

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-161

JAMES HUNTER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NEAL A. DUPREE
Florida Bar No. 311545
CCRC-South

PAUL KALIL
Florida Bar No. 174114
Assistant CCRC-South

ANNA-LIISA JOSELOFF
Florida Bar No. 0026283
Staff Attorney

Office of the Capital Collateral
Regional Counsel - South
101 N.E. 3rd Avenue, Suite 400
Ft. Lauderdale, Florida 33301
(954) 713-1284
COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Hunter's motion for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

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

"PCR." -- record on 3.850 appeal to this Court following the 2000 evidentiary hearing;

"PCR2" -- record on 3.851 appeal to this Court following the summary denial of Mr. Hunter's 2006 3.851 motion.

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Hunter requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar 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.

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PROCEDURAL HISTORY

On October 6, 1992 Mr. Hunter was charged by indictment with one count of first degree murder, three counts of attempted first degree murder, one count of attempted armed robbery, and three counts of armed robbery. (R. 46-49). Mr. Hunter and co-defendant Eric Boyd were tried by the same jury. Mr. Hunter was found guilty as charged on all eight counts (R. 291-301) and, after penalty phase proceedings, the jury recommended by a vote of nine-to-three that Mr. Hunter receive the death penalty for the first degree murder of Wayne Simpson. (R. 776).

The trial court found two aggravators: prior violent felony conviction and capital felony committed during a robbery. (R. 826-842). No statutory mitigating circumstances were found however, the court did find ten non-statutory mitigating factors: 1) fetal alcohol syndrome; 2) separation from siblings; 3) lack of mothering nurturing and bonding; 4) physical abuse; 5) emotional abuse and neglect; 6) unstable environment; 7) violent environment; 8) lack of positive role model; 9) death of adoptive mother; and 10) narcissistic personality disorder Id. The trial court sentenced Mr. Hunter to death.

This Court affirmed Mr. Hunter's conviction and sentence on

direct appeal.¹ Hunter v. State, 660 So. 2d 244 (Fla. 1995). The United States Supreme Court denied certiorari. Hunter v. Florida, 516 U.S. 1128 (1996).

Mr. Hunter filed his initial postconviction motion in March of 1997. On February 24, 1999, Mr. Hunter filed an amended Rule 3.850 motion. On November 10, 1999, Mr. Hunter filed his final "Second Amended Motion to Vacate Judgments of Convictions and Sentences With Special Request for Leave to Amend" raising thirteen claims.² On January 25, 2000, the trial court entered

¹ In his direct appeal, Mr. Hunter raised fourteen issues: (1) competency to stand trial; (2) erroneous ruling of competency to stand trial on second motion; (3) improper denial of right to backstrike during jury selection; (4) evidence from the stop and search should have been suppressed; (5) error in denial of motion for continuance; (6) mistrial should have been granted on motion that State committed Brady violation for failing to disclose exculpatory identification photographs; (7) improper admission of evidence of a prior robbery; (8) improper admission of testimony that Mr. Hunter pointed a gun at a colleague; (9) improper limitation on cross-examination of a State witness; (10) failure to hold Richardson hearing on State's failure to disclose it expert had examined the defendant as a juvenile; (11) mistrial required when State's expert opined on the defendant's credibility; (12) the instruction on the cold, calculated and premeditated (CCP) aggravating factor was not supported by the evidence; (13) constitutionality of section 921.141 including the CCP aggravator; (14) death sentence was disproportionate.

² Mr. Hunter's second amended Rule 3.850 motion alleged: (1) trial counsel was ineffective during the guilt phase for failing to (a) challenge the State's case through the knowledge of color photographs which were exculpatory, (b) failing to move for a hearing under Richardson v. State, 246 So. 2d 771 (Fla.1971), before the trial court due to the State's untimely disclosure of

an order granting an evidentiary hearing on claim (13) to the extent Hunter was arguing that exculpatory photographs existed that trial counsel could have used to demonstrate inconsistencies between the in-court identifications by State

photographs, (c) failing to utilize color photographs during trial, and (d) failing to disclose to the trial court unauthorized alterations in the photographs made by the State between the deposition of Donald Clark and Hunter's trial; (2) trial counsel was ineffective for failing to (a) provide adequate background information to Hunter's mental health expert and present additional mitigating circumstances, (b) object to the introduction of collateral crime victim evidence, (c) object to improper prosecutorial comments, and (d) adequately question potential jurors during voir dire; (3) Hunter's death sentence is invalid because (a) the jury instructions shifted the burden to Hunter to prove death was inappropriate, (b) the jury instructions improperly diluted the jury's sense of responsibility, and (c) the jury instruction on the cold, calculating, and premeditated aggravating circumstance was erroneous; (4) Hunter's trial was fundamentally unfair because (a) the trial court abused its discretion in failing to conduct an adequate mental health examination, (b) the trial court failed to appoint adequate mental health experts and conduct competency hearings, (c) the trial court erred by concluding death was the appropriate penalty, and (d) the trial court erred in failing to declare a mistrial when a State expert improperly gave his opinion on Hunter's credibility; (5) Florida's capital sentencing scheme is unconstitutional; (6) newly discovered evidence establishes that Hunter's conviction and sentence are constitutionally unreliable; (7) Hunter's death sentence rests upon an unconstitutional automatic aggravating circumstance; (8) the prosecutor made inflammatory and improper comments; (9) rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is unconstitutional; (10) execution by electrocution is cruel or unusual punishment or both; (11) Hunter's trial was fraught with substantive and procedural errors; (12) Hunter was denied a fair trial due to an actual conflict of interest by the public defender's office; and (13) trial counsel was ineffective for failing to file pretrial motions challenging the identification of Hunter by State witnesses Cooley and Howard.

witnesses Cooley and Howard and their identifications when they were or would have been shown the photographs. The trial court, however, summarily denied Hunter's argument within claim (13) that trial counsel was ineffective for failing to file pretrial motions challenging the identity of Hunter as legally insufficient.

The trial court held an evidentiary hearing on April 5, 2000. Thereafter, the trial court denied all claims raised in the original post-conviction proceedings.

Mr. Hunter appealed to this Court, alleging that: (1) trial counsel had an actual conflict of interest; (2) trial counsel was ineffective for failing to challenge the State's case through the use of photographic evidence; (3) the prosecutor made inflammatory and improper comments and counsel was ineffective for failing to object; (4) the jury instructions during the penalty phase were constitutionally invalid; (5) Florida's capital sentencing scheme is unconstitutional; (6) the trial court failed to appoint adequate mental health experts and conduct competency examinations; (7) Hunter's death sentence is disproportionate; (8) the trial court failed to declare a mistrial when a State expert improperly gave his opinion on Hunter's credibility; and (9) Hunter's death sentence rests upon an unconstitutional automatic aggravating circumstance.

This Court affirmed the trial court's denial of postconviction relief, finding issues (3), (4), (5), (6), (7), (8), and (9) to be procedurally barred because they could have been or were raised on direct appeal. This Court also denied Mr. Hunter's separate Petition for the Writ of Habeas Corpus. Hunter v. State, 817 So. 2d 786 (Fla. 2002).³

On June 6, 2002, Mr. Hunter filed a Petition for Writ of Habeas Corpus in Federal District Court. Mr. Hunter's Petition was denied on June 16, 2004.⁴ The Eleventh Circuit Court of Appeals affirmed the denial of federal habeas corpus relief on January 4, 2005. Hunter v. Sec'y, Dep't of Corr., 395 F. 3d 1196 (11th Cir. 2005). The U.S. Supreme Court denied Mr. Hunter's petition for a writ of certiorari on October 3, 2005. Hunter v. Crosby, 546 U.S. 854 (2005).

³ Mr. Hunter raised three claims in the habeas petition: appellate counsel, the same one as at trial, had the same conflict of interest alleged in the post-conviction motion; appellate counsel failed to argue that his sentence was disproportionate to one received by codefendant Boyd; and Mr. Hunter might be incompetent to be executed.

⁴ Mr. Hunter raised the following claims in his Petition for Writ of Habeas Corpus: (1) he was deprived of his right to counsel under the Sixth Amendment because his trial and appellate counsel labored under a conflict of interest; (2) he received ineffective assistance of counsel because his counsel failed to challenge the State's case through the use of photographic evidence; and (3) his counsel was ineffective for failing to object to improper and inflammatory comments and arguments made by the prosecutor.

On October 3, 2005, Mr. Hunter, through Assistant Capital Collateral Regional Counsel - Middle Region ("CCRC-Middle"), filed a successive Rule 3.851 motion raising the following claims: (1) newly discovered evidence establishes that Mr. Hunter is innocent of first degree murder and the death penalty because another co-defendant was the shooter; (2) newly discovered evidence establishes that the State made threats against and promises to State witness Tammie Cowan and did not reveal those threats and promises, in violation of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972); (3) newly discovered evidence establishes that defense counsel had an actual conflict of interest in representing Mr. Hunter and a key State witness; and (4) newly discovered evidence establishes that a key State witness was incompetent to testify. (PCR2. 1-12).

On October 20, 2005, the State responded to Mr. Hunter's motion and moved to disqualify CCRC-Middle. (PCR2. 13). The circuit court issued an order striking Mr. Hunter's successive motion for failing to comply with Fla. R. Crim. P. 3.851, and staying the State's Motion to disqualify. (PCR2. 24). On January 11, 2006, Mr. Hunter, through CCRC-Middle, filed an Amended Successive Motion for Postconviction Relief in compliance with Fla. R. Crim. P. 3.851. (PCR2. 29). The State filed its response

on February 23, 2006, and renewed its Motion to Disqualify CCRC-Middle. (PCR2. 54). On April 4, 2006, Assistant CCRC-Middle Eric Pinkard filed a Motion to Withdraw and Designate Capital Collateral Regional Counsel - South as Counsel of Record. (PCR2. 71). The circuit court granted Mr. Pinkard's motion (PCR2. 79) and on May 16, 2006, undersigned counsel filed his Notice of Appearance on behalf of CCRC-South. (PCR2. 84).

The circuit court held a case management/Huff hearing on November 14, 2006. (PCR2. 218-252). On December 22, 2006, the circuit court denied Mr. Hunter's amended successive 3.851 motion without an evidentiary hearing. (PCR2. 112-154). On January 29, 2007, Mr. Hunter filed a timely notice of appeal to this Court. (PCR2. 177).

STATEMENT OF FACTS

On direct appeal of Mr. Hunter's conviction and death sentence, this Court relied on the following facts which were elicited at Mr. Hunter's trial:

On September 16, 1992, James Hunter (a.k.a. Michael Miller), Tammie Cowan, Cathy Woodward, Charles Anderson, Andre Smith, and Eric Boyd traveled by car from St. Augustine to DeLand. Tammie Cowan testified that there were two black BB guns and one silver handgun in the car. Boyd and Anderson had the BB guns and Hunter had the handgun. In DeLand they stopped briefly to see Andre Smith's mother. Thereafter, at approximately 11:44 p.m., Cowan stopped the car and Anderson, Boyd, Smith, and Hunter exited. Hunter then confronted and robbed a man on the street, using the silver handgun. Hunter and his companions then departed for Daytona Beach. Shortly afterwards, a "be on the lookout" (BOLO) alert for the DeLand robbers was transmitted by the police throughout the Volusia County area. The BOLO described a gray four-door sedan occupied by at least five black individuals, two of whom were females, who were suspects.

After the robbery, Hunter directed Cowan to drive to Daytona Beach and the vicinity of Bethune-Cookman College where four young men were standing outside the "Munch Shop." Hunter instructed Cowan to stop the vehicle, and Hunter, Lewis, Anderson, and Smith exited and approached the four men. Hunter was armed with the silver handgun.

Hunter approached the men and ordered them to "give it up." Hunter and his companions then robbed the men at gunpoint.

Thereafter, while the men were lying face down on the sidewalk, Hunter shot each of them in turn. Wayne Simpson was the last victim to be shot in this process, and he subsequently died. Hunter and his colleagues then fled with the victims' clothing, jewelry, and other miscellaneous items of personal property. When Hunter returned to the car, he ordered Cowan to leave, and told her that he had fired the gun because a victim had tried to run. Shortly thereafter, at 12:40 a.m., Deputy Richard Graves observed a vehicle in Ormond Beach matching the DeLand BOLO. Graves stopped the automobile, and Cowan told Graves that she and the others had come from DeLand. While the car was stopped, the DeLand robbery victim was brought to the scene where he identified Hunter as his robber and also identified the car. Cowan consented to a search of the car which yielded two BB guns and personal property belonging to the victims of both the DeLand and Daytona Beach robberies. The gun used by Hunter was never found.

Hunter v. Florida, 660 So. 2d 244 (Fla. 1995).

Relevant Trial Testimony

Tammie Cowan testified at Mr. Hunter's trial that when they left St. Augustine, there were 2 BB guns and a silver handgun in the car. Lee Lewis and Charles Anderson had the BB guns and Mr. Hunter had the silver gun. (R. 671.) The purpose of going to Daytona was to go to a girl's house so that Mr. Hunter could obtain some marijuana. (R. 706). Cowan testified that Mr. Hunter had the silver gun. (R. 679, 682) and that after the shootings

Mr. Hunter said "pussy nigger tried to run, so he shot him." (R. 682, 683). Cowan claimed that she didn't tell the police anything about what happened in Daytona Beach because Mr. Hunter told her to tell police they didn't do anything. (R. 694). Cowan was charged with accessory after the fact to armed robbery and accessory after the fact to murder. At the time of Mr. Hunter's trial, Cowan was incarcerated, serving a sentence of 364 days and 5 years probation. (R. 695, 710). Cowan pled guilty to a first-degree felony punishable by life imprisonment. She thought she could be charged with murder and she was worried about that, but she did not consider 364 days and five years probation to be a light sentence. (R. 700).

Taurus Cooley testified at Mr. Hunter's trial that he was with Simpson, Troutman, and Howard the night of September 16, 1992 when they were approached by four men. Cooley testified that it was Mr. Hunter who told the four victims to "give it up." (R. 813). Cooley identified Eric Boyd as the man who held a gun to Troutman's neck, and Mr. Hunter as the one who put the gun to Cooley. (R. 814). Cooley identified Pope as the shortest of the men, who was behind everyone else. (R. 817).

Cooley testified that Mr. Hunter told him to take off his shirt, and he was looking at Mr. Hunter and Mr. Hunter shot him. (R. 817). Cooley dropped the shirt and sat back down. A couple

seconds later, Mr. Hunter shot Howard, Troutman, and Simpson. (R. 817). Cooley testified that Mr. Hunter had a small handgun, like a .25, which was chrome and looked very realistic. (R. 819, 825). Cooley Stated that he had never seen the four robbers before that night. (R. 824).

Cooley did not give a description of Mr. Hunter the night of the shooting, but gave one later. He said he remembered the shooter wore a red shirt (R. 828) and definitely a red baseball cap. (R. 830). He testified that he got a good look at Mr. Hunter that night (R. 828), and despite the fact that Mr. Hunter had a hat pulled down low on his face, Cooley claimed he saw enough of his face to make a positive identification. (R. 829). Cooley testified that he was never shown a photo line up with Mr. Hunter's picture in it and he never identified Mr. Hunter to the police (R. 830), however Cooley claimed there was "no doubt" in his mind that Mr. Hunter was the shooter. (R. 830).

Relevant Postconviction Evidentiary Hearing Testimony

At the evidentiary hearing on Mr. Hunter's first postconviction motion, George Burden testified that he was the lead attorney on Mr. Hunter's case and was employed by the Office of the Public Defender during the entirety of his representation. (PCR. 120). He was aware of the various

Statements of different witnesses regarding the different clothing that each participant in the shooting was wearing (PCR. 121) and that witnesses Taurus Cooley and Michael Howard had described the shooter as having on red clothing. (PCR. 122). He also recalled that all the witnesses Stated that there was only one shooter. (PCR. 122).

Burden made a demand for discovery in the case. (PCR. 122). He became aware of color photographs taken of the four suspects taken by Officer Mclean on the evening of the shooting only during the testimony of the last State witness during the jury trial. (PCR. 125). He Stated that one of the "show up" folders had a picture of Eric Boyd wearing a red shirt. (PCR. 130). Burden further Stated that the show up folder photograph of Mr. Hunter, taken by Officer Mclean on the evening of the shooting, showed him to be wearing a white shirt. (PCR. 132). He recalled that none of the witnesses testified that the shooter wore a white shirt. (PCR. 132).

Burden testified that he recalled that Taurus Cooley testified that he was an eyewitness who was shot during the incident. (PCR. 136). Burden claimed that he was not aware of any recent or pending charges against Cooley at the time he testified at Mr. Hunter's trial. (PCR. 138). Burden claimed he was unaware that on March 24th, 1992 Cooley was arrested by the

Daytona Beach Police Department on charges of fraudulent use of a credit card and possession of cocaine. (PCR. 138). He claimed he was unaware that on April 22, 1992 the Office of the Public Defender of Volusia County was appointed to represent Cooley on felony charges of credit card fraud and possession of cocaine. (PCR. 139, 140).

Burden claimed he was unaware that on May 11th of 1993 Cooley pled no contest to fraudulent use of credit card and possession of cocaine and received three years probation(PCR. 141). He claimed he was further unaware that in misdemeanor case number 92-41177 Cooley was arrested and charged with the crime of battery and that the Office of the Public Defender in Volusia County was appointed to represent him on that charge on September 9th, 1992. (PCR. 141). He claimed he was unaware that Cooley was arrested by the Daytona Beach Police Department for possession of cannabis which occurred on January 28, 1991. (PCR. 141) and that the Office of the Public Defender for Volusia County represented Cooley on those charges. Counsel Burden further Stated that he never cross examined Cooley concerning those recent and pending charges at Mr. Hunter's trial (PCR. 142) nor questioned Cooley concerning his prior criminal history during his deposition. (PCR. 142). Nor did he tell Mr. Hunter or the court that the Office of the Public Defender represented

State witness/victim Taurus Cooley. (PCR. 144).

Burden testified that he had made a specific discovery demand upon the Office of the State Attorney requesting criminal background history of all State witnesses and was never provided any information concerning the criminal background of Taurus Cooley. (PCR. 146). He claimed that had he been aware of Cooley's prior criminal history that he would have used it in cross examination. (PCR. 165, 166).

Elizabeth Blackburn-Gardner testified at the evidentiary hearing that she was the lead prosecutor in Mr. Hunter's case (PCR. 170) who was responsible for responding to discovery requests. (PCR. 170). Blackburn did not recall that witness/victim Taurus Cooley had any criminal history. (PCR. 179). She did not recall that the Office of The Public Defender had been appointed to represent Cooley on his criminal charges. (PCR. 180). She characterized Taurus Cooley as an important witness in the case. (PCR. 181).

Taurus Cooley testified at the evidentiary hearing that he was a victim in the case and had testified at Mr. Hunter's trial. (PCR. 263). He Stated that the person that shot him had on red clothing. (PCR. 264). He admitted that he had been charged in 1992 with credit card fraud and possession of cocaine, and that he was represented by the Office of the Public

Defender for Volusia County on the charges. (PCR. 280,281). Cooley also admitted to being arrested for the offense of battery in May of 1992, and being represented by the Volusia County Public Defenders Office. (PCR. 281). He also admitted to being charged with possession of marijuana on July 28, 1992 and that the Office of the Public Defender for Volusia County also represented him on that charge as well. (PCR. 283).

Lastly, Mr. Hunter testified at the evidentiary hearing that he informed trial counsel, Burden, about the existence of the color photographs that depicted the clothing of each suspect at the beginning of the case and asked him to use them in his defense. (PCR. 319). He also Stated that counsel Burden never showed him the "show up" folders at any time prior to the trial of his case. (PCR. 321). He also Stated that he was never informed that the Office of the Public Defender represented Taurus Cooley. (PCR. 322).

SUMMARY OF THE ARGUMENTS

Argument I

The lower court erred in denying Mr. Hunter's claims of newly discovered evidence without conducting an evidentiary hearing. Newly discovered evidence of co-defendant Eric Boyd's recent confession establishes that Mr. Hunter is innocent of the crime for which he has been convicted and sentenced to death. Newly discovered evidence establishes that defense counsel George Burden was laboring under an actual conflict of interest within the Office of the Public Defender which represented both Mr. Hunter and victim Taurus Cooley. Newly discovered evidence of prosecution witness Taurus Cooley's subsequent adjudication of not guilty by reason of insanity establishes that Cooley was incompetent to testify at Mr. Hunter's trial.

Mr. Hunter is entitled to an evidentiary hearing on these claims because the files and records do not conclusively show that he is not entitled to relief.

Argument II

The lower court erred in denying Mr. Hunter's claim that the State withheld favorable evidence in violation of Brady v. Maryland and/or presented misleading evidence in violation of Giglio v. United States without an conducting an evidentiary

hearing. The State withheld information regarding threats and promises made to a key state witness in exchange for her testimony. But for the State's withholding of this information and presentation of misleading testimony, the result of Mr. Hunter's capital trial and sentencing would have been different.

Mr. Hunter is entitled to an evidentiary hearing on this claim because the files and records do not conclusively show that he is not entitled to relief.

STANDARD OF REVIEW

Mr. Hunter presents arguments on questions of law requiring *de novo* review. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). Since no evidentiary development was permitted, Mr. Hunter's factual allegations must be accepted as true. Borland v. State, 848 So. 2d 1288, 1290 (Fla. 2003); Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996).

ARGUMENT I

BECAUSE THE FILES AND RECORDS DO NOT SHOW THAT HE WAS CONCLUSIVELY ENTITLED TO NO RELIEF, THE LOWER COURT ERRED IN DENYING MR. HUNTER'S CLAIMS OF NEWLY DISCOVERED EVIDENCE WITHOUT AN EVIDENTIARY HEARING.

This Court has long held that a postconviction defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.'" Lemon v. State, 498 So. 2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996).

The same standard applies to successive motions to vacate. Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of factual allegations impeaching trial testimony); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(remanding for

an evidentiary hearing to determine if evidence would probably produce and acquittal); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness claim that she was pressured by the State and received undisclosed consideration for her false testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]"). This Court, like the lower court, must accept that Mr. Hunter's allegations are true at this point in the proceedings. Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989).

This Court has recently reiterated the standard governing claims of newly discovered evidence:

To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d

512, 521 (Fla. 1998) (*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones II* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II*, 709 So. 2d at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. See *Jones I*, 591 So. 2d at 915.

In determining whether the evidence compels a [*43] new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id.* at 916. This determination includes

whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether this evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

Jones II, 709 So. 2d at 521 (citations omitted).

Riechmann v. State, 2007 Fla. LEXIS 664.

Mr. Hunter's Rule 3.851 motion pled facts regarding the merits of his claims and his diligence which must be accepted as true. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively rebut Mr.

Hunter's claims and that an evidentiary hearing is required. As demonstrated herein, Mr. Hunter is entitled to an evidentiary hearing, and thereafter relief, on his claims.

A. Newly Discovered Evidence that Co-Defendant Boyd Was the Actual Shooter

As alleged in Mr. Hunter's successive postconviction motion, Eric Boyd, Mr. Hunter's co-defendant who received a life sentence, has now come forward and Stated unequivocally that he (Boyd) shot Taurus Cooley in a dispute related to a drug deal. Mr. Boyd now States that he had "fronted" drugs to Cooley approximately one month before the shooting, and Cooley had failed to pay for the drugs. Mr. Hunter further alleged that Mr. Boyd was armed with the pearl-handled pistol used to shoot the victims. (PCR2. 33; 167-176).

Mr. Hunter has demonstrated diligence. Mr. Boyd had previously refused to talk to postconviction counsel because he thought that the State was finally going to honor a promise they had made to "straighten the entire case out." Mr. Hunter alleged that Mr. Boyd would testify that prosecutors Steve Alexander and Elizabeth Blackburn promised him that in five to eight years they would bring Mr. Hunter back to court and "clear everything up," but that he (Boyd) would have to keep his mouth shut and not talk to anyone, especially Mr. Hunter's lawyers.

(PCR2. 33).

In denying an evidentiary hearing, the circuit court found:

Assuming, *arguendo*, that Mr. Boyd would have testified as claimed in the motion, the allegations contained in Ground I are facially insufficient to establish that Defendant would probably be acquitted of the murder of Wayne Simpson, the fourth robbery victim. The central issue in this case is who shot and killed Wayne Simpson. Additionally the State has noted that Mr. Boyd was tried with Defendant, and Mr. Boyd did not testify against Defendant at trial in exchange for a promise of leniency or for any other reason. This issue was explored that the prior Rule 3.851 evidentiary hearing in this case, at which Mr. Boyd did testify and denied ever making any Statement adverse to his cousin, the Defendant. Thus, Defendant's claim that Boyd kept quiet until now due to expectation of leniency as a *quid pro quo* for non-existent trial testimony against Defendant is conclusively refuted by the record.

(Order, PCR2. 114). The judge's findings are erroneous for several reasons.

Mr. Boyd's recent confession, when viewed in conjunction with the evidence at trial and in postconviction, leads to the only logical conclusion that Boyd, not James Hunter, shot the four victims, including Wayne Simpson. The evidence presented at the trial and in postconviction demonstrates that there was only one "real gun" involved in the shootings, and the co-defendants had only "BB" guns. The person who shot all four victims was

wearing a red shirt and hat and carried a chrome or silver colored gun. When arrested and photographed, Mr. Boyd was dressed in a red shirt, Mr. Hunter was wearing white. Throughout Mr. Hunter's trial and postconviction proceedings, the State maintained that a single gunman shot all four victims, including Wayne Simpson. This fact has remained uncontroverted. It necessarily follows that the person who shot Taurus Cooley is the same person who shot Wayne Simpson. By his own admission, that person is Eric Boyd. Mr. Hunter is innocent of the murder of Wayne Simpson, and was wrongly convicted and sentenced to death.

Further, the fact that Boyd was tried with Mr. Hunter and did not testify against him at trial, and that Boyd denied ever making adverse Statements against Mr. Hunter at the evidentiary hearing, is irrelevant to the fact that Boyd now admits to being the actual shooter. The fact that Boyd remained quiet at trial and was untruthful at the evidentiary hearing does not conclusively rebut the fact that he now has confessed, in detail, to being the actual shooter. Naturally, it was in Boyd's interest to remain silent at trial, especially since he believed that the State was going to "straighten the case out" later, and he was facing a potential death sentence. By relying on Boyd's silence at trial and deception at the evidentiary hearing, the

lower court has essentially made a finding of Boyd's credibility without hearing his testimony as to his recent confession.

Had Mr. Hunter's jury heard the evidence that his co-defendant, Boyd, was the person who shot all four victims, including Wayne Simpson, there is a reasonable probability that Mr. Hunter would have been acquitted. The fact that Eric Boyd, not James Hunter, is the actual shooter certainly "weakens the case against [Mr. Hunter] so as to give rise to a reasonable doubt as to his culpability." Jones, 678 So. 2d at 315. At the very least, this evidence would yield a less severe sentence. An evidentiary hearing, at which Mr. Hunter can present the evidence of Cooley's confession, is warranted.

B. Newly Discovered Evidence of Trial Counsel's Actual Conflict of Interest

Newly discovered evidence establishes that defense counsel George Burden was laboring under an actual conflict of interest within the Office of the Public Defender, which represented both Mr. Hunter and victim Taurus Cooley. It is undisputed that Taurus Cooley had been represented by the public defender's office on several felony and misdemeanor charges immediately prior to and during the public defender's office's representation of Mr. Hunter in this case. At the evidentiary hearing on Mr. Hunter's initial postconviction motion, both

defense counsel Burden and former prosecuting attorney Elizabeth Blackburn testified that they had no knowledge of Cooley's prior record and representation by the public defender's office. The circuit court, this Court, the Federal District Court and the Eleventh Circuit Court of Appeals relied on Burden and Blackburn's testimony in denying relief.

Mr. Hunter alleged in his successive motion that newly discovered evidence establishes that Ms. Blackburn's and Burden's testimony at the evidentiary hearing was false. Specifically, prosecutor Blackburn obtained an NCIC/FCIC report on Cooley which contained information regarding prior charges for which he had been represented by the public defender's office. This information was subsequently provided to Burden prior to Mr. Hunter's trial. Mr. Hunter further alleged that postconviction counsel was deceived by the testimony of Ms. Blackburn and Burden at Mr. Hunter's evidentiary hearing that they were unaware of the conflict. The deception by the State in presenting false testimony about this lack of knowledge prevented Mr. Hunter from receiving a full and fair evidentiary hearing. As a result, the NCIC/FCIC report run by Ms. Blackburn, which establishes that Burden had been informed of Cooley's prior record, and the concomitant conflict arising therefrom, is newly discovered evidence. Mr. Hunter offered to present the

testimony of Elizabeth Blackburn and George Burden at an evidentiary hearing.

The State moved to disqualify CCRC-Middle on the ground that "it appears that present counsel would be a material witness regarding the timeliness of the claim if there is any dispute on this point, which would necessitate his removal as counsel on this case." (PCR2. 63). CCRC-Middle subsequently filed a motion to withdraw because:

In the Response to the Amended Successive Motion the State argues that undersigned counsel will be a witness to establish the prerequisites necessary to sustain claims that the evidence in question is newly discovered. In particular, the State argues that undersigned counsel is a witness to the date it was discovered that Eric Boyd now admits he was the shooter, and that undersigned counsel is a witness to the circumstances of discovery of the computer printout and whether those circumstances justify a finding that the printout is newly discovered evidence.

* * *

Undersigned counsel's testimony may help or harm the defendant, depending on the consequences of his actions.

(PCR2. 72). CCRC-Middle's motion to withdraw was granted (PCR2. 79), however the circuit court subsequently denied Mr. Hunter an evidentiary hearing on this claim. Without hearing counsel's testimony, the court found:

[T]his claim of newly discovered evidence is untimely. Counsel alleges that he located this evidence in the possession of the State Attorney's office. This evidence was available at the time of the prior 3.851 proceeding, and does not satisfy either prong of the Jones "newly discovered evidence" standard.

* * *

Defense Counsel at the time the instant motion was filed even asserts that he "discovered" Cooley's NCIC-FCIC report in the State Attorney's file. The Court's files and records establish that there have been no public records proceedings in this case since 1999. As a result, counsel had to "discover" Cooley's criminal history printout in the public records materials that were provided to him prior to filing defendant's first rule 3.851 motion. Hence, this evidence is unlikely to be "newly discovered."

(Order, PCR2. 116).

The circuit court's denial of this claim without an evidentiary hearing was error. The court, having found Mr. Pinkard to be a witness whose testimony was required to evaluate the merits of Mr. Hunter's claims, refused to hear Mr. Pinkard's testimony as to the circumstances of discovery of the computer printout and whether those circumstances justify a finding that the printout is newly discovered evidence. Instead, the court made credibility findings of Mr. Pinkard without hearing his testimony.

Contrary to the lower court's finding, the files and records do not conclusively show that Mr. Hunter is not entitled to relief. An evidentiary hearing on the merits of Mr. Hunter's claim is warranted.

C. Newly Discovered Evidence that A Key State Witness was Incompetent to Testify

The circuit court erred in summarily denying Mr. Hunter's claim that newly discovered evidence establishes that State witness Taurus Cooley was incompetent to testify at Mr. Hunter's 1993 trial.

Mr. Hunter alleged in his successive motion that Cooley was incompetent at the time of trial based on subsequent court proceedings in which Cooley was declared legally insane and not guilty by reason of insanity on several felony charges. Cooley's insanity was due to a longstanding mental illness from which Cooley suffered before, during, and after the time he testified at Mr. Hunter's trial.

The circuit court denied this claim on three grounds:

[T]his evidence cannot be considered "newly discovered evidence" because such evidence was in existence but undiscovered at the time of trial. Porter v. State, 653 So. 2d 354, 360 [sic]. As noted by the State, Defendant does not assert that Cooley (who was one of the Bethune-Cookamn College students victimized in this case) was also incompetent to testify at the prior Rule

3.851 proceedings in this case, where Defendant called Cooley as defense witness. Defendant has also failed to provide the name, address and telephone number of the expert witnesses that he asserts he "may" call to testify, contrary to the requirements of Rule 3.851(e)(2)(C)(i), Fla. R. Crim. P. He has also failed to allege that Cooley is now consenting to submit to any mental status examination by Defendant's unidentified mental status expert. This claim is also facially insufficient because it fails to allege any facts showing how Cooley's adjudication of not guilty by reason of insanity in Volusia County case number 2001-30956 CFAES on October 3, 2001 would have any relevance to Cooley's competency to testify in Defendant's jury trial in August of 1993. As such, this claim is denied.

(PCR2. 117).

The circuit court's reliance on Porter is erroneous. Porter involved claims of newly discovered evidence of trial counsel's conflict of interest, and a newspaper article wherein the trial judge indicated that he had already decided to sentence Porter to death before the jury made a life recommendation. This Court found Porter's first issue was barred because:

These court records [on which the newly discovered evidence claim is based] pertain to a key adverse witness whose testimony was the subject of this Court's original reversal in this case. Additionally, the State points out that **Schapp's deposition reveals a potential connection between Schapp and Widmeyer**. Of course, the deposition as well as the court records which reveal Widmeyer's representation of

Schapp are public records and have been continually available in Charlotte County throughout all post-conviction proceedings. We therefore conclude that Widmeyer's representation of Schapp was information available to Porter upon diligent search and thus cannot serve as a basis for relief.

Porter v. State, 653 So. 2d 374, 378 (Fla. 1995)(footnote omitted)(emphasis added).

Similarly, this Court denied relief on Porter's second newly discovered evidence issue because:

Information upon which Porter claims bias of the trial judge has long been available to Porter. In fact, Porter has raised the issue of judicial bias on several prior occasions. The record clearly demonstrates that on November 30, 1978, the trial judge entered a judgment and sentence stating that Porter was to be executed for both Count I and Count II although the jury did not recommend a sentence for each count until December 1, 1978. **The newspaper article says nothing more than what was already in the original 1978 sentencing order.** The 1978 sentence has since been reversed. Porter's present attack is based upon the 1981 sentencing order, but we find nothing demonstrating that the newspaper article pertains to the 1981 sentencing.

Porter, 653 So. 2d 374, 378 (emphasis added).

Unlike the situation in Porter, Mr. Hunter's trial counsel was not on notice that Cooley was insane or incompetent. Contrary to the circuit court's finding, the evidence of Cooley's long standing mental illness (his adjudication of not

guilty by reason of insanity) did not exist at the of Mr. Hunter's trial. It was only years later that Cooley was declared insane. As such, Porter is not analogous.

Mr. Hunter's case is akin to Mills v. State, 788 So. 2d 249 (Fla. 2001). In Mills, this Court upheld the circuit court's granting of penalty phase relief on Mills' claim of newly discovered evidence that a co-defendant was the actual shooter. The newly discovered evidence in Mills was the co-defendant's confession to a cellmate which was not made until after Mills' trial. It was the co-defendant's confession, and not his culpability, that constituted newly discovered evidence. Like co-defendant's culpability in Mills, Cooley's long-standing mental illness were unknown at the time of trial and could not be discovered with due diligence. Like Mills' codefendant's post trial confession, Cooley's post-trial adjudication is the newly discovered evidence.

Furthermore, the state and the circuit court make much of the State's assertion that "Defendant does not assert that Cooley [] was also incompetent to testify at the prior Rule 3.851 proceedings in this case, where Defendant called Cooley as defense witness." In fact, the evidentiary hearing record reveals that Cooley was experiencing mental problems during the evidentiary hearing. Howard Simpson, father of the Wayne Simpson

testified that:

When [Cooley] came to the stand this afternoon, I was really upset because of his demeanor and his actions when he went to the stand. I got up and I went outside and, not speaking directly to anyone, I responded by, What's wrong with him? And he came out shortly thereafter. . .

And I said, What's wrong with you? He said, What you mean? I'm not supposed to be here. I'm a mental case. My mother told me I'm not supposed to be here. I said, You need to tell somebody if you're going through mental problems. And that was basically all I said to him. But I know the young man is not himself

(PCR. 194). In any event, Cooley's testimony at the evidentiary hearing was not helpful to Mr. Hunter. Cooley did not testify as collateral counsel expected with regard to the identification issue, and Cooley's remaining testimony simply verified that he had faced criminal charges and was represented by the Office of the Public Defender. As such, the fact that Cooley was called by the defense at the postconviction evidentiary hearing has no bearing on the fact that this key witness at Mr. Hunter's capital trial, who put the murder weapon in Mr. Hunter's hand and identified Mr. Hunter as the shooter, was insane.

As a result of his long standing mental illness, Cooley was incompetent to testify at Mr. Hunter's trial and should have been disqualified pursuant to Fla. Stat. § 90.603(2)(providing that a person is disqualified to testify if incapable of

expressing himself or incapable of understanding the duty to tell the truth. Furthermore, Cooley's longstanding mental illness, and resulting insanity, certainly show a defect in his capacity, ability, or opportunity to observe, remember, or recount the matters about which he testified, which is valuable impeachment evidence. See Fla. Stat. §90.608(4).

In Jones this Court remanded for an evidentiary hearing because:

On the face of the pleadings, we cannot determine whether some of the evidence can properly be said to be newly discovered. Moreover, we cannot fully evaluate the quality of the evidence which demonstrably meets the definition of newly discovered evidence. Therefore, we believe it necessary to have an evidentiary hearing on the claims that are based upon newly discovered evidence. At the hearing, the trial judge should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at the trial, would have probably resulted in an acquittal. In reaching this conclusion, the judge will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.

Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). Rule 3.851(f)(5)(B) is clear: "If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." Conversely, where the motion, files, and records in

the case do not conclusively show that the movant is entitled to no relief, evidentiary development is necessary.

Accepting Mr. Hunter's allegations of newly discovered evidence at face value, as this Court must for purposes of this appeal, this Court should find that the allegations are sufficient to require an evidentiary hearing and remand for further proceedings on this claim. Scott v. State, 657 So. 2d 1129 (Fla. 1995); Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

ARGUMENT II

BECAUSE THE FILES AND RECORDS DO NOT SHOW THAT HE WAS CONCLUSIVELY ENTITLED TO NO RELIEF, THE LOWER COURT ERRED IN DENYING MR. HUNTER'S CLAIMS THAT THE STATE WITHHELD FAVORABLE EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND/OR PRESENTED MISLEADING EVIDENCE IN VIOLATION OF GIGLIO V. UNITED STATES WITHOUT AN EVIDENTIARY HEARING.

The Due Process Clause of the Fourteenth Amendment requires the State in a criminal case to disclose to the defense exculpatory evidence. Brady v. Maryland, 373 U.S. 83 (1963); see also Rogers v. State, 782 So. 2d 373 (Fla. 2001)(Under Brady, the government's suppression of favorable evidence violates a defendant's due process rights under the Fourteenth Amendment. See Brady, 373 U.S. at 86 (suppression of confession is violation Fourteenth Amendment).

The State's obligation to disclose favorable evidence is not extinguished by either a conviction or a sentence of death. In postconviction, "the State is under a continuing obligation to disclose any exculpatory evidence." Id. at 987; see also Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996)(finding that Brady obligation continues in post-conviction).

Favorable evidence has been defined by the United States Supreme Court as exculpatory evidence. Under due process, this includes evidence which impeaches a State's witness or the

reliability of the State's criminal investigation. United States v. Bagley, 473 U.S. 667, 676 (1985).

In Strickler v. Greene, 527 U.S. 263 (1999), the United States Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." 527 U.S. 263, 281 (1999), quoting Berger v. United States, 295 U.S. 78, 88 (1935). The Court also repeated that a prosecutor has a duty to disclose exculpatory evidence even though there has been no request by the defendant, 527 U.S. at 280.

The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, including impeachment evidence, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F. 2d 1533 (11th Cir. 1984).

When a Brady violation is alleged, the defendant must establish a prima facie case that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different." United States v. Bagley, 473 U.S. 667, 682 (1985). To meet this test, the defendant must prove: (1) the State possessed favorable evidence, including impeachment evidence; (2) the evidence was suppressed; and (3) there is a reasonable probability that, had the evidence been disclosed, the outcome would have been different. See Strickler v. Greene, 527 U.S. 263 (1999); Kyles v. Whitley, 514 U.S. 419 (1995); Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001).

In his successive postconviction motion, Mr. Hunter pled facts regarding the merits of his claims and his diligence which must be accepted as true. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively rebut Mr. Hunter's claims and that an evidentiary hearing is required. This Court has long held that a postconviction defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.'" Lemon v. State, 498 So. 2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). Factual allegations as to the merits of a constitutional claim as well

as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996).

The same standard applies to successive motions to vacate. Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of factual allegations impeaching trial testimony); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce and acquittal); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness claim that she was pressured by the State and received undisclosed consideration for her false testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]"). This Court, like the lower court, must accept that Mr. Hunter's allegations are true at this point in the proceedings. Lightbourne v. State,

549 So. 2d 1364, 1365 (Fla. 1989). As demonstrated herein, Mr. Hunter is entitled to an evidentiary hearing, and thereafter relief, on his claims.

In his successive 3.851 motion, Mr. Hunter alleged that postconviction counsel had recently learned from Tammie Cowan that the State threatened her with a life sentence if she did not testify against Mr. Hunter, and that threats and promises which resulted in Cowan's damaging and false testimony against Mr. Hunter were not disclosed to the defense at trial, in violation of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). The circuit court erroneously denied Mr. Hunter's claim without an evidentiary hearing. This Court should reverse the circuit court's order and remand this case for an evidentiary hearing on this claim.

The circuit court denied Mr. Hunter's claim because:

First, the Court finds that the instant successor Rule 3.851 motion contains no allegation that Ms. Cowan's trial testimony against Defendant was actually false or has not been recanted, nor does Defendant claim that the content of Ms. Cowan's trial testimony was linked to the alleged threat. The record reflects that Ms. Cowan was reluctant to testify for the State and was taken into custody as a material witness prior to trial. As the State has noted, the proposed testimony, if believed, would do no more than reaffirm Ms. Cowan's reluctance to meet her legal obligation to testify (i.e. it would be cumulative) and would not

satisfy the materiality prong of Brady v. Maryland, 373 U.S. 83 (1963).

Further, Giglio v. United States, 405 U.S. 150 (1972) is inapplicable, because this claim does not allege that any aspect of Cowan's trial testimony was false. In order to establish a Giglio violation, a defendant must show that: "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the Statement was material." Guzman, 28 Fla. L. Weekly at S829, 4; see also Ventura, 794 So. 2d 562 (quoting Robinson v. State, 707 So. 2d 688, 693 (Fla. 1998)). Finally, this claim fails to satisfy the requirements for relief based on a claim of newly discovered evidence, as it could have been discovered through due diligence.

(PCR2. 115). The circuit court's denial is error on several grounds.

Firstly, the court's finding that Mr. Hunter has failed to allege that Cowan's testimony is false is contrary to what has been plead and argued. Mr. Hunter has maintained his innocence throughout his direct appeal and postconviction proceedings, continually arguing that he was not the shooter. Cowan was one of the principal witnesses against Mr. Hunter at trial. She testified that Mr. Hunter was in possession of the only real gun on the night of the murder (R. 671, 677, 679, 682) and testified that she heard him say that one of the victims "tried to run, so he shot him." (R. 682). Given Mr. Hunter's longstanding claim of innocence, and taken together with the newly discovered evidence

that Mr. Hunter's co-defendant has confessed to shooting Taurus Cooley (see Argument I, supra), it is clear that the crux of Mr. Hunter's claim is that Cowan's damaging testimony was false and was the direct result of the threats and promises made to her by the State.

In any event, Cowan never disclosed threats or promises during her trial testimony, so the jury was unaware that they had been made. At the very least, evidence that Cowan had been threatened by the State or offered promises is valuable impeachment. At trial, Cowan admitted that she could have faced a life sentence, but Stated that the sentence she eventually received (364 days and five years probation) did not seem like a light sentence to her. Mr. Hunter's trial counsel attempted to impeach Cowan on cross-examination, but he was unable to effectively do so because he lacked knowledge of the threats and promises because they were being withheld by the State in violation of Brady.

Similarly, Cowan's recent Statement to postconviction counsel establishes that the State violated Giglio by presenting her false testimony. To establish a Giglio violation, Mr. Hunter must show that "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the Statement was material." Craig v. State, 685 So. 2d 1224, 1226

(Fla. 1996). This Court has observed that, "[t]he thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury." Id. at 1226-27 (quoting Routly v. State, 590 So. 2d 397, 400 (Fla. 1991); Robinson v. State, 707 So. 2d 688 (Fla. 1998)). Cowan testified falsely by not revealing that threats and promises had been made. Having made threats and promises, the State had knowledge that Cowan's testimony was not true.

Mr. Hunter was entitled to present evidence to the jury that the State had made threats and promises to her in exchange for her testimony. Had the jury known that threats and promises had been made to a key State witness, there is a reasonable probability that the outcome of Mr. Hunter's trial would have been different. See Strickler v. Greene, 527 U.S. 263 (1999); Kyles v. Whitley, 514 U.S. 419 (1995); Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001). The newly discovered evidence of the threats and promises made to Cowan is material to both guilt and punishment. Cowan was a key State witness whose testimony placed the only real gun in Mr. Hunter's possession directly before and after the murder. (R. 671, 677, 679, 682). But for the State's failure to disclose the evidence of the threats and promises made to Cowan that resulted in her damaging and false testimony,

defense counsel would have been able to use that evidence to effectively impeach Cowan and there is a reasonable probability that the result of Mr. Hunter's trial would have been different. This Court should remand this claim to the circuit court for evidentiary development in order for Mr. Hunter to prove that the newly discovered evidence of the State's threats against Cowan probably would have resulted in a different outcome had they been properly disclosed under Brady and Giglio.

CONCLUSION

In light of the foregoing arguments, Mr. Hunter submits that he is entitled to have the lower court's order reversed and his case remanded to the circuit court for an evidentiary hearing on his claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Kenneth S. Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, this 21st day of May, 2007.

PAUL KALIL
Assistant CCRC
Florida Bar No. 174114

ANNA-LIISA JOSELOFF
Staff Attorney
Florida Bar No. 0026283

OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - SOUTH
101 N.E. 3rd Ave., Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief complies with Fla. R. App. P. 9.100(1) and 9.210(a)(2).

PAUL KALIL