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JUL 10 1995
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 86020

BERNARD BOLENDER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

EMERGENCY: DEATH WARRANT SIGNED; EXECUTION SCHEDULED FOR 7:00 A.M., WEDNESDAY, JULY 12, 1995

APPLICATION FOR STAY OF EXECUTION AND REQUEST FOR REMAND FOR THE NECESSARY EVIDENTIARY HEARING

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and
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INTRODUCTION

On Friday, July 7, 1995, Petitioner filed a motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure. He pled that newly discovered evidence -- evidence which had been wrongfully withheld by the State -- demonstrated that he was innocent of the charges for which he is scheduled to be executed on July 12, 1995. Furthermore, the Rule 3.850 Motion explained that Petitioner's convictions -- based solely on co-defendant Joe Macker's bargained for and self-serving testimony -- and his sentence (an affirmed judge override of a unanimous jury recommendation of life imprisonment) resulted from fundamentally unfair and unreliable proceedings, infected by improper state manipulation and suppression of evidence about its dealings with and the credibility of Joe Macker.[1] Finally, the Rule 3.850 Motion outlined newly discovered evidence that Petitioner's death sentences were disproportionate -- co-defendant Joe Macker served seven (7) years of several "life" sentences, and co-defendant Paul Thompson, after a series of bizarre court proceedings, pled guilty to reduced charges and received a thirty-five year sentence. Of the three defendants, Petitioner is the only one who pled not guilty and testified to his innocence, and he is the only one facing the death

[1]The only evidence that Petitioner committed this offense came from Joe Macker's testimony and "cooperation." Macker's wife also testified, not to what happened but to who was present during the crimes. Her testimony was controlled by Macker, as required by Macker's plea agreement, and as now graphically presented in the previously suppressed and confidential pre-sentence investigation regarding Ms. Macker. See Claim III, Rule 3.850 Motion.

penalty.[2]

Petitioner filed with his Rule 3.850 Motion a motion to recuse the State Attorney's Office for the Eleventh Judicial Circuit because, inter alia, members of that office had participated in suppression of evidence at trial, suppression which continues to this day.[3] Furthermore, Petitioner contended that at least Abe Laeser, an Assistant State Attorney, would be required to testify in these proceedings.[4]

On Saturday, July 9, 1995, Judge Bernard Shapiro held a hearing on the Rule 3.850 pleadings. Judge Shapiro first denied the motion to disqualify the state attorney's office and to disqualify Mr. Laeser. He then heard argument on the Rule 3.850 motion. During the course of that argument Mr. Laeser made factual representations over objection,[5] just as predicted by the motion to

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[2]The record now compels the conclusion that even if Petitioner is guilty, it cannot reliably be said that his personal culpability is greater than that of the co-defendants, one of whom has been free for seven years and one of whom enjoys the prospect of freedom in short order. Accordingly, Petitioner urges this Court to reduce his death sentence to life imprisonment. See (Abron) Scott v. Dugger, 604 So. 2d 465 (Fla. 1992)("we hold that in a death case involving equally culpable codefendants the death sentence of one codefendant is subject to collateral review under Rule 3.850 when another codefendant subsequently receives a life sentence"); (Paul) Scott v. Singletary, No. 84,686 and 84,687 (Fla. March 16, 1995)(state suppression of evidence of a co-defendant's relative culpability cognizable in Rule 3.850 proceeding). Co-defendant Macker's life sentences were reduced in 1987 after he successfully challenged his guilty plea, and Thompson pled guilty in 1990 to reduced charges, both events occurring long after the 1982 trial.

[3]Just this month Assistant State Attorney Abe Laeser instructed Miamian Joe Macker not to speak with Petitioner's representatives.

[4]Indeed, upon receiving the Rule 3.850 motion, Penny Brill, another Assistant State Attorney, advised undersigned counsel that she was immediately scheduling a hearing at which she wished to present the testimony of Mr. Laeser.

[5]For example, Mr. Laeser "testified" that the condition that Macker pass a polygraph before he would be allowed to testify was simply a private agreement between Laeser and Macker's counsel. Contrary to this "testimony," however, the judge who heard Macker's plea and sentenced Petitioner to death was a party to

disqualify. However, Judge Shapiro denied the Rule 3.850 motion as a matter of law in a one page order containing no findings of fact. See Appendix A, submitted with this brief. Petitioner filed a notice of appeal.

In this brief Petitioner will first address the State's contentions that Petitioner should have discovered the State's suppressed evidence sooner than he did. Then Petitioner will present argument on his claims for relief.

I. THE STATE'S "DEFENSE" THAT PETITIONER SHOULD HAVE DISCOVERED ITS SUPPRESSION OF EVIDENCE EARLIER IS LEGALLY AND FACTUALLY FALLACIOUS, AND REQUIRES AN EVIDENTIARY HEARING.

At the outset it is important to underscore just what the State contends: namely, that a defendant may not raise a challenge to a conviction based upon state suppression of evidence if the state successfully suppresses it long enough. The sub-argument presented by the state is that it is the defendant's responsibility to look under the correct shell for evidence, not the state's trial and post-trial obligation to deliver exculpatory evidence whenever found.

These propositions are incorrect. The former argument turns

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and an enforcer of this agreement, and advised Macker in open court that if he was deceptive in the to-be-conducted polygraph the plea would be stricken. See p. 21, Rule 3.850 Motion.

Mr. Laeser also "testified" that Macker "passed" all polygraphs he was given. In fact, the State's own polygraph expert reported that Macker did not pass a first polygraph, and the only evidence in this record regarding Macker's second polygraph is that he failed it. See Apps. 5 & 6, reports of polygraph examiners.

Under similar circumstances -- where a trial court permitted factual submissions by the State, but did not allow the petitioner the opportunity to present his proof -- this Court reversed the resulting trial court ruling for a full 3.850 evidentiary hearing. See Johnson v. Singletary, 647 So. 2d 106, 111 n.3 (Fla. 1994)("it is difficult to see why Johnson should have been precluded from also putting on evidence.")

on itself -- the fact that the state successfully hides evidence is the proof of, not a defense to, a Brady[6] or a newly discovered evidence claim. The latter proposition misplaces burdens -- the state has an affirmative obligation to deliver exculpatory evidence whenever and wherever found. "[A]fter a conviction the prosecutor... is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976); Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993) (addressing public records disclosure in post-conviction proceedings and "emphasiz[ing] that the State must still disclose any exculpatory document within its possession or to which it has access, even if such document is not subject to the public records law") (citing Brady).[7]

With these overarching State obligations in mind, Petitioner turns to the State's "defenses."

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[6]Brady v. Maryland, 373 U.S. 83 (1963).

[7]See also Moore v. Kemp, 809 F.2d 702, 730 (11th Cir. 1987) (defendant who was not given Brady material in post-conviction proceeding did not get "full and fair" hearing in that proceeding); Amadeo v. Zant, 486 U.S. 214 (1988) (there is no procedural default when the state fails to disclose evidence supporting the post-conviction petitioner's claim; the evidence should be heard when it comes to light); Thomas v. Goldsmith, 979 F.2d 746, 749 (9th Cir. 1992) (rejecting the state's argument that the defendant/petitioner should have sought Brady material and have made a Brady claim earlier because the information was "under control of the state" and the defendant/petitioner could not "make the showing which would justify" relief without it -- **"We do not believe that [the Brady] claim is defeated by this conundrum. Rather, we believe the state is under an obligation to come forward with any exculpatory ... evidence."**) (emphasis supplied); id. at 750 (the constitutional "duty to turn over exculpatory evidence" applies in post-conviction proceedings.); Walker v. Lockhart, 763 F.2d 942 (8th Cir. 1985) (en banc) (relief granted under Brady **twenty (20) years after conviction** where it took that long for evidence which the state had earlier failed to disclose to come to light) (emphasis supplied).

Claim I

Claim I reveals that the State hid the timing, content, and result of the polygraph examination which Macker was required to take and pass before he could testify against Petitioner and receive a "life" sentence.[8] At a hearing as recently as June 8, 1995, the State continued successfully to oppose release of the very documents which the State now says were always available to Petitioner. The lower court accepted the State's arguments that the records could not be obtained without a medical release from Joe Macker, and entered an order denying the request. See Rule 3.850 Motion, pp. 35-36. Weeks later, finally, the State did an about-face and agreed to release the records.[9]

After the State released the records, however, it argued that they were never withheld. First, the State wrote that "it is undisputed that all written and verbal reports from the polygraph examiners were disclosed prior to trial." Response at 2. This is very much disputed.[10]

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[8]The state also hid the notes, documents, and graphs from a first "inconclusive" polygraph examination.

[9]The State pled in its answer to the Rule 3.850 Motion that the change of heart was because defense counsel had convinced the State that a release was not needed from Macker. Response at 3. At the hearing held on the Rule 3.850 Motion on July 8, 1995, Laeser stated that the real reason for the earlier refusals was that the State believed that the records were not subject to disclosure and that, as a matter of strategy, the State did not want to provide the Petitioner with a basis to challenge his conviction and sentence. The records were not turned over when public records law requests were made in 1987, 1989, 1990 and, at first, in 1995. The State's position flies in the face of this Court's law. See Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992) ("we encourage state attorneys to assist in helping defendants obtain relevant public records from outside agencies").

[10]This assertion is simply untrue. Moreover, as discussed in Argument I, infra, the second polygraph examination had not even occurred "before trial" and could not have been provided.

Second, the state wrote that "collateral counsel could have made the request for underlying charts, tests, questions, etc. in his second motion to vacate [in 1990] to Slattery Associates, Inc., under the Public Records Laws, Ch. 119, as they were the entity that had possession of the records." Response at 2.[11] This second

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[11]As conceded by Respondent, the state would not release any materials to collateral counsel before 1990. The following letters explain why:

March 14, 1989

Julie Naylor, Esq.
c/o Capital Collateral Representative
1533 South Monroe Street
Tallahassee, Florida 32301

Re: Bernard J. Bolender

Dear Ms. Naylor,

The Office of the State Attorney cannot comply with your "public records" request, pursuant to Section 119, Florida Statutes. We are actively prosecuting a case against a co-defendant, Paul Thompson. Therefore, these matters are exempt from public disclosure.

Please feel free to write to me if you are in need of further assistance. Thank you.

Sincerely yours,
JANET RENO
STATE ATTORNEY
By:
Abraham Laeser
Chief Assistant
State Attorney

AL/bjs
****
March 21, 1989

Ms. Julie Naylor, Esquire
Capital Collateral Representative
1533 S. Monroe Street
Tallahassee, FL 32301

Dear Ms. Naylor:

This letter is in response to your Capital Collateral Representative request concerning Bernard John Bolender.

The Dade State Attorney's Office has advised that there is a current pending prosecution against co-defendant Paul Thompson, and that no material should be released. This material is considered to be active criminal investigative information, and is therefore exempt.

Any further inquiries concerning the requested materials

response ignores the 1990 law and facts.

With respect to the law, in 1990 requests to the state attorney and the police (which were made here) should have resulted in the polygraph results being turned over. The polygraphs were done for the state at the state's behest and were specifically released by Macker to named state attorneys. App. 2 to Rule 3.850 Motion. The State could not hide these public records in a non-public entity to avoid releasing them. See Tober v. Sanchez, 417 So. 2d 1053, 1054 (Fla. 3d DCA 1982), review denied, Metropolitan Dade County Transit Agency v. Sanchez, 426 So. 2d 27 (Fla. 1983)(a state official may not transfer actual physical custody of public records to another to avoid compliance with a 119 request); Wisner v. City of Tampa Police Dept., 601 So. 2d 296 (Fla. 1st DCA 1992)(a police department may not allow a private entity to maintain physical custody of public records to circumvent the public records law).[12]

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should be addressed directly to the Metro-Dade Police Department Legal Bureau.

Sincerely,
THOMAS GUILFOYLE
Police Legal Bureau
1320 N.W. 14th Street
Miami, Florida 33125
Telephone: 547-7404

TG/bf
cc: Jack Leary, Commander
Records Bureau
Abraham Laeser, Esquire
Assistant State Attorney
State Attorney's Office

See Appendix B, appended hereto.

[12]Respondent cannot plausibly suggest both that the state did not have the records because a non-public agency did, and that a public records act request to the non-public agency would have unearthed the records. If the records were privately held, counsel had no access.

With respect to the facts, collateral counsel did request these polygraph records, specifically and correctly, both from the state attorney and from the police department in 1987, 1989 and 1990. For example, in letters dated March 3, 1989, and directed to Janet Reno and Bobby L. Jones (Metro-Dade Police Department), counsel requested "[a]ny and all records and reports of polygraph examinations ..." App. C (appended hereto). No polygraph material was turned over then, apparently on the basis of the "strategic" reasons Assistant State Attorney Laeser acknowledged last Saturday.

Claims II and IV

Petitioner pled that Macker's status as an informant for the state and as a target for grand jury investigation[13] was suppressed and exculpatory, providing powerful grounds for the impeachment of the state's only real witness. The State responded that there is no basis for this claim to be classified as "newly discovered." On the contrary, Petitioner specifically pled that this information was not previously had by or made available to collateral counsel. The State, however, sought and obtained dismissal of the Rule 3.850 motion without any evidence on the matter. This Court has found improper such dispositions of Rule 3.850 motions. See Card v. State, 652 So. 2d 344, 346 (Fla. 1995)("an evidentiary hearing will permit a full exploration of the facts bearing upon the state's contention that all matters ... were known or should have been known" earlier)(emphasis supplied). See also Harich v. State, 542

[13]This investigation was because Macker was involved in drugs, bribery, murders, political corruption, and other offenses.

So. 2d 980, 981 (Fla. 1989) (noting that an evidentiary hearing is proper in cases of newly discovered evidence on both the substantive claims and on procedural default arguments asserted by the State).

The facts are that collateral counsel asked for "tapes ... regarding Mr. Macker" in 1989, and did not receive any. App. C, appended hereto (March 3, 1989, letter, paragraph 3.)[14] Counsel asked again several weeks ago, and finally received the material contained at Appendix 10 of the Rule 3.850 Motion.[15]

Since 1987, post-conviction counsel made 74 public records requests in this case. The requests specifically sought precisely this information. Requests to the State Attorney (App. C), for example, stated even in introductory paragraphs:

> We request any and all state attorney files and records (regardless of form and including, for example, all photographs and tapes or other sound or video recordings) regarding Mr. Macker.
>
> We request any and all state attorney files and records (regardless of form and including, for example, all photographs and tapes or

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[14]Collateral counsel has filed 74 requests for Chapter 119 material since 1987, searching for information about this case. These requests were to the State Attorney's Office (on several occasions, 1987, 1989, 1990, and 1995); to law enforcement, including Metro Dade (on several occasions, 1987, 1989, 1990, and 1995); to FDLE (again on several occasions); and to other state authorities, including the Sheriff's Office, on several occasions. Only now has the information been disclosed.

[15]It must be remembered that the state had an obligation at trial to reveal impeachment evidence regarding Macker, and did not do so. See Goldberg v. State, 351 So. 2d 332, 336 (Fla. 1977) (state must release evidence going to credibility of witness, especially where "such details were essential to preparing a defense in a case of this nature, where witness credibility was virtually determinative of the entire issue."). Furthermore, "[t]he State Attorney is responsible for evidence which is being withheld by other state agents, such as law enforcement officers, and is charged with constructive knowledge and possession thereof." State v. Del Gaudio, 445 So. 2d 605, 612 n.8 (Fla. 3rd DCA 1984).

> other sound or video recordings) regarding Paul Thompson . . .

The State's refusals to provide the information until just days ago cannot be squared with this Court's holdings in Walton and other cases.

Claim III

Claim III involves the recently released confidential portion of a pre-sentence investigation of Diane Macker which sets out the State's long standing knowledge about the complete lack of credibility of both Joe and Diane Macker. Respondent writes that "a review of the trial court's files with respect to the above charges, which the defendant could have done for the past fifteen years, would have easily revealed the PSI now claimed to have been 'recently' discovered." Response at 9.

In fact the court file does not contain the PSI, much less a copy of the confidential portion of the PSI. PSI's are confidential and exempt from public disclosure:

> (1) Except as provided below, information in a presentence investigation made by the Department of Corrections shall be confidential and shall be available only to officers and employees of the court, the legislature, the Parole Commission, the Department of Health and Rehabilitative Services, the Department of Corrections and public law enforcement agencies in the performance of a public duty ....

Florida Statutes, 945.10. The confidential portions of a PSI are especially private, Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986); Sarasota Herald Tribune, (Division of the New York Times) v. Holtzendorf, 507 So. 2d (Fla 2d DCA 1987); Sheffield v. State, 580

So. 2d 790 (Fla. 1st DCA 1991); McClendon v. State, 589 So. 2d 352 (Fla 1st DCA 1991), and the Respondent is well aware that it was only because of luck that Petitioner received the confidential PSI several weeks ago.[16]

Remaining Claims

Petitioner will discuss in the body of argument, infra, the manner in which newly discovered evidence, especially of innocence, was obtained.

ARGUMENT I

HAD THE STATE NOT MISREPRESENTED TO THE COURT THAT ITS STAR WITNESS PASSED A POLYGRAPH EXAMINATION, AND HAD THE STATE NOT SUPPRESSED THE MANNER IN WHICH IT DEALT WITH THE STAR WITNESS, AND HIS INCONSISTENT AND EXCULPATORY STATEMENTS, PETITIONER WOULD NOT HAVE BEEN CONVICTED AND SENTENCED TO DEATH; THE STATE'S MISCONDUCT VIOLATED THE PETITIONER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS, AND A NEW TRIAL MUST BE GRANTED.

Petitioner was prepared to show below that the state suppressed the fraudulent manner in which it dealt with and presented its star, plea bargained, co-defendant witness, Joe Macker. Specifically, Petitioner was prepared to show that the State, after trial began: (a) met with Macker to try to get his story straight and took discoverable and exculpatory (but not disclosed) statements from him; (b) postponed giving Macker a polygraph examination, which he was required by his plea bargain to pass before he testified; c.) told the jurors that Macker would

[16]Despite not being entitled to this report, counsel asked for it several weeks ago and it was provided, probably because Ms. Macker is now deceased and privacy concerns are somewhat lessened. No counsel for Petitioner had ever seen this report before two weeks ago.

testify, even though he had not been given the required polygraph;[17] and, d.) after telling the jurors that Macker would testify, the state administered a polygraph which Macker failed, a failure suppressed by the state.

These facts are more fully set forth in Section A, below. Without regard to whether Macker actually passed or failed the polygraph, these facts demonstrate a manner of state dealing with Macker which, if disclosed, would "[have] 'carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case.'" Kyles v. Whitley, 115 S.Ct.1555, 1572 (1995)(ellipses in original)(citations omitted). If Petitioner had known what the state was doing, he could have raised the possibility of fraud, id. 1572, n. 15, shown that the police "'set [him] up,'" id. at 1573, and attacked "the good faith of the investigation," id. at 1571, "the reliability of the investigation ..." id; and "the process by which the police gathered evidence and assembled the case..." Id. at 1573, n. 19.

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[17]The state claimed below that "[i]ndeed it is undisputed that all written and verbal reports from the polygraph examiners were disclosed prior to trial," State's Response, p. 2. This is categorically false.

There were two polygraphs, as far as we know. The first was on January 19, 1980. A six page report from this polygraph was turned over to defense counsel. The second polygraph did not even occur until the late afternoon of April 21, 1980, after the trial had started. Petitioner very much disputes that a verbal or written report was given to trial counsel before April 21, 1980, regarding a test that did not occur until late on April 21, 1980.

It is especially telling that a prosecutor would inform the jury that a co-defendant would testify when the condition precedent to such testimony has not even occurred. As will be shown, the state told the Court that Macker would not testify unless he passed a polygraph, which was a condition of Macker's plea. A week later during voir dire and opening statement the state told the jurors that Macker would testify, and what he would say. Macker's dispositive polygraph was after this. Defense counsel wrongly was told that Macker had been polygraphed, and had passed, before the opening statement.

The fact that the state told the jury that Macker would testify before it was determined that he could (because he had not been polygraphed) was either a bold gamble, or the fix was in.

In this case, such an attack would have gone far. The only evidence against Petitioner came from the mouth of a co-defendant facing the death penalty, who testified in return for a life sentence. "Given this trial's circumstantial nature, [Macker's] role as the State's key witness, and the defense's inability to impeach [Macker] based upon the undisclosed evidence," Gorham v. State, 597 So.2d 782 (Fla. 1992), there is a reasonable probability that the outcome in this case would have been different had the state disclosed its polygraph machinations. See Brady v. Maryland, 373 U.S. 83 (1963). The issue is whether without the suppressed evidence the trial "result[ed] in a verdict worthy of confidence," Kyles, supra, at 1566, and Petitioner believes that this Court will conclude that no confidence attaches to the resolution of Petitioner's guilt.

Additionally, and, again, without regard to the admissibility of polygraph results, the state failed to reveal statements from the polygraph sessions which were inconsistent with Macker's trial testimony on critical issues, and failed to reveal the State's belief, based on Maker's interviews, that Macker was the person whose decision it was to murder the victims. Given the weakness of the state's case, this suppression warrants relief. Brady, supra; Jacobs v. Singletary, 952 F.2d 1282, 1288 (11th Cir. 1992).

The State's suppression of the fact that Macker did not pass the polygraph also compels relief,[18] again, without regard to

[18]Based upon the record before this Court the only evidence of the result of the polygraph finally taken by Macker during trial is presented in Appendices 5 and 6, filed with the Rule 3.850 Motion--

whether polygraph results are themselves admissible. The failure to reveal the results of the polygraph violated the Petitioner's right to due process and a new trial is required because "the failure to disclose the polygraph results clearly impaired [Petitioner's] ability to prepare and present his case." Bartholomew v. Wood, 34 F.3d 870, 875 (9th Cir. 1994)(even if inadmissible, polygraph evidence must be disclosed under Brady because clearly material, and can prompt further fruitful; investigation.

Finally, the failure to pass the polygraph under the circumstances of this case is admissible. First, it is admissible at guilt/innocence. In United States v. Lynn, 856 F.2d 430 (1st Cir. 1988), the defendant sought to cross examine his codefendant, Bryon, who was testifying pursuant to a plea agreement that provided that his failure to take or to "'successfully complete'" a polygraph examination could result in the "'nullification of this agreement at the sole discretion of the United States Attorney . . . .'" Lynn, supra, 856 at 432 (quoting the plea agreement). As

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Macker did not pass. The state's polygrapher prepared no written report on the polygraph performed after trial began, a very unusual omission for this particular polygrapher.

Abe Laeser, counsel for the State, stated (i.e., "testified"), below that Macker passed this April 21, 1980, polygraph. No report says so. Laeser "testified" that the polygrapher told him that Macker had passed.

These statements by Laeser were not subject to cross-examination, were not pled in the state's response, and were tantamount to "the trial judge permitt[ing] the State to introduce evidence" when the Petitioner was denied a hearing as a matter of law. See Johnson v. Singletary, 647 So.2d 106, 111 n. 3 (Fla. 1994). In any event, it is apparent from Petitioner's affidavits, see Apps. 5 & 6, Rule 3.850 Motion, that there was deception throughout these polygraphs.

here, Bryon's answers to some of the questions in the polygraph examinations were inconclusive, and the Court held that excluding the actual polygraph results from evidence violated the defendant's constitutional rights. See sub-section G, infra. Second, the polygraph is admissible at capital sentencing. See sub-section H, infra.

A. The State: Misrepresented to, and Hid From, the Court and Counsel the true Manner in Which the State was Dealing With Macker; Failed to Disclose that the State had Repeated Interviews with Macker Trying to Get Him to Pass A Polygraph; Did not Comply with Rules of Discovery Requiring that Macker's Statements be Provided; at a Time When Macker had not Even Taken a Polygraph, Told the Jury, the Court, and Defense Counsel that Macker Would Testify, Despite the Fact that He Could not Do So Unless he Had Passed a Polygraph; and Concealed From the Court and Defense Counsel That When Macker Finally did Take a Polygraph, He Did Not Pass It

After keeping the timing and the results of the Macker polygraphs from the courts and the defense for fifteen years, the state two weeks ago released 140 pages of documents which purport to contain the "complete and correct copy of the polygraph files of JOSEPH MACKER." See App. 2, Rule 3.850 Motion. These documents reveal that the state suppressed exculpatory statements made by Macker during the course of law enforcement polygraph interviews, that the State dealt with Macker in a sneaky and duplicitous way, including after trial had begun, and that Macker in fact failed the dispositive polygraph examination he was finally given.

The newly revealed polygraph materials demonstrate the following facts:

1. On January 18, 1980, Macker gave a statement which was transcribed. The statement recited that Petitioner and a third co-defendant killed the victims while Macker did little to nothing;

2. On January 19, 1980, Macker took a polygraph examination with respect to this 1/18/80 statement, and other matters;

3. On January 29, 1980, a report was written by Kent C. Jurney, Sr., the polygrapher. See App. 2 He reported that Macker answered truthfully when he denied that he shot or stabbed any victims, dishonestly when he said that he did not know beforehand that the victims would be killed, and dishonestly when he said that he did not strike any of the victims. Jurney reported that the test was inconclusive regarding whether Macker was deliberately holding back information;[19]

4. Jurney "recommended that Mr. Macker be re-examined at a later date to determine whether or not he is still holding back pertinent information;"

5. Jurney's six (6) page report was provided to Petitioner's defense counsel. That is all that was provided to Petitioner's defense counsel. The seventy-seven pages of documents, written questions and answers,

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[19]At the hearing conducted below, prosecutor Laeser stated that Petitioner "passed" this polygraph examination. Mr. Laeser's use of the word "pass" to describe a result which his own expert said showed "deception" and was, overall, inconclusive, helps explain how he Mr. lessor could also say that Macker passed a later exam which we now know Macker failed miserably.

and other materials generated or used during the January 19, 1980, polygraph examination were not provided to defense counsel;

6. Trial was to begin for Macker and Petitioner on April 14, 1980. The only evidence the state had against the Petitioner was a fingerprint. On the day of trial Macker entered a plea to second degree murder, received life sentences, and agreed to testify against the Petitioner. A pre-condition of the plea, imposed and to be enforced by the trial judge, was that Macker take and pass a polygraph examination consistent with his January 18, 1980, transcribed statement.[20] The trial judge told Macker, counsel for Petitioner, and the state that if Macker's answers were "deceptive in some fashion ... this could throw the entire agreement that you entered into with the State out and be placing you back into the position of being ready to start this case, which I am now ready to start." Plea hearing at 48. The prosecutor underlined what would happen if Macker was deemed deceptive in a second polygraph: "this plea arrangement would be abrogated." Id. at 51;

7. Unknown to Petitioner and his counsel until the state released material in this case on June 21, 1995,

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[20]This was because, as Detective McElveen stated in deposition, "at the time that the [January 19, 1980] polygraph was inconclusive, I had serious doubts whether or not [Macker] would be allowed to be a state witness." Deposition, March 15, 1980, pp. 89 - 90. Because Macker was deceptive on the first polygraph, it became a condition of his plea that he pass the second.

after the plea the state made two unsuccessful attempts to get Macker to pass a polygraph examination. Nevertheless, the state proceeded to use Macker's testimony against Petitioner, in abrogation of the plea constraints imposed by the Court and told to defense counsel. Indeed, the State falsely told defense counsel that Macker did pass post-plea polygraph examinations. See App. 7;

> 8. As the newly released materials show, on April 17, 1980, three days after the plea, a polygrapher named Slattery met with Macker and the lead detective in the case, Detective McElveen, for between six and eight hours. The purpose of this meeting was to conduct a polygraph examination of Macker. Slattery went over Macker's 1/18/80 statement with Macker and had Macker sign an agreement to take the polygraph and to release it to Abe Laeser and Bob Kayes, assistant state attorneys. Macker also released the results to Judge Fuller -- the judge who took the plea, later heard Macker's testimony, and overrode the jury's unanimous recommendation of life;

9. After meeting for six to eight hours on April 17, 1980, Slattery and McElveen apparently did not

conduct a polygraph examination.[21] Defense counsel did not know of this meeting;[22]

10. On April 21, 1980, jury selection began and was completed. During jury selection, the jurors were advised by the prosecutors that they would hear accomplice testimony. Supplemental ROA, at 104. Then Abe Laeser presented the state's opening statement in Petitioner's case. R. 279, 281 At that time, Mr. Macker had not yet taken, much less passed, the polygraph examination that his plea agreement required.[23] Hence, he could not testify. Nevertheless, the state informed the jury that Macker would testify about a version of the offense which made Petitioner the primary mover in the crimes. R. 285;

11. On April 21, 1980, between the hours of 1:00 and 4:46 p.m., Macker was polygraphed. It appears that no written report was prepared about this polygraph.[24]

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[21]It may be that they did conduct one, and have suppressed it.

[22]The recently revealed notes of the April 21, 1980, interview refer back to the April 17, 1980, interview: "During the pre-test interview [on April 21], S. and this examiner reviewed the case statements which he made to P.S.D. Detectives Steve McElveen and Steve Jackson on Thursday, April 17th, 1980." No such case statements were provided at trial, and none were provided on June 21, 1995, when the state finally turned over the supposedly complete polygraph files. Petitioner was entitled to such statements before trial under the rules governing discovery.

[23]Defense counsel did not know this.

[24]The new materials do indicate that Slattery was supposed to submit a written report to Bob Kaye, the assistant state attorney working with Mr. Laesor. App. 2 No report was released to any counsel for Petitioner ever. A polygraph examiner intimately familiar with Slattery's work submitted his affidavit below in which he stated that "[t]he fact that there is no report from Mr. Slattery is

Trial counsel did not know that Macker was polygraphed on April 21, 1980, and he was not provided any materials at all regarding the state's April 17, 1980, and April 21, 1980, meetings with Macker;

12. On April 23, 1980, Macker testified against Petitioner;

13. In addition to the fact that Macker failed the polygraph examinations and should not have been allowed to testify, notes from the polygraph examinations include the following:

> a.) During the April 21, 1980, polygraph, a Detective Moore and Detective McElveen are present with Slattery. In notes synopsizing what Macker tells them there exists a page with a line drawn down the middle. On the left hand side of the line is what Macker says that Petitioner did; on the right side of the line is what Macker says co-defendant Thompson did. On the right hand side, the document recites that Macker "actually saw Paul [Thompson] kill[] Hernandez after shooting and torturing him with the knife" is completely inconsistent with Macker's trial testimony three days later. At

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very unusual. I have never known Mr. Slattery to take part in a major crime polygraph examination and not render a report." App. 6.

trial, Macker testified that Petitioner tortured this victim with the knife. R. 824.[25]

b. On either April 17th or 21st, Bob Kaye, the assistant state attorney trying the case with Abe Laeser, contacted the polygrapher at 10:45 a.m. Notes reveal the following request for "more detail":

> more detail re idea - decision to kill them -- Macker's house - decision left to Macker -

App. 2. Based upon interviews with and statements by Macker to the State, the state believed that the decision to kill the victims was Macker's, a theory completely inconsistent with what the state presented at trial through Macker. This information was not provided to defense counsel.

These facts fit into the trial in the following way. The state had no idea or evidence about how the murders in this case occurred. The state's sole evidence tying Petitioner to the crimes was his fingerprints on the trunk of a victim's car.[26] On the

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[25]Trial counsel was provided none of the statements Macker gave on April 17 or April 21, 1980, in violation of the rules governing pre-trial discovery. Petitioner's trial actually started on April 21, 1980, and counsel had no idea that Macker had not passed a polygraph.

[26]Other than the fingerprint there was no evidence linking Petitioner to the car and no physical evidence that he was at the Macker house the night of the homicides. R. 693, 695. As to the fingerprint, Petitioner testified that he had

other hand, the murders occurred in Mr. Macker's house while he was there with his wife.

On the day trial was to begin Macker agreed to testify against Petitioner as a part of his plea bargain to avoid the death penalty. Part of Macker's plea agreement was that he had to pass a polygraph examination before he testified. Unknown to the Court and to defense counsel, Macker had not even taken this polygraph before the state told the jury during voir dire and in opening statement what Macker would testify to. Macker later testified and swore that Petitioner committed the murders while Macker participated in a minor way out of fear. At the time of his testimony, Macker had taken, but had not passed, a polygraph.

Petitioner testified in his own defense that he was not present when the murders occurred in Mr. Macker's house. As the prosecutor argued during closing argument at the guilt/innocence proceeding, "[t]he most important issue in this case is who to believe," Macker or Bolender. R. 1724.[27]

The trial judge and Petitioner's defense counsel believed when Macker testified for the state that Macker had passed a polygraph examination. The jury which heard Macker's testimony convicted the

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met John Merino earlier in the evening and that Merino showed him some cocaine that was in the trunk of a car that Merino was driving. R. 1032-34.

[27] Macker's wife, Diane Macker, also testified against Mr. Bolender. As discussed in Argument III, infra, previously undisclosed state documents reveal that Ms. Macker had a habit of being at murder scenes and later "giving testimony ... only because police investigators had placed her at the scene and put enough pressure on her that she felt it to be in her best interest to cooperate." See App. 1, Rule 3.850 Motion. Furthermore, Ms. Macker did whatever Mr. Macker told her to do, as recognized by the state which, as a condition of Macker's guilty plea, required that Macker obtain his wife's testimony in this case.

Petitioner, but only after five hours of deliberations and after the jurors' requests to review Mr. Macker's testimony were denied. The same jury -- hearing no more evidence -- unanimously recommended a life sentence for Mr. Bolender, the same supposed sentence that Mr. Macker received through plea bargaining.[28] This unanimous recommendation followed twelve minutes of deliberations.

The jury that recommended life imprisonment did not know that Macker had "passed" a polygraph examination. The judge that instantly overrode the unanimous recommendation "knew" that Macker had taken and passed a lie detector test with respect to his "less significant" culpability.[29]

B. The Manner in Which the State Produced Macker's Testimony was Exculpatory yet Concealed

The State could not use Macker's testimony unless he passed a polygraph examination. The state went to Macker on April 17, 1980, to test him before trial. A polygrapher spent hours with Macker, Macker released all polygraph results to the state, but no polygraph apparently occurred. Instead, Macker provided "case statements" to the examiners, statements which were not turned over to trial counsel and have not been released to current counsel.

On April 21, 1980, trial began. The state advised the lower

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[28]After-discovered evidence reveals that Mr. Macker's actual punishment was seven (7) years imprisonment.

[29]This Court sustained the trial judge's override of the unanimous jury recommendation of life based, inter alia, upon the following, which was established, if at all, solely through Macker's testimony: "Bolender acted as the leader and organizer in these crimes and inflicted most of the torture leading to the victims' deaths.... Macker's role was less significant, and there is no evidence that he participated in the stabbing and shooting of the victims." Bolender v. State, 422 So. 2d 833, 837 (Fla. 1982).

court on July 8, 1995, that all polygraph results were provided to trial counsel before trial. That is impossible, because the second polygraph Macker took was not taken until after trial began.

Nevertheless, the State advised the jury that Macker would testify, and what he would say, before he took the second polygraph. Inasmuch as Macker could not testify, pursuant to his plea, unless he passed a polygraph, it was somewhat premature for the state to advise all parties that Macker would testify before he had even taken a second polygraph.

The only opinions contained in this record with respect to whether Macker passed this second polygraph are those submitted by the Petitioner -- Macker failed.

These facts present compelling exculpatory evidence. Defense counsel would have been entitled to present this sequence of events to the jury through any witness--detective, prosecutor, or Macker--who knew about it. The answers would have revealed the possibility of fraud, Kyles v. Whitley, 115 S.Ct.1555, 1572 (1995), that the police "'set [Petitioner] up,'" id. at 1573, and attacked "the good faith of the investigation," id. at 1571, "the reliability of the investigation ..." id; and "the process by which the police gathered evidence and assembled the case..." Id. at 1573, n. 19.

C. Macker's Statements Were Inconsistent With His Trial Testimony

Impeachment by prior inconsistent statements would have been very effective in this case. For example, on direct appeal, this court found that "[Macker] stated that Bolander used a hot knife to burn the back of Hernandez." Bolander v. State, 422 So.2d 833, 834

(Fla 1982).[30] In fact, during one of the polygraph examinations Macker stated that it was the other co-defendant who performed this act. Inconsistency on this reasonably critical statement of the facts would provide a great source of impeachment. Furthermore, the state noted in its evaluation of Macker that he had said that it was up to him whether the victims would be killed, making him not other defendants, the leader and ringleader.

This and other inconsistences could have been effectively exploited by defense counsel, had the information been revealed:

> We find that Rhodes' polygraph testimony significantly clashes with his statements at trial, and was more damning than other equivocal statements made by Rhodes and available to the defense. Under Florida rules of evidence, the defense could have entered this report both to impeach the witness and to establish the truth of the matter asserted. See Fla.Stat.Ann. § 90.801(2) (West 1979). The examiner's report, if accepted as the truth, impeaches Rhodes' inculpatory trial testimony on several issues which centrally concern Jacobs' guilt or innocence. The examiner's report would therefore have provided the defense with more than merely insignificant supplemental support for cross-examination purposes. See, e.g., United States v. Benz, 740 F.2d903, 915-16 (11th Cir. 1984), cert. denied, 474 U.S. 817, 106 S.Ct. 62, 88 L.Ed.2d 51 (1985) (no Brady violation where evidence wold have provided additional support for cross examination but same information substantially otherwise presented to jury). The report was likely to have been particularly compelling to jurors because it was monitored by a polygraph.

Jacobs v. Singletary, 952 F.2d 1282, 1289 (11th Cir. 1992). See also Gorham v. State, 597 So. 2d 782, 784-85 (Fla. 1992) (granting

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[30]All such pertinent facts were established solely through Macker's testimony.

relief under Brady and noting, "This information was never disclosed to Gorham, and, thus, the defense was unable to attack [the State witness's] credibility by showing that she was biased ... Given this trial's circumstantial nature, Johnson's role as the State's key witness, and the defenses's inability to impeach Johnson based upon the undisclosed evidence, we find that [relief is appropriate]."); id. at 785, quoting Napue v. Illinois, 360 U.S. 264, 269 (1959) ("[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determine of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."); Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986) (The conviction rested upon the testimony of [the Mackers]. [Their] credibility was the central issue in the case. Available evidence would have had great weight in the asserting that [the Mackers'] testimony was not true. There is a reasonable probability that, had [the impeached] been used at trial, the result would have been different.") Code v. Montgomery, 799 F.2d 1481, 1484 (11th Cir.) (prejudice demonstrated where impeachment evidence was not used at trial because this trial was a "swearing match" and the impeachment evidence "'might have affected' the jury's comparison of the [Mackers'] testimony with the defendant's."); McMillian v. State, 616 So. 2d 933, 946 (Ala. Cr. App. 1993) (prior inconsistent statement of key witness was material impeachment evidence: "[Macker's] credibility was the most important issue in the case. There was much about [Macker] to

indicate unreliability, and without his testimony the evidence would have been insufficient to go to the jury."); Ex parte Womack, 541 So. 2d 47, 61 (Ala. 1988) (the "veracity and motive for testifying [of the key witnesses] were crucial considerations for the jury in weighing the evidence."), id. at 62 (the "strictest standard of materiality applies to suppression of impeachment evidence), id. at 64 (impeachment evidence relating to key witnesses "is, by its very nature, material evidence that tends to exculpate [Bolender]."), id. (impeachment "could cause the whole house of cards to tumble."); Ex parte Adams, 768 S.W. 2d 281, 290-91 (Tex. Cr. App. 1989) (prior inconsistent statement material because it "would have obviously constituted a secure basis for impeachment" of crucial identification testimony).

Petitioner is entitled to a new trial at which he properly can challenge macker's credibility.

D. The Theme Of the State's Closing Argument Was That Macker was Honest

The state began its closing argument by defining the one critical issue: "The most important issue in this case is who to believe," Macker or Bolender. R. 1724. Then the State set about explaining that Macker was honest:

> The defense has told you Joe Macker is a terrible person. Joe Macker, in fact, got up and testified. Of about all the witnesses who testified in this case, he has the least criminal record, one conviction for cocaine, a charge two years ago, and he admitted it freely to you.

R. 1759.[31]

> He told the truth ....

R. 1742

> He was forced into it, I believe, because of fear of the other two, because of the circumstances of their using his house to commit these crimes ....

R. 1743.

> [Defense counsel is] trying to convince you that man, Joe Macker, who stood on that witness stand and told you he would be in jail for the rest of his life,[32] and almost broke down and cried--they are trying to convince you that is a lie. You have to evaluate the credibility and believability of the witnesses.

R. 1747.

> Joe Macker told you, from his heart, the story of what happened that night.

R. 1748.

> Joe Macker is telling the truth. Joe Macker is a man who already has been sentenced in this case. He knows what his punishment is going to be.
>
> He was sentenced on those charges, and he was punished long before the first minute he got on that witness stand and talked to you about this case. His case is over and done with.
>
> He testified to the absolute truth about what happened that night. .... [H]e stood there

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[31]As now discovered, law enforcement officials at the time of trial actually knew that Macker was connected with murders in addition to the ones in this case, and that he was immersed in planned murders, organized crime, political and judicial corruption, and bribery of witnesses. See Argument II, infra.

[32]Macker filed a Rule 3.850 Motion after his conviction and stated that when he testified he in fact believed that he would serve only from three (3) to six (6) years in prison as a result of his plea. In fact, he served seven years. See App. 8, Rule 3.850 Motion.

and took it like a man.

> [I] believe he was honestly remorseful for his crimes.... He was willing to come before you and tell you the truth. .... He told you the truth about what happened that night.

R. 1750 - 51

> [T]he truth that was told by Joseph Macker ....

R. 1753

> The truth of this case is Joe Macker spoke the truth.

R. 1765.[33]

E. Defense Counsel Was Told That Macker Passed the Polygraph

Petitioner's attorney, Mr. Della Fera, was present when the Court was told that Macker would not have a deal and would not testify if he failed a polygraph examination. When trial began on April 21, 1980, with Macker as the state's star witness, Mr. Della Fera believed that Macker had passed the polygraph:

> 2. I understood that a condition of co-defendant Joe Macker's plea agreement was that he take and pass a polygraph examination. My further understanding was that he passed the polygraph examination.
>
> 3. Based on the foregoing information it was my belief that Joseph Macker had passed the polygraph examination or otherwise the State would not have allowed Joseph Macker to testify and receive the benefit of his negotiated plea.

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[33]The jurors were not so sure. They were told in jury instructions that "[t]he testimony of an accomplice even though uncorroborated is sufficient upon which to base a conviction .... R. 1777. Nevertheless, the jurors deliberated for hours and did not return a guilty verdict until after their request to review Macker's testimony was denied. R. 1797.

App. 7. Mr. Della Fera was not entitled to the polygraph results.[34]

Because the state had advised the Court and Mr. Della Fera that Macker's deal would be abrogated if he failed to pass a polygraph, when trial began with Macker as the star witness Mr. Della Fera did not want testimony about the polygraph. Based upon the state's representations to the Court, the results of the polygraph were that Macker had passed. Macker's testimony then was especially credible, and Mr. Della Fera did not want it enhanced by the purported polygraph results:

> THE COURT: I don't know of any problems about polygraphs.
>
> MR. LAESER: What I want to do is try and spend some time in the morning, if possible, with Mr. Macker to convince him that word shouldn't utter from his mouth, even by accident.
>
> THE COURT: I don't know. Counsel is in a position to bring it out on his cross.
>
> MR. DELLA FERA: I wouldn't bring it out.
>
> ....
>
> [THE COURT] I hope that it can be handled in such a fashion you don't invite the problem, because if you invite it, you'll live with it.
>
> MR. DELLA FERA: I'm not going to mention polygraph.

R. 523.

F. Macker Did Not Pass His Polygraphs

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[34]Polygraph results were not discoverable at the time of the Petitioner's trial. See Jacobs v. State, 396 So. 2d 713 (Fla. 1981).

After receiving on June 21, 1995, what purports to be the complete polygraph file on Macker, counsel submitted the materials to two polygraph experts. The experts concluded that Macker did not pass the polygraph examination which he took on April 21, 1980, and which he was required to pass before his plea could be finalized and before he could testify against the Petitioner. Macker also did not pass a polygraph exam he took in January, 1980, when he began negotiating with the State. He also did not take a scheduled polygraph examination on April 17, 1980, but instead spent many hours speaking with a polygraph examiner.

The first expert, James A. Johnson, Jr., has extensive experience in the use of polygraphs to investigate, solve, and prosecute crimes. He "served over twenty years in the United States Air Force as a Special Agent with the Office of Special Investigations, which has a mission similar to that of the FBI." App. 5.

This expert reviewed the material for the April 21, 1995, polygraph, and concluded as follows:

> 4. Test of April 21, 1980
>
> a. The 1980 examiner continued efforts to determine if Mr. Macker was withholding information. There was a polygraph examination scheduled to occur April 17, 1980, but it apparently did not occur for reasons that are not stated in the materials provided.
>
> b. The material provided did reflect that a polygraph was given on April 21, 1980, but no report of the results is provided. My analysis of the testing on April 21, 1980, reveals the following:

Charts I and II:

The same numerical cut offs for passing and failing are applicable as reflected above.

Questions 33 and 35 and the respective answers are the following:

33. Regarding those four men killed on January 8th, 1980, did you kill any of those men? No

35. Regarding those four men killed on January 8th, 1980, did you yourself kill any of or all of those men? No

- The scores from an evaluation of Charts I and II for questions 33 and 35 were respectively - **1 and 0**, which indicates that the charts are **inconclusive**.

Note: Chart II reflects a question 99A. The material does not reflect the wording of this question.

Chart III:

The same numerical cut offs for passing and failing are applicable as reflected above.

Questions 43, 44, and 45 and the respective answers are the following:

43. Before any of those four men entered your house on January 7, 1980, did you know they would be robbed? No

44. Before any of those four men entered your house on January 7, 1980, did you know they were going to be killed? No

45. Before any of those four men entered your house on January 7, 1980, did you plan or discuss killing them with anyone? No

- The scores from an evaluation of Chart III were respectively **+2, 0, and -3** which indicates Mr. Macker's **untruthfulness** to all of the questions.

Chart IV:

The same numerical cut offs for passing and failing are applicable as reflected above.

Questions 43, 44, and 45 and the respective answers are the following:

43. Other than what you have told me about, did you hurt or physically abuse any of those men? No

44. Did you shoot or stab any of those four men? No

45. Other than what you told me about, did you hit, kick or strike any of those men? No

- The scores from an evaluation of Chart IV for questions 43, 44, and 45 were respectively **-2, -1, and -1**, which indicates Mr. Macker's **untruthfulness** to all of the questions.

Chart V and VI:

The same numerical cut offs for passing and failing are applicable as reflected above.

Questions 43, 44, and 45 and the respective answers are the following:

43. Have you been completely truthful about what Bolender did to those men? Yes

44. Have you been completely truthful about what you did to those men? Yes

45. Have you been completely truthful about what (illegible in material)?

The scores from an evaluation of Charts V and VI for questions 43, 44, and 45 were respectively **-2 / 0, -2 / -2, and 0 / -2** indicating Mr. Macker's **untruthfulness** to all of the questions.

Note: Regarding Chart VI, questions 43, 44, and 45 were asked twice which caused the varied numerical scores as reflected above.

Summary: Mr. Macker continued to be **deceptive** during his retest of April 21, 1980 about his prior knowledge about plans to murder or rob the four men, his involvement in harming those men, and his account of what Mr. Bolender did to those men.

App. 5.

This expert also examined the materials from the January 19, 1980, examination:

4. Test of January 19, 1980

a. Regarding Mr. Macker's initial test on January 19, 1980, it is my opinion that Mr. Macker was deceptive regarding his denial of knowing that four men would be killed or robbed before they arrived in his home on January 8, 1980. This opinion concurs with the opinion of the 1980 examiner. After Mr. Macker was confronted with his deception by the examiner, he related additional information indicating that he had kicked one of the victims and may have kicked others. Mr. Macker continued to deny that he knew prior to the killings that the men would be murdered. The 1980 examiner conducted additional testing to determine if Mr. Macker was deliberately and willfully holding back information about the murders. The examiner was of the opinion that the charts were inconclusive regarding whether Mr. Macker was withholding information. I disagree with the examiner. My review of the charts determined that Mr. Macker continued to be **deceptive**.

b. My conclusions are based upon the following. A three-point scoring system was used to evaluate and score the charts (**+1, 0, and -1**). I used the federal government numerical scoring system to evaluate and score the charts. Copies of score sheets are appended to this report.

Charts I and II:

To pass the questions, a total score of **+2 or more** is required on each question from an evaluation of two charts. To fail the questions, a total score of **- 2 or more** is required on each question from an evaluation of two charts.

A score of **- 2 or more** on any question indicates that the examinee fails all other questions irrespective of the score.

Questions 33 and 35 and the respective answers are the following:

33. Did you stab any of those murder victims? No

35. On or about January 7th, 1980, did you shoot

Hernandez? No

- The scores from an evaluation of charts I and II for questions 33 and 35 were respectively **0 and + 1**, which indicates that the charts are **inconclusive**.

- Slattery's polygraph report however, states that Mr. Macker was **truthful** in his responses to questions 33 and 35.

Charts III and IV:

The same numerical cut offs for passing and falling are applicable as reflected above.

....

Questions 33 and 35 and the respective answers are the following:

33. On or about January 7th, 1980, did you know prior to Rudy coming into your house that anyone would be killed? No

35. On or about January 7th, 1980, did you know prior to Rudy coming into your house that anyone would be robbed? No

- The scores from an evaluation of Chart IV for questions 33 and 35 were respectively **-2 and -2**, indicating that Mr. Macker was **untruthful** in his answers to these questions. It is noted that the aforementioned opinion is rendered from an evaluation of only one chart.

- The 1980 polygraph report recites that Mr. Macker was **untruthful** in his responses to these questions.

Charts V and VI:

The same numerical cut offs for passing and failing are applicable as reflected above.

Questions 43, 44, 44A, and 44B and the respective answers are the following:

43. Other than what you have told me, did you in any way strike any other blows to any of those murder victims? No

44. Other than what you told me, did you in any way strike Hernandez? No

44A. Other than what you have told me, did you in any way strike Rudy? No

44B. Other than what you have told me, did you in any way strike Scott Bennett? No

- The scores from an evaluation of Charts V and VI for questions 43, 44, 44A, and 44B were respectively **-2, -1, 0 and 0**, which indicates Mr. Macker's **untruthfulness** to all of these questions.

- This 1980 polygraph report states however, Mr. Macker was **untruthful** to questions 43, 44, and 44B and that question 44A was **truthful**.

Charts VII and VIII:

The same numerical cut offs for passing and failing are applicable as reflected above.

Questions 33 and 35 and the respective answers are the following:

33. Are you now deliberately and willfully holding back information about that murder that occurred on or about January 8th, 1980? No

35. Are you deliberately and on purpose holding back information about your involvement in that multiple murder that occurred on or about January 8th, 1980? No

- The scores from an evaluation of Charts VII and VIII regarding question 33 was **-3**, indicating Mr. Macker's **untruthfulness**.

Question 35 could not be evaluated as Mr. Macker either sneezed or swallowed when asked this question.

- The 1980 polygraph report recites that Charts VII and VIII were **inconclusive**.

Summary: Charts I and II are **inconclusive rather than truthful** regarding whether Mr. Macker shot or stabbed any of the victims.

Charts III and IV are **deceptive** regarding whether Mr.

> Macker knew prior to one of the victims entering his home that anyone would be killed or robbed.
>
> Question 44A of Charts V and VI is **deceptive rather than truthful** regarding whether Mr. Macker concealed any information about striking Rudy Ayan.
>
> Question 33 of Charts VII and VIII is **deceptive rather than inconclusive** regarding whether Mr. Macker on the day of the polygraph examination was deliberately and willfully holding back information about the murders.
>
> In conclusion, Mr. Macker was untruthful during this test. After being confronted by the examiner, Mr. Macker made admissions. Subsequent testing indicated that Mr. Macker continued to be **deceptive**.

App. 5.

This expert concluded, overall, that: "Macker did not pass either of the polygraph examinations which I reviewed from 1980." App. 5.

The second expert who reviewed the recently disclosed polygraph results is Edward L. Du Bois, III. Mr. Du Bois is a graduate of Florida State University, where he earned a Bachelor of Science degree. After graduation, Mr. DuBois served as a Pilot in the United States Air Force. Mr. DuBois is a graduate of the International Institute of Polygraph Science. He is a member of the Florida Polygraph Association, a division of the American Polygraph Association. As a Polygraph Examiner, Mr. Du Bois has conducted examinations for most major law enforcement agencies in Dade, Broward and Monroe Counties. He was Monroe County's Chief Examiner from 1975 through 1989. He has conducted numerous major crime examinations for both the prosecution and defense, including the Dade County State Attorney's Office, Dade County Public Defender's Office and the U.S. Attorney's Office. He has been

appointed as a Special Investigator by several of Florida's State Attorneys, the Florida Supreme Court and the Florida Board of Bar Examiners. He has been retained as a Special Investigator by several law enforcement agencies, including the Monroe County Sheriff's Department, to perform internal investigations of these agencies. Mr. Du Bois is a skilled Polygraph expert and has testified in court in this capacity.[35]

Mr. Du Bois begins his analysis of the polygraph issue by noting that there was no report generated for the April 21, 1980, evaluation, a startling fact, in his experience:

> **Note:** There was no Report of Polygraph Examination provided for this review from Slattery's examination of Macker. The fact that there is no report from Mr. Slattery is very unusual. I have never known Mr. Slattery to take part in a major crime polygraph examination and not render a report. On page 2 of this Notepack, Slattery notes, "verbal report to Bob Kaye, 4:45 p.m. April 21, 1980".

App. 6. This expert noted other oddities in the procedure, most notably that it did not appear that an examination was going on at all. Instead, an interrogation was occurring, and during the interrogation "Macker's statement consisted of twenty four pages of rambling, admissions, allegations and lies." After an in-depth analysis of the examinations, this expert concluded: "**In conclusion**, it is my opinion that the polygraph examinations administered to Joseph T. Macker by Mr. Jurney and Mr. Slattery are

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[35]Abe Laeser told the lower court that he had never heard of this expert. In fact this expert has done polygraphs in the past for both Laeser and Bob Kaye. Petitioner is obtaining an affidavit reflecting this fact and will submit it as soon as possible.

invalid and unreliable. Under no circumstances should either of these examinations be used as the foundation for a Judicial decision. **To the degree that the polygraph examinations show anything, they show that Macker was deceptive."** App. 6.[36] This was based upon the following considerations:

> Macker tells Mr. Jurney that the only thing he did to the victims was to hit one in the head with a pool cue. Then after being deceptive on his test, he admits that he kicked several of the other victims. Then he tells Mr. Slattery that he hit the one victim in the head with a twenty four inch bat with a force great enough to drive a nail into a piece of hard wood.
>
> Macker also admits that he provided a heated knife so that Bolender could burn and torture the victims. Macker also described how he assisted Paul Thompson in capturing two of the victims who were waiting outside of his home. He also admits holding a gun on the victims at various times during the ordeal. The facts speak for themselves; Macker is an active and willing participant in these murders. He admits lying about his involvement.
>
> As a final blow to the testability of the issue, Macker admits on page 13 of his statement that he and Paul Thompson conspired to murder the four victims. He says, "We had to murder them or they were going to come back and murder me and Diane". Macker was referring to the four victims murdering him and his wife for what he claims Bolender had done to them, kicking them, etc. Macker also says that he assumed the victims were going to be ripped off because Bolender had discussed it with him previously. Also, other victims

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[36]The state wrote in its response that

> One polygrapher alleges that the results show that Macker was deceptive and the other polygrapher alleged that the examinations were invalid and unreliable.

Response, p. 2. In fact both polygraphers opine that Macker was lying, with one saying that the test was almost as poor as Macker's veracity.

had come to his house before.

> Finally, Macker admits that he received money, drugs and jewelry from the victims as a result of his participation in the murders. At one point, Slattery notes that Macker got between $9,500 and $9,800. Then he notes that "Macker's cut was: 1. Cash - $7,000; 2. Cocaine - 385 grams; and 3. Jewelry - gold watch band".
>
> ....
>
> Although this evaluation was hampered by not having a written report from Mr. Slattery, I was able to inspect Macker's responses to Mr. Slattery's relevant questions. Much to my dismay, there is the consistent presence of deception throughout Mr. Slattery's charts.
>
> Mr. Jurney found Macker truthful in his response to relevant questions on charts one and two. Although the questions are flawed, as noted above, there is also significant deception noted as well.

App. 6.

Plainly the state hid exculpatory results, misled the courts with respect to Macker's credibility, and violated the Petitioner's rights.

G. Petitioner Was Entitled to Introduce the Polygraph Results at Guilt/Innocence

In United States v. Lynn, 856 F.2d 430 (1st Cir. 1988), the defendant sought to cross examine his codefendant, Bryon, who was testifying pursuant to a plea agreement that provided that his failure to take or to "'successfully complete'" a polygraph examination could result in the "'nullification of this agreement at the sole discretion of the United States Attorney . . . .'" Lynn, supra, 856 at 432 (quoting the plea agreement). As here, Bryon's answers to some of the questions in the polygraph

examinations were inconclusive, and the Court held that excluding the actual polygraph results from evidence violated the defendant's constitutional rights.

> The defendant sought to use that fact to impeach Bryon by showing that he had not "successfully completed" the examination and therefore had a motive to continue to please the government by lying about Lynn's participation in the offense. The district court forbade any inquiry into the polygraph examination and its results. Id. The court of appeals reversed, finding that this complete foreclosure of cross-examination on the issue of the polygraph examination violated the defendant's rights under the confrontation clause.

The court first noted that

> especially broad latitude should be afforded the questioning of an accomplice now acting as a government witness which concerns "the nature of any agreement he has with the government or any expectation or hope that he will be treated leniently in exchange for his cooperation." Cross-examination of this type might not only impeach the credibility of the witness' prior statements with the suggestion that he lied before to obtain a good deal from the government; it could also reveal any present and continuing reasons for the witness to fabricate his testimony in return for future prosecutorial favors.

Id. at 433 (footnote and citations omitted). The court then found that the preclusion of cross-examination concerning the polygraph results violated the Sixth Amendment because it prevented the defense from bringing out the government's continuing hold on Bryon:

> This particular area of Bryon's potential bias had not yet been fully explored by the defense. While the cross-examination of Bryon was extensive, there were relatively few questions concerning Bryon's continuing

> reasons to lie to please the government. . . . [C]ross-examination on the foreclosed topic may have presented the only concrete example of the hold the government might still have had over the witness.

Id. at 433 (footnote omitted).

Here, cross-examination of Macker concerning the fact that he had failed both polygraph examinations, particularly the second one, would have been even more powerful. Because the plea agreement purported to give the State the sole discretion to determine whether or not Macker had passed the polygraph examination, and because if Macker failed the examination his agreement was void and he faced the death penalty for a crime he had confessed to (and his suppression motion had been denied), Macker had the strongest of all possible motives to say whatever the State wanted -- he had to do that in order to save his life. The polygraph results were clearly admissible to impeach Macker, and this impeachment is so powerful that it probably would have changed the outcome of the trial.

H. The Polygraph Results Were Admissible At Sentencing

The polygraph information is also critical for its value at sentencing. In Green v. Georgia, 442 U.S. 95 (1979), the Supreme Court held that state evidentiary rules cannot be employed to restrict admission of information suggesting that the defendant's sentence should not be death. See also Dutton v. Brown, 812 F.2d 593, 599-602 (10th Cir. 1987)(en banc)(unconstitutional to exclude any evidence at capital sentencing indicating that death should not be imposed, irrespective of any applicable state procedural rules).

I. The State Knowingly Presented False Testimony

The State's presentation of evidence which it knew, or had substantial reason to believe, was false, without disclosing and, in fact while concealing, the falsity of the evidence, violates due process. Napue v. Illinois, 360 U.S. 264 (1959). Due process is plainly violated when the state tells the Court that a witness has passed a polygraph examination and presents that witness' testimony when in fact the witness failed. A resulting conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976). Reversal is "virtually automatic" under such circumstances. United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975). Prosecutor's cannot avoid Napue by "consciously avoid[ing] recognizing the obvious -- that is, that [their witness] is not telling the truth." United States v. Wallach, 935 F.2d 445, 457 (2d Cir. 1991). If prosecutors could withhold exculpatory evidence "on a claim that they thought it unreliable, [the state could] refuse to produce any matter whatever helpful to the defense ...." Lindsey v. King, 769 F.2d 1034, 1040 (5th Cir. 1985). It does not matter whether the suppressed evidence is admissible. Nix v. Whiteside, 475 U.S. 157, 172 (1986)(defense counsel must not present perjured testimony even though it cannot be impeached with attorney-client privileged evidence). The State simply cannot put on evidence it has good reason to believe is perjured without disclosing the reasons to doubt it. Petitioner is entitled to a new trial.

ARGUMENT II

MACKER WAS A LIAR, A VIOLENT AND DANGEROUS CRIMINAL, AN EXTORTIONIST, A BRIBER, A STATE AGENT, A CORRUPTOR OF PUBLIC OFFICIALS (INCLUDING JUDGES), AND A CONFEDERATE OF "MURDER INCORPORATED", ALL KNOWN TO THE STATE BUT HID IN CONFIDENTIAL AND SEALED REPORTS WHICH COMPLETELY REFUTED THE STATE'S FLAGRANTLY FALSE ARGUMENT THAT MACKER WAS A REMORSEFUL DUPE LED ABOUT BY THE DANGEROUS PETITIONER, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENT RIGHTS.

The State presented evidence and argument that Macker was a non-violent person with a better arrest and conviction record than Petitioner and that based upon his background he was led about by Petitioner who was some sort of "ring-leader." Furthermore, the state vouched for Macker's credibility, "testifying" in closing argument that Macker was remorseful, repentant, and honest.

Newly discovered evidence of police and other state maintained files shows that the state's theory was known to be false, that Macker was a violent, dangerous, and perjurious person, and that he was one of the worst criminals in the Miami area. The state's misconduct in presenting Macker in a false light violated the Sixth, Eighth, and Fourteenth Amendments, and Petitioner is entitled to a new trial.

Newly discovered evidence reveals that Macker was surveilled by the Organized Crime Bureau in Miami in the late 1970s. During this time he was engaged in numerous criminal enterprises, including bribery of judges, drug trafficking, prostitution, gambling, extortion, obstruction of justice, illegal interception of wire communications, and other racketeering activities.

Additionally, he had direct knowledge of and involvement in

murders that were about to take place and others that had taken place in the Florida area.[37] Petitioner's case to beat charges:

> MACKER: Now if you put your whole case together and you put some witnesses together and shit like that what have you got Bob. Ya got a scam now with a scam the judge is goin to throw the whole fuckin' thing out with a scam.

---

[37]Many of the tapes reveal this murderous proclivity, but three references suffice to make the point. First, in a July 8, 1975, report, the following is revealed:

> LEWIS, BOB ROSS, and MACKER entered into a conversation about murder contracts and informants. Mentioned in the discussion are "DEACON" (DEACON CARNIVALE, a recent homicide victim) and the current trial of RICHARD CRAVERO.
>
> MACKER then makes the statement that three (3) persons were killed over the last couple of weeks. DEACON and someone named DON or TOM have been killed, and then MACKER states there is another one that they haven't found yet.

App. 10. Second, in a July 9, 1975, tape, two of Macker's callers talk about murder. The first is about "this one guy who don't think nothing about blowing away, about, ah, (inaudible) give a fuck. He'd blow the guy away as soon as look at him," and the other is about

> fuckin Gregory (inaudible) that fuckin Gregory (inaudible) fuckin, ah, Murder Incorporated after the fucking guy. .... And believe me these fuckin guys, ah, they're not too friendly, not too congenial.

App. 10. Finally, a body transmitter conversation picked up the following suggestion from Maker about killing a witness:

> MACKER: This I'll guarantee you.
>
> CI#1: What's that?
>
> MACKER: That he's dead 12 months from now.
>
> CI#1: Twelve months from now, well, twelve months from now the case will be over.
>
> MACKER: Look ... he's dead.

App. 10.

This "fuckin, ah, Murder Incorporated" target of police surveillance does not resemble the "tear in his eye" repentant follower described by the prosecutor in closing argument, see Claim I, D, supra, or the person of delicate sensibilities portrayed in testimony: "I was in shock for four days afterward ...." R. 859.

App. 10 (July 23, 1975, tape 18). And he talked repeatedly about buying and owning judges in Miami.

This information was well known to law enforcement officials, as the tapes reveal. Other recently revealed information shows more state knowledge. Undersigned counsel filed a § 119 request for Diane Macker's parole and probation records. These records are normally exempt from disclosure under § 119, but nevertheless, the records -- including the confidential PSI -- were released to undersigned counsel because Diane Macker died a little less than two years ago. These records were not previously available to Mr. Bolender and his counsel but have now been made available. As such, her confidential PSI constitutes newly discovered evidence that could not previously have been obtained through the exercise of due diligence. Nor was the information contained therein within the knowledge of Mr. Bolender or his counsel.

Ms. Macker's PSI shows some of what the state knew about their main witness at Mr. Bolender's trial. The report was prepared prior to Ms. Macker's sentencing by Judge Richard Fuller on a 1976 burglary and robbery charge, to which she pled guilty. This confidential PSI says the following about Macker:

a. Macker tried to bribe his wife to change her story about who killed her boyfriend:

> [the law enforcement source of the information] was extremely surprised at the marriage between the defendant [Diane] and Joseph Macker and [said] that it could only be a marriage of convenience since the subject has a lot of information regarding Macker's illegal activities. He pointed out that at one time the defendant had been offered a

bribe of $10,000.00 for changing her testimony in the conviction of Robert Jansen, who was convicted of second degree murder of her boyfriend, Howard Dubbin. He indicated that this offer was made by her present husband, Joseph Macker, and that for quite a long period of time, he, along with other police investigators, expected her to turn up dead any day for having testified against Jansen, and for the other information she had access to.

App. 1.[38]

b. Macker bribed judges:

According to Organized Crime Bureau Detective Dezavado, Macker has made statements to which the police department has wire tapped indicating that in one way or another he owns all the Judges downtown except one. It might be noted, that neither Federal or Dade County authorities have ever brought formal criminal charges against Mr. Macker **mainly due to the fact that they lacked the cooperation of witnesses, one of which is Diane Kennedy [Macker], the defendant in this case and now Macker's present wife.**

Id.

Joseph Macker[ ] had been for years under investigation by their department and was recently under investigation by the Dade County Grand Jury for drug trafficing [sic] and political bribery. It is Det. Dezavado's opinion that Mr. Macker is a highly influential person among political and judicial circles in Dade County and has claimed in the past that he owns all Judges downtown except one or two.

Det. Dezavado feels that Mr. Macker is interested in having his present wife, the defendant, change her testimony against Robert Jansen so that Jansen can claim the right to a new trial.

---

[38]Ten thousand dollars is what the state released to Ms. Macker before she gave a statement in this case.

Id.

This evidence is newly discovered and was not previously available to Petitioner. Furthermore, the state's suppression of this evidence requires relief. The prosecution's failure to disclose evidence favorable to the accused violates due process. Brady v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985). The State must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt-innocence or punishment, and regardless of whether defense counsel requests the specific information. Bagley, supra. When the withheld evidence goes to the credibility and impeachability of a state witness, the accused's sixth amendment right to confront and cross-examine witnesses against him is violated. Chambers v. Mississippi, 410 U.S. 284, 295 (1973). To the extent that the failure to disclose information renders a fact determination unreliable, the eighth and fourteenth amendments are violated because in capital cases, the Constitution cannot tolerate any margin of error. Additionally, any knowledge by the State that the facts were other than what the State presented through its witnesses during its case in chief would also establish that the State had knowingly presented false testimony in violation of Giglio v. United States, 405 U.S. 150, 154 (1972), and Mr. Bolender's constitutional rights.

A case cited by Respondent is directly on point with respect to why Petitioner is entitled to relief. In Breedlove v. State,

580 So2d 605 (Fla. 1991), this Court recognized that all of this information could have been used to attack Macker's credibility:

> A witness can be impeached by, among other things, showing that the witness is biased or by proving that the witness has been convicted of a crime. §§ 90.608(1)(b), 90.610(1), Fla.Stat. (1989). While defense witnesses may be impeached only by proof of convictions, the rule regarding prosecution witnesses has been expanded. Thus, this Court has stated: " '[I]t is clear that if a witness for the State were presently or recently under actual or threatened criminal charges or investigation leading to such criminal charges, a person against whom such witness testifies in a criminal case has an absolute right to bring those circumstances out on cross-examination[.]'" Fulton v. State, 335 So.2d 280, 283-84 (Fla. 1976) (quoting Morrell v. State, 297 So.2d 579, 580 (Fla. 1st DCA 1974)). The Morrell court explained that such expansion is needed so that the jury will be fully apprised as to the witness' possible motive or self-interest with respect to the testimony he gives.

Breedlove, supra, 297 So. 2d at 580 (footnote omitted). Similarly, Macker's informant status should have but was not revealed. See Gorham v. State, 597 So. 2d 782 (Fla. 1992); Argument IV, infra.

ARGUMENT III

THE STATE SUPPRESSED MATERIAL EXCULPATORY EVIDENCE REGARDING DIANE MACKER'S CREDIBILITY, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

As noted in Argument II, supra, a previously unreleased PSI regarding Diane Macker contains copious exculpatory information regarding Joe Macker. It also contains critical evidence about Diane Maker's credibility and illegal activities.

First, the report indicated that Diane Macker had been living with Joe Macker at 17845 N.E. 6th Avenue, North Miami, since July

1976 and that prior to 1975, the home was owned by organized crime boss Eddie Perrone, who was at the time of the report serving a 12-year federal sentence for possession of cocaine with intent to distribute and conspiracy to violate narcotic laws.

Furthermore, the report indicates:

a. Diane Macker was involved in homicides. According to several detectives with the Public Safety Department, including Organized Crime Bureau Detective Dezavado who was consulted by Detective McElveen on Mr. Bolender's case:

> [The defendant, Diane Macker, was known by law enforcement for] having high connections in organized crime, narcotic dealings, burglary rings, and having knowledge and valuable information in at least half a dozen homicides in Florida and also out of the State. She also was, by her own admission, to Det. Skip Arnganeschin, a Cocaine and drug courier throughout the United States and Mexico.
>
> * * *
>
> Lt. Minium, of the Dade County Public Safety Dept. homicide division, stated to this writer that in the past the defendant has cooperated with the police department simply to save her own skin. He indicated the defendant is "into everything there is, from being a drug carrier [sic], street hooker, to everything else imaginable." ...
>
> Lt. Minium went on to say that [the subject] has associated with some of the worst characters in town.
>
> Dt. Bill Kuhn, Dade County Safety Dept. burglary division, stated that the defendant was a bad junkie who ... did whatever was necessary to further her own cause. Det. Kuhn indicated that the defendant has been an informant since late 1974 or early 1975 for vice and narcotics and the homicide divisions....

App. 1.

b. Diane Macker was a con artist.

> Since her release from jail on bond, the defendant claims to have been completely free of any Heroine use.... One cannot help but wonder if [her] sudden interest in drug rehabilitation and job training might not be motivated by a fear of imprisonment and other possible consequences.
>
> If placed on probation, this writer sincerely feels that the defendant would be making a mockery of our Judicial system. Considering her extensive criminal related background and present association (through her husband) with possible narcotic dealers and crime figures, the defendant's likelihood of getting into more trouble is extremely high.
>
> ... The defendant has tried to convince the court and this writer that she has in the past been but a poor lost child who was never aware of what she was doing or the possible consequences. This writer is convinced that the subject is in fact an expert in the art of survival and "conning" other people in order to obtain what she wants. ....

Id.

c. Diane Macker did what Joe Macker told her to do. The report revealed that Diane Macker was a heroin and cocaine addict who was manipulated by her husband, Joe Macker. The confidential report indicates that Diane Macker had been a drug addict since she was a teenager but that she denied using any drugs since her arrest on May 7, 1976:

> The defendant has by her own admission been a heavy drug abuser since her teenage years. At the time of her arrest, she had a $100.00 per day Heroin habit.

* * *

> The subject indicated that approximately one month ago, in September 1976, she was riding in an automobile with Joseph Macker and another friend when she was handling a .22 caliber automatic weapon and accidentally shot herself in the arm.
>
> Dr. Arthur Lodato, the defendant's personal physician, stated that at the present time the defendant was being administered 10 mgs of Valium three times a day, and also taking 300 mgs of Quaaludes on occasion to help her sleep....
>
> [The defendant] has ... had a series of stormy illicit relationships which were invariably related in one way or another with her drug usage. ... In past years, the defendant had merely supported her drug habit through the commission of burglaries and prostitution. ... The defendant ... has a tendency to be overpowered and manipulated by those around her. At the present time, the main manipulating force in her life is her husband, Joseph Macker, who is infamous with Dade County Law Enforcement Officials for dealing in narcotics, stolen goods, and for being associated as a member of organized crime.

Id.

In sum, the state knew that Diane Macker would do what her husband told her to do and that she would testify about whatever was necessary to save her own skin. This evidence about Diane Macker was not revealed, it is newly discovered, and relief is required. The state's failure to disclose this evidence violated the Petitioner's Sixth, Eighth, and Fourteenth Amendment rights. See Breedlove, supra.

Diane Macker's status as an informant was especially relevant, as this Court found in Gorham v. State, 597 So.2d 782 (Fla. 1992):

> The State contends that [witness] Johnson's informant status in other cases cannot be deemed Brady material in the instant

case and that there is no evidence that Johnson was a confidential informant in this case. We do not agree with the State's contentions. The Florida Evidence Code provides that the credibility of a witness may be attacked by showing that the witness is biased. § 90.608(1)(b), Fla.Stat. (1981). A witness' relationship to a party, personal obligations to a party, or employment by a party all have been recognized as proper questions on cross-examination going to the interest and bias of the witness. Charles W. Ehrhardt, Florida Evidence § 608.4 (2d ed. 1984).

The State admits that Johnson was a confidential police informant on other occasions. Even though the police did not reveal Johnson's informant status to the state attorney who prosecuted Gorham's case, the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers. State v. Coney, 294 So.2d 82 (Fla.1973); see also State v. Del Gaudio, 445 So.2d 605 (Fla. 3d DCA), review denied, 453 So.2d 45 (Fla. 1984).

....

In evaluating Brady claims, courts must determine whether the withheld evidence is "material," rather than just favorable to the accused. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). The standard for determining "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. Given this trial's circumstantial nature, Johnson's role as the State's key witness, and the defense's inability to impeach Johnson based upon the undisclosed evidence, we find that such a reasonable probability exists in this case.

Id. at 784.

ARGUMENT IV

NEWLY DISCOVERED EVIDENCE REVEALS THAT MACKER'S PLEA BARGAIN CONDITION THAT HE PROCURE WITNESSES FOR THE STATE WAS AN OUTRAGEOUS VIOLATION OF DUE PROCESS OF LAW AND RESULTED IN AN UNRELIABLE CONVICTION AND SENTENCE OF DEATH, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE FLORIDA CONSTITUTION.

Macker knew how to run a scam:

> MACKER: Now if you put your whole case together and you put some witnesses together and shit like that what have you got Bob? Ya got a scam now with a scam the judge is goin to throw the whole fuckin' thing out with a scam.

App. 10 (July 23, 1975, tape 18). The state actually made it a part of this scam artist's plea agreement that he obtain the cooperation of major witnesses in the case. Specifically, Macker was:

> to make a good faith effort to produce the persons and the testimony of the following persons, whose testimony would be useful to the State of Florida. The persons, whose cooperation will be produced by the defendant include:
>
> a. Diane Macker, the defendant's wife
> b. Bobby McCall, a boarder in the defendant's house
> c. Edris Bourdeau
> d. Tony Novella
> e. Mary Mealy [sic]
> f. James Labruno
> g. Tim Sullivan
> h. Carolyn Perdue
> i. John Perdue
> j. two prostitutes who came to the Macker residence with Paul Thompson immediately subsequent to the aforementioned homicides.

App 3.

A plea condition that requires (or allows) a known major organized crime figure charged with four counts of first degree murder to "produce the cooperation and testimony" of purported key

eyewitnesses to the crime is, in and of itself, unconscionable. But in light of the facts that have recently come to light, this pact between the State and Macker destroyed any hope that the proceedings would be reliable.

The first name on the list sets the tone. Joe Macker -- who we now know was considered by law enforcement to be the "main manipulating force" in Diane Macker's life and who had attempted to bribe her with $10,000 to change her testimony in another homicide case -- was to "produce her testimony" against Mr. Bolender. He did.

Macker "produced" Bobby McCall (witness b), his loyal "houseman" and a long-time associate of organized crime kingpin Eddie Perrone, to testify that he saw Bolender and Thompson (but not Macker) dragging bodies out of the house. We now know that in his heretofore suppressed "pre-test interview" with polygrapher Slattery, Macker stated that he helped drag the bodies to the door and tried to jam victim Hernandez into the front seat of the car but he wouldn't fit. App. 2.

Witness c above, Edris Bourdeau, who lived in Macker's home and was a Perrone devotee, disappeared before trial. James "Jimmy" Labruno, witness f above, was a long time mobster-associate of Macker who also disappeared after installing new carpet in Macker's home after the murders occurred.[4] He reappeared to testify that Macker had planned to re-carpet and paint his house long before the

[4]Notes in the prosecutor's file also indicate that LaBruno "had a homicide agent with him when he came to install [the] rug." App. 11.

homicides occurred there. Tim Sullivan, witness g above, another Macker associate, also vanished, as did the two prostitutes (witnesses j above) who were in the house on the night of the murders.

Anthony Novello and Mary Mele went into hiding immediately after the murders out of fear that Macker and Thompson would have them killed. They vanished by the time Macker attempted to silence them with a $50,000 bribe. This is established by the following newly discovered evidence offered by a very frightened affiant:

> 1. ... I was about 19 at the time of the murders at Joe Macker's house on NE 6th Avenue, in Miami, in January of 1980, and I remember vividly the events of this period. My father and his common-law wife Mary Mele ... recounted to me the events of the evening of the murders; both were present at Joe Macker's house when the murders were committed, though neither was ever contacted or questioned by the police.
>
> 2. The reason they were never found by the police is that both of them went underground after the murders. They never left the area; they simply could not be found. Anthony and Mary were deathly afraid of Joe Macker because of what they knew about the murders.
>
> 3. My father told me in no uncertain terms that Joe Macker had done those murders; Macker had confirmed this to him, and warned him not to tell anyone what he knew about the murders. My father was afraid of Joe and warned all of us away from him. He said that Joe Macker was violent and dangerous. After the murders, when my father and Mary were in hiding, he told us under no circumstances to let anyone know where he was. He told us that the murders happened because of a drug deal that went wrong, and that Joe Macker had done them, and that Macker was to be avoided at all costs. My father was afraid of Joe Macker for a long time after that night; he was always looking over his shoulder for Macker, afraid that he was going to hurt him or Mary [or their family] because of what he knew about those four murders. My father never mentioned Bernard Bolender's name in connection with the murders, though I know that he knew him. According to everything my father told me, Bolender wasn't even there when the murders took place; he had

nothing to do with killing those four men.

> 4. An interesting thing happened shortly after the murders. A few days after the killings, a man in a brown van came by ... looking for my father. ... He introduced himself as "Joe." The man told me that he had to find my father. He called [him] "Tony," which meant he knew my father pretty well. He said, "I have fifty thousand dollars for Tony." He wanted to come inside and talk to me; he asked if he could leave the money with me to get to my father. I was too afraid to talk to him further or accept the money. When I told my father about this, and described the man to him, [he] said immediately, "That was Joe Macker," and told me again never to have anything to do with the man. It was clear to my father and to me that Macker was trying to pay my father off so that he wouldn't tell what he knew about Macker doing the killings.
>
> 5. The reason I have never come forth with this information before is that I was afraid; afraid for my father, my family and myself. Now, however, since my father has died, and with the pending execution of Bernard Bolender for a crime I do not believe he committed, I feel that I must do the right thing and make this information available to the Court.

Affidavit of Deborah Novello, App. 12.

Finally, Macker "produced" the testimony of John Perdue, a long-time drug trafficking associate of Macker's, who made up a hairbrained story about Petitioner sending Thompson to extort money from Perdue, when in fact Petitioner had no part in that incident and Perdue owed a large sum of money for the purchase of cocaine that had been fronted to him. App. 11.

In sum, the state gave Macker carte blanche -- indeed, made it a condition to his plea -- to procure the "cooperation" and testimony of people who were either completely under his control or who had already fled -- most likely from Macker -- out of fear that he would kill them. Under these circumstances, the convictions must be vacated and a new trial ordered.

ARGUMENT V

NEWLY DISCOVERED EVIDENCE REVEALS THAT MACKER CONFESSED TO COMMITTING THE MURDERS, THAT MR. BOLENDER WAS FRAMED BY MACKER AND THOMPSON FOR THE MURDERS, AND THAT MR. BOLENDER IS INNOCENT OF THE CRIME FOR WHICH HE WAS CONVICTED AND SENTENCED TO DIE.

Evidence not previously available to Mr. Bolender or his attorney reveals that Macker and Thompson committed the murders for which Mr. Bolender has been convicted and sentenced to die in the electric chair. This evidence further reveals that witnesses who knew the truth about the events of January 7 to 8, 1980 went underground after the crime occurred, for fear that they would be killed by Macker and/or Thompson. Additionally, two separate affiants have come forth to reveal that Macker confessed to killing the victims and that his intention from the moment the crimes occurred was to lay the blame at Mr. Bolender's feet. Additionally, another affiant swears that Macker and co-defendant Thompson set up Mr. Bolender to take the fall for this crime (see Affidavit of Donna Waters, App. 16). Finally, newly discovered evidence establishes that Macker attempted to pay Anthony Novello -- one of the people present in the house at the time of the murders -- $50,000 to disappear, but it was too late. Out of fear for his life at the hands of Macker, Novello had already gone into hiding.

The affiant -- who knew Macker and his wife to be informants and who had intimate knowledge of Macker's criminal activities -- confronted Macker about the murders and Macker admitted to them:

> 3. Macker was well known for doing drug ripoffs. That's what Macker was all about.

He had a helluva racket: he would arrange for out-of-town drug dealers to come to his house, which is where Macker did all his ripoffs. They'd come to the house and do a drug deal. Then Macker would turn right around and call the cops and get the guys arrested. Macker, who was a bondsman, would then arrange for the bail bond for the guys he had set up, with them never knowing that Macker was the one who had snitched them out. And he'd make money off of that. Then Macker would find them a lawyer to represent them and split the fee with the lawyer. Finally, Macker would get the guys probation by paying off judges.

4. Macker was also a double crosser. He even double crossed a guy who was doing ripoffs with Macker. Macker ripped the guy off by putting a gun to his head when he was at Macker's house. The guy later went to Macker's, shot up his house and tried to kill him.

5. After those people were murdered in 1980, I later met up with Macker at Union Correctional Institution. Macker told me that Bolender had to die, that he wanted Bolender to get the chair. That was because Bo knew the truth about what Macker had done. Then I said, "You did the cutting; you did the killing; it went down at your house." Macker's response was," ... I was fucked up. I was out of my mind on quaaludes."

6. Before I was contacted by Bolender's lawyer yesterday, I had never told anyone what I knew about Macker and what he did and said. The cops never talked to me, and neither did Bolender's trial lawyer. But I had my own legal troubles to worry about; I was facing charges at that time but wasn't arrested until years later. When I was on the street, I kept a low profile. Telling this to Bolender's lawyer yesterday was like confessing to a priest. It's something I'm willing to get off my chest now because I know Macker set those people up and killed them. I understand Bolender's looking at his fourth death warrant, that it doesn't look good for him, and that time is running out. I'm willing to tell what I know because I don't think it's

> right that he should be executed because he was made the fall guy for what went down that night.

App. 13.

Macker confessed to another inmate, Mike Devito, who was a cellmate with Macker at one time. According to Petitioner's affiant, Devito advised that Macker was laughing and bragging about having committed the murders with Thompson:

> 4. In 1987, I had an interesting conversation with Mike Devito.... He told me that he had been held in a cell with Joe Macker sometime in the early to mid 80's. They were telling war stories, and Macker told him point-blank that it was he and Thompson who had killed the four on NE 6th Avenue in 1980. Macker was laughing and talking about how they had tortured the men. Devito said Macker also talked of Bernard "Bo" Bolender as a "fall guy" for Macker and Thompson; he basically said they had set Bolender up, and that Bo had not been to the house until after the murders.

App. 14.

As noted in Claim IV, another affiant details how Macker tried to bribe two witnesses to disappear after they witnessed his crime.

The foregoing evidence establishes incontrovertibly that Bo Bolender was framed for the murders of four people and that he is innocent of the crime for which is he scheduled to be executed in just a few days. The State's case, based entirely on a house of cards built by Macker and the State, has crumbled. Petitioner is entitled to an evidentiary hearing on this claim. See Argument VII, infra.

ARGUMENT VI

NEWLY DISCOVERED EVIDENCE REVEALS THAT JOE MACKER WAS AN INFORMANT FOR THE STATE, THE STATE HAD SET UP A DRUG DEAL AT MACKER'S RESIDENCE, AND THE STATE'S FAILURE TO REVEAL THIS EVIDENCE VIOLATED THE PETITIONER'S SIXTH, EIGHTH,

AND FOURTEENTH AMENDMENT RIGHTS.

Evidence recently uncovered by undersigned counsel and never disclosed to Mr. Bolender's defense counsel before (despite repeated requests for such information) indicates that prior to and at the time of the offense, Joe Macker was a confidential informant for various law enforcement agencies in South Florida, including the DEA and the Miami Public Safety Department, Organized Crime Bureau ("OCB"). On Friday, July 1, 1995, OCB agreed to make available for inspection and copying records in its possession regarding its criminal investigation of Joe Macker. Included in these files are transcripts of conversations between Macker and other individuals that were obtained by wire-tap surveillance and by confidential informants who were wired during in-person meetings with Macker and his associates.

The tapes reveal that Macker was working as an informant for Tom Dezavado of the OCB. Additionally, notes contained within the State Attorney's files produced to undersigned counsel pursuant to § 119, Fla. Stat., indicate that Macker was also working for the DEA as an informant. This evidence is extremely pertinent and material, and provides strong impeachment. Gorham, supra 597 So.2d at 784 ("The State contends that [witness] Johnson's informant status in other cases cannot be deemed Brady material in the instant case and that there is no evidence that Johnson was a confidential informant in this case. We do not agree with the State's contentions.)

That Macker was an informant for these agencies was recently

confirmed by a man who knew Macker extremely well and who himself was a confidential informant. This man has sworn to the following:

> 2. I know Joe Macker, Bernard Bolender's codefendant in the January 1980 murder that took place at Macker's house. I knew Macker for some time prior to the murders. I was working as an informant for the DEA and other law enforcement agencies, and Macker was also working as an informant. In fact, both Macker and his wife Diane worked C.I.'s for the cops. Macker worked with the Organized Crime Bureau in Miami, for an agent named Dezavado. I know first hand that Macker was an informant, because when Macker bonded out on his federal charges, I personally took Macker to the DEA to introduce him to an agent named Pete Scrocci. Macker was desperate: he was broke and needed cash for legal representation on his federal charges.

App. 13. This affiant, who only recently was willing to reveal what he knew about Macker, has disclosed additional exculpatory information, discussed in Claim V, supra.

The Organized Crime Bureau files reveal that Macker was working both ends against the middle. At the same time that he was acting as an informant, he was engaging in numerous criminal activities, including bribery of judges, drug trafficking, prostitution, gambling, extortion, obstruction of justice, illegal interception of wire communications, and other racketeering activities. Additionally, he had direct knowledge of and involvement in murders that were about to take place and others that had taken place in the South Florida area. Through his bailbond business and his investigation agency, Macker was apparently able to reach high levels of government in South Florida. The corruption extended from organized crime figures and drug traffickers to judges, lawyers, and police officers. None of this information was ever disclosed to Mr. Bolender's defense,

however, and -- equally disturbing -- no prosecutions ever resulted from OCB's intelligence on Macker, with the exception of an indictment against Macker for illegal interception of wire communications, probably the least harmful of all the activities in which Macker and his co-conspirators were involved.

Newly discovered evidence, contained in the State Attorney's file but never disclosed to the defense until now, reveals that the DEA had set up the drug deal that culminated in the murders on January 8, 1980. Prosecutors' notes contained in the State Attorney's files indicate that in 1980, law enforcement officials had tapes in their possession -- which to this day continue to be withheld from the defense -- indicating that the DEA was aware of and had arranged for the drug transaction at Macker's house. In addition, two individuals have now come forward and signed sworn statements in which they state that Anthony Novello and Mary Mele -- who went underground after the murders occurred -- admitted to being present at Macker's home when the murders took place and stated that Macker -- an informant -- had arranged with the police to set up this deal. Anthony also learned that night that the OCB was directly across the street and surveilling Macker's house at the time of the murders.

> 1. My father and Mary Mele told me a lot about the events of January 7-8, 1980, at the home of Joseph Macker in Miami, Florida. My father and Mary Mele were present at Macker's house when four murders were committed there that night.
>
> 2. Mary Mele told me that she and Anthony were over to Joe Macker's house to do a drug deal that night. She said that something went wrong with the deal, something that led Anthony to realize that Joe Macker was actually

working for the police, and that the drug deal was going to be a bust. My father confirmed to me that he had found out that Joe Macker was a narc that night; he had felt that something was going to go wrong even before the victims showed up. ... Anthony wanted to back out of the deal, but was afraid of what Joe Macker and Paul Thompson would do if he tried; he was afraid they would kill him. My father told me that Joe Macker was a psycho and very violent. He was also very wary of Paul Thompson, and always talked of Thompson and Macker as the two who had done the killings that night. My impression from what my father told me was that Bernard Bolender may have been at Macker's house that night, or in the early morning of January 8, but only after the killings. He told me that the men were killed by Macker and Thompson only.

3. When my father realized that Macker was a narc that night, he thought he was going to jail; he also knew, how I don't know, that there was an Organized Crime Bureau surveillance house across the street from Macker's -- Macker may have told him so that night -- and that the cops were watching Macker's place. My father was afraid the cops had gotten his tag number that night, and he was especially afraid that Paul Thompson would try to kill him if he ever got out of jail; he thought Thompson believed he had told the cops what had happened that night, even though the cops never talked to my father or Mary. For the rest of his life my father was afraid and looking over his shoulder, worried about what Thompson or Macker might do to him or his family.

5. The reason I have never come forth with this information before is that I was afraid; afraid for [Anthony, his family] and myself. I knew a lot of this stuff shortly after the murders, but was afraid to say anything for fear of what Thompson or Macker might do to [Anthony, his family or myself]; in fact, I am still afraid of these men. Now, however, since my father has died, and with the pending execution of Bernard Bolender for a crime I do not believe he committed, I feel that I must do the right thing and make this information available to the Court.

App. 14.

This affiant further states that Macker confessed to a cellmate that he and Thompson were the ones who committed the murders. See Claim V.

Other evidence in police files supports that the murders

occurred in the midst of a law enforcement operation. The victims in this case -- John Merino, Rodolfo Ayan, Scott Bennett, and Nicomedes Hernandez -- were heavily involved in drug trafficking in the South Florida area. The State Attorney's files also indicate that Rodolfo Ayan was known to federal DEA agents. Evidence in the police files indicated that Merino, an informant for the DEA, had met with Rodolfo Ayan's brother, Carlos Ayan, a day before the murders and asked for his assistance in setting up a drug transaction with some people in Ft. Lauderdale. At the time of their meeting, at which several friends and relatives of Carlos were present, Merino bragged about being an informant but assured Carlos that he would not set Carlos up for a fall, that being a DEA informant was like having a license to buy and sell drugs, and that Merino was required to turn someone in to the authorities only once in a while. Carlos apparently rebuffed Merino's invitation to set up a transaction, leaving Merino to speak with Carlos' associate, "Angel." Angel's last name was never revealed, although a police lead sheet in the files received by undersigned counsel pursuant to Fla. Stat. § 119 reveals that Detective McElveen interviewed Angel. Neither a report nor the substance of that interview has ever been revealed nor was Angel's name and address ever disclosed to the defense.

Later that day, Merino met with Carlos again, who then left Merino to speak to Carlos' brother Rodolfo, a/k/a Rudy, and his associate Scott Bennett. According to the evidence in the police files, Rudy had become Scott Bennett's cocaine supplier, and they

frequently conducted drug transactions together. Prior to their acquaintance, Bennett had been obtaining his cocaine supply from Evelio and George Santana, two drug traffickers from Miami, until the Santana brothers put out a contract on Bennett's life, with the last death threat being made just a week before Bennett's murder.

There was also substantial evidence never revealed to the jury that Carlos Ayan, the brother of victim Rudy Ayan, was heavily involved in drug trafficking as well. Indeed, Carlos seemed to know far more about the events leading up to the homicides than was ever revealed at trial. Almost immediately after Carlos discovered that his brother Rudy, Bennett, Hernandez and Merino had left for Ft. Lauderdale to conduct a drug transaction, Carlos telephoned Merino's house to inquire as to their whereabouts. He was the first one to inform Mrs. Merino that her husband was dead. And then shortly after the murders, Carlos attempted, oddly enough, to obtain information about the crime from the Pompano Police Department by passing himself off as someone who was assisting Detective McElveen in the investigation. (Notably, victim John Merino had been working as an informant for the Pompano Police DeparTment.)

The jury was also unaware that Detective McElveen and three other law enforcement officers involved in the investigation of these murders had legal troubles of their own, as they were being investigated for their part in a sting operation in which they were alleged to have ripped off drug traffickers at the scene of drug-related homicides and even to have stolen drug money from the

homicide victims' bodies as well as their homes.

Because of the state's suppression of this evidence, a new trial is required.

ARGUMENT VII

AN EVIDENTIARY HEARING IS REQUIRED ON PETITIONER'S CLAIMS AND ON ANY PROCEDURAL DEFENSES THE STATE MAY ASSERT.

A Rule 3.850 litigant is entitled to an evidentiary hearing (and a stay of execution) unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d. 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). In cases such as Mr. Bolender's, this Court has held that evidentiary hearings are warranted on the substantive claims and any procedural issues involved (i.e., due diligence; why the evidence was not disclosed previously, etc.). There can be no serious dispute that an evidentiary hearing is necessary in this case under this Court's precedents, as discussed below.

A. Newly-Discovered Brady Evidence

The facts presented in these proceedings warrant a full and fair evidentiary hearing -- all relevant precedent from the Florida Supreme Court so holds. Thus, in Scott (Paul) v. State, No. 84,686 and 84,687 (Fla. March 16, 1995), the Florida Supreme Court addressed a capital defendant's 3.850 motion's "conten[tions] that the State violated the principles of Brady v. Maryland" by failing to disclose information suggesting that a codefendant was more

culpable than the defendant (Scott). Scott, slip op. at 3-4. The defendant had filed for Rule 3.850 relief on two (2) prior occasions presenting similar contentions about the culpability of the codefendant, see Scott, slip op. at 3, discussing Scott v. Dugger, 634 So. 2d 1062, 1065 (Fla. 1993), and Scott v. State, 513 So. 2d 653 (Fla. 1987), and had also previously sought federal habeas corpus relief. Scott v. Dugger, 686 F. Supp. 1488 (S.D. Fla. 1988), aff'd, 891 F.2d 800 (11th Cir. 1989), cert. denied, 498 U.S. 881 (1990); see also Scott v. Singletary, 38 F.3d 1547 (11th Cir. 1994) (denying motion to recall mandate); and had also previously sought and obtained public records from the prosecution pursuant to Chapter 119, Laws of Florida.

The actual evidence supporting the claims, however, was not uncovered until the filing of Mr. Scott's 1995 Rule 3.850 motion, when it was finally disclosed by the prosecutor pursuant to another Chapter 119 Public Records request. This Court granted a stay of execution and ordered an evidentiary hearing. The Court held:

> Recently, in Garcia v. State, 622 So. 2d 1325 (Fla. 1993), this court was faced with a similar claim that the state had withheld evidence of the participation of a co-defendant. In Garcia, we observed:
>
> > In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215 (1963), the United States Supreme Court ruled that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a

> probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985). It is irrelevant whether the prosecutor or police is responsible for the nondisclosure; it is enough that the State itself fails to disclose. See, e.g., Williams v. Griswald, 743 F. 2d 1533, 1542 (11th Cir. 1984).
>
> In the present case, the Smith statement was immaterial as to guilt, since there is no reasonable probability that the verdict would have been different had it been disclosed in light of the extensive evidence showing Garcia's complicity in the crime. However, the statement was clearly material as to penalty, for it would have eviscerated the State's theme that Joe Perez did not exist and that whatever deeds Garcia attributed to Perez in his initial statement to police were in fact Garcia's own acts. Because Lisa Smith said exactly the same thing that Garcia said in his statement to police three days after the crime--that Joe Perez is the same person as Urbano Ribas--the statement would have greatly aided the defense in arguing that Ribas, not Garcia, was a shooter, and Garcia was thus undeserving of the death penalty. The State's failure to disclose the statement undermines the integrity of the jury's eight-to-four recommendation of death and constitutes a clear Brady violation.

622 So. 2d at 1330-31 (footnotes omitted); see also Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989) ("Accepting the allegations [of the State's failure to disclose] at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing with respect to whether there was a Brady violation.").

We note that the jury in Scott's case recommended death by a vote of seven to five. In contrast, the co-defendant, Kondian, was permitted to plead to second-degree murder after Scott's trial, was given a 45-year sentence, and according to Scott is now free.

We conclude that the trial court erred in failing to hold an evidentiary hearing on the above claims. We remand for an evidentiary hearing on the issues addressed in this opinion. We have by separate order issued a

stay.

Scott, slip op. at 7-8 (emphasis added) (footnote omitted).[5]

In his concurring opinion, Justice Kogan explained why cases involving newly discovered facts -- such as Scott and Bolender -- require evidentiary hearings: a person should not be put to death before newly uncovered facts which undermine the validity of the capital conviction or death sentence are fully heard and considered at a hearing. Justice Kogan's opinion stated:

> The pivotal point of this case is that the co-perpetrator Richard Kondian entered into a plea agreement that resulted in only a forty-five year prison term. Today, Mr. Kondian is a free man. Florida law is well settled that death is not a proper penalty when a co-perpetrator of equal or greater culpability has received less than death. Harmon v. State, 527 So. 2d 182 (Fla. 1988). Thus,the overriding question today is whether Mr. Kondian's culpability vis-a-vis that of Mr. Scott might be judged differently in light of the alleged Brady material.
>
> In determining the answer, it is irrelevant that Scott previously claimed Kondian was the murderer in any prior proceeding. By its very nature, a Brady error results in an illegal suppression of material fact that could skew the jury's determinations, influence the trial court, and result in an erroneous appellate determination. What we must determine is whether this material reasonably might have resulted in a different outcome had it been properly disclosed under Brady.
>
> The Brady material presented today directly reflects on the relative level of culpability between the two co-perpetrators, because it tends to establish that Kondian bore the greater guilt. Had this material been available for trial, the defense then could have argued the disparity to the jury. If believed, such evidence

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[5]Garcia and Lightbourne were also Rule 3.850 cases. In each, the defendant's claims were based on newly discovered evidence and Brady error. In Lightbourne, the defendant had previously unsuccessfully sought 3.850 and federal habeas relief -- before the newly discovered facts supporting the claim of Brady error came to light.

could have changed the jury's recommendation from 7-to-5 in favor of death to a 6-to-6 split, which constitutes a life recommendation under Florida law. In sum, a vote change by a single juror would have altered the entire complexion of this case, because the trial judge is required to give the jury's recommendation great weight. Tedder v. State, 322 So. 2d 908 (Fla. 1975).

Moreover, the Brady material reasonably could have influenced this Court on appeal to reduce death to life because of Kondian's lesser sentence and his greater guilt (assuming arguendo the allegations here are true). We repeatedly have reduced sentences to life where a co-perpetrator of equal or greater culpability has received life or less. E.g., Harmon. Indeed, we have not hesitated to apply this standard even in collateral challenges long after the trial and direct appeals have ended, Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), as Mr. Scott now asks us to do. Accord Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

This conclusion is all the more compelling in light of the Florida Constitution's requirement that the death penalty be administered proportionately. Article I, section 17 of the Constitution prohibits the imposition of "unusual" punishments, and in examining this prohibition we previously have stated:

> It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper.

Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

I can think of no more paradigmatic example of disproportionate penalties than a case in which two persons have participated in the same murder yet the more culpable co-perpetrator is a free man and the less culpable co-perpetrator is sitting on death row. If that in fact is the case here, then the alleged Brady violation in this case has led to a result directly contrary to article I, section 17 of the Florida Constitution, because Scott's sentence thereby would be rendered "unusual." This is a question that must be examined on remand.

I emphasize that our task here in this proceeding is not to weigh the merits of Mr. Scott's Brady claim. That is the trial court's role once we have determined that the claim, if true, would reasonably require relief. Because I believe Mr. Scott's pleadings meet this test, I concur with the majority opinion.

Scott, slip op. at 9-11 (Kogan and Anstead, JJ; concurring) (emphasis added).

The codefendant did not testify against the defendant in Scott -- unlike the situation in Bolender, where the codefendant (Macker) and his wife were the prosecution's case at trial. Scott was also not an override case -- Mr. Bolender's case is an override case and he is thus entitled to even greater protections against a disparate sentence, as Florida's override standards mandate (see Section C infra). The constitutional errors in Bolender are more troubling; involve more egregious State misconduct; and demonstrate far greater unreliability in the trial and sentencing results than did the errors in Scott.

It is unclear why the State did not disclose the evidence pursuant to the prior Chapter 119 Public Records requests in Scott. It is now clear why the evidence was not disclosed pursuant to prior Chapter 119 requests in Bolender -- as Assistant State Attorney Laeser told the trial court this Saturday, he did not disclose the evidence before because of strategic reasons.

In Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989), the Florida Supreme Court addressed a motion for Rule 3.850 relief which "alleged that the State deliberately used false and misleading testimony and intentionally withheld material exculpatory evidence." The allegations involved the trial testimony of two State witnesses. Id. at 1365. Challenges to these witnesses had been previously rejected on direct appeal, id. at 1365 ("Lightbourne's challenge ... was rejected on direct appeal

because the trial record did not show that [the witness] was acting in concert with the State... "), and prior Rule 3.850 and federal habeas petitions had been denied. See id. at 1365, discussing prior proceedings in Lightbourne v. State, 471 So. 2d 27 (Fla. 1985) (Rule 3.850), and Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987) (federal habeas).

The subsequent Rule 3.850 motion, however, was supported by recently uncovered evidence suggesting that the petitioner's claims were valid. The Florida Supreme Court granted a stay of execution and ordered an evidentiary hearing:

> Accepting the allegations concerning Chavers and Carson at face value, as we must for purposed of this appeal, they are sufficient to require an evidentiary hearing with respect to whether there was a *Brady* violation. Moreover, we cannot say that these allegations are procedurally barred. Lightbourne's first motion for postconviction relief did not address Chavers' and Carson's testimony, and the allegations of his current motion sufficiently demonstrate that "the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due duligence" contemplated by the exception to the time limits of rule 3.850.

Lightbourne, 549 So. 2d at 1364.

As in Scott and Lightbourne, the defendant in Garcia v. State, 622 So. 2d 1325 (Fla. 1993), had also been convicted of capital murder and sentenced to death. His defense at trial had been that he was not the triggerman, but the codefendant was. The codefendant had pled in exchange for a life sentence and made extrajudicial statements which, although known to the government's agents, had not been disclosed to the defense. The statements

impeached the State's trial witnesses. The Florida Supreme Court held that "[t]he State's failure to disclose the statement undermines the integrity of the jury's eight-to-four recommendation of death and constitutes a clear Brady violation." Garcia, 622 So. 2d at 1330-31. In granting relief under Rule 3.850, the Florida Supreme Court explained:

> Garcia claims in Issues 5 and 10 that the withholding of the Smith statement when coupled with the State's opening and closing arguments constituted prosecutorial misconduct that deprived Garcia of a fair trial. We note that while the State is free to argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts. In the present case, there is simply insufficient evidence in the record to sustain the State's argument that Joe Perez was a nonexistent person created by Garcia during questioning. The available evidence shows otherwise--that Perez was a common alias for Urbano Ribas.
>
> The Perez/Ribas link was common knowledge with the State. At the time Ribas identified himself as Perez to Bradenton police on the night of the shootings, Garcia, who was in custody at the Sheriff's Department, had not yet told county detectives that Joe Perez was a coperpetrator. When deputies arrived in Bradenton shortly after Ribas was arrested to question him, he was identified not as Joe Perez, but Urbano Ribas, and was transported to the Sheriff's Department, booked under that name, and eventually released. Meanwhile, Garcia made his statement to county detectives Stout and David Perez implicating Joe Perez, and as soon as Detective Stout learned of the Perez/Ribas connection from local witnesses, he ordered Ribas rearrested. . . .
>
> . . . .
>
> By the next day, Detective Stout was so sure of the link he showed Garcia a single photograph -- Urbano Ribas -- to confirm the identity of Joe Perez. And by the following week, when Detective David Perez interviewed Lisa Smith at the Sheriff's Department, county police unquestionably understood that Ribas had initially identified himself as Perez and used a birth registration

card in that name.

> For the State prosecutorial team to argue on this record that Joe Perez was a nonexistent person created by Garcia during questioning constitutes an impropriety sufficiently egregious to taint the jury recommendation. Once again, we are compelled to reiterate the need for propriety, particularly where the death penalty is involved:
>
> > Nonetheless, we are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. As a Court, we are constitutionally charged not only with appellate review but also "to regulate ... the discipline of persons admitted" to the practice of law. This Court considers the sort of prosecutorial misconduct, in the fact of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office.
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> *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985 (citations omitted). *See also Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990).

Garcia v. State, 622 So. 2d at 1331-32 (emphasis added) (footnotes omitted).

Such errors are replete in Mr. Bolender's case. Indeed, the errors here are more substantial-- Garcia, Lightbourne and Scott were not overrides; Bernard Bolender's case, on the other hand, is one in which a jury was sufficiently troubled to vote for life even without the benefit of the newly discovered evidence, evidence demonstrating the skewed and unreliable nature of the State's assertions at trial.

Florida Supreme Court precedents mandating a full and fair

hearing in 3.850 cases of newly discovered evidence/Brady error are legion. The Florida Supreme Court is especially vigilant when such issues arise in capital cases. Thus, in Gorham v. State, 521 So. 2d 1067 (Fla. 1988), the Florida Supreme Court ordered a Rule 3.850 evidentiary hearing to assess the reliability of the capital conviction and death sentence where the 3.850 motion "alleged failure to disclose critical exculpatory evidence... in violation of Brady v. Maryland... " Id. at 1069. See also Gorham v. State, 597 So. 2d 782 (Fla. 1992) (granting relief after the evidentiary hearing).

In Arango v. State, 437 So. 2d 1099 (Fla. 1983), also a capital case, the Florida Supreme Court directed that an evidentiary hearing be held in Rule 3.850 proceedings on the basis of newly uncovered evidence suggesting that there was error under Brady. After the hearing, the Court granted relief and vacated the petitioner's conviction and death sentence, holding that the State's withholding of the evidence in earlier proceedings was constitutional error which precluded the presentation of material evidence favorable to the defense. See Arango v. State, 467 So. 2d 692 (Fla. 1985), and Arango v. State, 497 So. 2d 1161 (Fla. 1986).

Roman v. State, 528 So. 2d 1169 (Fla. 1988), involved a capital prosecution where the "primary issue at trial was whether or not Roman was drunk at the time of the offense. The State presented seven witnesses who testified that Roman was not drunk..." Id. at 1170. One of these witnesses, however, was a co-participant who gave law enforcement a statement which was not

discovered by the defense until subsequent Rule 3.850 proceedings and impeached the State's prosecutorial argument. Rejecting the State's assertion that there had been sufficient impeachment of the witness at the trial, the Florida Supreme Court held:

> Although the defense impeached [the witness], the state successfully rehabilitated the witness on redirect examination. Further, [the witness's] undisclosed statements were important not only for impeachment purposes, but for content as well... [W]e cannot say beyond a reasonable doubt that the State's failure to disclose [the witness's] prior statement did not contribute to the conviction. State v. DiGuillio, 491 So. 2d 1129 (Fla. 1986).
>
> Accordingly, we vacate Roman's conviction... and sentence of death... We remand to the trial court for a new trial.

Roman, 528 So. 2d at 1171.

Such decisions flow directly from core constitutional fair trial requirements. As long as fifty years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violates a criminal defendant's right to due process of law. Mooney v. Holohan, 294 U.S. 103 (1935). The Fourteenth Amendment's Due Process Clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

A prosecutor not only has the constitutional duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, but also to correct the presentation of false state-witness testimony when it

occurs. Alcorta v. Texas, 355 U.S. 28 (1957). The State's use of false evidence violates due process whether it relates to a substantive issue, Alcorta, the credibility of a State's witness, Napue; Giglio v. United States, 405 U.S. 150, 154 (1972), or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

In short, the State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 103-04 and n.8 (1976). The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio, 405 U.S. at 153. Consequently, in cases involving the use of false testimony, "the court has applied a strict standard. . .not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

In such cases 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), quoting United States v. Agurs, 427 U.S. at 102. The most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes from the mouth of a State's

witness. The defendant is entitled to a new trial if there is **any reasonable likelihood** that the falsity affected the verdict. See Bagley, 473 U.S. at 679 n.9. If there is "any reasonable likelihood" that the uncorrected false and/or misleading State-witness testimony affected the verdicts at guilt-innocence or sentencing, Mr. Bolender is entitled to relief.[6] Here, there is much more than a reasonable likelihood -- as the factual allegations in this motion demonstrate.

When the "inquiry is whether the State authorities knew" of the falsity of a government witness' testimony, "it is of no consequence that the facts pointed to may support only knowledge of the police because such knowledge will be imputed to state prosecutors." Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984)(citations omitted) (emphasis added); Garcia v. State, 622 So. 2d at 1330. In Bolender, the State not only withheld vital information from the jury, but presented deliberately misleading

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[6]This standard applies with full force to impeachment evidence. See Gorham v. State, 597 So. 2d 782, 784-85 (Fla. 1992) (granting relief under Brady and noting, "This information was never disclosed to Gorham, and, thus, the defense was unable to attack [the State witness's] credibility by showing that she was biased ... Given this trial's circumstantial nature, Johnson's role as the State's key witness, and the defenses's inability to impeach Johnson based upon the undisclosed evidence, we find that [relief is appropriate]."); id. at 785, quoting Napue v. Illinois, 360 U.S. 264, 269 (1959) ("[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determine of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."); Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986) (The conviction rested upon the testimony of [the Mackers]. [Their] credibility was the central issue in the case. Available evidence would have had great weight in the asserting that [the Mackers'] testimony was not true. There is a reasonable probability that, had [the impeachment] been used at trial, the result would have been different.") Code v. Montgomery, 799 F.2d 1481, 1484 (11th Cir.) (prejudice demonstrated where impeachment evidence was not used at trial because this trial was a "swearing match" and the impeachment evidence "'might have affected' the jury's comparison of the [Mackers'] testimony with the defendant's.")

and false information in support of this prosecution. The error affected the guilt phase verdict and the trial courts and Florida Supreme Court's decision as to sentence.

The State's duty to disclose Brady material does not end at the conclusion of the trial. "[A]fter a conviction the prosecutor... is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976); Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993) (addressing public records disclosure in post-conviction proceedings and "emphasiz[ing] that the State must still disclose any exculpatory document within its possession or to which it has access, even if such document is not subject to the public records law") (citing Brady). See also Moore v. Kemp, 809 F.2d 702, 730 (11th Cir. 1987)(defendant who was not given Brady material in post-conviction proceeding did not get "full and fair" hearing in that proceeding); Amadeo v. Zant, 486 U.S. 214 (1988) (there is no procedural default when the state fails to disclose evidence supporting the post-conviction petitioner's claim; the evidence should be heard when it comes to light); Thomas v. Goldsmith, 979 F.2d 746, 749 (9th Cir. 1992)(rejecting the state's argument that the defendant/petitioner should have sought Brady material and have made a Brady claim earlier because the information was "under control of the state" and the defendant/petitioner could not "make the showing which would justify" relief without it -- **"We do not believe that [the Brady]**

claim is defeated by this conundrum. Rather, we believe the state is under an obligation to come forward with any exculpatory... evidence.) (emphasis supplied). Id. at 750 (the constitutional "duty to turn over exculpatory evidence" applies in post-conviction proceedings.); Walker v. Lockhart, 763 F. 2d 942 (8th Cir. 1985)(en banc) (relief granted under Brady **twenty (20) years after conviction** where it took that long for evidence which the state had earlier failed to disclose to come to light) (emphasis supplied). The State's withholding of material information in Mr. Bolender's case warrants an evidentiary hearing and relief.

B. Newly Discovered Evidence and the Need for A Hearing on Procedural Issues.

The Florida Supreme Court's precedents also consistently hold that Rule 3.850 evidentiary hearings are appropriate in capital cases where newly discovered evidence demonstrates a lack of culpability on the part of the defendant -- even when there is no allegation of Brady error. Accordingly, in Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994), the Florida Supreme Court ordered an evidentiary hearing under Rule 3.850 where the defendant presented evidence indicating his lack of culpability in the offense. Relief had previously been denied in Rule 3.850 proceedings and federal habeas corpus proceedings. See Johnson, 647 So. 2d at 107-08 (outlining the prior decisions in Johnson I through Johnson IV.)

The evidence presented in the 1994 Johnson Rule 3.850 motion, however, was not discovered at the time of the prior proceedings. The Florida Supreme Court granted a stay of execution and directed that an evidentiary hearing be conducted. Johnson, 647 So. 2d at

111. The Court noted that claims based on newly discovered evidence "are not subject to the time limitations of Florida Rule of Criminal Procedure 3.850." Johnson, 647 So. 2d at 110.

Jones v. State, 591 So. 2d 911 (Fla. 1991), like Johnson, was also a capital case involving newly discovered evidence. Prior applications for Rule 3.850 and federal habeas corpus relief had been denied. See Jones, 591 So. 2d at 912, discussing Jones v. Wainwright, 473 So. 2d 1244 (Fla. 1985), Jones v. State, 528 So. 2d 1171 (Fla. 1988), Jones v. Dugger, 533 So. 2d 290 (Fla. 1988), and Jones v. Dugger, 928 F.2d 1020 (11th Cir. 1991).

Unlike the situation in Bolender, the prosecution presented a confession from Mr. Jones at the trial. The newly discovered evidence, however, cast doubt on the reliability of the conviction. The Florida Supreme Court stayed the execution and ordered an evidentiary hearing. The Court explained that the Florida "newly discovered evidence" standard does not require the petitioner to demonstrate innocence "conclusively". Rather, the petitioner should be afforded an evidentiary hearing to prove whether the evidence, had it been available at trial, "probably" would have resulted in a favorable verdict. Jones, 591 So. 2d at 915. "The same standard would be applicable if the issue were whether a life or death sentence should have been imposed." Id. at 915. The Court then summarized:

> In light of Jones' confession as well as the other evidence introduced at the trial, it could not be said that the newly discovered evidence would have conclusively prevented Jones' conviction. Under the probability standard we have adopted in this opinion, we cannot be sure whether Jones' motion should be denied.

> On the face of the pleadings, we cannot determine whether some of the evidence can properly be said to be newly discovered. Moreover, we cannot fully evaluate the quality of the evidence which demonstrably meets the definition of newly discovered evidence. Therefore, we believe it necessary to have an evidentiary hearing on the claims that are based upon newly discovered evidence. At the hearing, the trial judge should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at trial, would have probably resulted in an acquittal. In reaching this conclusion, the judge will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.
>
> We reverse the order denying Jones' motion for postconviction relief and remand the case for an evidentiary hearing in accordance with this opinion. As a consequence, we hereby stay Jones' pending execution.

Jones, 591 So. 2d at 916 (emphasis added)

In Card v. State, 652 So. 2d 344 (Fla. 1995), the Florida Supreme Court addressed a 3.850 motion presenting newly discovered evidence about improprieties engaged in by the sentencing judge. The petitioner had previously been denied Rule 3.850 and federal habeas corpus relief. See Card, 652 So. 2d at 344 (discussing prior proceedings). The evidence proffered by the latter 3.850 motion, however, had not been uncovered during those prior proceedings. The Florida Supreme Court directed that a full **evidentiary hearing should be held to address both the substantive issues raised and any "procedural" contentions asserted by the State.**

> We believe that the allegations of the petition are sufficient to require an evidentiary hearing on the question of whether Card was deprived of an independent weighing of the aggravators and the mitigators. Among the matters that can be developed at the hearing are the nature of the contact between Judge Turner and the prosecutors, when the judge was given the form of the

> sentencing order, and at what stage of the sentencing proceeding he gave copies to defense counsel. Further, an evidentiary hearing will permit a full exploration of the facts bearing upon the State's contention that all of the matters relating the Judge Turner's sentencing practices in death penalty cases were known or should have been known more than two years before this petition was filed.

Card, 652 So. 2d at 345-46 (citations and footnote omitted).

A similar ruling was made in Harich v. State, 542 So. 2d 980 (Fla. 1989), where the capital defendant's 3.850 motion presented a claim of conflict of interest by trial counsel. Applications for Rule 3.850 and federal habeas corpus relief had previously been denied. See Harich, 542 So. 2d at 981, discussing Harich v. State, 484 So. 2d 1239 (Fla. 1986), Harich v. Wainwright, 484 So. 2d 1237 (Fla. 1986), and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc).

The subsequent Harich Rule 3.850 motion, however, presented allegations of conflict of interest which had not previously been uncovered by post-conviction counsel. The Florida Supreme Court entered a stay of execution and ordered an evidentiary hearing on the substantive conflict claim and on any procedural default assertions advanced by the State. Harich, 542 So. 2d at 981.

Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990), was also a capital case involving newly uncovered evidence -- the claim involved evidence about a witness called by the State at trial. The new evidence undermined the reliability of the witness's prior declarations. The Florida Supreme Court entered a stay of execution and ordered "an evidentiary hearing to evaluate this newly discovered evidence." Smith, 565 So. 2d at 1297.

These rulings flow from the basic tenet of Florida law "that proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair." Steinhorst v. State, 636 So. 2d 948, 501 (Fla. 1994). Quoting from Scull v. State, 509 So. 2d 1251, 1252 (Fla. 1990), the Florida Supreme Court noted in Steinhorst:

> One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, §9, Fla. Const.... "[D]ue process" embodies a fundamental conception of fairness that derives ultimately from natural rights of all individuals. See art. I, §9, Fla. Const.

Steinhorst, 636 So. 2d at 501.

Steinhorst involved a subsequent post-conviction petition. See id. at 500 (discussing prior denials of Rule 3.850 relief). The subsequent petition presented newly uncovered evidence. After quoting Scull (see supra), the Florida Supreme Court ordered an evidentiary hearing:

> Thus, if the trial court determines that the "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been as certain [previously]...," then it should grant postconviction on relief...

Steinhorst, 636 So. 2d at 501.

C. Disproportionality

In Florida, a death sentenced individual is rendered ineligible for a death sentence where he or she presents facts demonstrating that the death sentence is disproportionate. In Bolender, the undisclosed and newly discovered evidence, combined with the jury's verdict for life, renders the death sentence

disproportionate. The Florida Supreme Court's opinions in Scott (Abron) v. Dugger, 604 So. 2d 465, 469 (Fla. 1992), and Scott (Paul) v. State, No. 84,686 and 84,687, (Fla. March 16, 1995), highlight why the application of this standard in Rule 3.850 proceedings is integral to the validity of Florida's capital punishment scheme.

Paul Scott's case was discussed above. In Abron Scott's case, 604 So. 2d at 469, the Florida Supreme Court held that new evidence about the disparate treatment of the co-defendant was evidence demonstrating that Rule 3.850 relief was appropriate. In short, where there is newly discovered evidence demonstrating the unreliability of the conviction or the death penalty, Rule 3.850 relief is proper. There is certainly substantial evidence before the Court demonstrating the unreliability of the conviction and death sentence in Bernard Bolender's case.

The Florida Supreme Court has long held that disparate sentencing treatment, i.e., a sentence less than death, for equally or more culpable accomplices "can serve as a valid basis for a jury's recommending life imprisonment." Pentecost v. State, 545 So. 2d 861 (Fla. 1989). The Court so held at least as long ago as Malloy v. State, 382 So. 2d 1190, 1193 (Fla. 1979), where the Court found that conflicting evidence on the identity of the trigger person, the "relatively equal complicity" of the codefendants, and the plea bargains reached by the State with the codefendants made the jury's life recommendation reasonable and not subject to an override. See also Caillier v. State, 523 So. 2d 158, 160-61 (Fla.

1988) (jury recommendation reasonable based on lesser sentence for codefendant, where jury could reasonably have found codefendant equally culpable, even though the trial court found defendant more culpable); Brookings v. State, 495 So. 2d 135, 143 (Fla. 1986) (jury could reasonably consider disparate treatment of accomplices, even though defendant was trigger person, where accomplices planned and assisted in the crime); Hawkins v. State, 436 So. 2d 44, 47 (Fla. 1983) (jury reasonably recommended life where defendant's testimony, gunpowder residue evidence and polygraph evidence suggested that codefendant was the triggerman).

This standard is central to Florida capital sentencing law, as Harmon v. State, 527 So. 2d 182 (Fla. 1988), demonstrates. Harmon's codefendant testified that Harmon was the leader in the robbery and murder, while Harmon denied any involvement. The Florida Supreme Court found that the jury "could have reasonably questioned" the relative culpability of Harmon and his codefendant, and the disparity in their sentences. Id. at 189. Similarly, in Fuente v. State, 549 So. 2d 652, 659 (Fla. 1989), the Court held that disparate treatment of the accomplices -- who had received immunity in return for their testimony -- supported the jury's life recommendation even though the trial judge did not find disparate treatment as a mitigating factor. See also Cooper v. State, 581 So. 2d 49, 51 (Fla. 1991) ("Conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment."); Jackson v. State, 599 So. 2d 103, 110 (Fla. 1992) (jury could reasonably have relied on disparate treatment of the

codefendant, "who the jury could have found was equally culpable").

Moreover, regardless of the jury's recommendation, the Florida Supreme Court will not affirm a death sentence if a codefendant or accomplice who was equally culpable received a lesser sentence. Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992) ("this Court probably would have found Scott's death sentence inappropriate" had it known his codefendant received a life sentence); Scott v. State, No. 84,686 & 84,687, slip op. at 10 (Fla. March 16, 1995) (Kogan, J., concurring) (withheld information suggesting codefendant was more culpable "reasonably could have influenced this Court on appeal to reduce death to life"); Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987) (recognizing disparate treatment as a mitigating factor undermining the propriety of the death sentence); Gafford v. State, 387 So. 2d 333 (Fla. 1980) (same); Slater v. State, 316 So. 2d 539, 542 (Fla. 1975) (defendants of equal culpability should not be treated differently).

These principles highlight the propriety of relief in Bernard Bolender's case. Mr. Bolender has never had the Florida Supreme Court or a Circuit Court sentencing judge give mitigating effect to the newly discovered evidence submitted in his Rule 3.850 motion. As the Florida Supreme Court recognized in Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992), newly discovered evidence undermining the reliability of a capital sentence must be given mitigating effect, even when it is first addressed in Rule 3.850 proceedings.

In non-capital cases, Florida law provides that "a sentencing error which causes an individual to be restrained for a time longer

than that allowed by law may be heard in any and every manner possible." Rodgers v. State, 19 Fla. L. Weekly D2175 (1st DCA 1994) (emphasis added). This standard is doubly important in capital cases and the failure to follow it in a capital case would be a grossly arbitrary deprivation of due process.

Mr. Bolender presents claims which are properly before the Court on their merits, and, which, once established at a hearing, would entitle the Bernard Bolender to relief. A stay of execution is appropriate. An evidentiary hearing is necessary on the substantive claims raised in this action and on the procedural assertions the State has now made. See Card, supra; Harich, supra.

ARGUMENT VIII

PETITIONER'S ATTORNEY WAS LESS THAN THREE YEARS OUT OF LAW SCHOOL AND WAS HIMSELF ADDICTED TO COCAINE AND WAS SELLING DRUGS, CIRCUMSTANCES WHICH RENDERED HIM INEFFECTIVE DURING THE TIME OF PETITIONER'S TRIAL AND VIOLATED THE PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Defense counsel Mr. Della Ferra graduated from law school in 1977 and represented Petitioner in a quadruple capital homicide case in 1980. He had never handled a capital case.

Furthermore, defense counsel was addicted to drugs and was a dealer, as revealed by his then girlfriend:

> Jimmy ... was using cocaine and so was I, and that was something we had in common. Jimmy used to deal cocaine as well as use it. Back then, the idea of smoking cocaine hadn't really caught on, but the Colombians had already started doing that, bringing smokable cocaine into the country. Jimmy and I smoked it, shot it up, and snorted it. It was a constant thing.

5. Snorting cocaine wasn't anything like

> smoking it or free-basing it. Free-basing was much more potent and would really mess you up. It would take days or weeks to come down off of it. Plus we were smoking pure, un-cut Colombian cocaine, not the watered-down stuff you see on the street.

App. 15.

> 8. Jimmy ended up representing Bo Bolender when Bo was arrested on these charges. Jimmy was into the whole ego thing of it. The problem was, he was still using cocaine and other drugs. I was pretty upset with Jimmy and the way he was handling the case. He thought this case was gonna make him big and I think he thought he could win the case. But he continued doing drugs right through the trial. I remember talking to him about how the case was going and telling him I thought he should be handling things differently. He was very nervous and hyper during the trial -- he didn't sleep at all. I think he was in way over his head, but he wouldn't listen to me.

Id.

> 12. It seemed to me like Bo had no real advocate at the trial....
>
> 13. ... I thought the whole atmosphere was pretty disgusting, considering that a man was in trial for his life. And throughout it all, Jimmy continued doing drugs. He wasn't in any shape to be representing someone on his own in a capital trial.

Id.

After the trial, the affiant had no further dealings with Della Fera, deciding instead to go into an anonymous drug rehabilitation program to clean up her life and get away from those influences. Since that time, she has moved constantly, from place to place, and has made a concerted effort to put that life behind her and to avoid any contact with Della Fera and the drug

underworld. Id. This affiant has come forward, under great fear for her safety, because she knows that what happened to Bo Bolender was wrong in the extreme:

> When I was contacted yesterday by one of the attorneys on Bo's case, I was totally shocked that she had found me and not inclined to talk until I was told of Bo's execution date. I have been clean for a long time now and I don't want anything to do with that former life. But having found out that Bo is scheduled to die in a little over two weeks, I can't keep silent any more about what I know. It would be a terrible and cruel injustice to kill Bo over what happened in January 1980. Bo had a lawyer who was using drugs and messed up during the proceedings ....

Id.

Under these circumstances, Petitioner's Sixth, Eighth, and Fourteenth Amendment rights were violated and a new trial is required.

ARGUMENT IX

THROUGHOUT THE TRIAL AND POST-CONVICTION PROCEEDINGS IN THIS CASE, THE STATE HAS INTERFERED WITH THE ABILITY OF THE DEFENSE TO OBTAIN EXCULPATORY TESTIMONY, IN VIOLATION OF DUE PROCESS AND THE EIGHTH AMENDMENT. AN EVIDENTIARY HEARING IS REQUIRED SO THAT THE DEFENSE CAN OBTAIN AND PRESENT THIS TESTIMONY, AND SO THE COURT CAN DETERMINE WHETHER IT WOULD PROBABLY HAVE PRODUCED A DIFFERENT RESULT AT THE GUILT OR PENALTY PHASE OF THE TRIAL.

Due process requires that the State disclose to the defense material exculpatory evidence. Brady v. Maryland, 373 U.S. 83 (1963). That duty does not dissipate when trial is over; it remains in full force and effect in post-conviction proceedings. Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992). Moreover, proceedings brought under Rule 3.850 are also subject to the dictates of due process. Holland v. State, 503 So. 2d 1250

(1987).

Throughout the trial and post-conviction proceedings in this case, the State has failed to disclose material exculpatory evidence and has otherwise hindered defense access to such evidence. The State continues this behavior to this day, as it has manipulated the two most critical potential witnesses -- Mr. Bolender's codefendants Joseph Macker and Paul Thompson -- into refusing to speak to the defense and into retracting or partially retracting previous exculpatory statements, respectively.

Under Jones v. State, 591 So. 2d 911, 915 (1991), Mr. Bolender is entitled to an evidentiary hearing if he can allege newly discovered facts which, if proven, would probably have changed the result either of the guilty or the penalty phase of the trial. See also Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994); Scott v. State, No. 84,686 & 84,687 (Fla., March 16, 1995). The State, however, has inhibited the ability of the defense even to make such allegations by tampering with these key witnesses. Due process does not permit the State to preclude Mr. Bolender even from making the initial showing in this fashion. See Thomas v. Goldsmith, 979 F.2d at 749. Rather, an evidentiary hearing must be held and Mr. Bolender must be given the opportunity, at last, to present this exculpatory evidence through sworn testimony subject to cross examination.

a. **Joseph Macker**

(1) The Office of the State Attorney, and Assistant State Attorney Abraham Laeser personally, have acted to obstruct

Mr. Bolender's access to evidence in support of his Rule 3.850 Motion. When investigators working on behalf of Mr. Bolender attempted to speak to Mr. Bolender's codefendant and the key State witness against him -- Joseph Macker -- Mr. Macker said that he had been instructed by Mr. Laeser not to say anything to anybody working on Mr. Bolender's behalf. Apps. 17 and 19, Affidavits of Stephen J. Gustat and Hal Shows.[7]

(2) Mr. Bolender's defense team should have the opportunity to speak freely with Macker. Macker testified only under a plea agreement obtained in questionable circumstances, see Claim II, supra, and Rule 3.850 Motion, App. 8, and it was never previously disclosed that he in fact failed the polygraph examination that he was required to pass in order for his plea to be valid. The State should not be permitted to continue shielding him from inquiry.

b. **Paul Thompson**

(1) Three codefendants were charged with the offense for which Mr. Bolender was convicted and sentenced to death: Mr. Bolender, Joseph Macker, and Paul Thompson. Macker entered a plea agreement with the State and testified against Mr. Bolender, implicating Mr. Bolender in the offense. Thompson, however, had a different story: Thompson was at Macker's house the night of the offense, but did not see Mr. Bolender there and did not see him commit the acts upon the victims about which Macker testified. R.

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[7]Mr. Macker is currently on parole for these offenses, and hence is readily subject to State influence.

58-60 (affidavit of trial counsel G. P. Della Fera regarding statements made to him by Thompson).

(2) Defense counsel repeatedly attempted to secure Thompson's presence to give this crucial testimony at Mr. Bolender's trial. See R. 49-60 (motion for continuance to allow for determination of Thompson's competency); R. 247 (renewed motion for continuance to determine Thompson's competence); R. 978 (request for writ of habeas corpus ad testificandum). The State opposed Mr. Bolender's attempts to secure Thompson's testimony, arguing that Thompson was in fact incompetent based on a district court ruling two years before. The trial court accepted the State's argument and denied Mr. Bolender's motions. R. 8. In fact, neither the district court nor any other court found Thompson to be incompetent -- the district court had simply dismissed the federal indictment without stating the reason. App. 20. The trial court refused to await the outcome of the ongoing attempts to determine whether Thompson was competent to stand trial. R. 8.

(3) The State failed to disclose either to the court or to defense counsel that it had received on March 7, 1980, information that Thompson was feigning insanity in order to avoid trial. Thompson v. Crawford, 479 So. 2d 169, 171 (Fla. 3d DCA 1985). Despite this knowledge, the State had opposed Mr. Bolender's attempts to secure Thompson as a witness.

(4) In December 1980, eight months after Mr. Bolender's trial, Judge Goderich -- who had replaced Judge Fuller -- adjudged Thompson to be incompetent and found him not guilty by reason of

insanity. App. 21. However, after the state mental hospital, to which Thompson had been committed, reported that Thompson was not mentally ill, further evaluations were conducted revealing that Thompson had been malingering and feigning mental illness. Thompson, 479 So. 2d at 173-75. As a result, the trial court determined that Thompson had secured his acquittal by fraud, and that he was in fact competent. Thompson's acquittal was set aside. Id. at 176.

(5) After Thompson's appeals were rejected, on January 25, 1990, Thompson pled guilty to four counts of second degree murder and eight other charges arising from the offense for which Mr. Bolender was convicted, and received a thirty-five year sentence.[8] As part of his plea agreement, on February 16, 1990, Thompson gave a deposition describing his version of the offense. Thompson's testimony exculpated Mr. Bolender and contradicted Macker's testimony on key points. Thompson did not recall that Mr. Bolender or anyone meeting his description was present on the night of the offense. He did recall seeing a person meeting the description of Robert McCall (who claimed to have slept through the entire incident, and was never charged with any role in the offense) and a person meeting the description of Macker. According to Thompson, McCall was actively involved in the events that night. Thompson admitted being present and participating in the binding and some of the beating of the victims, but denied seeing Mr. Bolender stab or shoot anyone:

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[8]He is now in a minimum security work release facility.

> Q. Did you ever see Boe (sic) hit, stab, or shoot anybody that night as far as you remember?
>
> A. If I could know exactly -- I still, no, I have got to say no. I don't want to take a chance.

App. 22 (Deposition of Paul Thompson, at 19).

(6) In preparation for clemency proceedings, an investigator for the defense spoke again to Thompson. Thompson confirmed what he had told trial counsel -- that Mr. Bolender was not present at Macker's house during the night when the offense took place. Thompson told the investigator that Mr. Bolender was not present and was not involved in the killings in any way. Thompson also told the investigator that it was Macker who gave the orders for the killings, that Macker was a dominating person who always called the shots, and that he and Macker thought the victims had to be killed because they would have retaliated if they had been allowed to live.

(7) Thereafter, the Governor's clemency office contacted unnamed local officials acting for the State, who manipulated Thompson into renouncing the statements he had recently made to the defense investigator (and previously to trial counsel). As is self-evident, the State is in a position to have considerable influence on the timing of any release of Thompson on parole. However, even under pressure from the State, Thompson simply reaffirmed the veracity of his 1990 deposition testimony, which is exculpatory to Mr. Bolender.

(8) The State's interference has inhibited the attempts

of the defense to obtain accurate and truthful statements concerning the offense from Macker and Thompson. These more recent efforts are of a piece with the State's conduct of the case from the beginning -- supporting the efforts of Thompson to avoid compulsory process through a fraudulent claim of incompetence; buying the testimony of Joseph and Diane Macker with the proceeds of the murders and a sweetheart plea agreement; providing by the plea agreement that Macker was to use good faith efforts to secure the presence and testimony of numerous witnesses under his control or influence, several of whom disappeared out of fear of Macker, and two of whom he attempted to bribe to not appear as witnesses; concealing the fact that Joseph Macker had failed a polygraph examination; and failing to reveal that Diane Macker was a "priceless" informant and that Joseph Macker was himself an informant and organized crime figure who "owned" numerous local judges.

(9) Mr. Thompson should be called as a witness at an evidentiary hearing. He has never testified in this case subject to cross examination. He eluded trial by faking incompetence and insanity. He has given exculpatory statements but then withdrawn or changed them, only to again reaffirm them later on. But at no time has he ever given a statement that is consistent with Macker's testimony, and neither jury nor court has ever heard him testify about the offense. Mr. Thompson must testify so that this Court can determine what effect his testimony would have had on Mr. Bolender's convictions and sentences. That testimony should be

free of any taint of pressure or inducement by the State Attorney's Office or by those with the ability to influence decisions concerning the duration of his incarceration. He must testify subject to cross examination because of the unique "value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." Pointer v. Texas, 380 U.S. 400, 404 (1965).

Throughout the trial and post-conviction proceedings in this case, the State has interfered with efforts by the defense to prove Bernard Bolender's innocence through the testimony of those with knowledge of the facts, after disclosure of all material, exculpatory information. So far, the State's efforts have succeeded. The result, however, has been a violation of due process, not to mention a denial of the heightened reliability that is required for the death sentence to be imposed in accordance with the dictates of the Eighth Amendment. A full evidentiary hearing at which all the relevant facts can be presented is required.

ARGUMENT X

MR. BOLENDER'S UNANIMOUS JURY LIFE RECOMMENDATION WAS OVERRIDDEN BY A JUDGE WHO WAS PREDISPOSED TO IMPOSE THE DEATH SENTENCE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IN VIOLATION OF THE FLORIDA CONSTITUTION AND FLORIDA LAW.

In Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), the Florida Supreme Court reviewed the denial of relief on a claim of ineffective assistance at penalty phase. The court below had found that counsel rendered deficient performance, but found that the defendant had failed to show prejudice, at least in part because

the judge in the Rule 3.850 proceedings was aware that the trial judge was predisposed to impose the death penalty if there was "any legal basis for providing the death penalty in this case...." Id. at 111 (Anstead, J., concurring). Justice Anstead explained that the fact that the trial judge was predisposed to impose death itself required resentencing, apart from counsel's constitutionally ineffective assistance:

> In other words, a substantial basis for the trial judge's denial of relief here was his candid belief that the sentencing judge was so predisposed to imposing death that there was virtually nothing that counsel could have done to change the outcome.... [T]his observation by Judge Tombrink alone undermines the integrity of the prior sentencing proceeding.
>
> .... [The decision to impose death] is controlled by the circumstances of each particular case, and cannot be made until those circumstances are developed through the detailed sentencing process required in capital cases. The constitutional validity of the death sentence rests on a rigid and good faith adherence to this process. Confidence in the outcome of such a process is severely undermined if the sentencing judge is already biased in favor of imposing the death penalty when there is "any" basis for doing so. Such a mindset is the very antithesis of the proper posture of a judge in any sentencing proceeding.

Id. at 111-12.

Here, as in Hildwin, the death sentence was imposed by a judge who was predisposed to impose death. As Justice Anstead cogently explained in Hildwin, imposition of the death sentence in this manner undermines the constitutional validity of the sentence and removes all confidence in the outcome of the process.

The facts that Judge Fuller was predisposed to impose the

death sentence in general and in this case in particular are beyond dispute. Trial counsel testified that he was well aware of Judge Fuller's predisposition, and that his knowledge of Judge Fuller's bias was a major reason why he introduced no mitigating evidence either before the jury at penalty phase or before the judge at sentencing:

> Q [BY ASSISTANT STATE ATTORNEY ABRAHAM LAESER] During your preparation, during the time of your preparation for the trial, had you heard or contacted anybody about the reputation of the judge who was sitting at the trial of this cause?
>
> A [MR. DELLA FERA] Yes. I was well aware of the obstacles we were facing by being in front of Judge Fuller, and had made Mr. Bolender aware of that....
>
> . . .
>
> The scouting report generally around the courthouse was that Judge Fuller would send an individual to the electric chair....

EH. 33.[9] Indeed, Mr. Della Fera testified that the case was only tried before Judge Fuller because the State successfully manipulated the process to transfer the case from Judge Durant -- where it was originally filed -- to Judge Fuller, a notorious "hanging" judge. EH. 33-34, 40.

Mr. Della Fera further testified that Judge Fuller would have refused even to consider mitigating evidence:

> I believe, presenting mitigating circumstances to Judge Fuller would really not have mattered that much to Judge Fuller at the time.

---

[9]Mr. Bolender will cite to the transcript of the evidentiary hearing in the Rule 3.850 proceedings as "EH. __."

> I thought that the testimony that either Bo's mother or Bo's sister might have put on with reference to his family, his background while he was a child in Long Island would not mean a hill of beans to Judge Fuller.

EH. 36.

Mr. Della Fera's testimony was found to be entirely credible. Indeed, the Florida Supreme Court expressly relied on his testimony in finding that counsel had a strategic reason for not putting on any mitigating evidence, noting that "after checking on the trial counsel's reputation," counsel decided not to put on the testimony of Mr. Bolender's mother and sister because such "nonstatutory mitigating evidence would have had little effect on the judge." State v. Bolender, 503 So. 2d 1247 (Fla. 1987). Unfortunately, the court failed to recognize what Justice Anstead has now made clear -- that the defendant is entitled to a fair and impartial sentencing judge, and that the fact of judicial bias both precludes the possibility of a constitutional sentencing process and negates the very notion of a valid strategy. No strategy in the world can make up for the lack of sentencing before an unbiased judge.

There is further evidence of Judge Fuller's predisposition to impose the death penalty. First, as former Judge Durant, Mr. Bolender's initial post-conviction counsel and a former colleague of Judge Fuller, was clearly aware, see EH. 40, Judge Fuller had a history of overriding jury recommendations of life. He had done so in at least two cases prior to Mr. Bolender's -- Bryant v. State, 412 So. 2d 347 (Fla. 1982), and White v. State, 403 So. 2d 331 (Fla. 1981). In Bryant, the first degree murder conviction was

overturned because Judge Fuller failed to instruct the jury on the defense's independent act theory of defense. Bryant, 412 So. 2d at 350. Beauford White was one of only three people to be executed in Florida despite a life recommendation from the jury. White's jury, like Mr. Bolender's jury, had unanimously recommended a life sentence. Second, Judge Fuller's bias in favor of the prosecution and in favor of the death sentence were readily apparent to other observers of the trial. App. 15, Affidavit of Robin Horowitz. Third, Judge Fuller's reputation as a "hanging" judge is well known among members of Miami's legal community. At an evidentiary hearing, Mr. Bolender will present testimony from numerous lawyers to that effect.

The evidence of Judge Fuller's bias renders the override death sentence in this case fundamentally unreliable and unconstitutional. Justice Anstead recognized that fact in Hildwin. The Eleventh Circuit recently held that sentencing by a biased judge violates the United States Constitution's guarantee of due process:

> In the Florida sentencing scheme, the sentencing judge serves as the ultimate factfinder. If the judge was not impartial, there would be a violation of due process. The law is well-established that a fundamental tenet of due process is a fair and impartial tribunal.

Porter v. Singletary, 49 F.3d 1483, 1487-88 (11th Cir. 1995); see Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). Mr. Bolender is entitled to an evidentiary hearing and, upon proof that Judge Fuller was biased, to a new sentencing proceeding.

CONCLUSION

Wherefore, Petitioner respectfully requests that the Court enter an order staying his scheduled execution and that the Court grant an evidentiary hearing and relief.

Respectfully submitted,

MARK EVAN OLIVE
and
ANNE FAITH JACOBS
Fla Bar No. 0046329
Volunteer Lawyers' Post-Conviction
Defender Organization, Inc.
805 North Gadsden Street
Steven M. Goldstein Building
Tallahassee, FL 32303-6313
(904) 681-6499

Attorneys for Bernard Bolender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by FACSIMILE to Fariba N. Komeily, Assistant Attorney General, Fax No. (305) 377-5655, Office of the Attorney General, Department of Legal Affairs, Ruth Bryan Owen Rhode Building, Dade County Regional Service Center, 401 Northwest Second Avenue, Suite 921-N, Miami, FL 33128, this 10th day of July, 1995.

Attorney

IN THE CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA

Plaintiff,

v.

BERNARD BOLENDER,

Defendant.
_____/

Case No. 80-640-A

EMERGENCY:
CAPITAL CASE
DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
JULY 12, 1995, AT 7:00 A.M.

FILED
JUL 8 1995

ORDER DENYING DEFENDANT'S MOTION TO STAY EXECUTION AND ORDER DENYING MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

On motion of Defendant, BERNARD BOLENDER, to stay his execution of death sentence, which is set for 7:00 a.m. on Wednesday, July 12, 1995, pursuant to a death warrant signed by the Governor of Florida on May 24, 1995, and on Defendant's Motion to Vacate Judgment of Conviction and Sentence,

It is hereby ORDERED that Defendant's Motion to Stay Execution is DENIED, and Defendant's Motion to Vacate Judgment of Conviction and Sentence is DENIED.

DONE and ORDERED in Miami, Florida, on this 8th day of July, 1995.

CIRCUIT JUDGE

Copies to:
Attorneys for Bernard Bolender
Office of the State Attorney

STATE OF FLORIDA, COUNTY OF DADE
I HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office JUL 08 1995 A.D. 19
HARVEY RUVIN, Clerk of Circuit and County Courts
Deputy Clerk
7264

—APPENDIX "A"—

STATE ATTORNEY
METROPOLITAN JUSTICE BUILDING
MIAMI, FLORIDA 33125

JANET RENO
STATE ATTORNEY

TELEPHONE (305) 547-5200

March 14, 1989

Julie Naylor, Esq.
c/o Capital Collateral Representative
1533 South Monroe Street
Tallahassee, Florida 32301

Re: Bernard J. Bolender

Dear Ms. Naylor,

The Office of the State Attorney cannot comply with your "public records" request, pursuant to Section 119, Florida Statutes.

We are actively prosecuting a case against a co-defendant, Paul Thompson. Therefore, these matters are exempt from public disclosure.

Please feel free to write to me if you are in need of further assistance. Thank you.

Sincerely yours,

JANET RENO
STATE ATTORNEY

By: Abraham Laeser
Abraham Laeser
Chief Assistant
State Attorney

AL/bjs

- APPENDIX "B" -

STATE ATTORNEY
METROPOLITAN JUSTICE BUILDING
MIAMI, FLORIDA 33125

JANET RENO
STATE ATTORNEY

TELEPHONE (305) 547-5200

March 14, 1989

Julie Naylor, Esq.
c/o Capital Collateral Representative
1533 South Monroe Street
Tallahassee, Florida 32301

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Please feel free to write to me if you are in need of further assistance. Thank you.

Sincerely yours,

JANET RENO,
STATE ATTORNEY

By:
Abraham Laeser
Chief Assistant
State Attorney

AL/bjs

CCR
State of Florida

1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376
(SC) 277-4376
(FAX) (904) 487-1682
(FAX) (SC) 277-1682

Larry Helm Spalding
Capital Collateral Representative

March 3, 1989

Janet Reno
State Attorney
Eleventh Judicial Circuit
Room 600 Metropolitan Justice Building
1351 N.W. 12th Street
Miami, Florida 33125

RE: Bernard John Bolender
aka Alexander Bo Solo

Dear Ms. Reno:

The Office of the Capital Collateral Representative (CCR) currently represents Bernard John Bolender in post-conviction matters. This is a formal request for access to public records pursuant to Section 119.01 et seq., Florida Statutes (1985).

Please provide immediate access to inspect and copy any and all state attorney files and records (regardless of form and including, for example, all photographs and tapes or other sound or video recordings) regarding Bernard John Bolender. Mr. Bolender was convicted of four counts of first degree murder in April 1980. 9/15/85 Date of Sentence

The record indicates that Mr. Bolender's co-defendant Joseph Macker testified as a state witness. We request any and all state attorney files and records (regardless of form and including, for example, all photographs and tapes or other sound or video recordings) regarding Mr. Macker. Particularly, but not limited to any information pertaining to grants of immunity, plea bargains, etc.

We request any and all state attorney files and records (regardless of form and including, for example, all photographs and tapes or other sound or video recordings) regarding Paul Thompson, also a co-defendant.

We request any and all information concerning other state witnesses or potential state witnesses in Mr. Bolender's case.

— APPENDIX "C" —

Our interest is in, but not limited to, the following:

1. Case reports.

2. Investigation reports, i.e., crime scene witnesses, etc. (including any and all memoranda prepared by law enforcement prosecutors during the course of the investigation and prosecution of this matter.)

3. Any and all jail records, including medical files.

4. Booking records and arrest reports.

5. Classification files.

6. Interrogation records and reports.

7. Transmittal sheets of evidence to crime labs.

8. The reports and results of crime lab work.

9. Information with regard to other potential suspects.

10. Log sheets and/or other records which reflect the physical location and movement of Mr. Bernard Bolender.

11. All notes of investigators, detectives and other officers and personnel.

12. Visitation records.

13. Medical records.

14. Any and all statements made by Mr. Bolender or others, including any and all statements obtained from suspects and potential witnesses in each of the subjects' cases.

15. Any and all records and reports of polygraph examinations, hypnosis, administration of sodium pentathol, sodium amethol or any other drug.

16. Any and all physical and/or documentary evidence, including any which was not placed in evidence at his trial.

This request is made in connection with and for purposes of Mr. Bolender's post-conviction pleadings. For your information we enclose a copy of a decision of the District Court of Appeal of Florida, Second District, which makes it clear that post-conviction proceedings do not constitute a "pending appeal" for purposes of determining whether criminal investigative files are exempt from public disclosure pursuant to the provisions of Sections 119.011(3)(d)2 and 119.07(3)(d), Florida Statutes (1985). Thus, the present status of Mr. Bolender's case is no impediment to our request. This request also specifically includes the files and notes of any assistant state attorneys who participated in the prosecution of these cases.

We are laboring under severe time restrictions and would appreciate your prompt attention to this records request. Thank you for your attention and assistance in this matter.

Sincerely,

Julie D. Naylor

Julie Naylor
Staff Attorney

Enclosure

jsw