IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CROSLEY ALEXANDER GREEN,

Petitioner,

v. CASE NO. 6:14-cv-00330

MICHAEL D. CREWS,
Secretary, Florida Department of Corrections,

DONALD LEAVINS,
Warden, Hardee Correctional Institution,

Respondents.

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HABEAS CORPUS PETITION WITH REQUEST FOR EVIDENTIARY HEARING

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PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HABEAS CORPUS PETITION WITH REQUEST FOR EVIDENTIARY HEARING

INTRODUCTION

This is a case about innocence. No direct evidence tied Crosley Green to the murder of Charles "Chip" Flynn, Jr. Newly discovered evidence demonstrates that Mr. Green was wrongfully convicted. This evidence includes: exculpatory evidence withheld by the prosecution that the police first concluded that Flynn's ex-girlfriend had pulled the trigger; the recantations of four witnesses who testified that Mr. Green confessed to them; ten alibi witnesses who say that Mr. Green was near his home almost two miles from the scene of the crime when the murder occurred; and a documented pattern of similar police and prosecutorial misconduct in Brevard County that has led to the wrongful conviction of at least four men—**Wilton Dedge, William Dillon, Juan Ramos, and Crosley Green—**all of whom, except Crosley Green, have been exonerated after years of wrongful incarceration.

STATEMENT OF FACTS

On April 4, 1989, after smoking marijuana and having sex with his ex-girlfriend, Kim Hallock, in an abandoned orange grove, Flynn was shot in the chest with a .22 caliber bullet. Hallock then drove Flynn's pick-up truck out of the orange grove, purposefully leaving the mortally wounded Flynn behind. Hallock drove to the home of Flynn's best friend, passing on the way a hospital and numerous homes where she could have sought help, including that of her parents. Hallock told Flynn's friend that "Chip got shot." Flynn's friend convinced her to call 911. Hallock later told the police that she and her ex-boyfriend had been robbed and kidnapped by "a black guy" with a gun. Hallock described the man as having "kind of a

big build," not quite as big as a body builder, but he was "just big."[1] In addition, Hallock said that the perpetrator had a distinctive hair style: "curled like a permanent" with "a little bit of an afro" that was "greasy," possibly with afro-sheen in it.[2]

The first police responders to arrive, Sergeant Diane Clarke and Deputy Mark Rixey, spoke with Hallock and examined the crime scene. Each concluded that Hallock killed Flynn—a conclusion that each maintains to this day.[3] Clarke and Rixey, who had more than 14 years of investigatory experience between them, both told Assistant State's Attorney ("ASA") Christopher White that, based on their crime-scene observations, they believed that Hallock killed Flynn; this conclusion is clearly documented and underlined in White's own August 28, 1989 handwritten notes.[4] White, however, purposefully concealed this exculpatory information: he failed to disclose Clarke's and Rixey's investigatory conclusions and failed to turn over his notes to the defense. Had White disclosed this exculpatory information as the law requires, it would have had a seismic impact on Mr. Green's trial.

The suppression of Clarke's and Rixey's observations and conclusions were devastating to the fairness of Mr. Green's trial because there was no physical evidence introduced at trial that tied Mr. Green to the alleged robbery, kidnapping, and murder. Investigators did not find a single fingerprint of Mr. Green's on the truck that he supposedly got into, out of, and drove for several miles.[5] Moreover, neither Mr. Green's physical build, nor his hairstyle or its length, fit the characteristics of the "black guy." In stark contrast to

[1] Ex. 13 at 10-11.
[2] Ex. 18-A at 74:15-19; Ex. 13 at 12.
[3] Exs. 21, 25, 28.
[4] Ex. 28 ("Mark [Rixey] & Diane [Clarke] suspect girl did it. . . .").
[5] Exs. 30, 31.

Hallock's description, Mr. Green has never been big or muscular and has never had a "geri-curl," a permanent with ringlets, or worn gel in his hair.[6] Instead, Mr. Green has always had a slight build and very short hair.

Hallock's first identification of Mr. Green resulted from a photographic lineup calculated to result in her selection of Mr. Green. First, the photo array directed Hallock to Mr. Green's photo, which was undeniably the smallest, the darkest, and most conspicuous—and in the center of the top row. Second, Hallock picked out Mr. Green only *after* the police told her that their suspect was in the photo lineup.[7] The police also told Hallock after she picked out Mr. Green that she had picked the right person.[8] Hallock initially only tentatively indicated that Mr. Green's photo was that of the "black guy," saying she was "pretty sure" and then eventually saying she was "sure" that her identification was correct.[9]

Otherwise, the only evidence used by the State to connect Mr. Green to the crime was the testimony of a dog tracker who supposedly followed shoe prints of the perpetrator. The shoe prints—from Win Streak tennis shoes matching neither the work boots allegedly worn by the "black guy" nor Mr. Green's *only* shoes (Reebok sneakers)—were located in a public park where many people had watched a baseball game earlier on the day of the crime.[10] The dog tracker followed the Win Streak shoe tracks to the vicinity of Mr. Green's sister's house. The trial court allowed this completely unreliable evidence to be admitted at trial, despite its determinations that: (1) the State did not recover any shoes that matched the tracks followed

[6] T. 1278:18-1279:3, 1289:25-1290:12; Ex. 75.
[7] Ex. 18-A at 61:6-25, 65:10-15; Ex. 9 at 132:25-134:21; T. 623:6-19; 755:23-756:7.
[8] T. 624:12-16; Ex. 9 at 134:23.
[9] Ex. 18-A at 64:5-14; Trial 624:3-11.
[10] Ex. 78 at 6:21-23.

by the dog; (2) the perpetrator was said to have been wearing heavy work boots, not tennis shoes; and (3) there was no evidence whatsoever that the shoe prints tracked belonged to Mr. Green, and thus the dog could have been tracking anyone at all.[11] The admission of the dog-tracking evidence was not harmless error. According to the Supreme Court of Florida, this "scent tracking was the only evidence that established Green's identity." *Green v. State*, 641 So. 2d 391, 394 (Fla. 1994).

Even with the dog-tracking evidence, the State's case against Mr. Green was weak—until three witnesses falsely testified that Mr. Green had spontaneously confessed to them. But each of the State's three confession witnesses—Jerome Murray,[12] Lonnie Hillary,[13] and Sheila Green[14]—has recanted, citing the State's coercion as the reason they lied. Most recently, a fourth key State witness, Laymen Layne, recanted his "spontaneous confession" testimony at one of Mr. Green's post-conviction hearings, also citing coercion by the State.[15]

Despite the egregious nature of this misconduct, this was not the first time that ASA White, the lead prosecutor in Mr. Green's case, relied on false testimony to obtain a conviction. White is a repeat offender in obtaining wrongful convictions. Mr. Green's conviction is part of a distinct pattern and practice of government misconduct in Brevard County. At least three men—**Wilton Dedge, William Dillon, and Juan Ramos**—have been exonerated based on the exact same type of government misconduct that occurred in Mr. Green's case. The same prosecutors and investigators—White and Brevard County Sheriff's

[11] T. 1363:2-18, 1367:13-17
[12] *See* Ex. 50 at 7:20-9:22, 13:11-16:7, 18:24-19:4, 21:8-20, 25:14-17.
[13] *See* Ex. 47; Ex. 44 at 19:1–6, 31:15–18, 49:20–50:4; Ex. 35-A at 21:2-8, 79:8-20.
[14] *See* Ex. 35-A at 18:19-19:4, 63:16-19, 64:18-19; Ex. 48.
[15] Ex. 58.

Office ("BCSO") Investigator Thom Fair—were responsible for the wrongful convictions in those cases, and engaged in the very same conduct in Mr. Green's case.

Mr. Green's court-appointed trial counsel was John Roberson Parker. Mr. Green's case was Parker's first and last defense of a death penalty case. Parker began his career alongside White and Phil Williams at the Brevard County State Attorney's Office—the same office to which he returned following Mr. Green's trial. Parker's performance was ineffective and deprived Mr. Green of his constitutional right to effective counsel. Parker utterly failed to investigate Mr. Green's alibi defense, to interview key witnesses, or to retain either ballistics or dog-tracking experts. Parker also failed to discover that Mr. Green did not know how to drive a manual-transmission vehicle, discrediting Hallock's claim that Mr. Green drove Flynn's manual-transmission truck, which was prone to stalling, while also holding a gun on Hallock and Flynn.[16]

Finally, newly discovered evidence includes a post-trial analysis by the Florida Department of Law Enforcement concluding that the .22 caliber bullet recovered from Flynn was compared to Flynn's revolver and was determined to have similar characteristics.[17] This disproves the prosecution's main theory at trial that there were two guns and that Flynn was shot with a gun Hallock described as an automatic weapon. Instead, it demonstrates that Flynn was shot with his own .22 caliber handgun, consistent with the conclusions of the first police officers on the scene that Hallock, not Mr. Green, shot Flynn.

[16] Ex. 34 at 21; Ex. 54; Ex. 18-A 83:12-84:7; Ex. 55 at 5:15-6.

[17] Ex. 130.

I. STANDARD OF REVIEW

A. 28 U.S.C. § 2254

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). To qualify for relief under the habeas standard of § 2254(d), the state court must have adjudicated the petitioner's claim on the merits. 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 131 S. Ct. 770, 780 (2011).

B. Claims Not Raised Below or Otherwise Procedurally Barred May Nonetheless Be Considered by this Court Because Compelling New Evidence Demonstrates that Mr. Green Is Actually Innocent

Pursuant to § 2254, Mr. Green has properly preserved his habeas claims set forth in the accompanying Petition for Writ of Habeas Corpus ("Petition"). But if this Court finds that any of Mr. Green's claims are procedurally defaulted, in whole or in part, such default must be excused. Based on substantial new evidence not available at trial, "it is more likely than not that no reasonable juror would have found [Mr. Green] guilty beyond a reasonable doubt" of the crimes for which he was convicted. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). This newly discovered evidence, discussed in detail below, raises doubt about Mr. Green's guilt "sufficient . . . to undermine confidence in the result of the trial." *Id.* at 317. As such, this Court should find that Mr. Green has satisfied his burden under *Schlup*, and has opened the "gateway" for this Court to consider the merits of each of his constitutional claims.[18]

[18] *See* Crosley Green: Evidence of Actual Innocence Requiring a New Trial, attached as Ex. 129.

1. Mr. Green Has Presented Newly Discovered Evidence that Was Unavailable at Trial Due to Prosecutorial Misconduct and Trial Counsel's Ineffectiveness

Evidence is "new" for actual innocence purposes if it "was not presented at trial." *Id.* at 324. Substantial pieces of newly discovered evidence were not available to Mr. Green or presented at trial due to the State's failure to turn over exculpatory material, the State's repeated instances of prosecutorial misconduct, and trial counsel's ineffectiveness. Had the jury heard all of the new evidence set forth in the Petition, along with the evidence presented at trial, it is more likely than not that "no juror, acting reasonably, would have voted to find [Mr. Green] guilty beyond a reasonable doubt." *Id.* at 329.

2. The Newly Discovered Evidence of Actual Innocence Is At Least as Compelling as the Evidence Presented In *Schlup*

All of the evidence upon which Mr. Green's habeas claims are based constitutes reliable, newly discovered evidence under *Schlup* "sufficient . . . to undermine confidence in the result of the trial." *Id.* at 317. The Supreme Court has provided extensive guidance to district courts to assist them in determining whether this standard has been satisfied:

> In assessing the adequacy of petitioner's showing, . . . the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. . . . The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."

Id. at 327–28. Applying these principles, Mr. Green's new evidence is just as compelling, if not more so, than the evidence deemed credible and newly discovered in *Schlup*.

First, each and every one of the State's witnesses who testified that Mr. Green

confessed to the murder—Jerome Murray, Lonnie Hillary, Sheila Green, and most recently, Laymen Layne—has recanted his or her testimony and sworn that the State's threats and manipulation were the reason for their original false testimony.[19] The recantations of all four of the State's witnesses who testified that Mr. Green "confessed" create significant doubt that any reasonable juror would have found Mr. Green guilty.[20]

Second, every piece of evidence withheld from the jury due to the State's repeated and egregious *Brady* violations—coupled with trial counsel's failure to investigate—constitutes newly discovered evidence. White failed to disclose that Clarke and Rixey, the first responders to the crime scene, concluded that Hallock was Flynn's killer. The conclusion of these experienced investigators is clearly documented and underlined in White's August 28, 1989 handwritten notes;[21] however, White failed to disclose Clarke's and Rixey's investigatory conclusions or provide his notes to the defense. The State also failed to maintain and/or disclose: (1) the audio tape of Hallock's 911 call shortly after the murder, which was "somehow . . . gone" from police custody the night before it was scheduled to be provided to the defense (impeachment evidence); (2) the audio tape of Hallock recounting her version of events to Flynn's father soon after Flynn was killed, which contained statements materially different from Hallock's police interviews, deposition, and court testimony (impeachment evidence); and (3) evidence that all of the State's key witnesses, other than Hallock, were coerced by the State to testify through prosecutorial threats, offers

[19] Ex. 50 at 7:20-9:22; 13:11-16:7, 18:24-19:4, 21:8-20, 25:14-17; Ex. 35-A at 18:19-19:4, 21:2-8, 79:8-20, 63:16-19, 64:18-19; Ex. 44 at 19:1-6, 31:15-18, 49:20-50:4; Exs. 47, 48, 49.

[20] Federal district courts have recently held that such recantation evidence is both credible and compelling, and warrants the issuance of a writ of habeas corpus. *See Lopez v. Miller*, 915 F. Supp. 2d 373, 399–417 (E.D.NY 2013).

[21] Ex. 28 ("Mark [Rixey] & Diane [Clarke] suspect girl did it. . . .").

of leniency in pending criminal proceedings, and other enticements (impeachment evidence).

Mr. Green's newly discovered evidence includes three alibi witnesses who were never presented to the jury as a direct result of trial counsel's failure to adequately investigate Mr. Green's alibi. Parker's deficient investigation failed to identify alibi witnesses Brandon Wright, Reginald Peters, Randy Brown, and Kerwin Hepburn, all of whom are consistent in their statements that Mr. Green never left Lori Rains's home on the night Flynn was killed. In addition, Parker was aware of six other available alibi witnesses during trial, but failed to adequately investigate and present these witnesses, instead calling only ***one*** alibi witness.[22]

Finally, as noted above, newly discovered evidence includes the post-trial analysis by the Florida Department of Law Enforcement concluding that the .22 caliber bullet recovered from the victim had "similar class characteristics" to Flynn's revolver,[23] and thereby disproving the prosecution's main trial theory. All of this, taken together, constitutes compelling new evidence under *Schlup* demonstrating Mr. Green's actual innocence.

3. Mr. Green's Wrongful Conviction Was Part of A Pattern of Government Misconduct in Brevard County

Among the newly discovered evidence that supports Mr. Green's claim of actual innocence under *Schlup* is evidence that his conviction was due to and part of a pattern of police and prosecutorial misconduct. Crimes allegedly committed by **William Dillon, Wilton Dedge, and Juan Ramos** were investigated by the BCSO and prosecuted by White—the very same law enforcement officials involved in Mr. Green's prosecution—and each has been exonerated under circumstances nearly identical to the unconstitutional actions

[22] Ex. 126.
[23] 2000 FDLE Firearms Report, attached as Ex. 130.

in this case.[24]

This distinct pattern of prosecutorial misconduct includes: (1) the suppression of exculpatory evidence; (2) the knowing use of perjured testimony, later recanted, obtained by feeding information to informants and offering vague assistance in exchange for false testimony; (3) the use of unreliable dog-tracking evidence; (4) the reliance on evidence that cannot be scientifically linked to the accused; (5) the intentional disregard of glaring discrepancies in witness identifications; and (6) the disregard of a lack of fingerprint or other evidence linking the defendants to the crime. The facts of these related cases demonstrate that the unconstitutional conduct in Mr. Green's case was no aberration. This pattern of prosecutorial and police misconduct should be considered as part of the totality of the circumstances supporting Mr. Green's actual innocence claim.

a. Wilton Dedge.

Like Mr. Green, as a result of Brevard County prosecutorial and police misconduct, Wilton Dedge was incarcerated for over 20 years for a crime he did not commit. In December 1981, a young woman was raped in her home. Like Mr. Green, Mr. Dedge did not fit the description of the perpetrator given to police by the victim, who described her attacker as about six feet tall, weighing between 160 and 200 pounds. Mr. Dedge was five feet five

[24] In fact, Mr. Dillon and Mr. Dedge have been awarded over $4 million in compensation by the State of Florida as a direct result of their wrongful incarceration at the hands of White. Aaron Deslatte, "Scott apologizes, signs bill giving William Dillon $1.35M," Orlando Sentinel, Mar. 1, 2012; Armen H. Merjian, *Anatomy Of A Wrongful Conviction: State v. Dedge And What It Tells Us About Our Flawed Criminal Justice System*, 13 Univ. of Pennsylvania Journal of Law and Social Change 137, 164 (2009–10). See also *After Innocence* (Showtime Independent Films 2005), a film that reviews Mr. Dedge's story and includes video of White's arguments.

inches tall and 125 pounds.[25] Just like in Mr. Green's case, the victim identified Mr. Dedge as the perpetrator out of a photo lineup.[26]

At Mr. Dedge's first trial, White repeatedly referred to a hair found at the crime scene as being the rapist's and asserted that it belonged to Mr. Dedge.[27] Like White's assertions about the shoeprints during Mr. Green's trial, White made these statements of purported fact despite the absence of scientific evidence tying it to Mr. Dedge. The prosecution's expert only presented hair analysis results at trial that could not exclude Mr. Dedge.[28] Yet, White argued to the jury that the hair was "identical in every single respect" to Dedge's.[29] As in Mr. Green's case, dog-tracking evidence was used to tie Mr. Dedge to the crime, with a dog tracker testifying that his dog found Mr. Dedge's scent in the victim's bedroom.[30] The jury convicted Mr. Dedge, but the Fifth District Court of Appeals reversed.[31]

On re-trial, DNA testing of the hair—relied on so heavily at the first trial by White—demonstrated that it was not Mr. Dedge's. But rather than concede that Mr. Dedge was innocent, White presented new evidence to secure Mr. Dedge's conviction. As he did with Laymen Layne in Mr. Green's case, White used the testimony of a jailhouse informant to buttress his case as it was being re-examined. Clarence Zacke, a seven-time convicted felon, was placed in a prison transport van alone with Mr. Dedge. Zacke then testified that Mr.

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[25] *Dedge v. State*, 442 So. 2d 429, 430 (Fla. Dist. Ct. App. 1983).
[26] Leonora LaPeter, *Guilty Until Proven Innocent*, St. Petersburg Times, Nov. 14, 2004, available at http://www.sptimes.com/2004/11/14/State/Guilty_imtil_proven-i.shtml; *see also* http://www.innocenceproject.org/Content/Wilton_Dedge.php.
[27] Trial Transcript at 403-04, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. Aug. 22, 1984) (hereinafter Dedge 1984 Transcript).
[28] *Dedge*, 442 So. 2d at 430.
[29] Dedge 1984 Transcript at 1659-60.
[30] *Dedge*, 442 So. 2d at 430.
[31] *Id.*

Dedge confessed to the rape.[32] Mr. Dedge was again convicted by jury. Like Sheila Green, Zacke later admitted that he had hoped to receive parole in exchange for testifying.[33] After serving 22 years in prison, Mr. Dedge was finally exonerated in 2004, following court-ordered DNA testing of swabs from the rape kit that proved that he was not the rapist.[34]

b. William Dillon.

In December 2008, the Brevard County State Attorney's Office dropped all charges against Mr. Dillon for the 1981 murder of James Dvorak after Mr. Dillon, like Mr. Green, spent more than 20 years in prison for a crime that he did not commit. As in Mr. Green's case, the initial description of the suspect did not match Mr. Dillon. The suspect was described as six feet tall with a mustache; Mr. Dillon is six feet four inches tall and physically unable to grow a mustache.[35]

The misconduct that led to Mr. Dillon's conviction included false and later recanted testimony from a former girlfriend, Donna Parrish, who was threatened with 25 years in jail if she did not implicate Mr. Dillon. At trial, Parrish testified that she was with Mr. Dillon on the night of the crime and saw him standing over the victim's body wearing a yellow t-shirt. Like Sheila Green, Parrish later recanted her testimony under oath.[36] Another witness put forth by White, jailhouse informant Roger Dale Chapman, falsely testified that Mr. Dillon confessed to him while in jail. BCSO Investigator Thom Fair, who was in charge of the

[32] Dedge 1984 Transcript at 1210-14.
[33] *Id*. at 1220.
[34] Merjian *supra*, note 27.
[35] Mot. for Postconviction Relief and to Vacate Judgment and Sentence Pursuant to Fla. R. Crim. Proc. 3.850 at 7, 21, *State v. Dillon*, No. 05-1981-CF-001796-AXXX (Fla. Cir. Ct. Dec. 10, 2008); Nolle Prosequi, *State v. Dillon*, No. 05-1981-CF-001796-AXXX (Fla. Cir. Ct. Dec. 10, 2008).
[36] *Id.* at 16–17.

photo line-up that resulted in Mr. Green's identification and who testified at Mr. Green's trial, told Chapman that Mr. Dillon was their "fall guy."[37] Chapman later admitted that he agreed to testify falsely in exchange for the dismissal of a rape charge.[38]

Finally, a BCSO dog tracker testified at Mr. Dillon's trial that his dog tracked Mr. Dillon's scent across State Road A1A to the murder scene and then linked Mr. Dillon to a bloody t-shirt. The judge that presided over Mr. Dillon's trial later described the dog scent evidence as "troubling," "flimsy," and "poor."[39] Mr. Dillon was exonerated in 2008 following court-ordered DNA testing of the yellow t-shirt, proving that he was not guilty.

c. Juan Ramos.

Like Mr. Green, Mr. Ramos spent years on death row for a crime he did not commit. Mr. Ramos was arrested in 1982 for the rape and murder of his neighbor—even though no physical evidence linked him to the crime scene. Like Mr. Green, dog-tracking testimony was the only evidence tying Mr. Ramos to the crime; nevertheless, he was convicted by a jury and sentenced to death.[40] After four years on death row, the Florida Supreme Court reversed Ramos's conviction, citing the unreliability of the dog-tracking evidence.[41] At a

[37] Seth Miller, "More About Snitch Testimony in Dillon," Plain Error (Nov. 5, 2009, 10:50 a.m.), available at http://floridainnocence.org/content/?p=1586. White's repeated use of informants to provide false testimony was also evident in another case—this one resulting in execution rather than exoneration. In *State v. Stano*, evidence was introduced in the form of a sworn affidavit of journalist Nash S. Rosenblatt that Clarence Zacke, who falsely testified that Stano had confessed to murder, did so at the request of White who visited Zacke and told Zacke what to say. According to the Rosenblatt affidavit Zacke admitted that "his trial testimony against Mr. Stano was what the prosecutors wanted him to say, and the prosecutors knew that the testimony was not true." Brief of Appellant, *State v. Stano* at pp. 21-22, No. 92614 (Fla. March 20, 1998).
[38] *Id*. at 10, 22; "More About Snitch Testimony in Dillon," http://floridainnocence.org/content/?p=1586.
[39] John A. Torres, *Dog handler led to bad evidence*, Florida Today (June 21, 2009), available at http://florida-issues.blogspot.com/2009/06/dog-handler-led-t-bad-evidence.html.
[40] *Ramos v. State*, 496 So. 2d 121, 122 (Fla. 1986).
[41] *Id*.

retrial, with no other evidence connecting him to the crime, Ramos was acquitted.[42]

4. Mr. Green's Post-Conviction Proceedings.

White's pattern of using false testimony to secure convictions of innocent men did not stop at Mr. Green's trial, but continued through his post-conviction proceedings. Faced with the recantations of all three of the State's confession witnesses, the State sought to introduce new evidence of Mr. Green's guilt during the Rule 3.851 post-conviction evidentiary hearing. The trial court denied Mr. Green's original post-conviction motion based on these recantations because the State supposedly discovered post-trial that Mr. Green had confessed to a fourth witness—Laymen Layne.[43]

During Mr. Green's first post-conviction evidentiary hearing, Laymen Layne testified that Mr. Green confessed to him on the night Flynn was killed. Layne "came forward" for the first time in 1999—ten years after the crime. In fact, Layne had recently been convicted of aggravated assault and operating a chop shop, and also admitted to three or four other felony convictions.[44] The post-conviction court relied on Layne's testimony in denying Mr. Green a new trial.[45] However, Layne, like every other prosecution witness that had testified as to a confession or admission by Mr. Green, recanted his testimony in 2009, stating that he had been offered assistance by the State in a civil custody dispute.[46]

In a 2009 evidentiary hearing, even after being warned by the judge that he could face

[42] Amended Petition Pursuant to Victims of Wrongful Incarceration Compensation Act at 1–2, *State v. Ramos*, No. 82-01321-CF-A (Fla. Cir. Ct. Oct. 20, 2010)
[43] The false testimony of Laymen Layne during post-conviction evidentiary hearings was raised in Mr. Green's successive §3.850 motion, as well as his §3.851 motion.
[44] Ex. 56-B at 149:9-20.
[45] Ex. 1 at 27-28.
[46] Ex. 58

perjury charges, Mr. Layne recanted his false testimony against Mr. Green.[47] Mr. Layne also testified that someone from the Brevard County State's Attorney's Office ("one of the State people") offered to reduce his jail time if he gave false testimony.[48] With Layne's recantation, *every single witness who testified* that Mr. Green confessed to him or her has recanted that testimony, citing police or prosecutorial coercion as the reason he or she originally lied about a confession.

Another piece of evidence the State introduced in Mr. Green's first post-conviction proceeding was mitochondrial DNA evidence relating to vacuumings collected from Flynn's

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[47] Ex. 128 at 25:7-9; 22:10-19:

Q. Did Crosley Green ever, ever confess to you that he had shot anybody?
A. No."

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Q. Did there come a point in time when you came into this courthouse and provided testimony at an evidentiary hearing in Crosley Green's case?
A. Yes.
Q. And did you provide truthful testimony then?
A. No.
Q. And what were you expecting at that time?
A. Time cut off.

[48] Ex. 128 at 30:8-31:10:

Q. Now, in your testimony before this Court before, did the State promise you anything about a reduction in any sentence or anything? Did anyone from the State, State Attorney's office, myself, Mr. White –
A. Somebody said they was going to help me with my sentence.
Q. Who said that?
A. One of the State representatives was going to help me with my time.
Q. Who?
A. I don't remember who it was. It was one of the State people.
Q. Well, was it myself?
A. I don't remember.
Q. Was it Mr. White? We're running out of State Attorneys that were in that proceeding. Did you get any benefit from your testimony? Did somebody come along later and change your sentence?
A. No.
Q. Couldn't it be that you just thought maybe somebody might help you down the road, not that anyone promised you anything?
A. No. I know Crosley Green did not shoot that person. Period. He did not say it.
Q. Although you said it to FDLE at the Titusville Police Department; correct?
A. They promised me to help me out. He did not shoot that guy.

truck in 1989, which allegedly contained two dark brown hairs and one fragment of the same type, typical of "Negroid" body hair. Just as it did in the **Wilton Dedge** case, the State claimed that the mitochondrial DNA ("mtDNA") *matched* Mr. Green's mtDNA. In fact, the State's own expert and Mr. Green's expert both testified that the mtDNA testing merely showed—exactly like the ***Dedge*** case—that Mr. Green *could not be excluded* as a source of the hairs and that any number of persons could have been the source, including any of Mr. Green's maternal relatives and a significant, but unrelated portion of the population.[49] In addition, evidence was presented that Mr. Green's brother, O'Conner Green, had been in and even driven Flynn's truck shortly before Flynn's death.[50]

GROUNDS FOR RELIEF

II. GROUND ONE: MR. GREEN WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS BY THE STATE'S SUPPRESSION OF EXCULPATORY AND IMPEACHMENT EVIDENCE AND ITS KNOWING RELIANCE ON FALSE TESTIMONY

The State improperly suppressed exculpatory evidence that showed that Mr. Green did not kill Flynn, as well as other evidence impeaching the testimony of key prosecution witnesses, in violation of *Brady*, which was clearly established federal law at the time of Mr. Green's trial. Moreover, in its unbridled efforts to obtain Mr. Green's conviction, the State knowingly relied on false testimony by its key witnesses in violation of *Giglio v. United States*, 405 U.S. 150, 153–54 (1972).

[49] Ex. 63-B at 101:15-23, 146:12-20; Ex. 64 at 235.
[50] Ex. 54. It was discovered by BCSO sometime on April 4, before Hallock identified Crosley Green as the "black guy," that O'Conner Green had a solid alibi for the time of the murder—he was at a club with 35 people. Ex.68-C at 70.

A. The State Suppressed Exculpatory and Impeachment Evidence

"[T]he suppression by the prosecution of evidence favorable to an accused upon request 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." *Brady*, 373 U.S. at 87. "The duty to disclose exculpatory evidence is applicable even in the absence of a request by the defendant, and it encompasses impeachment material as well as exculpatory evidence." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1309 (11th Cir. 2005). "The *Brady* rule applies to evidence possessed by the prosecution team, which includes both the investigators and prosecutors," regardless of whether one or the other did not know of the evidence. *Stephens v. Hall*, 407 F.3d 1195, 1203 (11th Cir. 2005); *accord Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

"There are three components of a *Brady* violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). "The prejudice or materiality requirement is satisfied if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Hammond v. Hall*, 586 F.3d 1289, 1305 (11th Cir. 2009) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Importantly, the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *United States v. Lyons*, 352 F. Supp. 2d 1231, 1244 (M.D. Fla. 2004) ("The test

is whether the undisclosed evidence 'undermines confidence in the outcome of the trial.'" (quoting *Kyles*, 514 U.S. at 434)). Further, this Court has held that the standard for materiality is less stringent if the State knowingly used perjured testimony or failed to correct testimony it learned was false. In such cases, "the test is whether it is reasonably likely that the falsehood *could* have affected the jury's verdict." *Lyons*, 352 F. Supp. 2d at 1244 (quoting *United States v. Arnold*, 117 F.3d 1308, 1315 (11th Cir. 1997)) (emphasis added).

1. The State Improperly Suppressed Exculpatory Evidence Contradicting Hallock's Account of The Crime, Including Evidence from First Responders

The State withheld evidence from the defense that the police officers who first responded to the crime scene independently concluded early that morning that Hallock's description of events lacked credibility and that it was she, not "a black guy," who killed Flynn. The first police responders, Sergeant Clarke and Deputy Rixey, each concluded at the time, *and maintain their conclusions to this day*, that Hallock shot Flynn.[51] They based their conclusions on observations of Hallock's demeanor and behavior the night of the murder; inconsistencies in her description of events; the crime scene evidence; and the behavior and statements of Flynn, who refused to identify or describe his killer.[52]

Clarke and Rixey both told White that they believed Hallock killed Flynn.[53] These experienced officers, and percipient witnesses to fresh evidence—including the lone eye-witness' statements and behavior—identified Hallock as the prime suspect for the murder, in part because they believed that her statements to police were incredible based on the

[51] Exs. 21, 25, 28.
[52] Ex. 28.
[53] Ex. 28.

evidence. Clarke and Rixey related their views to others in authority—including White—to facilitate the investigation and prosecution. White, however, did not disclose the exculpatory investigatory conclusions of these experienced officers—including his own handwritten notes reflecting their statements—to the defense.

This evidence is clearly substantial exculpatory evidence and could have been used to impeach testimony offered by the State to convict Mr. Green, including the trial testimony of Hallock, the State's star witness. *See Strickler*, 527 U.S. at 281–82. The State's failure to disclose information that could have been used to impeach key witnesses and support the defense theory that Mr. Green was not the culprit is material, exculpatory, and prejudicial to the defendant in violation of *Brady*. This is particularly so where, as here, the prosecution's case is circumstantial and based chiefly on one witness, whose trial testimony would have otherwise been devastatingly exposed to impeachment by the exculpatory evidence that the State failed to disclose. *See Monroe v. Angelone*, 323 F.3d 286, 312–15 (4th Cir. 2003); *see also Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 832–33 (10th Cir. 1995) (granting relief where evidence relating to another suspect was not disclosed). While the prosecution is always required to disclose impeachment material if it relates to the credibility of a witness, *Haber v. Wainwright*, 756 F.2d 1520, 1523 (11th Cir. 1985), the failure to do so is further exacerbated where, as here, the State withheld information exposing Hallock's motivation to lie. *Killian v. Poole*, 282 F.3d 1204, 1209–10 (9th Cir. 2002) (finding a *Brady* violation where undisclosed evidence indicated that a key prosecution witness had a strong motivation to lie); *Nuckols v. Gibson*, 233 F.3d 1261, 1265–67 (10th Cir. 2000) (same).

Moreover, White's failure to disclose his notes alone was a *Brady* violation. White's

notes are not attorney work product and thus should have been disclosed. Indeed, courts have consistently found that a prosecutor's notes containing exculpatory information are *per se Brady* material. *See Paradis v. Arave*, 240 F.3d 1169, 1173 (9th Cir. 2001) (finding a *Brady* violation where the prosecutor withheld notes from a meeting with police containing information that would have been useful to the defense).[54]

The state post-conviction court pointed to no evidence supporting its finding that Parker knew Clarke's and Rixey's conclusions at the time of trial.[55] White's notes were only obtained through the post-conviction Chapter 119 process,[56] and only after the State wrongly claimed that the notes were exempt from disclosure and the state post-conviction court determined *in camera* that the notes were potential *Brady* material. The post-conviction court's finding that Parker knew of the evidence regarding Clark's and Rixey's conclusions at the time of trial was "based on an unreasonable determination of the facts in light of the evidence presented" to the court and does not deserve this court's deference. *See* 28 U.S.C. § 2254(d)(2). The State's failure to turn over White's notes, and in particular the conclusions of Clarke and Rixey contained therein, was a violation of *Brady*, which was clearly established Supreme Court law at the time of Mr. Green's trial.

There is more than "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Hammond*, 586 F.3d at

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[54] *See United States v. Service Deli Inc.*, 151 F.3d 938, 943 (9th Cir. 1998) (same); *see also United States v. Park*, 319 F. Supp. 2d 1177, 1179 (D. Guam 2004); *Rickman v. Dutton*, 864 F. Supp. 686, 706 (M.D. Tenn. 1994) (finding that withholding prosecutor's file containing documents concerning a key prosecution witness's motivation to lie at the defendant's trial was a *Brady* violation), *aff'd on other grounds*, 131 F.3d 1150 (6th Cir. 1997).

[55] Order 31–32 (July 22, 2002) (Ex. 68).

[56] Fla. Stat. § 119 governs public records. Mr. Green's prior post-conviction counsel filed requests for these and other public records during his first State post-conviction proceedings.

1305(internal citations omitted). Rixey actually testified at trial, but was never asked about his crime scene observations or conclusion that Hallock had shot Flynn. One can only imagine the cross-examination of Officer Rixey if White's notes had been disclosed to Mr. Green's counsel. Disclosure of these statements before trial would have also allowed the defense to further develop the evidence of Mr. Green's innocence and the theory that Hallock, and not Mr. Green, was responsible for the murder. *See Bagley*, 473 U.S. at 683 (noting that a court should consider how lack of disclosure affected defendant's ability to prepare or present case); *see also Leka v. Portuondo*, 257 F.3d 89, 106 (2d Cir. 2001) (finding a *Brady* violation where undisclosed material would have had a "seismic impact" at trial). Indeed, this improperly suppressed evidence "'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Stephens*, 407 F.3d at 1203.

2. The State Improperly Suppressed Evidence Impeaching the Testimony of Key Prosecution Witnesses

The State withheld other evidence that would have squarely impeached the testimony of the key witnesses implicating Mr. Green in the murder. This likewise deprived Mr. Green of a fair trial and due process of law. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("[I]t is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

a. The State Improperly Suppressed Evidence Impeaching Hallock, Including Evidence that She Was Responsible For the Murder

The improperly suppressed contemporaneous statements from the first responders to the crime scene, concluding that Hallock was responsible for the murder, was not only

exculpatory, but it was also impeachment evidence against Hallock. *See United States v. Rivera Pedin*, 861 F.2d 1522, 1529 (11th Cir. 1988) ("We have applied the holding of *Napue* and its progeny to situations in which the prosecutor has knowingly permitted a witness to conceal, through false testimony, the witness' bias against the defendant."); *see also Haber*, 756 F.2d at 1523 (requiring evidence of a witness's credibility to be disclosed); *Simmons v. Beard*, 590 F.3d 223, 234 (3d Cir. 2009) (noting that suppressed evidence is material where "it calls into question the credibility of the . . . witnesses at the heart of the case"). Moreover, the State failed to maintain or disclose the audio tape of Hallock's 911 call shortly after the murder, which would have also served as key impeachment evidence against her. Inexplicably, the night before the State was to produce the tape to the defense, it was "somehow . . . gone" from police custody.[57] Whether or not the State's failure to maintain the tape was willful, the State's failure to produce or even describe this material evidence—which could both corroborate the investigatory conclusions of first responders that Hallock and not Mr. Green was responsible for the murder, and serve as critical evidence to impeach Hallock's testimony—deprived Mr. Green of his constitutional rights to a fair trial. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).[58]

That a transcript was provided instead of the tape does not remedy the constitutional violation. First, Hallock's demeanor during the call was crucial to evaluating her credibility; the jury was entitled to evaluate her demeanor as she provided her contemporaneous

[57] T. 649:10-15.

[58] Although the suppression of evidence such as the 911 tape constitutes a Brady violation "irrespective of the good faith or bad faith of the prosecution," *Brady v. Maryland*, 373 U.S. 83, 87 (1963), there is substantial evidence that the State acted in bad faith in "losing" the 911 tape. The timing of the loss the day before the tape was to be provided to defense counsel, the history of police misconduct in Brevard County, as well as other circumstances surrounding the investigation and prosecution of Mr. Green, strongly suggest bad faith.

description of the killing for the well-known indications of dissembling that make live testimony the centerpiece of our justice system. *See, e.g.*, *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) ("[O]nly the [trier of fact] can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."); *United States v. Deverso*, 518 F.3d 1250, 1258 (11th Cir. 2008). Second, because of circumstances indicating bad faith on the part of the State, one may not assume that the transcript accurately and completely reflected Hallock's call. *See Zeigler v. Crosby*, 345 F.3d 1300, 1305 n.4 (11th Cir. 2003).

The prosecution also failed to disclose the audio recording of Hallock recounting her story to Flynn's father soon after Flynn was killed, which was turned over to the BCSO on April 27, 1989.[59] The recorded statements differ materially from Hallock's police interviews, deposition, and court testimony. Had the recording been disclosed, it could have been used to impeach Hallock's trial testimony on numerous material inconsistencies among her various statements, as well as between Hallock's statements and the physical evidence.

b. The State Improperly Suppressed Evidence Impeaching Key Prosecution Witnesses, Including Evidence of Inducements to Obtain Testimony

Evidence that the prosecution induced testimony is impeachment evidence and must be disclosed to the defense. *See, e.g.*, *Napue*, 360 U.S. at 270. When the reliability of a given witness might determine guilt or innocence, non-disclosure of evidence that could impeach that witness is a *Brady* violation. *See Haber*, 756 F.2d at 1523 (prosecution is

[59] Ex. 41. The beginning of the recording contains a voice self-identified as BCSO homicide detective Scott Nyquist, which proves that Flynn's father turned the recording over to police before Mr. Green's trial.

required to disclose impeachment material relating to witness's credibility); *see also Harris v. Lafler*, 553 F.3d 1028, 1033 (6th Cir. 2009) (relief warranted where promises to testifying witness in exchange for testimony not disclosed to the defense). Given the absence of any physical or direct evidence, there can be no doubt that the false testimony of Sheila Green, Lonnie Hillery, and Jerome Murray—stating that Mr. Green made statements that they perceived as confessions—was crucial to Mr. Green's conviction. Both Williams (White's co-counsel at Mr. Green's trial) and Parker (defense counsel) have stated post-trial that these witnesses' "confession" evidence secured Mr. Green's conviction. Further, Juror Alma Jean Bloss stated that Sheila Green's testimony convinced the jury of Mr. Green's guilt. [60]

(1) Sheila Green

At trial, Sheila Green testified that her brother, Mr. Green, confessed to her that he killed a man, presumably Flynn.[61] This testimony was false and later recanted.[62] But the jury did not hear that police and prosecutors induced Sheila Green to testify against Mr. Green by threatening the loss of custody over her four young children.[63] Non-disclosure of the State's threats against a key prosecution witness to induce testimony is a clear violation of *Brady*. *See, e.g.*, *Beintema v. Everett*, No. 99-cv-35-J, 2001 WL 630512, at *20 (D. Wyo. Apr. 23, 2001) (granting relief where a police officer obtained testimony of a key witness by threatening prosecution of the witness's family). In addition, Sheila Green was awaiting sentencing on federal drug charges when she was asked to testify against her brother[64] and

[60] Bloss's statements are admissible under Federal Rule of Evidence 807.
[61] T. 856:10-858:9
[62] Ex. 48; Ex. 35-A at 18:19-19:4, 63:16-19, 64:18-19.
[63] *See* Ex. 35-A at 16:7-10, 21:21-24; Ex. 48.
[64] Grand Jury Indictment of O'Conner Bookert Green, *et al.*, attached as Ex. 43; T. 859; Ex. 35-A at 16:18-

was led to believe she would receive leniency if she cooperated. Yet the jury never heard about this.

Further, White afforded Ms. Green and Lonnie Hillery—a co-conspirator in her drug case, her fiancé, and the father of two of her children—special treatment in exchange for their testimony. First, White arranged for Ms. Green, a federal prisoner at the time, and Hillery to speak privately on the phone twice a week from his office.[65] Second, Ms. Green and Mr. Hillery were put in a room at the courthouse alone on the day they testified against Mr. Green. They were permitted to converse in private before either testified and again after Ms. Green testified but before Hillery testified, giving them ample opportunity to coordinate their testimony.[66] The jury never heard that White gave Sheila Green and Hillery special treatment, nor that they were alone together just before testifying against Mr. Green.

As Mr. Green's sister, Sheila Green's testimony was particularly damning, and many participants in Mr. Green's trial have indicated that it was her testimony that "strapped [Mr.] Green" to the electric chair.[67] Where, as here, the State withholds information of special treatment for a key witness in exchange for testimony, the petitioner is entitled to relief. *See, e.g.*, *Douglas v. Workman*, 560 F.3d 1156, 1176–83 (10th Cir. 2009) (finding a *Brady* violation where the prosecution did not disclose favorable treatment to its "linchpin" witness); *United States v. Boyd*, 55 F.3d 239, 244 (7th Cir. 1995) (new trial granted where

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17:21.

[65] Ex. 35-A at 22:3-17, 87:2-20.

[66] Ex. 35-A at 87:21-88:25. The fact that the prosecution in this case allowed Ms. Green and Hillery to communicate several times before Mr. Green's trial, particularly right before they both testified, makes this *Giglio* violation especially egregious. As this Court has recognized: "It is perfectly conceivable that desperate prisoners would cooperate with each other to polish up their stories . . . . It could be their only way to freedom." *Lyons*, 352 F. Supp. 2d at 1244 n.16.

[67] Ex. 36-B at 307:1-2.

prosecution suppressed the "continuous stream of unlawful" favors provided to key witnesses); *see also Sims v. Wyrick*, 552 F. Supp. 748, 767 (W.D. Mo. 1982) (granting relief where promises made to a key prosecution witness were concealed by the State).

(2) Lonnie Hillery

The jury also heard testimony from Sheila Green's then-fiancé, Lonnie Hillery, that on the night of the murder Mr. Green told Hillery that he "fucked up."[68] White induced Hillery to testify by threatening to take away Hillery's children, to re-prosecute him for drug charges, and to impose a lengthy jail sentence on Ms. Green, the mother of his children.[69] White also misled Hillery to believe that the State had found bloody clothing belonging to Mr. Green, though no such clothing has ever been found.[70] The jury never heard about the intermittent inducements and threats made by White in exchange for Hillery's testimony.

(3) Jerome Murray

The State never disclosed to the defense, and the jury never heard, that when key prosecution witness Jerome Murray met with White, there was a warrant outstanding for Murray's arrest and he thus felt compelled to cooperate.[71] Then, after Murray was arrested on that warrant, but before he testified at Mr. Green's trial, White urged Murray's release on bond.[72] This favorable treatment (or inducement), which clearly constitutes impeachment evidence, was never disclosed to the defense. In addition, the State failed to disclose evidence in its possession that Murray was a daily crack user when he allegedly heard Mr.

[68] T. 873:23.
[69] Ex. 44 at 19:1-6; Ex. 47; Ex. 35-A at 79:8-20.
[70] Ex. 47; Ex. 44 at 20:1-15, 31:1-5.
[71] Ex. 52 at 6:24-7:17.
[72] T. 1237:19-1238:1.

Green confess.[73] The prosecution violated *Brady* by withholding this crucial impeachment evidence from the defense.[74] *See Boyd*, 55 F.3d at 243-44 (new trial granted in part because prosecution failed to disclose information about key witness's drug use).

B. The State Knowingly and Improperly Relied on False Testimony

Besides withholding critical evidence, the prosecution elicited or allowed to go uncorrected critical false testimony from key witnesses in violation of *Giglio v. United States*, 405 U.S. 150, 153–54 (1972), which was also was clearly established at the time of Mr. Green's trial. "*Giglio* error, a species of *Brady* error, occurs when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." *Ford v. Hall*, 546 F.3d 1326, 1331 (11th Cir. 2008) (internal quotation marks omitted). To demonstrate a *Giglio* violation, the defendant "must point to specific facts establishing that the testimony was 1) used by the state, 2) false, 3) known by the state to be false, and 4) material to the guilt or innocence of the defendant." *Williams v. Griswald*, 743 F.2d 1533, 1542 (11th Cir. 1984). It is immaterial whether the prosecutors directly knew of the falsehood, because knowledge of the police is imputed to the prosecutors. *Kyles*, 514 U.S. at 438; *Williams*, 743 F.2d at 1542.

This Circuit has explained the standard for a new trial under *Giglio*:

> [T]he defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony *could have* affected the judgment of the jury." The "could have" standard requires a new trial unless the prosecution persuades the court that the false testimony was "harmless beyond a reasonable doubt." This standard favors granting relief. It is shaped by the realization that "deliberate deception of a court and jurors by the presentation of known false

[73] Ex. 50 at 17:23-24; Ex. 35-B at 124:4-7.
[74] T. 1241:19-24, 1256:22-1257:10.

evidence is incompatible with rudimentary demands of justice."

Smith v. Sec'y, Dept of Corr., 572 F.3d 1327, 1333 (11th Cir. 2009) (citations omitted) (emphasis added); *accord Lyons*, 352 F. Supp. 2d at 1244. "[T]he defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence." *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979).[75]

In Mr. Green's case, the prosecution elicited or failed to correct at least two types of testimony that it knew or should have known were false: (1) denials by key witnesses that they were induced by the State to testify against Mr. Green; and (2) substantive testimony regarding Mr. Green's alleged confession to the crime. Each type requires a new trial under *Giglio*. *See Williams*, 743 F.2d at 1542 (holding that denial of pressure to testify and substantive false testimony constitute two independent *Giglio* violations).

1. The State Knowingly and Improperly Relied on False Testimony from Various Witnesses that They Had Not Been Induced by the State to Testify

At trial, Sheila Green, Hillery, and Murray falsely testified that they had not been induced to testify against Mr. Green.[76] In fact, as the State well knew, these witnesses had been offered significant leniency in various pending legal matters, threatened with punishment, or both, if they did not testify. The failure to correct this false testimony is constitutional error requiring reversal. *See Williams*, 743 F.3d at 1543 (noting that undisclosed intimations that charges will either be brought or dropped depending on testimony support a constitutional claim under *Giglio*).

[75] Decisions by the former Fifth Circuit, issued before October 1, 1981, are binding as precedent in the Eleventh Circuit. *See Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).
[76] T. 860-61, 879-80, 1237:4-8.

With respect to Murray, not only did the prosecution fail to correct false testimony, but White intentionally emphasized it during his closing argument:

> WHITE: Jerome Murray is even harder for [Green] to explain because Jerome Murray has no real reason to tell us what he did unless it's just that that's what he heard. He wasn't offered any deals to get him to come in.[77]

Evidence that even one of the four witnesses to a murder was induced to testify against a defendant is sufficient to support a *Giglio* violation warranting reversal. *See Williams*, 743 F.2d at 1544. Here, every person who testified that Mr. Green had confessed to the crime was induced by the prosecution to do so, and the jury should have been informed of the complete circumstances by which the State secured their false testimony.

2. The State Knowingly Relied on False Testimony About The Confessions and Improper Communications with a Juror That It Knew or Should Have Known Were False

The State clearly relied on the false testimony of Ms. Green, Mr. Hillery, and Mr. Murray to convict Mr. Green. The pattern of police and prosecutorial misconduct in the **Dedge**, **Dillon,** and **Ramos** cases above is substantial evidence that the State knew it was relying on false testimony. The State also allowed Tim Curtis to testify that he could not identify the juror who had made a throat-slashing gesture in the courtroom parking lot during the trial, despite knowing that his testimony was false. Indeed, Curtis provided his perjured testimony at the State's behest, explaining later that he lied in court *at the direction of sheriff's office deputies.*[78] The police knew his testimony was perjurious, but the State let him offer it and made no attempt to correct it. *See Kyles*, 514 U.S. at 438 (imputing police's

[77] T. 1838:11-16.
[78] Ex. 54.

knowledge to State). Obviously, the false testimony was highly prejudicial. Curtis's truthful testimony would have resulted in a mistrial. The State's failure to correct the testimony thus violated Mr. Green's rights under *Brady* and *Giglio*.

III. GROUND TWO: MR. GREEN WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS BY THE TRIAL COURT'S FAILURE TO SUPPRESS HIS OUT-OF-COURT PHOTOGRAPHIC IDENTIFICATION AND LATER IN-COURT IDENTIFICATION

Mr. Green's conviction was a direct result of the unconstitutionally suggestive photographic lineup and the completely unreliable in-court identification by the alleged crime's only "witness," Hallock. The trial court's failure to suppress the identifications was error under clearly established federal law and denied Mr. Green due process and a fair trial. *See Foster v. California*, 394 U.S. 440, 442 (1969) ("[T]he conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law."); *see also United States v. Greene*, 704 F.3d 298, 306 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 419 (2013) ("Tainted identification evidence cannot be allowed to go to a jury because they are likely to accept it uncritically."). Indeed, a conviction based on eyewitness identification at trial after a pretrial photographic identification must be set aside when the "photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968).

A. The Photographic Lineup and The Manner in Which It Was Shown to Hallock Were Impermissibly Suggestive

Thom Fair, the BCSO investigator involved in the wrongful convictions of both **Mr. Dedge** and **Mr. Dillon**, conducted the photo line-up that led to Mr. Green's identification as

Flynn's murderer. Mr. Green's photo undeniably stands out from the other five used in the photo line-up shown to Hallock. It is smaller, has a lighter background, and Mr. Green is darker than the other five lighter-skinned individuals in the array. Moreover, it was placed in the top, center position. *See United States v. Saunders*, 501 F.3d 384, 390 (4th Cir. 2007) (concluding that a six-photo array was impermissibly suggestive: "Saunders's photo stood out sharply from the others in the array. The dark background and lack of overhead lighting in Saunders's photo distinguished it from the remaining five photos, all of which had light backgrounds and overhead lighting."); *see also United States v. Wiseman*, 172 F.3d 1196, 1209 (10th Cir. 1999) (quoting *United States v. Sanchez*, 24 F.3d 1259, 1262–63 (10th Cir. 1994) ("Common sense dictates that slight irregularities are more likely to 'jump out' at a witness reviewing a single sheet of paper with only six photographs on it than at a witness reviewing a large mug book containing hundreds of photographs. . . . The lower the number of photographs used by officers in a photo array, the closer the array must be scrutinized for suggestive irregularities.")).

The irregularity of Mr. Green's photograph is particularly problematic because his features are not clearly discernible as compared to the men in the other photographs. Hallock and others testified to how dark it was the night Flynn died—so dark that an individual's features were difficult, if not impossible, to see.[79] A viewer of the photographic lineup would be improperly biased toward Mr. Green's picture because the characteristics of his photograph recall the dark night of the crime, on which it was essentially impossible to see anything, let alone facial features. Given the stark contrast between the other photos' clarity

[79] T. 521:21-522:2; Ex. 13 at 19; Ex. 22 at 7:9-11; Exs. 21, 25.

and Mr. Green's photo's obscurity, it is no surprise that the suggestive photo array resulted in the misidentification of Mr. Green. *See Saunders*, 501 F.3d at 390 ("The risk of suggestiveness comes when one photo stands out . . . .").

Making the lineup that much more suggestive, the police told Hallock that their suspect was in the lineup before she viewed it.[80] *See Simmons*, 390 U.S. at 383 ("[The] chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.").[81]

Hallock tentatively indicated that Mr. Green's photo was that of the "black guy," saying she was "pretty sure" about her identification. It was only after repeated inquiry by the police that Hallock gave in and finally said she was "sure."[82] The police then told Hallock that she had identified their suspect,[83] which effectively precluded any chance of a legitimate, objective, in-court identification. *See Pineda Oliva*, 375 F. App'x at 698 (praise by detectives immediately after photo identification "effectively eliminated the persons in the remaining photographs and signaled to [the witness] that she had made the 'right' choice"); *Raheem*, 257 F.3d at 135 ("The defendant's protection against suggestive identification procedures encompasses not only the right to avoid methods that suggest the initial identification, but as well the right to avoid having suggestive methods transform a selection

[80] Ex. 18-A at 61:6-25, 65:10-15; Ex. 9 at 132:25–133:13, 134:23; T. 623:6-19, 755:23-756:7.
[81] *See also United States v. Lewin*, 900 F.2d 145, 149 (8th Cir. 1990) ("Telling the undercover officers that the photo spread contained the photographs of individuals who had been arrested . . . was impermissibly suggestive."); *Pineda Oliva v. Hedgpeth*, 375 F. App'x 697, 698 (9th Cir. 2010) (failure to inform the witness that the photographic lineup "might not contain a photograph of the suspect" contributed to the impermissibly suggestive identification, because the witness "thought she 'had to make a selection of one of these pictures'"); *Saunders*, 501 F.3d at 391 (police's suggestion that a suspect has been arrested might pressure a witness "to make an identification, even if he is not fully confident, for fear of jeopardizing the case against the arrested suspect").
[82] Ex. 18-A at 64:5-14; T. 624:3-11.
[83] T. 624:12-16.

that was only tentative into one that is positively certain.").

B. Hallock's Identification of Mr. Green Was Not Reliable

The impermissibly suggestive photographic lineup procedure compels this Court to assess the reliability of Hallock's identification of Mr. Green because "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). To pass constitutional muster, under the "totality of the circumstances," Hallock's identification of Mr. Green must be reliable notwithstanding the suggestive nature of the photographic lineup procedure. *See Neil v. Biggers*, 409 U.S. 188, 199 (1972). This assessment involves: (1) Hallock's opportunity to view the assailant during the crime; (2) her degree of attention; (3) the accuracy of her prior description of the assailant; (4) her level of certainty during the photographic lineup procedure; and (5) the length of time between the crime and her lineup identification. *See id.* at 199-200.

Hallock Had Little Opportunity To View The "Black Man" During The Crime. When taken together, the darkness of the crime scene, Hallock's mental state, and her testimony that she may have squarely seen the "black male's" face only for a brief ten to fifteen second period[84] with little or no light, strip away any degree of reliability with respect to her identification of Mr. Green. *See Wray v. Johnson*, 202 F.3d 515, 527 (2d Cir. 2000) ("Given the physical circumstances [e.g., 'it was dark out and it was shadows'] and the [police] officers' acknowledgement of their limited ability to see the gunman's face, the officers' identifications of the gunman as Wray cannot be considered strong.").

Hallock Paid Little Attention To The "Black Guy" During The Crime. Only hours

[84] Ex. 18-A at 46:18–48:21.

after Flynn was killed, Hallock told the police she was "really scared" and that she "really didn't even get a good look at [the 'black guy']."[85] *See United States v. Rogers*, 387 F.3d 925, 938-39 (7th Cir. 2004) (concluding that identification was unduly suggestive and unreliable and noting that the record "casts doubt on any attention that [was] paid to the man in the parking lot."); *United States v. Russell*, 532 F.2d 1063, 1066 (6th Cir. 1976) ("There is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation was made at a time of stress or excitement.").

Hallock's Description Of The "Black Guy" Does Not Come Close To Resembling Mr. Green. As addressed above, Hallock's initial description of the perpetrator is entirely inconsistent with Mr. Green's physical characteristics. *See United States v. Palmieri*, 623 F. Supp. 405, 409 (S.D.N.Y. 1985) (inaccurate description by witness was one factor in the Court's conclusion that witness's identification was not reliable); *see also Cossel v. Miller*, 229 F.3d 649, 655-56 (7th Cir. 2000) (reliability completely undermined because "Cossel does not fit the pre-identification description K.D. provided of her attacker.").

Hallock's Identification Of Mr. Green In The Photographic Lineup Was Tentative. After identifying the photograph of Mr. Green in the lineup, Hallock could tell police only that she was "pretty sure" that the photo depicted the "black guy" she saw at Holder Park.[86] It was only after she was asked several times by the police that she finally gave in and told

[85] Ex. 13 at 4, 12.
[86] Ex. 18-A at 64:5-14; T. 624:3-11.

police that she was sure she had identified the "black guy."[87]

IV. GROUND THREE: MR. GREEN'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE ADMISSION OF UNRELIABLE DOG-TRACKING EVIDENCE

Brevard County has a documented history of using dog-tracking evidence to wrongfully convict people. A key fact connecting the prosecutions of **Wilton Dedge, William Dillon, Juan Ramos, and Mr. Green** is that BCSO dog-tracking evidence was the only evidence linking the defendants to the crime scenes. Because the prejudicial effect of this evidence far outweighed any possible probative value, it should have been excluded. *See* Fed. R. Evid. 403; Fla. Stat. Ann. § 90.403. *United States v. Hale*, 422 U.S. 171, 176, (1975) (evidence "lack[ing] any significant probative value . . . must therefore be excluded"); *see also Old Chief v. United States*, 519 U.S. 172, 180-81 (1997) (unfair prejudice is "undue tendency to suggest decision on an improper basis," and prejudicial risk outweighs probative value where evidence might "weigh too much with the jury" and "so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge").

BCSO's problematic use of dog-tracking evidence in criminal cases around the time of Mr. Green's trial have now been well-documented. Florida Judge Gil Goshom tested the reliability of the BCSO's dogs' scent-tracking, concluding that tainted dog-tracking evidence has been used in many cases.[88] The judge testified by affidavit:

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[87] T. 624:12-16.

[88] Amended Petition Pursuant to Victims of Wrongful Incarceration Compensation Act at Attachment A ¶9, *State v. Ramos*, No. 82-01321-CF-A (Fla. Cir. Ct. Oct. 20, 2010).

> It is my belief that the only way [the BCSO dog tracker] could achieve the results he achieved in numerous other cases was having obtained information about the case prior to the scent tracking so that [the dog tracker] could lead the dog to the suspect or evidence in question. I believe that [the dog tracker] was regularly retained to confirm the State's preconceived notions about a case.[89]

At Mr. Green's trial, the State presented evidence that a police dog named "Zar" tracked Mr. Green's scent from the first of the two scenes, in Holder Park, to Mr. Green's sister's house.[90] To begin with, Zar was not even a tracking dog, but instead an all-purpose patrol dog.[91] It is also undisputed that Zar was not adequately trained in Variable Surface Tracking, a difficult technique requiring a dog to follow scents over different surfaces, including pavement, gravel, bare dirt, and sand (the very surfaces at issue here).[92] Moreover, the BCSO also took Zar to the second crime scene, the orange grove, but Zar could not gain a scent, let alone track anyone, even though there were fewer people at that location and the alleged perpetrator's tracks would have been fresher than at Holder Park.[93]

Zar's handler, Odell Kiser, essentially testified at trial that the dog had never made a mistake in test tracking.[94] Similarly, the director of dog training for the sheriff's office testified that Zar was one of the better dogs he had seen.[95] But discovery documents introduced at the post-conviction evidentiary hearing revealed that Zar ***did*** make mistakes and that the state attorney's office knew of them. Zar's records displayed many

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[89] John A. Torres and Jeff Schweers, *Dog handler led to bad evidence*, Florida Today, June 21, 2009. ,
[90] T. 1306:2-3, 1330:2-1333:9.
[91] Ex. 72 at 421:24-422:5.
[92] Ex. 72 at 417:5-419:10.
[93] Ex. 83 at 21-25.
[94] T. 1388:23-25, 1390-92, 1452.
[95] T. 1477.

unsatisfactory ratings and tracking mistakes, which were not revealed to the jury.[96] At the post-conviction hearing, Deputy Kiser admitted that Zar made "some mistakes" in test tracking.[97]

During post-conviction proceedings, dog-tracking expert, Dr. Warren Woodford, testified that the dog track in Mr. Green's case was extremely problematic for many reasons. First, a dog track originating from a footprint in sand is inherently unreliable.[98] Second, the Win Streak shoeprints from which the track originated sat in the sand too long before the track began to be a reliable starting point.[99] Third, a dog tracking in sand often follows the scent of the "critters" released in the sand, and not the human responsible for the footprints.[100] Fourth, older dogs are not reliable because they lose their sensing abilities with age.[101] Zar was nine or ten years old at the time of the track and, according to Dr. Woodford, too old to be reliable.[102] Fifth, Zar was not trained in tracking on different surfaces.[103]

Most important, Dr. Woodford testified that the dog track was unreliable because there was no "scent object," which Dr. Woodford called the "Achilles heel" of the track.[104] There was no actual object for the dog to learn the scent, only a footprint in the sand. Dr. Woodford testified that a track without a "scent object" is unreliable because one cannot discern what the dog is actually tracking.[105] In fact, during a second track around the park,

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[96] *E.g.*, Exs. 91-A, 91-B.
[97] Ex. 71 at 261:19-262:1.
[98] Ex. 72 at 413-414.
[99] Ex. 72 at 410:22-411:21.
[100] Ex. 72 at 410:22-411:21, 412:10-413:21.
[101] Ex. 72 at 416:2-15.
[102] Ex. 72 at 415:17-416:1.
[103] Ex. 72 at 417:6-14.
[104] Ex. 72 at 414:15-25, 436:19-22.
[105] Ex. 72 at 414:15-25, 436:19-22.

Zar walked right past where Flynn's truck would have been parked—where, according to Hallock, the "black guy" was located longer than he would have been when making the footprints where the track originated.[106] Dr. Woodford testified that it made no sense for the dog to do this if he was tracking the "black guy," and this example of Zar's behavior indicated contamination or that Zar was tracking something else.[107] And without a "scent object," the well-traveled nature of the sand dunes where the track originated made it nearly impossible to track a person.[108] Indeed, Zar's handler even admitted the possibility that "the track [he was] following was the track of someone who didn't commit the murder[.]"[109] The trial judge recognized the myriad problems with the dog-tracking evidence, but allowed it to be admitted anyway. Judge Antoon agreed that the State could not prove that the dog followed Mr. Green's tracks. He also noted that the State did not have tennis shoes that matched the shoe prints that were followed by the tracking dog.[110] Additionally, the trial judge pointed out that the witnesses, including Hallock, testified that the perpetrator was wearing work boots, not tennis shoes.[111] Finally, Judge Antoon stated that since no evidence connected the shoe prints to Mr. Green, the dog could have been tracking anyone.[112] The trial court improperly admitted the dog-tracking evidence, the State's only physical evidence linking Mr. Green to either crime scene, despite these factual discrepancies demonstrating its unreliability. *See United States v. Rozen*, 600 F.2d 494, 495–97 (5th Cir. 1979) (reversing

[106] Ex. 84.
[107] Ex. 72 at 433:25-434:19.
[108] Ex. 72 at 437:1-14.
[109] Ex. 71 at 288.
[110] T. 1363:13-18, 1364:14-19.
[111] T. 1367:13-17.
[112] T. 1363:13-18, 1364:14-19, 1363:13-18.

conviction where only evidence linking defendant to truck was dog-tracking evidence).

V. GROUND FOUR: MR. GREEN'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

Parker's myriad errors, failures, and deficiencies demonstrate that his performance in at least six areas, set forth below, fell well below the constitutional standards required by the Sixth and Fourteenth Amendments, and require that Mr. Green be granted relief. To obtain relief for Parker's ineffective assistance, Mr. Green must establish: (1) Parker's performance was deficient, and (2) Parker's deficient performance caused actual prejudice to Mr. Green. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both elements are satisfied here.

1. Parker's Failure To Investigate And Present Mr. Green's Alibi Constitutes Ineffective Assistance Of Counsel. During the evening of April 3 and the early morning hours of April 4, no fewer than ***ten*** people saw Mr. Green nearly two miles away from the orange grove when the crime was committed. Ten witnesses would have testified that Mr. Green was roving back and forth between the homes of Lori Rains and his cousin, Carleen Brothers, who lived within a block of each other in the housing projects in Mims.[113] But Parker failed to investigate and present this alibi evidence to the jury.

Where trial counsel undertakes to establish an alibi, but does not investigate available evidence or offer a strategic reason for failing to do so, his actions are unreasonable under the first prong of *Strickland*. *See Code v. Montgomery*, 799 F.2d 1481, 1483-84 (11th Cir. 1986) (failure to investigate potential alibi witness when relying on alibi defense is unreasonable); *see also Bigelow v. Haviland*, 582 F.3d 670, 670 (6th Cir. 2009) (counsel provided

[113] Ex. 49 at 3:14-28; Ex. 80 at 20:22-24:6.

ineffective assistance where "counsel could have uncovered [alibi] witnesses with minimal additional investigation").

In particular, Parker's failure to interview Tyrone Torres, Lori Rains, and Cheryl Anderson was inexcusable. The majority of federal appellate courts agree that "the refusal even to *interview* a witness with potentially exculpatory information cannot be considered 'strategic' and thus generally constitutes deficient performance." *Lopez v. Miller*, 915 F. Supp. 2d 373, 427 (E.D.N.Y. 2013); *see also Poindexter v. Booker*, 301 F. App'x 522, 528 (6th Cir. 2008).[114] Further, Parker clearly knew the identities of these witnesses and that they could support Mr. Green's alibi. The failure to contact known alibi witnesses clearly meets the first prong of *Strickland*. *See, e.g.*, *Grooms*, 923 F.2d at 90 (8th Cir. 1991) ("Once a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them to ascertain whether their testimony would aid the defense."); *see also Miller v. Singletary*, 958 F. Supp. 572, 577 (M.D. Fla. 1997) (considering importance of witness's testimony and the gravity of the charges, failure to interview witness was unreasonable); *Bryant v. Scott*, 28 F.3d 1411, 1417 (1994) (where trial counsel has contact information for an alibi witness, it is "incumbent" that he or she contact the witness).

First, Tyrone Torres was identified to Parker as an alibi witness by at least three people: Mr. Green, Carn, and Brothers. Torres was a close friend of Mr. Green's cousin, a

[114] *See also Pena-Martinez v. Duncan*, 112 F. App'x 113, 114 (2d Cir. 2004); *See Richards v. Quaterman*, 578 F. Supp. 2d 849, 870 (N.D. Tex. 2003), *aff'd*, 566 F.3d 553 (5th Cir. 2009) ("There is no excuse for [counsel's] failure to interview in advance of trial the important witnesses.") *Pavel v. Hollins*, 261 F.3d 210, 220-21 (2d Cir. 2001); *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1358–59 (4th Cir. 1992); *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991); *Lawrence v. Armontrout*, 900 F.2d 127, 129 (8th Cir. 1990); *Harris v. Reed*, 894 F.2d 871, 878–79 (7th Cir. 1990); *Crisp v. Duckworth*, 743 F.2d 580, 584 (7th Cir. 1984).

member of Mr. Green's community, and Mr. Green told Parker that his family would help Parker find anyone to whom he needed to speak. Nevertheless, *Parker never even attempted to interview Torres.*[115]

Second, though Mr. Green informed Parker that he had been at Lori Rains's at the time of the crime and Rains said the same in her police interview, *Parker never interviewed Rains*.[116] Parker testified during state post-conviction proceedings that he tried to find Rains, but his billing records confirmed that he tried only once and never followed up. Parker had a constitutional obligation to make diligent efforts to locate and interview her. *Berryman v. Morton*, 100 F.3d 1089, 1100 (3d Cir. 1996) (finding ineffective assistance where trial counsel's investigation of a key witness was limited to one attempt to subpoena that witness).

Third, *Parker never interviewed known alibi witness Cheryl Anderson*.[117] There is no reason to believe that she would not have testified at trial, and Parker had a constitutional obligation to seek her out. If Parker had interviewed these three known alibi witnesses, not only would he have secured testimony from all three that would have greatly benefited Mr. Green's defense, but he would have learned that still other people saw Mr. Green in the Mims projects when the crime occurred. Had Parker inquired, he would have learned from Torres or Rains that Wright, Peters, and Brown also saw Mr. Green at Rains's home that night and that all four of them remember that night.

2. Parker Was Constitutionally Ineffective For Failing To Present Available Alibi Witnesses. Although he knew of **six** alibi witnesses, two of whom were in the courtroom and

[115] Ex. 92.
[116] Ex. 36-B at 365:23-25.
[117] Ex. 92.

prepared to testify at trial, Parker presented only **one**—James Carn. Trial counsel's failure to call more alibi witnesses to support the credibility of a lone testifying alibi witness deprives a defendant of the right to effective counsel under *Strickland*. *See, e.g.*, *Tosh v. Lockhart*, 879 F.2d 412, 414 (8th Cir. 1989) (failure to present three additional alibi witnesses constituted ineffective assistance); *Montgomery v. Peterson*, 846 F.2d 407, 411–15 (7th Cir. 1988) (finding ineffective assistance of counsel where additional alibi witnesses were not called to testify); *Stewart v. Wolfenbarger*, 468 F.3d 338, 359 (6th Cir. 2006). Parker acknowledged in 2003 that Carleen Brothers's testimony was consistent with Carn's and that she would have testified that "the defendant could not have committed this particular crime because at the time that law enforcement officials determined this actually occurred, based on the circumstances, Mr. Crosley Green was at Ms. Brothers's home, which would be verified by Mr. Carn, and Ms. Brothers."[118] Parker's refusal to present this exculpatory evidence was objectively unreasonable and deficient under *Strickland*.

Mr. Green raised Parker's failure to investigate and present the alibi testimony of Carn, Brothers, and Rains during state post-conviction proceedings. Judge Jacobus found that Parker's decisions relating to this evidence were reasonable under *Strickland* in contravention of clearly established federal law, because it is well-established that failure of trial counsel to interview alibi witnesses is not a strategic choice:

[118] Ex. 36-A at 269-670:25-4.

> Where counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe that they would not be valuable in securing [the defendant's] release, counsel's inaction constitutes negligence, not trial strategy.

Workman v. Tate, 957 F.2d 1339, 1345 (6th Cir. 1992) (citations and quotations omitted).[119]

3. Parker Was Ineffective For Failing To Investigate And Present Evidence That Hallock May Have Committed The Crime. If Parker had interviewed Flynn's parents, friends, or coworkers, he would have learned that Hallock and Flynn had a tumultuous relationship, and that Hallock acted jealously before Flynn died.[120] According to Parker's billing records, the only person connected with Flynn to whom Parker spoke was Flynn's sister—a friend and colleague of Hallock's at the Brevard County Clerk's Office.[121] Parker's failure to investigate Hallock as a suspect was unreasonable and this deficiency was extremely prejudicial. *See Sanders v. Ratelle,* 21 F.3d 1446, 1457 (9th Cir. 1994) (finding ineffective assistance where counsel failed to investigate petitioner's "most important defense: that [another man] was the shooter" and instead pursued a mistaken identity

[119] *See also Bryant*, 28 F.3d at 1417-18 (failure to interview identified alibi witness is ineffective assistance of counsel, not a strategic choice, and is made more egregious by the seriousness of the offense and the gravity of the punishment); *Loyd v. Whitley*, 977 F.2d 149, 157 (5th Cir. 1992) ("[D]efense counsel's failure to pursue a crucial line of investigation in a capital murder case was not professionally reasonable."); *Raygoza v. Hulick*, 474 F.3d 958, 964-65 (7th Cir. 2007) (finding ineffective assistance where counsel interviewed and presented just one out of eight possible alibi witnesses and noting "[i]n a first-degree murder trial, it is almost impossible to see why a lawyer would not at least have investigated the alibi witnesses more thoroughly"); *Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6th Cir. 1987) (trial counsel's failure to investigate "a known and potentially important alibi witness" constitutes ineffective assistance of counsel); *Horton v. Zant*, 941 F.2d 1449, 1462 (1991) (a purportedly strategic decision is not objectively reasonable "when the attorney has failed to investigate his options and make a reasonable choice between them."); *Avery v. Prelesnik*, 548 F.3d 434, 438 (6th Cir. 2008) ("[T]he limitations on [the] investigation rendered it impossible for [trial counsel] to have made a 'strategic choice' not to have [the alibi witnesses] testify because he had no idea what they would have said."); *Garcia v. Portuondo*, 459 F. Supp. 2d 267, 287-88 (S.D.N.Y. 2006) ("[T]here is no reasonable trial strategy that would have excluded at least conducting interviews of the alibi witnesses to determine whether they could provide exculpatory evidence.").

[120] Ex. 8 at 1-2; Ex. 9 at 17:4-5; Ex. 14; T. 566, 631-632.

[121] Ex. 92 at 4.

defense); *see also Jones v. Jones*, 988 F. Supp. 1000, 1002 (E.D. La. 1997) ("Ineffectiveness of counsel is clear if the attorney fails to investigate a plausible line of defense or interview available witnesses. These can hardly be considered strategic choices since counsel by his failure has not obtained the facts upon which such a tactical decision could be reasonably made."); *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005 (the constitutional duty of trial counsel includes the obligation to investigate "*all witnesses* who may have information concerning his client's guilt or innocence.") (emphasis added); *accord Bryant*, 28 F.3d at 1419.

Parker, a former prosecutor, acknowledged his suspicion that Hallock shot Flynn.[122] But he never asked the jury to consider whether Hallock committed the crime. Nor did he ask Hallock whether she committed the murder. Parker did refer to the fact that Hallock was in love with Flynn and unhappy that Flynn was having sex with another woman,[123] but he did not suggest what the jury should infer from those facts.[124] Moreover, Juror Bloss's post-trial statements to a CBS reporter show that Parker never made it clear to the jury that Flynn was most likely shot with his own .22 revolver: "And I still don't know what caliber was actually shot into him, we never, as far as I can remember, they didn't never tell us what caliber actually killed him."[125] Where counsel believes someone else committed a crime, counsel is constitutionally deficient when he or she fails to introduce evidence to prove that fact. *See Richards*, 566 F.3d at 567–68; *see also Avila v. Galaza*, 297 F.3d 911, 916 (9th Cir. 2002) (counsel failed to put on evidence despite "strong belief" that defendant's brother committed

[122] Ex. 36-A at 253:13-256:8.
[123] T. 631-632:5.
[124] T. 1859, 1865.
[125] Ex. 69 at 4.

the crime).

4. Parker Failed to Investigate the Prosecution's Key Witnesses And Therefore Could Not Properly Impeach Them At Trial. Parker had a duty to investigate the prosecution's witnesses and discover evidence available to impeach their testimony. The many discrepancies among Hallock's statements to the police, to Flynn's father, in her deposition testimony, in her suppression hearing testimony, and in her trial testimony are recounted throughout this Memorandum and the Petition. Yet Parker failed to adequately investigate Hallock, to present her inconsistent statements to the jury, or to effectively confront her on cross-examination. "Faced with glaring and crucial discrepancies" in a witness's testimony, counsel's failure to confront the witness on cross-examination constitutes ineffective assistance. *Nixon v. Newsome*, 888 F.2d 112, 115–16 (11th Cir. 1989).

Moreover, had Parker conducted a proper investigation of the State's other key witnesses, he would have uncovered substantial material that could have been used to impeach the damning (and later recanted) testimony of Sheila Green and Lonnie Hillery. Nonetheless, Parker *neither interviewed nor deposed either of them*.[126] If Parker had spoken to them, he may have discovered the many problems surrounding their testimony. Parker's decision not to interview the witness that he himself characterized as the one that "strapped [Mr.] Green in" to the electric chair[127] cannot be considered sound trial strategy worthy of *Strickland* deference. *See Holsomback v. White*, 133 F.3d 1382, 1387–89 (11th Cir. 1998) (finding ineffective assistance for counsel's failure to interview two doctors who may have

[126] Ex. 36-B at 306:15-17; Ex. 92.
[127] Ex. 36-B at 307:1-2.

provided exculpatory testimony and finding that "[h]aving conducted no investigation into [the medical evidence]" the defense counsel "could not have made an informed tactical decision" regarding whether to call the doctors as witnesses).

Parker also failed to investigate and present evidence demonstrating that Jerome Murray had been convicted of multiple felonies and was likely a drug addict at the time he allegedly heard Mr. Green's "confession."[128] Parker apparently was aware that Murray had several felony convictions, but was unable to impeach Murray at Mr. Green's trial because Parker failed to obtain certified records of Murray's convictions. Parker could have obtained these records simply by making a telephone call.[129] In addition, Parker failed to discover that, at the time of Mr. Green's trial, Murray smoked crack cocaine every day.[130]

5. Parker Was Ineffective For Failing To Prepare And Present Independent Expert Testimony. Parker unequivocally believed that if he had requested the appointment of experts regarding ballistics and dog-tracking evidence, his requests would have been granted by the trial court.[131] Despite his certainty and the fact that experts would have greatly assisted in the preparation and presentation of evidence on crucial facts that contradicted the State's case, he never made those requests.[132] Where expert testimony would undermine the prosecution's case, counsel is ineffective for failing to secure an expert and offer such testimony. *See Draughon v. Dretke*, 427 F.3d 286, 294 (5th Cir. 2005) (finding counsel ineffective for failing to develop and present expert testimony establishing that bullet struck

[128] Ex. 51.
[129] Ex. 56-B at 90:14-91:4.
[130] Ex. 50 at 17:23-24; Ex. 35-B at 124:4-7.
[131] Ex. 36-A at 230:09-22.
[132] Ex. 36-A at 230:09-22.

ground before hitting victim where defendant was accused of intentional killing).

A ballistics expert would have been essential in demonstrating to the jury that Hallock's version of events could not have possibly been true. A ballistics expert would have told the jury that: (1) Flynn was most likely shot with his own gun; (2) the absence of gunshot residue on Flynn's hands and clothing demonstrate that he did not fire his gun that night as Hallock claims, and that he was not near an accidentally discharged semi-automatic weapon; and (3) the absence of fresh shell casings indicates that a semi-automatic weapon was not used. Multiple courts have found a failure to call a ballistics expert to be deficient. *See, e.g.*, *Draughon*, 427 F.3d at 294–96 (counsel was ineffective for failing to obtain a ballistics expert where the expert could have presented a strong case that the shooting did not occur in the manner testified to by the eyewitness); *see also*, *Soffar v. Dretke*, 368 F.3d 441, 478, *amended by*, 391 F.3d 703 (5th Cir. 2004) (finding ineffective assistance of counsel in part because counsel failed to retain a ballistics expert who would have told the jury that the crime scene evidence contradicted the prosecution's case). Parker also was ineffective for failing to obtain expert testimony and assistance relating to the dog-tracking evidence. Parker's failure to even seek a dog-tracking expert was objectively unreasonable.

6. Parker Was Ineffective For Failing To Challenge The Seating Of A Juror Whose Niece Had Been Murdered. Parker failed to challenge Juror Guiles, whose niece had recently been murdered.[133] Neither defense counsel nor the Court asked Juror Guiles any questions

[133] T. 118-120. During voir dire in jury selection, the following exchange took place:

about the murder of his niece. Parker did not seek to have him excused for cause on this basis and did not use a peremptory challenge to strike him, even though he had one available.[134] Parker later testified that he did not know why he did not ask any further questions of Guiles or challenge him for cause, but that he should have done so.[135]

When a defense counsel fails to exercise an available challenge during voir dire and thereby biases the jury, the defendant is left with a jury that "[can]not constitutionally convict" under *Strickland*. *Virgil v. Dretke*, 446 F.3d 598, 614 (5th Cir. 2006). To determine whether defense counsel provided effective assistance, the Eleventh Circuit has declared that a court should look to "whether the adversarial process at trial . . . worked adequately." *White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992). To this end, a defendant "ha[s] a right that his counsel make use of whatever strikes he is allotted . . . in a fashion that does not deprive him of his right to an impartial jury." *Haight v. Parker*, No. 3:02-cv-206, 2010 U.S. Dist. LEXIS 36158, at *12-13 n.2 (W.D. Ky. Apr. 12, 2010); *see also Virgil*, 446 F.3d at

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THE COURT: Have any of you been the victim of a crime or has any member of your immediate family been the victim of a crime?
MR. GUILES: My niece was murdered, but that's not immediate family.
THE COURT: How long ago was that?
MR. GUILES: Three years ago.
THE COURT: Three years ago?
MR. GUILES: (Nods head).
THE COURT: Where was it?
MR. GUILES: In Naples.
THE COURT: Would you able to set aside that?
MR. GUILES: Well, it doesn't seem like it's the same kind of thing.
THE COURT: Would you be able to set it aside and not let it affect this case?
MR. GUILES: Yes.

[134] Ex. 36-B at 235-239.
[135] Ex. 36-B at 235:22-236:6, 239:13-16. Parker acknowledged in his post-conviction deposition—with regard to a challenge for cause other than the one he had made based on pre-trial publicity—that: "I can tell you, if I didn't make a motion to excuse him for cause because of a family member, I should have. If I didn't, I can't tell you why." Ex. 36-B at 242:12-19.

613–14 (granting habeas relief to defendant convicted of bodily assault on an elderly person, in part because attorney failed to challenge a juror whose mother had been mugged).

7. The Cumulative Deficiencies Of Parker's Ineffective Assistance Prejudiced Mr. Green. As clear as Parker's individual deficiencies were, their cumulative prejudice to Mr. Green is even more apparent. Mr. Green need not show that it is more likely than not that each of Parker's errors on their own affected the outcome of his trial. *See Miller v. Singletary*, 958 F. Supp. 572, 578 (M.D. Fla. 1997). Rather, courts must assess the impact of counsel's errors in the aggregate. *See Strickland*, 466 U.S. at 695–96. The Eleventh Circuit has held that this assessment requires "a determination of whether reasonably effective assistance was rendered based upon the totality of the circumstances and the entire record." *Goodwin v. Balkcom*, 684 F.2d 794, 804 (11th Cir. 1982); *see also Foster v. Wolfenbarger*, 687 F.3d 702, 709 (6th Cir. 2012) ("When evaluating prejudice to the defendant, a reviewing court must take into account the totality of the circumstances . . . ." (citation and internal quotation marks omitted)); *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) ("Rather than evaluating each error in isolation, . . . the pattern of counsel's deficiencies must be considered in their totality.").

The state court was wrong when it evaluated in isolation the prejudice from each instance of Parker's ineffective assistance. Its decisions on this issue are thus contrary to and an unreasonable application of clearly established law under *Strickland*. Here, the evidence against Mr. Green was limited to testimony by Hallock, which Parker failed to adequately discredit; testimony of three witnesses alleging that Mr. Green spontaneously confessed to them, all of whom Parker failed to adequately investigate, and all of whom have now

recanted that testimony; and testimony regarding a faulty and illogical dog track, which Parker failed to counter with investigation or expert testimony. *See Foster*, 687 F.3d at 709 (finding ineffective assistance based in part on the weakness of the government's case, where no forensic evidence tying the defendant to the crime was recovered at the scene, and only one witness could identify the defendant as the person who committed the crime and her testimony at trial differed significantly from her physical description of the defendant to police). Viewed cumulatively, Parker's myriad errors at trial overwhelmingly prejudiced his client and thus violated the Sixth Amendment.

PRAYER FOR RELIEF

THEREFORE, Petitioner Green asks the Court to grant the following relief: that the Court find that Mr. Green's constitutional rights were violated in accordance with the grounds set forth in his Petition and this Memorandum in Support; that Mr. Green is entitled to an evidentiary hearing on any or all claims as appropriate; that Mr. Green's conviction on all counts be reversed and set aside; and any other relief to which Mr. Green is entitled.

Dated: March 26, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 26, 2014 the foregoing was filed using the CM/ECF system. I further certify that the foregoing document was mailed by first-class mail to Michael D. Crews, Secretary, Florida Department of Corrections, 501 South Calhoun Street, Tallahassee, Florida 32399, and to Donald Leavins, Warden, Hardee Correctional Institution, 6901 State Road 62, Bowling Green, Florida 33834.

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