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IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC12-2466

LOWER CASE NO. F00-40026A

COREY SMITH,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

_____ /

APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

BRIEF PURSUANT TO FLA.R.CRIM.P. 3.851(i)
COREY SMITH

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STATEMENT OF THE CASE

On December 13, 2000, COREY “BUBBA” SMITH was indicted with seven other co-defendants in a 17-count Indictment alleging crimes committed in connection with the drug-trafficking organization called the “John Does”. SMITH was listed as the lead Defendant with violations of Florida’s Racketeering Influenced and Corrupt Organizations (“RICO”) Act, in violation of Florida Statute Section 895.03(4) (Count I), conspiracy to commit racketeering, in violation of Florida Statute 895.03 (Count II), conspiracy to traffic cannabis, in violation of Florida Statute Section 893.135(5) (Count III), conspiracy to traffic cocaine, in violation of Florida Statute Section 893.135(5) (Count IV), first degree murder, in violation of Florida Statute Section 782.04(1) (Counts VI (Leon Hadley), VII (Melvin Lipscomb), X (Cynthia Brown), XII (Jackie Pope), XIV (Kevin Smalls), and XVI (Angel Wilson)), conspiracy to commit first degree murder in violation of Florida Statute Section 782.04(1) (Counts V (Leon Hadley), IX (Cynthia Brown), XI (Jackie Pope), and XV (Anthony Fail)), second-degree murder with a firearm in violation of Florida Statute Section 782.04(2) (Count XIII) (Marlon Beneby), and solicitation of first degree murder in violation of

Florida Statute Section 782.04 ((Count XVII) (Jarrett Wolf)) (R1.104-126).

At the time of his Indictment, SMITH was serving a life sentence for Federal narcotics conspiracy charges brought two years earlier. The Federal Indictment was also based on SMITH's alleged role as leader of the John Does during the same time period covered by the Information in this case. A Joint Federal-State Task Force had investigated the John Does. Many of the murders: Leon Hadley, Melvin Lipscomb, Cynthia Brown, Marlon Beneby, Angel Wilson, and the conspiracy to murder Anthony Fail, were featured in the Federal case and used under the Federal Sentencing Guidelines as Relevant Conduct to justify the imposition of the life sentence. SMITH's conviction was affirmed on appeal, but his case was remanded for resentencing. United States v. Allen, 302 F.3d 1260 (11th Cir. 2002).

SMITH's State prosecution was initiated by the filing of an Indictment on August 9, 2000, charging him with conspiracy to commit murder and the murder of Cynthia Brown (R1.102-103). Since SMITH was in Federal custody, the State filed a Request for Temporary Custody in accordance with the Interstate Agreement on Detainers on August 29, 2000 (R2.331-332). On October 13, 2000,

he was remanded to the custody of the State of Florida (R2.332).

SMITH was arraigned on the first Indictment on October 27, 2000, and after entering a plea of not guilty, he allegedly waived his right to a speedy trial (R2.332). On December 19, 2000, when SMITH was arraigned on the new Indictment with the additional charges, he was reminded by the Court that he had previously waived his right to a speedy trial (R2.332).

On June 8, 2004, SMITH filed a Motion to Dismiss Indictment based on the failure on the part of the State to comply with the mandates of Article IV(C) of the Interstate Agreement on Detainers, which requires trial within 180 days of a defendant being remanded by the federal government to the custody of the state for prosecution (R2.332). SMITH filed a Demand for Speedy Trial under Fla.R.Crim.P. 3.191 in open court on June 8, 2004 (R.722). On June 15, 2004, the trial date was moved up from October 4, 2004, to July 12, 2004 to comply with the Demand for Speedy Trial (R4.722).

On June 29, 2004, the attorneys appeared before the Court without SMITH being present. The State represented to the Court the existence of “negotiations” with defense counsel concerning what it characterized as the “dispositive” speedy

trial issue. In order to secure the transcripts necessary for the Court to decide the issue, the State requested a tolling, “not a waiver, a tolling” of the speedy trial period. Without SMITH being present, his attorneys agreed to a 30-day tolling falsely representing to the Court SMITH’s acquiescence. The State represented to the Court its understanding that the defense attorneys had agreed to a 60-day tolling. Instead, the Court tolled the speedy trial period for 45 days (R2.333).

The 45-day tolling period expired on August 14, 2004, and the speedy’s clock restarted (R4.722-723). SMITH subsequently claimed that he never agreed to any tolling of his speedy trial rights, and the Court’s decision to toll the clock for 45 days resulted in a trial date set after the 60-day period provided by Rule 3.191 upon a Speedy Trial Demand had expired (R7.1230-1231).

The Court had set a hearing on SMITH’s Motion to Dismiss for August 2, 2004, but there was no record of any Court proceedings occurring on that date (R2.333). The State did not file its Response to the Motion to Dismiss until August 18, 2004. On September 14, 2004, the Court denied the Motion to Dismiss (R2.334).

Assuming the validity of the Court having tolled the speedy trial period for 45 days on June 29, 2004, trial should have commenced by September 12, 2004, which was 50 days after the filing of the Demand pursuant to Rule 3.191(b)(4).

Due to Hurricane Frances, this Court had tolled all deadlines, including speedy trial from September 1-7, 2004. This would have extended the expiration period to expire to September 18, 2004.¹

At the September 14, 2004 hearing, defense counsel did not know the correct date within which to file a Notice of Expiration of Speedy Trial. They waited until September 23, 2004 to file it. There was another tolling of deadlines by this Court due to Hurricane Jeanne from September 23-27, 2004 (R4.723). Since SMITH's counsel had failed to effectively assert his speedy trial rights, trial commenced on October 4, 2004, and SMITH was no longer entitled to a discharge.

Trial commenced October 4, 2004. On December 3, 2004, the jury found SMITH guilty of the lesser-included crime of manslaughter on Counts 7 (Lipscomb) and 13 (Benneby), but otherwise found him guilty as charged (R4.714).

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SMITH's post-conviction counsel had not seen the written Demand for Speedy Trial referenced at the June 14, 2004, hearing, and had calculated the speedy's clock from that date. This resulted in a representation that the speedies expired on September 19, 2004. Adding the six-day Hurricane Frances tolling advanced the date to September 25, 2012. Since the Demand for Speedy Trial was filed on June 8, 2004, adding the Hurricane Frances tolling resulted in an expiration date of September 18, 2004 (R.334-335).

Penalty Phase commenced on February 7, 2005. The State presented victim impact witnesses and the Medical Examiner on the Cynthia Brown homicide.

The defense called the following witnesses in mitigation: Richard Moore, SMITH's court-appointed attorney in his Federal trial, who testified to his good courtroom behavior; Phil White, a cooperating State witness, who clarified that it was Cooke, and not SMITH, who had shot Hadley; Detective Alfonso regarding admissions made by Julius Stevens helpful to SMITH; George Slattery, a polygrapher, who had taken two different statements from Mark Roundtree in which he admitted to having killed Hadley, which he subsequently recanted; and Willie Mae Smith, SMITH's mother (R4.714-715, 716).

Willie Mae Smith testified about SMITH's childhood, adolescence, and family relationships. By her account, SMITH was raised in a loving home and had a good relationship with his siblings. His brother had been robbed and killed when SMITH was 12 years old, and his father had died of a heart attack the following year. SMITH was robbed and stabbed one time at school, and his mother had been seriously injured when stabbed by one of her brothers in 1991. Another of SMITH's uncles was robbed and killed in Liberty City in April, 1992,

and yet another uncle was killed in a fire in November, 1992. SMITH helped take care of his grandmother until her death in 1998. He had been exposed to chronic drug dealing and gang violence growing up in Liberty City. He had a seven-year-old son, Christopher, with whom he had a good and loving relationship (R4.715).

The State called Detective Alfonso and Trish Geter on rebuttal. Detective Alfonso testified to having visited Roundtree in prison where he recanted his earlier admissions to having killed Hadley. Geter confirmed that SMITH loved his grandmother, but claimed he was too busy taking care of his drug business to take care of her (R4.716).

Following the Penalty Phase, the jury recommended life sentences for the murders of Leon Hadley and Jackie Pope, and death sentences for the murders of Cynthia Brown (by a vote of 10-2), and Angel Wilson (by a vote of 9-3) (R2.320-321, R4.716).

Following a Spencer Hearing, the Court entered its Sentencing Order on March 17, 2005. The Court affirmed the jury's recommendation of death for the murders of Angel Wilson and Cynthia Brown (R2.321, R4.716).

The Sentencing Order found that, as to the murder of Cynthia Brown, the Court gave great weight to three aggravating factors: prior violent felony convictions; murder committed to disrupt or hinder law enforcement; and murder committed in a cold, calculated and premeditated manner. As to the murder of Angel Wilson, the Court also gave great weight to three factors: prior violent felony convictions; pecuniary gain; and murder committed in a cold, calculated and premeditated manner (R4.716-717).

As to its findings on mitigation, the Court allocated little weight to the lack of significant criminal history, extreme mental disturbance, and age. As to the proposed non-statutory mitigation, the Court found as follows: SMITH was not the actual killer, but only a minor participant (rejected); SMITH was born and raised in a crime-invested neighborhood (little weight); SMITH was raised in a gang-controlled community (little weight); SMITH was a good family man (some weight); SMITH's good behavior in his Federal trial (little weight); SMITH was exposed to chronic and systematic violence in his childhood and adolescence (little weight); and SMITH graduated from high school (little weight) (R4.717).

SMITH filed a timely Notice of Appeal to this Court. On March 19, 2009,

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SMITH raised the following issues on direct appeal: (1) the trial court erred in ordering extensive security precautions in and around the courtroom, which were highly prejudicial to the Defendant, without giving the Defendant notice and an opportunity to be heard, in violation of his Sixth and Fourteenth Amendment rights to a fair trial; (2) the trial court erred in not striking the jury panel who had been exposed to an out-of-court comment by the Defendant's mother which several members of the venire disapproved of and found inappropriate; (3) the court erred by allowing the State to use a non-qualified expert to "interpret" the words and phrases used by various persons on taped conversations played to the jury; (4) the court erred in allowing the State to introduce as non-hearsay a police report which contained out-of-court statements of Cynthia Brown accusing SMITH of killing Dominique Johnson, a homicide not charged in this case, and expressing her fear of him, when the State was offering the police report for the truth of its contents and the non-hearsay reason given by the State was pretextual; (5) the trial court erred in limiting the cross-examination of three witnesses: Anthony Fail, Demetrius Jones, and Dr. Emma Lew, the Medical Examiner who testified to the cause of death of Cynthia Brown, crucial to the State's case; (6) the trial court erred in not granting a mistrial after the prosecutor presented the Medical Examiner with an improper hypothetical, and solicited an opinion from the witness on the same fact after two defense objections were sustained; (7) the court erred in not granting a new trial for the State's intentional failure to provide the defense with a written statement from Mark Roundtree, who had admitted committing the Leon Hadley murder, was sentenced to life imprisonment, then recanted and implicated SMITH, that was materially favorable to the defense; (8) the court erred in not holding a hearing to determine prejudice to the defense after the State failed to disclose to the defense that witness Carlos Walker, who had originally denied any knowledge of the facts of the case during his deposition, had changed his statement testimony at trial and directly implicated SMITH by claiming to have witnessed him ordering Chazre Davis to "smother" Cynthia Brown; (9) the trial court erred in not granting a new trial where the trial was fundamentally flawed by the cumulative effect of prosecutorial misconduct, which could have reasonably been expected to affect the outcome of the trial.

this Court affirmed SMITH's convictions and sentences, Smith v. State, 7 So.3d 473 (Fla. 2009), but entered a corrected opinion on March 26, 2009.

This Court described in detail the evidence introduced at trial against SMITH. Smith, 7 So.2d at 480-91. That factual statement will be incorporated by reference in this Brief.

On April 13, 2009, the Florida Supreme Court entered a Provisional Appointment Order pursuant to Fla.R.Crim.P. 3.851(b) appointing the Capital Collateral Regional Commission–South to handle post-conviction proceedings for SMITH. On May 13, 2009, the CCRC–South moved to withdraw from SMITH's case due to a case-load conflict. After an evidentiary hearing heard on July 9, 2009, that Motion to Withdraw was denied.

A timely Petition for Writ of Prohibition and/or Writ of Mandamus was filed with the Supreme Court intended to prohibit the enforcement of the Order denying CCRC's Motion to Withdraw. On March 9, 2010, the extraordinary petitions were voluntarily dismissed. Smith v. State, 32 So.3d 60 (Table) (Fla. 2010).

On May 28, 2010, the CCRC-South filed a timely Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend

Pursuant to Rule 3.851 (R2.318-394). Paragraph 7 requested “leave to (1) supplement and/or amend his claims with new and/or additional evidence as it becomes available; (2) add claims; and (3) provide a memorandum of law in support of his claims for relief and his request for an evidentiary hearing.”

(R.319). Counsel averred that the Motion was not complete because the investigation, including the gathering of public records was on-going (R.319).

In Claim II, SMITH challenged the constitutionality of Rule 3.851 and the time limits imposed on post-conviction counsel to file a meaningful Motion to Vacate within the one year Statute of Limitations (R2.326-329).

On July 29, 2010, the State filed its Answer to Motion to Vacate and Memorandum of Law (R4.709-942). The State opposed all claims for relief advanced by SMITH without an evidentiary hearing except for the newly discovered evidence claim regarding the affidavit of Chazre Davis (Claim III)(c), and ineffective assistance of counsel regarding the giving of a manslaughter instruction (Claim III(a)(2)).

On November 22, 2011, SMITH filed a pro se Motion to Amend raising additional grounds (R6.1092-1101). On December 13, 2011, when the case was scheduled to be heard on one of SMITH’s requests for public records, the CCRC-South filed a Motion to Withdraw (R6.1104-1109). Attached to the Motion was a

letter from SMITH alleging abandonment by his attorneys. He complained of not having been visited by them for one year (R6.1108).

On December 13, 2011, SMITH was able to appear by telephone. He heard the argument presented by his counsel requesting permission to withdraw as his attorney (R.16.44-51). During the course of the hearing, the Court advised SMITH as follows:

The Court: Mr. Smith, you understand if I do allow Ms. Keffer to withdraw based on the conflict between you and she [sic] on your case that if I appoint another lawyer to represent you, it's going to take that lawyer an extraordinary amount of time to prepare, probably I would say six months to a year. This is a huge case.

Defendant: Yes ma'am.

The Court: You understand that?

Defendant: Yes, I do.

The Court: And you are okay with that?

Defendant: Okay.

(R16.50).

The Court granted the Motion to Withdraw and sought new counsel for SMITH.

It was not until April 13, 2012, that undersigned counsel was appointed to represent SMITH (R6.1130-1131). The delay was attributable to the unwillingness or unavailability of other attorneys who were contacted. Counsel had been contacted by the Court in advance to inquire as to his availability. Counsel had informed the Court that he would be willing to accept the appointment, but needed the approval of SMITH. A letter was sent to SMITH, who responded that he would accept counsel's representation. He was not, however, in Court on April 13, 2012, because he was in trial in Federal Court. Based on his acceptance of the appointment informally communicated to the Court, an Order of Appointment was entered and the case set for Status on May 15, 2012 (R19.68-70). At the time, counsel was not advised as to any time limitations on his thorough review of the case and preparation of the issues for consideration by the Court. At the time, counsel understood that a 3.851 Motion had already been filed by the CCRC-South, and his role would be limited to litigating that Motion.

On May 15, 2012, counsel appeared for the Status Conference by telephone. He represented to the Court that he had been in a Federal trial since before his appointment, and had not yet had the opportunity to acquire the file from the

CCRC-South. He told the Court that he would be able to pick up the file the following week, and thought that he could be ready for the Huff Hearing in six weeks after that (R20.73). The Court decided to schedule the Huff Hearing for July 5, 2012 (R20.74).

On June 15, 2012, SMITH filed a Motion to Continue Huff Hearing (R6.1158-1161). SMITH's counsel advised that he had met with his predecessor counsel at the CCRC-South and learned that the 3.851 Motion they had filed on SMITH's behalf was incomplete. There appeared to be further investigation required in order to determine if additional grounds needed to be added to the original 3.851 Motion. Counsel realized that determining whether to add grounds would require further review of the Records and a visit with SMITH, who he had not been able to schedule.

The State filed a Response in Opposition to the Motion to Continue the Huff Hearing (R6.1162-1170). The State made no mention of SMITH having been previously advised by the Court that any newly-appointed counsel would need from 6-12 months to prepare his case. Instead, the State insisted that regardless of the appearance of newly-appointed counsel, the original 3.851 Motion had been pending for too long, and the Huff Hearing should be held as scheduled.

On June 26, 2012, SMITH's Motion to Continue Huff Hearing was heard. Counsel explained how he had come to understand the true scope of the case as well as the ongoing work that the CCRC-South had been conducting into supplementing the 3.851 Motion. When he had represented on May 15, 2012, that he thought he could be ready in six weeks, he was basing that estimate on a belief that his work would be limited to "getting up to speed" on the 3.851 Motion that had already been filed, which understanding was predicated on the filed motion being complete. Counsel explained to the Court that he could not possibly complete his review of over 50 boxes of documents, and visit SMITH in order to determine whether a supplemental/amended 3.851 motion should be filed, and do everything prior to the Huff Hearing (R21.78-80).

As to the public record requests that had been made subsequent to the filing of the original 3.851 Motion, counsel understood that the process was complete. He had a large number of CD's and boxes of disclosures, but he had not yet had the opportunity to review them all (R21.80-81).

At the June 26, 2012, hearing, counsel also expressed his concerns regarding mitigation. He indicated that no forensic psychologist had yet seen

SMITH, and the adequacy of the investigation for Penalty Phase could not yet be determined. The State contended that SMITH had always rejected mitigation recommended by his attorneys (R21.82-84).

The Court denied the Motion to Continue the Huff Hearing. It determined that counsel had not been specific enough regarding additional issues he could raise based upon the information obtained from the public records to justify a continuance. Counsel was invited to have SMITH evaluated and add to the 3.851 Motion if an issue arose as a result, but refused to continue the Huff Hearing to accomplish that (R21.81, 85-86).

On July 5, 2012, counsel appeared for the Huff Hearing. After hearing the argument of counsel, the Court made the following determinations on the claims presented.

Claim I–Moot.

Claim II–Moot until a Motion to Supplement is filed.

Claim III–Denied without an evidentiary hearing although the Court stated that it would consider the submission of additional authority and/or amendment as to the claim that trial counsel was ineffective for failing to retain or present expert testimony from a defense medical examiner regarding Cynthia Brown’s cause of death, and the Motion for New Trial that had been filed but never heard regarding the Geter tapes. In addition, the State withdrew its concession permitting an evidentiary hearing on the manslaughter jury instruction issue citing the Amendment to the statute extending

the Statute of Limitations and case law finding the application of this Amendment to acts that had occurred before its enactment did not violate the ex poste facto clause. The State reiterated its agreement that an evidentiary hearing needed to be held on the newly discovered evidence of Chazre Davis.

Claim IV–Denied without prejudice to reopen after SMITH was evaluated by a forensic psychologist and he wanted to supplement his 3.851 motion by raising the claim that his trial lawyers were ineffective during Penalty Phase.

Claims V, VI, VII, and VIII–Denied.

(R22.90-114).

On September 24, 2012, the Evidentiary Hearing was held. At the Hearing, SMITH presented the testimony of Chazre Davis as newly discovered evidence. Davis had previously submitted an affidavit denying that SMITH had ordered him to kill Cynthia Brown. Davis reiterated that testimony at the Evidentiary Hearing. The details of the hearing will be explored in the context of Issue II, infra.

(R.23.118-197).

At the Evidentiary Hearing, there was some discussion about the pro se Supplemental Motion to Vacate that SMITH had filed on his own behalf back on December 11, 2011. The Court decided to defer ruling until it heard from the parties whether the grounds raised therein would be considered in her ruling

(R6.1110). On September 28, 2012, the State filed its Memorandum of Law Regarding Pro Se Motion for Leave to Amend opposing it (R7.1212-1220). On October 1, 2012, SMITH's counsel filed a Motion to Adopt Pro Se Grounds for Post-Conviction Relief (R7.1221-1225).

On October 5, 2012, SMITH filed a Supplemental/Amendment to Motion to Vacate Judgments of Conviction and Sentences Pursuant to Rule 3.851 (R7.1226-1238, and Motion for Permission to Amend Motion to Vacate Judgments of Conviction and Sentences (R7.1239-1246). In this Supplemental/Amended 3.851 Motion, SMITH amended the speedy trial argument, revised the issue regarding the presentation of a defense expert medical examiner as to Cynthia Brown's cause of death, and raised a Brady/Giglio violation based upon the testimony of Demetrius Jones.

SMITH alleged that in the Federal trial that preceded the Indictment in this case, Jones testified as a witness for the Government. During cross-examination in that trial, he had admitted to having fabricated testimony concerning the murder of Leon Hadley, thereby committing perjury in direct violation of his plea agreement. Despite having committed perjury, Jones was never prosecuted nor

was his plea agreement voided. Instead, he was listed as a witness by the State, and he testified at trial without mentioning his prior testimony against Leon Hadley. The State never disclosed the violation of his plea agreement nor the decision by the Government and/or the State to forgive him for it. This issue was first presented in the Amended 3.851 Motion.

On October 10, 2012, the Court issued an Order denying the Motion to Vacate Conviction and Sentence (R7.1247-1261). In addition to the grounds raised in the original 3.851 Motion, the Court ruled on SMITH's pro se Amended Motion to Vacate on the merits. On October 18, 2012, the Court denied SMITH's Motion for Permission to Amend Motion to Vacate Judgment of Convictions and Sentences and Supplemental/Amendment to Motions to Vacate Judgments of Conviction and Sentences (R7.1262).

A timely Notice of Appeal was filed.

ARGUMENT

ISSUE I

THAT THE COURT ERRED IN BY NOT GIVING COUNSEL ENOUGH TIME TO PROPERLY LITIGATE SMITH'S 3.851 MOTION. (1) IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY SMITH'S MOTION TO CONTINUE THE HUFF HEARING, AND (2) DENY SMITH'S MOTION FOR PERMISSION TO AMEND MOTION TO VACATE JUDGMENT OF CONVICTIONS AND REFUSE TO CONSIDER THE SENTENCES AND SUPPLEMENTAL/ AMENDMENT TO MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES ON ITS MERITS.

Undersigned counsel was appointed to take over this litigation on April 13, 2012, during a hearing he was unable to attend because he was involved in a Federal trial. On May 15, 2012, he appeared by telephone for the Status Conference because he was still involved in that same Federal trial. He represented to the Court that he had been unable to go to the offices of the CCRC-South to pick up the files by that time. He promised that he would be able to do so the following week. The Huff Hearing was set for July 5, 2012.

It was unreasonable for the Court to have expected counsel to be prepared within six weeks to argue the issues pending in the original 3.851 Motion unless the original 3.851 Motion was considered complete. If that were the case, counsel

would only need to focus on those portions of the Record related to the issues already raised.

When counsel had an opportunity to meet with SMITH's former counsel at CCRC-South, and begin his review of the voluminous documents, he realized that the 3.851 Motion was not complete. A more thorough review of the file, and a visit with SMITH to discuss any additional grounds was necessary. Counsel recognized that these tasks could not be accomplished prior to the Huff Hearing. Nonetheless, his Motion to Continue the Huff Hearing was denied.

Counsel was only able to arrange to visit with SMITH at the Union Correctional Institution after the Huff Hearing. The Evidentiary Hearing that had been ordered on the newly discovered evidence issue was not going to be supplemented by any additional grounds counsel could have raised except any issue that might have been raised after SMITH was evaluated by a forensic psychologist, which had been "pre-approved" for consideration at the evidentiary hearing. To any other issue raised, a follow-up investigation would have had to be conducted, an amended 3.851 would have had to be prepared, the State would have needed time to respond, and the Court would have had to conduct another Huff Hearing on the new grounds raised or the amendments to grounds previously raised that SMITH was given permission to amend at the Huff Hearing. The

Supplemental/Amendment to Motion to Vacate Judgments of Conviction and Sentences was filed before the Court issued its Final Order denying the original 3.851 Motion, which included the issues raised in SMITH's pro se Amended Motion to Vacate. It was an abuse of discretion for the Court to have denied SMITH's Motion for Permission to File the Supplemental/Amendment to Motion to Vacate Judgments of Conviction and Sentences.

Rule 3.851(f)(4) allows a motion to vacate to be amended up to 30 days prior the evidentiary hearing upon motion and good cause shown. The Circuit Court denied the Motion for Permission to Amend because it was filed after the Evidentiary Hearing.

Rule 3.851(f)(4) does not prohibit the amendment of a motion to vacate filed within 30 days of the evidentiary hearing or even afterwards. Generally, a defendant with a pending motion for post-conviction relief is entitled to amend that motion prior to the time that the Court has handed down a final ruling on all of the issues. Woldseth v. State, 974 So.2d 423 (Fla. 2d DCA 2007). If the defendant has filed a facially insufficient claim, or one that was deficient that can be cured by amendment, he should be permitted to amend his motion for post-conviction relief. Woods v. State, 963 So.2d 348 (Fla. 4th DCA 2007). If a post-conviction litigant has discovered new claims, they should be allowed under the

criteria in Spera v. State, 971 So.2d 754 (Fla. 2007); Boule v. State, 86 So.3d 1185 (Fla. 5th DCA 2012) That these cases address motions for post-conviction relief under Rule 3.850 specifically should not render them inapplicable to a motion to vacate a death sentence pursuant to Rule 3.851. It is unfathomable that this Court would be more restrictive in permitting amendments when death is the issue than in a non-capital case.

Counsel showed good cause for the delay in filing the Supplemental/Amendment to the original 3.851 Motion. After the Huff Hearing, counsel was able to arrange for a visit with SMITH at the Union Correctional Institution on August 2, 2012. Unfortunately, he was diverted by his responsibilities in preparation and participation at trial in a complex Medicare fraud case in the U.S. District Court in Miami from August 15-23, 2012, and the First Phase of a capital murder case also in Miami-Dade County from September 4-10, 2012. According to Rule 3.851(f)(4), counsel would have had to have filed his Amended Motion before August 24, 2012.

In denying SMITH's Motion for Permission to Amend, the Court was denying him due process. He had written a letter to the Court complaining of neglect of his case by the CCRC-South. He had filed a pro se Motion to Amend. The CCRC-South filed a Motion to Withdraw alleging an unspecified conflict of

interest. It was clear that SMITH wanted a new lawyer who would pay attention to his case, and work with him to make sure that all of his issues were properly presented. SMITH understood that any new lawyer appointed to represent him would need and get 6-12 months to prepare by the Court's own words at the hearing on December 11, 2011. Although the Court gave him a new lawyer, it did not give that lawyer sufficient time to do what was required in the case.

The Amended 3.851 that was filed was partly a product of counsel's interaction with SMITH as related to his speedy trial and defense medical examiner issues plus Demetrius Jones. As to the former, SMITH insisted that he never consented to a tolling of the speedy trial period before the hearing on June 29, 2004. This was in direct contradiction to the original 3.851 Motion which relied on the false representations of Carl Maztal to the Court that SMITH had given him authority to toll the speedy trial period for 30 days.

As to the latter, SMITH objected to the way that the CCRC-South had framed the issue. In the original 3.851 Motion, it was represented that the trial attorneys had been ineffective for failing to retain a defense expert medical examiner to support their theory in opening statement that Cynthia Brown died by erotic asphyxiation. In its Response, the State pointed out that a defense expert medical examiner had been retained, but never called as a witness. The State took

the position that the failure of the defense to call its expert could be explained as trial strategy.

But the issue was not trial strategy, as presented in the Amended 3.851 Motion. There was no evidence of erotic asphyxiation, and no expert was available to support that theory. SMITH's contention was that his trial attorneys knew this, but presented in their opening statements a factual claim that they knew would not be supported by the evidence introduced by the State at trial. This was ineffective assistance of counsel that discredited his defense. Since counsel had not been able to visit with SMITH before the Huff Hearing, he was not able to properly articulate SMITHS's position.

The Demetrius Jones issue had been presented as a newly discovered evidence claim, but where due diligence was excused because the evidence was suppressed or hidden by the State. Jones was an important witness against SMITH as regards the Cynthia Brown murder. He was not offered as a witness in the Leon Hadley murder in the State proceedings although he had testified in Federal Court to having been present in an apartment when COREY SMITH had allegedly ordered it. This testimony in Federal Court had been impeached with jail records indicating that he was incarcerated at the time of this alleged meeting. This constituted perjury on his part, and violated his plea agreement. The violation of

his plea agreement, and the decision to either void it and/or charge him with perjury was never disclosed to SMITH in these proceedings.

The State decided to not punish Jones, and continue to vouch for his credibility, but not to reveal its decision to SMITH. This issue only arose from counsel's far-reaching review of the records he had obtained from CCRC-South along with other files he had in storage regarding the Federal case against SMITH that preceded the instant Indictment. An evidentiary hearing needs to be ordered to explore these undisclosed facts surrounding Demetrius Jones' plea agreement and how it was portrayed to the jury in this case.

When the State does not disclose promises of immunity or preferential treatment made to one of its witnesses to the defense, it violates the due process rights of that defendant. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). If, as in this case, the witness testifies that he received the benefit of his bargain for only telling the truth with full knowledge that the consequences would be a revocation of his plea agreement and a higher sentence and/or a separate prosecution for perjury, then evidence that he had committed perjury without consequence would impeach his credibility. SMITH contends that it would constitute an additional due process violation for the prosecutor to allow

its witness to make a self-serving statement to buttress his testimony knowing that there would be no consequences because when he lied before there were none. In that instance, the State would be presenting false testimony. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). “To establish a Giglio violation, a defendant must show: (1) that the testimony was false, (2) that the prosecutor knew the testimony was false, and (3) that false evidence was material. If there is a reasonable possibility that the false evidence may have affected the judgment of the jury, a new trial is required.” Craig v. State, 685 So.2d 1224, 1226 (Fla. 1996). See also, Agurs, 427 U.S. at 104 (similar standard for determining the materiality of exculpatory information not disclosed to the defense by the prosecution).

SMITH’s claim that the State’s withholding of exculpatory evidence, and allowing his false testimony regarding his appreciation of the consequences of making a false statement to go uncorrected to the jury states a prima facie case for a due process violation. The only question remaining is whether the trial court abused its discretion in not permitting his 3.851 Motion to be amended before final judgment was entered. SMITH’s prior counsel had not raised it presumably because in all of the boxes they had gathered in the course of their preparation, this issue arose in the context of Jones’ testimony in Federal Court. Counsel had

been a participant in that trial, and had additional records he was able to locate with great difficulty. But for his prior knowledge of the case, this constitutional violation would not have been uncovered. The suppression of this exculpatory evidence applicable to a significant prosecution witness was only previously discovered, and brought to light because of counsel's prior exposure to the case.

The State should not be allowed to profit from its malfeasance, and be allowed to bury this issue. In a case where the State relied on 17 cooperating witnesses to prove the murder charges through their largely uncorroborated testimony, and for every one of those witnesses promised to punish perjury by depriving those witnesses of the benefits of their plea bargains, its decision not to have voided Demetrius Jones' plea agreement and/or prosecuted him for perjury when he clearly lied in the Federal trial was material to the integrity of the State's case. If the jury had been presented with evidence that the State's promises were meaningless in this regard, it would have most likely rendered a different result at least as to the murder charges for which SMITH is facing a death penalty.

ISSUE II

THAT THE TRIAL COURT ERRED WHEN IT DENIED SMITH'S NEWLY DISCOVERED EVIDENCE CLAIM BY APPLYING A PURELY SUBJECTIVE STANDARD TO JUDGING THE CREDIBILITY OF CHAZRE DAVIS RATHER THAN CONSIDERING THE IMPACT HIS TESTIMONY WOULD HAVE HAD BEFORE A JURY.

SMITH was never accused of killing Cynthia Brown. According to the testimony of State's prosecution witnesses seeking reduced sentences and/or immunity, SMITH was accused of ordering her then-boyfriend, Chazre Davis, to kill her. The motive was allegedly to eliminate her as a witness to his killing Dominique Johnson.

Chazre Davis was a co-defendant in SMITH's Indictment, and was named with SMITH in Counts IX and X, which alleged the conspiracy to murder and the first-degree murder of Cynthia Brown. At the time of SMITH's trial, Davis was still awaiting his trial. He had made a statement denying that SMITH had ordered him to kill Cynthia Brown and denying that he had killed her. Because he was facing charges himself, DAVIS was unavailable as a witness at SMITH's trial.

In October, 2009, he sent an affidavit to SMITH's attorneys which was submitted with SMITH's Rule 3.851 Motion. In that affidavit, he reiterated his

claims that SMITH had not ordered him to kill Cynthia Brown. SMITH submitted the affidavit and argued that Davis' testimony was newly discovered evidence that would entitle him to a new trial. The State agreed that SMITH's claim was legally sufficient to entitle him to an evidentiary hearing.

On September 24, 2012, the trial court conducted an evidentiary hearing. Davis was called as a witness by SMITH.

Davis said that Cynthia Brown was his girlfriend for a period of time in the 1990's (R23.127). Davis claimed not to have known SMITH during that time. He did not know where SMITH lived or what he did. He denied having any conversations with SMITH about killing Cynthia Brown (R23.128, 130).

Davis also testified about Carlos Walker. He remembered having a problem with Walker because Walker suspected that Davis was talking to his girlfriend (R23.128-129). Walker was an important State witness implicating SMITH in the Cynthia Brown murder. He was also a prosecution witness who during his deposition testified that he knew nothing about Cynthia Brown's murder or SMITH's involvement, but then changed his testimony at trial. His surprise testimony at trial corroborated the State's theory. Davis' newly discovered evidence suggested a motive for Walker making a false allegation against him.

The State attempted to impeach Davis' testimony by walking him through prior statements he had given to Detective Alfonso in 1997 and 1998 (R23.137-138). In all of those statements, however, Davis never admitted to being involved in the conspiracy to kill Cynthia Brown nor to have killed her (R23.138).

The State also sought to impeach Davis' testimony with his guilty plea on August 23, 2010. Davis claimed that he was forced to plead guilty when Detective Alfonso and his partner, Detective Aguerro, told him he was going to die in prison like SMITH if he did not cooperate (R23.131). He testified that his lawyers showed him SMITH's published opinion where this Court affirmed his sentence, and used it to coerce a guilty plea (R23.133). Davis was certainly not the first defendant looking at the death penalty who took a plea to take it off the table.

The Court decided after hearing Davis' testimony not to believe it. The only basis was the subjective belief that he was lying because his testimony was contradicted by the State's evidence. Based upon that standard, no Motion for New Trial Based Upon Newly Discovered Evidence would ever be granted unless there existed irrefutable physical or scientific evidence. The whole point of defense witnesses being called is to challenge the testimony of other witnesses presented by the State. Why in a case where the testimony of cooperating

witnesses seeking favorable treatment from the State in their own cases is credited as true, the testimony of a co-defendant serving a 40-year prison sentence who testifies without any evidence he has received a benefit is automatically discounted because it was contradicted by the testimony of those cooperating witnesses?

During cross-examination, the State explored with Davis Detective Alfonso's relentless pursuit of him as a witness. Detective Alfonso went so far as to attend a parole revocation hearing where he was violated, and Detective Alfonso tried to offer him a deal. Was Davis disbelieved because he contradicted the theory of the case from Detective Alfonso's view? It's hard to imagine any defense witness whose testimony would please the lead investigator in a murder case. That disagreement alone cannot be cause to reject his testimony. Tyson v. State, 905 So.2d 1048, 1049-50 (Fla. 2d DCA 2005), citing Light v. State, 796 So.2d 610, 617 (Fla. 2d DCA 2001) (the task of the trial judge is not to merely examine whether he or she believes the evidence presented at the post-conviction hearing rather than the contradictory evidence presented at trial; instead, the trial judge must determine whether the nature of the post-conviction evidence is such that a reasonable jury may have believed it.

While a trial court's determination of credibility are afforded great weight by the reviewing court, a trial court's capacity to determine the credibility of the witnesses in a post-conviction motion is more limited when the trial judge is examining whether the failure to call a particular witness prejudiced the defendant. The Second District in Light concluded that "the analysis that a judge must perform in this type of case is similar to the analysis required when a defendant alleges newly discovered evidence." Light, 796 So.2d at 617.

In Jones v. State, 709 So.2d 512 (Fla. 1998), this Court set the standard for considering a newly evidence claim. First, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. In order to reach this conclusion, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial.'" Id., at 521 citing Jones v. State, 591 So.2d 911, 915 (Fla. 1991). Once the newly discovered evidence can be determined to be admissible at trial, "an evaluation of

the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence.” Id. When newly discovered evidence casts doubt on a defendant’s guilt, a new trial should be ordered. Tyson v. State, 87 Fla. 392, 100 So. 254 (Fla. 1924); Adams v. State, 55 Fla. 1, 46 So. 152 (1908).

There is no doubt that Davis’ testimony went to the heart of the accusations against SMITH that held him responsible for ordering Cynthia Brown’s murder. All of the State witnesses detailed in the Order denying SMITH’s 3.851 Motion claimed to have witnessed or overheard conversations between SMITH and Davis or SMITH about Davis. What Davis had to say about these conversations should have been before the jury. The trial court’s dismissal of Davis’ testimony because it was contradicted by other witnesses constitutes insufficient reason to give due deference to the factual findings of the trial court. As to the murder of Cynthia Brown, Davis’ testimony would have directly contradicted and refuted the hearsay claims of the State witnesses, and most probably have resulted in a not guilty verdict as to Counts IX and X.

ISSUE III

THAT THE TRIAL COURT ERRED IN ITS DETERMINATION THAT SMITH'S COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN REGARDS TO THE SPEEDY TRIAL ISSUE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

In the original 3.851 Motion, SMITH alleged that contrary to what he had been told, his trial attorneys had failed to file a Demand for Speedy Trial. As part of their ineffectiveness, they represented to the Court at the June 29, 2004, hearing that SMITH had consented to a 30-day tolling of the speedy trial period. Having secured a representation that SMITH would consent to some tolling, the Court determined that it could set the amount of that tolling.

In its Response, the State showed in the Record that a Demand for Speedy Trial had been filed on June 8, 2004. According to the State, by filing the Demand for Speedy Trial, and considering the 45-day tolling as lawful, SMITH's speedy trial rights were vigorously defended, but his trial commenced within the time provided under Rule 3.191.

Despite filing the Demand for Speedy Trial, SMITH was still the victim of the ineffective assistance of counsel of his trial attorneys in pursuing it. At the Hearing on September 14, 2004, SMITH's trial attorneys were unaware of the

speedy trial time-line. A Notice of Expiration was not filed until September 23, 2004, when the speedy trial period had expired on September 18, 2004. It was the ignorance and apathy towards SMITH's speedy trial rights that should be the subject of an evidentiary hearing.

In his Amended 3.851 Motion, SMITH offered an additional ground for determination at an evidentiary hearing. He denied knowingly agreeing to any tolling to the speedy trial period. He claims that the representations of his trial attorneys were false. If this Court permits SMITH to amend his claim to include this allegation, it would add to his entitlement to an evidentiary hearing to explore the competency of his trial attorneys in the preservation of his speedy trial rights pursuant to Demand for Speedy Trial filed June 8, 2004.

This issue, like others, raised in SMITH's 3.851 Motion allege that SMITH's trial attorneys rendered ineffective assistance of counsel under the Sixth Amendment to the U.S. Constitution, applicable to the states by the Fourteenth Amendment. All claims of ineffective assistance of counsel are reviewed under the two-prong standard set in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 659 So.2d 1069 (Fla. 1995). A defendant alleging ineffective assistance of counsel must show (1) that counsel's performance was outside the range of reasonable professional assistance, and (2)

that such conduct in fact prejudiced the outcome of the proceedings. Strickland, 466 U.S. at 687, 691-92; Cherry, 659 So.2d at 1072. A claim of ineffective assistance of counsel is asserted absence of one of the most critical constitutional guarantees that assures that the result of the proceeding is reliable, and the prejudice prong is less outcome determinative. Robinson v. State, 913 So.2d 514, 522, n. 7 (Fla. 2005), quoting Strickland, 466 U.S. at 694. If an ineffective assistance of counsel claim has been established, “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” Id., see also, Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S.Ct. 848, 122 L.Ed.2d 180 (1993) (holding that an ineffective assistance of counsel analysis “focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.”)

Failing to competently pursue a defendant’s speedy trial rights can satisfy the first prong of Strickland. Gee v. State, 13 So.3d 68 (Fla. 1st DCA 2009); Smith v. State, 988 So.2d 693 (Fla. 2d DCA 2008). SMITH has shown that had his trial attorneys competently preserved his speedy trial rights, his case would have been dismissed. SMITH is entitled to an evidentiary hearing on this issue.

ISSUE IV

THAT THE AMENDMENT TO FLORIDA STATUTE SECTION 775.15, WHICH EXTENDED THE STATUTE OF LIMITATIONS FOR MANSLAUGHTER COULD NOT APPLY TO SMITH'S CASE WITHOUT VIOLATING THE EX POST FACTO PROVISIONS OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

SMITH had alleged as one of his grounds for ineffective assistance of counsel his trial attorneys' acquiescence to allowing the jury to be instructed as to manslaughter. At the time of the murders Leon Hadley (August 14, 1995) and Melvin Lipscomb (August 27, 1995), the Statute of Limitations for manslaughter was three years. Florida Statute Section 775.15(2)(b)(1981). When the Indictment was returned, both of these homicides were beyond the Statute of Limitations for manslaughter. The jury found SMITH guilty of manslaughter in Lipscomb's death. During the charge conference held in this case, SMITH's trial attorneys allowed the jury to be instructed as to manslaughter even though the Statute of Limitations had run as to the Hadley and Lipscomb killings.

In its Response, the State cited the case of Weber v. State, 602 So.2d 1316 (Fla. 5th DCA 1992), for the proposition that a defendant cannot consent to the

giving of an instruction for an offense barred by the Statute of Limitations as a matter of strategy, and then contend that it was fundamental error on appeal. The State conceded that the question of whether it was defense strategy or not could be determined by the Court only after an evidentiary hearing.

At the Huff Hearing, the State withdrew its concession. Citing the case of State v. Calderon, 951 So.2d 1031 (Fla. 3d DCA 2007), the State argued that the Amendment to Section 775.15 effective October 1, 1996, which eliminated any Statute of Limitations for manslaughter could be applied retroactively to any killing for which the old Statute of Limitations had not yet run, even if charges were not pending without violating the ex post facto clause. Under Calderon, both the Hadley and Lipscomb killings were prosecuted within the Statute of Limitations.

The issue before the Court at that point was the retroactivity of Calderon. If Calderon applied to SMITH's case, then the manslaughter charge was within the Statute of Limitations, and there could be no claim that his trial counsel were ineffective for not objecting to its decision in the Court's charge to the jury. If, however, Calderon did not apply, and the statute would not be retroactively applied to the Lipscomb case, then an evidentiary hearing would be needed to determine whether or not allowing a manslaughter instruction to be given

constituted ineffective assistance of counsel.

U.S. Supreme Court Justice Chase in Calder v. Bull, 3 Dall. 386, 1 L.Ed.

648 (1798), described ex post facto laws as follows:

I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. First, every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. Second, every law that aggravates a crime, or makes it greater than it was, when committed. Third, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Fourth, every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder, 3 Dall. at 390-91, 1 L.Ed. 648.

In Stogner v. California, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003), the U.S. Supreme Court considered whether a California state statute that extended the Statute of Limitations period in sex abuse cases violated the ex post facto clause. The Court determined that the Statute of Limitations at issue could not be extended without violating the ex post facto clause. In its ruling, the Court opined that the fact that the limitations period for the cases in question had already lapsed was a factor it was considering. It suggested without ruling that the Statute of Limitations might be extended if the crime was not charged when the date of the enactment of the statute was within the old limitations period.

Section 775.15 as amended effective October 1, 1996, purports to apply retroactively only to killings for which the old three-year limitations period had not yet expired. SMITH contends that constitutional principles as well as respect for the principles embodied by the ex post facto clause does not avoid the violation.

SMITH was indicted for the Lipscomb killing in 2000. By that time, the Statute of Limitations for manslaughter effective in 1995, when the killing had occurred, had run. The extension of the limitations period authorized by the 1996 Amendment to Section 775.15 violated the ex post facto clause.

ISSUE IV

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT TRIAL COUNSEL'S FAILURE TO REQUEST A RICHARDSON HEARING WHEN WITNESS CARLOS WALKER CHANGED HIS TESTIMONY AT TRIAL CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Carlos Walker was listed as a witness for the State. He was deposed by SMITH's attorneys prior to trial. During his deposition, Walker claimed to have no recollection of any involvement with SMITH. He had nothing to say about SMITH committing any crimes.

At trial, Walker changed his story. Now, he recalled vividly SMITH ordering Chazre Davis to “smother” Cynthia Brown.

SMITH’s trial attorneys made no objection to Walker’s testimony until after he had finished. At that point, they moved for a mistrial. The trial court refused to conduct a Richardson inquiry. It found that SMITH was not prejudiced.

On appeal, this Court recognized that there was no objection to Walker’s changed testimony. However, this Court did allow that the Motion for Mistrial may have preserved SMITH’s right to seek the inquiry. Smith, 7 So.3d at 505.

On direct appeal, this Court held that the trial court’s refusal to conduct a Richardson Hearing was harmless error. Smith, 7 So.3d at 505-6. The Court decided that based upon State v. Schopp, 653 So.2d 1016 (Fla. 1995), the failure to conduct a Richardson inquiry was no longer per se reversible error, it could find that despite the State’s failure to have disclosed pre-trial Walker’s changing testimony, and although it was established that the State had been aware of it in advance, the error in failing to disclose it was harmless beyond a reasonable doubt.

In reaching its conclusion, the Court was persuaded by the large number of witnesses who testified about SMITH’s involvement in the murder of Cynthia Brown. Given that all of this testimony was secured by the State through a suspect and unreliable plea-bargaining process, this Court’s reliance on these witnesses to

establish Walker's credibility and the prejudice to the defense was unfair because it used an incorrect standard. When determining harmless error in consideration of a constitutional claim regarding a witness' testimony, it is the impact of the impeachment information not disclosed on the jury's perception of the witness that must be evaluated, not whether the witness' testimony alone has influenced the verdict in the case. In Delaware v. Van Arsdall, 475 U.S. 673, 685, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), the U.S. Supreme Court held that that whether an error was harmless would depend on (1) the importance of the witness' testimony in the prosecution case, (2) whether the evidence was cumulative in failing to disclose it, (3) the presence of other evidence corroborating or contradicting the witness, (4) the extent of cross-examination permitted, and (5) the overall strength of the State's case.

The Court below in this case agreed with the State that the issue had been fully briefed and decided on direct appeal, but SMITH argued that the objection needed to have been raised earlier during Walker's testimony. SMITH raised in his 3.851 Motion the fact that his trial lawyers failed to object as soon as Walker's testimony deviated from his deposition. If they had objected earlier, and the Court had learned that the State had withheld Walker's decision to recant his deposition testimony, and testify in a manner that would surprise and incriminate SMITH at

trial, the Court might well have precluded the testimony or ordered some remedy as a sanction for the discovery violation ultimately found to exist. The fact that this Court did consider the issue on direct appeal did not absolve the trial attorneys from failing to make a timely objection that would have alerted the trial court to the discovery violation before the damage that Walker's testimony did to SMITH's case could be complete. An evidentiary hearing to determine why SMITH's trial counsel did not object to this testimony and bring its complaint to the trial court earlier is still necessary despite the consideration of the issue on direct appeal.

ISSUE VI

THAT THE TRIAL COURT ERRED IN FINDING THAT SMITH'S TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS WHEN HE STATED IN OPENING STATEMENT A CAUSE OF DEATH FOR CYNTHIA BROWN THAT HE KNEW COULD NOT BE SUPPORTED BY THE EVIDENCE THEREBY LOSING CREDIBILITY WITH THE JURY AND PREJUDICING SMITH'S DEFENSE.

During opening statement, defense counsel argued that the evidence would show that Cynthia Brown died of a drug overdose, not a homicide. There was no evidence that that was the cause of death, and the suggestion made later in the opening statement that the Medical Examiner's testimony would support this theory was false.

Dr. Emma Lew, the Medical Examiner, testified that Cynthia Brown died of asphyxia, which was explained by other evidence as having been caused by being smothered with a pillow. The defense theory of death by drug overdose had no basis in the Record.

The State properly exploited defense counsel's wild and irresponsible claims during closing argument when she stated:

The defense told you in opening statement that Cynthia Brown died of a drug overdose. They told you that there was foam in her mouth, consistent with a drug overdose.

You heard from the doctor, through the Deputy Chief Medical Examiner at Miami-Dade County Office of the Medical Examiner, the number two person in charge there, that Cynthia Brown died from asphyxia and suffocation at the Tradewinds Motel.

She did not die of a cocaine overdose, cocaine psychosis, cocaine induced heart attack, or any other reason. She was smothered with a pillow.

(R2.341).

When an attorney makes a false argument or states facts that he or she knows to be false or unsupported by the evidence at opening statement, and the falsity of those statements is revealed during the course of the trial, the resulting loss of credibility can be fatal to their case. If a prosecutor does it, then the jury can conclude that he or she has failed to meet the State's burden of proof. If a criminal defense counsel has done it, the resulting loss of credibility can convince

the jury to reject all of his or her arguments. It is one thing for an attorney to advance a theory of defense that the evidence fails to support, but it is another to advance a theory that the attorney knows would be proven false. That defense counsel has rendered ineffective assistance of counsel. Robinson v. State, 702 So.2d 213 (Fla. 1997).

In Robinson, this Court vacated a death sentence on direct appeal based, in part, on ineffective assistance of trial counsel in making factual assertions he knew were not going to be supported by the evidence. The attorney admitted that he had made an entirely fictitious opening statement because he thought that by shocking the jury his client would benefit because the jury would pay more attention to the proceedings. This Court found this dubious strategy absurd, and determined under the circumstances of the case that the incompetence displayed by the defense lawyer was so egregious that it warranted a reversal on direct appeal.

SMITH's counsel's opening statement regarding Cynthia Brown's cause of death caused him to lose credibility with the jury like the defense counsel in Robinson. As the jury began to hear the evidence, and it realized that the defense counsel had, in essence, lied, that attorney lost credibility on all issues. The prosecution knew this and exploited defense counsel's false and unsupported assertions during closing argument to SMITH's prejudice.

ISSUE VII

THAT THE TRIAL COURT ERRED IN NOT REQUIRING THE STATE TO AFFIRMATIVELY DISCLOSE ANY FILES OF COOPERATING WITNESSES THAT HAD BEEN ILLEGALLY MADE SECRET AND NOT DISCLOSED BEFORE TRIAL.

After SMITH's trial, media accounts revealed that many persons who were cooperating with the Miami-Dade State Attorney's Office and the U.S. Attorney's Office in Miami-Dade County had the court files for their cases "hidden", and not available for review by anyone.

The news accounts prompted the Honorable R. Fred Lewis, Chief Justice of this Court, and the Honorable Joseph P. Farina, Chief Judge of the Eleventh Judicial Circuit (Miami-Dade County), to order an investigation. As a result of that investigation, there were hidden files discovered in the Civil Division (R2.343).

Shortly thereafter, a reporter wrote that "[j]udges and prosecutors in Miami-Dade have had official court records altered and kept secret dockets to disguise what was actually happening in some court cases." Dan Christensen and Patrick Danner, Dockets Doctored to Shield Snitches, *Miami Herald*, Nov. 18, 2006. According to the report, "[m]ore bogus records apparently exist. Jose Arrojo, a

top assistant to Miami-Dade State Attorney Katherine Fernandez Rundle, said “judges’ altering public records in informant cases at prosecutors’ requests has been ‘an established practice in this circuit’ for two decades.” Id. The report revealed that in Miami-Dade, the records were not just sealed or hidden from public view; the dockets were actually altered in order to provide cover for snitches. State Attorney Rundle defended the practice indicating that “the use of altered court records ‘most often arises in narcotic or special prosecution cases,’” but agreed that “[a]ny future practice would not include affirmatively falsifying docket entries.” Dade Won’t Falsify Court Records, Rundle Says, Dan Christianson and Patrick Danner, *Miami Herald*, December 14, 2006. The Miami Herald found two cases, but more apparently exist:

Florida law makes it a crime for anyone—including judges, clerks or ‘other public officers’—to alter or falsify court records or proceedings. Offenders can be sent to prison for a year. Miami First Amendment attorney Thomas Julian called Fernandez Rundle’s remarks to the Chief Justice ‘stunning’. ‘It appears’ that the State Attorney is admitting that she and others in the judicial have simply ignored a criminal statute that flatly prohibits the falsification of judicial records,’ Julian said.

(R2.344).

SMITH questioned whether the witnesses who testified against him may have had their own case files hidden. There were no specific instances of hidden

files of State witnesses alleged in his 3.851 Motion.

The State maintained that it was SMITH's burden to identify whether any of its witnesses at trial had had their own case files hidden. At the Huff Hearing, the State persuaded the Court to deny SMITH an evidentiary hearing on this issue because of his failure to have identified any of the hidden files.

The burden of disclosing any impeachment evidence for any of the State's witnesses is on the State. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Floyd v. State, 902 So.2d 775 (Fla. 2005). This duty on the prosecutor to disclose evidence favorable to a defendant is not dependent on a specific demand being made. Kyles, 514 U.S. at 432-433; Brady v. Maryland, 373 U.S. at 83; United States v. Agurs, 427 U.S. at 97, 107; United States v. Bagley, 473 U.S. 667 , 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

The Court denied SMITH's claim and refused to grant him an evidentiary hearing. In its Order, the Court cited the case of Rodriguez v. State, 39 So.3d 275 (Fla. 2010), where an evidentiary hearing was held upon the allegation that one or more of the cooperating witnesses in that case had had their own cases made secret to hide exculpatory evidence. The defendant in that case was faulted for failing to have uncovered what had been hidden in what amounted to a conspiracy between the State and the judiciary.

When it comes to a defendant's right to due process, and the source of the violation is itself hidden within the files of the State Attorney's Office, the Court cannot impose the burden of uncovering this evidence on the defendant. It is the State that knows which dockets were kept secret or were altered to protect its cooperating witnesses because the alterations were done at the request of its lawyers . If the prosecutors involved did not maintain records, then the miscarriage of justice would be complete, and the crime unsolvable. Just because a defendant cannot find evidence of a secret docket does not mean that they do not exist. In light of the admissions by Ms. Rundle in the Miami Herald articles, the burden to reveal the existence of all secret dockets must be borne by the State. Otherwise, a rebuttable presumption must be found to exist especially in a case where the elected State Attorney herself admits that the illegal practice has regularly occurred over two decades.

During the Huff Hearing, the State suggested that the hidden files and secret dockets should be ascertainable by a review of all of the public records disclosed during the course of the post-conviction litigation. Since the defense had not identified any such material in its 3.851 Motion, the State argued that SMITH has failed to meet his burden.

The State's reasoning was flawed. There was no indication that any files that had been hidden or altered were ever uncovered or revealed by the State Attorney's Office. Consequently, it was a mere presumption that previously hidden files were deposited with the Registry. How can counsel be faulted for not finding records that have been hidden?

To the extent that the defense was required to review all of the records gathered during the course of this litigation in order to find any hidden files, or determine which dockets were altered pursuant to policy, counsel confessed at the Huff Hearing to having had insufficient time to do so. The Court denied SMITH's counsel's Motion to Continue the Huff Hearing on order to complete his review of all the materials disclosed in the various public records requests. This is but another reason why the Court's refusal to have continued the Huff Hearing was an abuse of discretion.

ISSUE VIII

THAT THE TRIAL COURT ERRED IN DENYING SMITH AN EVIDENTIARY HEARING ON THE POST-TRIAL DISCLOSURE OF THE GETER TAPES THAT WERE THE SUBJECT OF A MOTION FOR NEW TRIAL THAT WAS NEVER HEARD.

Trish Geter was SMITH's former girlfriend, and was an important witness for the State. Geter claimed to have had three-way telephone calls with SMITH prior to the death of Angel Wilson, which were part of the charged conspiracy to kill Anthony Fail. SMITH had been incarcerated on the Federal charges at the time.

After SMITH's indictment in the instant case, he and Geter were still maintaining a relationship. SMITH and his co-defendant, Latravis Gallashaw, made a series of three-way calls through Geter. During those calls, SMITH made exculpatory statements. Both SMITH and Gallashaw were both represented by counsel when the calls were made. The existence of these recorded telephone calls were not revealed to SMITH until May 13, 2005: after the death sentence in this case.

On May 20, 2005, a Motion for New Trial based upon the State's concealment of the Geter tapes was filed. That Motion was never ruled upon.

In his 3.851 Motion, SMITH contended that since the Motion for New Trial had never been ruled upon, the Record on Appeal had been incomplete, and he was entitled to litigate that Motion in post-conviction proceedings. The State countered stating that the issue was procedurally barred because it was not made part of the direct appeal.

The reason why the Motion for New Trial was not heard was because it was filed after the Notice of Appeal was filed. Trial counsel had tried to strike the Notice of Appeal so the Motion could be heard, but the Court denied the Motion. The Court invited trial counsel to request this Court relinquish jurisdiction to permit the Motion for New Trial to be heard and ruled upon. Since no request was filed with this Court to relinquish jurisdiction, the State contended that the Motion for New Trial was waived (R4.730).

Provided that the Motion for New Trial was timely filed, SMITH was entitled to a hearing and an opportunity to be heard to obtain a ruling. While he certainly had a right to request this Court relinquish jurisdiction on direct appeal so that it could be heard immediately, there was no requirement that he do so. His failure to do so would not constitute a waiver of his right to raise the issue in habeas proceedings.

In Jones v. State, 745 So.2d 1061 (Fla. 2d DCA 1999), a defendant filed a motion to relinquish jurisdiction to the appellate court in order to allow the trial court to conduct an evidentiary hearing on a motion for new trial. When the case returned to the trial court, no evidentiary hearing was conducted because the motion was denied as untimely. The Second District refused to consider the issue on the direct appeal, and affirmed the judgment and sentence without prejudice to the defendant's right to file a timely motion for post-conviction relief pursuant to Rule 3.850. Id., at 1062. See also, Jarrett v. State, 654 So.2d 973 (Fla. 1st DCA 1995) (Defendant did not waive appeal when, although he had escaped from custody, he was back before the Court before ruling on Motion for New Trial).

If a motion for new trial filed during the pendency of an appeal, but not heard on its merits, could be the subject of a 3.850 motion in Jones, the Motion for New Trial SMITH filed regarding the late disclosure of the Geter tapes, which were also filed while the case was on direct appeal, and was never heard, can be heard during post-conviction proceedings. The trial court erred in denying SMITH an evidentiary hearing on this issue.

ISSUE IX

THAT THE TRIAL COURT ERRED IN DENYING SMITH AN EVIDENTIARY HEARING IN ORDER TO PRESENT CLAIMS BASED ON THE 2006 ABA REPORT FINDING FLORIDA'S DEATH PENALTY SYSTEM FLAWED.

In 2001, the ABA created the Death Penalty Moratorium Implementation Project to collect and monitor data on the death penalty. American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, at 1 (2006). A State Assessment Team made up of death penalty experts both supporting and opposing the death penalty was assembled to evaluate Florida's death penalty scheme in an unbiased and non-partisan manner. In September, 2006, the ABA published a report containing the Florida State Assessment Team's conclusions as to Florida's death penalty scheme and its recommendations for improvement ("ABA Report"). At the conclusion of its investigation into Florida's death penalty system, the ABA was "convinced that there is a need to improve the fairness and accuracy in a death penalty system" as the State of Florida "fails to comply or is only in partial compliance with" certain minimum safeguards and policies to insure fairness and "many of these shortcomings are substantial." More specifically, the ABA Report found that:

[d]eath sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Florida capital jurors do not understand their role and responsibilities in deciding whether to impose a death sentence. In one study, over 35% of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7% believed that the defense had to prove mitigating factors beyond a reasonable doubt. The same study also found that over 36% of interviewed Florida capital jurors incorrectly believed that they were required to sentence the defendant to death if they found the defendant's conduct to be 'heinous, vile, or depraved' beyond a reasonable doubt, and 25.2% believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.

ABA Report at vi, cited by In re Standard Jury Instructions in Criminal Cases—Report No. 2005-2, 22 So.3d 17, 19 (Fla. 2009) (R2.366-367).

On October 29, 2009, this Court revised Instruction 7.11. See, In re Standard Jury Instructions, 22 So.3d 17. The revision was promulgated in response to the publication of the ABA Report in its call for fairness and accuracy in Florida's capital sentencing scheme. The prior instruction 7.11 that was used in SMITH's trial was enacted in 1997 (R2.370).

SMITH contends that the Instruction 7.11 used in his trial had been invalidated by the ABA Report on subsequent revision by this Court. The Court below disagreed citing Seibert v. State, 64 So.3d 67, 89 (Fla. 2010).

SMITH acknowledges that this Court still follows Seibert and refuses to permit a person facing a death penalty to challenge in post-conviction proceedings the fairness and integrity of the death penalty based upon the findings and recommendations contained in the ABA Report as adopted by this Court in the 2009 revisions to Instruction 7.11. Foster v. State, — So.3d —, 2013 WL 5659482 (Fla. October 17, 2013). Nonetheless, SMITH contends that post-conviction litigation in a death penalty case should be permitted to attack the fairness, integrity and reliability of the death penalty process.

ISSUE X

THAT THE TRIAL COURT ERRED IN AFFIRMING THAT LETHAL INJECTION UTILIZED BY FLORIDA CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Court below found that the “new protocol” for lethal injection was found to be constitutional in Valle v. State, 70 So.3d 530 (Fla. 2011). SMITH reserves the right to challenge the constitutionality of the protocol utilized by the State of Florida to implement the death penalty in existence at the time that a death warrant is issued.

ISSUE XI

THAT THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO THE PRINCIPAL INSTRUCTION GIVEN IN CONNECTION WITH THE CONSPIRACY COUNTS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

None of the murders listed in the Indictment were actually committed by SMITH. The State's theory was that the various murders attributable to SMITH had resulted because of an agreement he made with the actual perpetrator. In other words, SMITH was a member of a conspiracy to commit those murders.

The jury instructions in this case included the standard instruction on principals pursuant to Florida Statute Section 777.011. A principal instruction should not be given with respect to a conspiracy count. Ramirez v. State, 371 So.2d 1063 (Fla. 3d DCA 1979). For trial counsel not to object to the giving of a principal instruction in connection with the conspiracy counts constitutes ineffective assistance of counsel. McKay v. State, 988 So.2d 51 (Fla. 3d DCA 2008); Evans v. State, 985 So.2d 1105 (Fla. 3d DCA 2007).

Having set forth a prima facie case of ineffective assistance of counsel, SMITH was entitled to an evidentiary hearing. At that hearing, SMITH could establish the prejudice he suffered because of this erroneous instruction, and establishes his entitlement to a new trial.

ISSUE XII

THAT THE TRIAL COURT ERRED WHEN IT DETERMINED THAT TRIAL COUNSEL HAD NOT RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION WHEN IT FAILED TO OBJECT TO AN ERRONEOUS MANSLAUGHTER INSTRUCTION.

In State v. Montgomery, 39 So.3d 252 (Fla. 2010), this Court held that the then-existing standard jury instruction on manslaughter by act improperly required proof of intent to kill. By so holding, this Court determined that it was fundamental error for a jury to have been instructed under the old manslaughter instruction was fundamental error. The instruction on manslaughter given at SMITH's trial clearly violated Montgomery.

The trial court denied SMITH relief on this issue because his attorneys could not have been faulted for failing to anticipate a change in jury instructions (R7.1250), citing Walton v. State, 847 So.2d 438, 445 (Fla. 2003).

This issue was presented in SMITH's pro se Motion to Amend, which was adopted by counsel and heard on the merits. SMITH had characterized his claim

as one of ineffective assistance of counsel, not upon a fundamental change in the law. This Court has granted pro se movants with great latitude in their characterization of the relief being sought. The issue this Court needs to consider is whether the Montgomery error was so fundamental that it needs to be applied retroactively.

Under Witt v. State, 387 So.2d 922 (1980), this Court held that whether a new rule of law should be applied retroactively, the considerations would be (1) purpose to be served by the new rule, (2) extent of reliance on the old rule, and (3) the effect on the administration of justice of a retroactive application of the new rule. If a change in the law is of fundamental significance, and not a mere evolutionary refinement, then it should be applied retroactively.

The Montgomery decision would also be considered retroactive under the more restrictive standards promulgated by the U.S. Supreme Court when applied to Federal cases. Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

SMITH was convicted of manslaughter in Counts VII and XIII pursuant to a jury instruction clearly violative of Montgomery. If the jury had been properly instructed, it would most probably have found SMITH not guilty of the manslaughter charge. The fact that the manslaughter instruction was

fundamentally flawed effects the other murder counts as well. SMITH should be afforded a new trial.

CONCLUSION

Upon the arguments and authorities aforementioned, Appellant requests this Court vacate the Order denying his Motion to Vacate Judgments of Conviction and Sentences, as amended, with directions to hear the issues raised in his Supplement/Amendment to Motion to Vacate Judgments of Conviction and Sentences filed October 5, 2012, and conduct any evidentiary hearings necessary to fully litigate the constitutional issues raised in this post-conviction death penalty case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/e-mailed this 24th day of October, 2013, to: SANDRA JAGGARD, ASST. ATTORNEY GENERAL, Office of the Attorney General, 444 Brickell Avenue, Miami, FL 33131.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial Brief of Appellant was typed in Times New Roman 14.

CHARLES G. WHITE, ESQ.

