UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

FRANZ RIGG,

Petitioner,

v. CASE NO.: 1:13-cv-120886-MGC

MICHAEL D. CREWS,
Sec'y, Fla. Dep't of Corr.,

Respondent.

Petitioner's Reply to Respondent's Response to Order to Show Cause

Before the Court is Petitioner Franz Rigg's Petition for a Writ of Habeas Corpus. (D.E. 1). On June 7, 2013, Respondent filed a response to the Court's Order to show cause for not granting the Petition. (D.E. 10). Petitioner, through undersigned counsel, files this reply to the State's Response to the show cause order.

Contemporaneously with this reply, counsel has filed a motion to expand the record to include portions of the record on appeal and transcripts of pretrial proceedings, if necessary. Additionally, counsel seeks leave to file an affidavit by James Murphy, who would testify that Rosa Torrealba was drugged and raped by the alleged victim during their first date, and that she intended to take revenge on him.

I. STANDARD OF REVIEW

A. Habeas Corpus Review of State Court Decisions

Pursuant to 28 U.S.C. § 2254(a), a district court may grant an application for a writ of habeas corpus if the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Federal courts will generally only consider claims first raised in state

courts. 28 U.S.C. § 2254(b). With respect to claims denied on the merits in a state court, federal courts may grant relief when the lower court made a clear error of law or fact:

> (d) An application for a writ of habeas corpus . . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) 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; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d). However, federal courts apply *de novo* review to claims that were never adjudicated in state court, including those rejected solely pursuant to a state procedural bar. Conner v. Hall, 645 F.3d 1277, 1292 (11th Cir. 2011).

Although § 2254(d)(1) requires deference to the state court's conclusions of law, it does not require a federal court "to defer to the opinion of every reasonable state judge on the content of federal law." Wilkerson vs. Taylor, 529 U.S. 362, 389 (2000). "If after carefully weighing all of the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail." Id.

Federal habeas courts also must defer to the factual findings of state courts in many circumstances. Petitioners challenging a finding of fact must contend with Section 2254(e)(1), which provides that a state court's findings are presumed correct unless rebutted by clear and convincing evidence to the contrary. However, if a factual finding is unreasonable under Section 2254(d)(2), the presumption of correctness disappears and need not be rebutted. Adkins v. Warden, Holman Corr. Fac., 710 F.3d 1241, 1249 (11th Cir. 2013), *cert. pet. filed July 15,*

2013. "'A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.'" Id. at 1251 (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)).

B. Evidentiary Hearings on Federal Habeas Review

Under 28 U.S.C. §2254(e), petitioners who have "failed to develop the factual basis of a claim in State court" face difficult barriers to an evidentiary hearing in federal court. But a petitioner "fails" to develop the factual basis of a claim only through "a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams v. Taylor, 529 U.S. 420, 432 (2000). Where, as here, no such failure exists, Townsend v. Sain applies, requiring an evidentiary hearing when any of the six following criteria are present:

> …. If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. 293, 313 (1963); see Jefferson v. Upton, 130 S. Ct. 2217, 2220-21 (2010).

C. Use of Incentives to Secure Witness Testimony

American courts are often confronted with "the 'serious questions of credibility' informers pose." Banks v. Dretke, 540 U.S. 668, 701 (2004) (quoting On Lee v. United States, 343 U.S. 747, 757 (1952)). Nevertheless, the Constitution does not forbid admitting evidence from paid informers when the circumstances allow "the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed

jury." Hoffa v. United States, 385 U.S. 293, 311 (1966). Thus, no violation occurs when a witness is "subjected to rigorous cross-examination, and the extent and nature of his dealings with federal and state authorities [are] insistently explored." Id. However, "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." Montana v. Edelhoff, 518 U.S. 37, 53 (1996) (citing Chambers v. Mississippi, 410 U.S. 284 (1973)); see Michigan v. Bryant, 562 U.S. ____; 131 S. Ct. 1143, 1162 n.13 (2011).

D. Destruction of, or Failure to Disclose, Exculpatory Evidence

The Due Process Clause guarantees defendants the right to certain procedural safeguards when confronting a witness who testifies in return for some incentive. Brady v. Maryland, 373 U.S. 83 (1963). If the State possesses material, exculpatory information, it must be turned over to the defense in time for effective use at trial. Id.

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of [material] evidence affecting credibility" also violates a defendant's rights to due process. United States v. Giglio, 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)). This responsibility extends to information known to police, who are treated as agents of the prosecutor for the purposes of Brady and its progeny. Kyles v. Whitley, 514 U.S. 419, 421 (1995). Defendants are constitutionally permitted to rely on a prosecutor's representation that an open file policy exists; thus, failure to include an important document in a file constitutes suppression. Strickler v. Greene, 527 U.S. 263, 276 n. 14 (1999).

To demonstrate materiality, a petitioner need not show that the evidence withheld renders the evidence constitutionally insufficient to support a verdict of guilty. Id. at 434-45; see Jackson v. Virginia, 443 U.S. 307, 324 (1979) (establishing that evidence is sufficient unless "no rational trier of fact could have found proof of guilt beyond a reasonable doubt"). Instead, evidence is

material when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 443 U.S. at 435; see United States v. Bagley, 473 U.S. 667, 682 (1985) (explaining that materiality exists when the probability of a different result if the evidence had been disclosed is "sufficient to undermine confidence in the outcome").

Where evidence has been destroyed or lost, courts are ill-equipped to determine whether it would be material. Rather than encourage speculation on content of such evidence, the Supreme Court has directed courts to grant relief only upon a showing that the State has acted in bad faith, as when state actors "by their conduct indicate that the evidence could form a basis for exonerating the defendant." Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

E. Ineffective Assistance of Counsel

The Sixth Amendment guarantees the right to effective assistance of counsel at trial. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970) (recognizing that "the right to counsel is the right to the effective assistance of counsel"). Unless the ineffectiveness amounts to a *per se* denial of counsel, a petitioner must "show how specific errors of counsel undermined the reliability of the finding of guilt." United States v. Cronic, 466 U.S. 648, 659 n. 26 (1984). "An error of counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland v. Washington, 466 U.S. 668, 691 (1984). Thus, in addition to deficient performance, a habeas petition must show that counsel's error was reasonably likely to have resulted in conviction. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

F. Procedural Default

Mr. Rigg concedes that Respondent has identified claims raised in this proceeding that were never raised in state court. Claim 2, Claim 3a, and Claim 3d are not exhausted. However,

the claims are not procedurally defaulted because any failure to raise the claims was due to the ineffective assistance of counsel on appeal, Murray v. Carrier, 477 U.S. 478, 488 (1986), or on state postconviction review. Martinez v. Ryan, --- U.S. ----, 132 S. Ct. 1309, 1320 (2012). Additionally, Mr. Rigg's failure to present his claims of ineffective assistance of appellate counsel in state court is no obstacle to considering them as grounds for excusing his procedural default. See Edwards v. Carpenter, 529 U.S. 446, 453 (2000). Mr. Rigg did not have the benefit of counsel with respect to any claims of ineffective assistance of counsel, which must be brought in separate postconviction proceedings under Rule 9.141 of the Florida Rules of Appellate Procedure. Thus, under Martinez, those claims are not procedurally defaulted.

II. FACTS

A. Rosa Torrealba's Story in her Own Words: the Letter to the Sentencing Judge

Ms. Torrealba's letter is dated November 19, 2001. (D.E. 11-2, at 21-26). In her letter, Ms. Torrealba asked the sentencing judge for leniency. She explained that she grew up in a poor neighborhood of Caracas, Venezuela. At the age of eight, Ms. Torrealba joined the Analysis Group ("AG"), which was formed to "give children the appropriate tools to want to succeed in life." At the age of nine, AG's director began to molest her. (See Tr. 371-72 (identifying man as Edwin Martinez)). The following year AG's director brought her to the United States, where she was isolated from the outside world except for when she attended school. In 1999, AG's director was arrested, and in the ensuing investigation Ms. Torrealba "opened [her] eyes and saw a reality that was too painful to bear." She and the other AG children were left homeless. She turned to drugs to "numb [her]self out, and tried to commit suicide on different occasions."[1] According to

1 This statement directly contradicted Ms. Torrealba's testimony that she had only recently started taking drugs, after meeting Mr. Rigg. (Tr. 387).

Ms. Torrealba, at that point she met Mr. Rigg, who "became a friend and seemed to help when [she] needed it most." Due to his involvement she "began to see a therapist and was able to deal with some issues."[2]

According to Ms. Torrealba, "A few weeks after [breaking up with Mr. Rigg] I went on a date with the 'victim' in this case and had another unpleasant experience. I was taken advantage of, and had another emotional breakdown because of it. Franz Rigg was aware of what happened to me."[3]

B. The Establishment and Termination of Ms. Torrealba's Sexual Relationship with Franz and Elby Rigg

Ms. Torrealba came to America when she was twelve years old. (Tr. 371). Along with 13 or so other children (including her siblings), Torrealba lived with a man named Edwin Martinez. (Tr. 371). Mr. Martinez molested Ms. Torrealba and the others, and was convicted and incarcerated when Ms. Torrealba was sixteen years old. (Tr. 372). Ms. Torrealba suffered from the effects of her traumatic experiences. Torrealba showed J.L. where she had cut herself because she used to do this when she was "stressed out." (Tr. 263); see also subsection A, *supra* (summarizing Ms. Torrealba's letter to her sentencing judge).

Mr. Rigg met Ms. Torrealba while she was working as a receptionist at a chiropractor's office, where he also worked. (Tr. 373, 701). Mr. Rigg helped her find a therapist to deal with her mental health issues and suicidal thoughts. (Tr. 377). Mr. Rigg helped Ms. Torrealba find

2 Admittedly, Ms. Torrealba's letter contains statements unflattering to Me. Rigg, as she explained that she broke off their relationship because he "was becoming overly protective and very possessive, and this scared [her]." She also wrote that she was "facing life imprisonment for something I didn't plan or do."

3 If the Court grants leave, Mr. Rigg will file an affidavit from their mutual employer James Murphy, who would aver that Ms. Torrealba explained that J.L. had drugged and raped her on their first date, and that she intended to exact revenge.

her job at the mall where she could meet people her own age. (Tr. 707). Mr. Rigg also found her an apartment with a friend of his, Steve Bockus, who needed a roommate and lived closer to the mall than Ms. Torrealba's previous residence. (Tr. 376, 708). Mr. Rigg often dropped Ms. Torrealba off at work or picked her up, and sometimes took her to lunch. (Tr. 708-709). Elby did so occasionally as well. (Tr. 709). Mr. Rigg introduced Ms. Torrealba to his therapist Carl Moss, whom all three saw individually and as a group. (Tr. 712-713).

Their friendship developed until Ms. Torrealba entered into a sexual relationship with both Mr. Rigg and his wife Elby. (Tr. 702-704). The sexual relationships with Ms. Torrealba faded as Mr. and Ms. Rigg drifted apart from her due to "[d]ifferences in goals, differences in ages, differences in futures." (Tr. 704). Whereas the Riggs were more interested in "the dinner party thing," movies, and restaurants, Ms. Torrealba would often decline to accompany them, preferring to go out to a club. (Tr. 705). Mr. Rigg was glad that she was making friends with people closer to her own age. (Tr. 705-706).

A turning point occurred during the three's trip to Busch Gardens. (Tr. 381-82, 706). Ms. Torrealba became upset when she walked in on the Riggs. (Tr. 706). Later she explained to Mr. Rigg that she was upset, to which he responded "if anyone would basically have the right to be jealous, it would be my wife, not my girlfriend. That may not sound logical, but I felt that was where I put my foot down..." in response to Ms. Torrealba's insinuations that he should leave Elby for her. (Tr. 706). Mr. Rigg and Ms. Torrealba reached an understanding that their paths would diverge because he could not give her what she wanted. (Tr. 707). Mr. Rigg felt relieved that she was moving on to look for a suitable partner, because "her emotional pains and problems" had become more "time and effort intensive" as their relationship had deepened. (Tr. 707).

Mr. Rigg had mixed feelings about terminating the relationship with Ms. Torrealba, explaining that although he was not happy to see her go, he did not want to remain her boyfriend, and overall he "was hoping that she could go on the next stage of her life and become healthy and whole, and, for lack of a better term, more normal than what I had offered her." (Tr. 747).

A few days after returning from Busch Gardens, Ms. Torrealba called Mr. Rigg and mentioned that she had been on a few dates, which Mr. Rigg thought "[f]antastic." (Tr. 709-710). They agreed to continue to be friends, and Ms. Torrealba promised to keep working and to get back in school. (Tr. 710-11).

C. Ms. Torrealba's Relationship with J.L.

The victim in this case ("J.L.") met Torrealba in December 2000 at the mall at which they both worked. He asked her on a date, and she came to his house. According to J.L.'s testimony, the two had sexual intercourse before they left to go sing Karaoke. Afterward, they went to the house of one of J.L.'s friends, where they continued to drink and Rosa smoked some marijuana with his friends. (Tr. 322). J.L. did not partake because he was not in the mood to smoke. (Tr. 322). Torrealba returned to J.L.'s house, where they once again had sex before he took her home. (Tr. 255-260, 319-22).

Ms. Torrealba gave an account of their first date that differed in a few respects. According to Ms. Torrealba, J.L. was extremely drunk after the first date, and there was no sex after they returned to his house. (Tr. 385). J.L. had been drinking and using drugs, and was so intoxicated that she was afraid to have him drive her back to his house. (Tr. 453).

According to J.L., the following day Ms. Torrealba approached him at work wanting to know whether he thought she was a "slut." J.L. responded "No, I think we have a lot of

chemistry," which appeared to reassure her. (Tr. 261). They arranged a second date a couple of days later (Tr. 264), during which Torrealba withdrew from their physical intimacy, explaining that she wanted to get to know him better. The rest of the date consisted of conversation. (Tr. 262). Ms. Torrealba's account was basically consistent with J.L.'s. (Tr. 385-86).

D. The Night before the Alleged Sexual Assault: December 12, 2000

Mr. Rigg and Ms. Torrealba agreed that they met on the night of December 12, 2000. However, their testimony as to the events of that night could not have been more different.

Mr. Rigg testified that Ms. Torrealba called him at 3:00 a.m., telling him "I don't know where I'm at. I'm at Flannigan's. Could you please come pick me up? Nobody else can pick me up." (Tr. 711). Ms. Torrealba explained to him that she had gone out on a date that had not ended well, and that she "found herself" at Flannigan's. (Tr. 712). He and Elby picked her up and took her back to the Riggs' residence, where a "very harsh verbal" argument ensued. (Tr. 711). Mr. Rigg drove her home the following morning. (Tr. 767).

Ms. Torrealba's version, told for the first time at Mr. Rigg's trial and supported by evidence not elicited in her own trial,[4] painted Mr. Rigg as a sadistic monster. On the night of December 12, 2000, Ms. Torrealba accidentally took the wrong bus after staying late at work to close the store. (Tr. 386). She was taking a lot of drugs and dealing with severe depression, and she would "sometimes black-out and just completely like lose time, lose periods of time." (Tr. 387). She ended up at a restaurant, and called Mr. Rigg from there. (Tr. 388). Mr. Rigg came to pick her up, and took her back to his house. (Tr. 388-89). His ankle was hurt, and he was using crutches. (Tr. 391).

4 Relevant portions of her trial will be provided with the Court if necessary, as per the contemporaneously-filed motion to expand the record.

According to Ms. Torrealba, Mr. Rigg was upset because he suspected that she had not actually gotten the wrong bus, but instead been with someone who had left her. (Tr. 389). He demanded that she tell him about the details of her recent dates with J.L. (Tr. 390). She told him that she had had unprotected anal sex with J.L., which upset him greatly. (Tr. 390). Mr. Rigg got some duct tape from his wife[5] and used it to bind her hands and ankles, and to tape her mouth. (Tr. 390). Mr. Rigg then used his crutches to beat Ms. Torrealba all over her body (Tr. 391). Mr. Rigg was incensed because he thought she had broken up with him to see other people. (Tr. 391). "He told me that I had put him in danger for having unprotected sex, that all he tried to do was love me and be there for me, and he told me that I was going to be outside and sleep with the dogs where I belong." (Tr. 391). He asked whether she wanted to die by a knife or to drown; when she said she'd rather be cut, he dunked her in the pool until she was "waking up coughing water." (Tr. 392). He then tried to make her eat dirt. (Tr. 392). He left her outside to sleep, still bound. (Tr. 393).

Later, Officer Borges would testify that he did not observe any injuries or bruises to Ms. Torrealba when she was arrested less than a week later, and that Ms. Torrealba did not complain of any. (Tr. 577-78). J.L. would testify at Mr. Rigg's trial that Ms. Torrealba was limping due to what she referred to as a skating accident (Tr. 267), a detail he omitted from his testimony at Ms. Torrealba's trial. (See Torrealba Trial Transcript at 234; Deposition of J.L. for Torrealba Trial at 40).

5 Neither Mr. Rigg nor Elby were charged in connection with the events of that night.

E. The Night of December 13, 2000

Just as Mr. Rigg and Ms. Torrealba gave different accounts of the night before, they offered different versions of the day the crime allegedly occurred. Ms. Torrealba's testimony was mostly consistent with that of J.L., which she had observed during her own trial. However, J.L. testified for the first time that Ms. Torrealba was limping when he arrived at her apartment.

1. The testimony of Franz Rigg

The following day Ms. Torrealba called Mr. Rigg (Tr. 712). She wanted Mr. Rigg to meet someone she wanted to date. (Tr. 714). She suggested that Mr. Rigg meet them that night. (Tr. 715). Mr. Rigg had dinner plans, but he agreed that "[i]f it can be before my dinner, I can stop by real quick." (Tr. 715).

Mr. Rigg arrived driving his wife's vehicle. (Tr. 716). Mr. Rigg had sustained "an avulsion fracture, where you tear bone away from the tendon," and could not drive his own car, which had a manual transmission. (Tr. 717). Mr. Rigg's ankle was in a soft cast because the injury was too swollen to set with a hard cast, and he was walking on a single crutch. (Tr. 717).

When Mr. Rigg arrived, Ms. Torrealba appeared to be inebriated. She invited him in to meet J.L. (Tr. 718). When he entered, "from the left Mr. L. walked up, and because I felt the situation was just a little bit uncomfortable, I presented myself immediately, 'Hello, I'm Steve's friend. I'm Rosa's friend. How are you doing,' and he shook my hands, and he looked at Rosa." (Tr. 719). J.L. sought reassurance from Ms. Torrealba,[6] and Mr. Rigg told him "No, I just stopped by real quick. I'm on my way to a dinner date. Mind if I sit down?" (Tr. 719). J.L.

6 The transcript here indicates that "When [J.L.] looked at Rosa, he was like (indicating)." (T. 719).

asked again "What is he doing here?" (Tr. 719). Mr. Rigg again replied, "I'm just stopping by real quick on the way to a dinner date. I'm friends with Steve and Rosa." (Tr. 719).

In Mr. Rigg's own words:

> The handshake continued, but it wasn't like we were just shaking hands. I was -- like I'm trying to assure him I was there very briefly and everything was all right and, and he's trying to ascertain from her what I was doing there. It was almost as if he was also buzzed and he wasn't quite getting it or he didn't want to get it.
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> So, I was attempting to walk through the threshold so I could go sit down. Number one, because I wasn't comfortable standing.
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> Number two, because now I am starting to feel a little bit really uncomfortable, like, what's the problem? It became from a handshake to me trying to push through the doorway and him trying to block me in a kind of instant transformation. It became kind of a little shoving match, except I couldn't shove very well because I was on one leg.
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> ....
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> I wasn't able to walk through the threshold, and when I tried, he kind of just jerked me a little bit, nothing violent or bad, but I fell off balance. When I fell off balance, I lurched my right side. As I was trying to walk by, I was grazing his right side, and somewhat like Mr. L. testified, we had physical contact between the two bodies, which was kind of shoving, pushing, pulling, and I started to go down.
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> When I started to go down, I grabbed him with my right hand across his left side, because it was my right able. My right ankle, very similar to what he said, ended up going past him as I fell back. As I fell back, I grabbed him. He fell on top of me....

(Tr. 720-22).

After the two were on the ground, Mr. Rigg told J.L. repeatedly to "Relax," and tried to "assure him I was not there for that." (Tr. 722). J.L. seemed resentful, but was also "just belligerent and flailing around. He wasn't even striking me. He was just flailing like drunk, or, not really drunk, because drunk is more of a loss of coordination. He just seemed like he didn't know what was going on." (Tr. 722). J.L. would not respond to Mr. Rigg's entreaties, but kept looking at Ms. Torrealba for verification. (Tr. 722).

For a while, Mr. Rigg held on to J.L. as he struggled. "I didn't strike him. I didn't kick him. I didn't punch him . . . [W]hen he fell, he fell on me and I hurt quite bad, and every movement at that point, even if he just raised my ankle, was extremely painful." (Tr. 723). Eventually J.L. calmed down as Mr. Rigg kept telling him that he did not want to fight. (Tr. 723). When Mr. Rigg asked if he could let J.L. go, "it wasn't like a question and answer interaction between two people. It was more like he noticed that I wasn't punching him. He noticed that I wasn't kicking him. I grabbed ahold of him and held on. He realized that I wasn't doing anything else, and he stopped." (Tr. 724).

After an extremely brief and uncomfortable conversation on the couch, Mr. Rigg got up to leave. (Tr. 724). He asked Rosa to accompany him out, and J.L. followed them out to the breezeway, where J.L. and Rosa smoked cigarettes. (Tr. 725). J.L. said several times that he was also going to leave. (Tr. 725). As Mr. Rigg left, he told J.L. that he should not drive, and asked Rosa to keep him at her place for a while. (Tr. 725). Ms. Torrealba called Mr. Rigg that night, distraught because J.L. had "freaked out."[7] (Tr. 727).

2. The testimony of J.L.

Ms. Torrealba called around 3 p.m. and invited him over to have pizza and beer. (Tr. 264). J.L. had already made plans to go to Karaoke with his friends again, but agreed to stop by for a while. (Tr. 332). When he arrived sometime between 4:00 and 6:45 p.m. (Tr. 336-338), J.L. had to wait five or six minutes between the time he knocked and the time she opened the door (Tr. 266-67). J.L. noticed that Ms. Torrealba was limping.[8] (Tr. 266, 334.). Torrealba explained that

7 The court sustained the state's objection to Mr. Rigg's testimony that Ms. Torrealba told him that J.L. had "freaked out."

8 J.L. did not testify that Ms. Torrealba was limping, or that she told him she had hurt herself skating, during Ms. Torrealba's trial. (Torrealba Trial Tr. 234; see also J.L. Depo. 40). Mr.

she was limping because she had hurt herself skating. (Tr. 267). Torrealba did not have any pizza, but she offered him a drink made from "Kahlua and something. It was a dark drink in a martini glass." (Tr. 267). Ms. Torrealba had a martini glass as well but "wasn't really drinking it." (Tr. 268). When J.L. finished his drink she brought him another of the same, but brought herself a beer instead. (Tr. 268-269). J.L. began to feel something strange in addition to intoxication. (Tr. 270).

After bringing J.L. a third drink, Ms. Torrealba told him she wanted to introduce him to her roommate, Steve. (Tr. 271). Steve was a bald, soft-spoken man, 6'2" or 6'3" in height, and very muscular, with a goatee. (Tr. 272-73). J.L. identified Mr. Rigg as "Steve." (Tr. 273). Steve began to leave, explaining that he had a party to attend. (Tr. 273). J.L. got up to shake Steve's hand, at which point Steve grabbed J.L. and started to choke him. (Tr. 274).

According to J.L., Steve slammed him against the wall, and threatened to "stick a 19 inch dildo up [his] ass" and publish pictures of it on the Internet, and that "[t]his is what happens when you sleep with girls on the first date." (Tr. 275). J.L. felt a "light sensation" in his neck, "like pressure, or a prick," and heard Steve tell him "You are going to lose complete control of your body." (Tr. 275). Steve threatened to break J.L.'s neck and put him in the trunk of his car if he did not stop resisting. (Tr. 275). Within a minute of the pricking sensation, J.L. lost control of his body. (Tr. 344; but see Tr. 364).

J.L.'s body went limp as he lost control, and shortly thereafter his "mind went" and he began to hallucinate uncontrollably. (Tr. 276). "At one point, I mean, it was as much as seeing like a cathedral of demons flying around." (Tr. 276-77). He felt himself being dragged around, at which point he sobered up enough to confirm that he was not hallucinating the movement.

Rigg requests leave to supplement the record with relevant portions of these transcripts.

(Tr. 277). J.L. lost touch with reality for a while after that; the next thing he recalled was being propped up, feeling a severe pain in his rectum, and needing to defecate. (Tr. 277). J.L. had no recollection of being anally penetrated. (Tr. 346).

Afterward, he remembered lying against the bed, looking down and seeing his shorts around his ankles. Steve pulled up J.L.'s shorts and then took J.L. back to the couch. (Tr. 278). Fearing for his life, J.L. began to make positive comments such as "You guys are the best." (Tr. 285). He remembered Torrealba asking whether he could still attend law school, to which Steve responded "It will wear off. He'll be okay." (Tr. 287). He also heard Rosa and Steve tell each other that they would do anything for each other because they were such good friends. (Tr. 287).

After Steve left, J.L. walked outside and sat on the pavement.[9] It was then that he noticed that he was bleeding heavily from his rectum. (Tr. 288). He then went to his car, where asked Torrealba "Why did you do that? What did you do?" Torrealba replied that J.L. had just had a bad trip. J.L. asked again what she had done to him, at which point Torrealba "started getting scared" and went back into her apartment. (Tr. 288).

3. The testimony of Rosa Torrealba

Ms. Torrealba's testimony picks up from her version of the night before. According to Ms. Torrealba, the following morning Mr. Rigg told her that he didn't believe her and that he wanted to meet J.L. and hear his version of the story. (Tr. 393-94). Later that day, Mr. Rigg instructed her to call J.L. and ask him to come to her apartment. (Tr. 395-96). She called her therapist (who also treated Mr. Rigg and Elby), who told her not to worry that the two men would have any confrontation. (Tr. 396). He agreed to come over around 7 or shortly before. (Tr. 397).

9 According to Officer Borges, J.L. told him that he had actually tried to leave, but that Mr. Rigg had told him he was too intoxicated to leave (Tr. 579-80).

Ms. Torrealba's roommate Steve Bockus was gone when Mr. Rigg arrived with a duffel bag. (Tr. 398). Mr. Rigg produced a clear container filled with a Kahlua drink, and told Ms. Torrealba that she should make sure that J.L. drank it, but not to drink as much as J.L. (Tr. 399-400). If J.L. asked, she was to tell him that it was Kahlua and something else. (Tr. 465-66). Ms. Torrealba did not find this strange at all. (Tr. 400). Mr. Rigg then went into Steve's room to await J.L.

When J.L. arrived, Torrealba was drinking a beer, so that she wouldn't have to drink too much of the Kahlua drink. (Tr. 410). J.L. eventually drank his drink, her unfinished drink, and then one more over a half-hour period. (Tr. 412). J.L. and Torrealba sat in the living room and discussed their relationship. (Tr. 411-12). Around a half-hour after J.L. arrived, Mr. Rigg called the apartment's telephone from his own cellular phone. (Tr. 413). He explained that he had heard enough, and that he was going to leave. (Tr. 414).

When Mr. Rigg came into the common area, he introduced himself as Steve. (Tr. 414-15). As he left, J.L. also started to leave to go out as he had planned. (Tr. 415). Mr. Rigg shook Steve's hand, and then put him a headlock and forced him to the floor. (Tr. 416). Mr. Rigg was hitting J.L. in the neck and punching his body while he told him "that 'this is what happens to men that have sex with young girls on the first date,' and that he was going to insert a 19 inch dildo up his butt and post pictures of it on the Internet for his friends to see." (Tr. 417). Someone came to the door to investigate the noise, and Mr. Rigg dragged J.L. into the bedroom. (Tr. 417-18). Ms. Torrealba told the neighbor that everything was O.K. (Tr. 419).

Ms. Torrealba then went into the bathroom, where she stayed until Mr. Rigg came to get her. (Tr. 419-20). At that point, "J.L. was -- he was in my room leaning against the futon and his legs were open with his pants down to his knees and there were sheets of paper laying on the

futon, of signs, I guess." (Tr. 420). Mr. Rigg was taking pictures of J.L., whose eyes were only half open and rolled back into his head. (Tr. 420). JL. was mumbling incoherently. (Tr. 421). There appeared to be fecal matter on the floor. (Tr. 420). Ms. Torrealba thought she saw a large dildo in a plastic shopping bag. (Tr. 421). She helped Mr. Rigg pull up J.L.'s shorts and take him back to the living room sofa, where Mr. Rigg joined them after several minutes. (Tr. 422-23). Ms. Torrealba asked whether J.L. was going to be O.K., concerned because his eyes were rolled into his head and he was saying nonsensical statements like "I love gay people." (Tr. 423). Mr. Rigg told her that would be OK in 10-15 minutes, but not to let him drive in the meantime because he might hurt himself. (Tr. 424). Mr. Rigg then left, taking everything he had brought. (Tr. 424). Ms. Torrealba never saw any drugs or syringes. (Tr. 466).

F. The State's Physical Evidence

Forensic Toxicologist Chip Walls testified that J.L's urine tested positive for both ketamine and marijuana. (Tr. 523). He testified generally regarding the effects of ketamine. (Tr. 509-549).

Officer Borges observed discoloration on the rug in Torrealba's room as though it had been cleaned, but did not search it because Mr. Bockus lacked the authority to consent to a search of her room. (Tr. 559, 579). He did not find any blood or other bodily fluids where J.L. had claimed to be sitting on the concrete in front of the apartment. (Tr. 580). Indeed, he did not find blood anywhere in the house at all. (Tr. 580-81).

Sharon Hinz, a criminalist in the Forensic Biology Section of the Miami-Dade Police Department's Crime Laboratory Bureau, tested J.L.'s rectal smear, which indicated no sperm or semen. (Tr. 609). She was able to match J.L.'s DNA profile with the stains found on Ms. Torrealba's rug. (Tr. 613-14).

Lisbeth Colon, of Miami PD Crime Lab Bureau, testified next. (Tr. 629). A serologist, Ms. Colon had tested Ms. Torrealba's carpet, which returned a "presumptive" positive test for blood. (Tr. 632). She had not tested the carpet for feces, and saw no indication that semen or hair was present. (Tr. 635-38). None of the samples were referred to the Trace Analysis Section, which searches for physical samples. (Tr. 639).

Officer Borges later obtained a search warrant for Mr. Rigg's house, where he recovered syringes that were admitted into evidence over the objection of defense counsel. (Tr. 567). He also seized a pink dildo and an anal stimulator ("butt plug"), which were also admitted into evidence without objection. (Tr. 569-70). The sexual devices found at Mr. Rigg's residence were tested, and showed "a single female DNA profile." (Tr. 614). Additionally, Officer Borges seized a computer, rolls of undeveloped film, and several photographs. (Tr. 571).

G. Mr. Rigg's Expert on Ketamine: Ron Bell

At trial, the defense called forensic toxicologist Ron Bell as an expert witness regarding the administration and effects of ketamine. (Tr. 679). Mr. Bell explained that ketamine users enjoy the out-of-body anesthetic experience:

> The typical desired effect of the street user . . . . is complete dissociative effect. This is a dissociative anesthetic and total disassociation is the desired effect of people that generally use these drugs and they have what can be thought of as a total out of body experience, and during that experience, over that period of time they are unaware of their body completely and unaware of their surroundings.

(Tr. 684).

Mr. Bell explained that when taken orally, users typically feel ketamine's onset around 30 minutes after ingestion, although 15 minutes is possible. (Tr. 684). However, the maximum effects are usually felt after an hour or more. (Tr. 684).

Because ketamine breaks down during digestion, Mr. Bell thought it "virtually impossible" to reach a dissociative state through oral administration. (Tr. 684). For intramuscular injections, Mr. Bell thought it would require 100-150 milligrams of ketamine, administered in two injections, to achieve that level of anesthetic effect. (Tr. 685). Additionally, each injection would "have to be administered rather slowly over the course of a couple seconds. It can't just be put into the muscle tissue and be effective." (Tr. 685). When so administered, "the onset of the effects is typically within about five to ten minutes, but the duration of effects is only about an hour after that." (Tr. 685).

Based on J.L.'s testimony (including transcripts from Ms. Torrealba's trial and from depositions that Mr. Bell had reviewed), counsel posed the following hypothetical:

> And the hypothetical then would be, based on the testimony, that he was in a struggle or confrontation with an individual, that he feels a pressure or a prick to his neck, and then within one, two minutes is rendered helpless to resist, basically unconscious, doesn't remember anything until he senses that somebody -- or that he is being helped on with his pants.

(Tr. 685-686). Mr. Bell explained that J.L.'s version of events was inconsistent with administration both orally and by injection:

> In either case this drug just doesn't respond that quickly. For it to be administered and then to be incapacitated within a couple of minutes, it just doesn't happen. It's not consistent at all with the way ketamine actually acts in a person's system. Regardless of the administration, it takes time for the onset to occur. That's just the beginning of the onset, the beginning of the symptoms. It takes additional time to reach a level in which one may become incapacitated.

(Tr. 686).

Whether one hypothesized oral or intramuscular administration, based on J.L.'s testimony "[e]ither is inconsistent with what is known and the way ketamine affects individuals that use the substance." (Tr. 686). As for direct injection into a vein or artery, although that would produce a

more rapid onset, it would still take a "couple of minutes for the body to circulate the drug throughout the body and effects to occur, and still take some time for the maximum effect to be established." (Tr. 687).

Mr. Bell had a more fundamental problem with that theory than J.L.'s description of the effects, however. He thought it was "virtually impossible" to have administered an intravenous or intra-arterial injection to J.L.'s neck under the circumstances J.L. described. Arteries are "thick-walled vessels" and hospitals and clinics generally use a surgical procedure to collect arterial blood. (Tr. 687). If an artery had been punctured, obvious bleeding would have occurred. (Tr. 688). As for veins, "the veins in the neck are very deep, well below the surface. As far as injecting the needle and putting it within the vein itself long enough to make the injection of a complete dose of the drug where the person is involved in some type of a struggle, again, my opinion is that that would virtually be impossible to happen." (Tr. 688).

Mr. Bell also rejected the idea that J.L.'s version of events was consistent with an oral dose and then a later intramuscular injection. (Tr. 688). "That is just not consistent with the symptoms described and what's known about ketamine, how ketamine has to be introduced to the body to produce its effect." (Tr. 688). His ultimate opinion was that "the described method of the exposure to the ketamine and the resulting effect is not reasonable and is not possible within a reasonable degree of toxilogical [sic] certainty." (Tr. 688-89)

Mr. Bell also took issue with J.L.'s depiction of the duration of the ketamine's effect. (Tr. 689). "Ketamine is a relatively fast acting drug, which means that it's introduced into the body. At some point, regardless of the route of administration, the maximum effect occurs, but that maximum effect is relatively short lived, typically no more than an hour, and then the effects thereafter diminish rapidly. Within two to three hours the effects are virtually gone. So the idea

of 12 hour or more period experiences, influence, and modulating effects is just not reasonable." (Tr. 689 [sic]). Ultimately the story was "just not consistent with an involuntary administration," and most consistent with intranasal use (snorting) or with smoking. (Tr. 690).

On cross-examination, Mr. Bell maintained that even if a person was completely still, an intravenous injection to the neck is "very, very difficult. It would even be difficult for medical personnel to be able to make an intravenous injection in the vein of the neck." (Tr. 693). On redirect he confirmed that any injection in the neck would be expected to leave visible evidence. (Tr. 696).

H. Subsequent Events leading J.L. to Contact the Police

After he left Ms. Torrealba's apartment, J.L. drove away, but he was still hallucinating badly and did not have any depth perception, so he pulled over in a parking lot about 1/4 of a mile away. (Tr. 289). About four hours later, "as the sun [was] coming up," J.L. came to and drove home. (289-90). He was heavily bruised and his rectum was bleeding. (Tr. 290). He did not call the police at first because he was humiliated. (Tr. 291). However, later that day J.L. went to a Christmas party at his workplace. (Tr. 291).

The following day J.L. received a call from Torrealba, who told him that she had retained a lawyer. (Tr. 293). J.L. responded that "I got a lawyer too," although he didn't really understand what was happening. (Tr. 294). He told Torrealba never to call him again. (Tr. 294). This "was like the catalyst. I couldn't live the rest of my life without this certain action being done about that. . . . I got this crazy person calling me." (Tr. 359).

J.L then told his mother, a physician, what had happened. On her advice, he called the police on Friday. (Tr. 295). Pictures were taken that documented bruises and choking. (Tr. 298-99). Additionally, J.L. was examined by a doctor who diagnosed a rectal tear. (Tr. 295-96). The

examination did not reveal any needle mark. (Tr. 357). J.L. did not seek any pain medication. (Tr. 358).

Ms. Torrealba explained that she had threatened J.L. with legal action to ensure that he took an HIV test. According to Ms. Torrealba, Mr. Rigg returned later that night and gave her a card from a private attorney, whom she called. (Tr. 426-27). The attorney told her not to worry. (Tr. 426). She called J.L. and told him that she wanted him to take an HIV test, or she would seek legal representation. (Tr. 427).

I. J.L.'s Report to the Rape Center at Jackson Memorial Hospital

Dr. Karen Simmons, M.D. was an obstetrician gynecologist and director of the Rape Treatment Center at Jackson Memorial Hospital. (Tr. 641). Dr. Simmons did not have contact with J.L. Her testimony based on the report of examining physician Dr. Scott Silla, who had worked at the Center. (Tr. 646). Dr. Silla had recorded that J.L. had "numerous bruises, some on the face, scratches of the neck, and the other side of the neck. There were also bruises on the arm, and he documented an abrasion on the knee, and, also, documented some bruises that he drew on the back." (Tr. 647).

Although there was a scratch on J.L.'s neck, Dr. Silla did not find any evidence of a needle mark. (Tr. 659; see R. App. 63 (photograph documenting the scratch)).[10] J.L. had reported that he had last had sexual intercourse a week before the exam. (Tr. 648). Dr. Silla recorded that J.L. was suffering from a fresh rectal tear with scant bleeding. (Tr. 652). She described it as fresh, "consistent with blunt penetrating trauma." (Tr. 653).

On cross-examination Dr. Simmonds conceded that she had first reviewed the report earlier

10 Filed contemporaneously with this Reply is a Motion to expand the record to include, *inter alia*, the complete record on appeal.

that week; she had never examined J.L. (Tr. 654). The conclusion regarding the source of the tear was based solely on the history J.L. gave to Dr. Silla. (Tr. 657). Dr. Simmons admitted that the tear could be consistent with many acts other than rape, such as a consensual act. (Tr. 658, 662). However, Dr. Simmonds thought that it was not possible that a bowel movement could ever cause a tear like J.L.'s. (Tr. 658).

J. The Sentence Reduction Promised to Ms. Torrealba in Return for her Testimony

Ms. Torrealba received a five-year sentence reduction in return for her testimony against Mr. Rigg, despite claiming that she would rather remain in jail in the United States than be released and deported. The State claimed that Ms. Torrealba had written a letter requesting to speak with a prosecutor, but did not produce the letter before trial, and professed not to have a copy. Florida law does not grant to its State's Attorneys or courts the authority to reduce the sentence of cooperating defendants such as Ms. Torrealba.

1. Pretrial Motion to Suppress Ms. Torrealba's Testimony

On February 26, 2008, Mr. Rigg filed a motion to dismiss, contending that "his right to due process under the law [would be] violated by allowing the testimony of Rosa Torrealba" and requesting that the court exclude her as a witness at trial. (R. App. 27). Mr. Rigg explained:

> Prior to the last Trial date, the State Attorney's office approached Ms. Torrealba in an attempt to secure her testimony against Mr. Rigg. Ms. Torrealba at first told the state that she would not testify in Mr. Rigg's Trial. She then contacted the State Attorney, shortly after this first meeting, to inquire as to whether the State could offer her anything in exchange for her testimony.
>
> ….
>
> At the previous Pre-Trial Hearings, the State Attorney informed the Court that Ms. Torrealba would not agree to testify unless she was given a reduction in her sentence in exchange for her testimony. The State Attorney also informed the Court that the State was offering "a deal" of at least a five year reduction in Ms. Torrealba's sentence.

> Ms. Torrealba did not testify at her own Trial and the only prior statement which she made concerning Mr. Rigg's involvement was to Detective Borges, when she was first arrested. She stated that "Franz had nothing to do with this." Now that Ms. Torrealba has been promised a sentence reduction in her case she is willing to, for the first time, make a statement which incriminated Mr. Rigg.

(R. App. 28 (paragraph numbering omitted)).

After demonstrating why Florida law deprived the State's Attorney of any authority to make such a deal,[11] Mr. Rigg articulated two distinct due process violations. The first occurred because the State had entered into an unenforceable plea agreement. (R. App., p. 29, ¶¶ 11, 13). The second occurred because, by using means unlawful and therefore improper, the State created an arbitrary, unreliable truth-finding process. (R. App., p. 29-30, ¶¶ 12, 14). The Circuit Court denied the motion on March 7, 2008.[12]

2. Dispute as to whether and why Ms. Torrealba Initiated Contact with the State

At trial, the State claimed that Ms. Torrealba had sent the prosecutor a letter asking to speak with them. However, the State never provided that letter to the defense. (Tr. 495). The prosecutor explained that she had copied the letter from Ms. Torrealba's file but no longer had a copy. (Tr. 496).

> DUDIS: This is filed with the Court and not the State Attorney's Office. I don't see how it's our obligation to turn over a public record.
> JIMENEZ: Judge, I turned over everything. I never thought this was discoverable....
> ....
> JIMENEZ: Mr. Dudis threw a lot of my stuff out.
> DUDIS: Mari, let's not make a record that is going to get me in trouble with the Bar. I mean, Jesus Christ. I threw out duplicates. There were about eight copies of everything in this file, and I went

11 Mr. Rigg referred to Section 921.001(b) of the Florida Statutes. (R. App. 29).
12 Mr Rigg seeks leave to supplement the record with a transcript of the hearing on this motion.

> through it. I want this to be absolutely clear. I went though everything and threw out the nine copies of depo when there were 11 copies, and saved two. So I want it to be clear I am not throwing anything in the trash can.
> The fact of the matter is this is in a public record. It's in her file. It's not our obligation to turn over things that are public records. . . .

(Tr. 499-500).

The next day began with a discussion of the missing letter. Prosecutor Jimenez informed the Court she could not locate the letter, but found "a letter reflected in CJIS in June of '06. I have a feeling that is probably the letter, but it's not in the Court file. I don't know why." (Tr. 599). She appeared to remember only that Ms. Torrealba wrote, basically, "'I want to see a prosecutor. I want a prosecutor to come see me.'" (Tr. 599). The circuit court offered to allow the prosecutor's testimony or to give the jury a curative instruction, perhaps one that disavowed the existence of the letter. (Tr. 601-02).

At the end of the trial, Rigg's counsel moved for a mistrial on the grounds that the missing letter could have been Brady material. (Tr. 782). Ultimately, concluding that there was nothing the circuit court could "humanly do to remedy the situation," (Tr. 785), the court denied the motion for a mistrial but gave counsel permission to argue, "'Where is the letter?'" during closing arguments. (Tr. 786). The jury was not instructed on spoliation or otherwise informed that they could draw a negative inference from the fact that the letter was missing. (R. App. 134-151).

3. Dispute during Trial as to the Legality of the Sentence Reduction

At the time of Mr. Rigg's trial, Ms. Torrealba expected a sentence reduction of at least five years on her 16.25 year sentence. (Tr. 369-70, 443). Upon her release from prison, she expected to be immediately deported to Venezuela, where she had no family or friends. (Tr. 370-71).

Although she accepted the sentence reduction, Ms. Torrealba oddly claimed that she did not want to be released. Ms. Torrealba explained that she "would rather do the rest of my time in prison than go back to Venezuela." (Tr. 475). In fact, she was afraid to return to Venezuela. (Tr. 488). She explained that after she was deported to Venezuela, she would not be able to have visits from her family any longer because they were in the United States with no legal status. (Tr. 477, 487). Nevertheless, she had asked for a sentence reduction in return for her testimony, and made a deal with the State to receive a sentence reduction of at least five years. (Tr. 475-76). There was no written agreement and no explicit requirement that Ms. Torrealba testify truthfully; instead, she had just been told that she would receive at least five years, and maybe more, off her sentence for her cooperation. (Tr. 478).

After this testimony, Mr. Rigg's counsel moved to renew the pretrial motion to dismiss due to the state's unlawful sentence incentive. (Tr. 670). Counsel contended:

> It's our position there is no legal basis for them to have offered her this deal and there's no legal avenue. The State indicated that this open rule three is the basis that they were attempting to do it, but would not give any further explanation in regards to that, and there's no written agreement.
>
> The mandate in the Court file of Rosa Torrealba, I would ask that be taken judicial notice of that. Actually, I would ask the Court to make a determination whether or not you think the State can legally offer her the offer they did or not
>
> ....
>
> [O]ur position, as I stated in the motion, that they have no legal way to follow through with that, and if the Government commits misconduct or unethical behavior in order to obtain a witness that was essential to their prosecution and had her testify in the case, that would require the Court, in my opinion, to dismiss the charge.

(Tr. 670-71). Ultimately, the court did not alter its earlier ruling on the motion to dismiss. (Tr. 671).

K. Ms. Torrealba and Mr. Rigg after the Police Investigation Commenced

1. Ms. Torrealba's Arrest and Bond

Ms. Torrealba was very surprised to be arrested. (Tr. 427-28). Elby paid her bond, and she and Mr. Rigg went to go see an attorney. (Tr. 429). She did not tell the attorney what had actually happened. (Tr. 429). She then went to the Florida Keys with Mr. Rigg and Elby. (Tr. 430). When they later learned about that her bond was revoked because she had been convicted of a non-bondable offense, Mr. Rigg told her not to worry because she would be released on bond after her Arthur hearing. (Tr. 430). Mr. Rigg promised to turn himself in after she was bonded. (Tr. 430-31). When Ms. Torrealba returned to Miami and was arrested the second time, she stated to Officer Borges that she had committed the crime, and Mr. Rigg had nothing at all to do with it. (Tr. 578). Elby visited her on several occasions before trial, bringing letters from Mr. Rigg. (Tr. 431).

Ms. Torrealba claimed several times that she did not believe that she could be convicted at trial because of what Mr. Rigg had told her. However, she admitted that her lawyer had explained to her that under Florida's principal statute, she could be convicted based on acts contributing to the crime. (Tr. 507). She understood that "[b]y being there with him and assisting him in any way, you could be just as guilty as the person that committed the crime." (Tr. 507). Nevertheless, she did not believe she could be convicted under the law, and therefore did not testify at her own trial. (Tr. 508).

2. Mr. Rigg's Flight to Panama

Mr. Borges arranged a date for Mr. Rigg to surrender and face charges of sexual battery and kidnapping. (Tr. 573). However, Mr. Rigg did not surrender, and a warrant was issued.

Mr. Rigg explained that he fled to Panama:

> Because I would end up here trying to explain my lifestyle, trying to defend myself for my very life, for my freedom, so I wouldn't rot in jail for the rest of my life.
>
> Just the accusation, even if I win my trial, destroyed my career. I have lost my marriage. I have lost my reputation. I have lost everything I worked for my whole life, and even if I am acquitted, I can't get that back. There's nothing to get back.

(Tr. 733).

After a few months in Panama, Mr. Rigg found work despite his status as an illegal immigrant. (Tr. 734). Eventually a co-worker turned him in, and rather than flee Panama[13] Mr. Rigg took two weeks to wind up his affairs. (Tr. 735). Mr. Rigg was taken into custody in Panama on September 30, 2004. (Tr. 574).

On cross-examination Mr. Rigg acknowledged that he had failed to surrender himself in accordance with the arrangement between his counsel and Detective Borges. (Tr. 737). Mr. Rigg feared that he would be convicted despite his innocence, and did not feel he had the resources to mount an effective defense against these kinds of charges. (Tr. 737-43).

Leaving Elby behind was "the most painful decision" of Mr. Rigg's life. (Tr. 744). The fact that his wife supported him did not alter the reality that "my lifestyle was very controversial," and that Elby's parents were evangelical Christians who "would not tolerate for one second what I have to admit to, which is living the lifestyle." (Tr. 745).

The State the argued that, because Mr. Rigg would have been better able to present a defense if he had not fled, that he must not have actually had any defense. The prosecutor

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13 Mr. Rigg's testimony that what "I was not only aware that they [Panamanian and American officials] knew, I knew who told, when that told, and when they were going to be there. I knew all the details." (Tr. 735).

accused Mr. Rigg of "telling this jury you were not mentally acute enough [at the time] to realize, you know, 'I have potential alibi witnesses. I have people with whom I had dinner plans. I had my wife.'" (Tr. 775). She then asked Mr. Rigg "You don't think it would have been interesting for the jury to hear the people you were with that night?" (Tr. 775). Mr. Rigg explained, "that the event in question was independent of the dinner party. I am not saying I couldn't have been in the apartment, because I was, and the dinner party. I am saying I had dinner plans and I don't know where I had them." (Tr. 776).

Mr. Rigg denied that he would have, as the State put it, "recount[ed] this bizarre thing that you just told this jury" during the dinner party. Mr. Rigg explained:

> A holiday dinner party, for me, is to have a peaceful meal with friends, family, and talk about good things, happy things, not talk about the event that happened between my girlfriend, "Oh, by the way, I have a girlfriend, and her boyfriend, or perhaps boyfriend."
>
> I don't share my personal life publicly, which is why this is so incredibly humiliating.

(Tr. 776).

L. Closing Argument

The thrust of the State's argument was that Mr. Rigg was a mastermind who had completely manipulated Ms. Torrealba, who was "clay in his hands." (Tr. 879).

During closing arguments, the State repeatedly commented on the State's Attorneys' personal belief that Mr. Rigg had committed a crime. The jury was told "J.L. was raped. We know that." (Tr. 817). As for lesser included offenses, the jury was told it had "no reason to convict for battery when we know that sexual battery occurred." (Tr. 823). At the very end of the first closing argument, the State even directly attacked the presumption of innocence: "On Monday, this man was presumed innocent. That was on Monday. He is, I submit to you,

innocent no more. Convict him." (Tr. 827). On rebuttal, the state argued that "This defendant is not on trial because he has this alternative lifestyle, members of the jury. He's on trial because he is guilty." (Tr. 877; see also Tr. 899 (arguing that Mr. Rigg previously "had that presumption of innocence).

The state also commented on Mr. Rigg's failure to call other witnesses: "He had witnesses who could have helped him, his wife, people at the dinner party. He lost all this by fleeing." (Tr. 826; see also Tr. 891 ("[I]f he hadn't fled eight years ago, he could have had those people come in and say, 'He was with us. He didn't do this.'")).

III. ANALYSIS

A. The State of Florida Violated Mr. Rigg's Right to Due Process by Using an Unlawful Sentence Reduction to Secure the Testimony of Co-Defendant Rosa Torrealba.

It is easy to see why "a witness who receives financial compensation in exchange for testimony has less of an incentive to testify falsely than a witness who testifies in exchange for a reduced sentence." United States v. Abrego, 141 F.3d 142, 151 (5th Cir. 1998). Here, Ms. Torrealba was guaranteed that at least five years would be taken off of her sentence, and perhaps more. This unspoken "perhaps more" was the equivalent of a contingency agreement, creating an impermissible incentive to testify in accordance with the state's theory of the case. Combined with her earlier statements and J.L.'s failure to ever testify before that Ms. Torrealba was limping when she reached the door due to a self-described "skating accident," Ms. Torrealba's testimony suffered from indicia of severe unreliability. Additionally, Ms. Torrealba offered the incredible story that although she did not actually want a sentence reduction, she was going to accept one in exchange for her testimony.

In the context of the trial, the contents of the letter Ms. Torrealba purportedly wrote to the prosecution were crucial to her credibility, and therefore to Mr. Rigg's case.[14] Based on the absence of the letter, the circuit court's failure to exclude her testimony as unreliable because her involvement with the State's Attorneys could not be fully explored violated Mr. Rigg's right to due process of law. Because Mr. Rigg was denied an opportunity to present evidence as to the state's bad faith, the State's rejection of this claim in a *per curiam* was based on an unreasonable finding of fact, and also constituted an unreasonable application of law.

B. The State of Florida Violated Mr. Rigg's right to due process by suppressing material exculpatory evidence.

Given the importance of the letter and the circumstances of its disappearance, bad faith by the State of Florida is indicated. Mr. Rigg requests discovery and an evidentiary hearing to develop a record from which this Court may conduct a *de novo* review of this unexhausted (but not procedurally defaulted) claim under Youngblood (or, if the letter is recovered, Brady).

C. Counsel Rendered Ineffective Assistance at Trial and on Appeal

1. Failure to Impeach Ms. Torrealba with the Letter

Ms. Torrealba's testimony was crucial to Mr. Rigg's conviction. Failing to take advantage of any opportunity to discredit her would be deficient performance. The letter would have cast doubt on her truthfulness when she corroborated J.L.'s testimony, and also on the issue of how she was introduced to drugs. Especially if considered along with the testimony of Mr. Murphy, whose affidavit Mr. Rigg will submit if granted leave to supplement the record, the letter would have helped reveal the truth of the events of December 13, 2000: that Ms. Torrealba

14 In the motion to expand the record, counsel requests leave to submit an affidavit of James Murphy. Mr. Rigg and Ms. Torrealba both worked for Mr. Murphy, and Mr. Murphy explains that Ms. Torrealba told him after her first date with J.L. that he had drugged and raped her, and that she wanted revenge.

made good on her threat to take revenge on J.L. This would have gone directly to the heart of the State's case, creating a reasonable probability of a different result. This claim was not presented below, and is therefore subject to *de novo* review.

2. Failure to Retain a Medical Expert

Under Florida law, "[w]here the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." McArthur v. State, 351 So. 2d 972, 976 n.12 (Fla. 1977). If Dr. Michael Hellinger had testified at trial that anal fissures not only can be caused by bowel movements but most commonly are so caused, he would have contradicted the State's expert testimony that it was impossible for J.L.'s injuries to have come from any act except anal penetration. (See D.E. 11-2, at 60). Because no person testified that penetration occurred, and only the unreliable Ms. Torrealba testified that Mr. Rigg had possessed a dildo, a reasonable probability exists that the jury would have found the evidence consistent with a reasonable hypothesis of innocence. Thus, counsel's failure to raise the issue constituted deficient performance. The circuit court unreasonably concluded that the evidence of guilt in Mr. Rigg's case was "overwhelming," improperly rejecting Mr. Rigg's claim.

3. Failure to Object to the State's Burden-Shifting Argument

The Constitution places on the State the burden to prove every element of a crime beyond a reasonable doubt, and forbids shifting the burden of proof to the defendant to disprove his guilt. See Patterson v. New York, 432 U.S. 197, 214 (1977); In re Winship, 397 U.S. 358, 362-64 (1970). Florida courts do not permit prosecutors to remark on a defendant's failure to call witnesses unless the defendant relies on an alibi defense. Consalvo v. State, 697 So. 2d 805, 814 (Fla. 1996) (explaining that allowing such comments can "lead the jury to believe that [a]

defendant had the burden of proving his innocence"). Mr. Rigg did not rely on an alibi defense; nevertheless, the State's Attorney repeatedly commented on Mr. Rigg's failure to call Elby or his dinner companions as witnesses. As Mr. Rigg did not rely "on facts that could be elicited only from a witness who is not equally available to the State," error occurred under Florida law when the State's Attorney attacked its own straw-man version of an alibi defense. Rodriguez v. State, 753 So. 2d 29, 38-39 (Fla. 2000). This error was prejudicial because the State's case was based on circumstance and on testimony of witnesses who had not seen any crime occur, and the relative credibility of J.L., Ms. Torrealba, and Mr. Rigg was the crux of the trial.

Additionally, the State went beyond comments on Mr. Rigg's failure to produce witness, contending that he was no longer entitled to a presumption of innocence. The circuit court's summary conclusion that Mr. Rigg failed to meet either prong of Strickland is therefore unreasonable.

4. Failure to Object to Sex Toys

The presence of unrelated sex toys at Mr. Rigg's residence was not relevant to any issue contested at trial, and they were extremely prejudicial because they tended to show that Mr. Rigg was the kind of person who would possess the instrument allegedly used to penetrate J.L. Counsel should have objected to their introduction, and his failure to do so prejudiced Mr. Rigg's trial. This claim is subject to *de novo* review.

5. Failure to Object to the State's Personal Belief of Mr. Rigg's Guilt

The State may not express a personal belief in a defendant's guilt, or in the truth or falsity of a particular witness's testimony. United States v. Young, 470 U.S. 1 (1985) ; Martinez v. State, 761 So. 2d 1074, 1080-81 (Fla. 2000). The State's Attorney went beyond mere evidence-based statements, arguing that "He's on trial because he is guilty." (Tr. 877). This is exactly the

sort of statement that implies that evidence known to the State but not presented at trial conclusively proves the guilt of the accused. See Martinez, 761 So. 2d at 1081. The circuit court's summary conclusion that Mr. Rigg failed to meet either prong of Strickland is therefore unreasonable.

6. Cumulative Error

The "specific errors of counsel" described above "undermined the reliability of the finding of guilt." United States v. Cronic, 466 U.S. 648, 659 n. 26 (1984). To the extent that any of them do not individually rise to the level required to establish a reasonable probability of a different result, under Cronic the Court should examine the errors together to determine whether their cumulative effect deprived Mr. Rigg of "a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 688 (1984).

IV. CONCLUSION

Because the state courts made unreasonable findings of fact and conclusions of law, and because Mr. Rigg has raised meritorious claims subject to *de novo* review, Mr. Rigg prays that this Court will grant him habeas relief, expanding the record and granting an evidentiary hearing if necessary. Mr. Rigg also asks for any other relief to which he may be entitled.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 26, 2013, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and is being served on all counsel of record listed via transmission of Notices of Electronic Filing generated by CM/ECF.

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