

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96818

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DEBBIE CAUSSEAU

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CLERK, SUPREME COURT
BY [Signature]

TERRY MELVIN SIMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT/MOTION FOR STAY

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This morning, counsel for Mr. Sims filed a motion for stay of execution with this Court. Counsel requested that a briefing and argument schedule be entered that would allow a full and meaningful consideration of the merits rulings entered by the lower court on Mr. Sims' *Brady* and newly discovered evidence claims. The lower court found Sims's claims sufficiently meritorious to hold an evidentiary hearing, and, after the proof, the lower court entered merits rulings on Mr. Sims' claims. The instant brief—prepared without a record, without sleep, and under pressure--does not do justice to Mr. Sims' claims of innocence, to the flawed legal analysis applied below, or to the seriousness of the decisions this Court is now called upon to make. Counsel apologize for these failings.

Nevertheless, this brief is being filed because the Court has entered an order requiring it, and counsel fully intend to abide by this Court's orders. It is to be hoped that this brief further explicates for the Court the weight of Mr. Sims' claims and the need for a stay of execution and full briefing and argument.

I. INTRODUCTION

[T]he State's case against Sims was far from rock-solid. It was little more than a rickety conglomeration of two things: unbelievable "memories" retrieved through the superhuman "zoom" vision of mesmerized witnesses, and unreliable statements of drug-abusing codefendant-felons who faced near certain death if they did not please the prosecutor. * * * **Indeed, I have not the slightest particle of confidence in the outcome of this trial.**

Sims v. State, 602 So.2d 1253, 1259 (Fla. 1992)(Kogan, J., joined by Barkett, J., dissenting).

When Mr. Sims filed his motion for post-conviction relief in the trial court on October 21, 1999, two Justices of this Court had already lost all confidence in the State's "proof" of Mr. Sims's guilt. A federal district court had lost confidence in the outcome of the sentencing proceeding. *See Sims v. Singletary*, 155 F. 3d 1297 (11th Cir. 1998).

It was against the backdrop of these reasoned judicial conclusions, and Mr. Sims's consistent 21-year assertion that he is innocent of the murder of George Pfeil, that Mr. Sims presented the lower court with new and compelling evidence of innocence in support of two claims for post-conviction relief. The trial court was

required to consider Mr. Sims's newly discovered evidence, and did so.¹ However, the lower court did not consider the evidence in the manner required by law. To assess Mr. Sims' claims here, the trial court was obligated to conduct a "cumulative analysis" of the evidence "so that the trial court has a 'total picture' of the case." Lightbourne v. State, 24 Fla. L. Weekly S375, at *9.(Fla. July 8, 1999)(citing *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555 ("The fourth and final aspect of . . . materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item") and *State v. Parker*, 721 So. 2d 1147, 1151 (Fla. 1998)(conducting a cumulative analysis to evaluate a *Brady* claim)). The trial judge did not perform this task, and did not apply this legal standard, in this case. The "total picture" of the evidence in this case is not pretty, and the lower court erred.

Petitioner's un-rebutted evidence established, inter alia, that in the weeks immediately preceding the Longwood drugstore robbery, B.B. Halsell, Curtis Baldree, and TERRY WAYNE GAYLE were planning a drugstore robbery in the Orlando area. Harold Bryan testified that he was present at Halsell's apartment when

¹The lower court considered all of the evidence offered by Petitioner, either by way of affidavit, or through live testimony. The State says that counsel "played chicken" with the lower court and thus lost the opportunity to present evidence, but that is wrong. The lower court considered the evidence. What the lower court failed to do was enter a stay so that further evidence could be developed.

the three were planning the robbery. He wanted no part of it.

Clyde Oglesby testified by affidavit that Halsell recruited him for the robbery and pressured him to participate. Oglesby refused, and Halsell told him that Terry Sims had also refused to participate in the robbery.

Bryan, Oglesby, Walter Danny Morrison, and Jerry Lawrence, all testified² that either Halsell or Baldree or both had made statements indicating that Terry Gayle, not Terry Sims, committed the murder of George Pfeil. The trial court accepted this testimony as true. This evidence of innocence, as well as the fact that exculpatory evidence was withheld from the defense, whether viewed in light of the other evidence undermining confidence in the outcome of this case or not, requires relief.

Sims also presented evidence of a previously suppressed police report which contained the names of all these witnesses, *and* which revealed that Halsell had confessed to law enforcement officials that he had committed a series of drugstore burglaries with Terry Gayle, not Terry Sims, in the weeks preceding the murder here, *and* which revealed that he had been granted immunity for those crimes. Trial counsel, a former Sanford prosecutor, testified that this suppressed police document contained “our defense,” that he was stunned that he had not received it at trial, and

²Lawrence also testified by affidavit.

that it would have made a difference.

II. STATEMENT OF THE CASE

A. Procedural History

Terry Melvin Sims was convicted of first-degree murder on February 1, 1978, and sentenced to death by judicial electrocution on July 24, 1979. Upon timely appeal, the conviction and sentence were affirmed. *Sims v. State*, 444 So.2d 922 (Fla. 1984), *cert. denied*, *Sims v. Florida*, 467 U.S. 1246 (1984).

On July 24, 1986, Mr. Sims, through counsel, filed a Motion to Vacate Judgments and Sentence. The motion was filed in the Eighteenth Judicial Circuit, in and for Seminole County, Florida, pursuant to Florida Rules of Criminal Procedure Rule 3.850. On October 19, 1987, Mr. Sims, through counsel, separately filed an *Application for Relief Pursuant to Hitchcock v. Dugger* in the Supreme Court of Florida (case number 71,313). The latter claim was transferred to the Seminole County Circuit Court by order of the Florida Supreme Court on July 12, 1989.

Mr. Sims supplemented and amended his post-conviction relief motion. On February 18, 1991, after an evidentiary hearing, the circuit court denied relief. This Court affirmed. *Sims v. State*, 602 So.2d 1253 (1992), *cert. denied*, *Sims v. Florida*, 506 U.S. 1065 (Fla. 1993). Two Justices dissented, and would have granted Mr. Sims a new trial. *Id.*, 602 So.2d at 1258 (Kogan, J. and Barkett, C.J., dissenting).

In his initial post-conviction challenge Mr. Sims established that (1) the State used “a highly unorthodox, quirky, and suggestive form of hypnosis to ‘enhance’ the testimony of several key state eyewitnesses,” *Sims*, 602 So.2d at 1258 (Kogan, J., joined by Barket, J. dissenting); (2) “misstatements” by the prosecutor and B.B. Halsell misinformed the jury about the sentence Halsell would receive in exchange for his testimony, *Sims*, 602 So.2d at 1257 (majority opinion); and (3) that just before the Longwood robbery Terry Gayle purchased lock pullers that were used to steal the getaway car used by Mr. Sims’s codefendants. *Id.*

On February 25, 1993, Sims filed in this Court a *Petition for a Writ of Habeas Corpus*. This petition alleged numerous deficiencies in the state court’s appellate review of his case. The petition was denied. *Sims v. Singletary*, 622 So. 2d 980 (Fla. 1993).

On December 1, 1993, Mr. Sims filed a *Petition for a Writ of Habeas Corpus* pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Middle District of Florida. On August 22, 1997, the District Court entered an order denying relief as to the convictions and granting relief in part and vacating Mr. Sims’s death sentence.

The State appealed and Mr. Sims cross appealed, and on September 22, 1998, the United States Court of Appeals for the Eleventh Circuit entered an order affirming

the denial of relief as to the judgments of convictions and reversing the District Court's grant of relief as to the sentence of death. *Sims v. Singletary*, 155 F.3d 1297 (11th Cir. 1998); *reh'g denied*, *Sims v. Singletary*, 163 F.3d 1362 (11th Cir. 1998), *cert. denied sub nom.*, *Sims v. Moore*, ___ U.S. ___, 119 S.Ct. 2373 (1999).

Three months after the denial of certiorari, on September 23, 1999, the Governor of Florida signed a warrant for Mr. Sims's execution. The warden of Florida State Prison scheduled Mr. Sims's execution for October 26, 1999 at 7:00 a.m.

On September 28 and 29, 1999, Mr. Sims invoked his constitutional, statutory, and rule-based rights to post-warrant public records discovery pursuant to Article I, section 24, Florida Constitution; Chapter 119, Florida Statutes; Florida Rule of Criminal Procedure 3.852; *Brady v. Maryland*, 373 U.S. 83 (1963); and *Strickler v. Greene*, 119 S.Ct. 1936 (1999). Responses were due by October 8 and 9, 1999.

Following a status conference, on October 6, 1999, the trial court entered an order scheduling (a) a hearing on objections to Mr. Sims's public records requests (October 8, 1999), (b) the filing of other motions by Mr. Sims (October 12, 1999), and (c) a hearing on Mr. Sims's motions filed by the scheduled date (October 15-16, 1999).

A hearing was held on objections to Mr. Sims's public records requests, and

disclosures was ordered.

On October 12, 1999, Mr. Sims filed a motion to compel production of public records, and notice of inability to meet filing date and motion to modify scheduling order. These motions were summarily denied the same day, and Mr. Sims was given until 5:00 p.m. on October 13, 1999 to file additional motions. On October 13, 1999, Mr. Sims filed a notice of appeal of the orders entered the previous day.

Briefs and an application for a stay of execution were filed in this Court on October 15, 1999, and oral argument was held the next day. On October 21, 1999, this Court entered an order denying the relief requested by Mr. Sims's.

On October 21, 1999, the same day this Court affirmed the trial court's scheduling order and denial of Mr. Sims's motion to compel, Mr. Sims filed in the trial court a motion for post-conviction relief, and application for stay of execution. The motion presented two interrelated claims regarding Mr. Sims's innocence and the suppression of material exculpatory evidence by the State prior to trial.

On October 22, 1999, a telephonic scheduling hearing was held. The lower court set a *Huff* hearing for Saturday, October 23, 1999, and tentatively scheduled an evidentiary hearing for the following day.

On October 23, 1999, a *Huff* hearing was held at which both sides presented argument. Mr. Sims's counsel during his initial post-conviction proceeding informed

the court of how he obtained the records giving rise to the claims in the post-conviction motion, and Mr. Sims also amended and supplemented his pending post-conviction motion with the affidavit of Clyde Oglesby. Following a lunchtime recess, the trial court entered an order stating that Mr. Sims's claims merited an evidentiary hearing.

On October 24, 1999, an evidentiary hearing was held. At the beginning of the hearing, Mr. Sims again amended and supplemented his post-conviction motion with an affidavit, this time the affidavit of Jerry Lawrence. The trial court then heard testimony from four witnesses: Mark Rabinowitz and William Heffernan, Mr. Sims's trial attorneys; Harold Bryan and Walter Danny Morrison.

On October 24, 1999, the trial court entered orders denying post-conviction relief and denying a stay of execution. The court found that Mr. Sims's motion for post-conviction relief was timely filed, Order at 1 n. 2, and reached the merits of Mr. Sims's claims.

B. The Instant Motion and Evidentiary Hearing

Mr. Sims's presented the lower court with two interrelated claims. Claim One alleged that the State withheld from trial counsel a police report that contained information supporting the defense raised at trial that Terry Wayne Gayle, not Terry Sims was with B.B. Halsell and Curtis Baldree at the Longwood drugstore robbery,

and that Gayle, not Sims, shot Mr. Pfeil. The information contained in this report by Gainesville Police Department officer Homer McGilvray (hereinafter “McGilvray report”), was shared with the Seminole County Sheriff’s Department, the lead law enforcement agency investigating the Longwood robbery and shooting.

Claim Two was supported by affidavits from witnesses named in the McGilvray report.³ These witnesses gave sworn testimony, accepted as true by the trial court, that (1) Terry Gayle was involved in the planning of the Longwood robbery;⁴ (2) Terry Gayle and

III. ARGUMENT

A. The co-defendants lied

Mr. Sims presented the testimony of two witnesses (Harold Bryan and Danny Morrison) who swore that one of the co-defendants in the case -- B.B. Halsell -- admitted he had lied in court when he testified that Terry Sims had committed the crime; in fact, said Halsell, Terry Gayle committed the crime. Mr. Sims wished to present the testimony of two other witnesses—Clyde Oglesby (who swore by affidavit

³At the hearing, Mr. Sims withdrew the affidavit of Eston Bullard, whose name was not in the McGilvray report.

⁴In previous post-conviction proceedings, Mr. Sims established that the State withheld from the defense at trial information in the possession of the lead investigator showing that Gayle, with unindicted co-defendant Clarence Eugene Robinson, purchased lock pullers that were used to steal the getaway car.

that Halsell had said, “No, Sims wasn’t there”), and Jerry Lawrence (who swore by affidavit that Halsell said that Sims was not involved and that another co-defendant, Curtis Baldree, had “just shrugged” when accused of “lying on someone who was not even there.” The lower court believed that he did not have enough time to hear from these two witnesses, and so took their testimony by way of affidavit.

The lower court found this claim to be “troubling.” **The court concluded as a matter of fact that Halsell made these statements.** Order, note 4. The court also concluded that the evidence satisfied the standard for “newly discovered evidence.” *Id.* The court then went to the merits of the claim,⁵ and denied relief.

This requires considered briefing and argument in this Court for several reasons. First, the lower court accepted the State’s argument that the lower court could only consider the newly discovered evidence, and not the record as a whole, when resolving this claim. Thus, the lower court could not consider the problems with the evidence in this case that had led earlier post-conviction dissenters in this Court to conclude that a new trial was appropriate. *Sims v. State*, 602 So. 2d 1253, 1259 (Fla. 1992)(Kogan & Barkett, JJ., dissenting)(“Indeed, I have not the slightest

⁵The lower court rejected the State’s argument that this would not be admissible evidence on re-trial.

particle of confidence in the outcome of this trial.”). The lower court analyzed the newly discovered evidence only on the basis of the trial record, and not on the basis of evidence undermining confidence in the outcome: e.g., (1) the use of “a highly unorthodox, quirky, and suggestive form of hypnosis to ‘enhance’ the testimony of several key state eyewitnesses,” *Sims*, 602 So.2d at 1258 (Kogan, J., joined by Barket, J. dissenting); (2) “misstatements” by the prosecutor and B.B. Halsell that misinformed the jury about the sentence Halsell would receive in exchange for his testimony, *Sims*, 602 So.2d at 1257 (majority opinion); and (3) that just before the Longwood robbery Terry Gayle purchased lock pullers that were used to steal the getaway car used by Mr. Sims’s codefendants. *Id.* A thorough and sifting examination of the *entire* record, in light of the newly discovered evidence, is required by this Court’s, and Supreme Court, precedent, and full briefing and argument is essential to that inquiry. *Kyles v. Whitley*, 115 S.Ct. 1555, 1567 (1995); *Gunsby v. State*, 670 So.2d 920 (Fla. 1996); *Lightbourne v. State*, Case No. 89,526, 1999 WL 506961 (Fla. July, 8, 1999).

Second, the lower court erred by concluding that “the testimony of the other codefendant who testified at trial, Curtis Baldree, has not been attacked as untrue except to theorize that if Halsell said he was lying at trial Baldree must have lied too.” Order, p. 4. This is incorrect. The affidavit of Jerry Lawrence, accepted as

evidence by the lower court, contains a direct attack on Baldree's testimony. As noted above, Lawrence swore that Baldree had "shrugged" when accused of "snitch[ing] on someone who was not there."⁶

Third, the lower court concluded that there was substantial competent evidence to convict Sims even without the testimony of Halsell and Baldree. This is an

⁶Furthermore, counsel advised the lower court that additional affidavits would be forthcoming. At 6:41 p.m. last night, October 24th, the affidavit of Joyce O. Gray was obtained by counsel for Petitioner. According to the affidavit of Jerry Lawrence, Joyce Gray was present when he had his conversation with Baldree. Joyce Gray verifies this, and says: "Another time the case came up was at the Famous Amos restaurant in Jacksonville. We were there and a guy we knew, Jerry Lawrence, came in. Curtis [Baldree] was very high and Jerry was asking him about the case. Jerry confronted Curtis about snitching on someone who was not even involved. All Curtis would say to Jerry was that he did what he had to do." Thus, Joyce Gray verifies Lawrence, whose credibility has already been accepted by the lower court.

Joyce Gray further states as follows:

I saw Curtis frequently after his release in 1980 and before his death in March of 1981. I was still in Atlanta, but I saw him in Jacksonville and he came to Atlanta once during this period. ... On several occasions, the Sims case came up. He told me that he had no choice, but to lie—that Sims had nothing to do with it. Curtis said that he had to lie to protect himself and the others that were actually involved.

See Attachment hereto. This affidavit was not submitted to the lower court, as it was received too late. Counsel asked the lower court for more time to obtain the attendance of other witnesses, or to have their affidavits considered. This affidavit is being submitted as soon as was possible, after learning from Lawrence (whose affidavit was accepted below) that Gray was present at the Famous Amos restaurant meeting.

extraordinary conclusion. This case is now reduced from “a rickety conglomeration of two things: unbelievable ‘memories’ retrieved through the superhuman ‘zoom’ vision of mesmerized witnesses, and unreliable statements of drug-abusing codefendant-felons who faced near certain death if they did not please the prosecutor, Sims, 602 So. 2d at 1259, to only “unbelievable ‘memories’ retrieved through the superhuman ‘zoom’ vision of mesmerized witnesses.” *Id.* If this is going to be enough to dispatch Terry Sims to execution, it ought to at least occur after thorough analysis of the record, which arrives here today at 9:10 a.m.

*B. The State did not disclose evidence
which directly corroborated the defense*

Trial counsel Rabinowitz looked at the suppressed police report and stated from the witness stand that what was contained in it “was our defense.”⁷ He

⁷This Court has before it public records issues in this case, but has not released its opinions thereon. This suppressed report is pertinent to those issues.

At the *Huff* hearing below, the State argued that the “public records issue” was very important to the question whether Mr. Sims’s could establish due diligence. Mr. Sims had made a request for public records of the Gainesville Police Department, and that request is in the record before this Court. This request specifically sought information on James Anson “B.B” Halsell, and provided his gender, race, date of birth, and social security number, and sought information on Terry Gayle. In response, the Gainesville Police Department sent records to the capital post-conviction records repository. At the evidentiary hearing, Mr. Sims established that *the McGilvray report was not included in the materials which the Gainesville Police Department sent to the repository.*

said that the history of crimes committed by Halsell and Gayle documented in the report, and the immunity there offered, would have led to withering cross-examination of the co-defendants, and, more importantly, would have led to more defense evidence at trial.⁸ He was “pretty upset”⁹ when he read the report, believing it was withheld from counsel. Mr. Heffernan testified also, by phone, saying the report was not provided in discovery and that it reflected the “linchpin” of the defense: that it was Terry Gayle, not Terry Sims, who was the fourth participant in the robbery and killing in this case.

The trial court found defense counsel did not have the report or otherwise have information that Halsell had been interviewed by Investigator McGilvray of the Gainesville Police Department: “The defendant recently (within the last few weeks) discovered a police report authored by H.F. McGilvray of the Gainesville Police Department who was working on drug store burglaries and robberies in Gainesville.”

Mr. Sims also established that the McGilvray report was obtained in the last couple of weeks by Mr. Malone after he learned from current counsel that the Sims case was like the Marvin Johnson case in that they involved the “Dixie Mafia” or “Drugstore Cowboys.” Mr. Malone then went to Atlanta to inspect the files of Mr. Johnson’s attorney. There Mr. Malone found the McGilvray report.

⁸Co-counsel from trial testified in similar fashion.

⁹Quotes are from counsel’s notes—counsel received the record at 10:50 a.m., today.

Order at 2. At the hearing, the state did not dispute that trial counsel had not received the report or the information within it. Denying relief on this issue, the post-conviction court found “there is no evidence” that one of the lead investigators, Lt. Calangelo, “had the report and suppressed it from the defendant.” As support for this finding, the court determined that the “defense took Lt. Calangelo’s deposition and, being a trained police officer, he answered questions asked of him but did not volunteer information. As a result, the defense did not learn of the McGilvray interviews since further inquiry on the subject was not made.” This finding turns *Brady* law upside down.

The defense has shown that McGilvray’s name was never disclosed to the defense in discovery, and neither was his report. Testimony of Rabinowitz and Heffernan. This is a basic discovery default by the state under Rule 3.220, Fla.R.Crim.P. The evidence presented at the post-conviction hearing shows Lt. Calangelo knew McGilvray had interviewed both Halsell and Baldree, as the court concedes. That evidence is reflected in the McGilvray report¹⁰ as in it he relates how he had been in contact with Lt. Calangelo in discussing the potential worth of Halsell and Baldree to his own case, that Calangelo urged him to come to Sanford to

¹⁰ The state stipulated to the admission of the McGilvray report and deposition for use as substantive evidence in lieu of McGilvray’s testimony.

interview him, and that he in fact did so. In addition, both the McGilvray report and the McGilvray deposition (in Marvin Johnson's case), show that Lt. Calangelo was present with McGilvray, Baldree and Halsell during at least portions of McGilvray's interview with them. McGilvray depo at 47; Report. Plainly, at the very least, Lt. Calangelo knew about the interview of Halsell and Baldree.

But more evidence that the prosecution knew was presented at the evidentiary hearing. As Mr. Rabinowitz testified, immunity in Gainesville for the State's witness in this case would not have been unknown to the prosecutor here. Rabinowitz knows the prosecutors, he used to be one, and this would not have been missed by them, or even allowed without their agreement. Even if the prosecutors did not know of the agreement however, they had a duty to learn. Strickler v. Greene, 119 S.Ct. 1936 (June 17, 1999):

[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S. at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable. * * * Since . . . the prosecutor has the means to discharge the government's *Brady* responsibility if he will, *any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor*, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Kyles v. Whitley, 115 S. Ct. 1555, 1568 (1995)(emphasis added); Brady v. Maryland, 373 U.S. 83 (1963).

Mr. Rabinowitz also testified he and Mr. Heffernan were misled by Halsell on this issue during his deposition, taken after he had given the statement to McGilvray. The post-conviction court, reviewing Halsell's deposition, "concludes that Halsell was answering questions pertaining to this case and did not intentionally mislead the examiner. He was not specifically asked about interviews for other cases in different counties." Order at 3. But as Rabinowitz pointed out, Halsell specifically told them they had the only statements he had given, to Calangelo and Salerno. He also left out Gainesville even when being asked of other places in which he had committed crimes. A review of the deposition, and the trial attorneys' testimony here, shows the two were looking for other similar crimes Halsell and Baldree had committed with others. This was misleading. Even so, that is not the standard: the state must disclose the exculpatory evidence, not sit back and hope the defense is not totally deceived. However, during his deposition of November 13, 1978, Halsell was specifically asked about any statements he had given to the police and denied making any such statements. Halsell's specific sworn deposition testimony is false, misled the defense, and the state failed to correct that falsity.

At the outset of his deposition Halsell admitted to committing "about fifteen"

drugstore burglaries and robberies for Gene Robinson. Halsell depo 14, 19; App. D. When asked who he committed these drugstore burglaries with, Halsell said it was “Just different people around Jacksonville.” Halsell depo at 20. Names he gave were Bill Lawley, Gene Robinson, and Bobby Little: “Just different people, you know, whoever be there.” Halsell depo at 21. He named places he had committed these drugstore burglaries only where his rap sheet reflected an arrest, such as one in Pensacola. Halsell depo at 25. However, Halsell did not mention the drugstore burglaries in Gainesville which included his friend Terry Wayne Gayle. Later during the deposition, the prosecutor advised Halsell of his fifth amendment rights, and the witness refused to answer other questions about drugstore burglaries and robberies. Halsell depo at 55-56. Trial counsel Rabinowitz testified this impaired his ability to ask further questions.

At one point in the deposition, counsel asked Halsell if he knew Terry Wayne Gayle. Halsell said he knew him from Jacksonville, and admitted he had been involved in drugstore burglaries with him. Halsell depo at 139. He did not elaborate.

Halsell was pointedly and repeatedly asked about any statements he had made to police officers, and repeatedly and falsely told defense counsel the only statement he had given to the police was the one they had, which was to Ralph Salerno.

Q. How many statements have you given the police?

A. Concerning what?

Q. Concerning this.

A. The one you got, just one.

Halsell depo at 129. Later in the deposition, Halsell told defense counsel he had spoken with the police about a burglary he had been involved in with Bill Lawley. However, he again denied making any statements to police other than Lt. Calangelo and Sgt. Salerno:

Q. Who else have you talked to the police about other than Mr. Sims and Mr. Lawley, given a statement about Gene Robinson?

A. That's the only statement I gave, and you all got it.

Q. How about just conversations with the law enforcement officials without making a statement?

A. I've spoken to policemen, yes.

Q. How many times?

A. Two.

Q. Who?

A. Calangelo and Salerno.

Q. Did you give them any information outside the confines of this particular matter about other incidents that you were involved in?

A. Just trying to catch Gene and Sims.

Halsell depo at 136-137. Halsell's testimony about his police statements was just not true, and misled defense counsel, as they both testified at the hearing.

Trial counsel testified they locked on to the defense that Terry Gayle was the perpetrator and did everything they could to develop information: they traveled to prisons throughout the state, speaking with anyone they heard of who might know of Terry Gayle, and pursued that avenue through formal discovery as well. They were able to present some evidence linking Gayle to Halsell, Baldree, and Robinson, and showing he looked like Terry Sims, but not much. They both so testified. Mr. Rabinowitz testified that at the time of trial, "We really didn't have any firm information of different crimes they [Gayle and others] committed." The McGilvray report would have "absolutely" helped the defense, Heffernan testified: in addition to use at deposition and during the investigation of Gayle's involvement here, it "would substantiate that Halsell was lying to protect a friend" and "would have given our defense a great deal more credibility."

The McGilvray report shows Halsell provided detailed information to Investigator McGilvray about drugstore burglaries he had committed in Gainesville with both Robinson and *Terry Wayne Gayle* during 1977, and that this criminal activity continued up to several weeks preceding the offense in this case. In one case, Terry Gayle acted as the lookout. In exchange for this information, Investigator

McGilvray assured Halsell he would not be charged with any offense he told them about. These are the details Halsell gave Investigator McGilvray, according to his report:

JAMES HALSELL further stated that he was involved in a number of burglaries in Alachua County, FL., both inside and outside of the City of Gainesville. This witness admitted breaking into the following drugstores, and named the following individuals who accompanied him on these Burglaries:

1. GRESHAM'S DRUGSTORE, 837 S.W. 4th Avenue, Gainesville, FL; 29 November 1977. CR#77-41626

With HALSELL on this Burglary were JERRY LAWRENCE and **TERRY GAYLE**. HALSELL stated that he knocked out the glass in the rear door, entered the building, and took nothing but Class A narcotics. LAWRENCE and **GAYLE** acted as lookouts and all subjects were wearing gloves and stocking masks. He stated that he was in the building each time approximately forty-five to sixty (45-60) seconds, regardless of whether the alarm was ringing or not. In most cases, the crowbar

which he used was left at the scene. He used the same modus operandi in each one of these Burglaries.

- b. GRESHAM'S DRUGSTORE, 837 S.W. 4th Avenue, Gainesville, FL; 30 December 1976. CR#76-44446.

With HALSELL on this Burglary were CLYDE OGLESBY and JOHNNY FOWLER.

- c. GRESHAM'S DRUGSTORE, 1138 N.E. 16th Avenue, Gainesville, FL; 10 January 1977. CR#77-00993.

With HALSELL on this Burglary were **TERRY GAYLE** and JERRY LAWRENCE.

- d. WISE'S DRUG COMPANY, 3601 S.W. 2nd Avenue, Gainesville, FL; 21 January 1978. CR#78-02464.

With HALSELL on this Burglary were NELSON SILVA and HAROLD BRYAN.

- e. WISE'S DRUG COMPANY, 3601 S.W. 2nd Avenue, Gainesville, FL; 20 October 1977, CR#77-36472.

With HALSELL on this Burglary were **CLARENCE EUGENE ROBINSON** and **TERRY GAYLE**.

- f. WISE'S DRUG COMPANY, 1000 N.W. 8th Avenue, Gainesville, FL.;

[illegible] October 1977.

With HALSELL on this Burglary were **TERRY GAYLE** and
CLARENCE EUGENE ROBINSON.

This investigator advised HALSELL that I would give the information to the ALACHUA COUNTY SHERIF'S OFFICE as to other Burglaries in their area, and that they might want to talk with him later.

McGilvray Report, Ex. 1, App. A. (emphasis supplied).

At trial, Halsell was specifically asked about his relationship with Terry Wayne Gayle. This is what he said:

MR. HEFFERNAN: Will the Court grant me just a moment here, Your Honor?

THE COURT: Yes, sir.

Q. Do you know a man by the name of Terry Wayne Gayle?

A. Yes, sir.

Q. Who is Terry Wayne Gayle?

A. A guy in Jacksonville.

Q. Can you describe him for us, please?

A. He's shorter than me.

Q. Shorter than you?

A. Yes.

Q. How tall are you?

A. About five-eleven, six feet.

Q. How tall would you say Mr. Gale is?

A. About five seven, five six, somewheres around there.

Q. And how much does Mr. Gale weigh?

A. About a hundred and thirty pounds.

Q. And what color hair was Terry Wayne Gale have?

A. Dark black hair.

Q. Dark black hair. All right. And have you ever been involved in any crimes with Terry Wayne Gale?

A. Yes, sir.

Q. How many occasions?

A. Quite a few.

R348-49. Questioning then turned to other matters. This testimony would have been totally impeached by the evidence from the report. Baldree's testimony as well would have to be false. As it turns out, Terry Wayne Gayle was not just "a guy in Jacksonville," but a recent criminal cohort of Halsell. *He did not just commit "quite a few" crimes with Terry Gayle; he committed crimes quite close in time to the crime here, involving drugstores, as did the crime in the case at bar.* Had counsel known

of the specific crimes admitted to by Halsell, they could have established this relationship went up to the end of November, 1977, according to police information, the month before the Longwood Pharmacy robbery, and could have shown Halsell had repeatedly and recently committed not just crimes, but drugstore crimes with both Robinson and Gayle. This was the defense theory. He had also received immunity for it. But the state never disclosed what it knew, and sat by when Halsell lied about it.

The report also reveals the witnesses and affiants mentioned above--Clyde Oglesby, Jerry Lawrence, Harold Bryan and Danny Morrison--were all listed in the previously suppressed and now newly discovered police report.¹¹ Their testimony, which was credited by the lower court, could also have been used at trial. See section A, *supra*.

c. Additional use of newly discovered/*Brady* evidence

Plainly, in addition to impeachment, the defense would have been entitled to use the McGilvray and newly discovered evidence to show Terry Gayle committed

¹¹Mr. Sims had submitted the affidavit of another person--Eston Bullard--but withdrew that affidavit at the hearing below. Bullard, unlike Oglesby, Lawrence, Bryan and Morrison, was not listed on the suppressed police report. Trial counsel testified that he interviewed every person named in any police report he received, and he would have interviewed these persons had he seen their names.

this offense. The sixth amendment Compulsory Process Clause encompasses the right to present defense evidence, for "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967). The right to present defense evidence is necessary to "protect the integrity of the adversary process . . ." Taylor v. Illinois, 484 U.S. 400, 409, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988). It is essential to due process and cannot be unduly restricted by state hearsay rules. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1058, 35 L.Ed.2d 297 (1973).

The evidence would have been direct evidence that Terry Gayle, not Sims, committed the crime. "[W]here evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990). Rivera involved reverse "*Williams Rule*" testimony which is not exactly like the testimony proffered here. However, a wide range of evidence can point to the guilt of another, and "[o]ne accused of a crime may show his innocence by proof of the guilt of another." Pahl v. State, 415 So. 2d 42 (Fla. 2d DCA 1982)(*citing Lindsay v. State*, 69 Fla. 641, 68 So. 932 (1915)). Gayle's relationship with Halsell would have been admissible substantively. In Auchmuty v. State, 594 So. 2d 859 (Fla. 4th DCA 1992), the court reversed where

the trial court excluded evidence of the relationship between the victim and defendant, even though that evidence also reflected badly on the victim because it revealed he was a prison alum. In Billeaud v. State, 578 So. 2d 343 (Fla. 1st DCA 1991), the court found it was error to exclude evidence of the decedent wife's extramarital affairs offered to show that her last affair sent the defendant into a rage which was inconsistent with premeditated murder.

There is other evidence from the prior postconviction proceeding which would have assisted in building this defense and which must be considered under *Lightbourne*. 'Reverse-Williams Rule'¹² evidence which shows like crimes committed by the third party is admissible to show that party committed the offense charged.¹³ This Court held in Savino that admissibility of 'reverse Williams Rule' evidence must be judged by the same standards as Williams Rule evidence propounded by the state. If Terry Gayle were on trial, evidence that he bought lock pullers from the same detective agency the group used in the instant case, using the name of a company tying Gayle to the leader of the group in what is obviously a front business operation

¹² Williams v. State, 110 So.2d 654 (Fla.), cert. denied 361 U.S. 847 (1959).

¹³ §90.404(2)(a), Fla.Stat. (1989); see Rivera v. State, 561 So.2d 536, 540 (Fla. 1990); State v. Savino, 567 So.2d 892 (Fla. 1990); Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982); Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982); Robinson, 544 F.2d at 113.

to ease the theft of cars for robberies, when such purchase occurred within weeks of the charged offense, would be admissible to show plan, modus operandi, and identity. Sgt. Salerno previously testified it was Gayle who purchased the lockpullers, and that the seller identified a photograph of him. See Davis v. State, 87 So.2d 416 (Fla. 1956); Moore v. State, 324 So.2d 690, 691 (Fla. 1st DCA 1976), aff'd., 343 So.2d 601 (Fla. 1977). Similarly, in addition to the new Brady evidence showing Gayle's involvement in similar crimes with Halsell, evidence that Gayle purchased lock pullers around the time of the charged offense would be relevant when such a device was used to steal a car for use in drug store robberies to show Gayle participated in the charged offense.

The suppression of crucial documents, which had extremely exculpatory value, significantly harmed the defense. If there is a reasonable probability that the suppressed evidence affected the outcome, then it is material and its suppression violates due process. See Bagley, 473 U.S. at 682; Arango v. State, 497 So.2d 1161, 1162 (Fla. 1986). The prejudice in this instance is similar to that described in Arango v. State, 467 So.2d 692 (Fla.), vacated 474 U.S. 806 (1985), on remand, 497 So.2d 1161 (Fla. 1986). In Arango, the State failed to reveal a gun found under the victim's window which had been purchased a few days before by a man using a Hispanic name. Arango's defense was that he and the victim were overpowered by three Latino

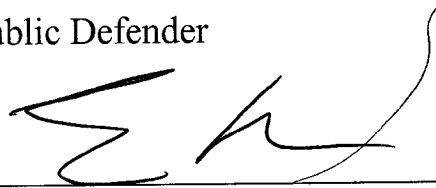
males who fled, one by jumping from the balcony, after the shooting. The suppression of the gun allowed the prosecutor to argue no physical evidence supported Arango's account, that it was a complete fiction. Id. at 694. The failure to reveal the gun affected the outcome of the case, in reasonable probability. Arango, 497 So.2d at 1162. Similarly, the defense could adduce no evidence below, aside from connecting Gayle to the gang and testimony that Gayle resembled Mr. Sims, to support the theory that Gayle, not Sims, committed the murder. Major pieces of evidence proving the defense theory was never disclosed.

CONCLUSION

The claims in this appeal implicate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Florida law. Sims relies upon these federal constitutional provisions, and state law, for his claims for relief. For the reasons stated herein, this Court should reverse the judgment of the trial court, and issue a stay of execution.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'S H MALONE', written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief is being sent via facsimile transmission, copy to follow by United States mail, first class postage prepaid, Kenneth S. Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., Daytona Beach, Florida 32118-3958, this 25th day of October, 1999.

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