALL IN AN EFFORT TO AVOID IMPRISONMENT.

Recently, the United States Supreme Court issued its decision in Bradshaw v. Stumpf, 545 U.S. 175 (2005). Following that decision, this Court addressed Bradshaw v. Stumpf and explained its significance:

> In Stumpf, the state first tried Stumpf under the theory that he was the principal actor in the shooting death of the victim. *Id. at 2403-04*. Then, based upon new evidence that came to light after Stumpf had been tried and convicted, the state tried Stumpf's codefendant under the inconsistent theory that the codefendant was the principal actor in the shooting death of the same victim. Id. The United States Supreme Court held that the use of such inconsistent theories warranted remand to determine what effect this may have had on Stumpf's sentence and to determine whether the death penalty violated due process.

Raleigh v. State, 932 So. 2d 1054, 1066 (Fla. 2006). In denying relief in Raleigh, this Court found the constitutional concerns outlined in Bradshaw v. Stumpf were not implicated because:

> the State did not take an inconsistent position as the prosecution did in *Stumpf*. In Figueroa's trial, the State never contradicted the position it took at Raleigh's trial regarding Raleigh's culpability. It did not change course by seeking to prove that Figueroa, not Raleigh, was the principal actor in Eberlin's death. Therefore, the due process concerns raised in *Stumpf* do not apply.

Raleigh, 932 So. 2d at 1066. From this Court's analysis, it is clear that a claim under Stumpf arises on the basis of the Due Process Clause of the Fourteenth Amendment and on the basis of the Eighth Amendment.

In Raleigh, the claim was raised on the basis of Stumpf while Mr. Raleigh's case was pending on an appeal from the denial of a Rule 3.851 motion. This claim was raised for the first time at oral argument after counsel had filed a notice of supplemental authority premised upon the decision in Stumpf. Presumably because Stumpf had not been available at the time the Rule 3.851 had been filed in circuit court, Mr. Raleigh was permitted to raise his claim premised upon that decision in the course of his appeal. Though this Court found the claim without merit in Raleigh, this Court did not question the manner in which the issue was brought before the Court.

The decision in Stumpf issued on June 13, 2005. This was after the evidentiary hearing in Mr. Byrd's case had been concluded, this was after final written closing arguments in Mr. Byrd's case had been submitted, and this was after the trial judge had issued an order on February 8, 2005, instructing counsel to refrain from "filing any more motions while the Court deliberates on the pending Motion for Post Conviction Relief." (Supp2PC-R102).

Moreover, this Court's decision in Raleigh issued on June 1, 2006, well after Mr. Byrd's case was already pending in this Court. It is in Raleigh that this Court recognized that a claim cognizable in Rule 3.851 proceedings had arisen under Stumpf. On the basis of the procedure followed in Raleigh which this Court found to be an acceptable means of raising a claim under Stumpf, Mr. Byrd submits that this claim is properly brought before the Court and that on the basis of the principle recognized in Stumpf and in Raleigh, Rule 3.851 relief is warranted.

Mr. Byrd recognizes that the specific issue in both Stumpf and Raleigh concerned the prosecution in different criminal proceedings against two co-defendants had taken inconsistent positions as to the respective roles of the co-defendants in the homicide at issue. But, there is no

indication that the inconsistent position has to be concerning the respective roles of the co-defendants during the murder. In fact, the logic and rationale is equally applicable in Mr. Byrd's case where the prosecution took inconsistent positions as to the truthfulness and credibility of Mr. Byrd's co-defendant, Sullivan. When Sullivan testified for the State against Mr. Byrd, the State maintained he was truthful and credible. Yet, less than a year later when seeking to revoke the probation that Sullivan received for the murder, the prosecution argued that Sullivan was a liar, that his testimony was unworthy of belief, and that not only had he lied to the court, he called his family members to lie, all in order to avoid incarceration on the murder case.

This Court in Raleigh focused on whether the prosecution had taken inconsistent positions as to the different co-defendants. Here, an examination of the prosecutor's closing arguments show substantial inconsistency. At Mr. Byrd's trial, the prosecutor argued:

> The first time we knew of what happened here is April 19th, when Ronald Sullivan, after being given probation, promised probation for truthful testimony, came and gave us a statement implicating Mr. Byrd in this homicide. If Mr. Sullivan had told Mr. Ober and myself, "I did it, guys, Wade Byrd didn't have anything to do with it," we would have been bound by those plea negotiations. He would have still received probation. My point being, I don't think he has got any motive to come in here and purposely try to put

> somebody in prison or in the electric chair. He would have been given probation either way.
>
> If Mr. Sullivan was going to go lie to you, he was going to lie to us, would he admit putting his hands around the lady's neck and strangling her? It's not pleasant, I know that, but he admits participating in a first-degree murder.

(R1206-07).[27]

But then less than a year later when seeking to revoke Sullivan's probation on the murder charge, the very same prosecutor confronted Sullivan in the following fashion:

[27]Of course, the prosecutor in this argument failed to acknowledge that on December 17, 1981, Sullivan advised a police officer that if he was given a deal, he would give them "Wade and Endress really good" (Supp2PC-R515). So that contrary to his argument, the prosecutors knew when Sullivan was given a deal that he was going to give them "Wade and Endress really good."

Q You are an admitted liar, are you not?

MR. CURY: Objection. Outrageous.

MR LOPEZ: I can prove that, Judge.

THE COURT: Overruled.

BY MR. LOPEZ:

Q Did you not admit to Frank Johnson that you lied to the Tampa Police Department during the pendency of your murder [sic]?

A I don't quite understand what you mean.

Q Let me direct your attention, sir, to October, 1981, when you were arrested by the Tampa Police Department for the charge of first-degree murder. Do you remember that?

A Yes, sir.

Q Did you give the police a statement that night?

A Yes, sir.

Q Was that statement a lie?

A Parts of it.

Q Okay. You are admitted liar, are you not?

A As far as you look at it, I guess I am.

(Def. Ex. 12 at 122-23; Supp2PC-R468-69). During the redirect examination, Mr. Sullivan testified:

Q Did you take the stand to testify on behalf of the State in the one which Frank Johnson was questioning you on?

A Yes, sir.

Q Did the State vouch for you as a witness?

A Yes, sir.

Q Weren't you a critical witness in that trial?
A Yes, sir.

Q Did they call you a liar then when you took the stand –

A No.

Q – to send a man to the electric chair?

A No, sir.

Q They believed you then?

A Yes, sir.

Q You had conversations outside the courtroom with the State Attorney?

A Yes, sir, quite a few times.

Q They believed you then?

A Yes, sir.

Q They put you on the witness stand?

A Yes, sir.

Q Did they call you a liar when you were on the witness stand?

A No, sir.

(Def. Ex. 12 at 126; Supp2PC-R471).

Mr. Lopez argued for revocation of Sullivan's probation. Mr. Lopez stated that the testimony of Sullivan's family could be explained by one fact: "They do not want to see this young man go to prison." (Def. Ex. 12 at 128; Supp2PC-

R473). The clear inference was that Sullivan and his family lied on the witness stand in order to keep him from going to jail. Mr. Lopez concluded by saying:

> I believe that you gave this young man a great break, with our recommendation, of course, because you listened to us. You had serious reservations about doing that due to the circumstances of that murder, but you did it because we asked you to.
>
> You gave that gentleman, Mr. Sullivan, a break. He has abused his own rights, Judge. He has taken advantage of himself. In my humble opinion, you have no choice but to sentence him, if you find him guilty, to the maximum under the law and that's all I have to say.

(Def. Ex. 12 at 128-29; Supp2PC-R473-74).[28]

Thus, in Mr. Byrd's case the State maintained that Sullivan was credible. In fact, the prosecutor stated that until Sullivan told them what had occurred the State was unaware of the roles of each of the co-defendant's in the murder (R1206)("The first time we knew of what happened here is April 19th, when Ronald Sullivan, after being given probation, promised probation for truthful testimony, came and gave us a statement implicating Mr. Byrd in this homicide."). It was on the basis

[28]Subsequently, Sullivan testified against Endress at his trial and admitted that he had testified falsely at the revocation of probation hearing and that he got his family members to also testify falsely in order to vouch for his false testimony. Sullivan acknowledged that his false testimony and his family members false testimony was all presented in order to try to avoid being incarcerated.

of Sullivan's testimony that aggravating circumstances were found.

Yet, in the case against Sullivan when the State sought to revoke his probation, the State took an inconsistent position as to Sullivan's credibility. According to the State, Sullivan was credible enough to rest a death sentence against Mr. Byrd upon his testimony, but he was not credible enough when he denied violating his own probation. It cannot be the State's position that Sullivan is only credible when it likes what he is saying. Such a position is precisely what Stumpf and Raleigh are concerned with. There must be some principled basis for the State's position. It cannot be free to arbitrarily or capriciously change its position and premise a death sentence upon such arbitrarily shifting sand. Either the man is worthy of belief, or he isn't.

In light of Bradshaw v. Stumpf and this Court's discussion in Raleigh v. State, Mr. Byrd submits his death sentence was imposed under circumstances incompatible with the Eighth and Fourteenth Amendments.

ARGUMENT II

MR. BYRD WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL

UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE, AND/OR THE PROSECUTOR VIOLATED GIGLIO AND/OR NEW EVIDENCE ESTABLISHES MANIFEST INJUSTICE.

A. Introduction

In order to insure that a constitutionally adequate adversarial testing, and hence a fair trial occurs, certain obligations are imposed upon the prosecuting attorney. Due process requires a prosecutor in a criminal prosecution to refrain from presenting false and/or misleading evidence. Strickler v. Greene, 527 U.S. 263, 281 (1999)(the State's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"). If a State's witness misrepresents a material fact, the prosecutor is obligated to stand up and correct the witness' misstatement. Giglio v. United States, 405 U.S. 150, 153 (1972), Napue v. Illinois, 360 U.S. 264 (1959). "Truth is critical in the operation of our judicial system. . . ." Florida Bar v. Feinberg, 760 So.2d 933 (Fla. 2000).

Further, the prosecutor as the State's representative has an obligation to learn of any favorable evidence known by individuals acting on the government's behalf and to disclose any exculpatory evidence in the State's possession to the defense. Strickler, 527 U.S. at 280. The

Florida Supreme Court has not hesitated to order new trials in capital cases wherein confidence was undermined in the reliability of the conviction as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Hugins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

In Mr. Byrd's case, the prosecution presented false and/or misleading evidence at the capital trial. This false and/or misleading evidence was used to obtain a conviction. This failure was not harmless beyond a reasonable doubt.

In addition, the prosecutor failed to disclose exculpatory evidence that was known to the State. This failure undermines confidence in the reliability of the verdict convicting Mr. Byrd of first degree murder and the penalty phase proceedings resulting in a sentence of death.

B. The Presentation of False and/or Misleading Evidence Claim

In Giglio v. United States, 405 U.S. 150, 153 (1972), the United States Supreme Court recognized that the

"deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." This result flowed from the Supreme Court's recognition that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). Accordingly, the Court concluded that the Fourteenth Amendment "forbade the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution has a duty to alert the court, the defense, and the jury when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959). The prosecutor must refrain from the knowing deception of either the court or the jury during a criminal trial. Mooney v. Holohan.

A prosecutor is constitutionally prohibited from knowingly relying upon false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957).

In cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in **any reasonable likelihood** have affected the jury's verdict." United States v. Bagley, 473 U.S. at 678, quoting United States v. Agurs, 427 U.S. at 102. (emphasis added). If there is "any reasonable likelihood" that uncorrected false and/or misleading argument affected the jury's determination, a new trial is warranted. As the United States Supreme Court explained in Bagley, this standard is the equivalent of the harmless beyond a reasonable doubt test. Thus, where the prosecution violates Giglio and knowingly presents either false evidence or false argument in order to secure a conviction, a reversal is required unless the error is proven harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679 n.9. See United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995).

This Court recently recognized that as to Giglio claims that it had been applying the wrong standard in determining whether a new trial was warranted when the State deliberately presented false of misleading testimony:

> We recede from Rose and Trepal [v. State, 846 So. 2d 405, 425 (Fla. 2003)] to the extent that they stand

> for the incorrect legal principle that the "materiality" prongs of Brady and Giglio are the same.

Guzman v. State, 868 So. 2d 498 (Fla. 2003). This Court proceeded to explain, "[t]he State as beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Id. This Court explained that this was a "more defense friendly standard" than the one historically used by the Court. Id.

In 1988, Mr. Byrd presented in his first motion to vacate a claim that the State had violated Giglio v. United States by knowingly making false arguments and presenting false evidence, and otherwise engaging in improper prosecutorial behavior. Mr. Byrd did not receive an evidentiary hearing on this claim. The circuit court indicated that the issue should have been raised on direct appeal (PC-R. 409).[29] In affirming the denial of Rule 3.850 relief, this Court did not specifically address Mr. Byrd's Giglio claim, nor distinguish it from Mr. Byrd's Brady claim. Byrd v. State, 597 So.2d 252, 255 (Fla. 1992). On appeal, this Court failed to recognize, let alone

[29]Under Florida law, Giglio claims are cognizable in Rule 3.850 proceedings. Guzman v. State, 868 So. 2d 498 (Fla. 2003); Ventura v. State, 794 So.2d 553 (Fla. 2001); Rose v. State, 774 So.2d 629 (Fla. 2000); Routly v. State, 590 So.2d 397 (Fla. 1991). This is clearly because such claims require evidence that was not of record at the trial.

address, the distinction between the standard of review for a Giglio claim and the standard of review for a Brady claim.

In Mr. Byrd's case, the State failed to correct false and/or misleading testimony of a crucial witness, Ronald Sullivan, Mr. Byrd's other co-defendant. The State relied upon this false and/or misleading testimony in convincing the jury to convict Mr. Byrd.[30] At Mr. Byrd's trial, the State elicited from Sullivan the following testimony regarding the consideration he received from the State in exchange for his testimony against Mr. Byrd:

[30]Again in 1989, Mr. Byrd was not granted an evidentiary hearing on his Giglio claim, only on his Brady claim. The current proceeding is the first time that Mr. Byrd has been able to present the evidence in support of his Giglio claim.

Q [Mr. Lopez]: All right, sir. When were you arrested on these particular charges, Mr. Sullivan?

A I believe it was October 27th or the 28th of '81.

Q What were you charged with at the outset, sir?

A First Degree Murder.

Q Did the State offer you some negotiations in reference to the murder, sir?

A Yes, sir.

Q What were those negotiations?

A That I was to give a full and truthful testimony to receive some term of probation and it was to the judge to determine how much probation I get.

Q At the end of your statement, is that correct?

A Yes, sir.

(R382-383). On cross-examination, Mr. Sullivan testified:

Q The only person that you have spoken to about this case have been the one police officer on October 13 and the statement that you gave at the police department on October 28 prior to April 19th when you gave this statement?

A April 19th.

Q Do you understand the question, Mr. Sullivan?

A Sir, you asked me did I talk to anybody besides that, and I just answered your question yes, I did, on April 19th.

Q But other than April 19th, you have given no statements at all other than the one statement on October 13th and then this statement on October 28th?

A No, sir.

Q And in both the statements, on October 13 and October 28 you lied?

A Yes, sir.

(R438).

However in December 1981, Sullivan had told Det. Ed Carter that he could give them “Wade [Byrd] and [E]ndress really good.” (Def. Ex. 16). As Det. McAllister explained in his report, Det. Carter had been talking with Sullivan in the Hillsborough County Jail on December 17, 1981, about “burglarys [sic]” when Sullivan proffered his assistance against Mr. Byrd. This Notice of this statement of Sullivan, the prime State’s witness, was not included in the January 6, 1982, Notice of Discovery (R1728).[31]

In light of the December 1981 police report detailing Sullivan’s statement, Sullivan's trial testimony was not true and not corrected by the State. In fact, in his closing argument the prosecutor repeated to the jury the falsehood (“the first time we knew of what happened here is April 19th, when Ronald Sullivan, after being given probation, promised probation for truthful testimony, came and gave us a

[31]Obviously, Sullivan’s trial testimony was false when he claimed that he had not spoken with any police officers about the murder case between October 28, 1981, and April 19, 1982. This false statement was not corrected, but in fact exploited by the prosecution.

statement implicating Mr. Byrd in this homicide. If Mr. Sullivan had told Mr. Ober and myself, 'I did it guys, Wade Byrd didn't have anything to do with it,' we would have been bound by those plea negotiations"), again misleading the jury (R1206).

Mr. Lopez explained in the guilt phase closing:

> . . . [Ronald Sullivan] was given probation -- please understand this -- he was given probation before he told the State Attorney's Office anything.

(R1206-1207). In the first post-conviction proceedings, Mr. Lopez stated, "I certainly know we talked to Ronnie a lot. Myself and Mr. Ober." (PC-R89). And Detective McAllister had reported Det. Carter's interview of Sullivan regarding "burglarys [sic]" four months prior to the deal during which Sullivan indicated that if he got a deal, he would give the State Byrd and Endress really good.

At the 1989 evidentiary hearing on the Brady claim arising from the non-disclosure of this police report, the prosecutor admitted that his closing was a bit inconsistent with McAllister's report:

> Q Do you indicate in the closing argument that you didn't know as the prosecutor what Mr. Sullivan would say as to Mr. Byrd prior to the April 19th plea negotiation?
>
> A I make a statement, I think, somewhere along those lines in here. I allude to April 19 and after he had been given probation, giving us a statement implicating Mr. Byrd. I say that in my summation here.

> Q Is that inconsistent at all with the fact that the December 17 report indicates he would get Mr. Byrd or get Wade real good?
>
> [Objection overruled]
>
> Q My question is, what is reflected in that report, is that at all inconsistent with what you indicated in the closing argument?
>
> A It is a little bit inconsistent in that, in that context, yes.

(PC-R93-94). Mr. Lopez elaborated that Mr. Byrd's counsel, if he had the McAllister police report, "should have known" that what Mr. Sullivan was saying wasn't true (PC-R91).

The record clearly establishes that Mr. Lopez knew that Sullivan was a liar. As noted previously after Mr. Byrd was convicted and sentenced to death, Mr. Lopez sought to revoke Mr. Sullivan's probation in a proceeding before Judge Alvarez. The revocation hearing was held on June 24, 1983. Mr. Lopez presented evidence that Sullivan had in January of 1983 sold marijuana to an undercover law enforcement officer. Mr. Sullivan and members of his family testified that he was not the person who sold marijuana to the undercover cop. In seeking revocation of Sullivan's probation, Mr. Lopez argued to Judge Alvarez that the testimony of Mr. Sullivan's family could be explained by one fact: "They do not want to see this young man go to prison." The clear inference was that Sullivan and his

family lied on the witness stand in order to keep Sullivan from going to jail.

On September 23, 1983, Sullivan was called as a witness against Endress. Sullivan at that time testified that he sold hash to undercover law enforcement officers on January 14, 1983. He admitted lying under oath at his revocation hearing. He explained that he lied because “I didn’t want to receive a life sentence in prison.” Since his family had corroborated his false testimony, he had procured perjured testimony. He also admitted that he refused to be deposed by Mr. Endress’s counsel in August of 1983. He explained that “I figured the State would offer me a deal.” And the State did make an offer of a sentence reduction to 25 years. Sullivan rejected the offer ”[b]ecause I figured they would offer me a better deal.” Finally when the State offered a maximum of 10 years, Sullivan agreed to testify against Endress. (Endress ROA at 1309-22).

In February of 2002, Mr. Byrd initially filed the pending motion to vacate after Endress for the first time agreed to speak to undersigned counsel’s investigator. At that time, he indicated that Sullivan was a liar and that he had lied in his testimony against both Mr. Byrd and Endress. Endress explained that Sullivan’s testimony during his (Endress's) trial

was false; according to Endress, Sullivan's story, as told at Mr. Byrd's trial and again at Endress's trial, was simply false. Endress also explained that he has continually been advised not to talk to anyone about his conviction and/or sentence, and thus until February of 2002 refused to talk to anyone about the case. Endress also stated that he was offered a life sentence to testify against Mr. Byrd but refused, and the State tried to give him a death sentence.

In September of 2002, Endress took the witness stand and testified. Endress testified that Sullivan was a liar who had lied to get benefit for himself. During his testimony, Endress indicated that when he was initially interrogated in October of 1981, law enforcement officers accused him of having committed a number of robberies with Sullivan.[32] Endress indicated it would not surprise him if Sullivan had committed any or all of the 13 robberies.[33] Endress's testimony thus

[32]In this regard, Endress stated, "I do remember that, you know, we were given a lot of robbery cases at that time. He and I -- I think both and - - or the robbery cases that he gotten were ones that they also gave me." (2PC-R1564). Endress testified that he "had seen [Sullivan] strong arm people before hisself [sic]. So I mean I wouldn't have put that passed him." (2PC-R1565).

[33]When Mr. Byrd alleged in 1989 collateral proceedings that "other uncharged crimes" were not pursued against Sullivan in return for his testimony, the trial prosecutors testified that they were unaware of any other uncharged crimes involving Sullivan (PC-R95, 143).

revealed new information for the first time that Sullivan got more consideration than he testified to.

Endress's testimony in this regard finds support in Det. McAllister's report that Det. Carter had gone to talk to Sullivan on December 17, 1981, about burglaries (Def. Ex. 16). It is also supported by the testimony of Francisco Garcia in his February 24, 2004, testimony that Endress had advised him while they were incarcerated together in early 1982 that the police were investigating him for "a few burglaries." Garcia indicated that this was "10, 15, 20. I am not sure." (2PC-R514).

However, the fact that law enforcement was investigating Endress and Sullivan for 13 robberies was of more significance than simply demonstrating Sullivan's testimony about the consideration he received was false. This undisclosed evidence provided corroboration of Mr. Byrd's defense that Sullivan and Endress robbed Debra Byrd as part of their pattern. After the robbery went awry and the police came looking for them, they each decided to try to shift culpability to Mr. Byrd by alleging that he put them up to killing his wife. At trial, the defense maintained that Sullivan and Endress had committed the murder and that Mr. Byrd was not involved. The false and misleading testimony from Sullivan precluded the jury from knowing of Sullivan's and Endress's criminal activity that would

have provided powerful support for the defense. Mary Jane Taylor's allegation that Endress forced his way into her residence at knife point and robbed her (Def. Ex. 13) and Benjamin Parry's allegation that Sullivan robbed him at gunpoint (Def. Ex. 14) provide corroboration of Mr. Byrd's defense at trial that Endress and Sullivan committed the murder and falsely tried to shift the blame to him. Ms. Taylor's description of Endress's actions toward her demonstrate a course of conduct by Endress that is parallel to his actions against Ms. Byrd as reported by Debra Williams and establishes a modus operandi.

The State cannot demonstrate that the false and misleading evidence and argument presented by the State was harmless beyond a reasonable doubt at Mr. Byrd's trial and penalty phase proceedings. Both the guilty verdict and the sentence of death were affected by the deception. Had the jury known the truth regarding Sullivan and Endress, a conviction finding guilt beyond a reasonable doubt could not have been returned. Certainly, a sentence of death would not have been imposed and/or affirmed on direct appeal had the fact that Sullivan, on whom the aggravating circumstances entirely rested, was a known liar who had committed a similar robbery just over

two weeks before Debra Byrd was shot and killed.[34] Rule 3.850 relief is warranted. A new trial and/or a resentencing are required under Guzman v. State.

C. The Undisclosed Exculpatory Evidence

In order to insure that a constitutionally sufficient adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. Banks v. Dretke, 124 S. Ct. 1256 (2004). The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Strickler v. Greene, 527 U.S.at 281. It is reasonable for defense counsel to rely on the "presumption that the prosecutor would fully perform his duty to disclose all exculpatory evidence." Id. at 284. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. Garcia v. State, 622 So. 2d

[34]At the evidentiary hearing, Judge Alvarez acknowledged that the jury's death recommendation "by a majority of 12" could have meant that the death recommendation was by a vote of 7 to 5.

1325, 1330-31 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995).

During the course of the proceedings in circuit court new undisclosed exculpatory evidence was revealed which must be evaluated cumulatively with the undisclosed/unpresented exculpatory evidence presented in the 1989 collateral proceedings. The new information presented in the proceedings below all flowed from the decision made by Endress in early 2002 to speak with Mr. Byrd's counsel for the first time.

At that time of the 1989 hearing, evidence regarding the undisclosed December 17, 1981, police report written by Det. McAllister was presented.[35] This report

[35]The claim was presented in the alternative as either evidence of a Brady violation or evidence of ineffective assistance of counsel because the defense attorney, Frank Johnson, had lost his trial file, and it could not be reviewed to ascertain definitively whether the police report was in defense counsel's

demonstrates that Hillsborough County Sheriff detectives spoke to Ronald Sullivan regarding “Burglarys” on December 17, 1981. Though “Burglarys” is clearly misspelled, the spelling clearly conveyed that more than one burglary was at issue. The State Attorney’s Office was copied with the report. The report indicates that Mr. Sullivan discussed his knowledge of where Mr. Endress “trew” [sic] the gun,” and that he wanted the homicide detective to know that “He could give us Wade and Indress [sic] really good.” The report finally indicates that the homicide detective, Det. McAllister, was to “re-interview Sullivan in the near futher [sic]”. Notice of this statement of Sullivan, the prime State’s witness, was not included in the January 6, 1982, Notice of Discovery (R1728). This evidence completely impeached Sullivan’s testimony that he had not advised the State before the deal with him was made as to whether he had anything to say that inculpated Mr. Byrd.[36]

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possession. Either the State unreasonably failed to disclose or defense counsel unreasonable failed to present the evidence to the jury.

[36]Also presented in 1989 was the fact that Mr. Ober had referred Debra Byrd’s sister to his brother-in-law for representation. As a result of the conviction of Mr. Byrd, Ms. Byrd’s sister was able to obtain life insurance proceeds that otherwise would have gone to Mr. Byrd. Mr. Ober’s brother-in-law received a large contingency fee. Shortly thereafter, the brother-in-law gave Mr. Ober approximately 10 percent of the contingency fee. The fact that Mr. Ober’s brother-in-law was representing Ms. Byrd’s

Now, new undisclosed exculpatory evidence has come to light. Under Kyles v. Whitley, this new evidence must be evaluated cumulatively with the previously presented evidence. Endress revealed that he and Sullivan were suspects in approximately 13 other robberies. This was evidence that would have been useful to the defense to use as impeachment of Sullivan and as corroboration for the argument that Sullivan and Endress committed the murder and blamed Mr. Byrd to limit their criminal responsibility.

Endress also testified that he was offered a seven year sentence to testify against Mr. Byrd but the offer was refused by his father who did not communicate the offer to Endress. Endress's father, James Endress, Sr., has confirmed this plea offer in his February, 2003, deposition. When Endress's father vetoed a plea, the State turned to Sullivan and gave him a deal. This constitutes new evidence of the prosecutorial decision to target Mr. Byrd as opposed to the career criminals with a violent history. Such evidence furthers supports Mr. Byrd's claim that familial considerations regarding Mr. LaRussa's representation of Ms. Byrd's sister affected the prosecutorial decision to target Mr. Byrd.

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sister and stood to make a large fee if Mr. Byrd was convicted was not disclosed at the time of trial.

Mary Jane Taylor's allegation that Endress forced his way into her residence at knife point and robbed her (Def. Ex. 13) and Benjamin Parry's allegation that Sullivan robbed him at gunpoint (Def. Ex. 14) provides corroboration of Mr. Byrd's defense at trial that Endress and Sullivan committed the murder and falsely tried to shift the blame to him. Ms. Taylor's description of Endress's actions toward her demonstrate a course of conduct by Endress that is parallel to his actions against Ms. Byrd as reported by Debra Williams and establishes a modus operandi (Def. Ex. 15). The file contained information favorable to Mr. Byrd that has now been disclosed in the wake of Endress's 2002 testimony.

This Court has indicated that the question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So.2d at 553. The information need not be in admissible form. If the State possessed exculpatory information and it did not disclose this information, a new trial is warranted where the non-disclosure undermines confidence in the outcome of the trial. In making this determination, "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present

other aspects of the case." Rogers v. State, 782 So.2d at 385. This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446. Information regarding "coaching" of State witnesses is Brady material because it gives the defense a tool to argue against the witness's credibility. Rogers v. State, 782 So.2d at 384.

Without this information, trial counsel was seriously "handicapped" in his representation of Mr. Byrd. Rogers, 782 So.2d at 385. Furthermore, without this information, counsel was limited in his ability to impeach the "thoroughness" and "good faith" of the State's investigation of this case. Kyles, 514 U.S. at 446.

In the Brady context, the United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. at 436; Young v. State, 739 So.2d at 559.[37] In Lightbourne v. State, 742 So. 238 (Fla. 1999), this Court, in explaining the

[37] The Florida Supreme Court has also held that cumulative consideration must be given to evidence that trial counsel unreasonably failed to discover and present at the capital trial. State v. Gunsby, 670 So.2d 920 (Fla. 1996). Thus, this argument must be evaluated cumulatively with Mr. Byrd's ineffective assistance of counsel claim, and his claim of newly discovered evidence.

analysis to be used when evaluating a successive motion for post-conviction relief, reiterated the need for a cumulative analysis. Accordingly, this Court cannot limit its consideration solely to the misconduct detailed above. Clearly, a cumulative analysis of all of the withheld evidence undermines confidence in the outcome of the trial and requires that this Court grant a new trial. In particular, the undisclosed exculpatory evidence causes confidence to be undermined in the reliability of the resulting death sentence. Rule 3.850 relief must issue.

D. Ineffective Assistance of Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court explained that under the Sixth Amendment:

> . . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

466 U.S. 668, 685 (1984). In order to insure that a constitutionally adequate adversarial testing, and hence a fair trial, occur, defense counsel must provide the accuse with effective assistance. Accordingly, defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where defense counsel fails in his obligations and

renders deficient performance, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Mr. Byrd previously presented an ineffective assistance of counsel claim that was largely plead in the alternative to his Brady claim. This was due to the fact that his trial counsel, Frank Johnson, had lost the trial file.

The ineffective assistance of counsel claim must now be revisited in light of the new exculpatory evidence that was not presented to Mr. Byrd's jury to the extent that this Court concludes that the failure was trial counsel's and not the State's. Additionally, however, there is new evidence regarding Frank Johnson and his disbarment. Mr. Byrd's lead trial counsel was Frank Johnson. Mr. Johnson became licensed to practice on April 11, 1979, just over two years before undertaking Mr. Byrd's capital case. He worked for the State Attorney's Office from 1979 until 1981. Given his short tenure as lawyer, it is not surprising that Mr. Byrd's case was his first capital case as a defense attorney (PC-R160).

On October 28, 2002, this Court granted Mr. Johnson's petition for disciplinary resignation without leave to seek readmission (Def. Ex. 7). In his Petition, Mr. Johnson had detailed his extensive legal difficulties with the Grievance

Committee of the Florida Bar. Besides the three matters pending in 2002, the Petition noted that Mr. Johnson had been sanctioned eight different times (Def. Ex. 8). Seven of those eight times were for failing to fulfill his obligations to his clients (Def. Ex. 8). Counsel for the Florida Bar, William Thompson, described the basis for Mr. Johnson's sanctions: "**It's a lack of diligence, a lack of ability**." (Def. Ex. 9 at 20)(emphasis added).

The Florida Bar records that have been introduced into evidence also reflect upon the credibility of Mr. Johnson's testimony at the 1989 evidentiary hearing. The previous finding in 1989 that trial counsel was not ineffective must be revisited. During those proceedings, neither defense counsel, Frank Johnson, nor the State disclosed that bar grievances were pending against him.[38] The pendency of bar grievances against an attorney are no different than the pendency of criminal charges against a State's witness. See Davis v. Alaska, 415 U.S. 308 (1974). It is a matter that goes to the motive of the witness

[38]The State acknowledged in its written closing of May 10th that complaints were filed against Mr. Johnson in 1988, prior to the 1989 evidentiary hearing.

to testify in a manner that curry favors with the State and the Florida Bar.[39]

To the extent that the State in 1989 attempted to shift responsibility for the unpresented exculpatory evidence to Mr. Johnson, "his lack of diligence, [his] lack of ability" constituted ineffective assistance of counsel. To the extent that this Court finds that any or all of the documents and information in the State's possession (discussed in parts B and

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[39]In its May 10, 2004, closing, the State argued that "Defendant Byrd's position is preposterous and if the State tried to use the same technique against a defendant saying he committed a bad act in 2003, thus he must have also committed one in 1993, the State would be cited for misconduct." State's May 10, 2004 Closing at 9. However, Mr. Johnson was not a defendant, he was a witness. Surely, the State recognizes that the criminal right afforded under the Sixth Amendment to the criminally accused do not extend to witnesses. As to a witness called by Mr. Byrd, the State argued in that same written closing of May 10th:

> Mr. Love is simply embittered because the State of Florida never offered him anything for his testimony. That is the motivation for Mr. Love's testimony in this evidentiary hearing. He sees it as his chance to get back at the State. Mr. Love is a **multi-offender** and **has numerous felony convictions** - three convictions of Robbery with a Deadly Weapon, Grand Theft Motor Vehicle, Aggravated Assault, Battery on a Law Enforcement Officer, Attempted Second Degree Murder and Grand Theft. Mr. Love did not testify and that probably is best, given his **penchant for committing crimes involving dishonesty.**

State's May 10, 2004, Closing at 5(emphasis added).

So it would seem that in light of the State's argument as to Mr. Love, it is proper to impeach a witness with bad conduct from many years ago, unless the State wishes to abandon its argument as to Mr. Love.

C, infra) which did not reach the jury were available to Mr. Johnson, trial counsel's performance in not using and presenting those documents or the information contained therein to Mr. Byrd's jury was deficient. State v. Gunsby, 670 So.2d 920 (Fla. 1996); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). As a result, confidence is undermined in the reliability of the conviction and sentence of death.

E. Conclusion

Although the facts underlying Mr. Byrd's claims are raised under alternative legal theories -- i.e., Brady, Giglio, and ineffective assistance of counsel -- the cumulative effect of those facts in light of the record as a whole must be nevertheless be assessed. Not only should this Court consider Mr. Byrd's claims in light of the record as a whole, but it should also consider the cumulative effect of the evidence which Mr. Byrd's jury never heard. This Court must consider Mr. Byrd's claims cumulatively in order to determine if he received the fair adversarial testing he was entitled to. When this is done, it will be clear to this Court that Mr. Byrd did not receive a constitutionally adequate adversarial testing. Mr. Byrd's jury was prevented from hearing significant amounts of favorable and exculpatory evidence which now results in a loss

of confidence in the reliability of the outcome of both the guilt and penalty phases of the trial.

As with Brady error, the effects of the deficient performance must be evaluated cumulatively to determine whether the result of the trial produced a reliable outcome. Cumulative consideration must also be given to the State's failure to disclose favorable evidence to the defense. State v. Gunsby, 670 So.2d 920 (Fla. 1996). When cumulative consideration is given to the wealth of exculpatory evidence that did not reach Mr. Byrd's jury, either because the State failed to disclose or because trial counsel failed to discover, confidence in the reliability of the outcome is undermined.

This evidence could not be discovered before because as Endress has indicated, he would not speak about his case to anyone, including Mr. Byrd's legal team. Further, Endress's testimony is new evidence that the State provided undisclosed consideration to Sullivan. This directly contradicts the testimony at the 1989 evidentiary hearing from the trial prosecutors that they did not recall that there were other crimes that were believed to be committed by Sullivan. As a result, it requires reconsideration of Mr. Byrd's Brady and ineffective assistance of counsel claims. Endress's testimony establishes that Sullivan was in greater jeopardy than he

acknowledged in his testimony. Either the State failed to disclose or trial counsel failed to investigate and elicit this evidence. Since Brady and ineffectiveness claims must be evaluated cumulatively, the matter must now be revisited in light of this new evidence so that the proper cumulative consideration can be conducted. Roberts v. State, 840 So.2d 962, 972 (Fla. 2002). Endress's recent testimony also supports Mr. Byrd's Giglio claim on which he was never provided an evidentiary hearing. In light of this testimony, the claim must be revisited. Accordingly, Rule 3.850 relief must issue and a new trial must be granted.

Alternatively, if neither the State nor the defense counsel failed in their constitutional duties, the evidence constitutes newly discovered evidence under the standard recognized in Jones v. State, 591 So.2d 911 (Fla. 1991). Where neither the prosecutor nor the defense attorney violated their constitutional obligations in relationship to evidence the existence of which was unknown at trial, a new trial is warranted if the previously unknown evidence would probably have produced an acquittal or a life sentence had the evidence been known by the jury. Where such evidence of innocence would probably have produced a different result, a new trial is required. Impeachment evidence may qualify under Jones

v. State as evidence of innocence that may establish a basis for Rule 3.850 relief. See State v. Robinson, 711 So.2d 619, 623 (Fla. 2d DCA 1998). Evidence which qualifies under Jones v. State as a basis for granting a new trial must be considered cumulatively in deciding whether in fact a new trial is warranted. State v. Gunsby, 670 So.2d 920 (Fla. 1996).

Mr. Byrd's previously presented claims under Brady and Giglio and his ineffective assistance of counsel claims must be evaluated cumulatively with new evidence not previously available that impeaches Mr. Sullivan, the crucial witness upon whom the State's case rests. The crux of the State's case was the testimony of Mr. Sullivan. Mr. Lopez, one of the prosecutors, testified that it would be an "understatement" to say that Mr. Sullivan's credibility was "a big issue" in the trial (PC-R. 91). Mr. Sullivan testified that Mr. Byrd hired him to kill Mrs. Byrd, and then actually participated in the murder. When all of the exculpatory evidence that the jury did not hear is considered, it is clear that Mr. Byrd did not receive an adequate adversarial testing under State v. Gunsby, and Lightbourne v. State. Confidence is undermined in the outcome of the trial and the sentence of death. Under the mandated analysis, confidence in the outcome

of both the guilt and penalty phases must be undermined. Rule 3.850 relief is required.

ARGUMENT III

THE SENTENCING JUDGE ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES AND BY FAILING TO DISCLOSE TO MR. BYRD AND/OR HIS COUNSEL THE FACT THAT THE STATE PREPARED THE FINDINGS IN SUPPORT OF THE DEATH SENTENCE.

In State v. Riechmann, 777 So.2d 342, 352 (Fla. 2000), this Court recognized that when a State's representative drafted the findings in support of a death sentence on an ex parte basis, two legal principles were implicated. Florida law requires the sentencing judge to independently weigh the aggravation and mitigation. § 921.141, Fla. Stat. (1985). Due process precludes ex parte communications concerning a pending matter.

In Riechmann, reversible error occurred when a judge had the State draft the findings in support of a death sentence on an ex parte basis:

> In the present case, the trial court's order reflects that the evidentiary hearing judge considered these factors in concluding that Riechmann was denied an independent weighing of the aggravating and mitigating circumstances. Specifically, the judge found: "Unlike the cases distinguished in Patterson, the record contains no oral findings independently made by the trial judge, which satisfies the weighing process required by Section 921.141(3), nor did defense counsel know that the State had prepared a sentencing

> order to which he failed to object." Order at 50. The record supports the trial judge's findings.

Riechmann, 777 So.2d at 352.

In Roberts v. State, 840 So.2d 962, 969 (Fla. 2002), this Court found a resentencing warranted where a judge had ex parte contact with the State regarding the drafting of a sentencing order. This Court stated, "there is nothing 'more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.'" The Riechmann and Roberts cases are not the only ones in Florida where resentencings have been ordered because the sentencing judge obtained a draft of findings in support of death from the State on an ex parte basis. However, they are three death sentences handed down by Judge Solomon who testified that he followed the same procedure in all three cases – he had the State draft the findings in support of the death sentence. This Court in its order in Riechmann made reference to its earlier opinion remanding for an evidentiary hearing on this claim in Card v. State, 652 So.2d 344 (Fla. 1995). After the evidentiary hearing was conducted in Card, error was found and a resentencing was ordered. In Card, the State did not appeal the order granting Rule 3.850 relief.

In Mr. Byrd's case, there were no oral factual findings made when the sentence of death was announced in August of 1982. After Sullivan's sentencing in October of 1982 at which a reluctant Judge Alvarez was convinced by Mr. Lopez to grant Sullivan probation and at which Mr. Byrd had no representation, Judge Alvarez prepared and filed written findings in support of the death sentence. When written findings were filed, a copy was sent to Mr. Lopez. He responded by sending a letter back to Judge Alvarez asking the judge to alter the order to indicate that no mitigating circumstances had been found (Def. Ex. 1). Mr. Lopez sent a copy of his letter to Mr. Johnson who had withdrawn and was no longer representing Mr. Byrd. No one actually representing Mr. Byrd was notified of Mr. Lopez's efforts to get the findings revised to eliminate the finding of a mitigating circumstance. At the time of the exchange between Judge Alvarez and Mr. Lopez, Robert Moeller had been appointed to represent Mr. Byrd. The contact between Judge Alvarez and Mr. Lopez can only be described as *ex parte*. It is apparent that Judge Alvarez did not engage in the independent weighing required by the statute and then reduce the results of his independent weighing to writing. And even now, sixteen years later, Judge Alvarez has not submitted written findings that were the product of his independent weighing. See

Muehleman v. State, 503 So.2d 310 (Fla. 1987)(trial court's written findings were filed two and one half months after sentencing and thus Van Royal did not apply). Due process was violated by the *ex parte* communication between the judge and the prosecutor regarding the content of the findings of fact in support of a death sentence. Rule 3.850 relief should issue

Shortly before the evidentiary hearing, the State for the first time disclosed Mr. Lopez's letter to Judge Alvarez. Since the basis for this claim arises from that letter, the *ex parte* contact between the State and Judge Alvarez in the drafting of the findings in support of the death penalty could not have been pled until it was disclosed. Mr. Byrd did not plead this claim until his counsel learned that in other cases during the 1980's the Hillsborough County State Attorney's Office had a standard practice of *ex parte* contact in the preparation of findings in support of death sentences.

Due process requires that this Court grant 3.851 relief and order a re-sentencing.

CONCLUSION

In light of the foregoing arguments, Mr. Byrd requests that this Court reverse the lower court, vacate Mr. Byrd's conviction and death sentence and grant other relief as set forth in this brief.

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 Scott A. Browne, Assistant Attorney General, Office of Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, on January ___, 2008.

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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