IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-1213

PAUL BEASLEY JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Central to this appeal is the United States Supreme Court decision in Banks v. Dretke, 540 U.S. 668 (2004). There, the Supreme Court held: "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Id. at 675-76. Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 696. Under Banks, the burden is on the State to "set the record straight," not upon the defense to intuit that the State is holding information back or misrepresenting facts.[1]

Here, the State presented the testimony of James Smith, a jailhouse informant, to counter Mr. Johnson's insanity defense. Mr. Smith testified that Mr. Johnson told him that he "could play crazy" in order to beat the charges. At the 1988 trial, Mr. Smith was adamant that he did not question Mr. Johnson on behalf of the State or at law enforcement's request. Smith claimed that the notes he made of his alleged talks with Mr. Johnson were his own idea. Nobody suggested he should memorialize the conversations. Mr. Smith also swore that he did not

[1]In Banks, the Supreme Court found that in the facts of that case "[t]hrough direct appeal and state collateral review proceedings, the State continued to hold secret the key witnesses' links to the police and allowed their false statements to stand uncorrected." Id. at 675.

receive or expect to receive any consideration from the State for his testimony.

In 1997, Mr. Smith testified that his trial testimony was false. He was specifically told by law enforcement in 1981 to question Mr. Johnson and gather evidence for the State to use in its prosecution. Mr. Smith testified that in 1981 he was told what questions to ask Mr. Johnson. Mr. Smith also testified that in 1981 he understood that he had a deal with the State and would receive consideration for his testimony.

In 1997, the State presented Hardy Pickard, the original prosecutor from 1981, to testify that Mr. Smith's post-conviction testimony was not true. According to Mr. Pickard, Mr. Smith was acting on his own when he spoke to Mr. Johnson and decided to make notes of his conversations. There was no deal with Mr. Smith, and that Mr. Smith's testimony at Mr. Johnson's trial was true.

What the State did not reveal at the time of trial or at the 1997 hearing on Mr. Johnson's first Rule 3.851 motion was that Mr. Pickard wrote contemporaneous handwritten notes in 1981 regarding law enforcement's contact with Mr. Smith. These notes corroborate Mr. Smith's 1997 version of the facts and contradict Mr. Pickard's 1997 testimony that Mr. Smith acted alone.[2] These handwritten notes show that Mr. Smith was a State agent with the express assignment to question Mr. Johnson. Smith was told what to ask and to make notes of Mr. Johnson's answers.

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[2]For example, one notation referencing Investigator Ben Wilkerson with the sheriff's office provided: "Ben - Smith had already talked to Johnson - Told Smith to make notes - Told [Smith] to keep ears open"(Def. Ex. 2).

At no time prior to the 2007 evidentiary hearing did the State ever "set the record straight" as required by Banks. Due process was violated when Mr. Johnson stood trial and again when the State failed to "set the record straight" in collateral proceedings. The State misled the presiding judge at the 1997 evidentiary hearing into believing Smith's claim that he was sent in and instructed to keep his ears open and make notes of Mr. Johnson's statements was false when it was true.[3]

The State's failure to set the record straight in 1997 resulted in the rejection of Smith's admission that his trial testimony had been false. The State's failure to set the record straight served as the basis for the denial of Mr. Johnson's motion to vacate. The State's failure to honor its constitutional duty cannot be viewed as harmless beyond a reasonable doubt to the extent that it is a clear violation of due process. The State's failure to advise Mr. Johnson's counsel that Mr. Pickard knew that law enforcement instructed

[3]After reviewing his handwritten notes, Mr. Pickard testified on December 4, 2007, "I'm sure [Mr. Smith] was told to listen, to take notes if he had an opportunity to take notes as to anything that Mr. Johnson said. He may have been even told to turn over the notes" (2PC-R. 1908).

Smith to keep his ears open and to take notes violated Brady and undermines confidence in the reliability of the decision to deny collateral relief. However, it is viewed - as Giglio error or as Brady error - the 1997 order finding Smith incredible and denying collateral relief cannot stand.

In light of its inherent unreliability under Banks, Mr. Johnson's conviction and sentence of death are inconsistent with the principles embodied in the Eighth and Fourteenth Amendments. Collateral relief is required.

STATEMENT OF THE CASE AND FACTS

The Eighth Judicial Circuit Court in Alachua County, Florida entered the judgments of convictions and sentences under consideration. Venue was changed from Polk County to Alachua County before the third trial in 1988. During post-conviction proceedings, venue was moved back to Polk County.[4]

[4] 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;

"R2" – record on second direct appeal to this Court;

"PC-R" – record on appeal of denial of first Rule 3.850

Mr. Johnson was arrested on January 9, 1981 (2PC-R. 173). On January 23, 1981, Mr. Johnson was charged by Indictment in Case No. 81-0112A1-XX. The indictment was reissued on March 6, 1981, and again on April 17, 1981. The indictment included three counts of first-degree murder, two counts of robbery, kidnapping, arson and two counts of attempted first-degree murder. During the 1981 proceedings, the Polk County State Attorney's Office represented the State. Hardy Pickard was assigned by the Polk County State Attorney's Office to be the trial prosecutor. Mr. Johnson pled not guilty.

A motion to suppress was filed by the defense, seeking to exclude statements that James Smith claimed that Mr. Johnson made while they were incarcerated together. In this motion, Mr. Johnson argued that Mr. Smith acted as a state agent in speaking to Mr. Johnson without providing Miranda warnings and without

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motion;

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

"ER" – volume of evidence introduced in 2007 on the second Rule 3.850 motion and paginated separately from the record.

honoring Mr. Johnson's invocation of his Sixth Amendment right to counsel.

At the suppression hearing, Mr. Smith acknowledged that in October, 1980 he had acted as informant for Investigator Ben Wilkerson with the Polk County Sheriff's Department (R. 1906). As an informant, Mr. Smith wore a wire so that his conversations could be monitored (R. 1907). In November, 1980, Mr. Smith was placed in the Polk County jail (R. 1907). While he was in the jail, Wilkerson visited Mr. Smith to "discuss[ ] some things" (R. 1907). Sometime later, Mr. Smith sought out Mr. Johnson.[5] Mr. Smith notified a detective with the sheriff's department within "a couple of days" of his first conversation with Mr. Johnson (R. 1908). Wilkerson then met with Mr. Smith (R. 1909). Mr. Smith testified that during the meeting with Wilkerson, they discussed the possibility of Mr. Smith talking with Mr. Johnson

[5]Mr. Johnson was arrested on January 9, 1981 (R. 1926). His initial appearance was on January 10, 1981 (R. 2142). At that time, the public defender was appointed to represent Mr. Johnson. On January 23, 1981, an indictment issued against Mr. Johnson (R. 2147). A second indictment issued on March 6, 1981 (2PC-R. 5). A third indictment issued on April 17, 1981 (2PC-R. 176).

more frequently in the future (R. 1910). Mr. Smith testified that there was no suggestion that he take notes or otherwise record his talks with Mr. Johnson (R. 1910). Mr. Smith was then returned to the jail and incarcerated.

Mr. Smith was placed in a single cell beside Mr. Johnson (R. 1913). While next door, Mr. Smith had extensive talks with Mr. Johnson. Mr. Smith wrote extensive handwritten notes that he testified reflected the statements that Mr. Johnson made to him (R. 1914). Subsequently, Mr. Smith met with Wilkerson and gave him the handwritten notes (R. 1915). Mr. Smith also gave a recorded statement.

Wilkerson also testified at the suppression hearing. He said his first conversation with Mr. Smith about Mr. Johnson occurred on February 5, 1981. Wilkerson testified that he had not previously told Mr. Smith to try to talk to Mr. Johnson. Wilkerson testified that he did not "give Smith any instructions on what to do in the future as far as going back and talking to Johnson again and getting more information" (R. 1927).

The State also produced Robert Wallace and George Elliott, investigators with the Polk County Sheriff's Department. They both testified that no one with law enforcement gave Mr. Smith any direction to have any contact with Mr. Johnson (R. 1931,

1932-33).

At Mr. Johnson's first trial in September, 1981, prosecutor Pickard argued that "Mr. Smith on his own, without talking with anybody from a police agency or the State or anyone else," decided to talk with Mr. Johnson and report the content of those conversations to law enforcement (R. 1942). Pickard said, "once they were aware that statements had been made to Mr. Smith they [police] made no request of him, did not tell him to go back and get more information" (R. 1943). Pickard concluded, "The issue is whether the police had anything to do with what Smith was doing. And they did not according to all the testimony from all the police officers and Mr. Smith, Smith did it on his own initiative" (R. 1946).

The presiding judge denied the motion to suppress. He concluded that when Mr. Smith took notes, he was "passively receiving those things. Finally, **Mr. Smith himself testified that he was doing it all on his own**" (R. 1948)(emphasis added). According to the judge, "the officers did not directly or surreptitiously or in any fashion direct Mr. Smith to do what he did" (R. 1949). The judge concluded that Mr. Smith was not a state agent.

During Mr. Johnson's first trial in September, 1981, the

defense presented an insanity defense. The State relied upon Mr. Smith's testimony regarding statements allegedly made by Mr. Johnson to refute the insanity defense. The jury returned a verdict of guilty on all counts. The trial court sentenced Mr. Johnson to death.

On direct appeal, Mr. Johnson challenged the denial of the motion to suppress. In affirming, this Court found that Mr. Smith had "**testified that he decided to take notes, solely on his own**, because he had trouble remembering things." Johnson v. State, 438 So. 2d 774, 776 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984)(emphasis added). This Court observed that the trial court had found that "**the detectives did not direct Smith, either directly or surreptitiously, to talk with Johnson or to take notes** on their conversations." Id. (emphasis added). This Court concluded, "We agree with the trial court that **this case presents a close question on whether Smith had become an agent of the state**, but we find the ruling that he had not to be supported by the evidence." Id. (emphasis added).

Mr. Johnson petitioned this Court for habeas relief when his death warrant was signed in 1986. Finding the habeas petition meritorious, this Court granted Mr. Johnson a new trial because the jury had been allowed to separate after it began

deliberations. Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986).

The case returned to circuit court for a retrial. In the intervening years, a new state attorney had been elected. Because of his defense work, a conflict required the Polk County State Attorney's Office to disqualify itself from this case (2PC-R. 1934, 2017). The Governor reassigned the case to the Hillsborough County State Attorney's Office (2PC-R. 2013). Lee Atkinson was assigned by Hillsborough County State Attorney to prosecute the case.

The second trial began in October 1987 in Polk County. Because of juror misconduct, a mistrial was declared. Afterward, the presiding judge granted the defense's motion to disqualify him and granted the defense motion for a venue change. Venue was moved to Alachua County, and this Court appointed a retired Eighth Judicial Circuit judge, Judge Carlisle, to preside (2PC-R. 176).

The third trial was held in Alachua County in April 1988; the prosecution of the case was handled by Mr. Atkinson with the Hillsborough County State Attorney's Office. Mr. Johnson was represented by the Polk County Public Defender's Office. Specifically assigned to represent Mr. Johnson were Larry

Shearer and Robert Norgard.

Mr. Johnson renewed his motion to suppress regarding the statements collected by Mr. Smith. The trial court again denied it finding that no evidence that law enforcement in any way encouraged Smith to speak with Mr. Johnson or take notes.

At his third trial, Mr. Johnson again presented an insanity defense based upon his long term addiction to crystal methamphetamine and his use of the drug on the day of the crimes (2PC-R. 1933). Expert testimony was presented that Mr. Johnson suffered from drug-induced psychosis at the time the offenses were committed (2PC-R. 1937).

In rebuttal, the State presented Mr. Smith's testimony that Mr. Johnson had said that "he could play like he was crazy and they would send him to the crazyhouse for a few years and that would be it" (R2. 2097)

The jury returned a guilty verdict on all counts. (R. 3350-3351). The jury recommended a death sentence by a vote of eight to four on Count I, nine to three on Count II, and nine to three on Count III. (R. 3616). The trial court imposed death sentences on Count I, II, and III. As to the other counts, the court sentenced Mr. Johnson to life for Count IV (Robbery), 15 years for Count V (kidnapping), 15 years for Count VI (arson),

life for Count VII (robbery), 30 years for Count VIII (first degree attempted murder) and 30 years for Count IX (first degree attempted murder). On appeal, this Court affirmed the convictions and sentences. State v. Johnson, 608 So. 2d 4 (Fla. 1992). With regard to Mr. Smith's testimony, this Court found that Mr. Johnson had not overcome the presumption that the trial court's factual determinations were correct. Johnson v. State, 608 So. 2d 4, 9 (Fla. 1992).

On August 1, 1994, Mr. Johnson timely filed a Rule 3.850 motion. Venue was returned to Polk County. Mr. Johnson amended his post-conviction motion on May 17, 1995. According to the State, the trial prosecutor's files could not be located and were not available to Mr. Johnson's collateral counsel as public records. Six days before the scheduled Huff hearing, and 59 days before the scheduled evidentiary hearing, the State announced that the trial prosecutor's files had been located and access was provided to Mr. Johnson's collateral counsel. A continuance to review and investigate any possible issues from those files was denied. The evidentiary hearing proceeded as scheduled in March 1997.

One of the issues Mr. Johnson raised was whether the State had withheld Brady material from Mr. Johnson and his counsel.

This claim largely concerned the informant, Mr. Smith, who was called as a witness at the 1997 evidentiary hearing (PC-R. 261). Mr. Smith testified about his previous statements and the testimony he gave at Mr. Johnson's trial. Mr. Smith admitted that his trial testimony had been false. Mr. Smith had understood that he would get consideration for testifying for the State at Mr. Johnson’s trial.

In 1997, Mr. Smith specifically emphasized that he was sent into the jail to try to question Mr. Johnson and obtain statements and admissions that could be used against him. Mr. Smith testified that he had been coached about what areas of questioning that he needed to cover with Mr. Johnson. He was asking questions of Mr. Johnson on behalf of Inv. Wilkerson:

> On a periodic basis I would see Mr. Wilkerson. He would come and call me down under the pretense of seeing a lawyer, and we would go into a little room on the first floor in the sheriff's department area and he would talk to me in there. And then I would go back up to the cell and ask questions that he would ask me to ask.

(PC-R. 261-262).

In 1997, Mr. Smith testified that he fabricated statements

that he attributed to Mr. Johnson in order to get out of the seven-year sentence he had hanging over his head. Mr. Smith made up answers to the questions he was told to ask Mr. Johnson to appease Investigator Wilkerson.

In 1997, Mr. Smith was specifically asked if Mr. Johnson told him “I will just act crazy to beat the charges” to which Smith answered "NO" (PC-R. 262). Thus, Mr. Smith had fabricated the testimony that Mr. Johnson would act crazy in order to get off. Mr. Smith also testified that Mr. Johnson did not make incriminating statements about the offenses:

> . . . Paul had some legal papers, a big stack of them, and between what Mr. Wilkerson would instruct me to ask and the legal papers is how most of the answers was determined.

(PC-R. 262).

Mr. Smith said his testimony about police never instructing him to get details from Mr. Johnson was not true - “They instructed me that I wasn't to say that they asked me to say anything.” (PC-R. 263).

In 1997, Mr. Smith testified that the police told him if he got helpful statements from Mr. Johnson, they would help him on his own criminal charges:

> They was going to, supposedly, I thought, help me in Court with the custody of my three kids, and at a later time when I went to court they was going to speak on my behalf to – to the sentencing judge and see if there could be a reduction in my sentence.

(PC-R. 263-264). Mr. Smith identified a letter he wrote to the state attorney on September 18, 1981 (received into evidence as Def. Ex. 11) and explained: "This letter was basically to see if Mr. Pickard was going to hold up his part of the deal." (PC-R. 264). Mr. Smith also identified another letter (received into evidence as Def. Ex. 12) he wrote to Hardy Pickard "to see where he was standing and if he was, in fact, going to go before the judge on my behalf" (PC-R. 265). Mr. Smith then identified another letter (received into evidence as Def. Ex. 15) that he had written to his sentencing judge (PC-R. 265-266). Mr. Smith explained that the purpose of his letters to the state attorney was to see if the state attorney was going to speak to the judge on his behalf in exchange for his testimony against Mr. Johnson (PC-R. 266). Mr. Smith identified hand written notes (received into evidence as Def. Ex. 6) he wrote while he was in the cell next to Mr. Johnson. Mr. Smith testified:

> Like I stated previously, Mr. Wilkerson would tell me what to ask. And in between Mr. Wilkerson and the papers, we just wrote it down, **Mr. Wilkerson told me to write it down because I couldn't remember everything that he was telling me to ask Mr. Johnson. So he come up with the idea that I needed to start writing and keeping notes**.

(PC-R. 267)(emphasis added). In 1997, Mr. Smith explained to the court what he did with Mr. Johnson's legal papers:

> I read them. Paul said he couldn’t read real well. And we read them for -- it took a while to read them to him. We was pretty close, side-by-side, just a little steel wall separating us.

(PC-R. 269). Reminded of his previous trial testimony against Mr. Johnson, Smith was asked “what is the truth?” Mr. Smith responded “I’m telling the truth now.” He then testified:

> The truth is exactly what I'm saying today. I was under extreme pressure from the detective that was speaking with me. And I was instructed very well not to say anything, that they was instructing me about what to say because the case would crumble. But today I'm telling the truth.

(PC-R. 269). Mr. Smith testified that he worked for Wilkerson in the past on arson cases wearing body wires (PC-R. 270). Mr. Smith identified a *Motion for Mitigation of Sentence* (received into evidence as Def. Ex. 14) dated October 6, 1981 that said he was trying to get his sentence mitigated, that he also filed appeals. Mr. Smith testified that Mr. Pickard had told him to file the motion to reduce his sentence and that Mr. Pickard would help him out. Mr. Smith testified that the *Motion to Mitigate Sentence* was denied (denial order received into

evidence as Def. Ex. 15) and that he went back into court.

Mr. Smith identified Def. Ex. 16, *Order Resetting Hearing* dated November 16, 1981 and Def. Ex. 17 *Order Suspending Sentence* and explained:

> I think I filed an appeal first and then I spoke with Mr. Pickard, and he said that -- anyway, one come before the other one and I had it wrong. And then when one was denied and the other one was denied, that's when I got hold of Mr. Pickard and told him that -- actually, I thought he was going to do something and he hadn't, and then I guess he took over from there.
>
> [Q]. And what was your understanding that the State was going to do for you in exchange for your testimony against Mr. Johnson?
>
> [A]. I would go back to court and try to get my
>
> sentence reduced.

(PC-R. 274-275).

Regarding Mr. Johnson's retrial in 1988, Mr. Smith testified in 1997 that "I didn't want nothing else to do with the trial" (PC-R. 275). He identified a letter (entered into evidence as Def. Ex. 18) dated July 7, 1987 that he wrote when he learned that he would again be needed to testify:

> I had wrote back and told him that I didn't want
>
> nothing else to do with the trial and that I didn't
>
> want to testify. And he basically said that, you
>
> know, you're going to testify. We're going to writ
>
> you or whatever, bring you back, and you're going to
>
> testify whether you want to or not.

(PC-R. 275-276).

Mr. Smith said he had come forward to testify at the 1997 hearing because he did not want to carry his false trial testimony inside of him for the rest of his life. Mr. Smith testified that he was appearing freely and voluntarily, and had nothing to gain by coming forward to correct his previous false testimony (PC-R. 276-277).

On cross examination, Mr. Smith said he did not want to have any part of someone dying, and that he had big reservations about testifying at the retrial as he wrote in his letter. Mr. Smith could not remember the exact words the State Attorney used to convince him to testify in 1988. He had testified at the 1988 trial that no promises were made to him:

> . . . because I was specifically told that if I did say that anything was promised me or anything, that it could bring another trial and possibly no conviction.

(PC-R. 286-288). "Before I went into the court he told me that I had to stick to exactly what I said."

Mr. Smith previously testified that the police did not put him up to anything and that it was his idea to write things down. Regarding his admission that those statements were lies, he said:

> There's just a point in your life that you've got to do what's right . . . I guess I've carried it inside for a long time, for a lot of years.

(PC-R. 289).

> I wrote the information down -- like I was telling this lady over here a while ago, **Mr. Wilkerson would**

> **ask me -- tell me things to ask him and I would ask him**. And then when I read Paul's papers with Mr. Wilker --What Mr. Wilkerson said in the papers, I would write it down and give it to Mr. Wilkerson. About every two or three days he would come and get the papers and then he would tell me some other things to ask.

(PC-R. 290)(emphasis added). Regarding where he got specific information, Mr. Smith could not say exactly where he got each piece but that some of the information came from television newscasts, some from Mr. Johnson's legal papers, some from Inv. Wilkerson, and some from Mr. Johnson (PC-R. 291, 294).

After Mr. Smith's testimony concluded in 1997, the State called Mr. Pickard to rebut Mr. Smith's testimony. The State elicited testimony from Mr. Pickard that he had no recollection of any agreement with Smith other than that his cooperation would be made known to the parole commission (PC-R. 357):

> Q. Prior to the trial commencing were there any other agreements with Smith, that you can recall or know of by yourself or the agents for law enforcement, that were not disclosed to the defense?
>
> A. Not that I have any recollection of.
>
> Q. Were there any suggestions or directions given by you to Smith as to what he should do or could do or must do in terms of testifying or gathering information?
>
> A. The only thing I told Mr. Smith is that he would be required to testify truthfully. As far as I know that's what he did.

(PC-R. 357-58).[6]

On the basis of Mr. Pickard's sworn testimony and the State's arguments based upon that testimony, the presiding judge concluded that Mr. Smith's 1997 recantation was not credible. The judge accepted Mr. Smith's original trial testimony as truthful and rejected Mr. Johnson's claims premised upon Mr. Smith's recanted testimony. On appeal, this Court affirmed. Johnson v. State, 769 So. 2d 990 (Fla. 2000).

Mr. Johnson filed for habeas relief on October 10, 2001, asserting ineffective assistance of appellate counsel and

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[6]The State did not reveal that certain handwritten notes contained in the Hillsborough County State Attorney's files disclosed less than sixty days before the evidentiary hearing had been written by Mr. Pickard, a Polk County prosecutor. Nor did the State ask Mr. Pickard about these notes during his testimony. Only years later did Mr. Johnson's collateral counsel learn that these cryptic handwritten notes had been made by Mr. Pickard regarding law enforcement's contact with Mr. Smith in February, 1981. As set forth *infra*, these handwritten notes contradict Mr. Pickard's 1997 testimony and corroborate Mr. Smith's 1997 testimony.

fundamental error. The petition was denied by this Court on September 26, 2002. Johnson v. Moore, 837 So. 2d 343 (Fla. 2002).

On February 7, 2003, Mr. Johnson filed a 3.850 motion in light of the decision in Ring v. Arizona, 122 S. Ct. 2428 (2002). On March 11, 2005, the court entered a written order denying Rule 3.850 relief (2PC-R. 289-93). Mr. Johnson timely filed an unsuccessful appeal to this Court. Johnson v. State, 933 So. 2d 1153 (Fla. 2006).

On April 27, 2007, Mr. Johnson filed a second Rule 3.851 motion (2PC-R. 1279). Claim I of this motion alleged a due process violation under Banks v. Dretke, 540 U.S. 668 (2004), Giglio v. United States, 405 U.S. 150 (1972), and Brady v. Maryland, 373 U.S. 83 (1963). This claim was premised upon new information that had surfaced in other capital cases prosecuted by Mr. Pickard. This new information revealed that handwritten notes in the Hillsborough County State Attorney's files had been written by Mr. Pickard from the Polk County State Attorney's Office. The notes reflected statements obtained by Mr. Pickard in 1981 which were exculpatory within the meaning of Brady.

In the motion to vacate, Mr. Johnson also presented claims challenging Florida's lethal injection protocol, and Florida's

capital sentencing scheme under Furman v. Georgia, 408 U.S. 238 (1972), in light of a recent ABA Report concerning the deficiencies in the structure of Florida's capital procedures. The circuit court held an evidentiary hearing on Mr. Johnson's Brady claim. The other claims were summarily denied.

At the December 2007 evidentiary hearing, Mr. Pickard's handwritten notes regarding James Smith were introduced as Def. Ex. 2 (ER. 9-14; 2PC-R. 1895-1914). Mr. Pickard identified five pages of notes. They show Smith's taped statement occurred on February 6th at 11:00 AM (ER. 11, 2PC-R. 1899).

One notation states: "James Smith - taped - Feb 6 - 11:00 AM - 1st report he wrote - Feb 8".

Another notation on the same page states: "Ben - Smith had already talked to Johnson - Told Smith to make notes - Told [Smith] to keep ears open" (ER. 11).[7]

The next notation on the same page provides: "1st contact - Feb. 5 - 1:29 PM - his request. 2-3 days prior got message

[7]When Mr. Pickard reviewed his notes on December 4, 2007, he testified: "I'm sure [Mr. Smith] was told to listen, to take notes if he had an opportunity to take notes as to anything that Mr. Johnson said. He may have been even told to turn over the notes" (2PC-R. 1908).

Smith wanted to see. Told Lang - he to have someone talk to Smith - Next saw - 11th - turned over pages - Make notes as to future conversation - Wilcox - talk to me + Glen about agent theory" (ER. 11, 2PC-R. 1908).[8]

A portion of Mr. Pickard's handwritten notes was in the form he often used for statements compelled through a state attorney subpoena. Mr. Pickard did not remember if a state attorney subpoena was necessary in this case since Mr. Smith was in custody (ER. 13, 2PC-R. 1895). This note said Mr. Pickard personally took a statement from Smith on February 16th (2PC-R.

[8]These handwritten notes clearly corroborate Mr. Smith's testimony in 1997 regarding his contact with law enforcement and the direction he had been provided to get statements and make notes. These notes corroborate Mr. Smith's 1997 testimony that he was meeting with law enforcement on a regular basis to receive instructions as to what information to try elicit. These notes also breath new meaning into Mr. Smith's trial testimony that after he went to law enforcement, his jail housing location was moved closer to Mr. Johnson's location. He was then moved to be still closer to Mr. Johnson's location. He was kept there until around May 1st (R. 2072-73).

1909-11).[9] One notation reads, “In cell right next to [defendant] - Wilkerson has many notes” (ER. 13)

Another notation reads Mr. Smith said “Randy Wilson may be involved.” Mr. Pickard specifically recorded “in jail for resisting, burglary, etc. Given 7 yrs. prison.” (ER. 14).

Still another handwritten note penned by Mr. Pickard was also in the form he often used for statements compelled through a state attorney subpoena. This note showed that Mr. Pickard took another statement from Mr. Smith on February 19th, three days after the previous one (ER. 10, 2PC-R. 1898).[10] The

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[9]What trial and collateral counsel did not know prior to the fall of 2006 was that Mr. Pickard personally met with Mr. Smith on February 16th and February 19th in order to interview him and obtained sworn statements. These interviews occurred while Mr. Smith was continuing to gather information from Mr. Johnson and at the same time the jail moved Mr. Smith closer to Mr. Johnson. Mr. Smith remained next to Mr. Johnson until May 1, 1981 (R. 2072-73).

[10]Mr. Smith’s appearance before Mr. Pickard on February 19th, three days after the appearance on February 16th, would suggest that Smith had been returned to the jail to continue gathering

handwritten note concerned a February 19th statement that included the phrase "witness sworn" meaning Mr. Pickard placed Mr. Smith under oath when he took the statement (ER. 10). This note also included a reference to Randy Wilson - "Talks about Randy Wilson all the time."[11] The note also referenced that Mr. Smith used to live with Kathy Weeks, Ronnie Joe Halley's sister. Neither it, nor the notes from the February 16th interview, included any reference to Mr. Johnson acting "crazy" in order to beat the charge.

Beside the handwritten notes of Mr. Smith's compelled appearances before Mr. Pickard, the notes document Amy Reid's compelled appearance on January 21, 1981 (ER. 3-8). In these notes, Mr. Pickard recorded his understanding of Ms. Reid's statements. Ms. Reid told Mr. Pickard that while she and the victim were with Mr. Johnson before the homicide, Mr. Johnson

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evidence for the State.

[11]The references to Randy Wilson were a suggestion that he might be involved in the homicides with Mr. Johnson. This reference to Mr. Wilson is a specific example of Mr. Smith fabricating information to please law enforcement who also were investigating Mr. Wilson. Later, it became clear that Randy Wilson had no involvement in the crime.

explained that he “was working in Miami - came to Lkld. To get crystal meth.” According to Ms. Reid, the victim “had one joint - smoked with [defendant]”. Ms. Reid also discussed the photo lineup in which she picked out Mr. Johnson’s picture; “photo I.D. - prior to lineup - tentative I.D.” Ms. Reid did acknowledge that she had since the murder “seen [defendant] in paper + also next to composite.”[12]

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[12]The content of these notes must be contrasted with Ms. Reid’s trial testimony. When called by the State at trial, Ms. Reid had testified that she positively identified Mr. Johnson’s photo during the photo lineup (R. 1455). No mention was made of the tentative nature of the identification. Nor was there any indication that after the photo lineup she had seen news coverage that included photographs of Mr. Johnson. During her trial testimony, Ms. Reid was asked if she was familiar with people who had been using crystal meth (R. 1458). Ms. Reid indicated that she was, but that Mr. Johnson’s behavior that she observed “was nothing at like that.” Ms. Reid made no mention of Mr. Johnson’s statement that he had come to Lakeland to get crystal meth. The notes from Reid’s January 21st statements contained evidence favorable to the defense which were not disclosed. Ms. Reid’s trial testimony was not corrected by the

In his 2007 testimony, Mr. Pickard identified the handwriting in the notes as his. He acknowledged that the notes reflected his interviews of Mr. Smith and Ms. Reid. The notes also reflected the content of a number of his conversations with law enforcement regarding Mr. Smith. As Mr. Pickard explained on December 4, 2007, when he reviewed the notes: "I'm sure [Mr. Smith] was told to listen, to take notes if he had an opportunity to take notes as to anything that Mr. Johnson said. He may have been even told to turn over the notes" (2PC-R. 1908). Mr. Pickard specifically testified that his "understanding [was] that Ben Wilkerson had told Mr. Smith to keep his ears open and to make notes" (2PC-R. 1927).

Mr. Pickard also testified in 2007 that he would not have disclosed the handwritten notes or their content to either Mr. Johnson or his counsel (2PC-R. 1911). Mr. Pickard testified that he would not have revealed that Mr. Smith or Ms. Reid made inconsistent statements to him if they contradicted those statements when they testified against Mr. Johnson either in a deposition or at trial (2PC-R. 1912-13). Mr. Pickard explained: "I did not believe anything in my notes could be used to impeach the witness." (2PC-R. 1913).

State.

Mr. Johnson's trial counsel, Robert Norgard, testified at the 2007 hearing that he was not provided any information by the State that law enforcement sent Mr. Smith into the jail with the instruction that he keep his ears open and take notes from Mr. Johnson (2PC-R. 1941-43). Mr. Norgard viewed any evidence or information that such instructions were given to be very favorable to Mr. Johnson's case. Mr. Norgard believed that such evidence or information that was in the State's possession should have been turned over under Brady. Mr. Norgard was certain that had he been aware of Pickard's notes detailing law enforcement's contact with Mr. Smith in February of 1981 and the instructions to Mr. Smith regarding his contact with Mr. Johnson that he would have presented the extensive contact to the jury. He also would have presented these facts in support of the motion to suppress (2PC-R. 1939-42). Mr. Norgard also would have used the information contained in the notes to cross-examine Smith and impeach him during his testimony at Mr. Johnson's trial. He also would used the information contained in the notes at the penalty phase as well. In fact, Mr. Norgard testified that information in the handwritten notes concerning Mr. Smith was precisely "the type of information we were looking for" when seeking Brady material in advance of Mr. Johnson's

1988 trial (2PC-R. 1944).

Mr. Norgard also unaware that Ms. Reid had advised Mr. Pickard about Mr. Johnson's statements regarding "meth" and that her identification of Mr. Johnson had been tentative (2PC-R. 1937). Mr. Norgard said this information from Reid's statement to Pickard would have been favorable to the defense and would have been used by the defense at trial. These statements by Ms. Reid would have been supported Mr. Johnson's defense regarding his use of "meth" and to impeach Ms. Reid at trial (2PC-R. 1938-39).

Hillsborough County prosecutor, Lee Atkinson, also was called to testify at the 2007 evidentiary hearing. He reviewed Mr. Pickard's handwritten notes that had been introduced into evidence. Mr. Atkinson testified that to the extent that he would have been aware of these notes prior to the 1988 trial, he saw nothing in the notes that would have been discoverable by the defense. Specifically, he testified:

> In my opinion that - - that's attorney work product. Some of it's double hearsay. Some of it is clearly mental impressions. None of it is - - appears to be verbatim. So, no, I would not have considered that to have been discoverable.

(2PC-R. 2024). As to statements made by a witness to the prosecuting attorney, Mr. Atkinson testified:

> In fact, that had been an issue that had come up in our office when we had done revamping of our own intake system, and the issue had come up as to whether or not statements made to the state attorney in his investigative capacity were discoverable by the Public Defender's Office because he had taken the position they were and we had thoroughly researched that issue.
>
> And – and as I recall had gone so far as to get a court ruling that, in fact, those documents were not discoverable. So whatever form they came in, however they had been produced, I would - - even under those circumstances would not have considered them to be discoverable.

(2PC-R. 2025).

Candance Sabella, the assistant attorney general who was counsel of record during the 1997 proceedings, was called by Mr. Johnson at the December 4, 2007, hearing. She testified that in December, 1996 it was discovered that her office was in possession of the prosecutor's trial file, *i.e.* the file maintained by Mr. Atkinson at the 1988 retrial (2PC-R. 2077-78). Ms. Sabella was unsure of when she obtained possession of the file or how long she possessed it (2PC-R. 2077). She testified that she had no memory of reviewing the contents of the file, nor did she have any memory of Pickard's handwritten notes (2PC-R. 2079). Ms. Sabella clarified that she was not saying that in 1996 she had not looked at the file, but merely that she had no memory of doing so (2PC-R. 2081).

Ms. Sabella further testified that there was nothing in the

handwritten notes indicating who had written the notes or when they were recorded (2PC-R. 2082). She indicated that looking at the exhibit, "I don't know who wrote it" (2PC-R. 2082). She also indicated that she made no effort to determine who had written the notes or what their significance was (2PC-R. 2082).

Both Mr. Atkinson and Ms. Sabella testified that even though they each had possessed the file that contained the handwritten notes that were introduced into evidence, they were unaware of anything in the notes that was discoverable by the defense. In fact, Mr. Atkinson specifically testified that he did not read the handwritten notes as containing any information favorable to Mr. Johnson.

Heidi Brewer had been Mr. Johnson's collateral counsel at the time of the 1997 evidentiary hearing. At the 2007 hearing, she testified that she had been seeking public records in Mr. Johnson's case after she was assigned to it in 1994 (2PC-R. 1958). Ms. Brewer sought the public records in the State Attorney's possession. However, there was confusion within the State Attorney's Office as to the location of the trial prosecutor's files (2PC-R. 1960). It was not until the eve of the Huff hearing in January of 1997 that Ms. Brewer received the trial prosecutor's file (2PC-R. 1962). The trial prosecutor's

files were located at the Attorney General's Office instead of the Hillsborough County State Attorney's Office (2PC-R. 1961-62). The trial prosecutor's file was contained in two banker boes and contained thousands of pages of material (2PC-R. 1962).

The evidentiary hearing had already been set to begin in the first part of March, 1997. After receiving the trial prosecutor's file nearly two years after the Rule 3.850 motion had been filed and the public records had been requested, Ms. Brewer sought a continuance and asked for an opportunity to conduct discovery depositions regarding the material contained in the trial prosecutor's file (2PC-R. 1963). All of her efforts to seek additional discovery were denied and the evidentiary hearing proceeded as scheduled in March of 1997 (2PC-R. 1963-64).

Ms. Brewer testified that the handwritten notes introduced into evidence at the 2007 hearing had been included in the two banker boxes that were provided to her in January of 1997 (2PC-R. 1964). However, there was nothing to indicate who wrote the notes or when the notes were written (2PC-R. 1964-65). There was no context for the notes that were contained in the files of the Hillsborough County prosecutor who was Mr. Johnson's trial prosecutor. Ms. Brewer was not told by anyone from the State

what the handwritten notes were, who wrote them, or when they were written (2PC-R 1965-67).

Terri Backhus, Mr. Johnson's current court-appointed collateral counsel, was called to testify in 2007. Ms. Backhus indicated that she was appointed to represent Mr. Johnson after Ms. Brewer withdrew as counsel in 2004 (2PC-R. 2097). Ms. Backhus testified that in the summer of 2006 she had a casual dinner with another capital defense attorney, Martin McClain, while she was in Fort Lauderdale. Mr. McClain had been working on the David Pittman case out of Polk County. He had recently had an evidentiary hearing in the case at which Mr. Pickard testified (2PC-R. 2085-87). In the course of the conversation, Mr. McClain began talking about the case he was working on at the time, Mr. Pittman's, and explained Mr. Pickard's use of state attorney subpoenas to conduct under oath interview of witnesses (2PC-R. 2097). Mr. McClain also explained Mr. Pickard's note taking practices and how Mr. Pickard viewed the sworn statements and the notes regarding them as not subject to discovery under Brady (2PC-R. 2086, 2097). As the conversation unfolded, Ms. Backhus advised Mr. McClain that Mr. Pickard had been the original prosecutor in Mr. Johnson's case (2PC-R. 2085). Accordingly, he suggested that she look through whatever

files she had and see if there were any unidentified handwritten notes, and if so, send them to him so that he could see if they were in Mr. Pickard's handwriting and/or in the format he used to memorialize under oath statements that he elicited from witnesses (2PC-R. 2085-87, 2097).

Upon Ms. Backhus' return to Tampa, she went through the materials in Mr. Johnson's case. She located copies of the files that the Attorney General provided to Ms. Brewer in January, 1997. She found a large number of pages of handwritten notes which she sent to Mr. McClain to review (2PC-R. 2098-2100). When Mr. McClain reviewed those handwritten notes, he saw that a large number of the pages that were in Mr. Pickard's handwriting and were in the format that he used to memorialize sworn statements he obtained through his use of state attorney subpoenas (2PC-R. 2094, 2100). Ms. Backhus then drafted a Rule 3.851 motion which she filed on behalf of Mr. Johnson on April 27, 2007.

After the evidentiary hearing was concluded and written closing arguments had been submitted, the circuit court entered an order denying Rule 3.851 relief on April 9, 2008 (2PC-R. 2204). The judge indicated that because Ms. Brewer was provided the handwritten notes in January of 1997, she should have raised

Mr. Johnson's claims based on the notes at that time. Because she had not done so, Mr. Johnson's claim which was raised in his 2007 motion to vacate was procedurally barred (2PC-R. 2255).[13] The circuit court concluded that even if the claim premised upon the notes was not procedurally barred, relief would still be denied. The circuit court explained that a previous judge, Judge Bentley, had considered Mr. Johnson's Brady claim after the 1997 evidentiary hearing, and found it meritless. The circuit court concluded, "The information contained in the state

[13]The circuit court did not address the language in Banks that required the State to "set the record straight". Nor did the circuit court address the fact that the Assistant Attorney General and the Assistant State Attorney, who both had obligations to review their files and disclose exculpatory information, had reviewed the handwritten notes and found nothing exculpatory about them when viewed without the context of who wrote them, when they were written, and the context in which they were written. If favorable nature of the notes was so obvious, then the State's failure to correct the false and misleading evidence presented at the suppression hearing in 1981, at the 1988 trial, and/or at the 1997 evidentiary hearing must have violated due process.

attorney notes does not clearly show that Judge Bentley's conclusion was in error" (2PC-R. 2258). The circuit court further found that undisclosed statements reporting comments made by the defendant to a witness could not be Brady material - "Presumably, if Mr. Johnson had said something like this to Ms. Reid, Mr. Johnson should have known about it. The defense would have been aware of it." (2PC-R. 2259).[14]

From the order denying relief, Mr. Johnson has appealed.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief in Argument I present mixed questions of fact and law. As such, this Court is required to give deference to findings of historical fact. However, legal conclusions of the lower court

[14]The circuit court premised this conclusion upon the notion that if the defendant was aware that he had made the statement, "the information [was] equally accessible to the defense and the prosecution" (2PC-R. 2259). Of course, this overlooked the fact that what was not disclosed was the sworn statement Ms. Reid made to Mr. Pickard in which she reported comments made by Mr. Johnson. Neither Mr. Johnson nor his counsel had access to the sworn statement made by Ms. Reid to Mr. Pickard.

are to be reviewed *de novo*. See Ornelas v. U.S., 517 U.S. 690 (1996); Stephens v. State, 748 So.2d 1028 (Fla. 1999).

The claims presented in Arguments II and III of this brief are constitutional issues on which no evidentiary development occurred. Where the circuit court denied an evidentiary hearing, the facts alleged by the Appellant must be accepted as true for purposes of this appeal in order to determine whether the Appellant is entitled to an opportunity to present evidence in support of his factual allegations. Peede v. State, 748 So. 2d 253 (Fla. 1999); Gaskin v. State, 737 So. 2d 509 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The review conducted on such claims is *de novo*.

SUMMARY OF THE ARGUMENTS

1. Mr. Johnson was deprived of an adequate adversarial testing at his capital trial where favorable information contained in the prosecutor's file which impeached the State's witnesses and supported Mr. Johnson's defense was not presented to the jury because it was either not disclosed by the State or unreasonably undiscovered by defense counsel. Due process was violated where the State hid notes reflecting that a jailhouse informant gave uncorrected false or misleading testimony about his contact with law enforcement and about discussions with Mr. Johnson. Had the witness' contact with the police and the instructions he received from them been disclosed, the witness' testimony would have been suppressed. The failure to correct

the testimony was not harmless.

Moreover, confidence is undermined in the outcome when all of the withheld favorable information is evaluated cumulatively. The State's presentation of false or misleading testimony at the 1997 post-conviction hearing to rebut Mr. Smith's admission that his trial testimony was false violated due process and requires that this Court's denial of Mr. Johnson's 1997 claims must be vacated as the denial is based on Mr. Pickard's false or misleading testimony and a violation of due process.

2. Mr. Johnson was deprived his due process rights of notice and opportunity to be heard and to present evidence on his challenge to Florida's lethal injection procedures. Mr. Johnson filed his challenge to the lethal injection procedures in light of the events during the execution of Angel Diaz. Mr. Johnson's challenge was filed before the evidentiary hearing in Lightbourne v. McCollum had started. Even though Mr. Lightbourne was given an opportunity to be heard and present evidence on his challenge to the lethal injection procedures, Mr. Johnson was denied that right when the circuit court erroneously ruled that this Court's case law predating the Diaz execution precluded a challenge to the lethal injection procedures.

3. The manner in which Florida's capital sentencing scheme operates is arbitrary and capricious within the meaning of the Eighth Amendment, and thus unconstitutional. Arbitrary factors are present and can be seen in Mr. Johnson's case. Accordingly, his sentence of death stands in violation of the Eighth Amendment principles enunciated in Furman v. Georgia.

ARGUMENT I

MR. JOHNSON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR KNOWINGLY PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE, AND/OR THE FAVORABLE EVIDENCE CONSTITUTES NEWLY-DISCOVERED EVIDENCE OF INNOCENCE WHICH UNDERMINES CONFIDENCE IN THE RELIABILITY OF THE TRIAL CONDUCTED WITHOUT THE EVIDENCE PRESENTED AND/OR THE STATE'S FAILED TO DISCLOSE EXCULPATORY INFORMATION IN THE COURSE OF PREVIOUS 3.850 PROCEEDINGS DEPRIVED MR. JOHNSON OF DUE PROCESS.

A. Introduction

In Strickland v. Washington, 466 U.S. 668, 685 (1984), the 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." In order to guarantee that a constitutionally adequate adversarial testing occurs, constitutional obligations are imposed upon both the prosecutor and the defense attorney. Failure to function as required will generally warrant a new trial where confidence is undermined in the reliability of the outcome of the trial. Brady v. Maryland, 373 U.S. 83, 87 (1963). But when the State engages in deliberate deception, a new trial is warranted unless the State proves the error harmless beyond a reasonable doubt. Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003)("[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.").

B. The Prosecutor's Obligations

1. Giglio obligation

a. legal standard

In Giglio v. United States, 405 U.S. 150, 153 (1972), the U.S. 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.'" In Gray

v. Netherland, 518 U.S. 152, 164-65 (1996), the Supreme Court explained:

> "Yet another way in which the state may unconstitutionally . . . deprive [a defendant] of a meaningful opportunity to address the issues, is simply by misinforming him." Brief for Petitioner 34. Petitioner cites *In re Ruffalo*, 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968), *Raley* v. *Ohio*, 360 U.S. 423, 3 L. Ed. 2d 1344, 79 S. Ct. 1257 (1959), and *Mooney* v. *Holohan*, 294 U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340 (1935), for this proposition. *Ruffalo* was a disbarment proceeding in which this Court held that the disbarred attorney had not been given notice of the charges against him by the Ohio committee which administered bar discipline. 390 U.S. at 550. In *Raley*, the chairman and members of a state investigating commission assured witnesses that the privilege against self-incrimination was available to them, but when the witnesses were convicted for contempt the Supreme Court of Ohio held that a state immunity statute rendered the Fifth Amendment privilege unavailable. 360 U.S. at 430-434. And in *Mooney* v. *Holohan*, the defendant alleged that the prosecution knowingly used perjured testimony at his trial. 294 U.S. at 110.
>
> *Gardner, Ruffalo, Raley*, and *Mooney* arise in widely differing contexts. *Gardner* forbids the use of secret testimony in the penalty proceeding of a capital case which the defendant has had no opportunity to consider or rebut. *Ruffalo* deals with a defendant's right to notice of the charges against him. Whether or not *Ruffalo* might have supported petitioner's notice-of-evidence claim, see *infra*, at 169-170, it does not support the misrepresentation claim for which petitioner cites it. *Mooney* forbade the prosecution from engaging in "a deliberate deception of court and jury." 294 U.S. at 112. *Raley*, though involving no deliberate deception, held that defendants who detrimentally relied on the assurance of a committee chairman could not be punished for having done so. ***Mooney*, of course, would lend support to petitioner's**

> **claim if it could be shown that the prosecutor deliberately misled him**, not just that he changed his mind over the course of the trial.

(Emphasis added).

This principle is an outgrowth of 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). As a result, 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 at a criminal trial. Mooney v. Holohan, 294 U.S. 103 (1935). Intentional sandbagging the defense to gain a strategic advantage is not permitted. The Supreme Court has concluded that on the basis of Mooney the Fourteenth Amendment due process was implicated where the prosecution deliberately misled the defense. Gray v. Netherland, 518 U.S. at 165.

This Court has stated, "[t]ruth is critical in the operation of our judicial system." Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument or allows it to stand uncorrected

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. at 433 n.7. The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, but also has a duty to alert the defense when a State's witness gives false testimony, and to refrain from deception of either the court or the jury. Alcorta v. Texas, 355 U.S. 28 (1957)Garcia v. State, 622 So.2d 1325 (Fla. 1993)United States v. Bagley, 473 U.S. 667, 678 (1985), quoting United States v. Agurs, 427 U.S. 97, 102 (1976). Thus, if there is "any reasonable likelihood" that uncorrected false and/or misleading argument affected the verdict (as to both guilt-innocence and penalty phase), relief must issue. In other words, where the prosecution violates Bagley, 473 U.S. at 679 n.9.

This Court has stated, "[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." Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004)Berger v.

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[15]Mr. Johnson was arrested on January 9, 1981 (R. 1926). His initial appearance was on January 10, 1981 (R. 2142). At that time, the public defender was appointed to represent Mr. Johnson. On January 23, 1981, an indictment issued against Mr. Johnson (R. 2147). A second indictment issued on March 6, 1981 (2PC-R. 5). A third indictment issued on April 17, 1981 (2PC-R. 176).

[16]If defense counsel was not diligent, then his performance was deficient and failed to meet the constitutional standards imposed upon him. State v. Gunsby, 670 So.2d 920 (Fla. 1996). As a result, the claim converts into an ineffective assistance of counsel inquiry that will then turn on whether confidence is undermined in the reliability of the trial, *i.e.* the same standard at issue if the claim is resolved as a Brady claim.

[17]This 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. Floyd v. State, 902 So.2d 775 (Fla. 2005); Mordenti v. State, 894 So.2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. 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).

[18]Even though this Court has denied claims similar to Mr. Johnson's claim in other cases, Mr. Johnson is obligated to present his claim to this Court in order to "exhaust" for

purposes of seeking federal habeas relief. As this Court's precedent holds, Mr. Johnson cannot summarily present his constitutional arguments or rely upon pleadings detailing the claim that was presented in the circuit court. By virtue of his obligation to "exhaust" his constitutional claims, and by virtue of his obligation to fully brief the claim before this Court in order to have the merits heard, Mr. Johnson must set forth his detailed argument even though this Court has adversely decided claims like his in other cases.

[19]Procedurally, Johnson's case is similar to Schwab in that the lethal injection claim was denied without an evidentiary hearing being conducted. However, it is clear from this Court's opinion that Mr. Schwab waited until after his warrant was signed in July of 2007 to file lethal injection challenge based on the Diaz execution. However, Johnson filed his Rule 3.851 in April of 2007, well before the Lightbourne evidentiary hearing had begun.

[20]This Court also noted in its Schwab opinion that the circuit court there had asserted that judicial economy would not be served if it were to hold an evidentiary hearing on the same issue litigated in Lightbourne. Clearly, this Court did not

accept this reasoning when it found error.

[21]The touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). The deprivation of this bedrock due process right is structural error that can be no more harmless that the denial of the right to trial by jury.

[22]Mr. Johnson notes at the outset that this Court addressed a similar claim in Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006). In addressing the merits of the claim and denying relief, this Court indicated that Rutherford had failed to demonstrate how the arbitrary factors outlined by the ABA Report prejudiced him. Mr. Johnson presents this claim herein because he believes that he can demonstrate the prejudice that this Court found necessary, but wanting in Rutherford.

Even though this Court has denied claims similar to Mr. Johnson's claim in other cases, Mr. Johnson is obligated to present his claim to this Court in order to "exhaust" for purposes of seeking federal habeas relief. As this Court's precedent holds, Mr. Johnson cannot summarily present his constitutional arguments or rely upon pleadings detailing the claim that was presented in the circuit court. By virtue of his obligation to "exhaust" his constitutional claims, and by virtue of his obligation to fully brief the claim before this Court in order to have the merits heard, Mr. Johnson must set forth his detailed argument even though this Court has adversely decided claims like his in other cases.

[23]The previous year, the U.S. Supreme Court in McGautha v. California, 402 U.S. 183 (1971), had considered whether:

> the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that

> no State shall deprive a person of his life without due process of law.

McGautha, 402 U.S. at 196. In the majority opinion written by Justice Harlan, the Court found no due process violation. In reaching this conclusion, the majority noted the impossibility of cataloging the appropriate factors to be considered:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability . . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

Id. at 204, 208. When Furman reached the Court the next year and the Petitioners argued that the statutory schemes for imposing a sentence of death violated the Eighth Amendment, Justice Stewart and Justice White joined the dissenters from McGautha and found that the death penalty statutes were indeed unconstitutional.

[24]Each found the manner in which the death schemes were then operating to be arbitrary and capricious. Furman, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); Id. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); Id. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); Id. at 313 (White,

J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); Id. at 365-66 (Marshall, J., concurring)("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.")(footnote omitted).

[25]It is important to recognize that the decision in Furman did not turn upon proof of arbitrariness as to one individual claimant. Instead, the Court looked at the systemic arbitrariness. Furman involved a macro analysis of a death penalty scheme and a determination as to whether the scheme permitted the death penalty to be imposed in an arbitrary and/or capricious manner.

[26]A plethora of factors contribute to an innocent individual being convicted of a capital crime. Given the number of exonerations so far, undoubtedly a risk that an innocent has been or will be executed in Florida is great. Certainly, such an occurrence would be itself violative of the Eighth Amendment. However also important under Furman are the systemic safeguards in place and their likely effectiveness in rescuing the innocent. This section focuses on the problems in Florida's rules and procedures that inhibit a condemned's ability to bring claims of newly discovered evidence of actual innocence, and inhibit his chances of being able to establish his innocence.

[27]The unanswered question is whether Mr. Melendez's exoneration was a second lightning strike. Did his luck finally turn so that he was able to finally demonstrate that his conviction was wrongful? Since no investigation has been conducted into how 22 innocent men ended up on death row, we have no knowledge as to whether the exonerated men simply had a remarkable change of luck which led to the exoneration.

[28]DNA testing established Frank Lee Smith's innocence posthumously. DNA testing did produce evidence in Rudolph Holton's case that while assisting in establishing his

innocence, was not dispositive.

[29]In fact in Swafford, three justices dissented on the grounds that the new evidence would have probably produced an acquittal had it been presented to the jury. Id. at 978-79 (Anstead, J., dissenting) ("This case represents one of those truly rare instances where this Court has summarily brushed aside on wholly speculative grounds a colorable claim of actual innocence and a possible serious miscarriage of justice. There has been absolutely no focus here on the reality of what actually happened.").

[30]The ABA Report also notes that the Death Penalty Information Center lists the case of Leo Jones as one that may have resulted in the execution of an innocent man. ABA Report on Florida at 8.

[31]In Jones, two justices dissented. See Id. at 527 (Anstead, J. dissenting) (this case "is troubling because of the sheer volume of evidence present in the record that another person committed the murder, and, yet, none of this evidence was heard by the jury that tried and convicted Jones"); Id. at 535-36 (Shaw, J., dissenting) ("The collateral process in Florida's capital sentencing scheme is a constitutional safety net

designed above all to prevent the execution of an innocent man or woman. The present case is a classic example of that safety net working properly--up to the present point. Although Jones was tried and convicted in 1981, much of the present evidence did not--could not--come to light until now, more than a decade later--after Officer Smith and Schofield's accusers came forward. This evidence vastly implicates Schofield and casts serious doubt on Jones' guilt. The case that stands against Leo Jones today is a horse of a different color from that which was considered by the jury in 1981. 'Fairness, reasonableness and justice'--and indeed, the integrity of Florida's capital sentencing scheme--dictate that a jury consider the complete case.").

[32]As was noted in Furman, any judicial system with procedural and substantive protections for an accused will result in errors; innocent individuals will be convicted. Furman, 408 U.S. at 366 ("Our 'beyond a reasonable doubt' burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death."). Yet, not only does empirical evidence now demonstrate that Florida has the highest

exoneration in capital cases of any state, nothing has been done to investigate, find out why, and attempt to remedy the matter.

[33]Certainly, the U.S. Supreme Court's decision in Strickland was and is binding upon this Court as determining the meaning of the Sixth Amendment. Yet as discussed *infra*, this Court has acknowledged its failure to properly apply one aspect of Strickland in a number of cases. Stephens v. State, 748 So. 2d 1028, 1032 n. 2 (Fla. 1999). Despite this acknowledgment, this Court refused to correct its error and reconsider those cases in which the error had been committed. Certainly, this injects arbitrariness into Florida's capital sentencing scheme that violates the principle of Furman.

[34]Even though the United States Supreme Court has explained that its decisions finding ineffective assistance in Rompilla v. Beard, Wiggins v.Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), were all dictated by its decision in Strickland and therefore each of those decisions date back to Strickland, this Court has refused to re-examine its decisions predicated on its understanding of Strickland which are at least arguably in error under Rompilla, Wiggins, or Williams. Thus, individuals on Florida's death row who have meritorious claims

under any one of these three decisions do not get the benefit of those three decisions if this Court had denied a Strickland claim before the Supreme Court issued these decisions. As explained *infra*, this is the injection of an arbitrary factor into who gets executed and who does not that violates the principle of Furman.

[35]The past ten years have demonstrated a consistent pattern of turmoil and chaos in the representation of capital postconviction defendants. The state-funded agency responsible for representing postconviction defendants was overwhelmed with cases, absorbing those cases that the federally funded organization had represented, and a large number of cases in the mid-90s when death sentences spiked and rule changes caused initial motions to be filed much quicker than in previous years. That the location of the agency was split into three regional offices but still managed under the auspices of a single agency. The agency was then officially separated into three regional offices with the creation of the Registry system to handle conflict and overflow cases. A few years later, the Florida Legislature eliminated one of the regional offices and sent Registry sixty-plus cases.

[36]Juan Melendez was exonerated in the course of his third motion for post-conviction relief. Yet, the funding of the registry makes no provision for even a second or third motion.

[37]However, in the non-capital context not involving the statutory right to effective collateral counsel, this Court held that when a convicted defendant establishes that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner, due process requires that the convicted defendant be authorized to file a belated motion to vacate. Steele v. Kehoe, 747 So. 2d 931, 934 (Fla. 1999)("we [have] made clear that 'postconviction remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States.'"). Accordingly, this Court ordered that Fla. R. Crim. Pro. 3.850 that addresses post conviction motions filed by non-capital defendants be amended to provide that an untimely motion could be filed if "the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion." Fla. R. Crim. Pro. 3.851 was not amended in a corresponding fashion.

[38]This statistic has not changed. "[A]s of December 10,

1999, of the 386 inmates on Florida's death row, 'only five were whites condemned for killing blacks. Six were condemned for the serial killings of whites and blacks. And three other whites were sentenced to death for killing Hispanics.' Additionally, since Florida reinstated the death penalty there have been no executions of white defendants for killing African American victims." Id. at viii.

[39]Yet, this Court regularly orders new trials in capital cases because of prosecutorial misconduct. Floyd v. State, 902 So. 2d 775 (Fla. 2005); Mordenti v. State,894 So. 2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Huggins, 788 So.2d 238 (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); Arango v. State, 497 So. 2d 1161 (Fla. 1986).

New trials on the basis of prosecutorial error have been ordered by the federal courts in course of federal habeas proceedings. Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1993); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). New trials have also been ordered on prosecutorial misconduct for which there is no reported decision. Ernest Miller and William Jent

United States, 295 U.S. 78 (1935)

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both received new trials from the federal district court in light evidence that the State withheld exculpatory information from the defense. Similarly, Juan Melendez received a new trial from the state circuit court on the basis of his claim that the State improperly withheld exculpatory information.

[40]There should be a higher ethical obligation because the prosecutor carries with him power derived from his job which must be held in check, just as each branch of government is subject to checks and balances. Without such checks and balances, Florida's death penalty scheme "smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring).

[41]The limited scope of the proportionality review, only looking at other cases in which death has been imposed, skews the review in favor of death and undercuts its "meaningfulness". The Court's shift in its affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends upon what year the appellate review was or is conducted. This variable has nothing to do with the facts of the crime or

the character of the defendant. This can only be describe as arbitrary. It is not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not". Furman, 408 U.S. at 313 (White, J., concurring).

[42]The lower courts in each of those cases had also not read Strickland in the fashion that the U.S. Supreme Court said it was meant to be read. In Williams, the issue addressed by the Supreme Court was the failure of the Virginia Supreme Court to properly read and apply the standards in Strickland. The ruling in Williams was quite simply that Strickland meant what the Supreme Court said in Williams it meant, and any court who did not read and apply Strickland in the fashion explained Williams had erroneously applied the constitutional principle at stake.

[43]Many of those who submitted an ineffectiveness claim to this Court prior to 2000 have also submitted the ineffective assistance claim to the federal courts. Just as the federal courts in Rompilla, Wiggins, and Williams, had failed to properly to read Strickland or failed to recognize that the state court reading was in fact contrary to Strickland, the Eleventh Circuit denied many ineffective assistance of counsel

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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arguable meritorious under Rompilla, Wiggins, and Williams. But by virtue, the Anti-Terrorism and Effective Death Penalty Act of 1996, the ability to file a second habeas and obtain review of the previously, albeit wrongly, denied ineffective assistance claim. Thus, numerous individuals are now stuck with a meritorious claim in light of Rompilla, Wiggins, or Williams, but with no court in which to have the claim properly evaluated.

[44]Certainly, the manner in which the retroactivity rules operate currently has as at least as much to do with who gets executed and who does not, than the facts of the crime and the character of the defendant does. The manner in which this Court applies its retroactivity rules is arbitrary and violates Furman.

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