No.

IN THE

SUPREME COURT OF THE UNITED STATES

KYLE A. KEYS,
Petitioner,
v.
MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12518-EE

KYLE A. KEYS,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

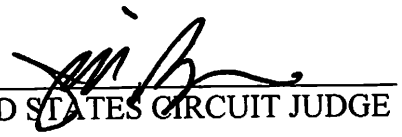
Appeal from the United States District Court
for the Middle District of Florida

BEFORE: TJOFLAT, JORDAN and JILL PRYOR, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-41

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12518
Non-Argument Calendar

D.C. Docket No. 6:15-cv-01096-GKS-GJK

KYLE A. KEYS,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 23, 2019)

Before TJOFLAT, JORDAN and JILL PRYOR, Circuit Judges.

PER CURIAM:

Kyle Keys filed a habeas petition under 28 U.S.C. § 2254 claiming that the State of Florida violated *Giglio v. United States*, 405 U.S. 150 (1972), by failing to disclose information he could have used to impeach a prosecution witness. We are barred from considering his claim, however, because he has procedurally defaulted it, and we therefore affirm the dismissal with prejudice of his petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Crime and the Trials

Keys was tried three times for first-degree murder and robbery with a firearm. His acquaintance Toris Oliver did not testify at the first two trials, which ended in a hung jury and a mistrial, respectively. At the third trial, Oliver testified that he and Keys pulled into the grounds of an apartment building to let Keys out to ask a woman for a cigarette. Oliver saw Keys approach the woman with a gun and try to grab her purse, then heard two gunshots and the woman screaming for help, and then saw her fall. When Keys returned to the car with a billfold and cell phone, Oliver asked if he had shot the lady, and Keys replied, "I shot in the air." Doc. 12-18 at 49.[1] Later, after learning that the woman had died, Oliver confronted Keys, who said that he had not meant to shoot her and that "the gun just went off." *Id.* at 54. On direct, cross, and redirect examination, Oliver denied that

[1] "Doc #" refers to the numbered entries on the district court's docket.

the prosecution had offered him anything in exchange for his testimony. Keys's third trial ended in his convictions on the murder and robbery charges.

After the verdict, Keys's trial lawyer received a letter from Oliver admitting that he had lied on the stand when he denied having received anything from the prosecution in exchange for his testimony. Oliver enclosed a letter from his own lawyer to himself regarding a conversation she had with the prosecution about the possibility of a deal in which the State would ask for a lower sentence if Oliver testified against Keys.

B. Keys's Motion Under Florida Rule of Criminal Procedure 3.850

Through counsel, Keys filed a post-conviction motion pursuant to Florida Rule of Criminal Procedure 3.850 arguing that Oliver's letter and enclosure were newly discovered evidence that undermined the validity of the jury verdict. The contents of Keys's Rule 3.850 motion are essential to our resolution of the instant appeal, so we describe them in detail.

In his five-paragraph argument, Keys raised a single claim titled "Newly discovered evidence." Doc. 12-27 at 74. The first two paragraphs described Oliver's trial testimony and his post-trial letter and enclosure. The third paragraph quoted the standard for a newly discovered evidence claim under Florida law. *See Burns v. State*, 858 So. 2d 1229, 1230 (Fla. Dist. Ct. App. 2003). Keys argued he met both prongs of the standard: (1) the evidence of Oliver's deal with the

prosecution was newly discovered because Keys could not have learned of it earlier through due diligence; and (2) introduction of the new evidence to impeach Oliver would "probably produce an acquittal" on retrial, especially since the first trial—at which Oliver did not testify—ended in a hung jury. Doc. 12-27 at 74-75; *see also Burns*, 858 So. 2d at 1230.

The fourth paragraph contained a large block quotation from a U.S. Court of Appeals for the Ninth Circuit case to illustrate "the importance of informing the jury that a prosecution witness has been offered a lenient sentence in exchange for his or her testimony." Doc. 12-27 at 75. That Ninth Circuit case and four other federal cases Keys cited all discussed *Giglio* claims. *See Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (en banc) (quoting *United States v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993)); *Brown v. Wainwright*, 785 F.2d 1457, 1466 (11th Cir. 1986); *United States v. Barham*, 595 F.2d 231, 242-43 (5th Cir. 1979); *Tassin v. Cain*, 482 F. Supp. 2d 764, 775 (E.D. La. 2007). Keys introduced the other citations to argue that Oliver's testimony was "inherently untrustworthy," that "it [wa]s probable that [Keys] would be acquitted" if Keys could use the new evidence to impeach Oliver on retrial, and that "[c]ourts . . . have consistently held that [post-trial] disclosure of a deal between the prosecution and the prosecution's key witness entitles the defendant to a new trial." Doc. 12-27 at 76 & n.2 (internal quotation marks omitted).

Citing only Florida state cases, the fifth and final paragraph requested an evidentiary hearing to determine whether the post-trial evidence qualified as newly discovered and whether it would likely lead to an acquittal if used in a retrial. Keys later amended his Rule 3.850 motion to attach Oliver's letter and its enclosure, Oliver's letter from his lawyer.

The Florida circuit court denied Keys's Rule 3.850 motion. In his motion for rehearing, Keys described his claim as a "newly discovered evidence claim." Doc. 12-28 at 25. His only argument was that the court failed to appreciate that Oliver's letter and enclosure were newly discovered, and the only case he cited was a Florida state case on the deadline for filing a motion for rehearing. *See Whipple v. State*, 867 So. 2d 433 (Fla. Dist. Ct. App. 2004). The circuit court denied his motion for rehearing. On appeal to the Florida district court of appeal, Keys again captioned his claim as a "newly discovered evidence claim." Doc. 12-28 at 35, 43. Most of his appellate brief was copied verbatim from his Rule 3.850 motion, including his citations to *Carriger*, *Bernal-Obeso*, *Brown*, *Barham*, and *Tassin*. The only new substance was the addition of a few paragraphs citing only Florida state cases and arguing that Oliver's letter and enclosure qualified as newly discovered evidence. The Florida district court summarily affirmed the denial of Keys's Rule 3.850 motion. His motion for rehearing again referred to his "newly discovered evidence claim" and argued that Oliver's letter and enclosure were

newly discovered. Doc. 12-28 at 53. The Florida district court summarily denied that motion.

C. Keys's Habeas Petition Under 28 U.S.C. § 2254

After the Florida district court of appeal denied Keys's motion for rehearing, Keys filed his § 2254 petition in federal district court. That petition raised two claims; only the first is before us.[2] Keys titled that claim "Violation pursuant to *Giglio v. United States*, 405 U.S. 150 (1972)." Doc. 1 at 6. He explained that *Giglio* stands for the proposition that due process requires the prosecution to disclose material evidence the defense can use to impeach a government witness, and then he used the same block quotation from *Carriger* and citations to *Bernal-Obeso*, *Barham*, *Brown*, and *Tassin* that he used in his Rule 3.850 motion. He requested an evidentiary hearing to develop the factual basis for his *Giglio* claim,[3] but the district court dismissed his petition with prejudice. This is Keys's appeal.

[2] Because Keys makes no argument to this Court regarding the second claim contained in his § 2254 petition—that the state trial court erred in denying Keys's motion for acquittal—he has abandoned that claim. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681-82 (11th Cir. 2014).

[3] The same counsel who filed Keys's Rule 3.850 and subsequent state post-conviction motions filed his § 2254 petition.

II. STANDARD OF REVIEW

We review *de novo* the mixed question of law and fact of whether a § 2254 petitioner has procedurally defaulted a claim. *Ogle v. Johnson*, 488 F.3d 1364, 1368 (11th Cir. 2007).

III. DISCUSSION

The district court correctly dismissed with prejudice Keys's § 2254 petition because he failed to fairly present his *Giglio* claim to the Florida post-conviction courts, resulting in an uncured procedural default.

Federal habeas petitioners must "fairly present[]" their federal claims to the state courts, *Picard v. Connor*, 404 U.S. 270, 275 (1971), to give the state courts a "meaningful opportunity" to consider any federal bases for relief, *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986). Otherwise, the claims are procedurally defaulted, and federal courts may not review the claims on their merits. *See Coleman v. Thompson*, 501 U.S. 722, 731-32, 735 n.1 (1991). Keys failed to comply with this requirement throughout the litigation of his Rule 3.850 motion. To begin with, the presentation of his Rule 3.850 motion would not have alerted a state court that Keys intended to raise a *Giglio* claim. He captioned his claim "Newly discovered evidence," Doc. 12-27 at 74; cited the state law standard for bringing a newly discovered evidence claim; argued that he could meet the two-pronged standard—(1) newly discovered evidence that would (2) "probably

produce an acquittal on retrial," *Burns*, 858 So. 2d at 1230; and requested an evidentiary hearing to develop the factual basis for his claim. He cited federal cases that cited *Giglio*, but he cited those cases only to support his contention that he could meet the second prong of a Florida law newly discovered evidence claim—showing that the new evidence would "probably produce an acquittal on retrial." *Id.*

Moreover, had Keys properly presented a Florida law newly discovered evidence claim and a *Giglio* claim to the state courts, he would have alerted the Florida courts to the lower standard for sustaining a *Giglio* claim as contrasted with the Florida law claim. Doing so would have given the Florida courts the opportunity to grant his *Giglio* claim even if they denied his newly discovered evidence claim. A Florida law newly discovered evidence claim requires that the new evidence be "such that it would probably produce an acquittal on retrial," *Burns*, 858 So. 2d at 1230, whereas a *Giglio* claim requires only a "reasonable likelihood that the false testimony *could have* affected the judgment of the jury," *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) (internal quotation marks omitted). Florida law's standard for relief based on newly discovered evidence is far more stringent than *Giglio*'s standard. But Florida law's standard is practically indistinguishable from the materiality standard under *Brady v. Maryland*, 373 U.S. 83 (1963)—"reasonable probability that, had the evidence

been disclosed to the defense, the result . . . would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Because *Giglio*'s materiality standard is "more defense-friendly" than *Brady*'s, *Alzate*, 47 F.3d at 1109-10, it is also more defense-friendly than Florida's standard for a newly discovered evidence claim.

If Keys had wanted to present a *Giglio* claim to the Florida courts, he would have called attention to *Giglio*'s more defense-friendly materiality standard. This would have given the Florida courts an opportunity to grant his *Giglio* claim even if they decided his Florida law newly discovered evidence claim lacked merit. Keys's failure to mention *Giglio*'s materiality standard in his Rule 3.850 motion is strong evidence that he failed to fairly present his *Giglio* claim to the Florida courts.[4]

Keys's case resembles *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005). There, McNair's state court post-conviction motion argued that the jury had improperly considered extrinsic evidence in violation of Alabama law, *id.* at 1303, which requires the court to determine that the extraneous evidence "*might* have unlawfully influenced" the jury, *Ex parte Troha*, 462 So. 2d 953, 954 (Ala. 1984) (internal quotation marks omitted). We observed that the materiality standard in a

[4] After Keys filed his Rule 3.850 motion, a Florida appellate court issued an opinion discussing at length the differences between a Florida law newly discovered evidence claim and a *Giglio* claim. *See Cueto v. State*, 88 So. 3d 1064, 1067 (Fla. Dist. Ct. App. 2012). Although Keys did not have the benefit of *Cueto*, the caselaw setting out the different materiality standards was available to him.

federal extraneous evidence claim is even lower—extraneous evidence is "presumptively prejudicial"—but the petitioner "never mentioned, much less argued, th[at] federal standard." *McNair*, 416 F.3d at 1303. And, just as "McNair's reliance on state law continued when he went before the Alabama Supreme Court," *id.*, Keys consistently referred to his claim as a "newly discovered evidence claim" throughout his state court post-conviction litigation.[5] Our conclusion that McNair failed to "fairly present his federal constitutional claim to the state court," *id.* at 1304, applies equally here.

Keys contends that his citations to federal cases citing *Giglio* sufficed to fairly present a *Giglio* claim in his Rule 3.850 motion. The U.S. Supreme Court has stated that "[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition . . . by citing in conjunction with the claim . . . a case deciding such a claim on federal grounds." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). But *Baldwin* concerned a § 2254 petitioner who raised an ineffective assistance of counsel claim to the state courts; failed to specify whether the basis for that claim was state law, federal law, or both; and then sought to raise a federal ineffective assistance of counsel claim in federal

[5] Doc. 12-27 at 88 (amendment to Rule 3.850 motion); Doc. 12-28 at 2 (reply to state's response to Rule 3.850 motion), 25 (motion for rehearing before Florida circuit court), 35, 43 (appellate brief to Florida district court of appeal), 53 (motion for rehearing before Florida district court of appeal).

court. *Id*. at 29-30. In other words, *Baldwin* addressed a situation in which the federal habeas court had to determine whether the § 2254 petitioner had raised only a state law claim to the state courts or also the federal law analog to that state law claim.

That is not the situation we face here. The federal analog of a Florida law newly discovered evidence claim is a *federal* newly discovered evidence claim. *See United States v. Scrushy*, 721 F.3d 1288, 1304-05 (11th Cir. 2013) (elements: "(1) the evidence must be newly discovered and have been unknown to the defendant at the time of trial; (2) the evidence must be material, and not merely cumulative or impeaching; (3) the evidence must be such that it would probably produce an acquittal; and (4) the failure to learn of such evidence must be due to no lack of due diligence on the part of the defendant"). *Giglio*, by contrast, concerns a situation where the government *knew or should have known* of evidence *in its possession* that the defense could have used to impeach a government witness. *See Bagley*, 473 U.S. at 676 ("Impeachment evidence . . . falls within the *Brady* rule. See *Giglio* . . . ."); *id.* at 678 (explaining that *Brady* concerns "information favorable to the accused that had been known to the prosecution but unknown to the defense"); *Ford v. Hall*, 546 F.3d 1326, 1331 (11th Cir. 2008) (setting forth the "knew[] or should have known" standard for "*Giglio* error, [which is] a species of *Brady* error"). The requirement that a § 2254 petitioner

fairly present his federal claims to the state courts is not satisfied where he raised only a "somewhat similar state-law claim" in the state courts. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Keys's Florida law newly discovered evidence claim was not "somewhat similar" to a *Giglio* claim. Thus *Baldwin*'s generous language cannot help Keys.

Given Keys's presentation of his Florida law newly discovered evidence claim to the state courts and the significant difference in the materiality standards between that claim and a *Giglio* claim, we conclude that Keys failed to fairly present his *Giglio* claim to the state courts. *See Picard*, 404 U.S. at 275. Under Florida law, "claims that could have been raised in a prior postconviction motion are procedurally barred." *Rivera v. State*, 187 So. 3d 822, 832 (Fla. 2015) (internal quotation marks omitted). Because Keys has deprived the Florida courts of the opportunity to consider his *Giglio* claim, he has procedurally defaulted it, and he has made no argument for cause and prejudice or a fundamental miscarriage of justice to overcome the default. *See Coleman*, 501 U.S. at 731-32, 735 n.1, 750. Due to this uncured procedural default, Keys's *Giglio* claim provides "no basis for federal habeas relief," *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998), and the district court properly dismissed with prejudice his § 2254 petition.[6]

[6] The district court ruled in the alternative that Keys's *Giglio* claim fails on the merits. We need not reach the district court's alternative ruling because we conclude that Keys has procedurally defaulted this claim. *See Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's dismissal with prejudice of Keys's § 2254 petition.

AFFIRMED.

(11th Cir. 2007) ("We may affirm the district court's judgment on any ground that appears in the record . . . .").

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12518-E

KYLE A. KEYS,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Kyle Keys moves for a certificate of appealability in order to appeal the District Court's denial of his motion under 28 U.S.C. § 2254. In his § 2254 motion, Mr. Keys presented a valid constitutional claim: that the State committed a Giglio[1] violation by failing to disclose that a material trial witness was offered a lesser sentence in exchange for his testimony, or by failing to correct the witness's testimony that he was not offered a lesser sentence in exchange for his testimony.

[1] Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972).

Because reasonable jurists would debate the District Court's decision as to that claim, a certificate of appealability is GRANTED on the following issues:

> Whether the District Court erred in concluding that Mr. Keys did not fairly present his Giglio claim to the state court and therefore failed to exhaust the claim.
>
> Whether the District Court erred in denying Mr. Keys's Giglio claim on the merits without holding an evidentiary hearing.

Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KYLE A. KEYS,

Petitioner,

v. Case No. 6:15-cv-1096-Orl-18-GJK

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

Petitioner initiated this action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1). In accordance with this Court's instructions, Respondents filed a Response to the Petition. (Doc. 10). Petitioner filed a Reply to the Response. (Doc. 15). Petitioner and Respondents subsequently filed supplemental memoranda at the request of the Court. (Docs. 17 & 21). For the reasons set forth below, the petition is denied.

I. PROCEDURAL HISTORY

Petitioner was indicted for first degree murder, robbery with a firearm, and fraudulent use of a credit card. (Doc. 12-1 at 5-7). Petitioner was tried beginning on July 9, 2007. (Doc. 12-1 at 20). The jury found Petitioner guilty with respect to fraudulent use of a credit card (Doc. 12-1 at 8), but could not reach a verdict with respect to first degree murder or robbery with a firearm. (Doc. 12-1 at 9). Petitioner was retried beginning on

December 11, 2008 (Doc. 12-16 at 23), and found guilty of first degree murder and robbery with a firearm. (Doc. 12-1 at 15-18). The state court sentenced Petitioner to life imprisonment. (Doc. 12-28 at 66).

Petitioner appealed. (Doc. 12-27 at 24). The Florida Fifth District Court of Appeal (the "Fifth DCA") affirmed *per curiam*. (Doc. 12-27 at 61). Petitioner sought further review by the Florida Supreme Court (Doc. 12-27 at 66), but that court declined review on jurisdictional grounds. (Doc. 12-27 at 68).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (Doc. 12-27 at 70), and thereafter filed an amendment to the motion. (Doc. 12-27 at 88). The state court denied the motion as amended. (Doc. 12-28 at 6). Petitioner appealed (Doc. 12-28 at 29), and the Fifth DCA affirmed *per curiam*. (Doc. 12-28 at 51). Petitioner filed a motion for rehearing and/or issuance of a written opinion. (Doc. 12-28 at 53). The Fifth DCA denied the motion. (Doc. 12-28 at 59).

A petition for a writ of habeas corpus followed.[1]

II. LEGAL STANDARDS

A. Habeas Relief Under the Antiterrorism Effective Death Penalty Act ("AEDPA")

AEDPA provides, among other things, that habeas relief cannot be granted with respect to a claim adjudicated on the merits in a state court unless the adjudication

[1]Petitioner was represented by counsel in connection with his state court motion for post-conviction relief. (Doc. 12-27 at 78; Doc. 12-28 at 4). He is represented by the same counsel in connection with this federal habeas action. (Doc. 1 at 13; Doc. 15 at 4).

"resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). AEDPA thus provides two primary avenues for relief: one based on a determination that the outcome was itself contrary to clearly established federal law; the other based on a determination that the outcome was infected by an unreasonable application of such law to the facts. As the Supreme Court explained:

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Regardless of the avenue taken, however, a prisoner "must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

B. Exhaustion of State Remedies

AEDPA separately provides that a person seeking relief must exhaust all remedies available in state court before challenging the constitutionality of a conviction in federal court. 28 U.S.C. § 2254(b)(1). This exhaustion requirement ensures that the state will have an opportunity to consider (and, if necessary, remedy) an alleged violation of a state

prisoner's federal rights. *Picard v. Connor*, 404 U.S. 270, 275 (1971). To exhaust a claim, "the petitioner [must] afford the State a full and fair opportunity to address and resolve the claim on the merits." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The petitioner must therefore identify the federal right at stake. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (*per curiam*) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."). As the Eleventh Circuit explained:

> It is not sufficient merely that the federal habeas petitioner has been through the state courts, nor is it sufficient that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made. The petitioner must present his claims to the state courts such that they are permitted the "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim."

Kelley v. Sec'y Dept. of Corr., 377 F.3d 1317, 1343-44 (11th Cir. 2004) (*quoting Picard*, 404 U.S. at 277). The Eleventh Circuit continued:

> We are not so draconian or formalistic as to require petitioners to give a separate federal law heading to each of the claims they raise in state court to ensure exhaustion for federal review. We simply require that petitioners present their claims to the state courts such that the reasonable reader would understand each claim's particular legal basis and specific factual foundation.

Id. at 1344-45. But the Eleventh Circuit cautioned:

> the "exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record. The ground relied upon *must be presented face-up and squarely; the federal question*

> *must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick.*

Id. at 1345 (*quoting Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988)) (emphasis added).[2]

When a petitioner fails to exhaust state court remedies, and the time to do so has passed, he is deemed to have procedurally defaulted his claim and will be unable to pursue habeas relief unless he can demonstrate either (a) cause for the default and actual prejudice as a result of the alleged violation of federal law or (b) failure to consider the claim would result in a fundamental miscarriage of justice. *Sullivan v. Sec'y Dept. of Corr.*, 837 F.3d 1195, 1201 (11th Cir. 2016). The "cause" that excuses a procedural default must result from "some objective factor external to the defense that prevented the prisoner from raising the claim and which cannot be fairly attributable to his own conduct," *McCoy v. Newsome*, 953 F.2d 1252, 1258 (11th Cir. 1992) (*per curiam*), while the "prejudice" that flows from the default must actually and substantially disadvantage the defense "so that [the prisoner] was denied fundamental fairness." *Id.* at 1261. A fundamental miscarriage of justice occurs when "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Wright v. Hopper*, 169 F.3d 695, 705 (11th Cir. 1999) (*quoting Schlup v. Delo*, 513 U.S. 298, 321 (1995)).

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[2]*Compare Howell v. Mississippi*, 543 U.S. 440, 443-444 (2005) (*per curiam*) (state court was not given a fair opportunity to resolve federal constitutional claim when it was purportedly located in a case cited in a case cited in petitioner's state court filing) *with Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (*per curiam*) (state court was given fair opportunity to resolve federal constitutional claim when it was identified in point heading of petitioner's state court filing).

C. Disclosure of Agreements and Correction of False Testimony

A prosecutor must disclose "evidence of any understanding or agreement as to prosecution of a key government witness." *Brown v. Wainwright*, 785 F. 2d 1457, 1464 (11th Cir. 1986). In addition, she must not present false testimony and, in the event she does, she must then "step forward and disclose." *Id.* If a prosecutor fails in either respect, the defendant is entitled to a new trial so long as there is "'any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Smith v. Sec'y Dept. of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009) (*quoting United States v. Agurs*, 427 U.S. 97, 103 (1976)). The "could have" standard requires a new trial unless the prosecution "persuades the court that the false testimony was 'harmless beyond a reasonable doubt.'" *Id.* (*quoting Ford v. Hall*, 546 F.3d 1326, 1332 (11th Cir. 2008) (*quoting Chapman v. California*, 386 U.S. 18, 24 (1967))).

III. ANALYSIS

A. Ground One

Petitioner purports to raise a "violation pursuant to Giglio v. United States, 405 U.S. 150 (1972)."[3] (Doc. 1 at 6). Petitioner maintains the prosecution (a) failed to disclose an agreement with one of its witnesses pursuant to which the witness would receive a lighter sentence in exchange for his testimony and (b) failed to correct the witness when he testified that he had not been promised anything by the state in return for his

[3]In *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court held that the government's failure to disclose an alleged promise to its key witness that he would not be prosecuted if he testified for the government justified a new trial to effectuate the defendant's right to due process.

testimony. Petitioner did not fairly present this claim to the state court and therefore failed to exhaust his state court remedies. Alternatively, Petitioner's allegation of prosecutorial misconduct is not supported by the record. For these reasons, ground one is denied.

(1) Petitioner Did Not Fairly Present a Giglio Claim to the State Court

Petitioner did not fairly present a "Giglio" or "due process" claim to the state court. A fair reading of his state court filings reflects his interest in obtaining a new trial under state law on the ground of newly-discovered evidence - nothing more and nothing less.[4]

The first ground for relief in Petitioner's state court motion for post-conviction relief is titled "Ground 1: Newly Discovered Evidence." In arguing in favor of a new trial, Petitioner cited *Burns v. State*, 858 So.2d 1229 (Fla. 1st DCA 2003), for a definition of newly-discovered evidence and for the proposition that "recantation evidence" is a type of newly-discovered evidence; *Dwyer v. State*, 743 So.2d 46 (Fla. 5th DCA 1999), for the

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[4]The state court summarized the newly-discovered claim as follows:

> [Petitioner] requests that the Court grant him a new trial on the basis of newly discovered evidence. Specifically, he claims that at his trial, co-defendant Toris Oliver testified that he had not been promised anything by the prosecution in exchange for his trial testimony; however, following trial, while [Petitioner's] appeal was pending, Mr. Oliver wrote a letter to [Petitioner's] attorney admitting that he had been offered a lesser sentence by the prosecution in exchange for his trial testimony. He also claims that Mr. Oliver's attorney wrote Mr. Oliver a letter wherein she told Mr. Oliver that the prosecutor would offer him a shorter sentence if he testified against Defendant. He contends that he could not have discovered Mr. Oliver was offered a lighter sentence because Mr. Oliver denied such a deal during his testimony.

(Doc. 12-28 at 6-7).

proposition that an evidentiary hearing is required to resolve whether evidence is new; and *McLin v. State*, 827 So.2d 948 (Fla. 2002), for the proposition that such a hearing is required to determine whether the newly-discovered evidence was of such a nature that it probably would have produced an acquittal on retrial. (Doc. 12-27 at 74-77). Petitioner's motion for post-conviction relief – read fairly – demonstrates Petitioner sought a new trial under state law.[5]

Petitioner cited two federal cases in the body of his motion for post-conviction relief[6] and two other federal cases in a footnote.[7] (Doc. 12-27 at 75-76). These federal cases are cited immediately *after* Petitioner's discussion of the applicable state law standard (and the application of that state-law standard to the facts of the case) and appear intended to bolster his argument for a new trial under state law. He quoted *Carriger* for the proposition that "the need for disclosure is particularly acute where the government presents witnesses who have been granted [a lenient sentence] in exchange for their testimony" and that "their use triggers an obligation to disclose material information to protect the defendant from being the victim of a perfidious bargain between the state and its witness." (Doc. 12-27 at 75). He quoted *Brown* for the proposition that "there is a

---

[5]Petitioner carried this state law theory for relief into his subsequent reply brief. In response to the state's argument that Petitioner's trial counsel was alerted to potential communication between the prosecution and witness prior to trial, he countered with *Dwyer v. State*, 743 So.2d 46 (Fla. 5th DCA 1999), for the proposition that an evidentiary hearing was necessary.

[6]*Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (which included internal citations to *Giglio* and *United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993)) and *United States v. Barham*, 595 F.2d 231 (5th Cir. 1979).

[7]*Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986) and *Tassin v. Cain*, 482 F. Supp. 2d 764 (E.D. La. 2007).

reasonable likelihood that disclosure to the jury that [the witness] was testifying under an agreement that might save his skin could have affected the jury's verdict and sentence." (Doc. 12-27 at 76 n.2). And he quoted *Tassin* for the proposition that "the jury's inability to assess [the witness'] credibility in light of her deal for potential leniency is sufficient to undermine the confidence in the outcome of Petitioner's trial." (Doc. 12-27 at 76 n.2).

Petitioner's motion for post-conviction relief does not contain the word "Constitution" or the phrase "due process". The phrase "constitutionally invalid" does appear in the motion - but it appears in the *fifth line of a thirteen-line footnote on the third page of his description of why he should receive a new trial on the ground of newly-discovered evidence (and then in a parenthetical following a citation to Brown).* (Doc. 12-27 at 76 n.2).

Significantly, Petitioner's federal habeas petition tacitly confirms that he did not fairly present a federal issue to the state court for its consideration. A comparison of the text of his state court motion for post-conviction relief and his federal court habeas petition evidences a stark difference between the legal theories upon which he seeks relief.

- The first ground for relief in Petitioner's state court motion for post-conviction relief is titled "Ground 1: Newly Discovered Evidence." (Doc. 12-27 at 74). In contrast, the first ground for relief in his federal court petition for habeas relief is titled "Ground 1. Violation pursuant to Giglio v. United States, 405 U.S. 150 (1972)." (Doc. 1 at 6).

- The two documents provide identical statements of fact, with a slight difference between the way Petitioner is identified in the state filing (defendant) and the way he is identified in the federal filing (Petitioner Keys). (*Compare* Doc. 12-27 at 74 *with* Doc. 1 at 6). Following these identical statements of fact, the state filing discusses the standard for a new trial under state law based on newly-discovered evidence and how the state standard is satisfied on the facts of the case. In contrast, the federal filing omits a discussion of state law (and the application of state law to the facts) and replaces it with a discussion of federal law and the application of federal law to the facts of the case.

The differences in these documents indicates that Petitioner changed his theory for relief between the state and federal courts. Petitioner's state filings seek relief under state law while his federal filings seek relief under federal law.

Moreover, Petitioner's reaction to the state court's denial of his motion for post-conviction relief further demonstrates he did not present a federal claim in his state court filings. The state court's order denying post-conviction relief cites various state court decisions regarding newly-discovered evidence and recantation of testimony; it does not, however, cite any federal cases regarding these or any other issues. (Doc. 12-28 at 6). Petitioner's subsequent actions are telling:

- Petitioner promptly filed a motion for a rehearing in state court. (Doc. 12-28 at 25). Petitioner did not argue that the state court failed to address a federal

constitutional claim (as one would expect if the earlier motion had been premised on federal law but the order denying relief was premised on state law). Instead, the motion for rehearing merely challenged the state court's determination that there was not any "newly" discovered evidence as that term is defined under state law. (The motion for rehearing was deemed denied due to the passage of time under Fla. R. Crim. P. 3.850(j).)

- Petitioner thereafter appealed from the denial of his motion for post-conviction relief. Petitioner summarized his argument on appeal as follows:

> The postconviction court's conclusion is directly contrary to the First District's analysis in *Burns v. State*, 858 So.2d 1229 (Fla. 1st DCA 2003). In *Burns*, the First District held that a defendant's knowledge that a witness is lying at trial does not bar a defendant's claim of newly discovered evidence based on that witness' post-trial recantation. Moreover, the documents attached to the postconviction court's order establish that prior to trial, Mr. Oliver denied that he had been offered a lesser sentence by the prosecution in exchange for his trial testimony in Appellant Keys' case. Thus the postconviction court erred by summarily denying Appellant Keys' newly discovered evidence claim.

(Doc. 12-28 at 35). Petitioner's argument repeated, largely verbatim, his argument from the earlier motion for post-conviction relief. (Doc. 12-28 at 37-41). If Petitioner were really raising a federal claim, then he would have presumably said so directly when contesting a decision that purportedly decided a federal claim without even mentioning it.

Petitioner's reaction to the state court's denial of his motion for post-conviction relief implies he was not pursuing a federal claim in state court.

• • • •

Petitioner did not fairly present a federal claim to the state court and he therefore failed to exhaust his remedies in that forum. Because of the passage of time, Petitioner is now precluded from returning to state court and he is therefore deemed to have procedurally defaulted this claim. Petitioner does not make any attempt to demonstrate cause for this default or any fundamental miscarriage of justice. As a result, ground one is denied.

(2) Petitioner's Allegation of Prosecutorial Misconduct is Unjustified

Assuming Petitioner fairly presented a federal claim to the state courts – which he did not – Petitioner would still not be entitled to relief because his claim of prosecutorial misconduct is without merit. As noted above, Petitioner argues that one of the prosecution's witnesses lied when he denied the existence of an agreement for a lighter sentence and, in addition, that the prosecution failed to correct this false testimony. To understand Petitioner's argument (and why it is unjustified) a review of the witness' testimony and certain documents is necessary.

The witness, Toris Oliver ("Oliver"), testified on direct examination that Petitioner shot Deborah Culin while robbing her. (Doc. 12-18 at 47-49 & 53-54). Oliver was later asked the following question and gave the following answer:

Q: The – have you been promised anything at all to testify in this particular case by the State of Florida regarding anything?

A: No.

(Doc. 12-18 at 62).

Oliver's testimony disclaiming a promise by the state was entirely consistent with a prior communication between his attorney and the prosecution, of which he had been previously apprised. A letter to Oliver from his attorney *ten months before Petitioner's trial* stated:

> In response to your letter of January 28, 2008, I am happy to see that someone is helping you at that end, because apparently I was unable to explain the situation to you when we met a few weeks ago.
>
> I was in the jail that day to visit you and some other clients. *Just by sheer chance,* I ran into Assistant State Attorney Ken Lewis, who was also doing some type of official business at the jail. *We began to discuss your case, and he said that he would be willing to make an offer for a shorter sentence if you would testify against Keys.*
>
> *However, as I was unable to get you to understand during our visit, he does not have the power to do anything for you now because the case is on appeal, and the appellate court has the file. Only if we win the appeal and the case is sent back for a new trial would he would [sic] have the authority to negotiate a deal.* What he was saying is that you could lock in a good deal for yourself now by testifying, and that would all be put into writing, and it would go into effect when we won the appeal, and the case came back to Orange County for retrial.
>
> *However, there is nothing in writing yet for me to send you because this was just a conversation he and I had at the jail.* Regardless, if you want, I can ask him to do a written proposal offer.

(Doc. 12-27 at 93) (emphasis added). The letter reveals that the prosecution had not made any specific promise to Oliver or to his attorney (and, in fact, reveals the prosecution's inability and/or unwillingness to make any such promise prior to the resolution of

Oliver's appeal *and then only if Oliver prevailed on the appeal*).[8]

Six months later, and approximately four months before Petitioner's trial, the Fifth DCA affirmed Oliver's conviction. *Oliver v. State*, 987 So.2d 91 (Fla. 5th DCA 2008). Oliver therefore knew four months before he testified at Petitioner's trial - and, by extension, while he was testifying at Petitioner's trial - that any chance for a deal vanished with the Fifth DCA's decision affirming his conviction.[9] His testimony at trial denying a "promise" or more generally a "deal" was therefore entirely consistent with the key communication preceding that testimony.[10]

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[8]This case is therefore analogous to *Lamarca v. Sec'y Dept. of Corr.*, 568 F.3d 929 (11th Cir. 2009), in which habeas relief was denied because petitioner failed to establish the witness received a benefit from the state in exchange for his testimony.

[9]A little more than two years after Petitioner's trial, Oliver wrote Petitioner's attorney and purportedly recanted his trial testimony. He wrote:

> I was offered a deal in exchange for my testimony by Assistant State Attorney Kenneth D. Lewis. As of right now I have in my possession a couple of letters sent to me via my counsel at the time Nancy McClintic discussing the offer. By me now advising you of this newly discovered evidence, you shall also be informed that my testimony was false in Kyle Keys trial in exchange for a lesser sentence in which the contents of the letters explains. During trial, I testified that I had not received a deal for my testimony, but in actuality I did and the letters prove it. Unfortunately, Mr. Lewis advised me to make up the necessary testimony in order to fabricate evidence to his satisfaction.

(Doc. 12-27 at 91). Oliver attached the earlier letter from his attorney in which she advised him there was *not* any specific promise or deal; the state attorney did *not* have the power to make such a promise or deal at the time; and any agreement could *not* be effected unless and until he prevailed on the appeal from his judgment of conviction. Oliver's claim that he received an actual offer that could be accepted and enforced is flatly contradicted by the text of the very letter he uses to support the claim. Petitioner's reliance on Oliver's statements in this regard (and his apparent willingness to believe him) is surprising because his trial counsel vigorously cross examined Oliver about changes in his story in an attempt to cast him as untrustworthy. (Doc. 12-18 at 72-73; Doc. 12-19 at 3-5, 35-37). His trial counsel famously asked Oliver at one point, "Were you lying then or are you lying now?" (12-19 at 3).

[10]*Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986) is therefore inapposite. In that case, the prosecution ultimately acknowledged the existence of a promise to, and an agreement with, the witness regarding his trial testimony (albeit an agreement with strings attached). *Id.* at 1462-63.

Moreover – and perhaps just as importantly – events after Petitioner's trial imply Oliver had not been promised anything in exchange for his testimony. Oliver acknowledged at Petitioner's trial that he was serving a life sentence for his involvement in the robbery, shooting and use of the victim's credit card. (Doc. 12-19 at 39). Nearly eight-and-one-half years later, Oliver is still serving a life sentence for these crimes. (Doc. 17 at 17 n.4). If Oliver had been promised a lesser sentence for his testimony, and if Oliver had lived up to his end of the bargain by testifying against Petitioner, then one would expect Oliver to seek enforcement of the promise. That he has not done so during the intervening 101 months implies there was not any promise or deal to begin with.

Petitioner's contention regarding prosecutorial misconduct is unjustified. Ground one is therefore denied for this separate and additional reason.

B. Ground Two

Petitioner alleges the state court improperly denied his motion for judgment of acquittal ostensibly in violation of his Fourteenth Amendment right to due process. (Doc. 1 at 11). Petitioner's direct appeal from the judgment of conviction did not allege a violation of a federal right and instead argued that the denial of his motion was inconsistent with state law. (Doc. 12-27 at 35-36). Petitioner did not fairly present a federal claim to the state court and therefore failed to exhaust his remedies in that forum. *See Zeigler v. Crosby*, 345 F. 3d 1300, 1307 (11th Cir. 2003) (petitioner failed to exhaust state court remedies by failing to raise a federal issue in his appeal from the judgment and sentence). Because of the passage of time, Petitioner is now precluded from returning to

state court and he is therefore deemed to have procedurally defaulted the claim. Petitioner does not make any attempt to demonstrate cause for this default or any fundamental miscarriage of justice.

Ground two is therefore denied.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a certificate of appealability only when a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Petitioner has not demonstrated that reasonable jurists would find this Court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petition has failed to make a substantial showing of the denial of a constitutional right. Thus, this

Court will deny Petitioner a certificate of appealability.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**. The Clerk of the Court shall enter judgment accordingly.

2. Petitioner is **DENIED** a Certificate of Appealability.

3. The Clerk of the Court is directed to close this case.

DONE AND ORDERED in Orlando, Florida, this 4 day of May, 2017.

G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
OrlP-5 5/2
Counsel of Record

Diana M. Tennis
636 W. Yale St.
Orlando, FL 32804

1-31-11

RE: Newly Discovered Evidence
CASE# 2006-CF-7165-O Kyle Keys V. State
[redacted]

FROM Toris Oliver X43288
Mayo Correctional Institution
8784 West US 27
Mayo, Florida 32066

To whom it may Concern, my name is Toris Oliver And I'm writting to Address An issue Long over Due. On 1-31-2008 I was offered A Deal IN exchange For my Testimony By Assistant State attorney Kenneth D. Lewis. AS of Right Now I have IN my possession A Couple of letters sent to me VIA my Counsel at the time Nancy mcClintic Discussing The offer.

By me Now Advising you of This Newly Discovered Evidence, you Shall Also BE informed That my Testimony was false in Kyle Keys TRial IN exchange For A Lesser Sentence in which The Contents of the Letters explains. During TRial I Testified that I had Not Received A Deal For my Testimony, But IN Actuality I did And THe Letters prove it. unFortunately MR. Lewis Advised me to make up the Necessary Testimony IN order to FABRicate evidence to his Satisfaction.

I am willing to Be Deposhoned in order to Bring the truth to the Light And explain This Newly Discovered evidence. I Can And wish to Be contacted By you in order to Clarify Any Questions you may have

Sincerly
Toris Oliver

Toris Oliver X43788
Mayo Correctional Institution
Mayo, Florida 32066

Certificate of service

I HEREBY CERTIFY, that A true copy of the foregoing document was placed in the hands of Mayo correctional Institution officials to forward by U.S. Mail to:

Attorney at Law
Diana M. TENNIS.
636 W. YALE St.
ORlando, Fl 32804

NANCY MCCLINTIC, P.A.
ATTORNEY AND COUNSELOR AT LAW
501 NORTH MAGNOLIA AVENUE
ORLANDO, FLORIDA 32801-1364

MAIN TELEPHONE: 407-839-0110 MAIN FACSIMILE: 407-841-4024

Toris Oliver
DC#43288
Desoto Correctional Institution
13617 Southeast Highway 70
Arcadia, FL 34266-7800

January 31, 2008

RE: Toris Oliver v. State of Florida, Case No. 5D06-3645

Dear Mr. Oliver:

In response to your letter of January 28, 2008, I am happy to see that someone is helping you at that end, because apparently I was unable to explain the situation to you when we met a few weeks ago.

I was in the jail that day to visit you and some other clients. Just by sheer chance, I ran into Assistant State Attorney Ken Lewis, who was also doing some type of official business at the jail. We began to discuss your case, and he said that he would be willing to make an offer for a shorter sentence if you would testify against Keys.

However, as I was unable to get you to understand during our visit, he does not have the power to do anything for you now because the case is on appeal, and the appellate court has the file. Only if we win the appeal and the case is sent back for a new trial would he would have the authority to negotiate a deal. What he was saying is that you could lock in a good deal for yourself now by testifying, and that would all be put into writing, and it would go into effect when we won the appeal, and the case came back to Orange County for retrial.

However, there is nothing in writing yet for me to send you because this was just a conversation he and I had at the jail. Regardless, if you want, I can ask him to do a written proposed offer.

If you do want to do this, you will be required to testify against Keyes. Then, if you later decided to reject the deal and go to trial again, the statements you made at the Keyes trial could be used against you. The deal he offers will probably not be time served, but anything would be an improvement on a life sentence.

Sincerely yours,

Nancy McClintic

Nancy McClintic,
Attorney at Law.

NM:wfm

P.S. Your case was scheduled for conferencing on Jan. 17.

IN THE

NINTH JUDICIAL CIRCUIT COURT

ORANGE COUNTY, FLORIDA

STATE OF FLORIDA, Plaintiff, v. KYLE A. KEYS, Defendant.	Case No. 2006-CF-7165

MOTION FOR POSTCONVICTION RELIEF

The Defendant, by and through undersigned counsel, and pursuant to Florida Rule of Criminal Procedure 3.850, respectfully moves this Honorable Court to grant him a new trial, and in support of said motion alleges:

1. Name and location of the court that entered the judgment of conviction under attack: Ninth Judicial Circuit Court in and for Orange County, Florida.

2. Date of judgment of conviction: December 18, 2008.

3. Length of sentence: Life imprisonment.

4. Nature of offense involved: Murder, robbery, and fraudulent use of a credit card.

5. What was your plea? (check only one)

   (a) Not Guilty X

   (b) Guilty ___

   (c) Nolo Contendere ___

   (d) Not Guilty by reason of insanity ___

   If you entered one plea to one count, and a different plea to another count, give details: N/A

6. Kind of trial: (check only one) N/A

7. Did you testify at the trial or at any pre-trial hearing?

Yes __ No X

If yes, list each such occasion: N/A.

8. Did you appeal from the judgment of conviction?

Yes X No ___

9. If you did appeal, answer the following:

(a) Name of court: Fifth District Court of Appeal, State of Florida.

(b) Result: *Per Curiam* Affirmed.

(c) Date of result: February 22, 2011.

(d) Citation (if known): *Keys v. State*, 56 So. 3d 21 (Fla. 5th DCA 2011).

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in this court?

Yes __ No X

11. If your answer to number 10 was "yes," give the following information (applies only to proceedings in this court):

(a) (1) N/A

(2) Grounds raised: N/A

(3) Did you receive an evidentiary hearing on your petition or motion, etc? N/A

(4) Result: N/A

(5) Date of result: N/A

If you did appeal, answer the following:

(a) Name of court: N/A

(b) Result: N/A

(c) Date of result: N/A

(d) Citation (if known): N/A

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in any other court?

Yes ___ No X

13. If your answer to number 12 was "yes," give the following information:

(a) (1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition or motion, etc.? N/A

(5) Result: N/A

(6) Date of result: N/A

(b) As to any second petition, application, motion, etc., give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition or motion, etc.? N/A

(5) Result: N/A

(6) Date of result: N/A

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and the facts supporting them.
For your information, the following is a list of the most frequently raised grounds for postconviction relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may

raise any grounds that you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the Court if you merely check (a) through (i).

(a) Conviction obtained by plea of guilty or nolo contendere which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by the unconstitutional failure of the prosecution to disclose to defendant evidence favorable to the defendant.

(c) Conviction obtained by a violation of the protection against double jeopardy.

(d) Denial of effective assistance of counsel.

(e) Denial of right of appeal.

(f) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).

(g) Sentence in excess of the maximum authorized by law.

(h) Newly discovered evidence.

(i) Changes in the law that would be retroactive.

A. Ground 1: Newly discovered evidence.

Supporting FACTS (tell your story briefly without citing cases or law):

The State's key witness at trial was Toris Oliver. During his trial testimony, Mr. Oliver claimed that the Defendant told him that he (the Defendant) shot the victim in this case (i.e., Mr. Oliver asserted that the Defendant confessed to the crime). (T-167). During Mr. Oliver's testimony, the prosecutor specifically asked Mr. Oliver whether he had been promised anything by the prosecution in exchange for his trial testimony and Mr. Oliver responded "No." (T-175).

Following the trial (while the Defendant's case was pending on direct appeal), Mr. Torres wrote a letter to the Defendant's trial counsel – wherein Mr. Torres admitted that at the time of trial, he had, in fact, been offered a lesser sentence by the prosecution in exchange for his trial testimony in the Defendant's case. Mr. Oliver has also disclosed a letter from his attorney (Nancy McClintic) wherein Ms. McClintic tells Mr. Oliver (prior to the Defendant's trial) that she had talked to the prosecutor and the prosecutor told her that he would offer Mr. Oliver a shorter sentence if Mr. Oliver would testify against the Defendant. Both of these letters (Mr. Oliver's post-trial letter and Ms. McClintic's pretrial letter) establish that Mr. Oliver's trial testimony was false (i.e., Mr. Oliver lied when he stated during the Defendant's trial that he had not been promised anything by the prosecution in exchange for his trial testimony).

"To be newly discovered, the evidence must be such that neither the [defendant], his counsel, nor the trial court could have discovered the facts in the affidavit at the time of trial through the exercise of due diligence, and must be such that it would probably produce an acquittal on retrial." *Burns v. State*, 858 So. 2d 1229, 1230 (Fla. 1st DCA 2003). "Recantation evidence is a type of newly discovered evidence." *Burns*, 858 So. 2d at 1230. The Defendant submits that he meets both

of the newly discovered evidence prongs in this case. Pursuant to Mr. Oliver's trial testimony, it is clear that the Defendant could not have discovered that Mr. Torres had been offered a lighter sentence in exchange for his testimony because Mr. Torres denied the existence of such a deal during his testimony. The Defendant further submits that had the jury been informed that Mr. Torres had been offered a lighter sentence in exchange for his testimony, trial counsel would have been able to impeach Mr. Torres and the jury would have disbelieved his testimony. If this information is disclosed to a jury on retrial, it will probably produce an acquittal. Without Mr. Torres' trial testimony, the State would not have been able to prove its case against the Defendant. Most notably, during a previous trial against the Defendant, Mr. Oliver did *not* testify and *the jury was hung*.

In *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997), the Ninth Circuit Court of Appeals stated the following regarding the importance of informing the jury that a prosecution witness has been offered a lenient sentence in exchange for his or her testimony:

> The need for disclosure is particularly acute where the government presents witnesses who have been granted [a lenient sentence] in exchange for their testimony. We have previously recognized that criminals who are rewarded by the government for their testimony are inherently untrustworthy, and their use triggers an obligation to disclose material information to protect the defendant from being the victim of a perfidious bargain between the state and its witness. We said that informants granted immunity are
>
> > by definition . . . cut from untrustworthy cloth, and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom . . . . Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy . . . . Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required by

> *Giglio*[1] to turn over to the defense in discovery all material information casting a shadow on a government witness's credibility.

United States v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th Cir. 1993).

Consistent with the Ninth Circuit's reasoning in *Carriger*, Mr. Torres was "inherently untrustworthy" in light of the fact that he was offered a lighter sentence by the State in exchange for his testimony. If, during a retrial, the jury is informed that Mr. Torres was offered a lighter sentence in exchange for his testimony, it is probable that the Defendant would be acquitted.[2] *See United States v. Barham*, 595 F.2d 231, 243 (5th Cir. 1979) ("[Defendants are] entitled to a jury that, before deciding which story to credit, [is] truthfully apprised of any possible interest of any Government witness in testifying falsely.").

The issue of whether evidence is new (i.e., could not have been previously discovered) is a factual matter to be resolved at an evidentiary hearing. *See Dwyer v. State*, 743 So. 2d 46, 48 (Fla. 5th DCA 1999) ("We reverse and remand for a new evidentiary hearing on Dwyer's claims of newly discovered evidence and ineffective assistance of counsel. Upon remand, the trial court shall determine whether, through the exercise of due diligence, the reputation witnesses could have been

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[1] *Giglio v. United States*, 405 U.S. 150 (1972).

[2] Courts in this country have consistently held that an after-the-fact disclosure of a deal between the prosecution and the prosecution's key witness entitles the defendant to a new trial. *See, e.g., Brown v. Wainwright*, 785 F.2d 1457, 1466 (11th Cir. 1986) ("If knowledge of the agreement struck with Floyd for favorable treatment on the Barksdale case could reasonably have led a jury to disbelieve his testimony, Brown's conviction and sentence were constitutionally invalid. There is a reasonable likelihood that disclosure to the jury that Floyd was testifying under an agreement that might save his skin could have affected the jury's verdict and sentence."); *Tassin v. Cain*, 482 F. Supp. 2d 764, 775 (E.D. La. 2007) ("Petitioner's jury was not fully informed of the possible interests that motivated Georgina Tassin. Weighing her story against Petitioner's, the jury was presented with a defendant testifying to save his life and a wife testifying against her husband with no apparent motivation other than that which she professed: 'to get the truth out in the open.' The jury's inability to assess Georgina Tassin's credibility in light of her deal for potential leniency is sufficient to undermine confidence in the outcome of Petitioner's trial.").

timely discovered and if their testimony could have been presented at trial."). Additionally, "ordinarily an evidentiary hearing is required for the trial court to properly determine . . . whether the newly discovered evidence is of 'such nature that it would probably produce an acquittal on retrial.'" *McLin v. State*, 827 So. 2d 948, 956 (Fla. 2002). Accordingly, the Defendant respectfully requests an evidentiary hearing on his newly discovered evidence claim.

15. If the ground listed in 14 was not previously presented on your direct appeal, state briefly what ground was not so presented and give your reasons it was not so presented: A claim of newly discovered evidence must be brought within two years of learning of the newly discovered evidence. *See* Fla. R. Crim. P. 3.850(b)(1); *Spradley v. State*, 868 So. 2d 632, 633 (Fla. 2d DCA 2004).

16. Do you have any petition, application, appeal, motion, etc., now pending in any court, either state or federal, as to the judgment under attack?

Yes ___ No X

17. If your answer to number 16 was "yes," give the following information:

(a) Name of Court: N/A

(b) Nature of the proceeding: N/A

(c) Grounds raised: N/A

(d) Status of the proceedings: N/A

18. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein.

(a) At preliminary hearing: N/A

(b) At arraignment and plea: N/A

(c) At trial: Diane M. Tennis, 636 West Yale Street, Orlando, Florida 32804

(d) At sentencing: Ms. Tennis

(e) On appeal: Leonard R. Ross, 444 Seabreeze Boulevard, Second Floor, Daytona Beach, Florida 32118

(f) In any postconviction proceeding: Michael Ufferman, 2022-1 Raymond Diehl Road, Tallahassee, Florida 32308

(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

WHEREFORE, Movant requests that the Court grant all relief to which the movant may be entitled in this proceeding, including but not limited to (here list the nature of the relief sought):

1. An evidentiary hearing to determine the merits of this motion for postconviction relief.

2. Such other and further relief as the Court deems just and proper.

OATH

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.

KYLE A. KEYS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the State Attorney
415 North Orange Avenue
Orlando, Florida 32801

by U.S. mail delivery this 17th day of May, 2012.

Respectfully submitted,

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227

Counsel for Defendant **KEYS**

xc: Kyle A. Keys

told me the specific facts that you laid out in that statement?

A No.

Q The -- have you been promised anything at all to testify in this particular case by the State of Florida regarding anything?

A No.

(Pause)

Q All right. I'm going to show you, sir, what's been previously marked as State's Exhibit B for Identification. Do you recognize that, sir?

A Yes.

Q How is it that you recognize that?

A I see me, Kyle, Desirae at the store.

Q All right. That's you in the store at the Super One Stop after the robbery?

A Yes.

Q And now I'm showing you what's been marked as State's Exhibit R for Identification and ask if you recognize that?

A Yes.

Q I'm also showing you what's been marked as State's Exhibit P for Identification and ask if you recognize that?

A Yes.

Q What was State's Exhibit R; what does that show?

A That's me turning in and my girlfriend's car, the Nissan Sentra.

Q And is that right after the robbery?

A Yeah.

Q And the other photo, what does that show that's within that Exhibit, State's Exhibit R?