IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-459

THOMAS JAMES MOORE,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on direct appeal to this Court;

"T. ___" - Trial transcript;

"PC-R. ___" - Record on appeal from denial of first 3.851;

"2PC-R. __" - Record on appeal from denial of second 3.851;

"3PC-R. __" - Record on appeal from denial of current 3.851.

All other citations will be self-explanatory or will otherwise be explained.

INTRODUCTION

On the afternoon of Thursday, January 21, 1993, Johnny Parrish's house in Jacksonville was discovered ablaze. When the fire was extinguished, Mr. Parrish's body was found inside; he had been shot and killed before the fire began.

Appellant, Thomas Moore, had been friends with his neighbor, Mr. Parrish.[1] Following the discovery of Mr. Parrish's body, Mr. Moore tipped off law enforcement on Friday, January 22nd that he saw Carlos Clemons[2] and Vincent Gaines[3] hanging near Mr. Parrish's house shortly before the homicide (T. 1114).[4] According to Mr. Moore, he had spoken

[1]In January of 1993, Mr. Moore was 19 years old (T. 1468).

[2]Mr. Clemons' date of birth was May 6, 1979 (3PC-R. 856). So at the time of the homicide in January of 1993, he was a little over three months short of his 14th birthday.

[3]Mr. Gaines' date of birth was March 14, 1976 (3PC-R. 868). So at the time of the homicide in January of 1993, he was a little over two months shy of his 17th birthday.

[4]According to the stipulated evidence at trial, Mr. Moore placed a call to the police at 4:00 PM on January 22, 1993. Detective O'Steen returned the call at 9:00 PM that same day and spoke with Mr. Moore. According to Det. O'Steen's note, Mr. Moore advised that he had been

to Mr. Parrish that day and warned him about what Mr. Clemons and Mr. Gaines had been up to that day:

> A I said, "Them there boys, they have got a gun because they are - - there were chasing Little Terry earlier today." And Michael Dean said, Yeah, they sure do." So, Mr. Parrish say, "Well, they had better not come around here because I have got one too."

(T. 1104).

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with a number of individuals drinking moonshine outside Mr. Parrish's house (Mr. Parrish was known to make and sell moonshine). Mr. Clemons and Mr. Gaines (who was identified as "Slim" in the Det. O'Steen's note) were among those outside Mr. Parrish's house. When everyone else left, Mr. Clemons and Mr. Gaines went across the street from Mr. Parrish's house. About thirty minutes later, Mr. Parrish's house was on fire (T. 1155-56).

Detective Conn who was the lead detective on the case went out of town at about noon on Friday, January 22, 1993 (T. 1154). In Det. Conn's absence, Det. O'Steen returned Mr. Moore's call (T. 1155). Det. Conn found Det. O'Steen's note regarding his conversation with Mr. Moore when she returned the following Monday morning (T. 1154-55). She interviewed Mr. Clemons on January 29, 1993, seven days after Mr. Moore's phone call. On January 29th, Det. Conn took Mr. Clemons out of school and transported him to the police station where she read him his rights and he gave a statement at about 4 PM (T. 927-30, 952).

After obtaining a statement from Mr. Clemons, the police arrested Mr. Moore (T. 943-44). Mr. Moore's arrest was broadcast on the evening news (T. 944). When Mr. Gaines was located and advised of his rights on January 30, 1993, he mentioned that he had seen the news report regarding Mr. Moore's arrest (T. 938-39, 943-45). Initially Mr. Gaines "denied any knowledge of Mr. Parrish's death and any involvement with Mr. Parrish's death" (T. 952). However after he was advised that the police had obtained a statement from Mr. Clemons and that he had said that Mr. Gaines' "involvement was standing out on the corner" (T. 955), Mr. Gaines gave a statement "that he only stood on the corner, that he heard Carlos and Thomas were going to get money from the old man" (T. 955).

When law enforcement followed up on Mr. Moore's tip, Carlos Clemons and Vincent Gaines turned the tables on Mr. Moore. They claimed that they were assisting Mr. Moore rob Mr. Parrish when he, Mr. Moore, shot and killed Mr. Parrish.[5]

[5]Raimundo Hogan testified at the 2011 evidentiary hearing regarding a conversations he had with Mr. Gaines in 1993 when they were both held in the juvenile pod of the Duval County Jail (3PC-R. 764-65). In these conversations, Mr. Gaines explained to Mr. Hogan why Mr. Moore was chosen to take the fall for the robbery he committed with Mr. Clemons:

> A Well, he just said that him and Clemons did a little robbery, dude got killed. I didn't know the victim at all. Then like two or three days later we talked more. That's when he went to telling me about exactly who did what.
>
> Q Okay. And what did he tell you in that conversation?
>
> A Well, he told me that him and Clemons robbed the dude, Clemons shot him, and then I asked him, you know, what you all going to do. He said they were going to put it on somebody else. I'm like, uh, well, you all really want to do that. He was like, we ain't got no choice, because the dude they're going to blame it on, he's a nobody.
>
> Q What does that mean, "he's a nobody"?
>
> A Well, he ain't really got no family, no friends going to take, you know, get some get-back when they tell on him. That's a nobody.
>
> Q Just for the record, what is "get-back"?
>
> A Okay. Well, if I tell on somebody, your family members find out that I told on you, they going to want to kill me or do something bodily harm to me. With Moore, there was no fear. He didn't have nobody in his family that they were scared of.

They were both arrested and housed in the juvenile pod of the Duval County Jail.

The State's case at Mr. Moore's trial came down to the testimony of Carlos Clemons with support from Vincent Gaines, both of whom had been charged as co-defendants in the murder of Johnny Parrish.[6] The State called Mr. Clemons to testify that he was inside Mr. Parrish's home with Mr. Moore when he saw Mr. Moore shoot and kill Mr. Parrish.[7] He was the only witness who claimed to have seen the homicide. His credibility was a central issue at the trial. At the trial, the State also called Mr. Gaines who testified that while he acted as a lookout, he observed Mr. Moore and Mr. Clemons enter Mr. Parrish's house.[8] Mr. Gaines testified after hearing two shots, he

[6]Mr. Clemons was charged with second degree murder and attempted armed robbery (T. 809-10). Mr. Gaines was also charged with second degree murder and attempted armed robbery (T. 552).

[7]Though Mr. Clemons had at one point pled guilty to second degree murder and juvenile sanctions in return for his cooperation with the State against Mr. Moore, that plea had been vacated by the time of Mr. Moore's trial because it was an "illegal agreement" (T. 810-12). In his testimony, Mr. Clemons told Mr. Moore's jury that there was no agreement then in effect and no promises had been made to him, although he had been told that "if [he] didn't tell the truth" the prosecutor would "[g]ive me life in prison" (T. 812). He explained that the reason that he was testifying at Mr. Moore's trial was that "[i]t's the right thing to do" (T. 813).

[8]By the time of Mr. Moore's trial, Mr. Gaines had pled to accessory to murder and attempted armed robbery and received a three and a half year prison sentence as part of a plea agreement Mr. Gaines was obligated to "[t]estify" "[t]ruthfully against Thomas Moore" (T. 555).

saw Mr. Clemons run from the house (T. 545, 548). *Moore v. State*, 701 So. 2d 545, 547 (Fla. 1997).[9]

At his trial, Mr. Moore testified in his own behalf and disputed the testimony of both Mr. Clemons and Mr. Gaines. He explained that he had warned Mr. Parrish about Mr. Clemons and Mr.

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[9]To bolster Mr. Clemons and Mr. Gaines in this credibility battle, the State also called Chris Shorter to testify to an alleged confession from Mr. Moore. According to Mr. Gaines, Mr. Shorter was a close friend to Mr. Clemons (T. 571). According to Mr. Clemons, Mr. Shorter was like family to Mr. Clemons - their mothers were like best friends and lived in the same apartment complex on Flag Street (T. 831). According to Mr. Shorter, he often visited Mr. Clemons' house, hung out and played games with him (T. 1012). Mr. Shorter, who had a felony conviction, also described Mr. Gaines as a friend (T. 1012), while he acknowledged that Mr. Moore owed him money when Mr. Moore failed to sell drugs for him (T. 1014). In cross, Mr. Shorter denied that Mr. Moore owed "over $3,000 for drugs that [he] ha[d] advanced him" and denied that he was dealing drugs for two big name dealers (T. 1014-15). However, Mr. Shorter did acknowledge he was unemployed in January of 1993 (T. 1013).

Though he testified that Mr. Moore told him that he did the murder the day of the homicide (T. 1022), in his initial contact with the police (Detective Hickson) a few days after the murder, Mr. Shorter refused to give the police a written statement (T. 1024), and maintained that "[he] didn't know too much about [the homicide]" (T. 1016). According to Mr. Shorter's testimony he "didn't choose to share [Mr. Moore's alleged confession] with the police" (T. 1016) ("No, not at that point."). It was not until February 4, 1993, that he agreed to give Det. Conn a sworn statement (T. 1006). However in the oral interview with Det. Conn before the sworn statement was given, Mr. Shorter maintained that he had no discussion with Mr. Moore about Mr. Parrish's homicide (T. 1025-27). In his testimony, he indicated that the oral statement to Det. Conn was "false" (T. 1027). According to Mr. Shorter, Det. Conn convinced him to change his story and say that Mr. Moore confessed to him the day of the murder (T. 1022, 1027).

At the 2011 evidentiary hearing, Mr. Moore's mother recounted how some years after Mr. Moore's conviction, Mr. Shorter approached her at a gas station while she was pumping gas and said: "I don't mean no harm, but I had to do what I had to do because I had to think about my children." (3PC-R. 738). He tried to go over specifics with Mr. Moore's mother, "but [she] was afraid of him. [She] wouldn't talk to him." (3PC-R. 741).

Gaines and their earlier activity that day chasing Little Terry with a gun.[10] He also advised his jury that he had tipped off the police the day after the homicide regarding his suspicions that Mr. Clemons and Mr. Gaines were involved (t. 1113). And Mr. Moore disputed Mr. Shorter's claim that he had confessed to doing the homicide (T. 1129-30).[11]

At its conclusion, the trial was a credibility battle between Mr. Clemons and Mr. Gaines on one hand, and Mr. Moore on the other who swore to his own innocence.[12]

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[10]Mr. Gaines in his testimony denied going with Mr. Clemons around noon on the date of Mr. Parrish's death, he denied seeing Mr. Clemons with a gun that day and denied seeing the individual known as Little Terry that day. (T. 568-69).

[11]Mr. Moore explained that Mr. Shorter was his "juggler man", "[h]e's like a dope supplier" (T. 1094). Mr. Moore's relationship with Mr. Shorter was premised upon the drug trade. Mr. Moore sold drugs for Mr. Shorter (T. 1093). Mr. Moore also testified that Mr. Shorter told him that Mr. Clemons was "a tough little sport" who he had been "used" on "capers" (T. 1097).

[12]The State also called Randy Jackson in an effort to impeach Mr. Moore's testimony. Mr. Jackson, who had felony convictions for crimes involving dishonesty, testified that while he was incarcerated in the Duval County jail in early 1993, he encountered Mr. Moore who told him that he had killed Mr. Parrish (T. 963-67). However, he did not tell law enforcement about this alleged confession until a week and a half before he gave his testimony at Mr. Moore's trial, eight months later (T. 968). He also claimed that he had no grudge against Mr. Moore even though in February of 1991, he had reported to the police that on February 10, 1991, Mr. Moore "struck [him] over the head with a pistol. After a scuffle [Mr. Jackson] fled at which time several shots were fired." (T. 973-77; 3PC-R. 8). As a result, of Mr. Jackson's statements to the police on February 10, 1991, Mr. Moore was arrested on February 11, 1991; however, the charges based upon Mr. Jackson's allegations were dropped on March 15, 1991, as reflected in the online docket of the Duval County Clerk of Court. *See State v. Moore*, Case No. 91-2718.

In this Court's opinion on direct appeal affirming the conviction and death sentence, it explained the facts of the case in the following fashion:

> Moore was convicted of robbing and killing Johnny Parrish - - an adult resident of his neighborhood - - and burning down Parrish's house. The two were friends, and Moore occasionally visited Parrish's home. On January 21, 1993, at about 3 p.m., Moore sat outside Parrish's house drinking with the victim. Moore claims that two other youths, Clemons and Gaines, approached the house. Moore claimed he saw the pair chase a neighborhood youth named "Little Terry" with a gun earlier that day, but Clemons denied it at trial. Clemons and Gaines testified that they had a conversation with Moore about robbing Parrish. Clemons said he agreed to go in the house with Moore, and Gaines was to be the lookout. Gaines said he stood outside but did not see either man go in. He said he heard two shots and then saw Clemons come out of the house and go back in. When Gaines started to walk away, Clemons caught up with him and told him Moore had shot Parrish.
>
> Clemons said that when he and Moore went into the house, Moore pulled out a gun. Moore asked Parrish where his money was and then shot him when he got no response. Later, neighbors saw smoke in Parrish's house and ran in and pulled out Parrish. Parrish was already dead when

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At the 2011 evidentiary hearing, Mr. Moore called private investigator, Dan Ashton to testify regarding his contact with Mr. Jackson. (PC-R. 827). When a hearsay objection was sustained, Mr. Ashton testified in a proffer that Mr. Jackson had told him that "he wanted to be paid for his testimony, that he was previously paid for his testimony by the State, that his brother and father were also paid for their testimony, and that if I showed him the money he would tell me what I wanted to know." (3PC-R. 832). During the cross of Mr. Ashton and not as a part of Mr. Moore's proffer, the State chose to ask Mr. Ashton "who on behalf of the State paid Randy Jackson?" (3PC-R. 833). The State elicited testimony from Mr. Ashton that in fact Mr. Jackson had not identified who paid him, he had simply "said they paid me, they paid me every time I came to court. And I said who is 'they'"... If I could have gotten a name from him, I clearly would have." (R. 833-34).

> exposed to the fire, and a fire investigator, Captain Mattox, said that there were two separate fires in the house, both of which were intentionally set.

Moore v. State, 701 So. 2d at 547.[13]

When he filed his current Rule 3.851 motion in 2006, Mr. Moore had located several witnesses who had been housed with Mr. Clemons and Mr. Gaines in the juvenile pod in the Duval County jail in 1993. These witnesses indicated in various accounts that Mr. Clemons and Mr. Gaines had made statements during that time period indicating that in order to save themselves, they were going to falsely put the blame on Mr. Moore for the homicide. Mr. Moore presented a claim based upon what these witnesses had advised. The claim was pled alternatively as either *Brady* evidence withheld by the State, *Strickland* evidence that Mr. Moore's trial counsel unreasonably failed to discover, or newly discovered evidence under *Jones v. State*, 591 So. 2d 911 (1991) (3PC-R. 12-20). Based upon Mr.

[13]It should be noted that Justice Anstead dissented from this Court's disposition of Mr. Moore's direct appeal. Besides concluding that reversible error occurred during the penalty phase of Mr. Moore's trial, Justice Anstead wrote: "I am troubled in this case because two of the most important aspects of our review, sufficiency of the evidence and proportionality of the death sentence, have not been briefed. Because these are fundamental issues that we must confront, I would require the parties to brief these issues rather than considering them without briefing." *Moore v. State*, 701 So. 2d at 552. In fact, the Initial Brief served on Mr. Moore's behalf on December 15, 1995, was 29 pages in length.

Moore's allegations, an evidentiary hearing was held on March 22, 2011.[14]

At the evidentiary hearing, Mr. Moore called a number of witnesses, including several individuals who had been incarcerated with Mr. Clemons and Mr. Gaines in the juvenile pod. In the State's case, it responded to this testimony by calling Mr. Clemons and Mr. Gaines to the stand to testify. Their 2011 testimony gave rise to a previously unknown claim under *Giglio v. United States*, 405 U.S. 150, 153 (1972), that the State had allowed both Mr. Clemons and Mr. Gaines to testify falsely at Mr. Moore's 1993 trial. This *Giglio* claim was newly discovered within the meaning of Rule 3.851(d)(2)(A), as it had not been previously disclosed. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). Their testimony also provided evidence in support of a related violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Thus, before this Court in Mr. Moore's current appeal are intertwining claims on which the circuit court heard evidence. First, there is Mr. Moore's alternatively pled *Brady-Strickland*-newly discovered evidence claim[15] which

[14]A month before the evidentiary hearing, the State provided Mr. Moore's counsel with an opportunity to depose Mr. Clemons and Mr. Gaines at the State Attorney's Office in Jacksonville.

[15]At the 2011 evidentiary hearing it was established that one of the juveniles in the juvenile pod at the Duval County jail, David Hallback, had spoken to Mr. Moore's attorneys on either July 2 or September 2, 1993 (before Mr. Moore's trial), and advised them that Carlos Clemons had told him and others in the juvenile pod that "Thomas didn't do it." (Def. Ex. 3). Another juvenile from that same pod spoke with Mr. Moore's trial attorneys about Mr. Clemons and Mr. Gaines on January 25, 1994 (Def. Ex. 1). In light of this evidence,

precipitated the filing of the Rule 3.851 motion in 2006. That alternatively pled claim is now premised upon the March of 2011 testimony from the individuals who had been incarcerated with Mr. Clemons and Mr. Gaines in 1993 and the statements those witnesses alleged were made by Mr. Clemons and Mr. Gaines in 1993 acknowledging that to save themselves they were going to make Mr. Moore take the fall for Mr. Parrish's homicide.[16] And, there are the *Giglio-Brady* claims arising from the testimony from Mr. Clemons and Mr. Gaines in March of 2011 establishing that their testimony at Mr. Moore's trial was materially false. Mr. Moore, who testified to his innocence at trial and still maintains his innocence, argues in this brief that, in light of the evidence presented at the March 2011 hearing and for the reasons explained herein, his conviction cannot constitutionally stand and a new trial must be ordered.

STATEMENT OF THE CASE

A. Procedural History

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it is clear that Mr. Moore's trial attorneys were aware that Mr. Clemons and Mr. Gaines had made statements to fellow inmates in the juvenile pod.

[16]In his written closing in the circuit court, Mr. Moore asserted that: "To the extent that Mr. Moore's trial counsel was aware or should have been aware of individuals who knew of exculpatory statements made by Mr. Clemons, but failed to learn of such statements or conduct follow up investigation upon such statements because counsel's office represented the witnesses in their own criminal cases, counsel's performance was deficient because of a known or unknown conflict of interest." (3PC-R. 27). This was because David Hallback who advised individuals from the public defender's office representing Mr. Moore that Mr. Clemons had advised him that Mr. Moore had not committed the murder was also represented by the public defender's office (3PC-R. 728-29).

Mr. Moore was charged with and convicted of first-degree murder, attempted armed robbery, conspiracy to commit robbery, armed burglary, and arson.[17]

The trial commenced on October 25, 1993. Following the guilty verdicts on October 29, 1993 (T. 1378-82), a penalty phase proceeding was conducted on November 3, 1993 (T. 1386). At the conclusion of those proceedings, the jury, by a 9-3 vote, recommended the imposition of a sentence of death (T. 1553). On December 2, 1993, the circuit court sentenced Mr. Moore to death (T. 1580-82).

On appeal, this Court affirmed the convictions and sentence of death with Justice Anstead dissenting. *Moore v. State*, 701 So.2d at 549.[18] This Court unanimously found guilt phase error when the State was permitted to present a witness, Larry Dawsey, to testify that he saw Mr. Moore several days after the murder and Mr. Moore

[17]Mr. Moore was indicted on February 18, 1993, on six counts. However, the sixth count, possession of a firearm by a convicted felon was not submitted to the jury (R. 428-32).

[18]Moore presented seven claims on appeal: (1) it was error to limit Moore's cross-examination of two State witnesses on crucial points of fact; (2) it was error to limit cross-examination of a third witness, refuse to hear a proffer, and deny a motion for mistrial; (3) it was error when the court made prejudicial remarks in the presence of the jury commenting on evidence and disparaging the defense, and thereby denying Moore due process; (4) it was error to admit a witness's testimony that Moore was in possession of a firearm two days after the victim's death; (5) it was error to admit a copy of co-defendant Clemons' written statements to police into evidence; (6) it was error to admit victim impact evidence which did not comport with section 921.141(7), Florida Statutes (1995); and (7) it was error to allow the State to use mitigation as nonstatutory aggravation during penalty phase closing arguments. The fourth argument was found to be meritorious, but harmless. The other six arguments were found to be without merit.

showed him a long nose .38 and said "If they don't stop saying that I killed the victim, somebody is going to be dead for real" (T. 712).[19] However, this Court concluded this error was harmless saying: "Because there was direct evidence from the other witnesses that Moore possessed a gun on the actual day of the murder and direct evidence that Moore shot the victim, there is no reasonable possibility that the error contributed to the conviction here." *Moore v. State*, 701 So. 2d at 550.[20]

Following the denial of certiorari review by the US Supreme Court, legal representation of Mr. Moore passed to CCRC-North. Due to unresolved public records issues, Mr. Moore filed an incomplete motion to vacate and through that motion sought to litigate public records issues. On April 29, 1999, the circuit court held a hearing on Mr. Moore's outstanding public records demands. On May 12, 1999, the circuit court issued orders regarding the public records issues. Mr. Moore filed for a rehearing on May 21, 1999. On July 7, 1999, Mr. Moore filed a supplement to rehearing motion based on this Court's Amended Rule 3.852 (dated July 1, 1999).

[19]The gun used to shoot Mr. Parrish was never located and was not presented at Mr. Moore's trial.

[20]This Court did not address this evidence's impact on the penalty phase even though it constituted aggravating evidence.

On July 7, 1999, the circuit court denied Mr. Moore's request for a rehearing.[21] On July 14, 1999, the circuit court entered an order requiring Mr. Moore to file his final amended Rule 3.851 motion within 30 days. On July 19, 1999, Mr. Moore filed a motion seeking reconsideration of this order. On August 9, 1999, Mr. Moore supplemented the motion for reconsideration. On August 17, 1999, the circuit court entered an order setting the date for Mr. Moore to file his final amended Rule 3.851 motion as September 20, 1999.

On August 26, 1999, Mr. Moore sought to disqualify the presiding circuit court judge. The circuit court denied the disqualification motion on September 8, 1999.

On September 20, 1999, Mr. Moore filed a yet still incomplete amended Rule 3.851 motion. Mr. Moore also filed several pleadings\motions regarding outstanding public records issues. On March 8, 2000, the circuit court held a hearing on the outstanding pleadings\motions. The circuit court ordered agencies to comply with Mr. Moore's public records demands by March 17th (which they failed to do) and granted Mr. Moore twenty (20) days to amend.

On April 6, 2000, Mr. Moore filed his third amended motion to vacate. On April 20, 2000, the circuit court held a *Huff* hearing and a hearing on the outstanding public records requests. The circuit court denied the Rule 3.851 motion on August 4, 2000, and denied rehearing on September 8, 2000.

[21]Apparently, the supplement to the rehearing motion and the circuit court's order denying rehearing crossed in the mail.

A notice of appeal was filed. This Court affirmed the summary denial of Rule 3.851 relief. *Moore v. State*, 820 So. 2d 199 (Fla. 2002).[22] During the pendency of the Rule 3.851 appeal, Mr. Moore also filed a petition for writ of habeas corpus with this Court. However, this Court also denied Mr. Moore's habeas petition.[23] After

[22]In his 3.850 appeal, Mr. Moore raised the following eleven claims: (1) the trial court abused its discretion by refusing to order state agencies to comply with Moore's request for additional public records; (2) the trial court erred by denying Moore an evidentiary hearing on his rule 3.850 claims regarding newly discovered evidence and ineffective assistance of counsel; (3) the trial court erred in refusing to consider Moore's third amended motion to vacate his convictions and sentence of death; (4) the trial court erred by denying Moore's motion to disqualify the trial judge; (5) the omission of a pretrial conference from the record denied Moore a proper appeal; (6) Moore's constitutional right to be present at all critical stages of trial was violated; (7) Moore did not receive a mental exam by a competent, confidential expert, to which he is entitled under *Ake v. Oklahoma*, 470 U.S. 68 (1985); (8) section 922.105(1) - (2), Florida Statutes (1999), violates the constitutional requirement for a knowing and voluntary waiver of one' fundamental constitutional rights; (9) the trial court erred in rejecting Moore's claim that several statements made by the prosecutor deprived him of a fair trial; (10) Florida' use of electrocution as its method of execution is unconstitutional; and (11) the standard instructions regarding the pecuniary gain aggravating circumstance were constitutionally defective. This Court found claims 5, 6, 7, and 11, to be procedurally barred and declined to address claim 2. This Court found claims 8 and 10 to be without merits, and ruled similarly as to claims 1, 3, 4. Finally, this Court found merit as to Claim 9, but the error was not so egregious as to warrant relief.

[23]Nine claims were raised in the habeas petition: (1) appellate counsel was unconstitutionally ineffective for failing to argue that Moore's constitutional rights were violated by Moore's absence from a pretrial discussion among counsel and by the failure to have the discussion transcribed; (2) appellate counsel was unconstitutionally ineffective for failing to argue that Moore's sentence was disproportionate; (3) appellate counsel was unconstitutionally ineffective for failing to argue that the trial court was clearly erroneous in permitting the prosecutor to use peremptory challenges to strike prospective jurors Dunbar, Pitts, Washington, and Carter;

Mr. Moore filed for a rehearing, this Court denied rehearing on June 20, 2002.

On July 19, 2002, Mr. Moore filed a Rule 3.851 motion in circuit court raising a claim under *Ring v. Arizona*, 536 U.S. 584 (2002). Subsequently, the circuit court summarily denied. Mr. Moore timely appealed the summary denial.[24] On June 7, 2004, this Court issued a summary order affirming the denial of relief. *Moore v. State*, FSC Case No. SC03-489. Mr. Moore's motion for rehearing was denied on October 8, 2004.

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(4) appellate counsel was unconstitutionally ineffective for failing to argue that the prosecutor's arguments constituted fundamental error; (5) appellate counsel was unconstitutionally ineffective for failing to argue that the trial court committed fundamental error in allowing the penalty-phase jury to hear testimony regarding Moore's prior armed robbery conviction; (6) appellate counsel was unconstitutionally ineffective for failing to argue that victim impact evidence and the attendant statute deprived Moore of a fair sentencing; (7) appellate counsel was unconstitutionally ineffective for failing to argue that the standard penalty-phase jury instructions improperly shifted the burden of proof to Moore; (8) appellate counsel was ineffective for failing to raise the claim that Moore was denied his right to a fair sentencing when the trial court denied his request for an instruction that the jury could consider mercy in its sentencing decision; and (9) ftlineappellate counsel was constitutionally ineffective for failing to argue that Moore's penalty phase, when viewed as a whole, violated his constitutional rights. This Court found the claims to be without merit or procedurally barred.

[24]The Office of the Capital collateral Regional Counsel for the Northern Region (CCRC-North) represented Mr. Moore until its demise on June 30, 2003. John Jackson, an Assistant CCRC-North, had acted as Mr. Moore's lead attorney and filed Mr. Moore's initial Rule 3.851 motion in 1999 (3PC-R. 798-99). On September 10, 2003, following the closure of CCRC-North, Mr. Moore was provided with registry counsel pursuant to §27.710, Fla. Stat. At the time that Mr. Moore's case went to the registry, Mr. Moore's appeal from the denial of a Rule 3.851 motion premised upon *Ring v. Arizona*, 536 U.S. 584 (2002), was pending before this Court.

Meanwhile, Mr. Moore filed a second petition for a writ of habeas corpus on May 13, 2004. This petition was premised upon this Court's decision in *State v. Ruiz*, 863 So. 2d 1205 (Fla. 2003). However, this Court entered a summary order denying the petition on December 16, 2004. *Moore v. Crosby*, Case No. SC04-834. Mr. Moore's motion for rehearing was denied by this Court on March 21, 2005.

Mr. Moore thereupon filed a third petition for a writ of habeas corpus on March 23, 2005. *Moore v. Crosby*, Case No. SC05-498. The petition was premised upon the U.S. Supreme Court decision in *Roper v. Simmons*, 543 U.S. 551 (2005), and the State's use of Mr. Moore's convictions of crimes committed when he was juvenile to establish an aggravating circumstance justifying the sentence of death.[25] Without these convictions of crimes committed when Mr. Moore was a juvenile, the previously convicted of a crime of violence could not have been established and used to justify a sentence of death. Yet, this Court summarily denied Mr. Moore's petition premised upon *Roper v. Simmons*.

On January 27, 2006, Mr. Moore filed the Rule 3.851 motion at issue in this appeal (3PC-R. 1). In the Rule 3.851 motion, Mr. Moore pled newly discovered information that his investigator had uncovered through interviews of numerous witnesses, many of whom had

[25]In this Court's direct appeal opinion affirming Mr. Moore's death sentence, it noted that as to Mr. Moore's prior armed robbery conviction "he had been tried as an adult at age 15." *Moore v. State*, 701 So. 2d at 547. As to the aggravated assault conviction, the

been incarcerated with Mr. Moore's co-defendants, Carlos Clemons and Vincent Gaines and gave rise to a claim pled alternatively as a *Brady* violation, a *Strickland* violation, or newly discovered evidence of *Jones v. State* (3PC-R. 12-17). The Rule 3.851 motion also included a *Giglio* claim premised upon the State's false assertions during the State's closing regarding the cross-examination of Mr. Moore as to the sequence of events around the time that Mr. Jackson went to the police claiming that Mr. Moore had hit him with a gun and shot at him (3PC-R 8).[26]

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offense date was January 30, 1991, nearly 3 months before Mr. Moore's eighteenth birthday.

[26]During the State's cross-examination of Mr. Moore at his trial, the following exchange occurred:

> Q Isn't it true, sir, that approximately two weeks after you hit Randy Jackson on the head you and Randy Jackson got arrested for a committing a crime together?
>
> A I don't know how long it was. It was about in that time frame.
>
> Q If I showed you the police report would that help?
>
> A Yes.
>
> Q Does that sound about right to you (tendering).
>
> A Yes. I just mentioned that, you know, it sounds about that, that sounds about that time frame.

(T. 1140). Based upon this cross-examination, the State falsely argued in closing: "you heard that two weeks after that incident of being hit in the head the two of them were back consorting together, getting arrested for something else." (T. 1233-34). In the State's rebuttal closing, the false argument continued: "this stuff about Randy and him not being friends, - - - even after them getting into this little altercation where Randy Jackson took the gun or a hammer, whatever, - - - they still went out together and got arrested together.

The circuit court permitted Mr. Moore to amend the Rule 3.851 motion in August of 2008. Subsequently, Mr. Moore was ordered to file an addendum which was filed on September 28, 2009 (3PC-R. 243). A case management hearing was held on January 27, 2011, at which the State suggested that the circuit court should conduct an evidentiary hearing as to the allegations in Paragraph 3a of the addendum. The State also offered to make Mr. Clemons and Mr. Gaines available for a deposition by Mr. Moore's counsel in advance of the evidentiary hearing. Accordingly, an evidentiary hearing was ordered only on the factual allegations set forth in Paragraph 3a of the addendum (3PC-R. 687-88).[27]

On February 24, 2011, Mr. Moore was permitted to depose Carlos Clemons and Vincent Gaines at the State Attorney's Office in Jacksonville, Florida.

They are still friends." (T. 1276). However, the State's argument was false and the State knew it. The incident for which Mr. Moore and Mr. Jackson were charged with aggravated battery as co-defendants occurred on January 30, 1991, before the altercation between them (3PC-R. 8). Mr. Moore was arrested on the aggravated battery charges on February 26, 1991, while he was in jail on the basis of Mr. Jackson's allegations against him. Mr. Jackson had gone to the police on February 11, 1991, and claimed that Mr. Moore hit him with a gun and shot at him on February 10, 1991 (3PC-R. 8). And Mr. Jackson was not arrested on charges stemming from the January 30th incident until March 22, 1991.

[27]An evidentiary hearing was not permitted on Mr. Moore's factual allegations other than those in ¶ 3a of the Addendum to his Rule 3.851 motion. For example, at the outset of the March 22, 2011, evidentiary hearing it was made clear that testimony regarding "the Audrey McCray allegation" would not be permitted because those allegations did not appear in ¶ 3a of the Addendum (3PC-R. 687-88).

On March 22, 2011, the evidentiary hearing on the pending Rule 3.851 motion was conducted. After Mr. Moore's counsel had presented eight witnesses, the State called both Carlos Clemons and Vincent Gaines to testify and presented their testimony. At the close of the proceedings, the presiding judge ordered the parties to submit written closing arguments within 30 days after the receipt of the transcript of the hearing (3PC-R. 894-95). The presiding judge advised that the evidence that he had just heard concerned him:

> THE COURT: I'm not sure yet what I can tell you. Okay? I have to make a decision as to whether or not - - I don't necessarily have to determine the truthfulness of any or all of these witnesses. I will tell everybody. For what it's worth, that all of this testimony concerns me. Okay? I'm not at this point in time ready to absolutely disregard all of the testimony I've heard. I may. But the **cumulative effect** concerns me of the testimony. So for whatever that's worth to you.

(3PC-R. 890) (emphasis added).

Mr. Moore filed a motion for leave to amend the Rule 3.851 motion in light of testimony at the evidentiary hearing on April 6, 2011. The motion to amend the Rule 3.851 motion sought leave to add a claim to the Rule 3.851 motion premised upon the March 22nd testimony of Mr. Clemons and Mr. Gaines. Both Mr. Clemons and Mr. Gaines were called as witnesses by the State and gave sworn testimony that

contradicted the trial testimony. In the motion to amend, Mr. Moore argued that the March 22nd testimony revealed that the State had knowingly presented false evidence when those witness had testified at Moore's 1993 trial and known impeachment evidence of them was not disclosed. At a minimum, Mr. Clemons and Mr. Gaines revealed that their trial testimony was false in material ways.

Mr. Moore's written closing argument was served on April 28, 2011 and filed on May 2, 2011 (3PC-R. 362-90). The State's written closing argument was filed on April 29, 2011 (3PC-R. 305).

The order denying Mr. Moore's Rule 3.851 motion was filed on January 4, 2012 (3PC-R. 391). In this order, the circuit court allowed Mr. Moore to amend his Rule 3.851 with a *Giglio* claim premised upon the 2011 testimony from Mr. Clemons and Mr. Gaines (3PC-R. 404). The circuit court denied the claim on the merits (3PC-R. 404-07). However, there was no cumulative analysis conducted of Mr. Moore's claims. *See Parker v. State*, 89 So. 3d 844 (Fla. 2011).

Mr. Moore filed a motion for rehearing on January 23, 2012 (3PC-R. 413). In this motion, Mr. Moore asserted that the order denying relief had overlooked and failed to properly analyze crucial evidence:

> The order states: "With regard to the claim of ineffective assistance of counsel claim is untimely and procedurally barred." Order at 4. However, the evidence in support of the ineffective assistance of counsel could not be discovered by Mr. Moore's previous collateral counsel, John Jackson, despite his diligent efforts to investigate and locate David Hallback and Charles Simpson. In the public defender's files there was a note concerning an interview of Mr. Hallback in the summer of 1993 (T. 173;

Def. Ex. 3). This note referred to Mr. Hallback as someone with exculpatory information. After Mr. Clemons told Mr. Hallback that Mr. Moore was not there when the crime occurred, Mr. Hallback who was Mr. Moore's first cousin, told his grandmother about the conversation with Mr. Clemons (T. 43-44, 47). She then told the attorneys representing Mr. Moore, and shortly thereafter, two men who indicated they were representing Mr. Moore arrived at the jail to talk with Mr. Hallback about his conversation with Mr. Clemons (T. 43-44, 56-57). Introduced at the March 22nd evidentiary hearing as Defense Exhibit 3 was a document from Moore's public defender's files reflecting that "either 7 or 9/2 of '93, conference at jail with David Hallback, Jr., and it listed a case number that he must have been in jail on" (T. 173). In fact, Mr. Moore's collateral counsel in the 1999-2003 time frame, John Jackson, had sought to speak with Mr. Hallback regarding this note because it indicated that Mr. Hallback "had some information about some statements that Mr. Clemons had made" (T. 150-52). However, Mr. Jackson's investigator at the time spoke to the wrong David Hallback, speaking to the senior Mr. Hallback, as opposed to the junior (T. 173-74). Trial counsel was aware of Mr. Hallback and could have called him as a witness. His performance in failing to further investigate and present the exculpatory evidence was deficient.

Besides Mr. Hallback, the public defender's file from Mr. Moore's case made reference to an interview of Charles Simpson (T. 164-66; Def. Ex. 1). This note which was dated 1/25/94 referenced a conference with Mr. Simpson in the Duval County Jail regarding information he had about a gun involved in Mr. Moore's case (T. 166). Mr. Jackson, who had represented Mr. Moore until the closure of CCRC-North, testified that he was aware of the name Charles Simpson and had "absolutely" wanted to interview him, but had been unable to do so despite his diligent efforts to locate him (T. 150-51). However, undersigned counsel's investigator, Dan Ashton was successful in locating Mr. Simpson and interviewed him at Charlotte Correctional Institution in 2005 (T. 127, 169). During this interview, Mr. Simpson told Mr. Ashton about the juvenile pod at the Duval County Jail in which he, Mr. Clemons, and Mr. Gaines had been incarcerated during the 1993-94 time period (T. 170). Both Carlos Clemons and Vincent Gaines were incarcerated on the sixth floor when Mr. Simpson arrived.3/ Mr. Simpson had gone to school with Mr. Clemons, and he knew Mr. Gaines "[f]rom the hood" (T. 123-27). Mr. Clemons told Mr. Simpson "[t]hat the older guy took the rap" (T. 125).4/ Mr. Simpson gave Mr. Ashton a list of "names of people that

he might also talk to that [he] remembered were also incarcerated" with Mr. Clemons and Mr. Gaines in the Duval County Jail in the 1993-94 time period (T. 127). Mr. Simpson testified that this list of names included "Raimundo Hogan, Mandell Rhodes, Junior Foster. I think a Darryl Jenkins" (T. 127). This names could have been obtained by Mr. Moore's trial counsel had he conducted follow up investigation. Trial counsel's performance was deficient.

(3PC-R. 415-17). Footnote 3 stated:

During the cross of Mr. Gaines by Petitioner at the March 22nd evidentiary hearing, he confirmed that Mr. Simpson was incarcerated in the same pod with him and Mr. Clemons in 1993 (R. 226).

(3PC-R. 417). Footnote 4 stated:

During the State's cross-examination of Mr. Simpson at the March 22nd evidentiary hearing, the following exchange occurred:

> Q What specifically are you saying that you're saying under oath right now is the truth, Mr. Simpson?
>
> A That he wasn't the guy. He wasn't the guy that shot that dude.

(T. 134). Mr. Simpson also testified during the State's cross-examination that he "knew who the triggerman was" and he knew that to be "Carlos, the 13 year old" (T. 136).

(3PC-R. 417).

The motion for rehearing was summarily denied on February 2, 2012 (3PC-R. 437). Mr. Moore filed a notice of appeal on March 2, 2012 (3PC-R. 439).

B. Relevant Facts

" \l 2 1. Carlos Clemons' plea agreement

At Mr. Moore's 1993 trial, the State called Carlos Clemons, a co-defendant, to testify that he observed Mr. Moore commit the homicide. He was the only witness who claimed to have observed the homicide. His credibility was a central issue at the trial. The theory of the defense was that Mr. Moore was innocent and that, in fact, Mr. Clemons with the assistance of Vincent Gaines actually committed the homicide. At the 1993 trial, Mr. Clemons testified that in March of 1993 that he had entered into a plea agreement with the State:

> Q Did there come a time when you entered into plea negotiations with me [Angela Corey] - - or with my office through me?
>
> A No, ma'am. Yes, ma'am.
>
> Q Okay. Were you able to consult with Ms. Watson [his court appointed counsel] about that?
>
> A Yes, ma'am.
>
> Q What was your agreement for the plea that you were going to enter? What did you agree to do?
>
> A To plea for juvenile sanctions and testify.
>
> Q And do what?
>
> A And go home on home detention.
>
> Q What were you supposed to do when you testified?
>
> A Tell - - testify truthfully.
>
> Q Testify what?
>
> A Truthfully.

Q Okay. Did you agree to that deal to plead to second degree murder and attempted armed robbery for juvenile sanctions?

A Yes, ma'am.

Q for truthful testimony?

A Yes, ma'am.

(T. 809-10). The March 1993 deal that Clemons discussed was a deal that provided for a plea to second degree murder and attempted armed robbery. On cross, Mr. Clemons testified:

Q And when you entered into your plea agreement back on March 25th you were immediately released from the jail later on that day, right?

A Yes, sir.

Q You were sent home and put on home detention where they put an ankle bracelet on you, right?

A Yes, sir.

Q Part of your agreement in that was that you were going to be a good fellow, right?

A Yes, sir.

Q You weren't going to get in any more trouble, right?

A (No response.)

Q You even told Ms. Corey you were going to be a good fellow, didn't you?

A Yes, sir.

Q You weren't a good fellow while you were home on detention, were you?

A No, sir.

Q You smoked marijuana, right?

A No, sir.

Q You didn't smoke any marijuana while you were on home detention?

A No, sir.

Q So, I take it when they took a urine sample from you in August and it came up positive for marijuana, that was just a mistake?

A I was around it.

Q You were around people smoking marijuana in your home while you were on home detention on a second degree murder charge, sir?

A Yes, sir.

(T. 818-19).[28] In his 1993 trial testimony, Mr. Clemons indicated that the March 1993 plea agreement was determined to be illegal days before Mr. Moore's trial and that, as a result, it was vacated:

Q Did something happen to that plea agreement?

A Yes, ma'am.

Q What happened?

A They said it was an illegal agreement.

Q Illegal under the law?

A Yes, ma'am.

Q What did you do?

A Took the plea back.

Q Took the plea back?

[28]In his 1993 testimony, Mr. Clemons had indicated during the direct examination that he was returned to jail after "I smoked marijuana with my sister" on August 23, 1993 (T. 811). He remained incarcerated in the jail until his testimony in late October of 1993 (T. 811).

A Yes.

Q As of right now what kind of charges are you facing?

A Second degree murder, attempted armed robbery.

Q What jail are you in; adult jail or juvenile jail?

A Adult.

Q **Have I made any promises at all about what your sentence is going to be?**

A **No ma'am**.

Q What did I tell you I would do if you didn't tell the truth?

A Give me life in prison.

Q **Did Judge Southwood make you any promises to testify here today**?

A **No, ma'am**.

Q **Do you have any idea or thoughts about what he is going to do to you if and when you are tried or you enter a plea**?

A **No, ma'am**.

Q Do you even know what charges you are going to be offered to plea on or what you are going to be tried on?

A No, ma'am.

Q **Why are you testifying if you don't have a deal?**

A **It's the right thing to do.**

Q I'm sorry?

A **It's the right thing to do.**

(T. 812-13) (emphasis added). So, according to his 1993 trial testimony, Mr. Clemons had no deal with the State and did not know what he might be able to plead to and/or what his sentence would be. In summary, there was no plea agreement in effect.

On cross-examination, Mr. Clemons testified:

> Q Okay. You expect and you hope, don't you - - let me ask you. You hope that whenever something is worked out for you it will be close to the same thing you had originally signed up for, don't you?
>
> A Yes, sir.
>
> Q And I guess you figure if you don't cooperate with the State now you are not going to be in their good graces, are you?
>
> A I don't know.

(T. 823).

Thus in 1993, Mr. Clemons testified under oath before Mr. Moore's jury that he had no agreement with the State at the time of his testimony and no knowledge of what if anything he would receive from the State as a result of his testimony. He told Mr. Moore's jury that he was testifying without a deal with the State because "It's the right thing to do." The prosecutor urged the jury to believe Mr. Clemons because:

> Carlos Clemons **without any deals** - - and he took the stand **without any deals**. He gave a statement to the police without any deals instantly. He never denied his involvement. **He took the stand without any deals**. You saw his attorney sitting here. And he told you he has never said anything different than what you heard here in this courtroom.

(T. 1221)(emphasis added).[29]

At the March 22, 2011, evidentiary hearing, the State called Carlos Clemons back to the witness stand.[30] Early in the direct examination, the presiding judge inquired:

> THE COURT: All right. Can you tell me or ask him, either one, what was the deal for him to testify?
>
> MS. COREY: I'll go over that, Your Honor. Thank you for the reminder.
>
> THE COURT: Just for my recollection.

(3PC-R. 860). The State thereupon elicited the following testimony from Mr. Clemons regarding the "deal" for his 1993 testimony at Mr. Moore's trial about which the judge had just inquired:

> Q Now you had a lawyer representing you?
>
> A Yes, ma'am.

---

[29]The prosecutor also argued:

> Carlos Clemons goes into a program the very next day. He does not talk to Vincent. They don't even see each other until after they have given their statements. And I don't know if they have seen each other even since then. But they do not get together and make up their statements and put it together before they talked to the police. Carlos is in the program, some sort of juvenile program.

(T. 1230). However in Mr. Gaines' 2011 testimony, he testified that Mr. Clemons was in the juvenile pod at the same time he was in 1993 (3PC-R. 878). Mr. Gaines further testified that he was able to talk with Mr. Clemons during that time and that they did "talk about [their] case" (3PC-R. 879).

[30]His testimony was offered by the State in response to four witnesses called by Mr. Moore who testified that while they were incarcerated with Carlos Clemons and Vincent Gaines in the Duval County Jail, Mr. Clemons and Mr. Gaines made statements indicating that Mr. Moore had not been involved in the homicide of Mr. Parrish, but that he was the person that they had chosen to take the fall for the crime that they committed.

Q Was that Ms. Watson?

A Yes, ma'am.

Q Denise Watson. Can you relate to the Court your memory of the plea agreement between you and Ms. Watson and the State of Florida?

A That I would go to a juvenile facility, either from -- till I turn 18 or 21. It didn't really speculate.

Q Okay. What charges did you enter a plea to?

A Manslaughter.

(3PC-R. 860-61). Thus, the testimony presented by the State on March 22, 2011, was the contrary to Mr. Clemons' trial testimony that he had no deal with the State when he testified before Mr. Moore's jury in 1993. On cross at the 2011 hearing, Mr. Clemons testified as follows:

Q Now, I believe you were asked on direct that you understood that if you didn't testify truthfully you would go to jail?

A Yes, sir.

Q Was that pursuant to the plea agreement?

A No, sir. It was - - they already knew.

Q You already knew that. Is that what you said?

A Yes, sir.

Q But was there an agreement to testify truthfully in the case?

A Yes, sir.

Q And what were the terms of the plea agreement? Do you recall?

A I just know I was going to a juvenile facility and didn't state no time. It just --

> Q So in exchange for testifying against Mr. Moore you would be able to plead to manslaughter and go to a juvenile facility?
>
> A Yes, sir.
>
> Q That was your understanding?
>
> A Yes, sir.
>
> * * *
>
> Q In terms of the plea agreement - - in terms of the plea agreement, if it came out now that you testified untruthfully at the trial against Mr. Moore in 1993, what would happen?
>
> A I'm not sure.
>
> Q Okay. Are you - - if it came out now that you testified untruthfully, do you know whether the plea agreement could be revoked?
>
> A I'm not - - I'm pretty sure.

(3PC-R. 864-65).

Clearly, the 2011 testimony is concerning an entirely different agreement than the March 1993 agreement that was vacated as illegal before Mr. Moore's trial. The March 1993 agreement had provided that Mr. Clemons plead as charged to second degree murder and armed robbery. According to Mr. Clemons' 2011 testimony the agreement in effect when he testified at the 1993 trial provided for a plea to a lesser included offense - manslaughter. Thus, the undisclosed agreement in effect at Mr. Moore's trial was an agreement that was even more favorable to Mr. Clemons than the one vacated as illegal. The 2011 testimony revealed that Mr. Clemons had entered

into an agreement with the State before his testimony at Mr. Moore's October of 1993 trial that provided that in exchange for his testimony against Mr. Moore, he would plead to a lesser included offense and be sentenced as a juvenile. According to Mr. Clemons' 2011 testimony, he then served about two years in a juvenile institution on a plea to manslaughter (3PC-R. 865).

2. Vincent Gaines' testimony about Little Terry

At Mr. Moore's 1993 trial, the State called Vincent Gaines, a co-defendant, to testify that while he acted as a lookout, he observed Mr. Moore and Mr. Clemons enter Mr. Parrish's house. He testified after hearing two shots, he saw Mr. Clemons run from the house (T. 545, 548).[31] A significant feature of Mr. Moore's defense at the 1993 trial was that Mr. Gaines had been in the company of Mr. Clemons earlier on the day of the homicide when the two chased an

[31]In his closing argument to the jury in 1993, Mr. Moore's trial attorney focused upon Vincent Gaines' relationship with Mr. Clemons and his history of lying for him:

> Vincent Gaines. Carlos Clemons' best friend and closest friend. They see each other daily. Vincent Gaines actually lived with Carlos on weekends. His partner in crime. Both this case and before. The tie between these two is so close that Gaines will lie to the authorities for Carlos if he thinks that it will help Carlos or himself. And he told you that. And he admitted to you that he would lie to help Carlos out. And he is a man of his word in that regard. Because he's done it before. He is so practiced and has become so accustomed to lying for Carlos that he even lies about whether Carlos was in school that day.

(T. 1252).

individual known as Little Terry with a gun.[32] This was significant to the defense because Mr. Moore testified as to his knowledge of the incident which caused him to warn Mr. Parrish about Mr. Clemons and Mr. Gaines and what they had been up to (T. 1104).[33] In his testimony, Mr. Gaines disputed that such an incident involving Little Terry had occurred earlier that day:

> Q Mr. Gaines isn't it true that around midday, -- in other words before school got out, - - you were with Mr. Clemons and the two of you left Flag Street to go over to Grand Park?
>
> A No, sir.
>
> * * *
>
> Q Mr. Gaines, around noontime or shortly thereafter on the date of Mr. Parrish's death, did you go to Grand Park with Carlos Clemons?
>
> A No, sir.
>
> Q At about that same time did you observe Mr. Clemons with a chrome-plated .38 in his possession?
>
> A No, sir.

---

[32]In his 1993 trial testimony, Mr. Clemons testified that on the day of Mr. Parrish's homicide, he and Vincent Gaines may have had a run-in with Little Terry (T. 827, "I think so.").

[33]Mr Moore's testimony was that on the day of Mr. Parrish's homicide, Mr. Moore spoke to Mr. Parrish, his friend, and told him what Mr. Clemons and Mr. Gaines had been up to that day:

> A I said, "Them there boys, they have got a gun because they are - - there were chasing Little Terry earlier today." And Michael Dean said, Yeah, they sure do." So, Mr. Parrish say, "Well, they had better not come around here because I have got one too."

(T. 1104).

Q Did you see a young fellow whose nickname is Little Terry that day?

A Not that I remember.

(T. 568-69).[34] When Mr. Moore's trial counsel sought to delve into Mr. Gaines' credibility on this issue, the judge cut him off and precluded further questioning because Mr. Gaines had testified the incident did not happen (T. 565-68).[35]

In Mr. Moore's direct appeal to this Court, the first issue raised concerned the judge imposed limitations upon the cross-examination of Mr. Gaines and Mr. Clemons regarding the incident with Little Terry. This is a testament to the significance that the Little Terry incident played in the credibility battle

[34]During this questioning by Mr. Moore's counsel, a sidebar was held at which the trial judge imposed limits upon counsel's cross-examination of Mr. Gaines as to the Little Terry incident. The judge indicated that when Mr. Gaines testified that he wasn't there when the Little Terry incident happened, counsel had to accept the answer (T. 566, "You asked him was he there at that time. He testified he wasn't even there. I mean, I can't make him testify to what you want him to testify to.").

[35]Interestingly at the 1993 trial, State Attorney Corey had told Mr. Moore's jury during her rebuttal closing argument:

> Now, I will tell you Vincent Gaines is not very bright. I will say he is as dumb as a rock would be more appropriate. And that may sound insensitive, ladies and gentlemen, but you saw him for yourself. But the State doesn't pick its witnesses.

(T. 1271). But while the State impugned his intelligence, it stood behind his credibility, after all it elicited testimony from Mr. Gaines that if he failed to testify truthfully the State "can take [the plea agreement] back" (T. 555-56).

between Mr. Gaines and Mr. Clemons on one side and Mr. Moore on the other. The Initial Brief filed in this Court explained:

> The incident in which GAINES and CLEMONS chased Little Terry through the neighborhood with a gun **was critical to the defense theory of the case - that CLEMONS, not Appellant MOORE - killed PARRISH, and that GAINES and CLEMONS were lying**. (T1260). The incident also was crucial for impeachment as GAINES denied the incident took place at all (T568-569), while CLEMONS admitted chasing Little Terry but denied having a gun at all that day, (T829), and witness Willie Reese said GAINES and CLEMONS chased Little Terry but didn't mention whether they had a gun or not (T609-613). The Appellant, MOORE, testified that GAINES and CLEMONS chased Little Terry with a gun, (T1094), and Little Terry himself testified that Gaines and CLEMONS chased him, and that CLEMONS started to pull out a gun. (T1189-1190).
>
> Because the incident was critical to the defense theory and for impeachment of key State witnesses GAINES and CLEMONS, the trial court's refusal to allow defense counsel to fully explore the incident on cross-examination of GAINES and CLEMONS was an abuse of discretion and reversible error.

(Initial Brief, *Moore v. State*, Case No. 82,925, at 8-9) (emphasis added). This Court found no error in the judge imposed limitation on the cross of Mr. Gaines. In doing so, this Court relied upon the trial judge's finding that Mr. Gaines testified that he wasn't there. *Moore v. State*, 701 So. 2d at 549.

On March 22, 2011, the State called Mr. Gaines back to the witness stand.[36] At that time, the State elicited testimony from Mr.

[36]Mr. Gaines' testimony was offered by the State in response to the four witnesses called by Mr. Moore who testified that while they were incarcerated with Mr. Clemons and Mr. Gaines in the Duval County Jail, Mr. Clemons and Mr. Gaines made statements indicating that Mr. Moore had not been involved in the homicide of Mr. Parrish, but was the person that they had chosen to take the fall for the crime. Mr. Gaines was also called to the stand to contest the testimony of Daniel Ashton,

Gaines that he had not told Mr. Moore's investigator (who he acknowledged seeing in 2005 and 2006) that he and Mr. Clemons had chased Little Terry with a chrome-plated .38 (3PC-R. 870). According to Mr. Gaines' direct testimony he told Mr. Moore's investigator on those two occasions that they met the "[s]ame thing that I testified against in court" (3PC-R. 870). But then during the cross, Mr. Gaines explained that he was in fact with Mr. Clemons when Little Terry was chased at Grand Park, but that Mr. Clemons was not armed with a gun:

> Q Now, you were asked about whether you had told an investigator about having a gun and chasing Little Terry. Do you recall that?
>
> A Yes, I recall that.
>
> Q Did that come up in the discussion with the investigator at all?
>
> A Yes, it did.
>
> Q And what did you tell the investigator about the Little Terry incident?
>
> A **I told him we chased Little Terry but we didn't have a gun**.
> Q So when you say "we" --
>
> A Me and Carlos.
>
> Q Was that the same day as the murder?
>
> A I can't recall.
>
> Q Okay. And you were chasing Little Terry why?

---

an investigator for Mr. Moore, who had testified that in 2005 and 2006, he interviewed Mr. Gaines. Mr. Ashton testified that during the interviews, Mr. Gaines told him that he had been present for the Little Terry incident and that Mr. Clemons was in fact armed with a chrome .38 at the time that Little Terry was chased (3PC-R. 828-30).

A I think we was just bullying him.

Q Okay. Were you threatening him?

A Just bullying him, chasing him.

Q Well, is bullying the same thing as threatening?

A You can say we was bullying.

Q Did you have any weapon of any kind?

A No, I didn't.

Q Okay. But you definitely recall chasing Little Terry?

A Yes, I do.

Q And you recall Mr. Clemmons was part of that?

A Right.

(3PC-R. 877-78) (emphasis added). This testimony was in direct conflict with Mr. Gaines' testimony at Mr. Moore's 1993 trial. Though Mr. Ashton, an investigator for Mr. Moore, interviewed Mr. Gaines in 2005 and 2006 and was advised by Mr. Gaines that he and Mr. Clemons had chased Little Terry with a chrome-plated .38, it was not until the State actually presented Mr. Gaines as a witness at the 2011 evidentiary hearing that there was any action by the State that could be construed as an acknowledgment or admission that Mr. Gaines' trial testimony was false. By presenting Mr. Gaines' testimony in this regard, the State adopted Mr. Gaines' 2005/2006 disclosure that he and Mr. Clemons indeed chased Little Terry back in January of 1993. In so doing, the State by offering his testimony in 2011 and relying

it has implicitly conceded that his contrary testimony at Mr. Moore's 1993 trial was false.

3. Witnesses from the juvenile pod.

a. David Hallback

At the 2011 hearing, David Hallback testified that, when he was a juvenile, he was incarcerated with Carlos Clemons in the juvenile pod in Duval County jail which was located on the sixth floor (3PC-R. 699-700).[37] Mr. Hallback was already in the jail facility when Mr. Clemons arrived in early 1993 (3PC-R. 700). Mr. Clemons recognized Mr. Hallback from school and began talking with him shortly after his arrival on the 6th floor (3PC-R. 703). Mr. Clemons discussed his case with Mr. Hallback because "he was very scared about his charges" (3PC-R. 703-04). In this conversation, Thomas Moore's name came up:

> Q But did - - did Carlos Clemons mention Thomas Moore to you?
>
> A Well, when we discussed about the case, you know.
>
> Q What did he tell you about Thomas Moore?
>
> A Well, basically he was saying that he wasn't - - I asked him myself like, you know, where was - - where was this other guy at and he was like, well, he had left because he had to wait for him to leave.
>
> Q Okay. And did he explain why they needed to wait for him to leave? Well, let me back up. Where did he leave from, according to Mr. Clemons?

[37]Carlos Clemons in his 2011 testimony did remember that he had been incarcerated with David Hallback (3PC-R. 864). This was after passing Mr. Hallaback in the hallway outside the courtroom before being called to testify in 2011 (3PC-R. 862).

A He left from - - I guess from the scene of the crime or whatever.

Q Okay.

A He left before all this had happened.

Q Okay.

A Because basically he was saying that that was - - Thomas was the old man's best friend, they was always hanging out together, always around there.

Q Okay. And so then after he left, then what did Mr. Clemons - - after Thomas Moore left, what did Mr. Clemons say happened?

A Well, basically say they - - I guess they went back to the house or whatever. They didn't say, you know, what - - they did or anything. He didn't go on and that, you know, he did anything. He just said that Thomas had to leave, they had to wait on him to leave because they - - you know, Thomas wasn't going to let them do that.

Q Okay. And did he indicate that Thomas Moore didn't have anything to do with the crime?

A Yeah. Well, basically he said he wasn't there.

(3PC-R. 705-06).

Mr. Hallback testified that he is Mr. Moore's first cousin (3PC-R. 713). After Mr. Clemons told him that Mr. Moore was not there when the crime occurred, Mr. Hallback told his grandmother about the conversation with Mr. Clemons (3PC-R. 714). She then told the attorneys representing Mr. Moore, and shortly thereafter, two men who indicated they were representing Mr. Moore arrived at the jail to talk with Mr. Hallback about his conversation with Mr. Clemons (3PC-R. 715,

727-29). However, David Hallback was also represented by the same public defender's office representing Mr. Moore (3PC-R. 728-29).

Introduced at the 2011 evidentiary hearing as Def. Ex. 3 was a document from Moore's public defender's files reflecting that "either 7 or 9/2 of '93, conference at jail with David Hallback, Jr., and it listed a case number that he must have been in jail on" (3PC-R. 824-25). In fact, Mr. Moore's collateral counsel in the 1999-2003 time frame, John Jackson, had sought to speak with Mr. Hallback regarding this note because it indicated that Mr. Hallback "had some information about some statements that Mr. Clemons had made" (3PC-R. 812).

b. Mandell Rhodes

Mandell Rhodes testified that he was incarcerated on the sixth floor of the Duval County jail July to December of 1993 (3PC-R. 746).[38] During that time period, he spoke on occasion with both Carlos Clemons and Vincent Gaines. He also saw Mr. Clemons and Mr. Gaines talk to each other in the jail, but he didn't hear their conversations.[39] When talking to Mr. Rhodes, Mr. Gaines did not

[38]In his 2011 testimony, Vincent Gaines indicated that he had seen Mandell Rhodes "in the chute at the courthouse" and that he recognized him (3PC-R. 879). However, Mr. Gaines did not have a specific recollection of Mr. Rhodes from the juvenile pod on the sixth floor of the Duval County jail (3PC-R. 879). Mr. Clemons, on the other hand, had not seen Mr. Rhodes at the courthouse before the 2011 hearing, nor had he seen a picture of him (3PC-R. 863). From just hearing the name, Mr. Clemons did not remember Mr. Rhodes.

[39]In his March 22nd testimony, Vincent Gaines confirmed that during 1993, there were times that he was incarcerated on the sixth floor along with Mr. Clemons, and that when they were incarcerated together,

provide Mr. Rhodes with any specific details regarding his pending case (3PC-R. 749). However, Mr. Clemons told Mr. Rhodes that "he was the one who did it" (3PC-R. 750). Mr. Rhodes testified to his understanding of what Mr. Clemons told him:

> Since - - from what I understand, the State already gave him an escape route being that he was the youngest, they feel like he couldn't have did nothing like that, he had to be misled, you know, stuff like that. So he went with the story they basically gave him, blame it all on the oldest guy.

(3PC-R. 751).

c. Raimundo Hogan

Mr. Gaines and Mr. Clemons were able to talk with each other. In fact, the two of them did talk about their pending case (3PC-R. 878-79).

Raimundo Hogan testified that he was incarcerated in the juvenile pod on the sixth floor of the Duval County jail in 1993-94 (3PC-R. 761-62).[40] While he was there, he had occasion to speak to both Vincent Gaines and Carlos Clemons (3PC-R. 763-64). Mr. Hogan was friends with Mr. Gaines from the street (3PC-R. 764). He saw Mr. Gaines shortly after Mr. Hogan was jailed. At that time in 1993, Mr. Gaines told him about his case:

> Q Okay. And did he tell you any of the details about the crime?
>
> A Well, he just said that him and Clemons did a little robbery, dude got killed. I didn't know the victim at all. Then like two or three days later we talked more. That's when he went to telling me about exactly who did what.
>
> Q Okay. And what did he tell you in that conversation?
>
> A Well, he told me that him and Clemons robbed the dude, Clemons shot him, and then I asked him, you know, what you all going to do. He said they were going to put it on somebody else. I'm like, uh, well, you all really want to do that. He was like, we ain't got no choice, because the dude they're going to blame it on, he's a nobody.
>
> Q What does that mean, "he's a nobody"?
>
> A Well, he ain't really got no family, no friends going to take, you know, get some get-back when they tell on him. That's a nobody.
>
> Q Just for the record, what is "get-back"?

[40]In his 2011 testimony, Vincent Gaines remembered Raimundo Hogan "[f]rom the county jail" (3PC-R. 879). Mr. Gaines indicated that the only place in the county jail that he could recall him from was "the sixth floor" (3PC-R. 879). Mr. Gaines agreed that to "the best of [his] recollection, [Mr. Hogan] would have been there as well" (3PC-R. 879). Mr. Clemons, on the other hand, did remember the name Raimundo Hogan, but didn't remember being incarcerated with him (3PC-R. 863).

A Okay. Well, if I tell on somebody, your family members find out that I told on you, they going to want to kill me or do something bodily harm to me. With Moore, there was no fear. He didn't have nobody in his family that they were scared of.

(3PC-R. 764-65).

Mr. Gaines told Mr. Hogan that Mr. Clemons "shot him" with "a .38" (3PC-R. 766).[41] Later when he saw Mr. Clemons, Mr. Hogan asked Mr. Clemons "about it and I asked him did he really shoot the dude and he said yeah" (3PC-R. 766). All Mr. Clemons told Mr. Hogan was "that he shot the dude and that was it and he going with Gaines on putting it on Moore" (3PC-R. 766). Mr. Hogan saw Mr. Gaines and Mr. Clemons talking together while they were incarcerated, but since he wasn't part of their conversation, he didn't know what they were discussing (3PC-R. 767).

d. Charles Randolph Simpson

Charles Randolph Simpson testified that he was incarcerated on the sixth floor of the Duval county jail in the fall of 1993 (3PC-R. 774).[42] Both Carlos Clemons and Vincent Gaines were

[41]According to Mr. Hogan, Mr. Gaines was "the one that told me they supposed to have stole [the gun] out of the car" (3PC-R. 767). Mr. Hogan thought Mr. Gaines told him that the car the gun was stolen from "was a black Mustang" (3PC-R. 767).

[42]In his 2011 testimony, Vincent Gaines recalled Mr. Simpson being present on the sixth floor of the Duval County jail in 1993 (3PC-R. 878). He also recalled that Mr. Clemons was "there at the same time"

incarcerated on the sixth floor when Mr. Simpson arrived. Mr. Simpson had gone to school with Mr. Clemons, and he knew Mr. Gaines "[f]rom the hood" (3PC-R. 775). Mr. Clemons told Mr. Simpson "[t]hat the older guy took the rap" (3PC-R. 777).[43]

Mr. Simpson testified that prior to his incarceration with Mr. Clemons, he had seen "Mr. Clemons with a gun" (3PC-R. 777). On one occasion, Mr. Simpson had encountered Mr. Clemons out on the street in the company of Mr. Gaines and Terrance Jennings. "I remember them pulling a gun out on me" (3PC-R. 778). "It was a chrome .38" (3PC-R. 778). This incident happened "about a day or two" before Mr. Parrish was killed (3PC-R. 779).

Mr. Simpson made a witness statement in 1994 regarding his knowledge of Mr. Clemons' possession of a gun (3PC-R. 790). This statement was in the files of the public defenders who had represented Mr. Moore (3PC-R. 268). It demonstrated that after Mr. Moore's conviction, the public defenders learned that Mr. Simpson had

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(3PC-R. 878). Mr. Clemons, on the other hand, did not remember "being incarcerated" with Mr. Simpson (3PC-R. 863).

[43]During the State's cross of Mr. Simpson, the following exchange occurred:

> Q What specifically are you saying that you're saying under oath right now is the truth, Mr. Simpson?
>
> A That he wasn't the guy. He wasn't the guy that shot that dude.

(3PC-R. 786). Mr. Simpson also testified during the State's cross that he "knew who the triggerman was" and he knew that to be "Carlos, the 13 year old" (3PC-R. 788).

information and that an interview was conducted “1/25/94" (#PC-R. 268; Def. Ex. 1).

4. Dan Ashton, registry counsel’s investigator

Dan Ashton, an investigator, was called to testify in 2011 about his work on Mr. Moore’s case beginning in early 2005. Mr. Moore’s registry counsel recruited Mr. Ashton to work on Mr. Moore’s case (3PC-R. 815). He began his investigation by obtaining “investigator boxes, prior boxes from investigators or attorneys” who had previously worked on Mr. Moore’s case (3PC-R. 816). This included “the investigator boxes which would have been compiled by previous CCRC investigators” (3PC-R. 816). Mr. Ashton testified that he was sure that this included “the trial attorney files or at least copies of the trial attorney files” (3PC-R. 816). Mr. Ashton got the “record on appeal” from the direct appeal which included “everyone’s testimony” (3PC-R. 816).

Mr. Ashton “reviewed all of the records that I had that were supplied to me, came up with a list of names, talked with Mr. Moore, with Mr. McClain, family members” (3PC-R. 816). After getting familiar with these records, Mr. Ashton conferred with counsel and mapped out a plan on how to proceed. As Mr. Ashton explained:

> there seemed to be a number of names that came up periodically throughout the records that I had reviewed and I’m sure I discussed with Mr. McClain, you know, which of these people had been seen, which people should we see at this point and a list was generated, and then I just systematically went through the list of individuals that we decided were important to speak with.

(3PC-R. 817).

Included on the list of people to speak to were Mr. Moore's co-defendants: Carlos Clemons and Vincent Gaines (3PC-R. 817). Mr. Ashton located Mr. Gaines and went to Century Correctional Institution to speak with him in February of 2005 (3PC-R. 818).[44] During this interview, Mr. Gaines made statements to Mr. Ashton regarding Mr. Moore's case "that were inconsistent with his trial testimony" (3PC-R. 828).[45] In fact, Mr. Gaines told Mr. Ashton that

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[44]The notes from this interview were dated February 21, 2005, and introduced into evidence during the State's cross of Mr. Ashton (3PC-R. 839-41).

[45]Mr. Gaines had testified at Mr. Moore's trial and denied seeing Mr. Clemons chase Little Terry with a gun and in so doing maintained that Mr. Moore's trial testimony was not true:

> Q Mr. Gaines, around noontime or shortly thereafter on the date of Mr. Parrish's death, did you go to Grand Park with Carlos Clemons?
>
> A No, sir.
>
> Q At about that same time did you observe Mr. Clemons with a chrome-plated .38 in his possession?
>
> A No, sir.
>
> Q Did you see a young fellow whose nickname is Little Terry that day?
>
> A Not that I remember.

(T. 568-69). However, Mr. Gaines told Mr. Ashton something quite different. He revealed he was in fact with Mr. Clemons when Little Terry was chased at Grand Park:

> Q Now, you were asked about whether you had told an investigator about having a gun and chasing Little Terry. Do you recall that?

he "believe[d] the gun that killed Mr. Johnny was a .38 that Carlos had." (R. 187).[46] Nearly a year later in early 2006, Mr. Ashton again spoke with Mr. Gaines at Century Correctional Institution after he conducted numerous interviews of other individuals who had been incarcerated with Mr. Gaines and Mr. Clemons (R. 176).[47]

A Yes, I recall that.
Q Did that come up in the discussion with the investigator at all?

A Yes, it did.

Q And what did you tell the investigator about the Little Terry incident?

A I told him we chased Little Terry but we didn't have a gun.

* * *

Q Okay. But you definitely recall chasing Little Terry?

A Yes, I do.

Q And you recall Mr. Clemmons was part of that?

A Right.

(3PC-R. 877). This statement was in direct conflict with Mr. Gaines' testimony at Mr. Moore's trial. This change in Mr. Gaines' story meant that he confirmed Mr. Moore's trial testimony, as opposed to refuting it.

[46]Mr. Ashton testified that Mr. Gaines "told me that he and Carlos Clemmons chased Little Terry around the neighborhood with a chrome-plaed .38 which was stolen from a black Mustang from a person named Tat in an apartment complex and that Carlos Clemmons had that .38 when he went into Mr Johnny's house" (R. 185).

[47]Mr. Ashton's notes from the second interview of Mr. Gaines were dated January 4, 2006 (3PC-R. 841). These notes were introduced into evidence and read aloud during the cross of Mr. Ashton (3PC-R. 841-42). According to these notes, Mr. Gaines told Mr. Ashton that

In its cross, the State asked Mr. Ashton "And what action did you take against Vincent Gaines back in 2005 to pursue perjury charges against him?" (3PC-R. 835-36).

Mr. Ashton testified that a note from the public defender's file made reference to Charles Simpson (3PC-R. 819).[48] This note which was dated 1/25/94 referenced a conference with Mr. Simpson in the Duval County jail regarding information he had about a gun involved in Mr. Moore's case (3PC-R. 819). Mr. Ashton was successful in locating Mr. Simpson and interviewed him at Charlotte Correctional Institution in 2005 (3PC-R. 787, 821). During this interview, Mr. Simpson told Mr. Ashton about the juvenile pod at the Duval County jail in which he, Mr. Clemons, and Mr. Gaines had been incarcerated during the 1993-94 time period (3PC-R. 822-23). Both Carlos Clemons and Vincent Gaines were incarcerated on the sixth floor when Mr. Simpson arrived, and he told Mr. Ashton about conversations that he recalled.[49] Mr. Simpson gave Mr. Ashton a list of "names of people that he might also talk to that [he] remembered were also

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during Mr. Moore's trial "a male courtroom bailiff told him that Angela Corey [the prosecuting attorney] was pissed at him for lying" (3PC-R. 841). Mr. Gaines told Mr. Ashton that "the only thing he lied about was chasing Little Terry with a gun" (3PC-R. 841-42).

[48]Mr. Moore's trial counsel was a public defender, and the public defender's files on Mr. Moore had been provided to CCRC-North when John Jackson, an attorney with that office represented Mr. Moore prior to its closure in 2003 (3PC-R. 805-06).

[49]During the cross of Mr. Gaines at the 2011 evidentiary hearing, he confirmed that Mr. Simpson was incarcerated in the same pod with him and Mr. Clemons in 1993 (3PC-R. 878).

incarcerated" with Mr. Clemons and Mr. Gaines in the Duval County Jail in the 1993-94 time period (3PC-R. 823). This list of names included "Raimundo Hogan, Mandell Rhodes, Junior Foster. I think a Darryl Jenkins" (3PC-R. 779, 823).

Thereafter, Mr. Ashton located Mandell Rhodes and spoke to him (3PC-R. 771, 823).[50] Mr. Ashton also located Raimundo Hogan (3PC-R. 823). Mr. Ashton interviewed Mr. Hogan in 2005 at Tomoka Correctional Institution (3PC-R. 779).

Mr. Ashton also interviewed David Hallback, Jr. (3PC-R. 172). Mr. Hallback's "name had appeared in the files that were turned over to" Mr. Ashton (3PC-R. 824-25). In the public defender's files there was a note concerning an interview of Mr. Hallback in the summer of 1993 (3PC-R. 825).

Mr. Ashton also located and spoke to Randy Jackson in early 2005 (3PC-R 827). Mr. Jackson made statements to Mr. Ashton that impeached Mr. Jackson's testimony at Mr. Moore's trial. At the 2011 evidentiary hearing, Judge Southwood sustained a hearsay objection to Mr. Ashton testifying to the statements that Mr. Jackson made to him that impeached his testimony at Mr. Moore's trial (3PC-R. 827). Mr. Moore's collateral counsel thereupon sought to proffer Mr. Jackson's statements to Mr. Ashton. When Judge Southwood ruled that it would not permit a proffer, the State interceded saying, "Judge,

[50]Prior to his interview of Mr. Simpson, Mr. Ashton had not seen any reference any where in Mr. Moore's files and records regarding the name Mandell Rhodes (3PC-R. 824).

if the Court doesn't mind, we would prefer just for purposes of future litigation that they go ahead and proffer [Mr. Jackson's statements to Mr. Ashton]" (3PC-R. 831-32). Thereupon the following was proffered:

> Q And what did Mr. Jackson relay to you about Mr. Parrish's murder?
>
> A What I specifically remember him telling me was that he wanted to be paid for his testimony, that he was previously paid for his testimony by the State, that his brother and father were also paid for their testimony, and that if I showed him the money he would tell me what I wanted to know. And then I remember him making a statement about Thomas, that there were people a lot guiltier than Thomas out on the street, and that was pretty well where the conversation ended, I believe.

(3PC-R. 832).

During the cross of Mr. Ashton and not as a part of Mr. Moore's proffer, the State chose to ask Mr. Ashton "who on behalf of the State paid Randy Jackson?" (3PC-R. 833). The State elicited testimony from Mr. Ashton that Mr. Jackson simply "said they paid me, they paid me every time I came to court." (3PC-R. 833-34).

During the cross of Mr. Ashton, he was questioned about the fact that he had also interviewed "Little Terry Ashley who told me he was being chased by Carlos Clemmons with a gun" (3PC-R. 846). Mr. Ashton's understanding was that Mr. Clemons "chased Little Terry the

same day as the murder" with a gun that Mr. Gaines said was a chrome-plated .38 (3PC-R. 846-47).

5. John Jackson, former collateral counsel

John Jackson was called at the 2011 evidentiary hearing and testified that he had served as Mr. Moore's lead collateral counsel from 1998 until 2003 when he was employed by the Office of the Capital Collateral Counsel for the Northern Region (hereafter CCRC-North)(3PC-R. 798-99). Mr. Jackson testified that before filing Mr. Moore's initial Rule 3.851 in 1999 he tried to thoroughly investigate Mr. Moore's case. He had an investigator attempt to find Vincent Gaines in order to interview him about the homicide and his testimony at Mr. Moore's 1993 trial (3PC-R. 805). However, to the best of his recollection, his investigator was unable to locate Mr. Gaines.

Mr. Jackson was aware of the notes in the public defenders' files regarding information that Charles Simpson provided after Mr. Moore's trial in early 1994 (3PC-R. 805-06). Because of the information set forth in the note (Def. Ex. 1), Mr. Jackson tried unsuccessfully to locate Mr. Simpson and interview him (3PC-R. 806-07). Mr. Jackson, who had represented Mr. Moore until the closure of CCRC-North, testified that he was aware of the name Charles Simpson and had "absolutely" wanted to interview him, but had been unable to do so (3PC-R. 806).

Mr. Jackson was also aware of a note in the public defenders' files regarding information provided by David Hallback regarding Carlos Clemons in the summer of 1993 (3PC-R. 807, 811-12; Def. Ex. 3). Mr. Jackson had sought to speak with Mr. Hallback regarding this note because it indicated that Mr. Hallback "had some information about some statements that Mr. Clemons had made" (3PC-R. 812). However, the individual named David Hallback that Mr. Jackson was able to locate and interview was not the David Hallback who had been interviewed by representatives of the public defender's office in the summer of 1993 (3PC-R. 807).

To the best of Mr. Jackson's recollection, he did not recall ever learning that Mandell Rhodes or Raimundo Hogan possessed any information regarding Mr. Moore's case or statements made by Carlos Clemons or Vincent Gaines (3PC-R. 809). Accordingly, Mr. Jackson had no reason to look for either Mr. Rhodes or Mr. Hogan in order to interview either of them.

During Mr. Jackson's 2011 testimony, the following exchange between the presiding judge and Mr. Moore's collateral counsel occurred:

> THE COURT: Ms. Corey, I didn't mean to threaten you not to make any objections, but I don't have the slightest idea where Ms. McDermott is going and what relevance is it to run off a whole list of names and say I've never heard of them.
>
> Are you attacking his representation of Mr. - - of the defendant, Mr. Moore?
>
> MS. MCDERMOTT: No, Your Honor.

THE COURT: What's the point of the questions then? I have no idea where you're going with it. I mean you can name off 50 people he doesn't know and he didn't do anything.

MS. MCDERMOTT: We're just establishing what was done previously because I think - -

THE COURT: Well, you're establishing a lot that wasn't done for whatever reason he doesn't know anything about and it's got no relevancy whatsoever.

MS. MCDERMOTT: Right.

THE COURT: If you want to talk to him about something he did, somebody he talked to, it's probably still going to be hearsay, but at least it's to the point. Because all this other point I don't know. We're taking up a lot of time.

MS. MCDERMOTT: Well, I'm just establishing in terms of the diligence prong that I think we're required to meet what was done and that avenues were investigated and then I think - -

THE COURT: Well, you think you have to, as the part of this matter we're dealing with, you have to establish due diligence on his part?

MS. MCDERMOTT: I think so, Your Honor. That's my understanding.

THE COURT: I mean you're not attacking him as the lawyer in the case. If you were - -

MS. MCDERMOTT: No. No, that's not our purpose.

THE COURT: Okay.

MS. MCDERMOTT: If I could just have one minute.

(3PC-R. 810-11).

6. Wilhelmenia Moore

Wilhelmenia Moore, Mr. Moore's mother, testified about a conversation that she had with Chris Shorter sometime after Mr.

Shorter testified at Mr. Moore's 1993 trial and Mr. Moore was convicted and sentenced to death. Ms. Moore was at a neighborhood service station pumping gas when Mr. Shorter "walked up to [her]" (3PC-R. 738). Mr. Shorter then "started talking and he said, I don't mean no harm, but I had to do what I had to do because I had to think about my children" (3PC-R. 738). Ms. Moore did not go over any specifics with Mr. Shorter because she "was afraid of him. I wouldn't talk to him. He had no reason approaching me" (3PC-R. 741).

Ms. Moore testified that this encounter "wasn't - - it wasn't like right after the trial" (3PC-R. 739). It was "[m]aybe some years" after the trial (3PC-R. 739).

STANDARD OF REVIEW

As to the issues on which an evidentiary hearing was conducted, on appeal they involve mixed questions of law and fact. "*Brady* claims are mixed questions of law and fact. When reviewing *Brady* claims, this Court applies a mixed standard of review, 'defer[ring] to the factual findings made by the trial court to the extent that are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law'" *Johnson v. State*, 921 So. 2d 490, 507(Fla. 2005) (citations omitted). That standard of review has been employed by this Court when reviewing ineffective assistance of counsel claims. *Parker v. State*, 89 So. 3d 844 (Fla. 2011). *See Porter v. McCollum*, 130 S. Ct. 447 (2009). That standard of review has been employed by this Court when reviewing

a claim premised upon *Giglio v. United States*, 405 U.S. 150, 153 (1972). *Johnson v. State*, 44 So. 3d 41, 65 (Fla. 2010). *See Guzman v. Sec'y Dept. of Corrs.*, 663 F.3d 1336 (11th Cir. 2011).

SUMMARY OF THE ARGUMENT

1. The State's knowing presentation of false testimony by Carlos Clemons that there was no plea agreement at the time of testimony at Mr. Moore's trial, its false argument he testified without any deal in place, its presentation of false testimony by Vincent Gaines denying that he had been present for the chase of Little Terry on the day of Mr. Parrish's homicide, and its misleading presentation of evidence and argument disputing the defense's claim that Randy Jackson bore a grudge against Mr. Moore and that due to the animosity between the two Mr. Moore would never have regarded him as a confidante, violated Mr. Moore's due process under *Giglio v. United States* and the line of cases that followed. The constitutional error is not harmless beyond a reasonable doubt, and the conviction and/or the sentence of death must be vacated.

2. The circuit failed to follow this Court's decision in *State v. Gunsby* and properly analyze the newly found evidence that Mr. Moore presented and alternatively argued constituted either *Brady* evidence, *Strickland* evidence or newly discovered evidence under *Jones v. State*. The circuit court erroneously barred *Strickland* as serving as basis for consideration of evidence that trial counsel failed to discover as a result of a lack of diligence. The circuit

court failed to consider the evidence that trial counsel could have discovered had diligence been exercised cumulatively. The circuit court erroneously failed to engage in any cumulative analysis. And the circuit court refused to consider the *Brady* claim premised upon the undisclosed threats to Audrey McCray and the undisclosed impeachment of Mr. Clemons and Mr. Gaines. When the proper analysis under *Parker v. State* is employed, the conviction and/or sentence of death cannot stand. Rule 3.851 relief is mandated.

ARGUMENT I

THE STATE KNOWINGLY PRESENTED FALSE AND/OR MISLEADING EVIDENCE AND KNOWINGLY MADE FALSE AND/OR MISLEADING ARGUMENT AT MR. MOORE'S TRIAL AND FAILED TO CORRECT THE FALSE AND/OR MISLEADING TESTIMONY AND/OR ARGUMENT IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. Introduction.

In order to insure that a constitutionally sufficient adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. *Banks v. Dretke*, 540 U.S. 668 (2004). "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." *Banks v. Dretke*, 540 U.S. 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. "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Id*. The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." *Garcia v. State*, 622 So.2d 1325, 1331 (Fla. 1993). If a State's witness misrepresents a material fact, the prosecutor is obligated to stand up and correct the witness' misstatement. *Giglio v. United States*, 405 U.S. at 153, *Napue v. Illinois*, 360 U.S. 264 (1959).

This Court recently found a *Giglio* violation and granted Rule 3.851 relief in *Johnson v. State*, 44 So. 3d 41 (Fla. 2010). There this Court explained:

> This case law is based on the principle that society's search for the truth is the polestar that guides all judicial inquiry, and when the State knowingly presents false testimony or misleading argument to the court, the State casts an impenetrable cloud over that polestar. The United States Supreme Court explained as follows: "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair ... [for it] involve[s] a corruption of the truth-seeking function of the trial process." *United States v. Agurs,* 427 U.S. 97, 103-04, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The rationale underlying this principle is timeless:
>
> > [I]f a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured[,] [s]uch a contrivance by a State to procure the conviction and imprisonment of a defendant is ... inconsistent with the rudimentary demands of justice....

> *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935).
>
> ***
>
> In other words, **whenever the State seeks to obfuscate the truth-seeking function of a court by knowingly using false testimony or misleading argument, the integrity of the judicial proceeding is placed in jeopardy**.

Johnson v. State, 44 So. 3d at 53-54 (emphasis added).

In Mr. Moore's case the State presented and relied upon false testimony and/or misleading argument in obtaining a conviction and sentence of death.

B. Carlos Clemons.

As to the testimony of Carlos Clemons at Mr. Moore's trial, the State did not stand up and correct his false and misleading testimony before Mr. Moore's jury until March 22, 2011, when it called Mr. Clemons to testify at the Rule 3.851 evidentiary hearing.[51] Early in the direct examination of Mr. Clemons in 2011, the presiding judge inquired:

> THE COURT: All right. Can you tell me or ask him, either one, what was the deal for him to testify?
>
> MS. COREY: I'll go over that, Your Honor. Thank you for the reminder.

[51]After the March of 2011 hearing had concluded, Mr. Moore filed a motion to amend his pending Rule 3.851 motion to include a *Giglio* claim premised upon the testimony given by Mr. Clemons when called as a witness by the State. This motion to amend was filed on April 6, 2011 (3PC-R. 279). The State did not respond separately to the motion to amend, but included a section in its post-hearing memorandum titled: "Moore's Untimely and Inconsequential 2011 Motion to Amend" (3PC-R. 350). However, the circuit court granted Mr. Moore leave to amend to include the *Giglio* claims based upon the 2011 testimony from Mr. Clemons and Mr. Gaines.

THE COURT: Just for my recollection.

(3PC-R. 860). It was then that the State presented Mr. Clemons' sworn testimony revealing that at the time that he testified at Mr. Moore's trial a deal was in place for his testimony against Mr. Moore.[52] In his 2011 testimony, Mr. Clemons testified that at the time of his testimony at Mr. Moore's trial the agreement in effect at the time was that in exchange for his testimony he would be permitted to plead to "manslaughter," a lesser included offense of the crime with which he had been charged, *i.e.* second degree murder (3PC-R. 30).[53]

In the cross in 2011, Mr. Clemons made it extremely clear that under the "agreement" his ability to plead to a lesser included offense was tied to testifying at Mr. Moore's trial:

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[52]It is significant that it was the prosecuting attorney who called Mr. Clemons to testify at the 2011 hearing and presented his testimony regarding "the deal" after the judge inquired (3PC-R. 860). Under Rule 4-3.3 of the Florida Rules of Professional Conduct, an attorney is precluded from presenting false evidence. Certainly, the prosecutor was in a position to know if Mr. Clemons' testimony that she chose to present in March of 2011 was true or false.

[53]Under *Banks v. Dretke*, 540 U.S. at 675-76, the State's failure to correct false and/or misleading evidence and argument relieved the criminal defendant of any obligation to discover the falsehood until the State finally discloses that the testimony at Mr. Moore's trial was false. In Mr. Moore's case, that did not happen until 2011. A criminal defendant has the right to assume that a prosecutor would not engage in such prohibited conduct. *Banks v. Dretke*, 540 U.S. at 694 ("If it was reasonable for Banks to rely on the prosecution's full disclosure representation, it was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction."). Accordingly, a criminal defendant's reliance upon such a right cannot erect a procedural bar. A defendant must be afforded an opportunity to present his constitutional claim once he discovers that the prosecutor presented false and/or misleading evidence and/or argument.

Q But was there an agreement to testify truthfully in the case?

A Yes, sir.

Q And what were the terms of the plea agreement? Do you recall?

A I just know I was going to a juvenile facility and didn't state no time. It just --

Q **So in exchange for testifying against Mr. Moore you would be able to plead to manslaughter and go to a juvenile facility?**

A **Yes, sir**.

Q That was your understanding?

A Yes, sir.

(3PC-R. 864-65) (emphasis added).[54]

In denying Mr. Moore's relief upon his *Giglio* claim as to Mr. Clemons,[55] the circuit court wrote:

> This Court finds it necessary to first clarify the time-line with regard to Mr. Clemmons' plea agreements.

[54]In his 2011 testimony, Mr. Clemons agreed that in exchange for his testimony, he "would be able to plead to manslaughter" (3PC-R. 864-65). Thus, his testimony is not that he had entered a plea in his own case when he testified in 1993 at Mr. Moore's trial, but that he "would be able to".

[55]In his order denying relief, the presiding judge had permitted Mr. Moore over the State's objection to amend his Rule 3.851 motion to include a *Giglio* claim based upon Mr. Clemons' testimony in March of 2011. The judge explained: "Although the State argues that the Defendant's violation of Rule 3.851's spirit has 'grown from the egregious to the absurd,' this Court will nonetheless address the Defendant's newly raised claims **as the Defendant could file these claims within one year of discovery**." (3PC-R. 404) (emphasis added) (footnote omitted). The State did not appeal this ruling and thus is precluded from challenging it in Mr. Moore's appeal.

> On March 25, 1993, in Duval County Case Number 16-1993-CF-1658, Mr. Clemmons entered into a plea agreement. On October 25, 1993, days before the Defendant's trial, Mr. Clemmons withdrew his plea of guilty. On December 3, 1993, just over a month after the Defendant's trial, Mr. Clemmons was permitted to withdraw his plea of not guilty and enter a guilty plea. This Court finds it necessary to point out that during the evidentiary hearing, when Mr. Clemmons testified regarding his plea agreement, he was never asked to clarify whether he was referring to the plea agreement entered into before or after the Defendant's trial.

(3PC-R. 405).[56]

What the circuit court failed to acknowledge in its order is that Mr. Moore's collateral counsel did ask clarifying questions at the 2011 evidentiary hearing after the State called Mr. Clemons and, pursuant to the judge's request, had Mr. Clemons testify to scope of "the deal" (3PC-R. 860).[57] The agreement that had been entered

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[56]At the conclusion of the quoted passage, the presiding judge dropped a footnote in which he wrote: "The Defendant, however, acknowledged that he had notice of the facts giving rise to this claim prior to the evidentiary hearing (Defendant's April 6, 2011 Motion at 15-6) and still failed to ask any clarifying questions or further explore Mr. Clemons' testimony in regard to this claim." (3PC-R. 405). As Mr. Moore explained in his April 6th Motion to Amend, "[t]he first indication provided to Mr. Moore that a plea agreement between the State and Mr. Clemons existed at the time of his 1993 testimony at Mr. Moore's trial was at a February 24, 2011, deposition when the State made Mr. Clemons available to Mr. Moore's current collateral counsel for a deposition at the Office of the State Attorney for the Fourth Judicial Circuit" (3PC-R. 293-94). This was less than 30 days before the evidentiary hearing commenced.

[57]Specifically, Mr. Moore's counsel inquired in the following fashion:

> Q **So in exchange for testifying against Mr. Moore you would be able to plead to manslaughter and go to a juvenile facility?**
>
> A **Yes, sir**.

in March of 1993, but vacated shortly before Mr. Moore's trial, required Mr. Clemons to plead guilty as charged to second degree murder and attempted armed robbery as the online docket for the Duval County Clerk of Court shows.[58] The online docket further shows that

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Q That was your understanding?

A Yes, sir.

(3PC-R. 864-65) (emphasis added). There is nothing ambiguous about Mr. Clemons' testimony that the State first elicited after the presiding judge asked to be advised of "what was the deal for him to testify" (3PC-R. 860). There was an agreement in place at the time of his testimony. The record clearly shows that it was a different agreement than the earlier one that had been vacated as illegal before Mr. Moore's trial (T. 809-10). The presiding judge tried to read ambiguity into Mr. Clemons' unambiguous testimony. There was nothing more to clarify.

[58]At the 1993 trial, Mr. Clemons testified that in March of 1993 that he had entered into a plea agreement with the State:

> Q Did there come a time when you entered into plea negotiations with me [Angela Corey] - - or with my office through me?
> A No, ma'am. Yes, ma'am.
> Q Okay. Were you able to consult with Ms. Watson [his court appointed counsel] about that?
> A Yes, ma'am.
> Q What was your agreement for the plea that you were going to enter? What did you agree to do?
> A To plea for juvenile sanctions and testify.
> Q And do what?
> A And go home on home detention.
> Q What were you supposed to do when you testified?
> A Tell - - testify truthfully.
> Q Testify what?
> A Truthfully.
> Q Okay. **Did you agree to that deal to plead to second degree murder and attempted armed robbery for juvenile sanctions**?
> A **Yes, ma'am**.
> Q For truthful testimony?
> A Yes, ma'am.

in December of 1993 after Mr. Moore's trial, Mr. Clemons entered a plea to a lesser included offense of second degree murder and to the attempted armed robbery charge as charged. In his 2011 testimony, Mr. Clemons made it clear that the agreement in place at the time of his testimony provided for him to plead to a lesser included offense. That was clearly a different agreement than the one entered into in March of 1993 and vacated shortly before Mr. Moore's trial which had required him to pled guilty as charged.

The existence of an agreement with the State for his testimony at Mr. Moore's trial is contrary to Mr. Clemons' testimony at the 1993 trial and contrary to the State's closing argument to Mr. Moore's jury as to why Mr. Clemons should be believed over Mr. Moore, who had testified in his own behalf.[59]

But despite the language in the circuit court's order criticizing Mr. Moore's counsel for failing to ask more questions at

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(T. 809-10) (emphasis added). In his 1993 trial testimony, Mr. Clemons indicated that the March 1993 plea agreement was determined to be illegal days before Mr. Moore's trial and that, as a result, it accordingly was vacated (T. 812-13).

[59]The prosecutor urged Mr. Moore's 1993 jury to believe Mr. Clemons because:

> Carlos Clemons **without any deals** - - and he took the stand **without any deals**. He gave a statement to the police without any deals instantly. He never denied his involvement. **He took the stand without any deals**. You saw his attorney sitting here. And he told you he has never said anything different than what you heard here in this courtroom.

(T. 1221)(emphasis added).

the evidentiary hearing, the circuit court did not find that Mr. Clemons' had not testified false within the meaning of *Giglio* when it denied relief. Without making any factual determination as to whether Mr. Clemons' trial testimony was false, the circuit court then said:

> Even if Mr. Clemmons' statement that he had previously testified pursuant to a plea agreement was before the jury, it would not have affected the jury's verdict, nor would it probably produce an acquittal on retrial.

(3PC-R. 405). However, the legal standard set forth by the circuit court for measuring whether the false testimony was material under *Giglio* was not the proper one, and as a result, the conclusions it drew using the erroneous legal standard it set forth were and are invalid and cannot withstand the *de novo* review required to be conducted by this Court. *Johnson v. State*, 44 So. 2d at 64-65.

Where it is established (or as here acknowledged through the testimony of Mr. Clemons who was called by the State in a postconviction proceeding) that the State misled the defense and/or the trier of fact, the due process violation warrants a reversal unless the State proves that the violation was harmless beyond a reasonable doubt. *Guzman v. State*, 868 So. 2d 498 (Fla. 2003). In *Guzman*, this Court explained that "**[t]he State as beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt**."

Id. at 507 (emphasis added).[60] This Court noted that this is a "more defense friendly standard" than the one applied where it is not shown that the State's actions were deliberate.[61]

Certainly, the circuit court's analysis in Mr. Moore's case did not employ the harmless beyond a reasonable doubt standard that this Court found to be required in *Guzman*. But it also must be noted that the Eleventh Circuit has found that in *Guzman*, this Court, while correctly identifying the constitutionally mandated standard, had unreasonably applied that standard and had failed to give Mr. Guzman the full benefit of the controlling federal standard. *Guzman v. Sec'y Dept. of Corrs.*, 663 F.3d at 1348, 1350-52.

In *Guzman v. Sec'y Dept. of Corrs.*, 663 F. 3d at 1348, 1351-53, the Eleventh Circuit explained the defects in this Court's materiality analysis in its decision in *Guzman* in which this Court denied Rule 3.851 relief:

> But we must also consider the cumulative effect of the false evidence for the purposes of materiality. *Kyles,* 514 U.S. at 436–37 n. 10, 115 S.Ct. at 1567 n. 10; *Smith,* 572 F.3d at 1334. "Considering the undisclosed evidence cumulatively means adding up the force of it all and

[60]This standard was derived from the US Supreme Court's directive that in cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." *United States v. Bagley*, 473 U.S. 667, 679 n. 9 (1985).

[61]This standard is also consistent this Court's statement "[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).

weighing it *against the totality of the evidence that was introduced at the trial." Id.* (emphasis added).

* * *

Second, the Florida Supreme Court's materiality determination **unreasonably discounted not only the fact that Cronin was the State's key witness in the case**, **but also the fact that her credibility was critical to the State's case against Guzman**. One need only read the Florida Supreme Court's assessment of the evidence in Guzman's direct appeal opinion, as set forth above, *supra* at 5–6, to confirm that Cronin's testimony was critical to the State's case. *Guzman II,* 721 So.2d at 1157–58. Most importantly, **Cronin's trial testimony was especially significant because it directly contradicted Guzman's trial testimony** in a manner that can only be considered material to the question of Guzman's guilt by fair minded jurists. **Guzman testified on his own behalf and denied his participation in any respect with this robbery-murder**. *Id.* at 1157. As set out above, although Guzman admitted that he possessed and sold Colvin's ring, he claimed he got it from Cronin. Cronin's testimony was inapposite in all material respects. *Id.*; *see also, Guzman,* 941 So.2d at 1056 (Anstead, J., dissenting) (**"The bottom line is that Cronin was *the* key witness in the case and the credibility of her testimony was critical to the State's case against Guzman."**).

* * *

Third, although the Florida Supreme Court acknowledged that both Cronin and Detective Sylvester lied about the $500 reward during trial, **the court either did not consider or unreasonably discounted the import of the fact that *both* Cronin and Sylvester testified falsely**. *Cf. Porter v. McCollum,* ---U.S. ----, 130 S.Ct. 447, 454, 175 L.Ed.2d 398 (2009) (finding the Florida Supreme Court's decision, in the context of an ineffective assistance of counsel claim, was an unreasonable application of the general *Strickland* standard, where the state court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"). In this regard, we agree with the dissent of Justice Anstead, when he stated:

> a rational and objective factfinder would not only have considered the fact that Cronin, the most important witness for the State, was paid for her

> testimony, but would also have considered the fact that both this crucial witness and the lead detective in the case perjured themselves when they denied under oath that any compensation was paid to Cronin. And, critically, it would have been of especial concern to the factfinder that this crucial State witness had previously and repeatedly denied any knowledge of the case and only implicated the defendant after the State offered compensation to her.
>
> *Guzman,* 941 So.2d at 1056 (Anstead, J., dissenting).
>
> While the state court considered the failure to disclose the $500 reward as to Cronin's testimony, neither the trial court on remand, nor the Florida Supreme Court on review, addressed "the impact of the inability to impeach Detective Sylvester concerning her denial that any payment had been provided to Ms. Cronin." *Guzman,* 698 F.Supp.2d at 1332. **Guzman's "counsel was never given the opportunity to impeach the detective concerning her false testimony with regard to the payment, or to impeach her regarding her having permitted the key witness to give false testimony under oath before the court in the trial proceeding."** *Id.*
>
> The state courts' decisions were objectively unreasonable because **they all but ignored the importance of Detective Sylvester's testimony and what defense counsel could have done with this impeachment evidence**. In determining the impact of the State's action in suppressing favorable evidence, courts should consider how the defense's knowledge of the withheld information would have impacted not just the evidence presented at trial, but also the strategies, tactics, and defenses that the defense could have developed and presented to the trier of fact. **Because Detective Sylvester was the lead detective, her impeachment would have "impugned not only her veracity but the character of the entire investigation."** *Guzman,* 698 F.Supp.2d at 1332. **This would have been consistent with Guzman's testimony that he was not involved in the offense and evidence of other viable suspects**.

(emphasis added).

Not only did the circuit court in Mr. Moore's case conduct no cumulative analysis of Mr. Moore's *Giglio* claims, as the

controlling federal standard required, it failed to recognize that the State's case rested on Mr. Clemons' credibility. He was the only witness to claim to be present and witness Mr. Moore fire the gun and shoot Mr. Parrish. The circuit court ignored the fact that the Mr. Moore testified in his own behalf and disputed Mr. Clemons' testimony.[62]

[62]In order to convict Mr. Moore, the jury had to be convinced beyond a reasonable doubt that his account was untrue and that Mr. Clemons' account was correct. Evidence that Mr. Clemons sat in the witness box and after swearing to tell the truth lied to the jury as to the existence of a deal and the benefit that he would receive for his testimony, certainly creates a reasonable possibility that the jury would have a reasonable doubt given Mr. Moore's sworn testimony that he did not commit the murder. Not only did lie to the jury, the prosecutors who entered the agreement with Mr. Clemons allowed him to do so. This in turn impeached the good faith of the prosecutors in making the State's case against Mr. Moore.

The circuit court ignored the fact that Mr. Clemons' testimony before the jury was false as to the existence of a deal and the impact upon his credibility in the eyes of the jurors had they known he had just testified falsely. And the circuit court ignored the fact that the trial prosecutor would have known of "the deal" when she allowed the testimony to go uncorrected and when she relied upon the absence of a deal in her closing argument.[63] Knowledge of the truth would have "impugned not only [the prosecutor's] veracity but the character of the entire [prosecution]." *Guzman v. Sec'y Dept. of Corrs.*, 668 F.3d at 1353.

Employing the proper materiality standard applicable to a *Giglio* claim, leads to the inescapable conclusion that the false testimony of Mr. Clemons as to whether he was testifying pursuant to a deal and the false argument by the prosecuting attorney that Mr. Clemons did in fact testify without a deal was material within the meaning of *Giglio* and that a new trial is required.

C. Vincent Gaines.

As to the testimony of Vincent Gaines at Mr. Moore's trial, the State did not stand up and correct his false testimony before Mr. Moore's jury until the March 22, 2011, hearing when the State called Mr. Gaines to testify regarding his contact with Little Terry on the

[63]As was explained in *Alcorta v. Texas*, 355 U.S. 28 (1957), due process is violated where prosecutor deliberately "gave the jury the false impression that [witness's] relationship with [defendant's] wife was nothing more than casual friendship").

day of Mr. Parrish's homicide.[64] In his 2011 testimony, Mr. Gaines indicated during the State's direct examination that he had not told Mr. Moore's collateral investigator (Dan Ashton) who he saw in 2005 and 2006 that he and Mr. Clemons had chased Little Terry with a chrome-plated .38 (3PC-R. 870). During the cross, he explained that he was in fact with Mr. Clemons when Little Terry was chased at Grand Park, but that Mr. Clemons was not armed with a gun:

> Q Now, you were asked about whether you had told an investigator about having a gun and chasing Little Terry. Do you recall that?
>
> A Yes, I recall that.
>
> Q Did that come up in the discussion with the investigator at all?
>
> A Yes, it did.
>
> Q And what did you tell the investigator about the Little Terry incident?
>
> A **I told him we chased Little Terry but we didn't have a gun**.
>
> Q So when you say "we" --
>
> A Me and Carlos.
>
> Q Was that the same day as the murder?
>
> A I can't recall.

[64]After the March of 2011 hearing had concluded, Mr. Moore filed a motion to amend his pending Rule 3.851 motion to include a *Giglio* claim premised upon the testimony given by Mr. Gaines when called as a witness by the State. This motion to amend was filed on April 6, 2011 (3PC-R. 279). The State did not respond separately to the motion to amend, but included a section in its post-hearing memorandum titled: "Moore's Untimely and Inconsequential 2011 Motion to Amend" (3PC-R. 350).

Q Okay. And you were chasing Little Terry why?

A I think we was just bullying him.

Q Okay. Were you threatening him?

A Just bullying him, chasing him.

Q Well, is bullying the same thing as threatening?

A You can say we was bullying.

Q Did you have any weapon of any kind?

A No, I didn't.

Q Okay. But you definitely recall chasing Little Terry?

A Yes, I do.

Q And you recall Mr. Clemmons was part of that?

A Right.

(3PC-R. 877-78). This testimony directly contradicted Mr. Gaines' testimony at Mr. Moore's 1993 trial. Though Mr. Ashton, on behalf of Mr. Moore, interviewed Mr. Gaines in 2005 and 2006 and was advised by Mr. Gaines that he and Mr. Clemons had chased Little Terry with a chrome-plated .38, it was not until the State actually presented Mr. Gaines as a witness at the 2011 evidentiary hearing that there was any action by the State that could be construed as an acknowledgment or admission that Mr. Gaines' trial testimony was false. By presenting Mr. Gaines' testimony in this regard, the State adopted Mr. Gaines' 2005/2006 disclosure that he and Mr. Clemons indeed chased Little Terry back in January of 1993 and that his contrary testimony at Mr. Moore's 1993 trial was false testimony.

Further, it was during the cross of Mr. Ashton that the State introduced Mr. Ashton's notes from the second interview of Mr. Gaines which were dated January 4, 2006, as substantive evidence (3PC-R. 841). These notes were introduced as substantive evidence by the State when the prosecuting attorney had Mr. Ashton read the notes aloud during its cross of Mr. Ashton (3PC-R. 841-42). According to these notes, Mr. Gaines told Mr. Ashton that during Mr. Moore's trial "a male courtroom bailiff told him that Angela Corey [the prosecuting attorney] was pissed at him for lying" (3PC-R. 841). Mr. Gaines told Mr. Ashton that "the only thing he lied about was chasing Little Terry with a gun" (3PC-R. 841-42). According to the uncontradicted evidence presented by the State, the prosecuting attorney at Mr. Moore's trial knew that Mr. Gaines' testimony denying that he and Mr. Clemons chased Little Terry earlier in the day before Mr. Parrish was shot and killed.

Further other notes that the State introduced into evidence when it had Mr. Ashton read his notes aloud at the 2011 hearing which indicated that Mr. Gaines "stated the gun was stolen from a black Mustang at the Imperial Estates Apartments. The gun was stolen from Tat's, T-A-T aprostrophe s, uncle. And I said unknown name. Vincent Gaines claims to have no further information on the gun or where it ended up. He heard that when Carlos Clemons was booked into the county jail that he had a .38 shell in his pocket." (3PC-R. 841). The notes also indicated that Mr Gaines had, not only been present for

the Little Terry incident, but had seen that Mr. Clemons was in fact armed with a chrome .38 at the time that Little Terry was chased (3PC-R. 840).

In denying Mr. Moore's relief upon his *Giglio* claim as to Mr. Gaines,[65]

the circuit court wrote: "At trial, Mr. Gaines denied seeing Little Terry on the day of the murder. (T.T. at 568-9). However, at the evidentiary hearing, Mr. Gaines testified that he and Mr. Clemmons chased and bullied Little Terry on the day of the murder." (3PC-R. 406). The circuit court then noted that the State argued that Mr. Moore had failed show "that the State had knowledge of any false trial testimony" (3PC-R. 406). Having noted the State's position, the circuit court continued without resolving the issue raised by the State:

> However, even assuming that the State did have knowledge of the purported false trial testimony, the Defendant cannot show that the evidence is material, i.e., that there is no reasonable probability that it could have affected the jury's verdict.

(3PC-R. 406).

[65]In his order denying relief, the presiding judge had permitted Mr. Moore over the State's objection to amend his Rule 3.851 motion include a *Giglio* claim based upon Mr. Gaines' testimony in March of 2011. The judge explained: "Although the State argues that the Defendant's violation of Rule 3.851's spirit has 'grown from the egregious to the absurd,' this Court will nonetheless address the Defendant's newly raised claims **as the Defendant could file these claims within one year of discovery**." (3PC-R. 404) (emphasis added) (footnote omitted). The State did not appeal this ruling and thus is precluded from challenging it in Mr. Moore's appeal.

In its analysis, the circuit court never addressed the impact on Mr. Gaines' credibility before the jury in light of the revelation that he lied in his testimony at Mr. Moore's 1993 trial on a point that the defense believed was key.[66] The circuit court did not consider that on the basis of his false testimony trial counsel's cross of Mr. Gaines regarding the Little Terry incident was curtailed and that defense counsel was precluded from demonstrating that Mr. Gaines had lied to the jury despite his obligation to testify truthfully in order to retain the benefit of his plea agreement with the State. The circuit court did not address that, despite Mr. Gaines' false testimony, he has retained the benefit of his plea agreement and no effort by the State to revoke it has been pursued.[67]

The circuit court did not address the impact of the false testimony on this Court's finding on direct appeal that Mr. Moore's confrontation clause rights had not been impinged. The circuit court did not address the fact that Mr. Moore testified in his own behalf and maintained that he had not committed the murder and in fact had warned the victim about Mr. Clemons and Mr. Gaines and their pursuit

[66]The State at trial used Mr. Gaines' testimony to corroborate Mr. Clemons' claim that he, Mr. Clemons, was with Mr. Moore and saw him shoot Mr. Parrish, and impeach Mr. Moore's claim that he had warned Mr. Parrish about Mr. Clemons and Mr. Gaines chasing Little Terry with gun. So in the credibility battle between Mr. Clemons and Mr. Moore, Mr. Gaines was an extra who the State used to both bolster Mr. Clemons' testimony while impugning Mr. Moore's testimony.

[67]To this day, no effort has been made by the State to revoke Mr. Gaines' deal because his testimony at Mr. Moore's trial as he know has acknowledged was untruthful.

of Little Terry with a gun. The circuit court did not address the fact that Mr. Gaines and Mr. Moore's testimony at trial was in conflict and that the issue before the jury was whether it could conclude beyond a reasonable doubt that Mr. Moore's account was not true. Thus, the fact that on this point Mr. Gaines had lied would strengthen Mr. Moore's claim that his account was indeed worthy of belief. And the circuit court did not consider how trial counsel could have argued that the now known fact that Mr. Gaines' testimony was false as to the Little Terry incident demonstrated that the only reason for Mr. Gaines to lie about this was because the truth was more damning.

As explained in the preceding section concerning the *Giglio* claim arising from Mr. Clemons' false trial testimony, the controlling federal standard was not applied by the circuit court and this Court must review the matter *de novo*. A cumulative analysis is required and was not conducted. Not only did the State present Mr. Clemons false testimony that he had no deal, it presented Mr. Gaines' false testimony to bolster Mr. Clemons' credibility and impugn Mr. Moore's. The circuit court did not consider the cumulative impact of the false testimony from both Mr. Clemons and Mr. Gaines. Under *Guzman v. Sec'y Dept. of Corrs.*, and the discussion of the manner in which the proper *Giglio* materiality analysis should be conducted, and for the same reasons articulated in preceding section regarding Mr. Clemons' false testimony, Rule 3.851 must issue. Mr. Moore's

conviction and sentence of death must be vacated and the matter remanded for a new trial.

D. Claim relating to Randy Jackson's trial testimony.

As to Mr. Moore's *Giglio* claim regarding the State's use of misleading evidence and argument concerning when Mr. Moore and Randy Jackson had fought in relation to their involvement in a battery of Timothy Brinkley, it was pled in Mr. Moore's Rule 3.851 motion filed in 2006 (3PC-R. 6-12). The circuit court did not grant an evidentiary hearing on this *Giglio* allegation; instead, the claim was found "untimely" by the circuit court and denied for that reason (3PC-R. 393). The circuit court found that Mr. Moore's trial counsel was not diligent in failing to discover the prosecutor's use of misleading evidence and argument at Mr. Moore's trial (3PC-R. 394).

Randy Jackson was called as a witness by the State at Mr. Moore's trial. The State elicited testimony from Mr. Jackson in which he claimed that on or about January 29, 1993, Mr. Moore told Mr. Jackson while they were incarcerated together in the county jail that he, Mr. Moore, had killed Mr. Parrish (T. 965-67). According to Mr. Jackson, he had been put in county jail on January 2, 1993, and remained there while he served a four month sentence, hence his encounter with Mr. Moore (T. 964). In cross-examination, the defense elicited testimony from Randy Jackson regarding an altercation that he had with Mr. Moore in which Mr. Jackson claimed that Mr. Moore hit him with a hammer (T. 971). This testimony was elicited to

demonstrate animosity between Mr. Moore and Mr. Jackson and demonstrate Mr. Jackson's true motive in testifying falsely against Mr. Moore. Regarding this altercation, Mr. Jackson claimed he did not remember that he had advised the police that Mr. Moore had hit him with a gun and that Mr. Moore had shot at him with a gun (T. 972-73). On re-direct of Jackson the State elicited the following: "Do you know a man named Timothy Brinkley?" "Yes, ma'am." "Do you remember you and Mr. Moore having contact with Timothy Brinkley after he hit you in the head with the hammer?" "Yes, ma'am." (T. 980).[68]

However, the evidence presented by the State that the "hammer" incident happened after the "Timothy Brinkley" incident was false and the State knew it was false. The State used this false evidence to argue that whatever animosity that had existed was brief and passing. However, Mr. Jackson was arrested on March 22, 1991, for a battery upon Timothy Bunkley that occurred on January 30, 1991. Mr. Moore had been previously charged with battery of Timothy Bunkley on February 26, 1991. At that time, Mr. Moore was already in jail

[68]The truth, which the State knew, was that the incident involving Mr. Brinkley's encounter with Mr. Moore and Mr. Jackson occurred on January 30, 1991. The altercation between Mr. Moore and Mr. Jackson that led to animosity between the two occurred on February 10, 1991. In order to blunt the defense' effort to impeach Mr. Jackson as motivated to testify against Mr. Moore by animosity towards Mr. Moore and to discredit Mr. Jackson's testimony by showing that due to Mr. Moore's history with Mr. Jackson, Mr. Moore would never have confided in Mr. Jackson, the State resorted to presenting false and misleading evidence and argument that the incident involving Mr. Brinkley occurred later in time after the February 10th altercation between Mr. Moore and Mr. Jackson. Factually, the State's contention was simply false.

pursuant to an arrest and booking report, dated February 11, 1991, that reflects an arrest on that date on the basis of Randy Jackson's allegation that on February 10, 1991, Mr. Moore "struck victim over the head with a pistol. After a scuffle the victim fled at which time several shots were fired." The incident involving Bunkley occurred on January 30th before the February 10th fight between Mr. Jackson and Mr. Moore.

During the State's cross-examination of Mr. Moore, the State elicited the following: "Isn't it true, sir, that approximately two weeks after you hit Randy Jackson on the head you and Randy Jackson got arrested for committing a crime together?" "I don't know how long it was. It was about in that time frame." "If I showed you the police report would that help?" "Yes." "Does that sound about right to you (tendering)" "Yes. I just mentioned that, you know, it sounds about that, that sounds about that time frame." (T. 1140).

In the State's closing, the jury was intentionally deceived: "you heard that two weeks after that incident of being hit in the head the two of them were back consorting together, getting arrested for something else" (T. 1233-34). In the State's rebuttal closing, the deception of the jury continued: "this stuff about Randy and him not being friends, - - - even after them getting into this little altercation where Randy Jackson took the gun or a hammer, whatever, - - - they still went out together and got arrested together. They are still friends." (T. 1276). The State knowingly and

intentionally deceived the jury. Mr. Moore and Mr. Jackson were not arrested together. They were arrested separately, nearly a month apart, for actions that occurred on January 30th well in advance of the February 10th "hammer" incident.

To the extent that the circuit court found that Mr. Moore's trial counsel was not diligent in discovering the State's deception in front of the jury, this Court has indicated the lack of diligence of trial converts the claim into one of ineffective assistance of counsel:

> it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (to establish ineffective assistance of counsel, a defendant must show that (1) counsel performed outside the broad range of competent performance and (2) the deficient performance was so serious that the defendant was deprived of a fair trial).

State v. Gunsby, 670 So. 2d at 920, 924 (Fla. 1996).

The logic of this Court's ruling is clear. A criminal defendant is entitled under the Sixth Amendment to effective representation at trial. A want of diligence upon the part of trial counsel deprives a criminal of that right to effective representation. Accordingly, this Court in *State v. Gunsby* indicated that a reviewing court must analyze whether the defendant was prejudiced by trial counsel's failure to exercise due diligence:

> The second prong of *Strickland* poses the more difficult question of whether counsel's deficient performance,

> standing alone, deprived Gunsby of a fair trial. Nevertheless, when we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted *Brady* violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome. *Cf. Cherry v. State,* 659 So.2d 1069 (Fla.1995) (cumulative effect of numerous errors in counsel's performance may constitute prejudice); *Harvey v. Dugger,* 656 So.2d 1253 (Fla.1995) (same). Consequently, we find that we must reverse the trial judge's order denying Gunsby's motion to vacate his conviction.

State v. Gunsby, 620 So. 2d at 924.

Mr. Moore's case like Mr. Gunsby's case requires an analysis not just of the prejudice arising from trial counsel's want of diligence in challenging the prosecutor's deceiving evidence and argument before the jury, but of that prejudice evaluated cumulatively with Mr. Moore's claims regarding the false testimony of Mr. Clemons and Mr. Gaines. When such an analysis is undertaken, employing the requisite harmless beyond a reasonable doubt standard used for judging the harmlessness of *Giglio* violations, it is clear that Mr. Moore is entitled to a new trial.

It is also clear that consideration of the prejudice arising from the State's deception about the ongoing animosity between Randy Jackson and Mr. Moore cannot be ignored by asserting that Mr. Moore's collateral counsel should have raised this claim in the 1999 Rule 3.851 motion. Under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), Mr. Moore had an equitable right to effective representation as to the presentation of a claim of ineffective assistance of trial

counsel in his first Rule 3.851 motion. Just as a want of diligence by trial counsel constitutes a showing of deficient performance at the trial stage, a want of diligence by collateral counsel constitutes deficient performance under *Martinez v. Ryan*. The State's use of deception to gain Mr. Moore's conviction cannot brushed aside because his state provided lawyers failed to exercise due diligence and protect him from such misconduct. Indeed, this Court has said: "Truth is critical in the operation of our judicial system." *Florida Bar v. Feinberg*, 760 So. 2d at 939. Accordingly, "society's search for the truth is the polestar that guides all judicial inquiry, and when the State knowingly presents false testimony or misleading argument to the court, the State casts an impenetrable cloud over that polestar." *Johnson v. State*, 44 So. 3d at 53. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

E. Conclusion.

When the proper and federally mandated *Giglio* standard is used to gauge the materiality of the State's resort to false and misleading evidence and argument in order to secure a conviction, it is clear that Mr. Moore's conviction and sentence of death cannot stand. *See Guzman v. Sec'y Dept. of Corrs.* As this Court recently explained: "whenever the State seeks to obfuscate the truth-seeking function of a court by knowingly using false testimony or misleading argument, the integrity of the judicial proceeding is placed in

jeopardy." *Johnson v. State*, 44 So. 2d at 54. Accordingly, Mr. Moore's entitled to Rule 3.851 relief.

ARGUMENT II

MR. MOORE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND/OR PRESENT EXCULPATORY EVIDENCE, AND/OR NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT AN INNOCENT MR. MOORE WAS CONVICTED UPON THE BASIS OF FALSE EVIDENCE AND ARGUMENT.

A. Introduction.

In his Rule 3.851 motion filed on January 27, 2006, Mr. Moore presented as Claim II his contention that he "was deprived of his rights to due process under the Fourteenth Amendment as well as his rights under the Fifth, Sixth, and Eighth Amendments because either the State failed to disclose evidence which was material and exculpatory in nature and/or presented misleading evidence and/or defense counsel unreasonably failed to discover and present exculpatory, and/or newly discovered evidence establishes that an innocent Mr. Moore was convicted upon the basis of false evidence and argument." (3PC-R. 12).

Mr. Moore's claim was and is that favorable information and evidence now exists which calls into question the testimony of Carlos

Clemons and Vincent Gaines at Mr. Moore's 1993 trial and the validity of his conviction and/or sentence of death. Based upon this Court's case law recognizing the interplay between *Brady/Giglio* claims, *Strickland* claims, and newly discovered evidence claims, Mr. Moore pled Claim II of his Rule 3.851 motion in the alternative. Newly found evidence that the State had possession of at the time of trial and failed to disclose is categorized as *Brady* evidence; newly found evidence that trial counsel failed to discovered due to a want of diligence is categorized as *Strickland* evidence; and newly found evidence that neither State possessed nor trial counsel could have discovered through due diligence is categorized as newly discovered evidence of innocence. *State v. Gunsby*, 620 So. 2d at 924.

Thus under this Court's ruling in *State v. Gunsby*, the proper categorization of the newly found evidence is dependent upon a determination whether the newly found evidence existed at the time of trial and if so, why did the evidence not get presented to the jury. That is why Mr. Moore, while identifying the newly found evidence in Claim II, alternatively pled the claim as premised upon *Brady v.*

Maryland, 373 U.S. 83 (1963),[69] *Strickland v. Washington*, 466 U.S. 668 (1984),[70] and *Jones v. State*, 591 So. 2d 911 (1991).[71]

Finally, relying on *State v. Gunsby*, Mr. Moore asserted in Claim II of his Rule 3.851 that whether the individual bits of newly found evidence were determined to be *Brady* material, *Strickland* evidence, or *Jones* evidence, the individual bits of evidence qualifying under one of three options had to then be evaluated cumulative to determine whether Mr. Moore was entitled to a new trial (3PC-R. 17).[72]

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[69]As to a *Brady* basis for the claim, Mr. Moore wrote in Claim II of the Rule 3.851 motion: "Where exculpatory evidence is not timely disclosed, a new trial is warranted where the non-disclosure undermines confidence in the reliability of the jury's verdict rendered without the benefit of the exculpatory evidence." (3PC-R. 16).

[70]As to an ineffective assistance of counsel basis for the claim, Mr. Moore wrote in Claim II of the Rule 3.851 motion: "To the extent that the State asserts that trial counsel was not diligent, the claim should be analyzed as an ineffective assistance of counsel claim." (3PC-R. 17).

[71]As to a newly discovered evidence basis for the claim under *Jones v. State*, Mr. Moore wrote in Claim II of the Rule 3.851 motion: "The Florida Supreme Court recognized in Jones v. State, 591 So.2d 911 (Fla. 1991), that where neither the prosecutor nor the defense attorney violated there constitutional obligations in relationship to evidence the existence of which was unknown at trial, a new trial is warrant if the previously unknown evidence would probably have produced an acquittal had the evidence been known by the jury." (3PC-R. 17).

[72]In Claim II of the Rule 3.851 motion, Mr. Moore wrote: "When the proper analysis is conducted, Mr. Moore must be afforded a trial that is a true adversarial testing within the meaning of the constitutional guarantee." (3PC-R. 17).

After disclosure of additional public records, the Rule 3.851 motion was amended on July 31, 2008 (3PC-R. 106). At the State's urging, the circuit court at a case management hearing in July of 2009 ordered Mr. Moore to plead the newly found evidence set forth in Claim II with more specificity.[73] In effort to comply with that directive, Mr. Moore filed an Addendum to the amended Rule 3.851 motion on September 28, 2009 (3PC-R. 243). Set forth in the Addendum was a paragraph designate "3a" that was to be added to Claim II of the Rule 3.851 motion (3PC-R. 243). An evidentiary hearing was ordered, but only upon the newly found evidence set forth in paragraph "3a" (3PC-R. 687-89). Thus, Mr. Moore was precluded from presenting evidence regarding the factual allegations contained elsewhere in Claim II of his Rule 3.851 motion.

B. David Hallback.

At the 2011 evidentiary hearing, Mr. Moore called David Hallback to testify. Mr. Hallback testified that in the summer of 1993 he was incarcerated in the juvenile pod with Carlos Clemons who had previously known (3PC-R. 700-01). Mr. Hallback testified that Mr. Clemons told Mr. Hallback that Mr. Moore was not there when the crime occurred (3PC-R. 705) ("He left before all this had happened.").

[73]At the case management hearing, the presiding judge said: "I don't feel like Mr. McClain has adequately set forth who these witnesses are, what they said, and when they said it in specificity that I can judge whether it's even necessary to have an evidentiary hearing and have them come in and testify." (3PC-R. 590).

The State elicited testimony in cross that Mr. Hallback, who was Mr. Moore's first cousin, told his grandmother in 1993 about the conversation with Mr. Clemons (3PC-R. 714-15). The State brought out in cross that Mr. Hallback's grandmother then told the attorneys representing Mr. Moore, and that shortly thereafter two men who indicated they were representing Mr. Moore arrived at the jail to talk with Mr. Hallback about his conversation with Mr. Clemons (3PC-R. 715-16, 727).[74]

The presiding judge questioned Mr. Hallback and elicited testimony that in 1993 at the time of his conversation with two individuals who indicated that they were with the public defender's office representing Mr. Moore, Mr. Hallback was also being represented the "same Public Defender's Office right here in Jacksonville" (3PC-R. 729).

Subsequently a handwritten note was introduced that was obtained from the public defender's files in Mr. Moore's case as Def. Ex. 3 (3PC-R. 276). The handwritten note is dated either "7-2-93" or "9-2-93," either way before Mr. Moore's trial. The handwritten note contains David Hallback's name, case number, address, and mother's name. The note then provides:

> - Says that Carlos Clemons was with [illegible] cell block (Feb. or so).

[74]The individuals who saw Mr. Hallback on behalf of Mr. Moore and talked to him about Mr. Clemons' statement told Mr. Hallback that "they would get back in touch" and instructed him "not to discuss this information with anybody else" (3PC-R. 715). However, they never did get in touch with him again (3PC-R. 719).

- Clemons was telling them what happened.

- Said Thomas didn't do it.

(3PC-R. 276).

Mr. Moore's collateral counsel in the 1999-2003 time frame, John Jackson, had sought to speak with Mr. Hallback regarding this note because it indicated that Mr. Hallback had some information about some statements that Mr. Clemons had made (3PC-R. 812). However, Mr. Jackson was unsuccessful in finding the Mr. Hallback referred to in the note (3PC-R. 807).

Following the evidentiary hearing, Mr. Moore submitted a written closing argument in which he wrote:

> To the extent that Mr. Moore's trial counsel was aware or should have been aware of individuals who knew of exculpatory statements made by Mr. Clemons, but failed to learn of such statements or conduct follow up investigation upon such statements because counsel's office represented the witnesses in their own criminal cases, counsel's performance was deficient because of a known or unknown conflict of interest.

(3PC-R. 388).

In its order denying Rule 3.851 relief, the circuit court wrote: "With regard to the claim of ineffective assistance of counsel, such claim is untimely and procedurally barred." (3PC-R. 394).[75] Besides erroneously citing "Fla. R. Crim. P. 3.851(d)(1)," the

[75]At the end of the sentence, the circuit court dropped the following footnote: "Further, the Defendant's claim in this regard is wholly insufficient and conclusory, as the Defendant does not indicate which facts counsel failed to discover or why the failure to discover such facts was unreasonable." (3PC-R. 394).

circuit court provided no basis for its conclusion. Mr. Moore's motion was filed pursuant to Rule 3.851(d)(2), which provides that a motion is timely if filed beyond the time period set forth in "(d)(1)" if "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertain by the exercise of due diligence." The movant's attorney referenced here is clearly collateral counsel. Thus, the issue under this provision is whether collateral counsel had exercised diligence in searching for the newly found evidence when preparing and litigating the first Rule 3.851 motion.[76]

When Mr. Moore sought to present evidence of his collateral counsel's diligence through the testimony of that attorney, John Jackson, the circuit court cut off the examination:

> THE COURT: Ms. Corey, I didn't mean to threaten you not to make any objections, but I don't have the slightest idea where Ms. McDermott is going and what relevance is it to run off a whole list of names and say I've never heard of them.
>
> Are you attacking his representation of Mr. - - of the defendant, Mr. Moore?
>
> MS. MCDERMOTT: No, Your Honor.
>
> THE COURT: What's the point of the questions then? I have no idea where you're going with it. I mean you can

[76]Of course, the US Supreme Court has held that as to the presentation of a claim of ineffective assistance of trial counsel, a criminal defendant has at least an equitable right to effective representation by collateral counsel in litigating the trial ineffectiveness claim. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). If John Jackson did not exercise due diligence as to David Hallback, then he rendered deficient performance for the reasons explained by this Court in *State v. Gunsby*.

name off 50 people he doesn't know and he didn't do anything.

MS. MCDERMOTT: We're just establishing what was done previously because I think - -

THE COURT: Well, you're establishing a lot that wasn't done for whatever reason he doesn't know anything about and it's got no relevancy whatsoever.

MS. MCDERMOTT: Right.

THE COURT: If you want to talk to him about something he did, somebody he talked to, it's probably still going to be hearsay, but at least it's to the point. Because all this other point I don't know. We're taking up a lot of time.

MS. MCDERMOTT: Well, **I'm just establishing in terms of the diligence prong that I think we're required to meet what was done and that avenues were investigated** and then I think - -

THE COURT: Well, **you think you have to, as the part of this matter we're dealing with, you have to establish due diligence on his part**?

MS. MCDERMOTT: **I think so, Your Honor. That's my understanding**.

THE COURT: I mean you're not attacking him as the lawyer in the case. If you were - -

MS. MCDERMOTT: No. No, that's not our purpose.

THE COURT: Okay.

MS. MCDERMOTT: If I could just have one minute.

(Defense counsel conferring.)

THE COURT: You know, this is basic black letter law. Everything has to be offered for some purpose in testimony and I haven't seen it in this particular witness so far.

(3PC-R. 810-11).

The State in its cross of John Jackson made no contention that he had not exercised diligence. Indeed, the State's brief cross concluded with the prosecutor asking: "But in spite of any other evidence pointing to this defendant's guilt, you still would have pursued all these lines of investigation that you just mentioned, correct?" (3PC-R. 813). Mr. Jackson responded: "I don't want to say always, but most likely." (3PC-R. 813).

Thus, there was no challenge to Mr. Jackson's diligence as to David Hallback. When Mr. Moore tried to present evidence of Mr. Jackson's diligence, the presiding judge interrupted and called the evidence unnecessary and irrelevant.

The circuit court's ruling that the ineffective assistance component of Claim II was not timely under Rule 3.851(d)(1) was erroneous when the claim was in a successive petition and presented under Rule 3.851(d)(2). There was no challenge to the previous collateral counsel's diligence in his efforts to locate David Hallback. Accordingly, the claim was properly before the circuit court and should have been considered on the merits.

As to the merits, the State elicited evidence that Mr. Hallback had spoken with someone on behalf of Mr. Moore's trial counsel well before his trial. The handwritten note in the public defender's file showed that Mr. Hallback informed Mr. Moore's counsel that Mr. Clemons had told him and others in the juvenile pod that Mr. Moore did not commit the murder. Yet follow up was not conducted

before Mr. Moore's trial.[77] Mr. Hallback was not further interviewed, and no other interview of inmates in the juvenile pod occurred until Mr. Moore's trial.[78] Within the meaning of *State v. Gunsby*, this lack of diligence on the part of trial counsel constituted deficient performance:

> ... it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel ....

State v. Gunsby, 670 So. 2d at 924.

The circuit court never analyzed the prejudice flowing from trial counsel's deficient performance in failing to follow up on the information provided by Mr. Hallback. First, the circuit court's *Jones v. State* analysis is not the proper analysis for determining prejudice under *Strickland v. Washington*. As the US Supreme Court recently explained in *Porter v. Mccollum*, the proper prejudice analysis under *Strickland* requires the reviewing court to consider the impact the unpresented evidence may have had on the jury that did

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[77]A second handwritten note from the public defender's file was introduced as Def. Ex. 1 (3PC-R. 268). This second note shows that in early 1994 someone from the public defender's office interviewed Charles Simpson. This document had the following notation "conf. w/ Charles Simpson re: gun." It also includes the notation "Carlos had some tie-in w/ the gun." Reference is also made to "Carlos + Vincent Gaines."

[78]The obvious explanation for this failure was the inherent conflict arising from the public defender's office representing both Mr. Hallback and Mr. Moore, evidence that the presiding judge elicited when he questioned Mr. Hallback (3PC-R. 729).

not hear the evidence. A reviewing court cannot simply discount the evidence because the judge presiding at the evidentiary hearing did himself credit the evidence. Here, the testimony of the inmates in the juvenile pod regarding statements made by Mr. Clemons and Mr. Gaines would have served to raise questions about the credibility of Mr. Clemons and Mr. Gaines, particularly given that Mr. Moore testified in his own behalf and challenged the testimony of Mr. Clemons and Mr. Gaines as false.

Second as this Court explained recently, cumulative consideration of the individual bits of evidence showing *Strickland* prejudice is required, as is cumulative consideration of the *Strickland* prejudice evidence along with the evidence of materiality of undisclosed *Brady/Giglio* information and newly discovered evidence under *Jones v. State*. *Parker v. State*, 89 So. 3d 844, 867 (Fla. 2011). Thus, in determining whether Mr. Moore is entitled to a new trial, the unpresented information that Mr. Hallback possessed, along with the undiscovered information that could have been ascertained by interviewing other inmates in the juvenile pod, as well as the *Brady/Giglio* evidence set forth in Argument I of this brief, and the newly discovered evidence under *Jones v. State*, must all be considered cumulative.[79] When the proper analysis, which the circuit court did not do, is conducted it is clear that Rule 3.851 relief is

[79]Consideration of the error that this Court found on direct appeal which was ruled harmless should also be factored into the analysis.

warranted. Mr. Moore's convictions and sentence of death must be vacated and the matter remanded for a new trial.

C. The other witnesses from the juvenile pod.

In addition to Mr. Hallback, Mr. Moore presented the testimony of Raimundo Hogan, Mandell Rhodes, and Charles Simpson. These individuals each testified that they were in the juvenile pod with either Mr. Clemons, Mr. Gaines or both in 1993. Had trial counsel followed up on the information provided by David Hallback in the summer of 1993, these witnesses could have been located at that time in advance of Mr. Moore's trial. However, the circuit court did not address the ineffectiveness component of Claim II of Mr. Moore's Rule 3.851 because it found it barred under Rule 3.851(d)(1), even though the claim was presented in a successive petition and clearly governed by Rule 3.851(d)(2). Because of the circuit court's erroneous analysis, the proper analysis of Mr. Moore's ineffective assistance of counsel claim was not conducted as required by *State v. Gunsby*, and as required by *Porter v. McCollum*, *i.e.* the impact that prejudice evidence may have had on the jury that did hear the evidence due to counsel's lack of diligence.

Mr. Clemons recalled that Mr. Hallback was in the pod, and Mr. Gaines recalled Mr. Simpson and Mr. Hogan. Neither Mr. Clemons nor Mr. Gaines could dispute that Mr. Rhodes was present. Indeed, Mr. Moore's investigator, Dan Ashton, got Mr. Rhodes' name from Mr. Simpson who Mr. Gaines acknowledged was there. There are documents

from 1993 and 1994 demonstrating that Mr. Hallback and Mr. Simpson had tried to tell there story then. This is not as the State tried to suggest in its cross-examination some recent fabrication to help Mr. Moore.[80]

The four witnesses from the juvenile pod were not all part of one story or one alleged conversation. The each had a different story to tell. The each had different contact with Mr. Clemons and Mr. Gaines. Mr. Hallback only talked with Mr. Clemons. Mr. Hogan's information came primarily from Mr. Gaines. Mr. Rhodes had spoken to both Mr. Gaines and Mr. Clemons, but the only information that he got, *i.e.* that Mr. Clemons was the shooter, he got from Mr. Clemons. And Mr. Simpson had encountered Mr. Clemons and Mr. Gaines out on the street right before Mr. Parrish's homicide and knew that their group was in possession of a chrome .38 which was pulled on Mr. Simpson. According to Mr. Simpson, Mr. Clemons acknowledged while they were incarcerated together that he was the shooter and that the older guy was taking the fall. Yet despite the disparate ways that each learned bits of information, the information when considered cumulative, as required under this Court's decision in *Parker v. State*, fits together to tell a coherent and exculpatory story that undermines confidence in the outcome under the proper *Strickland* analysis. *Porter v. McCollum*.

[80]Mr. Simpson, Mr. Hogan and Mr. Rhodes all indicated that they did not know Mr. Moore and had no reason to try to help him.

And when the information from these four witnesses is considered cumulatively with the evidence supporting Mr. Moore's other claims, it clear confidence in the jury verdict is undermined.

D. 2011 Testimony of Mr. Clemons and Mr. Gaines.

Mr. Clemons in his 2011 testimony revealed that he had an undisclosed plea agreement with the State at the time that he testified at Mr. Moore's trial.[81] This undisclosed favorable evidence must also be part of the cumulative analysis that this Court held is required. *Parker v. State*, 89 So. 3d at 867.

Mr. Gaines revealed that his trial testimony had been false as well. After Mr. Moore presented the testimony of Dan Ashton regarding statements made by Vincent Gaines,[82] Mr. Gaines confirmed that he had spoken to Mr. Ashton twice and that he had told him he had been with Mr. Clemons when they chased Little Terry on the day of the Parrish homicide. This was contrary to his trial testimony. Clearly, Mr. Gaines had been willing to lie at Mr. Moore's trial when he testified that he had not been involved in the Little Terry incident. According to evidence presented by the State in its cross

[81]Mr. Moore in Argument I of this brief presents his *Giglio* argument premised upon this new evidence. He certainly believes a new trial is warranted on the basis of *Giglio*. But, Mr. Clemons' 2011 testimony also demonstrates that favorable information in the State's possession was not disclosed within the meaning of *Brady v. Maryland*.

[82]It should go without saying that statements made by either Carlos Clemons or Vincent Gaines which were inconsistent with or contradicted their trial testimony would be admissible at trial as impeachment, and to the extent that the statements were against penal interest, they would be admissible substantively.

of Mr. Ashton, Mr. Gaines advised that the State knew that his trial testimony denying the Little Terry incident was false. Yet, this favorable information was not disclosed by the State. Mr. Gaines' willingness to testify untruthfully at Mr. Moore's trial corroborates the story emerging from the juvenile pod witnesses that Mr. Clemons and Mr. Gaines were out to save themselves and if it took pinning the crime on someone else, that was no obstacle. When cumulative consideration is given to all of evidence as required by *Parker v. State*, the case is cast in a whole new light. The circuit court failed to engage in the proper analysis.

Indeed, the 2011 testimony of Carlos Clemons and Vincent Gaines amply demonstrated their willingness to lie in order to save themselves as best they could. Confidence is undermined in the reliability of the jury verdict returned in the absence of this new evidence. As a result, a new trial is required.

E. Randy Jackson.

Mr. Moore sought to present the testimony of Dan Ashton regarding the statements made to him by Randy Jackson. While the presiding judge erroneously sustained an objection to the evidence which impeached Mr. Jackson's trial testimony and accordingly admissible, the State in its cross questioned Mr. Ashton about the statements.[83] The State chose to ask Mr. Ashton "who on behalf of

[83]To the extent that the circuit court excluded Mr. Ashton's testimony as to Randy Jackson's statements to him, the circuit court erred. Since Mr. Jackson testified at Mr. Moore's 1993 trial, his statements

the State paid Randy Jackson?" (3PC-R. 833). The State elicited testimony from Mr. Ashton that Mr. Jackson simply "said they paid me, they paid me every time I came to court." (3PC-R. 833-34). The State's examination of Mr. Ashton regarding Mr. Jackson's statements was not part of any proffer, and therefore introduced Mr. Jackson's statements into evidence. The circuit court failed to consider this newly found impeachment evidence and include it a cumulative evaluation of the *State v. Gunsby* evidence in deciding whether Mr. Moore was entitled to Rule 3.851 relief. This was error.

F. Wilhelmenia Moore.

Wilhelmenia Moore, Mr. Moore's mother, testified at the 2011 evidentiary hearing about a conversation that she had with Chris Shorter sometime after Mr. Moore's 1993 trial. Ms. Moore was at a neighborhood service station pumping gas when Mr. Shorter "walked up to [her]" (3PC-R. 738). Mr. Shorter then "started talking and he said, I don't mean no harm, but I had to do what I had to do because I had to think about my children" (3PC-R. 738). Ms. Moore did not go over any specifics with Mr. Shorter because she "was afraid of him. I wouldn't talk to him. He had no reason approaching me" (3PC-R. 741).

The circuit court failed to consider this newly found impeachment evidence and include in a cumulative evaluation of the

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to Mr. Ashton constitute admissible impeachment and come within the scope of *Jones v. State,* 591 So. 2d 911 (1991), and its progeny.

State v. Gunsby evidence in deciding whether Mr. Moore was entitled to Rule 3.851 relief. This was error.

G. Audra McCray

In his Rule 3.851 motion, Mr. Moore pled newly found information regarding Audrey McCray and why she testified for the State at his trial. Mr. Moore alleged that:

> Audrey McCray was threatened by law enforcement with the lose of custody of newborn son if she did not testify for the State against Mr. Moore. Ms. McCray has indicated that out of fear, she testified the way that she did, and that out of fear, she did not tell any of Mr. Moore's prior attorneys about these threats. This information had not been previously available to Mr. Moore's collateral counsel, and counsel had no way of knowing of this information until either the State or Ms. McCray disclosed it. Only now has Ms. McCray disclosed this information for the first time. When Chris Shorter told her about clothes that supposedly Mr. Moore gave him, she did not believe it was true. Before she testified she was advised that she faced jail time and the loss of her son's custody. Clearly as Ms. McCray has now indicated she had reason to curry favor with the State by testifying against Mr. Moore in the fashion that she did. Davis v. Alaska, 415 U.S. 308 (1974). The State did not disclose that it had threatened Ms. McCray and/or that she feared for the loss of custody of her son. This information constitutes favorable information within the meaning of Brady v. Maryland, 373 U.S. 83 (1963), that was withheld by the State.

(3PC-R. 120-21). However, Mr. Moore was precluded from presenting evidence on this portion of Claim II because the factual allegation were not specifically contained within paragraph 3a; the allegations were in paragraph 7 of the amended motion to vacate (3PC-R. 688).

The circuit court denied relief on Mr. Moore's *Brady* claim arising from the undisclosed threats to Ms. McCray without the benefit of evidentiary development (3PC-R. 403). The circuit court's

reasoning was that Mr. Moore did not "specif[y] what things in Ms. McCray's testimony were not true, thereby failing to make out a prima facie allegation under *Brady*" (3PC-R. 403). The circuit court's reasoning was erroneous. *See Smith v. Sec'y Dept. of Corrs.*, 572 F. 3d 1327, 1343 (11th Cir. 2009) ("For these reasons, we conclude that the Florida Supreme Court's decision was unreasonable insofar as it determined that the prosecutor's 1989 note about Melvin Jones' fears that he would be facing charges that he had sexually abused his daughter was not impeachment evidence under *Brady.*").

H. Conclusion.

When Mr. Moore's Claim II is properly analyzed, it is apparent that the circuit court's analysis was erroneous. Under the proper analysis Rule 3.851 relief is required.

CONCLUSION AND RELIEF SOUGHT

When the proper analysis is conducted, Mr. Moore must be afforded a new trial and/or penalty phase that is a true adversarial testing that is constitutionally compliant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Stephen White, Office of the Attorney General The Capitol, PL01, Tallahassee, FL 32399, on September 16, 2011.

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CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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