James Reddy

James Reddy has been Chief of the Appeals Division of the Cook County Public Defender's Office since 1990. (Tr. of Evidentiary Hr'g of 5/4/99, at 30). He has been an attorney for 24 years, and employed with the Public Defender's Office since March, 1976. (Tr. of Evidentiary Hr'g of 5/4/99, at 29). At the time of his representation of Paula Gray, he was a staff attorney with the Appeals Division. (Tr. of Evidentiary Hr'g of 5/4/99, at 30).

Mr. Reddy first represented Ms. Gray in the appeal of her 1979 trial judgment to the Appellate Court of Illinois, which affirmed her conviction, and to the Illinois Supreme Court, which denied her petition for leave to appeal. (Tr. of Evidentiary Hr'g of 5/4/99, at 31). Subsequently, in 1983, Mr. Reddy successfully secured the grant of a new trial for Petitioner from the Seventh Circuit Court of Appeals pursuant to a writ of habeas corpus, after a previous dismissal by the District Court for the Northern District of Illinois. (Tr. of Evidentiary Hr'g of 5/4/99, at 31-32).

As was his custom with clients of the Appeals Division, Mr. Reddy would have communicated by mail with Ms. Gray up to the time of her reversal, with an opening letter introducing himself, the fact of his assignment to do her appeal, and advising her to call him collect with any questions. (Tr. of Evidentiary Hr'g of 5/4/99, at 32). He would have forwarded her all documents pertaining to her case, such as the parties' legal briefs, each with a cover letter. (Tr. of Evidentiary Hr'g of 5/4/99, at 32). Mr. Reddy recalls speaking to Ms. Gray perhaps two or four times, and perhaps some written communication with her. (Tr. of Evidentiary Hr'g of 5/4/99, at 32-33).

Mr. Reddy visited Ms. Gray once at the Dwight Correctional Facility, along with Scott Arthur or Cliff Johnson, though he is unsure of the prosecutor's name, along with Petitioner's mother. (Tr. of Evidentiary Hr'g of 5/4/99, at 33). Mr. Reddy "rode down with the prosecutors" because they had previously approached him, as Paula Gray's appellate counsel and through an introduction by Vince Gaughan, then Public Defender, as to "whether or not Paula would be interested in cooperating with the State." (Tr. of Evidentiary Hr'g of 5/4/99, at 33-34). This prosecutorial offer was made to Petitioner because it was Mr. Reddy's understanding that Dennis Williams had been granted a new trial by the Illinois Supreme Court. (Tr. of Evidentiary Hr'g of 5/4/99, at 33).

At the prison, "the gist of the conversation was [apparently his indication to Petitioner that] these prosecutors are interested in talking to you [Paula Gray] about possibly cooperating," though he doesn't recall the particulars of the discussion. (Tr. of Evidentiary Hr'g of 5/4/99, at 35). In response to an inquiry as to whether Petitioner and her mother spoke privately, Mr. Reddy remembers "that there was [sic] some conversations that [he] wasn't present for..." (Tr. of Evidentiary Hr'g of 5/4/99, at 35). At the conclusion of these conversations, Paula Gray did not want to cooperate. (Tr. of Evidentiary Hr'g of 5/4/99, at 35).

Thereafter, Petitioner's 1978/1979 case was reversed by the Seventh Circuit, and Mr. Reddy continued to be Petitioner's attorney. (Tr. of Evidentiary Hr'g of 5/4/99, at 35-36). While facilitating the placement of Ms. Gray's case on the Sixth Municipal District's trial call, Mr.

Reddy was paired by his office with George Morrissey, an "experienced senior attorney" whom Mr. Reddy also understood to be an experienced trial lawyer at the Sixth Municipal Courthouse in Markham, and who was "to be the trial person if and when [Paula Gray's trial] was to go down." (Tr. of Evidentiary Hr'g of 5/4/99, at 36). Mr. Reddy had done either "one or no trials at that time." (Tr. of Evidentiary Hr'g of 5/4/99, at 36).

Mr. Reddy periodically appeared with Paula Gray in Markham and during his conversations with her had no questions concerning her fitness to stand trial. (Tr. of Evidentiary Hr'g of 5/4/99, at 37).

Ms. Gray did, in fact, testify for the prosecution against Mr. Jimerson, and against Mr. Williams and Mr. Rainge at a later time, though Mr. Reddy doesn't recall the exact years. (Tr. of Evidentiary Hr'g of 5/4/99, at 37).

Mr. Reddy indicated that he, George Morrissey and Paula Gray had "talked all along whether or not [Ms. Gray] was again interested in cooperating with the State or not." (Tr. of Evidentiary Hr'g of 5/4/99, at 38). Mr. Reddy also talked with Ms. Gray's mother. (Tr. of Evidentiary Hr'g of 5/4/99, at 38). Each time, he recalls, Petitioner turned them down, [indicating] "[n]o, I'm not interested." (Tr. of Evidentiary Hr'g of 5/4/99, at 38). It eventually became a now or never situation with her case getting older and the other cases were coming to trial, so they had to know her final decision, because "it was either a matter of Paula agreeing to cooperate or her case was going to begin trial." (Tr. of Evidentiary Hr'g of 5/4/99, at 38, 39). George Morrissey and Paula Gray thereupon had a conversation outside of Mr. Reddy's presence, and Mr. Morrissey came back and "surprised [Mr. Reddy] by saying that Paula had changed her mind and decided to cooperate." (Tr. of Evidentiary Hr'g of 5/4/99, at 38-39).

Mr. Reddy had "two theories of defense":

> [He] raised one of them in the Appellate Court of Illinois in the direct appeal and that was assuming arguendo, that Paula's statements about being present and so on were true, that that simply wasn't enough to prove her guilty by accountability based on her age, the fact that she had an IQ of 64 as I recall and so on. My argument was essentially that she was a victim under that scenario.
>
> Now of course, the only other possibility would be to argue that her incriminating statements were not true and that her later testimony that she was made to say those things at the Motion to Suppress was true and then we could theoretically put Paula on to say that. Those were the two possibilities.

(Tr. of Evidentiary Hr'g of 5/4/99, at 39-40)

Mr. Reddy recalls that the latter possibility occurred at Ms. Gray's first trial, where she was convicted, though he doesn't remember if Petitioner testified at that trial. (Tr. of Evidentiary Hr'g of 5/4/99, at 40).

Both George Morrissey and Mr. Reddy "thought it would be better for [Ms. Gray] to [testify on behalf of the State because they] thought that if she did that that the odds were very strong that the State would not be interested in prosecuting her and the case would go away." (Tr. of Evidentiary Hr'g of 5/4/99, at 40-41).

Mr. Reddy further testified that "[t]here was no deal [with the State]. There was what I called a subjective expectation. I thought personally that the case would go away." (Tr. of Evidentiary Hr'g of 5/4/99, at 41). This conclusion was not based on anything the prosecutors told him. (Tr. of Evidentiary Hr'g of 5/4/99, at 41). He and George Morrissey related the foregoing to Ms. Gray as their "professional opinion of what would happen." (Tr. of Evidentiary Hr'g of 5/4/99, at 41). They never told Ms. Gray there was a deal, "because there was no deal," and they talked to her about not testifying to anything if it's not the truth, to "just tell the truth." (Tr. of Evidentiary Hr'g of 5/4/99, at 41-42).

Subsequently, Mr. Reddy was advised that Paula pled guilty to perjury. (Tr. of Evidentiary Hr'g of 5/4/99, at 42). He was not present at the plea. (Tr. of Evidentiary Hr'g of 5/4/99, at 42).

During the time that Mr. Reddy was representing Paula Gray, he felt that she understood the nature of the charges against her and that she was fit to stand trial. (Tr. of Evidentiary Hr'g of 5/4/99, at 42). It was also his "lay...," non-expert belief that she could cooperate and assist him in her defense. (Tr. of Evidentiary Hr'g of 5/4/99, at 42-43). Furthermore, if Ms. Gray had given any indication that she couldn't understand the nature of the charges, or couldn't assist in her defense, Mr. Reddy would have brought that to the attention of the court. (Tr. of Evidentiary Hr'g of 5/4/99, at 43).

On cross-examination, Mr. Reddy indicated that it was understood between he and George Morrissey, in an unspoken manner, that Mr. Reddy was second chair and would "take leads from [Mr. Morrissey] because of [Mr. Morrissey's] experience." (Tr. of Evidentiary Hr'g of 5/4/99, at 44).

The visit to Dwight to see Paula Gray was perhaps the spring of 1983. (Tr. of Evidentiary Hr'g of 5/4/99, at 44-45). Mr. Reddy was contacted by Cliff Johnson and Scott Arthur, after these prosecutors first contacted Vince Gaughan. (Tr. of Evidentiary Hr'g of 5/4/99, at 45). Mr. Reddy doesn't recall any particulars about what these assistant State's Attorneys intended to do if Paula Gray decided to cooperate, but he recollects that:

> the idea was [the People] would like to talk to [his] client to see whether she was willing to cooperate and [they would] see what happens depending on what she says...

(Tr. of Evidentiary Hr'g of 5/4/99, at 45)

Mr. Reddy believes he spoke privately with Ms. Gray at Dwight and remembers her telling him she didn't want to cooperate. (Tr. of Evidentiary Hr'g of 5/4/99, at 46). Upon specific inquiry

from Petitioner's counsel, Mr. Reddy testified that Paula Gray said "many times" that "[she] wasn't there and didn't know anything." (Tr. of Evidentiary Hr'g of 5/4/99, at 46).

After the 1983 Seventh Circuit reversal, Ms. Gray's case was continued in the state court for "a long time." (Tr. of Evidentiary Hr'g of 5/4/99, at 46). Part of the reason for the delay is that there was no real procedure for getting "paperwork from a federal court to grant a State a new trial [sic]." (Tr. of Evidentiary Hr'g of 5/4/99, at 47). The state court order rendering a new trial was therefore not issued immediately after the 1983 reversal, but "many months later." (Tr. of Evidentiary Hr'g of 5/4/99, at 47).

Also, Mr. Reddy, along with Mr. Morrissey, understood their options with Ms. Gray's matter as either going to trial, or "continu[ing] the case on the possibility that Paula would cooperate." (Tr. of Evidentiary Hr'g of 5/4/99, at 47-48). The determination to continue the case "until she decided to cooperate" was "a collective decision." (Tr. of Evidentiary Hr'g of 5/4/99, at 47-48). However, the continuances would not have gone on indefinitely because as he previously testified, "there was an 11th hour moment when [they] were going to go to trial." (Tr. of Evidentiary Hr'g of 5/4/99, at 48).

Mr. Reddy reiterated that he doesn't "recall any particulars" about what he talked about in his conversation with Scott Arthur and Cliff Johnson. (Tr. of Evidentiary Hr'g of 5/4/99, at 48). Nor does Mr. Reddy recall any particular conversations with George Morrissey about any discussions Mr. Morrissey had with Scott Arthur or Cliff Johnson. (Tr. of Evidentiary Hr'g of 5/4/99, at 48-49). Mr. Reddy agreed that when Ms. Gray testified for the State against Jimerson in 1985, that she had no assurance that when her trial came about, if it did, that her testimony wouldn't be used against her. (Tr. of Evidentiary Hr'g of 5/4/99, at 50). Mr. Reddy also agreed that the same was true of the 1987 Williams and Rainge case. (Tr. of Evidentiary Hr'g of 5/4/99, at 50).

Mr. Reddy testified that George Morrissey and he talked about the possibility of the State dropping charges in such a way as to let Ms. Gray out of jail and that:

> [they] both...believe[d] that it would be better for Paula to cooperate and if she did so, [they] believed the case, at least the murder case, would go away..."

(Tr. of Evidentiary Hr'g of 5/4/99, at 51).

Mr. Reddy agreed "absolutely" that had they been wrong, Paula Gray could have been convicted again of murder, and that had additional facts emerged at the retrial, there was the possibility of her being subject to life imprisonment. (Tr. of Evidentiary Hr'g of 5/4/99, at 51).

Mr. Reddy is aware, by having read the 1995 Illinois Supreme Court Jimerson opinion [People v. Jimerson, 166 Ill.2d 211 (1995)], that Scott Arthur filed a discovery request in the Williams and Rainge case in which he stated that a deal had been made with Paula Gray to drop the murder charges if she testified truthfully. (Tr. of Evidentiary Hr'g of 5/4/99, at 53).

However, to Mr. Reddy's knowledge, there was no such agreement with Ms. Gray prior to the 1987 Williams and Rainge trial. (Tr. of Evidentiary Hr'g of 5/4/99, at 53-54).
Mr. Reddy surmises that he was involved with Ms. Gray "through April of '87." (Tr. of Evidentiary Hr'g of 5/4/99, at 55). Mr. Reddy never saw the discovery materials in Ms. Gray's case, and indicated that the discovery materials were served on George Morrissey who was in the Markham courthouse. (Tr. of Evidentiary Hr'g of 5/4/99, at 57). Mr. Reddy reiterated that "as far as [he] knew" there was no deal with the People, but he didn't see any George Morrissey correspondence to Paula Gray, or the prosecutor, nor was he aware that George Morrissey even wrote to Ms. Gray. (Tr. of Evidentiary Hr'g of 5/4/99, at 58).

Dr. Orest Eugene Wasyliw

Dr. Orest Eugene Wasyliw is a psychologist licensed in the State of Illinois since 1981. (Tr. of Evidentiary Hr'g of 5/4/99, at 63). He identified Respondent's [Evidentiary Hr'g] Exhibit Number Nine as his curriculum vitae. (Tr. of Evidentiary Hr'g of 5/4/99, at 63-64). Dr. Wasyliw is currently Director of Adult Clinical Psychology for the Isaac Ray Center at the Rush-Presbyterian-St. Luke's Medical Center's Psychiatry and Law Unit. (Tr. of Evidentiary Hr'g of 5/4/99, at 66). He has held this position, previously known as Senior Clinical Psychologist, since 1985 or 1986. (Tr. of Evidentiary Hr'g of 5/4/99, at 69).

Dr. Wasyliw received both his undergraduate and doctorate degree in psychology from the University of Illinois at Chicago in 1967 and 1980 respectively. (Tr. of Evidentiary Hr'g of 5/4/99, at 64-65). His training before receiving his Ph.D. included a two year internship at the Veteran's Administration Out-Patient Clinic in Los Angeles; diagnostic evaluations of developmentally disabled adolescents at the Illinois State Pediatric Institute in 1972, including assessment for mental retardation and other types of intellectual limitations; and his specialization at graduate school in cognitive psychology, or the "psychology of thinking, reasoning, memory, language...[or] higher processes [or]...abilities...specifically measured in intelligence tests." (Tr. of Evidentiary Hr'g of 5/4/99, at 65-66).

As a clinical psychologist, and subsequent senior clinical psychologist, at Rush-Presbyterian, he was responsible for doing out-patient treatment of mentally disordered offenders, or persons found not guilty by reason of insanity and still subject to out-patient treatment; and evaluations of criminal issues such as "sanity at the time of the offense, competency to give a knowing and voluntary confession, competency to understand Miranda type warnings, issues concerning dangerousness...[and] treatment." (Tr. of Evidentiary Hr'g of 5/4/99, at 66-67).

Also, as Director of Adult Clinical Psychology, he has taught medical graduate psychology students at Rush-Presbyterian in a variety of fields related to forensic psychology and published articles and made presentations regarding the use of psychological testing to assist in the assessment of legal issues. (Tr. of Evidentiary Hr'g of 5/4/99, at 67). He currently teaches forensic psychiatry to Rush-Presbyterian psychiatric residents and post-doctoral fellows. (Tr. of Evidentiary Hr'g of 5/4/99, at 67). Dr. Wasyliw also teaches psychological and neuropsychological testing of incarcerated persons to psychology interns at Cermak Hospital, which is part of Cook County Jail, coupled with a once a year teaching assignment on forensic

issues to University of Illinois Medical Center psychiatric residents. (Tr. of Evidentiary Hr'g of 5/4/99, at 67-68).

Dr. Wasyliw has a private practice which includes consultations for law enforcement agencies, including a pending assignment teaching U.S. Secret Service agents in interviewing techniques and familiarization with mental health issues. (Tr. of Evidentiary Hr'g of 5/4/99, at 68-69). He also does evaluations for new applicants to police and fire departments, the FBI, and other law enforcement agencies, as well as fitness for duty evaluations, and assistance to the Secret Service in evaluating persons for whom the Service has concerns about dangerousness as to protected persons. (Tr. of Evidentiary Hr'g of 5/4/99, at 69). He has additionally been an associate with Cavanaugh and Associates since its inception about 1985, which specializes in forensic assessments in civil cases. (Tr. of Evidentiary Hr'g of 5/4/99, at 69).

Dr. Wasyliw's specialty is in three areas: (1) clinical psychology, regarding the assessment and treatment of mental disorders and emotional or behavioral problems; (2) neuropsychology, involving the use of psychological testing in assessing the presence and effects of brain damage, and; (3) forensic psychology, regarding the use of behavioral science techniques for assisting legal institutions in rendering their legal decisions. (Tr. of Evidentiary Hr'g of 5/4/99, at 68).

He has been requested by the court and attorneys to conduct "probably several hundred" determinations as to the competency of an individual to stand trial. (Tr. of Evidentiary Hr'g of 5/4/99, at 70). Dr. Wasyliw has qualified to testify as an expert in court "possibly over a hundred" times. (Tr. of Evidentiary Hr'g of 5/4/99, at 70). Dr. Wasyliw has received numerous special awards, including the Klopfer Award for his 1988 research publication regarding the "use of psychological testing to assess exaggeration or minimalization of psychological problems" by people in a criminal context. (Tr. of Evidentiary Hr'g of 5/4/99, at 71). Dr. Wasyliw stated that this work "was considered the most important contribution to the assessment of personality for the year 1988." (Tr. of Evidentiary Hr'g of 5/4/99, at 71).

On January 27, 1999, pursuant to a request to evaluate Paula Gray regarding a civil case she was involved in, Dr. Wasyliw conducted a personal interview and administered psychological testing of Petitioner. (Tr. of Evidentiary Hr'g of 5/4/99, at 72). The purpose of his "general psychological evaluation" of Ms. Gray was to "[assess] the presence, nature and extent of any psychopathology that might be related to the issues" being raised in her civil matter. (Tr. of Evidentiary Hr'g of 5/4/99, at 73). Along with the interview, Dr. Wasyliw administered three specific psychological tests, scored and interpreted the testing, and integrated this data with records he had received. (Tr. of Evidentiary Hr'g of 5/4/99, at 73). The information he had gotten regarding Paula Gray before his January 27th evaluation were:

1. records of Petitioner's education, including various testings conducted on Ms. Gray during her school years;

2. records of her 1978 hospitalization at St. James Hospital;

3. the 1990 or 1991 report by Dr. Hardy of the Isaac Ray Center;

4. the Department of Children and Family Services' psychological test reports of Petitioner from 1991 to 1996;

5. Dr. Kulb's psychological testing report, who was a psychologist requested to test Ms. Gray by Dr. Levin, the psychologist retained by Petitioner's civil case attorney. Dr. Wasyliw also reviewed Dr. Kulb's raw data and actual test scores, in addition to reassessing those scores;

6. transcript of Paula Gray's 1978 grand jury testimony;

7. transcripts of Petitioner's testimony in eleven separate instances, including her 1998 civil case deposition. Nine of the eleven testimonies were actual transcripts, and two were summaries;

8. prison or jail letters written by Ms. Gray from 1982 to 1984;

9. Paulette Gray's deposition testimony in the 1998 civil action;

10. Zulina Mason's deposition;

11. transcripts of Petitioner's 1978 trail testimony for 10/14/78 and 10/18/78;

12. Ms. Gray's testimony at Verneal Jimerson's 1985 trial;

13. Petitioner's testimony at the Williams and Rainge 1987 trial, and;

14. transcripts of Paula Gray's guilty plea on April 23, 1987.

(Tr. of Evidentiary Hr'g of 5/4/99, at 73-77).

Dr. Wasyliw testified that the foregoing information is the type reasonably relied upon by professionals like himself in formulating opinions. (Tr. of Evidentiary Hr'g of 5/4/99, at 77).

On voir dire examination, pursuant to Respondent's motion to qualify Dr. Wasyliw as an expert and the objection of Petitioner's counsel to the doctor's substantive testimony, Dr. Wasyliw reiterated that he is a clinical psychologist and that in 1998 he evaluated candidates for public safety (i.e. police agency) employment, as well as police and other personnel already on the force regarding fitness for duty. (Tr. of Evidentiary Hr'g of 5/4/99, at 79). Though he does not currently counsel people in a clinical setting, Dr. Wasyliw emphasized that the two major areas of expertise in clinical psychology are treatment and assessment, and that in previous years, he has taught, supervised, and written articles about treatment. (Tr. of Evidentiary Hr'g of 5/4/99, at 79-80). He indicated that though there is a correlation between being a clinician and treatment, it's not necessary. (Tr. of Evidentiary Hr'g of 5/4/99, at 80).

Dr. Wasyliw was retained, along with Dr. James Cavanaugh and psychiatrists, pursuant to their association with Cavanaugh and Associates. (Tr. of Evidentiary Hr'g of 5/4/99, at 80-81). The psychiatrists made summaries of the various records which they and Dr. Wasyliw had available, including court papers, depositions, and pleadings. (Tr. of Evidentiary Hr'g of 5/4/99, at 81).

The reason for Dr. Wasyliw's evaluation of Petitioner was to assess whether she appeared to have suffered emotional damages as a result of her civil action claim of false arrest and incarceration. (Tr. of Evidentiary Hr'g of 5/4/99, at 81, 82). But a comprehensive psychological evaluation of Ms. Gray, stated Dr. Wasyliw, included an understanding of Petitioner individually, both her character, intellectual level, and various other things making Paula Gray a person. (Tr. of Evidentiary Hr'g of 5/4/99, at 82). Dr. Wasyliw was also charged with evaluating the Ford Heights Four for the above described reasons. (Tr. of Evidentiary Hr'g of 5/4/99, at 83).

Dr. Wasyliw doesn't recall the total time allotted for evaluating all five people, but spent most of one day with Ms. Gray. (Tr. of Evidentiary Hr'g of 5/4/99, at 84). His evaluation of Petitioner included an interview and the administration of three tests commonly used in forensic psychology. (Tr. of Evidentiary Hr'g of 5/4/99, at 84). One of the purposes of the tests was to show whether or not there was any evidence of post-traumatic stress syndrome. (Tr. of Evidentiary Hr'g of 5/4/99, at 84-85).

During Dr. Wasyliw's interview of Ms. Gray, he didn't ask her about the disposition of her case in 1987. (Tr. of Evidentiary Hr'g of 5/4/99, at 85). Petitioner volunteered the circumstances of her May 13th, 1978 [apparently police] interrogation, without inquiry from Dr. Wasyliw. (Tr. of Evidentiary Hr'g of 5/4/99, at 85). Ms. Gray didn't mention any names to him. (Tr. of Evidentiary Hr'g of 5/4/99, at 86). Not recalling whether Petitioner mentioned names the police used in referring to her, or particular threats the police made to her at the station house, Dr. Wasyliw referred to his notes of his interviews of Ms. Gray, which were typed at Petitioner's request. (Tr. of Evidentiary Hr'g of 5/4/99, at 85, 86). Dr. Wasyliw stated that Paula Gray did not speak about the foregoing matters regarding names she was called or threats by the police on May 13th, 1978. (Tr. of Evidentiary Hr'g of 5/4/99, at 86). Dr. Wasyliw also testified that Ms. Gray did not speak to him about:

17. her appearance at the June, 1978 court proceeding nor her recanted testimony as to not knowing anything about the crimes;

2. the [1984] charges lodged against her;

3. what crimes she was convicted of in [1987];

4. what her sentence was in [1987];

5. her placement in a particular area of Cook County Jail, though she continually referred to County [Jail] when speaking about her incarceration experiences;

6. getting a new trial, or;

7. the way her case was resolved in 1987.

(Tr. of Evidentiary Hr'g of 5/4/99, at 87-88).

When administering the tests, Dr. Wasyliw read the questions to Ms. Gray as opposed to her reading the questions to herself. (Tr. of Evidentiary Hr'g of 5/4/99, at 88). Though Dr. Wasyliw indicated that this was not standard procedure, it was "an acceptable alternative." (Tr. of Evidentiary Hr'g of 5/4/99, at 88). The reason for this alternative was that Petitioner "demonstrated trouble understanding initial questions of a longer test" which Dr. Wasyliw "initially started to administer." (Tr. of Evidentiary Hr'g of 5/4/99, at 89). When he asked Ms. Gray questions, she often responded that she didn't understand. (Tr. of Evidentiary Hr'g of 5/4/99, at 89). Dr. Wasyliw concluded, based on the tests he administered, as well as his entire interview record and evaluation, that Ms. Gray was suffering from an anxiety disorder with elements of depression. (Tr. of Evidentiary Hr'g of 5/4/99, at 89). These conditions can affect the way people perceive or understand events, "but...do not necessarily do so." (Tr. of Evidentiary Hr'g of 5/4/99, at 89-90).

Dr. Wasyliw reiterated that he reviewed Petitioner's testimony at the Williams and Rainge 1987 trial, but neither recalls, nor took note of, Ms. Gray not knowing whether she talked to her lawyer for three years. (Tr. of Evidentiary Hr'g of 5/4/9, at 90). In response to the question of whether he recalls Ms. Gray not being sure whether or not she spoke with the prosecutors who put her on the stand, Dr. Wasyliw simply recalled that Petitioner often gave answers of "I don't remember" throughout her various testimonies. (Tr. of Evidentiary Hr'g of 5/4/99, at 90).

[After extensive argument by both party's regarding the admissibility of Dr. Wasyliw's testimony concerning Ms. Gray's competency, pursuant to criminal law, to stand trial in 1987, which involved her understanding of the nature and purpose of the proceedings pending against her, and capability of assisting in her own defense, coupled with Petitioner's concession of Dr. Wasyliw as an expert for "the purpose for which he became involved in this case," the Court ruled that Dr. Wasyliw could testify regarding competency in general; and also whether or not he would be able to render an ultimate opinion regarding Petitioner's competency on April 23, 1987; as well as the reasons he would be unable to do so. In addition, Dr. Wasyliw was permitted to testify as to why Dr. Levin did not have enough information to testify the way that he did. (Tr. of Evidentiary Hr'g of 5/4/99, at 91-96)].

On continued re-direct examination, Dr. Wasyliw concluded, based on the previously indicated data and information, that from when Petitioner was in school until 1996, she consistently tested at the mild mental retardation level. (Tr. of Evidentiary Hr'g of 5/4/99, at 96-97). Regarding Petitioner's academic intelligence, or the type intelligence utilized in school and which is capable of being tested, Dr. Wasyliw indicated that from 1991 to 1996, Ms. Gray scored at virtually the highest level of developmental retardation, or the boundary of being classified as retarded and borderline normal. (Tr. of Evidentiary Hr'g of 5/4/99, at 97). Since Petitioner's release from prison, according to Dr. Wasyliw, she has shown a higher level of adaptive functioning, or the

extent that she can use knowledge practically in her life to help herself, than her intelligence test scores indicate. (Tr. of Evidentiary Hr'g of 5/4/99, at 97-98). Her adaptive functioning has rarely been formally assessed. (Tr. of Evidentiary Hr'g of 5/4/99, at 97). Examples of Ms. Gray's adaptive functioning since her release from prison include caring for her children and those of others as a babysitter, cooking for the children, and living independently. (Tr. of Evidentiary Hr'g of 5/4/99, at 98). Dr. Wasyliw stated this evidences a capacity by Petitioner to grow; and that in fact, her academic test scores have been consistently higher since her discharge from prison, than during her school years. (Tr. of Evidentiary Hr'g of 5/4/99, at 98).

Dr. Wasyliw testified that the term "EMH," or educable mentally handicapped, may be applied to the status of Ms. Gray. (Tr. of Evidentiary Hr'g of 5/4/99, at 99). He further explained that educable mentally handicapped:

> overlaps with the concept of mild mental retardation, but basically the next lower level is trainable. Trainable means that you can be taught motor skills, such as dressing yourself, tying your shoe laces, etcetera, but you are at too low a level to learn concepts and be able to then utilize those concepts independently.
>
> Educable means that you can be taught...in the way a person in a normal school setting is taught. You are not going to learn as quickly, you are not going to learn things that are as complex, but you can be taught to understand concepts and to utilize those concepts yourself later.

(Tr. of Evidentiary Hr'g of 5/4/99, at 99-100).

Dr. Wasyliw added that EMH includes the ability to learn and use problem solving techniques, which in Ms. Gray's case was exemplified by her [EMH] school classification as being educable, which was consistent with her psychological test findings. (Tr. of Evidentiary Hr'g of 5/4/99, at 99-100). Another example was Petitioner's ability to learn to live independently and to find jobs on her own, both through referral and by personally seeking people out. (Tr., of Evidentiary Hr'g of 5/4/99, at 100). He concluded that "she is able to independently help herself and maintain an independent existence." (Tr. of Evidentiary Hr'g of 5/4/99, at 100).

Dr. Wasyliw's opinion concerning Ms. Gray's ability to understand the truth is that '[s]he can understand what lying or not lying means." (Tr. of Evidentiary Hr'g of 5/4/99, at 103). His opinion is based on her past testimony in describing particular things as lies and using the word [lies] itself. (Tr. of Evidentiary Hr'g of 5/4/99, at 103). Petitioner is also able, states Dr. Wasyliw, to distinguish between fantasy, or fiction, and reality, and she uses the term "lie" appropriately; for example, when Dr. Wasyliw asked her if she had "'Aladdin's lamp'" (for the purpose of being granted three wishes), Ms. Gray immediately objected that that was a lie. (Tr. of Evidentiary Hr'g of 5/4/99, at 103-04).

Dr. Wasyliw also stated that Petitioner can understand what the concept of a lie means and can apply it to her own testimony. (Tr. of Evidentiary Hr'g of 5/4/99, at 104). He does not base this

opinion on whether or not Ms. Gray was telling the truth on one occasion or another. (Tr. of Evidentiary Hr'g of 5/4/99, at 104-05). Dr. Wasyliw opined that:

> [Petitioner's] ability to understand what a lie is has been consistent [from 1978 until the present date]. There are times she is more depressed or less depressed and she has shown a gradual increase overall in intellectual skills. She has not been exactly the same every time. But in terms of her ability to understand what a lie is, I see no indications in the records in the period of time when she did not show that capability.

(Tr. of Evidentiary Hr'g of 5/4/99, at 107).

Dr. Wasyliw also concluded that Ms. Gray has had the capacity to make decisions from before 1978 up to the present date, citing her decision "to protect herself" when first contacted by the police by telling them she was "thirteen...a minor," "in order to get rid of the police." (Tr. of Evidentiary Hr'g of 5/4/99, at 108). Also, her initial inquiry to the police upon their second visit as to whether they had a search warrant, indicated her "ability to make an assessment of the situation and to ask appropriate questions," which also constituted her making a decision. (Tr. of Evidentiary Hr'g of 5/4/99, at 108-09).

Finally, Petitioner's babysitting involved decision making, as for example, decisions regarding an emergency, whether the child needs to eat and other matters regarding child care. (Tr. of Evidentiary Hr'g of 5/4/99, at 109). Dr. Wasyliw further indicated that Ms. Gray has always shown an ability to observe, recollect and relate experiences, while emphasizing she has "always shown a very good ability to recollect experiences." (Tr. of Evidentiary Hr'g of 5/4/99, at 110). For example, Dr. Wasyliw testified, each of the "different times she gives true stories, one that she was involved in the various alleged crimes and the other that she was not," Petitioner relates "in detail including details of small, although trivial types, of surrounding events." (Tr. of Evidentiary Hr'g of 5/4/99, at 110). Her detailed stories are also done "consistently throughout her various testimony [sic]." (Tr. of Evidentiary Hr'g of 5/4/99, at 110). Dr. Wasyliw stated that Petitioner gave a:

> detailed description of events, many hurtful events that occurred to her in jail and prison and she did that several times. She was able to do that in a substantial amount of detail. There was no time in which she was unable to bring out a period of time in her past. When she did describe events in her past she did it articulately, she did it fluently, she used communication skills well.

(Tr. of Evidentiary Hr'g of 5/4/99, at 110-11).

Dr. Wasyliw additionally testified that from 1987 until today, that Petitioner "absolutely" knows what day, month and year it is. (Tr. of Evidentiary Hr'g of 5/4/99, at 111). The only time, he stated, that Ms. Gray "might not have been oriented was during her psychiatric hospitalization" in 1978. (Tr. of Evidentiary Hr'g of 5/4/99, at 111). Nor can Dr. Wasyliw be sure of whether Petitioner was oriented at all times during her original Cook County [Jail] imprisonment in light

of Ms. Mason's [deposition] testimony that Paula Gray was mute during that time and he cannot determine the reason for Petitioner being mute based on Ms. Mason's testimony. (Tr. of Evidentiary Hr'g of 5/4/99, at 112).

In addition, Dr. Wasyliw reiterated his testimony that Ms. Gray was oriented in April of 1987, as indicated by her responses to the Judge's inquiries in the [plea] transcript. (Tr. of Evidentiary Hr'g of 5/4/99, at 112-13). Petitioner gave "yeses" and "no's" when each response was appropriate. (Tr. of Evidentiary Hr'g of 5/4/99, at 113). She also gave a substantive answer when it was appropriate, by responding to the Judge's question about whether her plea was voluntary that "'[she was] doing this on [her] own,'" as opposed to a simple yes. (Tr. of Evidentiary Hr'g of 5/4/99, at 113). Dr. Wasyliw has seen no evidence from 1978 until the present day that Ms. Gray cannot recognize or remember people, or recognize places. (Tr. of Evidentiary Hr'g of 5/4/99, at 113-14). Nor was there any evidence in the records he reviewed that Petitioner was deficient in her motor processes, including walking, use of her hands and senses, articulating and talking. (Tr. of Evidentiary Hr'g of 5/4/99, at 114). The only exceptions were when she was born with polio, and during her 1978 hospitalization in which there were "indications of catatonia that she was not moving or [was] rigid." (Tr. of Evidentiary Hr'g of 5/4/99, at 114).

Dr. Wasyliw is familiar with the term "'suggestibility'" in his profession and describes it as:

> [having] to do with a person's vulnerability to having their belief or opinions changed so that if you believe one thing, how easy it is for somebody else to make you believe something else.
>
> * * *
>
> ...[S]uggestibility has to do with changing one's opinion, one's beliefs so that when you are saying it, even when it is changed, [you] are believing it at that moment.

(Tr. of Evidentiary Hr'g of 5/4/99, at 114-15).

Dr. Wasyliw indicated that the most intense form of suggestibility is hypnotism, or "inducing extreme suggestibility," where a susceptible person can be made to believe he or she, for example, is a chicken, or they're given false memories. (Tr. of Evidentiary Hr'g of 5/4/99, at 115).

Dr. Wasyliw's opinion, based on his review of the records [previously listed] and to a reasonable degree of scientific certainly, is that Paula Gray's statements to police, assistant State's Attorneys, and the grand jury in May, 1978, are not the product of suggestibility. (Tr. of Evidentiary Hr'g of 5/4/99, at 115-16). This is because Petitioner later testified that her confessions were lies, which therefore takes it out of the realm of suggestibility, since suggestibility is changing a person's beliefs. (Tr. of Evidentiary Hr'g of 5/4/99, at 116). Thus, when Petitioner says she has lied, then it's not suggestibility. (Tr. of Evidentiary Hr'g of 5/4/99, at 116). He further stated that:

> [f]or example, [regarding] suggestibility, the research mentions low intelligence...can increase suggestibility. Intelligence has very little affect on giving a knowingly false statement...[T]he factor that is most related to changing ones statement and knowing that you have changed your statement is guilt, which is not related to suggestibility. So there are different things than suggestibility than to making statements that you know you don't believe in at that time. They are influenced by different things.

(Tr. of Evidentiary Hr'g of 5/4/99, at 116-17).

Dr. Wasyliw testified that his opinion on suggestibility is supported by research, including research cited by Dr. Levin in his recent deposition. (Tr. of Evidentiary Hr'g of 5/4/99, at 117). Dr. Wasyliw additionally stated that the "one standard for competency [to enter a plea]" which is applicable to "subservient competencies" is that "a person is fit unless that person does not understand the nature and purpose of the [proceeding] against them and is unable to assist in their own defense." (Tr. of Evidentiary Hr'g of 5/4/99, at 117-18). Based upon Dr. Wasyliw's review of eleven items of testimony by Ms. Gray, which constitute "critical" documents and information normally relied on by professionals in determining competency as previously defined by Dr. Wasyliw, he opines that there is nothing which would lead him to conclude Ms. Gray was unable to understand the nature and purpose of the proceedings which were pending against her in 1987. (Tr. of Evidentiary Hr'g of 5/4/99, at 118-19). The basis of Dr. Wasyliw's opinion is:

> because there is evidence just the opposite and specifically, it has to do with the nature of her testimony in virtually each of the different testimonies for which there are independent transcripts and there are specifically three patterns. One is that she often uses answers, a group of answers that include I don't know, I don't remember or standing mute. Those answers are almost always given to the attorney who is on the opposite side of whatever she is claiming at the time, whether she is claiming involvement in the crimes or no involvement. Whoever is the opposing counsel she will give I don't know, I don't remember or will not answer all together. She hardly ever does that to the counsel who is on her side, depending on what she is claiming at the moment.
>
> It is not dependent on the questions themselves, the content of the questions, it is not dependent on the complexity of the questions, it is dependent almost solely on whether an answer would help her or harm her. So she understands how to and consistently how to protect herself and consistently attempts to protect herself depending on what can get her into trouble during that particular testimony.

(Tr. of Evidentiary Hr'g of 5/4/99, at 119-20).

Dr. Wasyliw also explains three examples with which Petitioner shows a capacity to understand and utilize specific legal concepts. (Tr. of Evidentiary Hr'g of 5/4/99, at 120). Citing to page 29

of the transcript of Ms. Gray's 10/14/78 trial testimony, he notes that she spontaneously states that she got a prescription so that she could prove that she was hospitalized at Rush-Presbyterian-St. Luke's Medical Center. (Tr. of Evidentiary Hr'g of 5/4/99, at 121, 124). This shows her practical understanding of the concept of evidence, indicated Dr. Wasyliw. (Tr. of Evidentiary Hr'g of 5/4/99, at 121). Secondly, Dr. Wasyliw stated that Ms. Gray's definition of the term "'parole,'" given to Dr. Lesco during administration of the Wechsler adult intelligence examination, is:

> out
> that when a person gets / of jail they have parole. They have to obey their parole officer. If they don't, they have to go back and finish their term or their time.

(Tr. of Evidentiary Hr'g of 5/4/99, at 127).

[The quotations refer to Dr. Wasyliw's testimony, and not necessarily Petitioner's specific statements. Also, Dr. Wasyliw's foregoing testimony is apparently based on his "notes" of interviews and testimonies of Paula Gray. (See Tr. of Evidentiary Hr'g of 5/4/99, at 124)]. Dr. Wasyliw additionally testified that Ms. Gray is capable of both understanding the term "perjury" and "what a lie is, what a crime is." (Tr. of Evidentiary Hr'g of 5/4/99, at 128). Dr. Wasyliw also stated that Petitioner indicated in an interview with Dr. Levin that she went through an appeal, evidencing her appropriate use of that legal term. (Tr. of Evidentiary Hr'g of 5/4/99, at 128-29). Ms. Gray additionally "never answered inappropriately" the questions regarding what crimes she was charged with, whether she was convicted of them, and what sentence she received. (Tr. of Evidentiary Hr'g of 5/4/99, at 129).

Dr. Wasyliw concluded that he had not reviewed a sufficient amount of information, or undertaken the proper examination of Ms. Gray, to determine whether or not she was competent to enter a plea in 1987. (Tr. of Evidentiary Hr'g of 5/4/99, at 131-32). This is because he did not evaluate Petitioner as to the specific issue of competence at a particular time in the past. (Tr. of Evidentiary Hr'g of 5/4/99, at 132). Nor did Dr. Wasyliw ask Ms. Gray about her understanding of, or to utilize legal concepts, which is normally done in "a competency situation." (Tr. of Evidentiary Hr'g of 5/4/99, at 132). Dr. Wasyliw [did] not relate Ms. Gray's answers "to those questions that [he] would ask to records of her actual behavior at the particular relevant time." (Tr. of Evidentiary Hr'g of 5/4/99, at 132). Those types of questions are normally posed by Dr. Wasyliw in evaluating competency, "regardless of what period of time." (Tr. of Evidentiary Hr'g of 5/4/99, at 132). Also, in light of the availability of the foregoing information for [April of 1987], the evaluation must be conducted for the purpose of determining competency "in order to render an opinion to a reasonable degree of scientific certainty." (Tr. of Evidentiary Hr'g of 5/4/99, at 132-33).

Limiting his opinion to the first of the two factors in determining competency of whether or not a person understands the nature and purpose of the proceedings pending against them, Dr. Wasyliw testified that it is his understanding that Dr. Levin did not undertake a competency evaluation of Ms. Gray, nor did Dr. Levin know the criteria for competency and he had never done a competency evaluation before. (Tr. of Evidentiary Hr'g of 5/4/99, at 133). Regarding the second part to the competency statute regarding "the ability to assist one's [sic] own defense,"

Dr. Wasyliw opined to a reasonable degree of medical certainty that Ms. Gray has "consistently demonstrate[d] a capacity of attempting to defend herself." (Tr. of Evidentiary Hr'g of 5/4/99, at 134). Dr. Wasyliw cites a previously discussed example evidencing the foregoing conclusion:

> It has to do with whether or not she is able to give a self protective pattern of responding, that is that in all of her testimony she gave answers when the favorable attorney asked questions, but she very often gave I don't know, I don't understand or stood mute when opposing counsel asked questions. That was done consistently throughout before 1987, at 1987, and after which shows that she...has the capacity to defend herself. Whether she is doing it well or not well is a separate issue, but she consistently demonstrates a capacity of attempting to defend herself.

(Tr. of Evidentiary Hr'g of 5/4/99, at 134).

Dr. Wasyliw's understanding is that the second factor in determining competency with respect to possessing "the capacity to assist in one's own defense," includes the "ability to communicate with counsel and to remember relevant issues in the case." (Tr. of Evidentiary Hr'g of 5/4/99, at 134-35). In this regard, Dr. Wasyliw testified that Ms. Gray "has always demonstrated a very detailed memory...[and] has never shown any problems in communicating." (Tr. of Evidentiary Hr'g of 5/4/99, at 134-35).

Also, Dr. Wasyliw testified that mildly mentally retarded and developmentally disabled persons such as Paula Gray "are not per se as a function of their status necessarily [un]able to understand the nature and purpose of legal proceedings..." (Tr. of Evidentiary Hr'g of 5/4/99, at 135).

Additionally, Dr. Wasyliw testified that he "[doesn't] believe [Dr. Levin] could have made [a] determination [as to whether or not Miss Gray was capable of understanding the nature and purpose of the proceedings pending against her in 1987] on the basis of the evidence he had available." (Tr. of Evidentiary Hr'g of 5/4/99, at 135-36). This is because based on Dr. Wasyliw's review of Dr. Levin's affidavits and transcript of his interview [apparently of Paula Gray] and testing by Dr. Kulb requested and relied upon by Dr. Levin, Dr. Levin never asked Petitioner to define or utilize a legal concept; nor did he "[inquire] as to [Ms. Gray's] specific understanding" of what she told him she was convicted of, nor of her specific understanding of the concepts contained in her statements that she spent time in jail "because of convictions," and "that she was let out after appeal." (Tr. of Evidentiary Hr'g of 5/4/99, at 136). [Respondent's Exhibit Number Nine, or Dr. Wasyliw's curriculum vitae, was admitted into evidence. (Tr. of Evidentiary Hr'g of 5/4/99, at 138)].

On cross-examination, Dr. Wasyliw conceded that Paula Gray exhibited a pattern of "[having] more trouble defining individual words in isolation than using them meaningful [sic]." (Tr. of Evidentiary Hr'g of 5/4/99, at 139-40). As such, Dr. Wasyliw stated that Petitioner could understand the essential difference between the truth and a lie, and yet have problems with the specific word "'truth.'" (Tr. of Evidentiary Hr'g of 5/4/99, at 141-42). Dr. Wasyliw observed in

his testing where Ms. Gray had trouble with specific words used in his tests, and further stated that:

> [t]hose are vocabulary words and those were somewhat more complex words than truth, but she does have trouble defining individual words in isolation.

(Tr. of Evidentiary Hr'g of 5/4/99, at 141).

For example, indicated Dr. Wasyliw, one of the test questions asked for a true or false answer to "'I believe in the saying, that early to bed, early to rise,' etcetera." (Tr. of Evidentiary Hr'g of 5/4/99, at 141). Because the word "'saying'" gives many people problems [and apparently Petitioner as well], Dr. Wasyliw "tried to use alternatives to see if there was a version that stuck to the intent of the question that she could respond to." (Tr. of Evidentiary Hr'g of 5/4/99, at 141).

Also, Dr. Wasyliw recalls that Paula Gray was babysitting her brother for her family in the 1970's. (Tr. of Evidentiary Hr'g of 5/4/99, at 141-42). Dr. Wasyliw doesn't recall the name of that brother, nor did he ask Petitioner anything about decisions she made in the course of babysitting for that sibling. (Tr. of Evidentiary Hr'g of 5/4/99, at 142).

Dr. Wasyliw additionally stated that Ms. Gray's June, 1978 preliminary hearing testimony, based on his review of the transcript, consisted of her continually saying:

> 'It's a lie. It's a lie' regardless of the question she was asked until cross-examination...[by] favorable counsel at which point she opened up and gave more substantive answers and that has been her consistent pattern across her testimonies. At that point she began talking about the police having made her do it and having given her a pill of some sort.

(Tr. of Evidentiary Hr'g of 5/4/99, at 142-43).

But Dr. Wasyliw thereafter conceded that it was not clear to him which questioner in Ms. Gray's foregoing preliminary hearing testimony was friend or foe. (Tr. of Evidentiary Hr'g of 5/4/99, at 143). In response to the inquiry of Petitioner's counsel as to whether [Ms. Gray's pattern of testimony] actually existed as he previously testified to, Dr. Wasyliw stated that "[Petitioner's preliminary hearing testimony] was the first time that she changed her story." (Tr. of Evidentiary Hr'g of 5/4/99, at 144).

He indicated that Ms. Gray told him several times in his interview that she had been raped at Cook County Jail, but she didn't tell him the number of times that the rapes had occurred and he didn't inquire about it. (Tr. of Evidentiary Hr'g of 5/4/99, at 144). Also, Ms. Gray did not give him the number of people involved in her rape or rapes, and Dr. Wasyliw did not ask. (Tr. of Evidentiary Hr'g of 5/4/99, at 144).

Dr. Wasyliw did not review Dr. Levin's evidentiary hearing testimony in this matter because of his understanding, related to him by Respondent, that experts weren't allowed to know the

testimony of other experts. (Tr. of Evidentiary Hr'g of 5/4/99, at 145). Dr. Wasyliw doesn't recall the name of the prosecutors or specific time when he was told this information. (Tr. of Evidentiary Hr'g of 5/4/99, at 145).

Dr. Wasyliw reviewed the February, 1979 Dwight Correctional facility's evaluation when Paula Gray entered that institution, but doesn't recall Petitioner's statement in that evaluation that she was down there for rape and murder convictions, or that she didn't say anything to the interviewer about perjury. (Tr. of Evidentiary Hr'g of 5/4/99, at 146). When Dr. Wasyliw was questioned further about the prison evaluation indicating that Paula Gray stated she didn't understand anything about the concept of perjury, he responded "I don't recall the details of that evaluation all together." (Tr. of Evidentiary Hr'g of 5/4/99, at 146).

Dr. Wasyliw stated that he is testifying in his role as Director of Adult Clinical Psychology for the Isaac Ray Center, but that his evaluation of Paula Gray in January, 1999, was pursuant to his association with Cavanaugh and Associates, with which he has been connected since approximately 1985. (Tr. of Evidentiary Hr'g of 5/4/99, at 147). Most Cavanaugh and Associate cases are insurance company clients. (Tr. of Evidentiary Hr'g of 5/4/99, at 147-48). The law firm of Freeborn and Peters retained Cavanaugh and Associates to do the evaluation of the Ford Heights Four and Paula Gray. (Tr. of Evidentiary Hr'g of 5/4/99, at 148).

On re-direct, Dr. Wasyliw testified that he doesn't recall from his review of the information previously cited that Ms. Gray reported being sexually assaulted while at Cook County Jail before 1998. (Tr. of Evidentiary Hr'g of 5/4/99, at 148). He also specifically recalled Ms. Mason's testimony that Petitioner never told her she had been sexually assaulted. (Tr. of Evidentiary Hr'g of 5/4/99, at 148-149).

George Michael Morrissey

George Michael Morrissey has been a judge of the Circuit Court of Cook County since February, 1991 [hereinafter referred to as "Mr. Morrissey" as he was not a judge at the time of the subject events]. (Tr. of Evidentiary Hr'g of 5/4/99, at 151). He has been an attorney licensed in Illinois since 1971. (Tr. of Evidentiary Hr'g of 5/4/99, at 151). Mr. Morrissey was an assistant Public Defender from 1980 until 1991. (Tr. of Evidentiary Hr'g of 5/4/99, at 152-53). Prior to that time, and relying on his accounting background, he had a small private practice specializing in real estate, estate planning, tax work, and small corporate work. (Tr. of Evidentiary Hr'g of 5/4/99, at 152).

In 1987, Mr. Morrissey was an assistant Public Defender assigned to the Sixth Municipal District [in Markham, Illinois]. (Tr. of Evidentiary Hr'g of 5/4/99, at 153). From about 1980 until 1987, he had tried fifteen capital cases, or cases where the State was seeking the death penalty, and numerous felonies and other cases. (Tr. of Evidentiary Hr'g of 5/4/99, at 153-54). Mr. Morrissey began representing Ms. Gray pursuant to a request for trial assistance by James Reddy, of the Illinois Appellate Defender's Office, who did not have much trial experience. (Tr. of Evidentiary Hr'g of 5/4/99, at 154-55). Also, Ms. Gray's case was a Sixth District matter. (Tr. of Evidentiary Hr'g of 5/4/99, at 155). Mr. Reddy had represented Petitioner in both her

state appeals and federal writ of habeas corpus, ultimately securing her release, or grant of a new trial, on the writ. (Tr. of Evidentiary Hr'g of 5/4/99, at 154-55). Mr. Morrissey is unsure of the specific period of time that he was Ms. Gray's attorney, but he continued representing her until her April 23, 1987 guilty plea. (Tr. of Evidentiary Hr'g of 5/4/99, at 155-56). He also recalls representing Petitioner at the time of her 1985 trial testimony against Verneal Jimerson on behalf of the State. (Tr. of Evidentiary Hr'g of 5/4/99, at 157).

As Paula Gray's attorney, Mr. Morrissey from time to time had conversations with her about her case. (Tr. of Evidentiary Hr'g of 5/4/99, at 155). Also during his representation of Petitioner, Mr. Morrissey did not have any reason to believe, based on Paula Gray's conduct or words or any other source, that she did not understand the nature and purpose of the proceedings against her, or that she could not assist him in defending her. (Tr. of Evidentiary Hr'g of 5/4/99, at 156).

Mr. Morrissey indicated he was prepared to try Petitioner's case, and felt that "the only available defense" for Paula Gray was that of "compulsion," or that Petitioner was forced to do what she did, and that she was an unwilling participant in the deaths of the two individuals. (Tr. of Evidentiary Hr'g of 5/4/99, at 156-57).

Mr. Morrissey stated that Petitioner agreed to testify as a prosecution witness prior to the 1985 Jimerson trial. (Tr. of Evidentiary Hr'g of 5/4/99, at 157). He indicated that that came about because the scenario which had been presented to him "from day one" was that Paula Gray was an innocent bystander drawn into the double homicide by reason of her proximity in standing outside of the building where she lived in the housing project; that she was taken to the vacant apartments and held a Bic lighter while the four individuals raped and murdered the young lady and murdered the gentleman; that upon returning home, she told that story to her sister, and the sister told the story to their mother the next morning; that the mother told Paula she had to tell that story and Mr. Morrissey is unsure if the police were canvassing the area or if Ms. Gray's mother convinced her to go to the station. (Tr. of Evidentiary Hr'g of 5/4/99, at 158). Petitioner thereupon repeated the story to the police and to the Felony Assistant; that Paula's sister told the Felony Review attorney the same basic story; that Paula Gray was subsequently taken to the grand jury and told the same story, and thereafter kept in "some kind of protective custody" for a day or two; that she was released upon her request and thereafter moved in with one of the defendants of the original murder case, who Mr. Morrissey believed to be Mr. Williams; that Mr. Williams' attorney, Archie Weston, picked up and brought Paula to the preliminary hearing at the Markham Courthouse, where Petitioner testified that she didn't see anything, didn't do anything and didn't know anything. (Tr. of Evidentiary Hr'g of 5/4/99, at 158-59).

Mr. Morrissey presumed that the foregoing scenario was presented to Mr. Reddy over a period of several years, because Mr. Reddy prepared the briefs and argued the cases in the Appellate and U.S. District Courts. (Tr. of Evidentiary Hr'g of 5/4/99, at 159). Mr. Morrissey further stated that "that was the scenario that everyone believed happened in this case." (Tr. of Evidentiary Hr'g of 5/4/99, at 159). This scenario was presented to Mr. Morrissey when Paula Gray was faced with trial, and Paula Gray had the option of testifying for the People, which the State had wanted her to do a number of years after they took her to the grand jury. (Tr. of Evidentiary Hr'g of 5/4/99, at 159-60).

Mr. Morrissey stated that when he and Mr. Reddy had a discussion with Petitioner, she decided to testify the way she had at the grand jury. (Tr. of Evidentiary Hr'g of 5/4/99, at 160). He further testified that the last interview or discussion indicated by his notes, between himself, Mr. Reddy and Paula Gray, was shortly before the Jimerson trial. (Tr. of Evidentiary Hr'g of 5/4/99, at 160). His next notations related to Paula's plea "some period of time after that [discussion]," and also to the earlier guilty findings as to the other defendants. (Tr. of Evidentiary Hr'g of 5/4/99, at 160).

Mr. Morrissey indicated that the "scenario all along was [for Paula Gray] to tell the truth" while testifying for the prosecution. (Tr. of Evidentiary Hr'g of 5/4/99, at 160). When Ms. Gray testified in the Jimerson case, Mr. Morrissey did not sit in on the direct examination of Petitioner but he did observe, perhaps upon "coming back from lunch," [defense counsel's] cross-examination regarding the fact that she was represented by Mr. Morrissey, who had told her:

> to tell the truth and when [Mr. Morrissey] heard that [he] just kept on walking because as far as [he] was concerned, through this whole case, if Paula had testified consistently the way she did in the grand jury and the way 'we' all thought it happened, she wouldn't have spent any time in custody and she wouldn't have been in the predicament she was in. She was victimized a couple of times by the system, [he] thought, and [he] was attempting to try to alleviate her condition.

(Tr. of Evidentiary Hr'g of 5/4/99, at 160-61).

While conferring with Paula Gray about testifying in any of the cases, Mr. Morrissey stated that "Paula Gray wasn't the sharpest person in the school district," and that Mr. Reddy informed him that Paula's I.Q. was even lower than he previously thought. (Tr. of Evidentiary Hr'g of 5/4/99, at 162). Moreover, he observed that while talking to Paula and her mother, Paula "would understand what you are saying and would go through things," but sometimes Paula "might start to wander or something." (Tr. of Evidentiary Hr'g of 5/4/99, at 162).

Mr. Morrissey never sought a deal from the People for Petitioner because he thought she had been victimized multiple times by the system by being taken to the grand jury, essentially abandoned, and later finding herself in the hands of the co-defendant's family and changing her story 180 degrees. (Tr. of Evidentiary Hr'g of 5/4/99, at 162). He felt that this should and could have been avoided. (Tr. of Evidentiary Hr'g of 5/4/99, at 162).

Therefore, Mr. Morrissey did not seek a deal because "[he] didn't want [Paula Gray] to be concerned about anything else other than telling the truth about what happened on the night of the event...and [he] didn't want her to be in front of somebody on cross-examination or direct or anything else and have her in a situation where she has got to explain the deal and isn't the deal really why you are testifying, isn't the deal this and that." (Tr. of Evidentiary Hr'g of 5/4/99, at 162-63). Based upon Mr. Morrissey's subjective thought as to what he knew of the system, he:

> ...considered [Paula Gray] a victim in the system and in [his] professional opinion, if she testified the way we all thought it happened, that she would never be prosecuted on this case or if she was prosecuted on this case, after she testified the way she did, that [he] couldn't imagine a judge in the system that would ever find her guilty.

(Tr. of Evidentiary Hr'g of 5/4/99, at 163).

Mr. Morrissey stated that "[t]here was absolutely no deal at any time" for Paula Gray in exchange for her testimony in the Jimerson trial, and specifically told Paula there was no deal in the case. (Tr. of Evidentiary Hr'g of 5/4/99, at 161, 163). He was surprised as to why the case was reversed, and subsequently filed an affidavit indicating as such. (Tr. of Evidentiary Hr'g of 5/4/99, at 161-62).

Mr. Morrissey specifically indicated that Paula was a victim of the system because:

> ...she was a young person that wasn't the most intelligent person in the community, hadn't finished high school, lived in a very tough neighborhood, vacant properties, crime, etcetera, and so she was having a tough time on her day-to-day life experiences, I would imagine. Then to be involved in this situation where these individuals -- and being exposed to the tremendous violence that she was, coming home telling the family about it, repeating it to the police, to the State's Attorney, then being taken out of her community again, down to the grand jury, whatever, however that impacted her. After that they felt enough of her to take her to the Holiday Inn for a day or two or forever or whatever it was, she doesn't like it there. She is not with her family. I think her mother visited her once. This [he was] getting from reports after the fact and then she decides to go home. Somehow or other after she gets home she gets involved with the co-defendant Williams' family, Dennis Williams. And then the attorney, Archie Weston, who is representing Williams, who now has an individual who is living with his client's family who is going to testify against them ends up taking her to the courthouse, walks up arm in arm and she comes in and testifies that that never happened and finds herself arrested. [He] thought that was a pretty good portrayal of somebody who has been victimized by the system.

(Tr. of Evidentiary Hr'g of 5/4/99, at 164-65).

Mr. Morrissey indicated that he was involved in Paula Gray's 1987 perjury plea. (Tr. of Evidentiary Hr'g of 5/4/99, at 165). Upon reviewing the transcripts of Petitioner's 1987 plea, Mr. Morrissey indicated that the other charges, including murder, were dismissed, leaving the [perjury] indictment against Ms. Gray. (Tr. of Evidentiary Hr'g of 5/4/99, at 165). He stated that the original indictment indicated that the basis for the perjury charge was that Paula told the truth at the grand jury and told a lie at the preliminary hearing. (Tr. of Evidentiary Hr'g of 5/4/99, at 165-66). The plea, however, didn't conform to the indictment in that the State's Attorney read in the record that Petitioner testified in a different manner in the preliminary hearing than she did before the grand jury, and Mr. Morrissey didn't know how one could defend against such a perjury count. (Tr. of Evidentiary Hr'g of 5/4/99, at 166).

Mr. Morrissey agreed with the State's Attorney's Office that Paula Gray should receive two years probation for her perjury plea in order to be under the auspices of the Probation Department, since Petitioner would be residing in the community and "official contact with her" would facilitate her possible relocation to perhaps Michigan. (Tr. of Evidentiary Hr'g of 5/4/99, at 167-68). Mr. Morrissey believed that it was "nonreporting" probation. (Tr. of Evidentiary Hr'g of 5/4/99, at 168). He also discussed the foregoing proposal with Ms. Gray prior to her guilty plea. (Tr. of Evidentiary Hr'g of 5/4/99, at 168).

Mr. Morrissey did not have any reason to believe that Petitioner did not understand the charge to which she was pleading or the consequences of that plea. (Tr. of Evidentiary Hr'g of 5/4/99, at 168).

On cross-examination, Mr. Morrissey's recollection about when he became involved in Petitioner's matter was not refreshed by the half sheet of her case, or Plaintiff's [or Petitioner's Evidentiary Hr'g] Exhibit 5-A. (Tr. of Evidentiary Hr'g of 5/4/99, at 169-70). However, he believed he became involved in Paula Gray's case several months before the October 30th, 1985 start of the Jimerson trial. (Tr. of Evidentiary Hr'g of 5/4/99, at 170). He doesn't recall if he filed any discovery requests on behalf of Ms. Gray. (Tr. of Evidentiary Hr'g of 5/4/99, at 170).

Mr. Morrissey believed that he was contacted by ASA Scott Arthur regarding Petitioner's cooperation in the Jimerson case. (Tr. of Evidentiary Hr'g of 5/4/99, at 170-71). He is unsure when he was contacted by Scott Arthur, or when the Jimerson trial was set for, but recalled that Paula's trial was being scheduled, and "the issue was, were we going to proceed with Paula's trial depending on what Paula decided to do." (Tr. of Evidentiary Hr'g of 5/4/99, at 171). He stated that when Petitioner decided to testify for the State, the Jimerson trial proceeded shortly thereafter. (Tr. of Evidentiary Hr'g of 5/4/99, at 171). Mr. Morrissey wasn't having any discussions with Scott Arthur because he was "trying to figure out what Paula was going to do." (Tr. of Evidentiary Hr'g of 5/4/99, at 172). He indicated that "in the frame work of getting ready to try Paula's case," Paula decided to testify for the State consistent with her grand jury testimony, which he communicated to Scott Arthur. (Tr. of Evidentiary Hr'g of 5/4/99, at 172). Her case didn't go forward and the Jimerson case did. (Tr. of Evidentiary Hr'g of 5/4/99, at 172).

Mr. Morrissey stated that the subject of leniency for Petitioner never came up in his discussions with Scott Arthur. (Tr. of Evidentiary Hr'g of 5/4/99, at 172). Also, the Jimerson trial having ended, and Paula Gray having testified according to his understanding in that proceeding, Mr. Morrissey indicated he had no discussions with any other prosecutor regarding the disposition of Petitioner's case. (Tr. of Evidentiary Hr'g of 5/4/99, at 172-73). The reason that he didn't discuss disposition is because "[he] never anticipated Paula would ever go to trial if she testified the way that she testified at the grand jury." (Tr. of Evidentiary Hr'g of 5/4/99, at 173). In 1986 and 1987, Mr. Morrissey doesn't recall having any discussion with Scott Arthur or any other prosecutor regarding Paula Gray and her status. (Tr. of Evidentiary Hr'g of 5/4/99, at 174).

The Williams and Rainge trials were conducted after Jimerson's, but Mr. Morrissey doesn't know when Paula Gray decided to testify in those matters, because after she decided to testify in Jimerson, "he just presumed that she was going to continue to testify in the other cases and that's in fact, what she did." (Tr. of Evidentiary Hr'g of 5/4/99, at 173-74). Mr. Morrissey didn't recall that the Willliams and Rainge "retrials" took place in February of 1987. (Tr. of Evidentiary Hr'g of 5/4/99, at 174). He did, however, indicate that Paula Gray's was the only matter remaining after the Willliams and Rainge case was over, that she had testified in their [1987] case, and that he had had no disposition talks with prosecutors regarding Petitioner's case at the conclusion of these [sic][1987] matters. (Tr. of Evidentiary Hr'g of 5/4/99, at 174). There were no disposition talks with the People until the April 23rd, 1987 date of Paula Gray's perjury plea, when the prosecutors dismissed all charges except the perjury case. (Tr. of Evidentiary Hr'g of 5/4/99, at 174-75). Mr. Morrissey doesn't remember any conference with the assigned judge, or of "sitting down and going over" with Ms. Gray the recommendation of probation or offer of relocation. (Tr. of Evidentiary Hr'g of 5/4/99, at 175, 178). He recalls, however, that "that [information] was communicated to her," and that probation would be offered to show her some support in the system, and that there was going to be an offer or attempt made to relocate her. (Tr. of Evidentiary Hr'g of 5/4/99, at 176). Mr. Morrissey indicated that this was the State's Attorney's rationale for seeking probation, that he agreed with it, and that all of these matters were discussed before court on April 23rd [1987]. (Tr. of Evidentiary Hr'g of 5/4/99, at 177). He is unsure of the State's Attorney with whom he spoke regarding the foregoing relocation and disposition, but it could have been Jim Reddy who related this information to him. (Tr. of Evidentiary Hr'g of 5/4/99, at 177).

Also, Mr. Morrissey indicated that his earlier testimony that in June of 1978 Archie Weston picked up Paula and took her to court, was presumably related to him by Jim Reddy. (Tr. of Evidentiary Hr'g of 5/4/99, at 178).

Upon the Court's inquiry, Mr. Morrissey stated that he was not sure that Petitioner had a viable defense to perjury by contradictory testimony, even though she didn't affirmatively tell a different story, where she testified under oath "one way"on day one, and then denied all of that information, or said it was a lie, under oath, on day two. (Tr. of Evidentiary Hr'g of 5/4/99, at 178-79). He indicated that they "weren't sure if [Ms. Gray] had all of sudden decided not to testify against her boyfriend [Kenny Adams]," but this did not constitute a defense based on "threat, compulsion, etcetera." (Tr. of Evidentiary Hr'g of 5/4/99, at 179).

Applicable Statutory Law and Supreme Court Rules

[735 ILCS] 5/2-1401. Relief from judgments

§ 2-1401. Relief from judgments.

(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of

review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. Except as provided in Section 6 of the Illinois Parentage Act of 1984...[750 ILCS 40/6], there shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.
(b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(c) Except as provided in Section 20b of the Adoption Act...[750 ILCS 50/20b] and Section 3-32 of the Juvenile Court Act of 1987...[705 ILCS 405/3-32] or in a petition based upon Section 116-3 of the Code of Criminal Procedure of 1963...[720 ILCS 5/116-3], the petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(d) The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.

(e) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment.

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.

735 ILCS 5/2-1401 (1999)

[Relevant Provisions of Illinois Supreme Court] Rule 402. Pleas of Guilty

In hearings on pleas of guilty, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

(b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

(c) Determining the Factual Basis for Plea. The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea. (emphasis added).

* * *

S.H.A. Ch. 110A, S.Ct.Rule 402 (1985). [Note that Ill.Rev.Stat., 1987, ch. 110A, ¶ 402, has the same text as the above cited 1985 Supreme Court Rule 402].

[Relevant Provisions of Illinois Supreme Court] Rule 412 [and Committee Comments]. Disclosure to Accused (emphasis added)

* * *

(c) Except as is otherwise provided in these rules as to protective orders, the State *shall disclose* to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor. (emphasis added).

* * *

Committee Comments

(October 1, 1971)

* * *

Paragraph (c) is included to comply with the constitutional requirement that the prosecution disclose, "* * * evidence favorable to an accused. * * * where the evidence is material either to guilt or to punishment." Brady v. Maryland, 373 U.S. 83 at p. 87, 83 S.Ct. 1194 at 1196-97 (1963). Although the pretrial disclosure of such material is now not constitutionally required it is clear that, *if a conviction is to be valid, the material must be disclosed so that the defense can make use of it.* In providing for pretrial disclosure, this paragraph *permits adequate preparation for*, and minimizes interruptions of, *a trial*, and *assures informed pleas by the accused.* (emphasis added).

* * *

Sup. Ct. R. 412 (2000). [As of October 1, 1971, texts for Rule 412 (c) and Committee Comments to Paragraph (c) were identical to those of the above-cited provisions of the 2000 Rule. Note also that the Respondent has filed a copy in this matter of Rule 412(c) and Committee Comments to Paragraph (c) of that rule as Respondent's Group Ex. 11 Item D that also contains identical texts to those of the above-cited provisions of this rule and Committee Comment]

Parties' Legal Arguments

As previously discussed, the Court conducted the foregoing evidentiary hearing to resolve the eight (8) factual issues listed in Memorandum "Evidentiary Hearing" at 31-32, and to receive additional evidence for assisting it in determining whether Petitioner has established, by a preponderance of the evidence, her allegations that Brady (and 412(c)) evidence fraudulently concealed from her by the Respondent, as well as newly discovered evidence of Petitioner's actual innocence, constitute grounds, which if known by the 1987 trial court, would have prevented or precluded Petitioner's 1987 perjury judgment. More specifically, the Court will analyze and determine the facts and law regarding each of its determinations as set forth in Memorandum "Issues/Court's Determination of Issues" para. 1.h.-m., at 12-14.

Also, both the People's Motion to Dismiss, Petitioner's Answer, and Petitioner's Proposed Findings of Fact and Conclusions of Law as to Respondent's Motion to Dismiss, have raised and argued pertinent issues which can constitute grounds for the grant or denial of Ms. Gray's 2-1401 petition. Therefore, this Memorandum will reference these arguments, case law and exhibits, where relevant, in determining whether 2-1401 relief should be afforded. *The Court reiterates that it has denied Respondent's Motion to Dismiss.*

Petitioner's Post-Hearing Memorandum

I. Introduction

Ms. Gray's Post-Hearing Memorandum requests vacatur of her 1978 conviction for murder and rape charges, as well as her 1987 perjury plea, and the 1978 orders of *nolle prosequi* entered on the Clark gas station charges, in addition to the 1987 orders of *nolle prosequi* entered on murder and rape counts (for which Petitioner had been previously convicted in 1978, and as to which the federal court granted her a new trial pursuant to a writ of habeas corpus). (Petitioner's Post-Hearing Mem. at 1). Petitioner's Post-Hearing Memorandum also generally moves for the dismissal of the murder and rape charges alleged by her 1978 indictment, as well as dismissal of the charges of the 1984 information (including the perjury count). (Petitioner's Post-Hearing Mem. at 15). In addition, Ms. Gray's Post-Hearing Memorandum requests dismissal of the underlying charges of the 1978 and 1987 *nolle prosse* orders. (Petitioner's Post-Hearing Mem. at 1, 11-15).

These requests are premised on the Petitioner's "innocence of the charges" and "Respondents's fraudulent concealment of exculpatory evidence." (Petitioner's Post-Hearing Mem. at 1-2). Petitioner submits that each of her claims were proven by the petition's allegations and the evidentiary hearing conducted by the Court. (Petitioner's Post-Hearing Mem. at 2).

Citing to case law, the Petitioner alleges that the factual issues presented by her petition "are admitted in the main" because the Respondent has not filed an Answer, and its Exhibits do not rebut in any significant way the Petitioner's sworn allegations and other evidence. (Petitioner's Post-Hearing Mem. at 2).

Petitioner also indicates that the Court is charged by the Illinois Supreme Court with assessing the credibility of the evidence, including witness testimony, and notes that none of the persons shown to have concealed evidence, either submitted evidence or testified at the evidentiary hearing. (Petitioner's Post-Hearing Mem. at 2).

II. 1987 Guilty Plea to Perjury

A. Void Nature of the Pejury Count

Ms. Gray reiterates that she was indicted in 1978 for perjury and that the charge in the indictment regarding her June, 1978 Preliminary Hearing testimony was that she made a "'false statement...relating to the presence and participation of [the Ford Heights Four in the subject crimes]."' (Petitioner's Post-Hearing Mem. at 2). However, the Petitioner argues, both Illinois Supreme Court and First Appellate District case law require that to constitute a legally sufficient perjury charge, the language purportedly constituting a false statement must be recited and/or described in the count itself, or the charge is void. (Petitioner's Post-Hearing Mem. at 2-3). Again citing to case law, a void judgment can be vacated at any time, and in such instance, "'there could be no reason to justify the denial of section 2-1401 relief..." (Petitioner's Post-Hearing Mem. at 3).

B. Innocence

Petitioner submits that her 1987 perjury plea can additionally be vacated on the grounds of innocence, because "justice would only be served by doing so." (Petitioner's Post-Hearing Mem. at 3).

Ms. Gray alleges that we now know that her denials at the 1978 Preliminary Hearing of involvement by herself and the Ford Heights Four in the Lionberg/Schmal crimes were truthful, not perjurious. (Petitioner's Post-Hearing Mem. at 3). The Ford Heights Four have been freed of the rape and murder charges and received gubernatorial pardons based on innocence, and three of the four real killers have been convicted of the crimes. (Petitioner's Post-Hearing Mem. at 3). Also, Petitioner has filed an affidavit with the Court from Ira Johnson, one of the real killers, which "independently establishes that Ms. Gray was not involved in the crimes." [See Petitioner's Add'l Auth's and Mat'ls Ext. 11]. (Petitioner's Post-Hearing Mem. at 4).

Petitioner asserts that the Respondent has not addressed the issue of Ms. Gray's innocence, but rather argues the advantage Petitioner received from her 1987 guilty plea in avoiding a retrial on murder and rape charges, by reason of the prosecutor's orders of *nolle prosequi* as to these allegations. (Petitioner's Post-Hearing Mem. at 4). Petitioner also notes that it is "both extraordinary and depressing" that a public agency would adopt a position that a person should be "saddled with a conviction and attendant disadvantages," notwithstanding "incontestable evidence" that it was error to have charged Ms. Gray from the outset. (Petitioner's Post-Hearing Mem. at 4). Petitioner also cites to analogous law permitting withdrawal of guilty pleas to correct a "manifest injustice," arguing that this precedent strengthens their argument that the perjury charge is void. (Petitioner's Post-Hearing Mem. at 4).

C. Fraudulently Concealed Evidence

While conceding that avoiding a retrial on murder and rape charges in 1987 is "a desirable outcome," Petitioner alleges that Respondent's position ignores the fact that Petitioner and the Ford Heights Four "were ignorant of [12 items of] outcome-determinative evidence." (Petitioner's Post-Hearing Mem. at 4-5). This evidence, Ms. Gray asserts, was not contested by Respondent, except for their allegation that Petitioner has not provided an adequate foundation, "even though the evidence came from the State's files." (Petitioner's Post-Hearing Mem. at 6). Petitioner discusses, as an example, the "ostensible police notes of the interview of Sherry McCraney," the wife of Charles McCraney, a key state witness. (Petitioner's Post-Hearing Mem. at 6). Mr. McCraney's testimony at the trials of the Ford Heights Four placed certain of them at the scene of the crime prior to and during its commission, while Sherry McCraney's statement, if believed at trial, "meant that her husband mistakenly reported possible activity by the Ford Heights Four as being that of the murderers." (Petitioner's Post-Hearing Mem. at 6). The notes containing Mrs. McCraney's statement were produced in 1998 by the Sheriff's Office, which was the investigating agency [of the Lionberg/Schmal crimes]. (Petitioner's Post-Hearing Mem. at 6). Petitioner argues that the fact that no police officer admitted to producing the notes is irrelevant, and that the notes constitute classic exculpatory material which the State had a duty to disclose under Brady v. Maryland. (Petitioner's Post-Hearing Mem. at 6).

Petitioner contends that had the following 12 items of evidence, including the Sherry McCraney notes, been disclosed by the prosecution in 1978, acquittals [of Paula Gray and her co-defendants, Dennis Williams and Willie Rainge] would have resulted. (Petitioner's Post-Hearing Mem. at 6). Moreover, had Petitioner known of these 12 items in 1987, including the later confessions by and convictions of the real killers, as well as pardons of the Ford Heights Four [on the grounds of innocence], the State would likely have dismissed the charges, or Ms. Gray would have insisted on trial. (Petitioner's Post-Hearing Mem. at 6-7). In effect, but for the concealment of this evidence, there would have been no [1987] conviction for perjury. (Petitioner's Post-Hearing Mem. at 7). Petitioner alleges that the following items of evidence did not come to her attention until less than two years ago; that this evidence was not disclosed to Petitioner, despite it's "obvious exculpatory value"; and that Archie B. Weston, Sr., Ms. Gray's 1978 attorney, testified at the evidentiary hearing in this matter at "4/28/99 Tr. pp. 195-96, 204-210, 217-35," that he "received a single police report before trial, and none of the critical notes." (Petitioner's Post-Hearing Mem. at 5 n.1). The evidence includes:

1. The notes by the assistant State's Attorney in the Felony Review Division [Earnest DiBenedetto] that Charles McCraney "saw no faces" of the possible murderers, "Ex.14, Bates Stamp p. 047486 (Petitioner's Additional Authorities and Materials)," while [Mr. McCraney] testif[ied at Petitioner's 1978 trial] that he saw Ms. Gray and the Ford Heights Four." "People v. Gray, 87 Ill.App.3d 142, 146...(1st Dist. 1980)...";

2. The notes of the Sherry McCraney interview which were in the Sheriff's possession [and were discussed in the foregoing paragraph]. "Petition, Ex. H; Ex. 9, Petitioner's Additional Authorities and Materials (excerpts from deposition of Sheriff's Investigator).";

3. The exculpatory interview notes of Ms. Gray. (Petitioner's Add'l Auth's and Matl's Ex. 9);

4. The notes or report of the interview of Marvin Simpson on May 17, 1978, by Sheriff's officials and George Nance of the Ford Heights Police Department [or the so-called Capelli notes or street file]. "Petition, Ex. G.";

5. The report of George Nance of the Simpson interview. "4/29/99 Tr. p. 32";

6. The information that the State's forensics examiner, Michael Podlecki, conducted microscopic comparisons of pubic hairs found at the scene with pubic hair standards from the Ford Heights Four, and concluded that the crime scene hairs were not similar to those of the accused;

7. The information that Mr. Podlecki's trial testimony was false when he said that the pubic hairs were of no "evidential value." In fact, the hairs were evidence that African-American males other than the Ford Heights Four committed the rapes;

5. The information that Michael Podlecki asked a prosecutor and a Sheriff's police officer to obtain head hair standards from the Ford Heights Four for comparison with the head hairs found on the socks, but officials declined to obtain the requested hairs. "4/29/99 Tr. pp. 156-62";

6. The notes by the Felony Review prosecutor [Earnest DiBenedetto] reflecting his conclusion regarding Paula Gray that "this witness is reluctant." "Ex. 14, Bates Stamp p. 07486, Petitioner's Additional Authorities and Materials.";

5. The information that Sheriff's officers had seized and searched a Buick (Simpson had said the real killers drove such a car) in August of 1978 in connection with the Lionberg/Schmal investigation, though the search warrant, search warrant affidavit, and return evidently had been destroyed. "...Ex. 10, Petitioner's Additional Authorities and Materials.";

1l. The information that Charles McCraney had been shown a photo spread by Sheriff's officers, and that Willie Watson had appeared in a line-up about a week after the bodies had been found. "...4/[29]/99 Tr. 234-235.";

12. The information that although David Jackson provided inculpatory testimony against the Ford Heights Four, "People v. Williams, 93 Ill.2d 309, 319...(1982)," his story was false, manufactured by prosecutors. "Hearing Ex. 3-A" [Plaintiff's [or Petitioner's Evidentiary Hr'g] Exhibit 3-A is David Jackson's October 11th, 1994 affidavit asserting that he "falsely testified against Dennis Williams and Willie Rainge and co-defendants in [their 1978] trial because [he] was offered a deal by Cliff Johnson and Scott Arthur." Mr. Jackson never heard, as he testified, the Ford Heights Ford inculpate themselves in the subject crimes, and "Cliff Johnson as well as Scott [Arthur]...gave [him] a story to tell as part of the deal."]. [Note that the Williams opinion indicated that David Jackson testified at the 1978 trial that he heard only Dennis Williams and Willie Rainge make statements incriminating them in the subject offenses and not Kenneth Adams or Verneal Jimerson. Williams, 93 Ill.2d at 320]. In fact, Jackson had had no contact with the Ford Heights Four at the Cook County Jail. "Hearing Ex. 4-A." [Plaintiff's [or Petitioner's Evidentiary Hr'g] Exhibit 4-A is Bernard Robinson's April 9th, 1999 affidavit indicating that he was arrested with David Jackson and others in the early morning of May 15, 1978; that they were in a Markham holding cell with the Ford Heights Four where he observed Williams' and Rainge's faces were marked and swollen; all parties were transported to Cook County Jail on May 15, 1978, where Mr. Robinson and David Jackson were in a cell together, separate from those of the Ford Heights Four, and though they were all able to talk through the cell bars, Mr. Robinson did not see or hear Williams, Adams, Rainge or Jimerson].

(Petitioner's Post-Hearing Mem. at 5-6 n.1)

D. Timing of Petition

Ms. Gray argues, as alleged by Respondent, that the petition would be untimely under the two-year limitations period of a Section 1401 petition, 735 ILCS 5/2-1401(c), but for the legislative inclusion of two exclusions: fraudulent concealment of evidence and legal disability. (Petitioner's Post-Hearing Mem. at 7).

1. Fraudulent concealment.

Petitioner contends that when "significant exculpatory evidence" is concealed by the prosecution, it tolls the two-year post-judgment limitations period, and that such period does not begin to run until the Petitioner is aware of the evidence or should have known of it. (Petitioner's Post-Hearing Mem. at 7). Ms. Gray asserts that the Respondent concealed such exculpatory evidence, and also the evidence supporting her innocence, and that these proofs were not known to Petitioner until less than two years before the petition was filed. (Petitioner's Post-Hearing Mem. at 7). [See also Petitioner's Proposed Findings of Fact and Conclusions of Law as to Respondent's Mot. to Dismiss para. 40, at 18-19, for Petitioner's argument that Illinois case law "suggests that free-standing claims of innocence deserve scrutiny *regardless of the defendant's compliance with technical requirements* [or apparently the two year limitations period of the post-judgment statute]" (emphasis added)].

Petitioner cites to two "related incidences of concealed evidence" raised by Respondent at the evidentiary hearing, involving the Marvin Simpson statement exculpating Paula Gray, and Dennis Johnson's public account that he knew who was involved in the subject crimes, untruthfully excluding himself despite his actual involvement. (Petitioner's Post-Hearing Mem. at 7). Ms. Gray argues that the Dennis Johnson information was not useful to Petitioner in view of his refusal to come forward and testify, or to reveal the name of the real killers. (Petitioner's Post-Hearing Mem. at 7). Also, as Mr. Johnson's account was public knowledge, having appeared in the 1982 article by Rob Warden in The Chicago Lawyer, this information was known to the prosecutor, who failed to do any follow-up investigation, grant immunity to Dennis Johnson, or issue a grand jury subpoena. (Petitioner's Post-Hearing Mem. at 7-8).

2 Legal Disability.

Petitioner's attorneys argue that Paula Gray is suffering from a "legal disability" which has interfered with her understanding of the various proceedings. (Petitioner's Post-Hearing Mem. at 8). They further contend that the criminal law test of "'incompetency'" is irrelevant, and that this Section 1401 matter is guided by the civil law definition of "legal disability." (Petitioner's Post-Hearing Mem. at 8, 10).

They also indicate that "legal disability" has not been defined by Section 1401, nor "the other statute of limitations" cited by Respondent. (Petitioner's Post-Hearing Mem. at 8). [Note that on December 14, 1999, subsequent to the evidentiary hearing and submission of written arguments in this matter, the First District, in Selvy v. Beigel, 309 Ill.App.3d 768, 776 (1st Dist. 1999), ruled in a 2-1401 proceeding that "[t]o be under a legal disability a person must be

'entirely without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his estate or financial affairs.'" Moreover, the In re Doe First District opinion made clear that "[s]imply because autism [or mental retardation] is considered a *developmental* disability [under the Mental Health and Developmental Disabilities Code (Ill.Rev.Stat. 1991, ch. 91½, par. 1-106)] does not grant it automatic status as a *legal* disability." (emphasis added). In re Doe, 301 Ill.App.3d 123, 127 (1st Dist. 1998). Accordingly, Petitioner's argument that the Court should use the Statute (on) Statutes (ILCS 70/1), and the Developmental Disability and Mental Disability Services Act (405 ILCS 80/3-3(k)(1), 3-3(k)(1)(A), and 3-3(k)(2)(D)), in defining "legal disability" under 735 ILCS 5/2-1401, is without merit.]

Petitioner's counsel further allege that the evidentiary hearing in this case clearly established that "Ms. Gray is capable of living a full life, albeit with the support system about which the Court heard...[but that] it is uncontested that she has a severe intellectual handicap," though this "is not a characterization of which [Petitioner] would approve." (Petitioner's Post-Hearing Mem. at 10). They further point out that although Respondent elicited testimony that she paid her own bills and went shopping, the evidence also established that Ms. Gray did not count the change given to her by store personnel after purchases, but instead "just put the change in her pocket. Tr. 181-82." (Petitioner's Post-Hearing Mem. at 10).

Paula Gray's attorneys also emphasized the Court's having heard her testimony and observed "the difficulty she had with words, painful experiences, and concepts, her errant misconceptions about the nature of the charges against her and the trials in which she participated, and her general demeanor." (Petitioner's Post-Hearing Mem. at 10). They conclude that these matters are "more telling than legal terms in assessing her levels of comprehension and functioning." (Petitioner's Post-Hearing Mem. at 10).

Having established that Petitioner suffers from a legal disability, her counsel conclude that "delay in filing the [p]etition is excused by the exclusion in Section 1401." (Petitioner's Post-Hearing Mem. at 10-11).

III. 1978 *Nolle Prossed* Counts

Petitioner alleges that in 1978, she was charged and tried on ten felony counts regarding events occurring at the Clark gas station, wholly without Respondent's presentation of supporting evidence, either at the grand jury issuing the charges against Ms. Gray, or her subsequent [September] 1978 trial, nor the 1985 trial of Verneal Jimerson, or the 1987 [retrial] of Dennis Williams and Willie Rainge. (Petitioner's Post-Hearing Mem. at 11).

Again citing case law, Petitioner argues that pursuant to "constitutional imperative," a person may not be charged with a crime without supporting evidence. (Petitioner's Post-Hearing Mem. at 11). Also, indictments lacking any evidence are void and may be attacked at any time. (Petitioner's Post-Hearing Mem. at 11). Therefore, since Ms. Gray was subjected to charges lacking any evidentiary foundation "whatsoever," the 1978 charges and *nolle prosse* orders should be vacated and dismissed. (Petitioner's Post-Hearing Mem. at 12).

Petitioner reiterates Respondent's argument that *nolle prosse* orders are "interlocutory," and therefore non-appealable. (Petitioner's Post-Judgment Mem. at 12). As such, per Respondent, these orders "are not cognizable under 1401..." (Petitioner's Post-Judgment Mem. at 12). Ms. Gray counters that this argument ignores the purpose of Section 1401 which is to afford post-judgment relief "regardless of the nature of the order or judgment from which relief is sought," citing from the text of the 2-1401 statute. (Petitioner's Post-Hearing Mem. at 12).

Petitioner's position is that Respondent's basic argument is "that when the State indicts a person without evidence, then *nolle prosses* the charges, the defendant is saddled forevermore with an arrest record because the charges theoretically could be revived in the future." (Petitioner's Post-Hearing Mem. at 12). This argument, Ms. Gray asserts, "ignores the equitable nature of Section 2-1401 Petitions as well as the constitutional right to a speedy trial." (Petitioner's Post-Hearing Mem. at 12).

Referencing both case law and an Illinois Bar Journal article written by Judge Davis, Petitioner discusses the inclusion of equitable principles in Section 72 (1401's predecessor) and Section 1401 proceedings, and concludes that the issues of such petitions "are not resolved by reference to the status of *nolle prosse* orders as appealable or non-appealable if substantial justice thereby would be denied." (Petitioner's Post-Hearing Mem. at 13).

Ms. Gray further argues that Respondent's foregoing position is in error as a matter of law because historically, the prosecutorial right to *nolle prosse* charges was limited by requiring reinstatement by the State within the same term of Court as the dismissal occurred. (Petitioner's Post-Hearing Mem. at 13-14). This limitation on the State's authority to recharge was based on the constitutional right to speedy trial, which the Petitioner argues was unaffected by the abolition of Terms of Court. (Petitioner's Post-Hearing Mem. at 14). The Petitioner also cited case law regarding "the public scorn that attends unresolved allegations of criminal conduct." (Petitioner's Post-Hearing Mem. at 14).

Though this is a case of first impression according to Ms. Gray, the Petitioner concludes that "the *nolle prosse* charges could not be revived without running afoul of speedy trial and due process rights." (Petitioner's Post-Hearing Mem. at 14). Also, as the *nolle prosses* occurred 21 years ago, in 1978, they are outside any "acceptable time limit for revival" and should therefore be vacated and dismissed. (Petitioner's Post-Hearing Mem. at 14).

IV. 1987 *Nolle Prosses* of Murder and Rape Charges

Subsequent to Petitioner's plea of guilty to perjury on April 23, 1987, the Respondent *nolle prossed* the remaining counts of murder and rape. (Petitioner's Post-Hearing Mem. at 14). Ms. Gray similarly argues that these counts should be vacated and dismissed on the grounds of Petitioner's innocence, and because the passage of time bars the State from reviving these charges on constitutional due process and speedy trial grounds. (Petitioner's Post-Hearing Mem. at 14).

Petitioner cites People v. Hryciuk, 36 Ill.2d 500 (1967), in support of its position regarding the murder charges, for which there is no statute of limitations. In Hryciuk, the Illinois Supreme Court, upon its grant of a new trial for defendant's rape conviction rendered 14 years earlier, barred the State from charging the defendant with murder, arising out of the same incident as the rape offense, after the passage of 14 years. (Petitioner's Post-Hearing Mem. at 15). The grounds on which the court barred the prosecution, where no new evidence had since been acquired of defendant's commission of the homicide, were the People's violation of the defendant's constitutional rights to due process and a speedy trial. (Petitioner's Post-Hearing Mem. at 15).

Petitioner argues that Hryciuk provides the foregoing constitutional support for vacatur and dismissal of Paula Gray's murder and rape charges *nolle prossed* in 1987, more than 12 years ago, where no new evidence was presented as to Petitioner's involvement in the crimes; the contrary in fact being true. (Petitioner's Post-Hearing Mem. at 15). As such, the 1987 *nolle prosse* orders against Ms. Gray should be vacated and dismissed. (Petitioner's Post-Hearing Mem. at 15).

V. Conclusion

For each of the foregoing reasons, Petitioner moves for "judgment vacating and dismissing all charges and related orders against her." (Petitioner's Post-Hearing Mem. at 15).

Respondent's Post-Hearing Brief

I. Introduction

Citing to supporting documentation from the herein matter, Respondent summarizes the procedural history of this proceeding by indicating that Ms. Gray filed her petition, pursuant to 735 ILCS 5/2-1401, on March 2, 1999, seeking to vacate multiple orders of *nolle prosequi* and her "conviction for perjury entered pursuant to a plea agreement reached over 12 years ago, on April 23, 1987." (Respondent's Post-Hearing Brief at 1). On March 25, 1999, Respondent moved to dismiss the petition by challenging, among other issues, the sufficiency of factual allegations that would entitle Ms. Gray to 2-1401 relief. (Respondent's Post-Hearing Brief at 1-2). Respondent notes that Petitioner's response to its motion to dismiss argued that she be allowed to offer the necessary proof at a hearing. (Respondent's Post-Hearing Brief at 2). Respondent concludes that Ms. Gray having been provided "full opportunity to present evidence [at such evidentiary hearing] to satisfy her burden under Section 2-1401," that she has failed to do so, and her petition should therefore be denied. (Respondent's Post-Hearing Brief at 2).

Respondent states that Petitioner has incorrectly asserted that "'Respondent has not filed an Answer'" to her 2-1401 Petition, noting that "Respondent's Joint Response" was filed as a joint pleading, which included "a thorough response to the assertions of her Petition and a challenge to many of the allegations." (Respondent's Post-Hearing Brief at 2). Respondent also indicates

that its Joint Response sought to strike many of the allegations of the petition, as well as many of the statements contained in the affidavits attached thereto, as both "conclusory" and "often groundless." (Respondent's Post-Hearing Brief at 2 & n.1). Moreover, Respondent offered both documentary and testimonial evidence contesting the petition, as well as providing support for its denial. (Respondent's Post-Hearing Brief at 2).

Respondent alleges that the evidence "properly submitted" to the Court "demonstrates" that: (1) Petitioner committed the offense of perjury, because she made material and contradictory statements under oath, before the May 16th, 1978 Grand Jury, and Preliminary Hearing of June 19th, 1978, regarding the presence and participation of "Williams, Jimerson, Rainge and Adams" in the Lionberg/Schmal crimes; (2) that Ms. Gray has not established a meritorious defense to set aside her guilty plea to the perjury count, and; (3) that no legally sufficient basis exists to vacate the orders of *nolle prosequi* entered on the charges pending against Ms. Gray in 1978 and 1987. (Respondent's Post-Hearing Brief at 2-3).

Respondent also submits that Ms. Gray's petition is time barred by Section 2-1401(c), because Petitioner cannot establish a basis for tolling the [two-year limitations] provision of this section on the grounds of "'fraudulent concealment'" or "'legal disability.'" (Respondent's Post-Hearing Brief at 3). Respondent further asserts that Petitioner's request that the Court exercise its equitable powers "to release her from the consequences of her decisions made long ago...would certainly be an odd result considering the frequency by which her testimony changed in 1978, 1985, 1987, and 1999." (Respondent's Post-Hearing Brief at 3). Accordingly, Respondent requests that the Court deny Petitioner's relief under Section 2-1401. (Respondent's Post-Hearing Brief at 3).

II. Overview of Standard for Relief from Judgment under Section 2-1401

Citing to case law, Respondent states that generally, a trial court loses its jurisdiction after 30 days. (Respondent's Post-Hearing Brief at 3). Also, Section 2-1401 is not intended to provide review of an order which could have been appealed, nor as a substitute for a party's right to appeal. (Respondent's Post-Hearing Brief at 3). It is a collateral remedy for bringing matters of fact, not appearing in the record of the court rendering judgment, which if known to the court when the judgment was rendered, would have prevented its entry. (Respondent's Post-Hearing Brief at 3-4).

A party seeking 2-1401 relief must allege in its petition and prove by a preponderance of the evidence, "facts showing due diligence and the existence of a meritorious defense or claim." (Respondent's Post-Hearing Brief at 4). Due diligence requires a showing by the petitioner that "the adverse judgment was not entered due to her own neglect," and that she was diligent in presenting her petition. (Respondent's Post-Hearing Brief at 4). Also, Petitioner must prove her claim of "fraudulent concealment" of information by clear and convincing evidence, and "not merely suspicion," to toll the Section 2-1401 [two-year] statutory limitation. (Respondent's Post-Hearing Brief at 4).

III. Petitioner Has Failed to Establish Grounds to Vacate Her Plea of Guilty to Perjury

Respondent alleges that Petitioner provided testimony in a June 19th, 1978 Preliminary Hearing regarding the presence and participation of "Williams, Rainge, Adams and Jimerson" in the Lionberg/Schmal crimes which was in conflict with her May 16th, 1978 Grand Jury testimony pertaining to the same matters. (Respondent's Post-Hearing Brief at 4). Thereafter, Ms. Gray again provided conflicting testimony in Jimerson's 1985 trial, as well as the 1987 "retrials" of Williams and Rainge. (Respondent's Post-Hearing Brief at 4).

Respondent reiterates that on April 23, 1987, Ms. Gray, represented by Assistant Public Defender George Morrissey, appeared before Judge Frank Meekins and changed her previously-entered plea of not guilty to the charge of perjury contained in "84 C6 [sic] 5543", to a plea of guilty, by reason of her "contradictory testimony before the Grand Jury and at the Preliminary Hearing." (Respondent's Post-Hearing Brief at 5). Respondent also quotes ASA Richard Burke's factual basis for the perjury plea from the plea transcript, including Mr. Morrissey's "[stipulation to the court]...[that Mr. Burke's recitation] would be the testimony offered by the State." (Respondent's Post-Hearing Brief at 5-6). (See Memorandum "Respondent's Account" at 29-30).

Respondent then cites the 1987 perjury law from S.H.A. [Ch. 38], ¶ 32-2:

> § 32-2. Perjury. (a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.
>
> § (b) Proof of Falsity. An indictment or information for perjury alleging that the offender, under oath, has made contradictory statements, material to the issue or point in question, in the same or in different proceedings, where such oath or affirmation is required, *need not specify which statement is false.* At the trial, the prosecution need not establish which statement is false. (Emphasis added).

(Respondent's Post-Hearing Brief at 6).

Indicating that "[a] similar provision existed in 1978," and citing "generally [to] People v. Mitchell, 44 Ill.App.3d 399, 401 (4th Dist. 1976)," the Respondent concludes that the relevant perjury law required neither that the indictment specify which material and contradictory statement was false, nor proof by the prosecution as to which of the contradictory statements made under oath was false. (Respondent's Post-Hearing Brief at 6).

As Petitioner clearly "made contradictory statements, material to the issue or point in question, in different proceedings where such oath was required," and the law does not require the prosecution "to establish which of the two statements was false," Judge Meekins properly accepted Ms. Gray's perjury plea in 1987. (Respondent's Post-Hearing Brief at 6). Moreover, Petitioner offered no evidence at the hearing to dispute "these facts," so Petitioner "was properly guilty of the offense." (Respondent's Post-Hearing Brief at 6).

Respondent indicates that Petitioner nonetheless makes two arguments "in an effort to vacate her conviction." (Respondent's Post-Hearing Brief at 6). First, Petitioner "complains (12 years *ex post facto*)" that the perjury indictment supporting her plea is defective because it does not specify the false statement. (Respondent's Post-Hearing Brief at 7). This argument, according to Respondent, ignores the fact that the indictment provides "the substance of the contradictory statements." (Respondent's Post-Hearing Brief at 7). Respondent contends that its position is consistent with the leading case on the issue, People v. Aud, 52 Ill.2d 368, 370 (1972), cited by Petitioner, which requires that the perjury indictment either state the alleged statement verbatim or provide its substance. (Respondent's Post-Hearing Brief at 7). Also, Respondent notes that the sufficiency of an indictment cannot be challenged by a 2-1401 petition, because such a proceeding is limited to error[s of fact] unknown to the court when judgment is entered. (Respondent's Post-Hearing Brief at 7). It cannot contest an error of law. (Respondent's Post-Hearing Brief at 7). Therefore, Petitioner's challenge to the sufficiency of the indictment should be denied both because a 2-1401 petition cannot challenge an error of law, and the [purportedly insufficient] indictment was "'of record'" in 1987. (Respondent's Post-Hearing Brief at 7).

Furthermore, pursuant to case law, where the sufficiency of an indictment is attacked for the first time on appeal, it will be held sufficient if it appraises the defendant of the "precise offense charged with sufficient specificity to prepare her defense and to show a resulting conviction or acquittal as a bar to future prosecution arising from the same conduct." (Respondent's Post-Hearing Brief at 7 & n.2). Respondent states that Petitioner's 1987 perjury indictment is legally sufficient because it "has accomplished this [dual purpose]." (Respondent's Post-Hearing Brief at 7 & n.2).

Petitioner's second ground for vacatur of the plea is that she was innocent of the Lionberg/Schmal crimes. (Respondent's Post-Hearing Brief at 7). Respondent, however, argues that "the charge and plea...now before [the] Court is one for perjury, not murder, rape or kidnapping." (Respondent's Post-Hearing Brief at 7). As such, Ms. Gray's perjury plea, as well as the underlying charge, are premised on her "material and contradictory statements under oath, not her participation or non-participation in the other crimes." (Respondent's Post-Hearing Brief at 7). Respondent further points out that the "abundance of evidence" presented to the Court through the testimony of Judge Meekins, Judge Morrissey, and Mr. Reddy establishes that Petitioner entered a knowing and voluntary plea and was competent to enter same. (Respondent's Post-Hearing Brief at 7).

Lastly, Respondent alleges that Petitioner's reliance, by analogy, on cases involving the withdrawal of guilty pleas, will provide no guidance in this matter, because a 2-1401 petition cannot challenge the sufficiency of an indictment, citing to case law. (Respondent's Post-Hearing Brief at 8). Noting that the withdrawal of plea cases emphasize that such a petition cannot review an order which the party could have appealed, nor act as a substitute for an appeal, Respondent concludes that allowing Petitioner to proceed as if she were withdrawing her plea would violate Illinois Supreme Court policy against unilateral modification of a plea agreement by a defendant. (Respondent's Post-Hearing Brief at 8).

Respondent again cites case law that a defendant may not appeal the trial court's decision without first moving to withdraw the guilty plea, because to do otherwise, would compel the State to be bound by the terms of the agreement, while permitting the defendant to "unilaterally [renege on] or modify the terms that were previously acceptable." (Respondent's Post-Hearing Brief at 8-9). Applying contract principles, the Illinois Supreme Court concluded that to allow the defendant to unilaterally modify a plea agreement, while saddling the State with its terms, would "'encourage gamesmanship of a most offensive nature,'" be inconsistent with constitutional fundamental fairness, and discourage negotiated plea agreements. People v. Evans, 174 Ill.2d 320, 327-328 (1996)(Respondent's Post-Hearing Brief at 9).

Therefore, Petitioner's request to unilaterally modify her 1987 plea agreement with the State, in which Ms. Gray pled guilty to perjury and Judge Meekins sentenced her to 2 years probation and ordered the *nolle prosequi* of the remaining murder and rape charges, should be denied as violative of Illinois Supreme Court policy. (Respondent's Post-Hearing Brief at 9).

IV. Petitioner Cannot Invoke the Provisions of 735 ILCS 5/2-1401 to Vacate the Orders of *Nolle Prosequi*

Respondent asserts that Petitioner's request to vacate both the 1978 and 1987 orders of *nolle prosequi* violates both the policy and legal precedent of the Illinois Supreme Court. (Respondent's Post-Hearing Brief at 9).

First, the terms of the 2-1401 statute make clear that such a remedy is limited to "'[r]elief *from final orders and judgements.*" (Respondent's Post-Hearing Brief at 9-10). However, "[a]n order granting the State's motion for *nolle prosequi*," Respondent points out, "is an *interlocutory order*." (Respondent's Post-Hearing Brief at 10). Citing to case law definition of an order of *nolle prosequi*, Respondent notes that such an order is not a final disposition of a case, and is a procedure which reverts the case to the same condition which existed before the commencement of the prosecution. (Respondent's Post-Hearing Brief at 10). No criminal charge remains pending after the entry of an order of *nolle prosequi*, so that the State must file a new charging instrument to commence the prosecution. (Respondent's Post-Hearing Brief at 10). As such, Ms. Gray cannot utilize a 2-1401 petition to vacate orders of *nolle prosequi* motioned for by the State and entered by agreement between the parties. (Respondent's Post-Hearing Brief at 10).

Nor has Petitioner cited any authority in support of her position that Section 2-1401 provides a mechanism for vacating non-final orders, or *nolle prosequi* orders specifically. (Respondent's Post-Hearing Brief at 10). Petitioner instead cites the phrase in the statute "'[a]ll relief heretofore available [referring to the common law writs which had been abolished] and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought..." (Respondent's Post-Hearing Brief at 10-11). However, Respondent alleges, this creates a contradiction within the statute itself, which by its terms limits its relief to "*final orders* and judgments." (Respondent's Post-Hearing Brief at 11). Also, statutory construction requires that when a specific provision is followed by a general provision, both of which relate to the same subject matter, the specific provision controls.

(Respondent's Post-Hearing Brief at 11). As such, the early reference in 2-1401 to "final orders and judgments" controls the later reference to "orders" generally. (Respondent's Post-Hearing Brief at 11). Nor, per case law, should statutes be rewritten by parties to make them consistent with their own idea of orderliness and public policy. (Respondent's Post-Hearing Brief at 11).

Respondent asserts that Petitioner's argument that "'[i]ndictments lacking any evidence are void,'" is unclear and that in any event, an indictment is not an order of *nolle prosequi*. (Respondent's Post-Hearing Brief at 11). Also, as to Petitioner's argument that she will be saddled forevermore with arrest records, Respondent contends that the "arrest record exists" and that *nolle prosequi* orders cast the arrests in a favorable, as opposed to unfavorable, light. (Respondent's Post-Hearing Brief at 11). Further, Respondent indicates, Petitioner should seek an order of expungement if "[she] is really concerned with the negative consequences of arrest." (Respondent's Post-Hearing Brief at 11).

Furthermore, Respondent states that Petitioner's argument that she should be granted relief by reason of the equitable nature of Section 2-1401, "does nothing to create a basis to proceed where non[e] can exist." (Respondent's Post-Hearing Brief at 11-12). Petitioner's assertion that the prosecution is barred from reviving the [*nolle prossed*] charges which were the subject of Ms. Gray's 1987 plea agreement, by reason of constitutional due process and speedy trial violations, is not before the Court. (Respondent's Post-Hearing Brief at 12).

Therefore, based on the foregoing reasons, the petition should be denied because the 1978 and 1987 *nolle prosequi* orders are inappropriate for Section 2-1401 consideration. (Respondent's Post-Hearing Brief at 12).

V. Gray's Petition Should Also Be Denied Because It Is Barred by the Two Year Limitations Period Applicable to Section 2-1401 Petitions

Respondent alleges that should the Court reject its earlier arguments, then Ms. Gray's petition is time barred. (Respondent's Post-Hearing Brief at 12). Respondent notes that the Paula Gray "acknowledges" that her petition is untimely pursuant to Section 2-1401(c), because it was filed more than two years after the entry of the order or judgment in question. (Respondent's Post-Hearing Brief at 12). Therefore, pursuant to case law, the Petitioner must affirmatively establish the existence of "facts" which would toll the limitations period prescribed by Section 2-1401(c). (Respondent's Post-Hearing Brief at 12). Ms. Gray's original petition sets forth three grounds for tolling: fraudulent concealment, legal disability, and that the Illinois discovery rule for tort cases governs her Section 2-1401 claim. (Respondent's Post-Hearing Brief at 12). Petitioner's Post-Hearing brief has abandoned her grounds based on the discovery rule. (Respondent's Post-Hearing Brief at 12).

A. The Petitioner has Failed to Offer Clear and Convincing Evidence of Fraudulent Concealment

Citing case law, Respondent states that in order to toll the Section 2-1401 statutory limitation, Petitioner must prove by clear and convincing evidence that fraudulently concealed evidence might have changed the outcome. (Respondent's Post-Hearing Brief at 13). Ms. Gray must allege facts, "supported by affidavit," establishing that affirmative acts or representations by Respondent were designed to prevent discovery of the purported grounds for relief, and that the Petitioner's lack of good faith and reasonable diligence did not prevent discovery of the grounds for relief at the time of trial or within the limitation period. (Respondent's Post-Hearing Brief at 13).

Respondent alleges that Petitioner has failed to meet this high burden. (Respondent's Post-Hearing Brief at 13). First, Ms. Gray has offered no support that evidence was fraudulently concealed from her while she was represented by George Morrissey. (Respondent's Post-Hearing Brief at 13). A showing of mere inadvertence or mistake by Respondent is insufficient. (Respondent's Post-Hearing Brief at 13). Petitioner must prove "affirmative acts designed to conceal." (Respondent's Post-Hearing Brief at 13). Secondly, Respondent reiterates Petitioner's allegation that "if [the purportedly fraudulently concealed] information was available to her she would not have pled guilty to perjury." (Respondent's Post-Hearing Brief at 13). The People respond that they then would not have *nolle prossed* the 1987 pending charges. (Respondent's Post-Hearing Brief at 13). Also, notes Respondent, Petitioner has acknowledged that the avoidance of a 1987 trial was a "'desirable outcome.'" (Respondent's Post-Hearing Brief at 14). Lastly, the information Petitioner labels "fraudulently concealed," according to Respondent, was actually known or should have been known to Petitioner in 1987, was "of record in 1987," or was not in existence until the years after her 1987 plea agreement. (Respondent's Post-Hearing Brief at 14).

Regarding Petitioner's claim that Respondent has not contested her allegations of fraudulent concealment, the People state that this is both incorrect and an attempt to shift the burden in these proceedings. (Respondent's Post-Hearing Brief at 14). Respondent cites the written challenges contained in its Joint Response [or Mot. at] 9-12, including not only allegations that the events involving the purported fraudulent concealment asserted by Petitioner could not have been "fraudulently concealed," but also Respondent's argument contesting each of the paragraphs of Ms. Gray's petition asserting fraudulent concealment. (Respondent's Post-Hearing Brief at 14). Respondent additionally references its "Joint Response [or Mot. at]...20-29" [that includes its "Motion to Strike Portions of Petitioner's Petition and Affidavits" in Respondent's Joint Mot. at 20-26, and "Response to Gray's Petition" in Respondent's Joint Mot. at 26-29], as further written argument controverting the petition in this matter. (Respondent's Post-Hearing Brief at 14). Finally, Respondent has challenged Petitioner's assertions through the offer of documentary evidence citing the "Attachments to Respondent's Joint Mot. [or Joint Mot. Exhibits]; Respondent's Supplemental Exhibits in Opposition to Petitioner's Motion to Vacate Convictions [or Respondent's Group Ex. 11]"); numerous exhibits; as well as the testimony of former Assistant State's Attorney Earnest DiBenedetto, Mr. James Reddy, Judge Frank Meekins, Judge George Morrissey and Superintendent Debra Hopkins. (Respondent's Post-Hearing Brief at 14).

Respondent challenges Petitioner's assertions that had she known in 1987 of the confessions and convictions of the real killers, as well as pardons of the Ford Heights Four, then the State would have dismissed the charges, or she would have insisted on trial, by noting that this information was incapable of being withheld because it did not come into existence until 1995 and 1996. (Respondent's Post-Hearing Brief at 15).

Also, Respondent reiterates the argument of its Joint Motion that certain of the paragraphs of Ms. Gray's petition, attested to by Petitioner, do not involve information which was "*not known*" to her prior to the expiration of the Section 2-1401 limitation period. (Respondent's Post-Hearing Brief at 15, n.6). Furthermore, Respondent both denies and has moved to strike many of the paragraphs of the Petition. (Respondent's Post-Hearing Brief at 15 & n.6). For example, Ms. Gray's affidavit allegation that she was assigned to Tier A-3 at the Women's Section of the County Jail after her August 31st, 1978 arrest, and that she was unaware of the types of inmates assigned to this tier, was available to her, and was rebutted by the testimony of Superintendent [Debra] Hopkins explaining, in effect, that police agencies never had anything to do with classification of women during intake, as well as CCDOC's policy underlying Ms. Gray's assignment to Tier A-3. (Respondent's Post-Hearing Brief at 15-16 & n.6). Also, regarding Petitioner's assertion that Mr. Weston received no discovery prior to her 1978 trial, Respondent notes that Mr. Weston "may have forgotten what was in his possession because he examine[d] witnesses based on reports which are in addition to the one report he recalled having." (Respondent's Post-Hearing Brief at 16 & n.6).

Respondent then offers a response to each of the twelve items alleged by Petitioner's Post-Hearing Memorandum to have been fraudulently concealed by the People. (Respondent's Post-Hearing Brief at 15).

(1) [Regarding ASA DiBenedetto's notes indicating that Mr. McCraney "saw no faces"], Mr. McCraney acknowledged, on cross-examination by Petitioner's 1978 attorney, Archie Weston, that he advised the police early in the investigation that he could not identify the subjects. (Respondent's Post-Hearing Brief at 16). Also, Respondent argues that "Mr. McCraney did not identify the subjects until he received assurances that he would be relocated." (Respondent's Post-Hearing Brief at 16). This information was therefore not fraudulently concealed, because Mr. Weston was in possession of it "20 years ago." (Respondent's Post-Hearing Brief at 16).

(2) With respect to the notes of an alleged interview with Sherry McCraney, Respondent states that Petitioner offered "no proof whatsoever" at the evidentiary hearing on these notes. (Respondent's Post-Hearing Brief at 14-15). This occurred despite Ms. Gray's claim, prior to the hearing, and over the People's objection, that these notes were withheld [by Respondent] and that the hearing would establish same. (Respondent's Post-Hearing Brief at 14-15). Also, assuming that the notes represent what is unilaterally speculated by the Petitioner, Ms. Gray has not established that they were "fraudulently concealed." (Respondent's Post-Hearing Brief at 15). Furthermore, these notes do not impeach Mr. McCraney's testimony as Petitioner alleges. (Respondent's Post-Hearing Brief at 15). Rather, they support his testimony in "many respects." (Respondent's Post-Hearing Brief at 15). Moreover, citing to case law, newly discovered

evidence which merely impeaches is not grounds for Section 2-1401 relief. (Respondent's Post-Hearing Brief at 15).

(3) The alleged notes of Paula Gray's conversation with the police is the same information she related at the June, 1978 Preliminary Hearing and is "nothing unusual" other than her first contact conversation with the police. (Respondent's Post-Hearing Brief at 16).

(4) Petitioner, alleges Respondent, has failed to establish that the "'Capelli' information" was fraudulently concealed. (Respondent's Post-Hearing Brief at 16). Also, had the Petitioner exercised due diligence, the information was available to Ms. Gray before a period of two years prior to filing her petition; and Petitioner failed to elicit at the evidentiary hearing that Mr. Reddy and Mr. Morrissey did not have this information. (Respondent's Post-Hearing Brief at 16).

(5) There is no evidence, according to the Respondent, that the George Nance report of the Simpson interview, prepared by the Petitioner's own witness, was "'fraudulently concealed.'" (Respondent's Post-Hearing Brief at 17).

(6) and (7) [Regarding Mr. Podlecki's microscopic hair comparison results that the pubic hairs found at the crime scene were not similar to those of the Ford Heights Four and his subsequent trial testimony that the pubic hairs were of no "'evidential value'"], Respondent argues that Mr. Podlecki's testimony regarding standards "appears to indicate that Mr. Weston uses the 'no evidentiary value' terminology to the defendant's benefit by neutralizing the pubic hair evidence." (Respondent's Post-Hearing Brief at 17).

(8) Respondent states that the prosecution did file a petition with the court in 1978 seeking the collection of head hair samples [of the Ford Heights Four] in accordance with Mr. Podlecki's request. (Respondent's Post-Hearing Brief at 17).

(9) ASA DiBenedetto's notes concluding that "this witness [or Paula Gray] is reluctant" is not exculpatory in nature because it reflects Mr. DiBenedetto's perception, as evidenced by his testimony at the evidentiary hearing, that Ms. Gray was reluctant because "she lived in the area where the suspects resided and seemed hesitant to become involved in this matter." (Respondent's Post-Hearing Brief at 17).

(10) Respondent argues that there is no evidence to conclude that the "warrant" [for the seizure and search by the Sheriff's police of a Buick alleged by Petitioner to be the same car described by Marvin Simpson] was fraudulently destroyed because it can no longer be located after a twenty year period. (Respondent's Post-Hearing Brief at 17). Also, the search of the Buick was unrelated to the Simpson statement, as evidenced by Mr. Watson's testimony that his father may have owned a Buick in 1978. (Respondent's Post-Hearing Brief at 17).

(11) Respondent notes that Mr. McCraney was cross examined about "the photo spread" in 1978, and that the evidence that Mr. Watson was in a line-up is irrelevant, coupled with the fact that Mr. Watson was also a friend of Petitioner in 1978. (Respondent's Post-Hearing Brief at 17).

(12) Respondent asserts that any statement by David Jackson is irrelevant, as it implicates individuals other than Paula Gray. (Respondent's Post-Hearing Brief at 18).

B. Petitioner Has Failed to Establish a "Legal Disability" Sufficient to Toll the Limitations Period of Section 2-1401

[As previously noted in Memorandum "Petitioner's Post-Hearing Memorandum" at 163, on December 14, 1999, Selvy v. Beigel, 309 Ill.App.3d at 776, defined "legal disability" under Section 2-1401 as a person who "must be 'entirely without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his estate or financial affairs.'" Selvy's foregoing definition of 2-1401 "legal disability" is therefore consistent with the one proffered by the Respondent in this matter.]

Respondent submits that pursuant to either it's definition of "'legal disability,'" or that of Petitioner, Ms. Gray has not presented new facts which raise a bona fide doubt as to defendant's fitness to enter a guilty plea, as required by case law. (Respondent's Post-Hearing Brief at 22). Nor did legal precedent require Judge Meekins to question Petitioner's fitness due to her limited mental capacity. (Respondent's Post-Hearing Brief at 23). The question of a defendant's fitness is an issue for the trial court, and Judge Meekins stated on the record his familiarity with Paula Gray and expressly recognized her competency to enter a guilty plea. (Respondent's Post-Hearing Brief at 23).

Respondent concludes that the Court should deny Ms. Gray's petition "for all of the foregoing reasons." (Respondent's Post-Hearing Brief at 23).

Petitioner's Reply to
Respondent's Post-Hearing Brief
("Petitioner's Reply")

I. Introduction

Petitioner states that Respondent's Post-Hearing Brief not only "fails to question the innocence of Ms. Gray," but it also contends, in effect, that "innocence is irrelevant [in this matter]," and that the Court should "ignore...Petitioner's innocence." (Petitioner's Reply at 1).

Paula Gray submits that her assertions of innocence throughout the evidentiary hearing and briefs filed in this matter have been supported by the evidence. (Petitioner's Reply at 1). Petitioner and her attorneys further allege that they were denied newly discovered evidence from 1978 onward due to its fraudulent concealment; and that this evidence makes clear that she was "wrongfully accused, convicted and incarcerated." (Petitioner's Reply at 1-2). Moreover, Paula Gray was a mentally-retarded 17 year old, a "mere child," suffering from a statutory legal disability at the time of her wrongful incarceration. (Petitioner's Reply at 2).

Ms. Gray states that the "same police who hid evidence of her innocence, and the identities of the real killers, threatened [Petitioner] until she was in a catatonic state, in a successful attempt to force her to implicate herself and others for a crime they did not commit. None of the police appeared at the hearing in this case." (Petitioner's Reply at 2).

Petitioner is now in possession of the evidence needed to exonerate her, which was wrongfully denied from 1978 onward, and her resulting charges and convictions should therefore be removed from her record pursuant to Section 2-1401. (Petitioner's Reply at 2).

II. Failure to Answer the Petition

Ms. Gray reiterates that Respondent has failed to answer the petition, noting that the denials contained in Respondent's "'Motion to Dismiss the Petition [and] to Strike Portions [of the Petition and affidavits]...[and] Response [to the Petition]'" is consistent with a motion to dismiss pursuant to the Civil Procedure law. (Petitioner's Reply at 2). This "Response," however, is violative of an "'Answer,'" as required by the same Civil Procedure law, because it does not "'contain an explicit admission or denial of each allegation of the pleading to which it relates.'" (Petitioner's Reply at 2-3).

III. Perjury

Petitioner argues that Respondent mischaracterizes the perjury count by alleging that it contains the "'substance of the contradictory statements.'" (Petitioner's Reply at 3). According to Ms. Gray, this charge alleges Petitioner committed perjury because "'she made a false statement'" at the preliminary hearing. (Petitioner's Reply at 3). However, that allegedly "false statement" is not set forth in the perjury charge or otherwise identified. (Petitioner's Reply at 3). Nor is the substance of the Petitioner's purportedly false statement at the preliminary hearing provided by Ms. Gray's grand jury testimony, which grand jury testimony clearly consisted of her stating that she witnessed the Lionberg/Schmal crimes. (Petitioner's Reply at 3).

Therefore, Respondent fails to state in its perjury count against Petitioner what the "'substance' [of the false statement] is to which [Respondent] refers." (Petitioner's Reply at 3).

Secondly, Respondent's allegation that it need not prove which of two contradictory statements is false is misplaced, "because the grand jury chose to allege that Paula Gray committed perjury at the preliminary hearing, not that particular statements at two proceedings were inconsistent." (Petitioner's Reply at 3-4). Accordingly, case law requires that the perjury charge specify the allegedly false statement and when it was made, which Respondent's perjury charge against Petitioner fails to do. (Petitioner's Reply at 4).

IV. Fraudulently Concealed Evidence

Petitioner has proven that until the last two years, exculpatory documentary and testimonial evidence was wrongly concealed from her because:

Archie Weston testified that he never received any of this information from the State in 1978;

Ms. Gray's attorneys during her appeal and plea indicated "they never saw these documents," and;

The State never said they tendered this information to Mr. Weston or Ms. Gray's other attorneys. (Petitioner's Reply at 4).

Also, this exculpatory evidence, contends Ms. Gray, was in the exclusive possession of "the police and State's Attorney's Office" when hidden from Petitioner and her attorneys. (Petitioners's Reply at 4).

Respondent's Post-Hearing Brief ("Brief") "does not say the evidence actually was disclosed," while simultaneously offering reasons for its failure to tender some of this evidence which "are nothing more than an attempt to discredit much of the information that reveals the true killers." (Petitioner's Reply at 4). However, Petitioner argues, the State has placed the real killers in jail using much of this same evidence. (Petitioner's Reply at 4). Also, Respondent attempts to downplay the evidence demonstrating the "erroneous nature of the testimony of the witnesses who said Paula and the Ford Heights Four were involved in the murders." (Petitioner's Reply at 4).

Petitioner further alleges that "the state does not understand its obligations to tender exculpatory evidence under Brady and its progeny...[including their obligation] to produce all Brady material in the possession of investigating police." (Petitioner's Reply at 6).

First, the State's Brief asserts that the documentary evidence and testimony of Earnest DiBenedetto, James Reddy, Judge Frank Meekins, Judge George Morrissey, and Superintendent [Debra] Hopkins denied the concealment of documents. (Petitioner's Reply at 4). Nonetheless, these witnesses did not indicate "that any of the fraudulently concealed evidence was tendered to Paula or her attorneys." (Petitioner's Reply at 4-5). In fact, according to Ms. Gray, if the State had tendered this evidence, it would have produced documents or testimony to establish such disclosure, which the State failed to do. (Petitioner's Reply at 5).

The State's next contention that the Sherry McCraney notes serve merely to impeach her husband's testimony and therefore is not subject to 2-1401 relief is incorrect, because she "was a witness to the events on the night in question." (Petitioner's Reply at 5). Her testimony could have been "entirely inconsistent with the State's theory." (Petitioner's Reply at 5). The State therefore had a duty to turn over the report of this interview, which Mr. Weston confirmed it did not. (Petitioner's Reply at 5).

Petitioner states that Respondent also contends that the later confessions and convictions of the real killers and pardons of the Ford Heights Four is irrelevant, because the real killers were not convicted, and the Ford Heights Four were not pardoned, until 1996. (Petitioner's Reply at 5). Paula Gray, however, argues that none of these events would have occurred unless "some of this fraudulently concealed evidence was discovered." (Petitioner's Reply at 5). This evidence

having only been tendered to Petitioner and her attorneys less than two years ago, Ms. Gray "was [therefore] wrongfully incarcerated for almost nine years, and remains implicated in wrongdoing even now." (Petitioner's Reply at 5).

Petitioner questions how the state can claim that the documents hidden from her are unimportant when the real killers were "identified in some of [those same] documents," which were not disclosed to Mr. Decker until within two years of filing this petition. (Petitioner's Reply at 5).

The Respondent also argues, according to Petitioner, that Mr. Weston's awareness as to Mr. McCraney's unwillingness to testify until he was relocated, is the same as knowing Charles McCraney couldn't earlier identify any of the alleged killers, is misplaced, as these are two entirely different assertions. (Petitioner's Reply at 5). Ms. Gray argues that Mr. Weston had a right to know "that Mr. McCraney told Assistant State's Attorney DiBenedetto that he had seen no faces." (Petitioner's Reply at 6).

Petitioner additionally contends that the "Respondent continues to act as if...information regarding what really happened during this investigation is unimportant," when the State argues in its Brief that Mr. Weston was not entitled to know the police took a statement from Ms. Gray, early in the investigation, that "she then knew nothing about the murders." (Petitioner's Reply at 6). Petitioner [apparently] concludes that this information was an important factor in establishing that the police heaped overwhelming threats and abuse on a helpless 17-year-old, "who was rendered catatonic as a result of police abuse in the guise of police questioning." (Petitioner's Reply at 6).

Ms. Gray states that the Respondent alleges in its Brief that the "Capelli" information, which both identified the real killers and was in police possession days after the Ford Heights Four were taken into custody, was not fraudulently concealed. (Petitioner's Reply at 6). Petitioner reiterates that the People do not understand their obligations under Brady and its progeny, and that Ms. Gray and her attorneys did not receive this evidence, which was used to prosecute the real killers, until the two-year period preceding the filing of her petition. (Petitioner's Reply at 6).

Petitioner contends that George Nance's testimony that he prepared a report of the Simpson interview and Mr. Weston's indication that he did not receive this report, constitutes fraudulent concealment of the George Nance report in violation of the prosecutor's Brady obligations. (Petitioner's Reply at 6). Notwithstanding Respondent's assertions that these notes were not fraudulently concealed, "[p]rosecutors are obligated to produce all Brady material in the possession of the investigating police." (Petitioner's Reply at 6). And as with the Capelli information, the George Nance report "identifies the real killers and was hidden from Ms. Gray." (Petitioner's Reply at 6).

The [People's] forensic examiner tested and compared pubic hairs found on the socks of Carol Schmal with those of the Ford Heights Four, and found the accuseds' [pubic] hairs to be "dissimilar" to those on the socks. (Petitioner's Reply at 6-7). Though this finding, contends Petitioner, was "exculpatory," the official reports stated that nothing of evidential value was

found. (Petitioner's Reply at 7). Also, no reports were ever made regarding the hair comparisons or the fact that the Ford Heights Four "likely were not the source of the hairs [found on the victim's green socks]." (Petitioner's Reply at 7). The State's argument that it met its disclosure responsibilities by "the reference 'no evidentiary value' in the examiner's notes" is insufficient, since the foregoing facts exculpated the Ford Heights Four and were therefore of evidentiary value. (Petitioner's Reply at 7). Petitioner adds that had the forensic examiner found semen which did not match that of the Ford Heights Four, such finding would "obvious[ly]" have been of "'evidentiary'" value to the defendants. (Petitioner's Reply at 7).

Ms. Gray states that Respondent alleges that ASA DiBenedetto's notes are not exculpatory. (Petitioner's Reply at 7). Yet while his notes indicated that Paula Gray was a "reluctant witness," he testified at the hearing to suppress her [inculpatory] statement[s] that she was not reluctant. (Petitioner's Reply at 7). Petitioner contends that Mr. Weston sought to suppress her statement due to coercive questioning by the same police "who hid the proof of her innocence." (Petitioner's Reply at 7).

Ms. Gray argues that information regarding the police obtaining a warrant for the search and seizure of the car matching the vehicle indicated in the "'Capelli'" report, though admitted to by Respondent, was never disclosed to Mr. Weston or any of Ms. Gray's other attorneys. (Petitioner's Reply at 7). Petitioner further contends that the disappearance of the supporting affidavit, warrant and inventory "certainly indicates foul play," notwithstanding Respondent's argument that the disappearance of these documents is not proof of their fraudulent destruction. (Petitioner's Reply at 7). The defense, states Petitioner, was never "told of the police officer's knowledge regarding the real killers." (Petitioner's Reply at 7). Ms. Gray further alleges that Respondent's argument that the search of the car had nothing to do with the Simpson statement is "amazing" in light of the fact that evidence of the vehicle's seizure was located in the Lionberg/Schmal file. (Petitioner's Reply at 7-8). While the State argues Willie Watson's father may have owned such a car, Petitioner responds that neither Willie Watson nor his father was a suspect in these crimes. (Petitioner's Reply at 8). Only the real killers, who were both known to and hidden from the defense by the police, were suspects. (Petitioner's Reply at 8).

Though the Respondent alleges that the Jackson statement is irrelevant because it implicates "'individuals' other than Paula Gray,'" those individuals, contends Petitioner, were the Ford Heights Four. (Petitioner's Reply at 8). The State cannot "plausibly" argue that evidence as to the innocence of the co-defendants is irrelevant, in light of the fact they indicted Ms. Gray as a co-defendant of the Ford Heights Four and argued that she was in league with them. (Petitioner's Reply at 8).

V. Statutory Disability

Petitioner contends that Ms. Gray's statutory mental disability was established by the expert testimony and documentation she tendered, and that the State offered "no expert testimony or documentary" evidence to the contrary. (Petitioner's Reply at 8). Petitioner also emphasizes that "Paula Gray's mental condition has remained the same since she was seven years old and was first tested." (Petitioner's Reply at 9).

VI. *Nolle Prossed* Counts

Petitioner notes that Ms. Gray demanded trial at her 1987 perjury plea before Judge Meekins on the two counts for which no plea was entered, which were subsequently *nolle prossed* by the People. (Petitioner's Reply at 9). Therefore, because "all speedy trial and equitable time has passed," these *nolled* counts are now final, non-appealable orders subject to Section 2-1401 relief. (Petitioner's Reply at 9). Petitioner also reiterates previous arguments in her memorandum as to this issue. (Petitioner's Reply at 9).

Finally, Petitioner clarifies, in answer to the Respondent's "puzzle[ment]" as to Ms. Gray's argument that indictments are void for lack of evidence, that she was referring to the ten counts in 1978 which were *nolle prossed* by the State at the conclusion of their case [or the gas station charges alleged by Counts 5-6 and 9-16 of the 1978 indictment]. (Petitioner's Reply at 9). These counts, contends Ms. Gray, were not supported by any evidence and are therefore void, or "can be attacked at any time." (Petitioner's Reply at 9).

VII. Conclusion

Based on each of the previously discussed reasons, Petitioner prays for "judgment vacating and dismissing all pertinent Orders." (Petitioner's Reply at 10).

Court's Legal Analysis

At the outset, the Court must emphasize that Petitioner's section 2-1401 proceeding, in conjunction with her civil action against Cook County and various other parties (see Memorandum "Judicial Notice" para. 7.a., at 227 (judicial notice of Ms. Gray's civil action under Case Nos. 97 C 4698 and 98 L 5019)), is the first judicial review of Paula Gray's criminal matters involving Ms. Carol Schmal and Mr. Larry Lionberg since vacatur of the judgments and dismissal of the charges against the Ford Heights Four for the subject crimes, and their subsequent receipt of a $36 million compromise and settlement award from Cook County pursuant to their civil actions in this matter (after having received gubernatorial pardons based on their innocence of the Lionberg/Schmal offenses). (Tr. of [Jimerson's] Mot. to Dismiss Indictment of 6/24/96, at 46; Tr. of [Williams, Rainge and Adams'] Pet. For Post-Conviction Relief of 7/2/96, at 3-4; Petitioner's Add'l Auth's and Mat'ls Ex. 18; Petitioner's Answer to Respondent's Mot. to Dismiss Ex. B; see also Memorandum "Judicial Notice" para. 7.b., at 227-28 (judicial notice of the matters contained in the foregoing statement)). As such, no other tribunal, except Petitioner's foregoing civil matter, has had presented to it the incontrovertible proof of innocence of Ms. Gray's purported principals, including DNA evidence and the conviction and incarceration of other persons who were and are wholly unrelated and unconnected with the Ford Heights Four, for the commission of the Lionberg/Schmal crimes.

Secondly, based on the Court's review of the record in this case, DNA evidence was the critical component in establishing the innocence of the Ford Heights Four. These four men, as well as Paula Gray, had maintained for a number of years that they were innocent of the Lionberg/Schmal crimes, unfortunately to no avail. But for the factual circumstances of this case, to wit, scientific evidence pointing to the multiple rape of one of the victims by the perpetrator(s), and the virtually irrefutable corroboration provided by DNA evidence as to the innocence of Dennis Williams, Verneal Jimerson, Willie Raines and Kenneth Adams, their self-professed claims of innocence could very well have never been established as a matter of law.

Finally, this Court will be guided in its post-judgment decision by the ruling of our Illinois Supreme Court that "[o]ne of the guiding principles in the administration of section 72 relief [section 2-1401's predecessor] is that the petition invokes the equitable powers of the court, which should prevent enforcement of a judgment when it would be unfair, unjust, or unconscionable." Ostendorf v. International Harvester Co., 89 Ill.2d 273, 285 (1982).

The parties raise numerous issues in this matter. The Court will address each, in turn.

A. Findings of Fact

In a post-judgment proceeding, issues of fact must be determined by the Court, or "trier of fact." [See People v. Reymar Clinic Pharmacy, Inc., 246 Ill.App.3d 835, 840 (1st Dist. 1993), holding that "[i]n a section 72 [or 2-1401] proceeding...[w]here there is a genuine dispute as to an issue of fact, that issue must be determined by the trier of fact"]. Also, the credibility of witnesses in section 2-1401 proceedings is a matter for the trial court's determination. People v. Stewart, 66 Ill.App.3d 342, 347 (1st Dist. 1978), citing People v. Bracey, 51 Ill.2d 514, 517 (1972) and People v. Bermundez, 31 Ill.App.3d 945, 947 (1st Dist. 1975); see also People v. Coleman, 183 Ill.2d 366, 384 (1998), again citing to People v. Bracey, 51 Ill.2d at 517. The petitioner has the burden of proving the factual allegations of her petition by a preponderance of the evidence. Malkin v. Malkin, 301 Ill.App.3d 303, 311 (1st Dist. 1998), citing Smith v. Airoom, 114 Ill.2d 209, 220 (1986). Applying the foregoing decisional law, the Court makes the following findings of fact (reiterating that Ms. Gray has proven each such finding by a preponderance):

1. Respondent correctly argues that the October 4th, 1978 trial court denial of Petitioner's motion to suppress "all statements, admissions, etc., of Paula, including her grand jury testimony of May 16 [1978 inculpating she and the Ford Heights Four in the subject crimes]," on among other "grounds [the] failure to give Miranda warnings, coercion, etc.," constitutes *res judicata* of those issues, which would preclude their relitigation in this matter. See People ex rel. Gray, 721 F.2d at 592; Memorandum "Judicial Notice" para. 3.a., at 225 (judicial notice that Petitioner's 1978 trial court denied her "Motion to suppress confession statements or admission" on October 4th, 1978). However, *res judicata* can be relaxed if Petitioner has introduced "substantial new evidence" in this proceeding that the CCSP coerced her to tell a police fabricated lie to various sheriff's police, assistant State's Attorneys, and the May 16th, 1978 grand jury. [See People v. Patterson, 192 Ill.2d 93, 139 (2000), a post-conviction action holding that "in the interests of fundamental fairness, the doctrine of *res judicata* [regarding its own decision on direct appeal finding the defendant's confession voluntary] can be relaxed if the defendant presents substantial

new evidence." Patterson went on to hold that "substantial new evidence" was the same as new evidence sufficient to warrant a new trial, or "it must be of such conclusive character that it will probably change the result upon retrial," and must also be material, not merely cumulative, discovered after the trial, and be of such character that it could not have been discovered prior to trial by the exercise of due diligence. Patterson, 192 Ill.2d at 139; see also People v. Wakat, 415 Ill. 610 (1953), cited by the U.S. Supreme Court in support of its decision in Miranda v. Arizona, 384 U.S. 436 U.S. 436, 446 at no.7, as one of several instances of police brutality to secure a statement in which the accused either incriminates himself or a third party. Wakat, a post-conviction proceeding with facts and a *res judicata* issue virtually identical to the herein matter, pre-dates Ostendorf, 89 Ill.2d at 284 (1982), permitting post-judgment relief based on newly-discovered evidence, but is instructive in the principles it sets forth regarding the operation and relaxation of *res judicata* in a collateral proceeding which are operative to this date. This case involved a defendant who suffered serious injuries due to police beating, including when he was returned to the scene of the crime. The trial court denied suppression of his resultant self-incriminating statement which the police concocted. The issue on appeal was whether the trial court could revisit the defendant's allegation of a coerced statement based on newly discovered evidence that the police had previously perjured themselves. The Illinois Supreme Court held that the trial court "did not exceed its authority when it reheard the evidence upon the claim asserted or when it permitted new and additional evidence to be introduced." Wakat, 415 Ill. at 710. It's rationale, based on violation of the defendant's constitutional rights, was not unlike the equitable principles invoked by a section 2-1401 petition, in stating that:

> [b]asically, what the People contend for is the mechanical application of the doctrine of res judicata, which this court expressly rejected in the Jennings case. 'Where it appears a petitioner's claims were fairly asserted and litigated and the issues of fact have been resolved against petitioner by the judge or jury that heard the witnesses, due weight should be accorded that determination. But it is clear that res judicata cannot be mechanically applied to foreclose an inquiry which probes beneath the mere fact of adjudication to determine whether or not, in the process of adjudication, there has been any infringement of the constitutional rights of the petitioner...[citation omitted]

Wakat, 415 Ill. at 709.

The court concluded that "res judicata can have no application to petitioner's allegation of perjured testimony" based on newly discovered evidence that was not and could not have been tried at the original trial, and that to deny petitioner post-conviction review of his allegation that his conviction was unconstitutionally based on a coerced confession and perjured testimony would defeat the very purpose of the Post-Conviction Act. Wakat, 415 Ill. at 709-710. See also People v. King, 192 Ill.2d 189, 193, 198 (2000), for a similar relaxation of *res judicata* by the Supreme Court in a post-conviction proceeding and corresponding grant of an evidentiary hearing for a "fresh examination of the circumstances in which [the petitioner] gave a confession statement to authorities," based on newly discovered evidence].

Not unlike Wakat, for this Court to summarily deny review of Petitioner's claim based on newly discovered evidence that the CCSP coerced her to tell their concocted story simply because of the prior adjudication of this issue, would defeat the very purpose of our post-judgment statute. As such, the Court must apply the Patterson standard regarding relaxation of *res judicata* to determine the appropriateness, as per Wakat and King, for it to rehear or review the evidence (including the relevant newly discovered proofs) of Ms. Gray's claim that her May, 1978 inculpatory statement to various sheriff's police, ASA's, and the May 16th, 1978 grand jury constituted CCSP coercion to compel her to tell their fabricated story.

Ms. Gray has presented the following "substantial new evidence" in this proceeding that the CCSP coerced her to tell their fabricated story to various sheriff's police, assistant State's Attorneys, and the May 16th, 1978 grand jury incriminating she and her four alleged principals:

a. Petitioner's actual innocence of the subject crimes (see para. 1.d.-g. below);

b. Petitioner's detailed account of the subject crimes, which in view of her proven innocence of these offenses as set forth in para. 1.d.-g. below, could only have been obtained in a manner consistent with Ms. Gray's theory of defense at her 1978 trial, namely, CCSP coercion to compel her to tell their fabricated lie (recall Petitioner's testimony that the CCSP made her repeat back their account a number of times at the police station and also took her to the scene of the crimes, where they walked her through the subject building and by the creek while pointing out to her different details of the offenses and telling Ms. Gray what they wanted her to say (Tr. of Evidentiary Hr'g of 4/30/99, at 80, 81, 84, 92, 93, 94-97, 99; Memorandum "Evidentiary Hearing" Paula Gray at 101, 102, 102-03, 103, 103-04, 104);

c. Petitioner has consistently claimed over an approximate seven (7) year period that she was coerced by the CCSP to tell a police fabricated lie to the May 16th, 1978 grand jury commencing with her June 19th, 1978 preliminary hearing testimony; and also at the time of her 1978 trial, suppression and sentencing hearing testimony; and during her incarceration at the Dwight Correctional facility from 1979 until on or about the October, 1985 Verneal Jimerson trial. (See Jimerson, 127 Ill.2d at 58). Significantly, at a time Petitioner was facing the prospect of serving her entire 50 year sentence prior to the grant of her federal writ, and after having completed almost 4½ years of harsh imprisonment (recall her testimony about being raped at the Cook County Jail in the winter of 1978 and repeatedly being "bothered" by other inmates at both the County Jail and Dwight, and evidence regarding her youth, inability to fight, non-violent personality, mental retardation, and cursing Dwight correctional officers for the protection of segregated placement as to which her requests were routinely denied), Ms. Gray nonetheless refused the

Respondent's offer of *immediate release* if she would inculpate her alleged principals (and plea guilty to perjury), reiterating that she knew nothing about the subject crimes and refusing to incriminate the Ford Heights Four. [See Patterson, 192 Ill.2d at 145, which noted, in relaxing *res judicata* as to the voluntariness of a confession alleged to be the result of police torture, that petitioner's "substantial new evidence" included the fact that "defendant [or petitioner had] *consistently claimed* that he was tortured" (emphasis added); see also Memorandum "Findings of Fact" para. 3. at 193-95 for Court's finding that Petitioner was raped at Cook County Jail in the winter of 1978];

d. DNA proofs on or about June 24, 1996 conclusively establishing that the Ford Heights Four did not rape Carol Schmal which is inconsistent with Ms. Gray's May 16th, 1978 grand jury testimony, lending scientific corroboration to Petitioner's theory of defense at her 1978 trial that she was coerced by the CCSP to tell their fabricated lie to sheriff's police, ASA's, and the May 16th grand jury. [See Tr. of [Jimerson's] Mot. to Dismiss Indictment of 6/24/96, at 5; Memorandum "Judicial Notice" par. 4., at 225 (judicial notice that DNA evidence establishes that the Ford Heights Four did not rape Carol Schmal); see also People v. Hobley, 182 Ill.2d 404, 436 (1998), finding that newly discovered evidence of a negative fingerprint report provided "*scientific evidence*" as "further support for the unreliability of [the] alleged confession [of the post-conviction petitioner]" (emphasis added)];

e. DNA proofs on or about April of 1997 conclusively establishing that Juan Rodriguez raped Ms. Schmal, who implicated three men other than the Ford Heights Four (Dennis Johnson, Ira Johnson, and Arthur J. Robinson) in the subject offenses. Three of the four individuals (Dennis Johnson having died) were indicted on August 9th, 1996 and convicted of the murders of Larry Lionberg and Carol Schmal by June 23, 1997 (the statute of limitations having expired as to the rape offense), again directly contrary to Ms. Gray's inculpatory statement to the CCSP and assistant State's Attorney's, as well as her May 16th, 1978 grand jury testimony. This scientific evidence also corroborates her 1978 trial allegations of police coercion and fabrication of her grand jury statement under oath. [See Petitioner's 2-1401 Mot. para. 40.q.; Memorandum "Judicial Notice" para. 6.e.-i., at 226-27 (judicial notice that Ind. No. 452, dated August 9, 1996, General No. 96 CR 19145, charged Ira Johnson (01), Arthur Robinson (02), and Juan Rodriguez (03) with the Lionberg/Schmal crimes, and that they were convicted of these offenses on June 16th, 1997, April 28th, 1997, and June 23rd, 1997 respectively); Memorandum at 10; see also Hobley ruling in para. 1.d. above];

f. affidavit evidence by one of the real killers of Ms. Schmal

and Mr. Lionberg (Ira Johnson) stating that Ms. Gray was neither present at nor involved in the commission of the Lionberg/Schmal crimes, lending corroboration to Petitioner's 1978 theory of defense of CCSP coercion and fabrication (see also Respondent's [Evidentiary Hr'g] Ex. #10, at 046248-046255, for additional affidavit of Ira Johnson, along with that of Arthur J. Robinson, also one of the real killers, stating that Paula Gray and the Ford Heights Four "were not involved in any way" in the subject crimes), and;

g. the vacatur of the judgments and dismissal of the charges for the Lionberg/Schmal crimes against the Ford Heights Four, as well as gubernatorial pardons of these four men based on their innocence of the subject offenses, conclusively establishing that the Ford Heights Four did not murder Larry Lionberg, or murder and rape Carol Schmal as per Ms. Gray's May 16th, 1978 grand jury testimony, lending corroboration to Petitioner's theory of defense that she was coerced by the CCSP to tell their fabricated falsehood to sheriff's police, ASA's, and the May 16th grand jury. (See Petitioner's Add'l Auth's and Mat'ls Ex. 18).

Petitioner's foregoing "substantial new evidence" is of such conclusive character that it would probably have changed the result of the 1978 trial; is material and not merely cumulative of the 1978 trial evidence; was discovered by Petitioner after the 1978 trial; and is of such character that it could not have been discovered prior to the 1978 trial by the exercise of due diligence because of the government's suppression, loss and/or destruction of materially favorable evidence that precluded the fruition or realization of Ms. Gray's actual innocence proofs. (See Memorandum "Analysis" para. 3.c., at 321-24). Accordingly, the Court can relax the *res judicata* bar of the 1978 trial court's denial of Petitioner's motion to suppress her statement, based on failure to give Miranda warnings and [police] coercion; and review, including a determination of the facts, the issue as to whether the CCSP coerced Ms. Gray to tell a police fabricated lie to various sheriff's police, assistant State's Attorneys, and the May 16th, 1978 grand jury. [Parenthetically, Petitioner satisfied the foregoing criteria, which are the same as those for 2-1401 relief based on newly discovered evidence, prior to and at the time of her 1987 perjury plea. (See Memorandum "Analysis" para. 4., at 324-30)].

The First District, in Chicago Judo and Karate Ctr. v. McGee, 328 N.E.2d 94, 95, 27 Ill.App.3d 1077 (1st Dist. 1975), held that in a post-judgment proceeding to vacate a default judgment, it is incumbent on the opposing party [or respondent] to plead to the petition in some manner *and to support their defense thereto by evidence or affidavit.* It added that failure by the opposing party to plead to the petition or *to respond to petitioner's testimony* requires that such testimony be taken as true. While this Court will later hold in its "Preliminary Findings of Law" that the People have pleaded in opposition to Ms. Gray's petition (see Memorandum "Preliminary Findings of Law" para. 1., at 228), the Respondent failed to introduce either affidavit or testimonial evidence in opposition to Petitioner's testimony in this matter that notwithstanding her persistent claims of innocence to the CCSP, that they forced her to tell a police fabricated falsehood to various sheriff's police and Cook County Assistant State's Attorneys in May of 1978, as well as the May 16th, 1978 grand jury, incriminating she and the

Ford Heights Four in the Lionberg/Schmal crimes. This Court therefore finds that Ms. Gray's foregoing testimony must be taken as true, *in toto*, and rules that this testimony constitutes the facts in this matter.

Also, notwithstanding Respondent's admission and resultant factual finding, pursuant to case law, of Petitioner's foregoing testimony regarding CCSP coercion and fabrication by failing to present controverting or rebuttal evidence, the Court finds that this testimony by Ms. Gray was both credible and reasonable, as well as consistent with and corroborated by her newly discovered evidence in this matter. Furthermore, Respondent's failure to present *any* controverting or rebuttal evidence to Petitioner's testimonial assertions of serious CCSP misconduct lends strong corroboration to the truthfulness of Petitioner's testimony. The Court therefore determines on (these) additional grounds that Ms. Gray's testimony, *in toto*, regarding her being forced by the Cook County Sheriff's police to tell a police fabricated lie to various sheriff's police, assistant State's Attorneys, and the May 16th, 1978 grand jury constitutes the facts in this matter.

Moreover, the Court finds Petitioner's June 18th, 1996 statement contained in Inv. Kelly's June 25th, 1996 report (see Memorandum "Evidentiary Hearing" Dr. Robert Clinton Watkins, Jr. at 64; Paula Gray at 104-05, 110, 111) to be both honest and credible based on the Court's assessment of her credibility and the evidence of this proceeding, including the People's failure to present any countervailing testimonial, documentary or affidavit proofs. (See Respondent's Joint Mot. Ex. G). Moreover, this report was introduced in this matter by Respondent, so presumably the People do not have objection to the reliability of its contents. Finally, the information contained in this exhibit is consistent with Ms. Gray's evidentiary hearing testimony (found credible by the Court); and also her persistent claims of innocence, as well as that of CCSP coercion and fabrication of her inculpatory May, 1978 grand jury testimony and statements to various sheriff's police and ASA's from the time of her June 19th, 1978 preliminary hearing testimony, through her 1978 suppression hearing, trial and sentencing hearing testimony, and also while at the Dwight Correctional Facility both *prior* and subsequent to the grant of her 1983 federal writ. The Court therefore renders a finding of fact regarding the contents of Ms. Gray's June 18th, 1996 statement as reported by Inv. Kelly on June 25th, 1996. The Court will later find admissible the foregoing report of Ms. Gray's June 18th statement on the grounds that it is in the nature of a deposition under oath. (See "Preliminary Findings of Law" para. 4., at 240).

An additional factual issue relating to CCSP coercion and fabrication arose during the evidentiary hearing testimony of Dr. David Scott Levin for Petitioner, and Dr. Orest Eugene Wasyliw for Respondent, both clinical psychologists. The issue involved the question of whether Ms. Gray, as a mildly mentally retarded person, was "highly malleable and susceptible to suggestion from authority figures" at the time of her questioning by police in May of 1978, as testified and attested to by Dr. Levin. (Petitioner's 2-1401 Pet. Ex. A paras. 5-7; Tr. of Evidentiary Hr'g of 4/28/99, at 69, 75-76, 86-87, 119, in which Dr. Levin confirms his "3/1/99" affidavit; Memorandum "Evidentiary Hearing" Dr. David Scott Levin at 35, 35-36, 36-37, 40). Dr. Levin also indicated that a mildly mentally retarded person would be more likely to obey the authority that is imposed on them by another person, and be obedient to the suggestion of others,

because throughout their lives they may have experienced themselves as being dependent on others who seem to know more and have more power than they do. (Tr. of Evidentiary Hr'g of 4/28/99, at 75-76; Memorandum "Evidentiary Hearing" Dr. David Scott Levin at 35-36). Dr. Wasyliw, on the other hand, countered Dr. Levin's testimony and opined that Ms. Gray's statements to the police, prosecutors and the grand jury in May of 1978 were not the product of suggestibility, because suggestibility has "to do with a person's vulnerability to having their belief or opinions changed," in addition to "changing [a person's] opinion, [a person's] beliefs[,] so that when [they] are saying it, even when it is changed, [the person is] believing it at the moment." (Tr. of Evidentiary Hr'g of 5/4/99, at 114-15, 116; Memorandum "Evidentiary Hearing" Dr. Orest Eugene Wasyliw at 144, 145). In his opinion, the most intense form of suggestibility is hypnotism, or inducing extreme suggestibility, where a person can be made to believe he or she is a chicken, for example, or given false memories. (Tr. of Evidentiary Hr'g or 5/4/99, at 115; Memorandum "Evidentiary Hearing" Dr. Orest Eugene Wasyliw at 145). As such, Dr. Wasyliw concluded that Ms. Gray's later testimony that her [May, 1978] confessions were lies would take her 1978 confessions out of the realm of suggestibility, since Petitioner had not changed her beliefs while making those confessions. (Tr. of Evidentiary Hr'g of 5/4/99, at 115-16, 116; Memorandum "Evidentiary Hearing" Dr. Orest Eugene Wasyliw at 145).

In People v. Mulero, 176 Ill.2d 444, 479 (1997), the Illinois Supreme Court stated that "[i]t is the trial court's function to assess the credibility and weight to be given to psychiatric [or psychological] expert testimony." The Court must assess greater weight to the testimony of Dr. Levin on the question of Ms. Gray's "susceptibility to authority" because he has a more advanced level of experience than Dr. Wasyliw in the clinical assessments of mentally retarded persons like Paula Gray, which assessments he conducted while at the University of Chicago, *after* receiving his Ph.D. in psychology. [Recall also his testimony to having conducted "a good number" of clinical assessments at the University of Chicago of persons classified as mildly mentally retarded]. (Tr. of Evidentiary Hr'g of 4/28/99, at 102-03, 149; Memorandum "Evidentiary Hearing" Dr. David Scott Levin at 38, 43; Petitioner's 2-1401 Mot. Ex. A (Curriculum Vitae)). Dr. Wasyliw's experience in this regard was in 1972 at the Illinois State Pediatric Institute, where he assessed mental retardation, among other types of intellectual limitations, *before* receiving his Masters degree [in Psychology]. (Tr. of Evidentiary Hr'g of 5/4/99, at 64-66; Memorandum "Evidentiary Hearing" Dr. Orest Eugene Wasyliw at 137; Respondent's [Evidentiary Hr'g] Ex. 9).

Also, Dr. Levin's construction or definition of the word "suggestibility" or "suggestible" has clear support in case law, and is consistent with both the United States and Illinois Supreme Courts' test for determining whether a confession is voluntary, which is "whether a [defendant's or accused's] will was overborne at the time he confessed." Reck v. Pate, Warden, 367 U.S. 433, 440 (1961); People v. Brown, 169 Ill.2d 132, 144 (1996); People v. Kincaid, 87 Ill.2d 107, 117 (1981).

[See Fikes v. Alabama, 352 U.S. 191, 193, 197 (1957), finding that the confession of a defendant, whom three psychiatrists determined was "schizophrenic and *highly suggestible*," was coerced because "the circumstances of pressure applied against the power of resistance of this petitioner, who cannot be deemed other than weak of will or mind, deprived him of due process"

(emphasis added); People v. Bernasco, 185 Ill.App.3d 480, 489 (5th Dist. 1989), aff'd, 138 Ill.2d 349 (1990), which favorably cited the analysis of People v. Berry, 123 Ill.App.3d 1042, 1045 (4th Dist. 1984), that ruled that the defendant's confession was coerced upon finding that, in conjunction with the deceptive and coercive activities of the police, "the defendant's subnormal mentality [or educable mentally handicapped status and an I.Q. of 80], coupled with his young age [17], lack of education, and complete lack of experience in criminal matters, suggested an *increased suggestibility to coercion and intimidation*" (emphasis added); People v. Higgins, 239 Ill.App.3d 260, 272 (5th Dist. 1993), affirming the defendant's confession as involuntary and coerced because the mentally coercive police tactics, "combined with the defendant's mental capacity [special education student and I.Q. of 67] and his *suggestibility*," constituted a coercive tactic designed to make the defendant confess and undermined the voluntariness of his confession. (emphasis added). See also People v. Henderson, 83 Ill.App.3d 854, 864 (1st Dist. 1980), which in denying defendant's confession as coerced where he argued that his "mental capacity [mental retardation and I.Q. of 62] caused him to be *highly suggestible*, and ...[to respond] in a manner in which he thought his questioners wanted him to respond," ruled that "at the time defendant confessed, there [was] absolutely nothing in the record to support a finding that defendant was asked leading questions or that suggestions as to what occurred were made to him" (emphasis added); People v. Carpenter, 38 Ill.App.3d 435, 441 (5th Dist. 1976), again involving a defendant's claim that his confession was coerced because he was unduly susceptible to police suggestion by reason of a low intelligence level [or I.Q. of 76], which the appellate court denied on the grounds that "the record as a whole [did] not reflect that the officers attempted any suggestion which would indicate that defendant's confession was not the product of a free will."]

As such, according to case law, the voluntariness of a defendant's confession or inculpatory statement is premised on whether his or her will has been overborne by police conduct, and the defendant's "suggestibility," which is one of the factors in determining this question, is when the accused is more prone to having their resistance being overcome by, or he or she is less resistant to police authority, or coercive and deceptive conduct by the police. Therefore, while the truthfulness or reliability of a defendant's confession or inculpatory statement is one of the primary purposes for ensuring its voluntariness (see Higgins, 239 Ill.App.3d at 272, holding that along with protection of constitutional rights, "the law and rules as to confessions are designed to ensure that any confession obtained from a defendant is trustworthy"), the defendant's awareness of the truth or falsity of a statement alleged to be coerced is not the pivotal question in assessing its voluntariness (and defendant's suggestibility), as proposed by Dr. Wasyliw, but rather whether the defendant's will has been overcome, including a determination, among other factors and where applicable, of whether the defendant was "susceptible" to police authority, or whether his or her will was more prone to being overcome by police conduct due at least in part to mental retardation.

Based on the foregoing case law, analysis, and evidence in this proceeding, the Court assesses greater weight to Dr. Levin's definition and construction of "suggestibility," as opposed to that of Dr. Wasyliw, and holds that in May of 1978 when Petitioner was questioned by the CCSP and made inculpatory statements to various sheriff's police, assistant State's Attorneys, as well as the May 16th, 1978 grand jury, Ms.Gray was a mildly mentally retarded person with an I.Q. of between 57 and 71, and little more than an 8th grade primarily EMH education, as well as

little or no experience in life, and no experience in criminal matters, and that as a result of this background and her cognitive level, was highly malleable and susceptible to suggestion (or fabrication), as well as coercive, intimidating, or deceptive conduct by authority figures, or the Cook County Sheriff's police.

A final factual issue regarding CCSP coercion and fabrication involves ASA Earnest DiBenedetto's testimony at the evidentiary hearing that Paulette Gray told him on May 14th, 1978 at the Homewood Sheriff's facility that Paula admitted to her (Paulette) on what he believes was Thursday morning, May 11th, 1978, before the bodies were discovered by the police authorities, and to their mother (Mrs. Louise Gray), later the same day, that she (Paula Gray) had witnessed the Lionberg/Schmal killings. (Tr. of Evidentiary Hr'g of 5/3/99, at 79-80, 88, 100, 101, 115; Memorandum "Evidentiary Hearing" Earnest DiBenedetto at 121-22,124, 125, 126). Mr. DiBenedetto also testified that Mrs. Louise Gray told him at the police station that Paula had related the same thing to her [Louis Gray] Thursday as she [Paula] had told Paulette, which ASA DiBenedetto stated were the same matters Paula told him later at the Homewood Sheriff's facility. (Tr. of Evidentiary Hr.g of 5/3/99, at 104; Memorandum "Evidentiary Hearing" Earnest DiBenedetto at 125).

The Court finds the foregoing testimony by Mr. DiBenedetto unworthy of belief, based on ASA DiBenedetto's own testimony that despite his awareness of the fact that this was a "heater" case; that he was the first representative of the State's Attorney's office at the Homewood facility charged with the responsibility of commencing his office's investigation and securing evidence for the assistant State's Attorneys prosecuting the case; that he spoke to Paulette Gray for 15 to 20 minutes; and that Paulette and Louise Gray's incriminating statements were obviously significant, he didn't take any contemporaneous notes of their statements, nor at any time reduce their statements to writing (even after later hearing a similar, apparently direct knowledge incriminating account by Petitioner), either in his felony review folder/notebook or log book, or obtain a signed statement by these purported corroborative witnesses. (Tr. of Evidentiary Hr'g of 5/3/99, at 85-87, 88, 89, 97-98, 101, 102, 104, 109, 111-12, 116-17, 120; Memorandum "Evidentiary Hearing" Earnest DiBenedetto at 123, 124, 125, 125-26, 126, 127). [Note that the corroborative evidence in support of these statements is distinct from that of Petitioner's later inculpatory statement, which ASA DiBenedetto also did not reduce to writing, because although this statement by Ms. Gray was police coerced, her subsequent grand jury testimony, also CCSP coerced, *corroborated* the fact that she had previously made a *similar* inculpatory statement to Mr. DiBenedetto at the Homewood police station. (See Memorandum "Preliminary Findings of Law" para. 4., at 244, for Court's ruling that Petitioner's inculpatory statement to various sheriff's police, assistant State's Attorneys in 1978, as well as the May 16th, 1978 grand jury was the result of Ms. Gray having been coerced by the CCSP to tell their fabricated falsehood). Conversely, Paulette and Louise Gray's statements were not corroborated by their testimony at the later 1978 trial. See next comment].

Secondly, the evidence in this proceeding and record of this case indicate that neither Paulette nor Louise Gray's 1978/1979 trial testimony corroborated Mr. DiBenedetto's foregoing testimony. Indeed, Paulette Gray specifically denied at the trial having ever spoken to ASA DiBenedetto while at the police station "on or about" May 13th, 1978, or that Paula had ever

spoken to her about the murder case. (Petitioner's Answer to Respondent's Mot. to Dismiss Ex. C at 4410:01-4411:03, 4419:05-4424:23); see also Petitioner's Answer to Respondent's Mot. to Dismiss Ex. D at 0945:01-1198:02; Tr. of Evidentiary Hr'g of 5/3/99, at 103-04 regarding ASA DiBenedetto not recalling any conversations with prosecutors or others of whether Paulette and Louise Gray had testified for the State (in the 1978 trial), or that neither were ever asked if Paula had made incriminating statements to them. Furthermore, according to the First District Appellate Court opinion regarding Petitioner's (and her 3 co-defendant's) 1978 trial, Paulette Gray testified in mitigation that "she was not told [of] the incidents of May 11 by her sister [and additionally] denied making any statements to the police concerning her knowledge." Rainge, 112 Ill.App.3d at 407. [Recall too Petitioner's June 18th, 1996 statement to Inv. Kelly indicating that she never told her mother or Paulette that she witnessed the Ford Heights Four kill Carol Schmal and Larry Lionberg. (See Respondent's Joint Mot. Ex. G at 041100; Memorandum "Evidentiary Hearing" Paula Gray at 105)]. [Note that Mr. DiBenedetto's evidentiary hearing testimony regarding Paulette Gray's purported statement to him at the CCSP facility inculpating her sister would have provided key rebuttal evidence for the State at Petitioner's 1978 trial in contravention of Paulette's foregoing trial and mitigation testimony in support of Petitioner].

Thirdly, according to the First District Appellate Court opinion regarding Ms. Gray's 1978 trial, ASA DiBenedetto did not render at that trial his evidentiary hearing testimony as to the purported inculpatory statements made by Petitioner to Paulette and Louise Gray. See Gray, 87 Ill.App.3d at 145; see also People ex rel. Gray, 721 F.2d at 589. Mr. DiBenedetto failed to testify to these statements notwithstanding the fact, as previously noted, that this evidence would have constituted important corroborative or rebuttal evidence of Petitioner's guilt, and would also have supported the veracity of Ms. Gray's inculpatory grand jury testimony introduced at the 1978 trial, further rendering suspect the credibility of ASA DiBenedetto's evidentiary hearing testimony that Paulette and Louise Gray made statements to him in May of 1978 that Petitioner incriminated herself to them in the subject offenses.

Lastly, and perhaps most significantly, the Court will later find, as earlier indicated, that Petitioner's "substantial new evidence" as set forth in this paragraph and already existent evidence of police coercion and fabrication, establishes by a preponderance of the evidence that commencing with the CCSP interrogation of Ms. Gray on May 12th, 1978, Petitioner was coerced by the Sheriff's police (and simultaneously apprised of the details of the offenses by the CCSP) to tell a police fabricated lie to ASA DiBenedetto (and other prosecutors, as well as the May 16th, 1978 grand jury and sheriff's police). (See Memorandum "Preliminary Findings of Law" para. 4., at 238-45). Accordingly, Paula Gray would not have been aware of the details of the subject crimes on May 11th, 1978, or prior to her May 12th, 1978 initial CCSP interrogation, to enable her to "confess" these matters to Paulette and her mother on May 11th as Mr. DiBenedetto has claimed he was told by Paulette and Mrs. Gray.

Based on all of the above discussed reasons, the Court finds ASA DiBenedetto's testimony unworthy of belief that Paulette and Louise Gray stated to him on May 14th, 1978 that Petitioner confessed to them on May 11th, 1978 to having previously witnessed the subject crimes.

2. The post-hearing case of Selvy v. Beigel, 309 Ill.App.3d at 776, as previously indicated, held that "[t]o be under a legal disability [for purposes of tolling section 2-1401] a person must be 'entirely without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his estate or financial affairs.'" Therefore, competency, or fitness to stand trial (i.e the defendant's ability to understand the nature and purpose of the

proceedings and to assist in the defense-see People v. Kinkead, 182 Ill.2d 316, 336 (1998); People v. Wiggins, 312 Ill.App.3d 1113, 1115 (1st Dist. 2000)), is not the correct definition for "legal disability" under section 2-1401(c) of the post-judgment law. Also, Petitioner concedes this point in her Post-Hearing Memorandum at 10 where Ms. Gray "contends that the criminal law of 'incompetency' is irrelevant."

Because Selvy, and not fitness or competency to stand trial, is the appropriate standard for determining Petitioner's 2-1401 legal disability, the Court is no longer presented with the controverted facts presented and argued by both parties regarding this issue (recall that Selvy was decided after the entirety of the evidence was received in this matter). Also, the Court will limit its finding of fact regarding Petitioner's 2-1401 legal disability to her 1987 judgment, or from April 23rd, 1987 and the period thereafter, because Ms. Gray's 1979 judgment is void (see Memorandum "Preliminary Findings of Law" para. 2., at 228-29), and her 2-1401 petition is not a proper legal remedy for dismissal of the charges of the 1978 indictment, or for vacatur of the 1978 orders of *nolle prosequi* for the gas station offenses, nor dismissal of the underlying charges. [Recall the holding of S.C. Vaughan Oil Co., 181 Ill.2d at 497, that "2-1401 relief is available only from final orders and judgments." (Memorandum at 4). See also Memorandum "Preliminary Findings of Law" para. 2., at 230-34, for discussion and rulings regarding vacatur of the 1978 nolle prosse orders and dismissal of the charges of the 1978 indictment, including those that were *nolle prossed*].

The relevant evidence regarding Petitioner's legal disability under 2-1401(c) includes Paula Gray's testimony as to the manner in which she conducted her life's affairs subsequent to her release from prison on or about April 24th, 1987, and of course after her April 23rd, 1987 perjury plea. Petitioner testified about renting an apartment, choosing furniture for the apartment; living for a number of years by herself; arranging for caller ID; paying rent, electric and telephone bills on her own; and cleaning other people's homes and babysitting for cash payments. Ms. Gray also related her selection of the dress she wore to court in this matter, and putting beads in her hair. No rebutting or controverting evidence was presented by Petitioner, so the foregoing testimony by Paula Gray must be taken as true, as to which the Court renders a finding of fact. Hiram Walker Distributing Co. v. Williams, 99 Ill.App.3d 878, 881 (1st Dist. 1981); Chicago Judo & Karate Ctr., 328 N.E.2d at 95, 27 Ill.App.3d at 1077; see also Bank of Ravenswood v. Domino's Pizza, 269 Ill.App.3d 714, 723 (1st Dist. 1995).

Also, the Court found this testimony by Ms. Gray both truthful and credible, and accordingly rules that it constitutes the facts of this proceeding on these additional grounds.

3. Petitioner presented no evidence in this 2-1401 proceeding in support of her allegation that investigating Cook County Sheriff's police either threatened her with, or carried out their alleged May, 1978 interrogation threat in retaliation for her exculpatory preliminary hearing testimony, of causing her to be assigned to Tier A-3 of the women's division at the Cook County Jail, which was reserved for inmates believed to be "violent lesbians or who demonstrated exaggerated masculine, sexually aggressive, traits in contacts with other women." (Petitioner's 2-1401 Mot. at 7). Therefore, the Court denies a finding of fact as to this allegation.

However, the Court finds that based on a reasonable view of the evidence in this proceeding, that Petitioner was in fact assigned to Tier A-3, which was reserved for violent lesbians or female inmates who demonstrated exaggerated masculine, sexually aggressive, traits in contacts with other women.

This finding of fact is based on Superintendent Debra Hopkins' testimony that in the 1970's:

-Tier A-3 was for the lesbian population and high bond aggressive inmates, and that aggressive inmates for assignment purposes included a high profile case, or one which had gotten in the media, as well as detainees with charges indicative of aggressive conduct, such as murder, aggravated assault and home invasion;

-a woman arrested who dressed and wore her hair like a man was typecast as "lesbian" and assigned to Tier A-3;

-that Paula Gray was arrested [in 1978] in connection with a high profile case;

-that there was no separate section for teenage detainees in the 1970's and that they were placed throughout the jail, nor separate rooms for slightly built and mentally slow female inmates, and;

-she recalls Ms. Gray being assigned on the third floor [with Tiers A-3 and B-3] between 1984 and 1991.

Zulina Mason also testified that based on her year plus incarceration at the Cook County Jail and transfer to each of the six tiers of the women's facility, that during the 1978 period that she and Petitioner were held together in the jail, Tier A-3 was reserved for lesbian oriented females of the most aggressive nature, where they walked, talked and presented themselves as men instead of females.

Based on the foregoing testimony of Superintendent Hopkins, which is uncontroverted and credible, as well as that of Zulina Mason, which is also credible, the Court can reasonably conclude that Ms. Gray was assigned to Tier A-3 in 1978 because she was arrested for murder in connection with a high profile case, and she would not have been segregated by reason of her being a teenager, slight of build or mentally retarded. Also, Superintendent Hopkins' recollection that Ms. Gray was assigned to the third floor (Tier A-3 or B-3) of the women's facility of the County Jail sometime from 1984 to 1991 lends further corroboration that Petitioner was previously housed on Tier A-3 in 1978, in view of the above factors delineating specific tier assignments. (Recall that B-3 was for high bond, non-aggressive inmates).

The Court also finds Ms. Gray's testimony about being raped at Cook County Jail in 1978 to be credible and honest, particularly in view of Petitioner's difficulty in relating this incident. Recall that the Court took a break, and subsequently offered Ms. Gray a weekend recess, because it observed her literally rocking on the stand as she gave her testimony regarding this matter. It also observed her halting, hesitant and fearful demeanor in communicating her rape at the County Jail facility in the winter of 1978. Ms. Gray's rape testimony was at least indirectly corroborated by Ms. Mason's statement that Petitioner was mute the entire one and half month period she knew Petitioner at County Jail, and for one year thereafter at the Dwight

Correctional Facility. The Court found this testimony by Ms. Mason both straightforward, clear and credible.

Superintendent Hopkins' testimony that "gang rapes...didn't happen in [the women's division at Cook County Jail]" is neither reasonable, realistic, nor worthy of belief. In fact, it is inconsistent with Superintendent Hopkins' own testimony that the lesbian population was housed together on A-3 because of the belief that there would be fewer love affairs resulting in less *friction* and less *fights*, the operative terms, of course, being *love affairs*, *friction* and *fights*, and Ms. Hopkins' intimation that friction and fights by the lesbian population (or those presumably involved in "love affairs") still occurred despite their being grouped together on Tier A-3. Superintendent Hopkins added that the high bond aggressive inmates were the majority on Tier A-3, as compared to the lesbian population. She stated that the longer an inmate remained at the facility, the more inclined she was to be in a lesbian relationship, and that the third floor (with Tiers A-3 and B-3) housed long term inmates because of the charge and bond amount.

Thus, one could reasonably conclude, based on Superintendent Hopkins' testimony, that aggressive inmates, who were the majority on Tier A-3, periodically became lesbians due to their long term stay. There was no testimony by Ms. Hopkins that these aggressive inmates turned lesbian, lost their aggressiveness. In fact, Ms. Hopkins' merely stated that lesbian inmates were not necessarily *more* aggressive [presumably then other female inmates in the women's facility], but were very manipulative, again leaving open the possibility that they still exhibited aggressive conduct. Finally, there has been no showing that Petitioner's rape was perpetrated by lesbian inmates, as opposed to members of the aggressive, non-lesbian inmate population of Tier A-3.

Also, Ms. Mason's previously cited testimony that Tier A-3 was for lesbian oriented females of the most aggressive nature, coupled with her statement of being aware of the existence of "blanket part[ies]," or gang rapes by female inmates while covering the victim's head with a blanket, sheet or towel, during the 1978 and 1979 period that she and Petitioner were jointly housed at the County Jail, lends strong corroboration to the details of Petitioner's rape account. Zulina Mason additionally testified that she never saw Paula in a fist fight in the one and half months she knew her at County Jail, or the nine years they spent together at the Dwight Correctional Facility. Ms. Hopkins added that Paula Gray was "not a disciplinary problem."

Therefore, it could be reasonably concluded, based on Zulina Mason's testimony, as well as that of Superintendent Hopkins, that in 1978 there were fights and friction amongst the lesbian population on Tier A-3 of the women's division at the Cook County Jail, indicating their aggressive nature (along with that of the majority of the inmates on that tier); that there were apparently aggressive inmates turned lesbian on A-3; and that most of the detainees on that tier were apparently non-lesbian, aggressive detainees, which when coupled with the presence of an innocent, non-street smart, non-violent, slightly built and mentally retarded girl of 17, could easily have resulted in her being taken sexual advantage of by any number of lesbian or non-lesbian aggressive inmates, or combination thereof. When added to Petitioner's testimony, which of course, is the only first person account of this incident and which the Court again

observes to have been both reasonable and credible, it finds that Ms. Gray experienced an incident of rape by female inmates at the Cook County Jail in the winter of 1978.

[Note also that it is clear to this Court that Petitioner's ability to testify in this proceeding to *multiple* rapes while incarcerated would have been exceedingly difficult, including a detailed explanation by her as to whether her having been "bothered" at both Dwight and County Jail included numerous sexual assaults. It further notes that Petitioner apparently cursed Dwight correctional personnel to secure the protection from other inmates of segregated placement. (Recall Zulina Mason's testimony that in the nine plus years of her incarceration with Ms. Gray at the Cook County Jail and Dwight Correctional Facility, she never saw Petitioner in a fist fight. Recall also Superintendent's Hopkins' testimony that Petitioner was not a disciplinary problem while housed at the County Jail). However, notwithstanding these observations, the Court finds that Dr. Levin's testimony regarding Petitioner having advised him that she was the victim of multiple rapes while at Cook County Jail is inadmissible to prove the fact of such rapes. This is because Dr. Levin is not an expert in the physical or emotional effect(s) of sexual abuse, nor was he testifying as an expert in this regard. Rather, Dr. Levin, as a clinical psychologist in the diagnosis and treatment of mental disorders with children, adolescents and adults, was testifying, based on his diagnostic examination of Petitioner, as to "whether she suffered from a mental disorder" from at least the May, 1978 date of her initial interrogation by police, until the February, 1999 date of his last evaluation of Ms. Gray. Therefore, while Petitioner's account to him of numerous rapes while incarcerated at the Cook County Jail is admissible as evidence upon which experts like Dr. Levin rely for rendering their opinion, this evidence is not admissible to prove that Ms. Gray was the victim of multiple rapes. (See People v. Sifuentes, 248 Ill.App.3d 248, 251 (1st Dist. 1993), holding that evidence otherwise inadmissible at trial is admissible for forming the basis of an expert's opinion, provided it is evidence upon which experts in his or her field rely for rendering such opinion; see also People v. Wheeler, 151 Ill.2d 298, 308 (1992), which makes clear that evidence regarding the victim's competency is not substantive evidence that a sexual assault has occurred in holding that "*[u]nlike psychological evidence regarding the victim's competency and credibility as a witness*, evidence of rape trauma syndrome [admissible by the testimony of an expert in post-traumatic syndrome pursuant to Ill.Rev.Stat.1989, ch. 38, par. 115-7.2] is substantive evidence that a sexual assault occurred"). Nor is Petitioner's statement of multiple rapes, indicated by Grace Castle's affidavit, legally sufficient to support a 2-1401 finding, because it constitutes inadmissible hearsay, and Ms. Castle is not an expert in sexual abuse. (See Petitioner's 2-1401 Mot. Ex. H paras. 1-2, 7; see also Gas Power, Inc. v. Forsythe Gas Co., 249 Ill.App.3d 255, 258-259 (1st Dist. 1993), holding that an affidavit in support of a 2-1401 petition is governed by Supreme Court Rule 191, citing People v. Sanchez, 115 Ill.2d 238, 285 (1986), which states that Rule 191 requires that affidavits be made on the *personal knowledge of the affiant*, and must show that if the affiant were sworn as a witness, that they could testify competently to the contents of the affidavit)].

4. Regarding the fact issue of a deal between the People and Paula Gray, the Court initially finds that pursuant to Mr. James Reddy's testimony, which the Court finds credible, he began representing Petitioner as her *appellate* counsel from subsequent to her 1978 trial court conviction until the November 16, 1983 grant of her federal writ of habeas corpus. He continued

his representation of Ms. Gray as her *trial* counsel from November 17, 1983 until her April 23, 1987 plea. During the time of his representation of Petitioner, Mr. Reddy was employed as a staff attorney with the Appeals Division of the Cook County Public Defender's Office. Again pursuant to Mr. Reddy's testimony, the Court finds that Mr. George Morrissey, as an experienced trial attorney with the Cook County Public Defender's Office, was paired by the "head of the appeals division" with Mr. Reddy, an inexperienced trial attorney, "to be the trial person if and when [Paula Gray's trial subsequent to the 1983 grant of her federal writ] was to go down"; which pairing occurred sometime between November 16, 1983 and May 11, 1984. (Tr. of Evidentiary Hr'g of 5/4/99, at 36; Memorandum "Evidentiary Hearing" James Reddy at 134). [Recall Mr. Reddy's testimony that Mr. Morrissey was paired with him while James Reddy was facilitating the placement of Petitioner's case on the Sixth District's trial call, which was effected on "5-11–84." See Memorandum "Judicial Notice" para. 3.b., at 225 (judicial notice that Paula Gray's 1984 case, No. 84 C 4865, was placed on the Sixth Municipal trial call, J. Gerrity, on "5-11-84")]. The Court also finds, according to Mr. Reddy's testimony, again assessed as credible and reasonable, that from May 11, 1984 until April 23, 1987, he was second chair to Mr. Morrissey in representing Ms. Gray, and would "take leads" from Mr. Morrissey due to the latter's experience. (See Tr. of Evidentiary Hr'g of 5/4/99, at 44; Memorandum "Evidentiary Hearing" James Reddy at 135).

As detailed in this Memorandum at 6-7, the Illinois Supreme Court held in People v. Jimerson, 166 Ill.2d at 226-227, that there was a deal between Paula Gray and the People that they would drop murder charges against her in exchange for her testimony against Jimerson, Williams and Rainge at their 1985 and 1987 trials, upon which the court based it's post-conviction vacatur of Mr. Jimerson's 1985 trial conviction. This ruling constitutes collateral estoppel (or *res judicata*) of this issue in this proceeding. However, pursuant to Patterson, 192 Ill.2d at 139 (see Memorandum "Findings of Fact" para. 1., at 181), *res judicata* can be relaxed "in the interests of fundamental fairness" if the Respondent has presented "substantial new evidence" in this matter that there was no deal.

Therefore, to relax the *res judicata* bar of the Jimerson determination that there was a deal between Petitioner and the People, the Respondent must show that after the May 25th, 1995 Jimerson ruling, it discovered new evidence that there was no deal between Ms. Gray and the State to drop murder charges in exchange for her incriminating testimony, and that this new evidence is so conclusive it would probably have changed the Supreme Court's grant of Jimerson's post-conviction petition vacating his 1985 trial judgment, and is also material, non-cumulative, and was not discoverable by Respondent, with due diligence, prior to the May 25th, 1995 decision.

The only "new" evidence presented by Respondent in this proceeding that there was no deal with the People for Ms. Gray's inculpatory testimony against three of the Ford Heights Four, is the testimony of Petitioner's 1983 to 1987 trial counsel, to wit, James Reddy and George Morrissey, that there was no deal with the People as set forth in Jimerson. First, this testimony or evidence is not new because it existed as early as the April 23rd, 1987 date of her plea, which was prior to, and not *after*, the 1995 Jimerson decision. [See Patterson, 192 Ill.2d at 139, holding that one of petitioner's items of evidence is new because "it did not exist until *after* [petitioner's]

trial"]. Secondly, this evidence was discoverable by Respondent with due diligence prior to the 1995 Jimerson decision, or could easily have been obtained from James Reddy and/or George Morrissey from the time of the April 23rd, 1987 date Petitioner pled guilty to perjury, and the People *nolle prossed* her murder charges, until the May 25th, 1995 date of the Jimerson ruling. Finally, the evidentiary hearing testimony of Mr. Reddy and Mr. Morrissey denying the existence of a deal between the People and Ms. Gray neither addressed, nor controverted Petitioner's testimony in this matter that Cliff Johnson and/or Scott Arthur, the principal prosecutors of Paula Gray and the Ford Heights Four in the Lionberg/Schmal case, spoke to her *outside the presence of her attorney (James Reddy) at Dwight* in the spring of 1983, and prior to the grant of her federal writ. Furthermore, Mr. Morrissey was not her lawyer at that time, and Mr. Reddy never denied that such *ex parte* conversation took place. Therefore, Respondent's evidence in this proceeding regarding the non-existence of a deal is not so conclusive that it would probably have changed the outcome of the Supreme Court's vacatur of Verneal Jimerson's 1985 conviction based on its finding of the existence of such deal. Accordingly, the Court finds that Respondent has not presented "substantial new evidence" as required by Patterson (and other Illinois Supreme Court cases) to authorize it to relax the *res judicata* bar of Jimerson. As such, the existence of a deal between Ms. Gray and the People as described in Jimerson constitutes by law, the facts of this case, to wit, that the People agreed to drop murder charges against Petitioner in exchange for her incriminating testimony against Verneal Jimerson, Dennis Williams and Willie Rainge at their respective 1985 and 1987 trials.

Also, Petitioner testified in this proceeding to additional details of the deal not included in the Jimerson description of the same agreement. Ms. Gray stated that the People promised her, outside the presence of counsel, that they would get her out of jail and relocate she and her mother and sister out-of-state, if she kept the Ford Heights Four in prison by testifying that they raped and killed Carol Schmal, and killed Larry Lionberg, and threatened that she would remain in prison for life if she didn't help the prosecution. (See Tr.of Evidentiary Hr'g of 4/30/99, at 123, 158-59; Memorandum "Evidentiary Hearing" Paula Gray at 108-09, 114). This testimony by Petitioner must be accepted by the Court as true, because it wasn't controverted by Respondent either by counter-affidavit or other evidence in this proceeding (i.e. the testimony or affidavit of Cliff Johnson and/or Scott Arthur). See Hiram Walker Distributing Co., 99 Ill.App.3d at 881; Chicago Judo & Karate Ctr., 27 Ill.App.3d at 1077; see also Bank of Ravenswood, 269 Ill.App.3d at 723. Therefore, the Court finds that Petitioner's foregoing testimony constitutes the facts as to the specific content or nature of the People's deal with Ms. Gray, or threat and promise(s) directed toward her by the prosecution.

The Court also finds that Petitioner's above cited testimony regarding the details of the deal made to her (or threat and promise(s) directed toward her) by the People was both credible and straightforward. Furthermore, its truthfulness is strongly corroborated by the failure of Respondent to present controverting affidavit or testimonial evidence to Ms. Gray's serious claims of prosecutorial misconduct. Moreover, Respondent had clear motive (though ethically unjustified) to approach and threaten and make promise(s) to Petitioner to obtain her incriminating testimony, by reason of its significance in the State's 1985 and 1987 prosecutions (and convictions) of Jimerson, Williams and Rainge. [ASA Johnson expressly acknowledged, at the outset of its prosecution of Petitioner, the importance of Ms. Gray's testimony to its case

against the Ford Heights Four when he responded to an August, 1978 grand juror's question, or the same grand jury which appears to have indicted Ms. Gray, that "[w]e made no promises or threats to her; but obviously when we are beginning the case, it is a *circumstantial case* [against the Ford Heights Four] without her, limited at best. *With her, it becomes an excellent case*." (emphasis added). Respondent's Group Ex. 11 Item K at PD00225. Recall also Jimerson's finding that "Ms. Gray's testimony was the only evidence to link [Mr. Jimerson] to [the Lionberg/Schmal] crimes," and the decision in Williams, 147 Ill.2d at 223, where even with the inclusion of Paula Gray's incriminating testimony, the Supreme Court held that "...the evidence in [Dennis Williams' case and apparently that of his co-defendant, Willie Rainge, with whom he was jointly tried] is closely balanced," while affirming Mr. Williams' conviction]. Accordingly, the Court finds that Respondent approached Petitioner at Dwight and promised her, outside the presence of counsel, that they would get her out of jail and relocate she and her mother and sister if she inculpated the Ford Heights Four in the subject crimes, and threatened her that she would remain in prison for life if she didn't help them.

The Court renders a further finding of fact that Petitioner's perjury plea and two year probation sentence were part of the Dwight deal between the People and Ms. Gray for securing her immediate release. The Court's reasoning for this finding is not unlike that of the Supreme Court in Jimerson where it stated that:

> instead of [Paula Gray] being retried, *following her testimony* against [Jimerson], Williams and Rainge [at their 1985 and 1987 trials], all charges against Gray *except perjury* were dropped. *After pleading guilty to the perjury charge*, Gray was sentenced to two years' probation. The justices of the Illinois Supreme Court are not required to suspend common sense in evaluating the evidence in the record. A commonsense view of this evidence lends substantial support to the conclusion that Gray's denials of a deal were false. (emphasis added).

Jimerson, 166 Ill.2d at 227. Accord People v. Diaz, 297 Ill.App.3d 362, 371 (1st Dist. 1998).

Similarly, this Court is not required to abandon its commonsense view of the evidence in this record which lends substantial support to its finding that Petitioner was required to plead guilty to perjury as part of the deal offered to her by the State at Dwight in order to secure her immediate release.

First, as noted by Jimerson, the timing of her perjury plea and release was *after* she had given her incriminating testimony for the People against Jimerson, Williams and Rainge over a multi-year period, which suggests a connection or relationship between Ms. Gray's plea and incriminating testimony, and her release from prison (see additional discussion in next paragraph). Secondly, even though Petitioner had complied with the State's Dwight deal of inculpating three of the Ford Heights Four at their 1985 and 1987 trials, she was not immediately released after her testimony, and still remained jailed. Therefore, provided that *prior* to Petitioner's release, Respondent told Ms. Gray she would have to plead guilty to perjury (as well as render inculpatory testimony), it is immaterial to the Court's determination of the terms of the

Dwight deal whether Respondent related this information to Petitioner at Dwight in 1983, or as late as just prior to her plea in 1987, because in either instance Ms. Gray did not, and the Court can reasonably conclude from the evidence, *would* not have enjoyed the immediate freedom she was promised at Dwight, without first pleading guilty to perjury (along with inculpating three of the Ford Heights Four).

Also, the People could just as easily have dismissed the perjury charge, along with all other charges of the 1984 information, to effectuate Ms. Gray's prompt release, but chose instead to retain this allegation and secure a perjury plea and probation sentence *before* moving for *nolle prosse* dismissal of murder (as per the terms of the deal set forth in Jimerson) and the other remaining charges of the 1984 information, which enabled Ms. Gray to get out of jail as promised at Dwight. This clearly evidenced the State's intent that it wanted to obtain a perjury plea from Petitioner *before* effecting her release, pursuant to their Dwight promise, via *nolle prosse* dismissal of the remaining charges and proffer of a sentence of probation. [Note that the People never told Ms. Gray how they would secure her immediate release, but simply that they would "get [Petitioner] out of prison" and relocate she and her family, if she incriminated the Ford Heights Four]. In fact, this aspect of the Dwight deal is contained in the transcript of Petitioner's perjury plea (or the perjury plea in exchange for what effectively constituted her immediate release, to wit, two years probation and *nolle prosse* dismissal of murder and all other charges of the 1984 information). [See Respondent's Joint Mot. Ex. A at 156/10 for the People's statement to Judge Meekins that the agreement reached between them and Mr. Morrissey "is for [their] recommendation of a period of two years felony probation to the perjury count" and they would *nolle prosse* all other counts; see also Respondent's representation to the Court by Mr. Burnham that his understanding from Judge Meekins and the transcript of the plea was that at the time Ms. Gray pled guilty to perjury, "she was promised if [she] plead to the perjury the murder and rape charges will be nolle prossed." (Tr. of Evidentiary Hr'g of 5/4/99, at 60)]. To treat the foregoing deal (or agreement) as set forth in the plea record and by Mr. Burnham's representation, as something which was separate and distinct from the People's deal (or agreement) as determined by Jimerson and the very same deal (offer) at Dwight pursuant to Petitioner's testimony in this matter, would be unreasonable and nonsensical in view of the evidence of this proceeding, and would also contravene the Supreme Court's commonsense analysis applicable to this factual issue.

Essentially, Petitioner's incriminatory testimony without the perjury plea would not have secured her immediate release as promised at Dwight; nor would Ms. Gray's perjury plea without her incriminating testimony. Clearly, both conditions had to be met, and even completed in a certain order, before the People *nolle prossed* all other charges of the information to bring about what mattered to her the most --- her immediate release from prison (i.e. Petitioner's incriminating testimony *followed by* her plea and dismissal of all other charges, because the pending charges constituted Respondent's stated threat to Petitioner of lifelong imprisonment, via prosecution of these charges, to compel Ms. Gray not only to render key inculpatory testimony against the Ford Heights Four needed by the People, but also to plead guilty to perjury, to effect her release. Petitioner's perjury plea and release *before* rendering her incriminating testimony, while compelled by the foregoing prosecutorial threat, would have eliminated this same threat also necessary to compel her pivotal inculpatory testimony). Moreover, the

Respondent itself has provided significant support and corroboration for this reasoning by the Court when it states in its Post-Hearing Memorandum at 13 that if Petitioner had not pled guilty to perjury (by reason of the disclosure to her of the Brady information she claimed the People fraudulently concealed), it would follow "that the State would not have nolle prossed the charges in 1987," [including the murder allegations cited by the Jimerson description of the deal]. Respondent's concluding comment that this argument is "particularly perplexing" once again not only disregards the proofs of this proceeding evidencing *all* the conditions of the Dwight deal, but also controverts Jimerson's commonsense view of this evidence.

Based on the foregoing analysis and evidence, the Court finds that Respondent's Dwight deal with Petitioner, offered outside the presence of her counsel, required that she testify against three of the Ford Heights Four incriminating them in the subject crimes, as well as enter a later plea of guilty to perjury, in exchange for her immediate release from prison pursuant to a two year sentence of probation and *nolle prosse* dismissal of the remaining charges. The Court additionally finds that the prosecution simultaneously threatened Petitioner at Dwight, again outside the presence of her counsel, that she would stay in prison for life if she did not inculpate the Ford Heights Four in the subject offenses and thereafter plead guilty to perjury.

5. Pursuant to the evidentiary hearing testimony of Mr. Reddy and Mr. Morrissey, Petitioner's 1983 to 1987 trial counsel, which the Court finds credible, the Court makes the following findings of fact regarding their representation of Petitioner as it relates to Respondent's Dwight deal offer, or promise(s) and threat directed to Ms. Gray outside the presence of her counsel (see Memorandum "Findings of Fact" para. 4., at 199):

a. both trial counsel had "talked all along whether or not [Ms. Gray] was again interested in cooperating with the State or not" (Tr. of Evidentiary Hr'g of 5/4/99, at 38; Memorandum "Evidentiary Hearing" James Reddy at 134). [Recall that Mr. Reddy, the inexperienced trial counsel and "second chair" to Mr. Morrissey, had previously taken prosecutors, pursuant to their request, to speak with Ms. Gray at the Dwight Correctional Facility in perhaps the spring of 1983 and prior to the grant of her November, 1983 federal writ, when Petitioner rejected "many times" the prosecutors' offer to cooperate with the State saying "she wasn't there and didn't know anything.". (Tr. of Evidentiary Hr'g of 5/4/99, at 33-36, 44-46, 154-55; Memorandum "Evidentiary Hearing" James Reddy at 133-34, 134, 135-36)];

b. both trial counsel thought it would be better for Petitioner to testify for the State (Tr. of Evidentiary Hr'g of 5/4/99, at 41; Memorandum "Evidentiary Hearing" James Reddy at 135);

c. both trial counsel collectively made the determination to continue the case "until [Petitioner] decided to cooperate" (Tr. of Evidentiary Hr'g of 5/4/99, at 47-48; Memorandum "Evidentiary Hearing" James Reddy at 136);

d. Mr. Morrissey, the experienced and lead trial counsel, felt that "the only available defense" for Paula Gray was that of "compulsion," or that Petitioner was forced to do what she did, and that she was an unwilling participant in the deaths of the two individuals. Mr. Morrissey later stated that "[he didn't] know how you can defend against" perjury based on testifying

differently in the grand jury and preliminary hearing proceedings as indicated by the People's factual recitation in support of Petitioner's 1987 plea. (Tr. of Evidentiary Hr'g of 5/4/99, at 156-57, 166; Memorandum "Evidentiary Hearing" George Michael Morrissey at 150, 153). Mr. Morrissey also opined that "he was not sure that [Paula Gray] had a viable [defense] that...was sufficient enough to overcome [perjury by contradictory testimony]." (Tr.of Evidentiary Hr'g of 5/4/99, at 178-79; Memorandum "Evidentiary Hearing" George Michael Morrissey at 155);

e. Mr. Morrissey related a "scenario" which was identical to the State's theory of prosecution of Petitioner and further stated that "that was the scenario that everyone believed happened in the case." (Tr. of Evidentiary Hr'g of 5/4/99, at 158-59; Memorandum "Evidentiary Hearing" George Michael Morrissey at 150-151, 151);

f. Mr. Morrissey indicated that "through this whole case, if Paula had testified consistently the way she did in the grand jury and the way we all thought it happened, she wouldn't have been in the predicament she was in...[and that s]he was victimized a couple of times by the system...and [he] was attempting to try to alleviate her condition." (Tr. of Evidentiary Hr'g of 5/4/99, at 161; Memorandum "Evidentiary Hearing" George Michael Morrissey at 151);

g. both trial counsel repeatedly insisted to Petitioner that she testify for the State against three of the Ford Heights Four as set forth by para. 5.a.-c., f. above, even to the extent of not securing a deal, or protection against self-incrimination, for her inculpatory testimony (Tr. of Evidentiary Hr'g of 5/4/99, at 41, 50, 51, 58, 161-63, 172; Memorandum "Evidentiary Hearing" James Reddy at 135, 136-37, 137, George Morrissey at 152, 154), and;

h. both trial counsel presented Petitioner with a "now or never" situation that she either cooperate with the State or begin trial for the Lionberg/Schmal crimes, while advising her that "it would be better for her" to cooperate with the State and that if she cooperated "the odds were very strong that the State would not be interested in prosecuting her and the case would go away." (Tr. of Evidentiary Hr'g of 5/4/99, at 38-39, 40-41; Memorandum "Evidentiary Hearing" James Reddy at 134, 135). [See Mr. Morrissey's testimony that Petitioner's trial was being scheduled and "the issue was, were we going to proceed with Paula's trial depending on what Paula decided to do" and his "subjective thought" that "he couldn't imagine a judge in the system that would ever find her guilty" "if [Petitioner] testified the way we all thought it happened." (Tr. of Evidentiary Hr'g of 5/4/99, at 163, 171; Memorandum "Evidentiary Hearing" George Michael Morrissey at 152, 153)].

Based on the above proofs, the Court finds that from the summer of 1983 until on or about the date of Verneal Jimerson's trial in late October, 1985, the primary intent, purpose and focus of Mr. Reddy and Mr. Morrissey's representation of Petitioner was to convince her to cooperate with the State and inculpate the Ford Heights Four in the subject crimes at the trials of three of her alleged principals, which unbeknownst to these attorneys, was consistent with and corroborative of, at least in part, the Dwight deal (or promise(s) and threat) made by the prosecution in the summer of 1983 to Ms. Gray, outside the presence of her counsel (Mr. Reddy).

6. Pursuant to the testimonial and documentary evidence of this proceeding, as well as judicial notice (see Memorandum "Judicial Notice" at 224-28), the Court makes the following factual findings regarding the government's possession or control of the alleged twelve (12) Brady (and 412(c)) evidentiary items; the timeliness of Ms. Gray's 2-1401 petition; Petitioner's due diligence in discovering her alleged newly discovered evidence and in filing her petition on the grounds of fraudulently concealed Brady (and 412(c)) evidence and that of her actual innocence; and Respondent's disclosure of the alleged Brady (and 412(c)) proofs to Ms. Gray:

a. The following twelve (12) items of alleged newly discovered Brady (and 412(c)) evidence were in the possession or control of the police or prosecution on the date indicated (each evidentiary item will be numbered in the same manner indicated by Petitioner's Post-Hearing Memorandum at 5 n.1):

> Item No. 1 - ASA DiBenedetto's notes indicating Charles McCraney "saw no faces" [the night and scene of the Lionberg/Schmal crimes]. (Petitioner's Add'l Auth's and Mat'ls Ex. 14, at cover letter, 047486) - in possession or control of the prosecution on May 15th, 1978 based on the January 28th, 1999 cover letter from ASA Thomas M. Burnham indicating that this page, or Bates number "047486," is contained in a group of documents he identified as "Bates numbers 47484 through 47487," which documents "represent[ed] the Felony Review folder...pertaining to the Lionberg/Schmal crimes," and Mr. DiBenedetto's evidentiary hearing testimony identifying this page as part of his felony review folder for May 15th, 1978. (Petitioner's Add'l Auth's and Mat'ls Ex. 14; Tr. of Evidentiary Hr'g of 5/3/99, at 110; Memorandum "Evidentiary Hearing" Earnest DiBenedetto at 125) [Note, however, that ASA DiBenedetto testified that pursuant to standard practice in Felony Review, he "would have filled out [his Felony Review Folder] later that "Sunday evening" [May 14, 1978] or "Monday morning" [May 15, 1978] before [he] concluded [his] work [at the Homewood Sheriff's facility]." (Tr. of Evidentiary Hr'g of 5/3/99, at 108-09; Memorandum "Evidentiary Hearing" Earnest DiBenedetto at 125). As such, the information of his review folder entries for "May 15th, 1978," was not necessarily received by him on May 15th, but apparently sometime between his initial arrival at the CCSP station at approximately 2 a.m. on Sunday morning, May 14th, 1978, and Monday, May 15th, 1978. (See Tr. of Evidentiary H'g of 5/3/99, at 79; Memorandum "Evidentiary Hearing" Earnest DiBenedetto at 121)].
>
> Item No. 2 - Notes of Sherry McCraney interview (Petitioner's 2-1401 Mot. Ex. H.) - in possession or control of CCSP prior to Petitioner's September, 1978 trial. This finding is based on:

- the Bates stamp of "*CCSP*000104" (emphasis added) identifying this document and evidencing that it was in the possession or control of the "CCSP" or Cook County Sheriff's Police (see Petitioner's 2-1401 Mot. Ex. H). Further proof that Item No. 2 is a CCSP document is evidenced by its police terminology identifying the source of the statement, or the document's contents, as "Sherry McCraney F/N/24" (or female Negro 24 years of age), which terminology is identical to that of the Capelli notes (see Item No. 4 stating "Marvin Simpson M/N/24" as its source, or male Negro 24 years of age), which item is positively identified as a CCSP document in the later discussion regarding Item No. 4;
- details of Item No. 2 indicating that it "clearly" relates to the Lionberg/Schmal case because, as previously discussed, it is a CCSP document, which was the police agency investigating the subject crimes—it also indicates at the top "Sherry McCraney" of "1533 Hammond Lane," which is the same last name and address as Charles McCraney, a key prosecution witness. Furthermore, Archie Weston confirmed at the evidentiary hearing that "he is now aware" that the Sherry McCraney named in Item No. 2 is the wife of Charles McCraney (Tr. of Evidentiary Hr'g of 4/28/99, at 205; Memorandum "Evidentiary Hearing" Archie Weston at 48)—the night in question indicated by Item No. 2 is "Wednesday," the same night of the Lionberg/Schmal crimes—the document's diagram, indicating four buildings, two each facing one another, and reference to apparently a "red" car "stuck" between two of the buildings, as well as to a street light being broken out possibly the same evening, and one shot being heard, is all consistent with the testimony of Charles McCraney at Petitioner's 1978 trial. (Respondent's Group Ex. 11 Item G at 1165-66, 1172, 1175, 1184-85, 1190-91, 1192, 1199, 1203, 1209; Memorandum "Preliminary Findings of Law" para. 8., at 279). [See Hobley, 182 Ill.2d at 430-32, which granted post-conviction relief on, among other grounds, newly discovered evidence and reports identified as Chicago Police Department documents by that department's "RD number," or record department number, coupled with the contents of these documents or reports which "clearly" related to the arson in question by listing the names of the victims who died in the fire];
- proofs in this proceeding that excepting Mr. Podlecki's September 15th, 1978 forensic report, the entire CCSP "investigation" of the Lionberg/Schmal crimes, as well as that of the Cook County State's Attorney's Office, was conducted *prior to* Petitioner's September, 1978 trial, so it can reasonably be concluded that the Sherry McCraney notes were generated by the CCSP before Ms. Gray's 1978 trial (see Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. #2-A; Petitioner's Add'l Auth's and Mat'ls Ex's. 6, 8-10, 13-14,16; Petitioner's Second Add'l Auth's Ex. C; Respondent's Group Ex. 11; Tr. of Evidentiary Hr'g of 5/3/99, at 74-130; Memorandum "Evidentiary Hearing" Earnest DiBenedetto at 120-28);

- CCSP Investigator David Capelli's January 9th, 1998 deposition testimony in the civil actions emanating from this case, indicating that the Sherry McCraney notes, or Item No. 2, "[look] like [material] that would be in [the Lionberg/Schmal] master file" (Petitioner's Add'l Auth's and Mat'ls Ex. 8, at 80-81; Item No. 2 is identified in this exhibit as "104");
- the fact that these notes were contained in the middle of a file of documents marked sequentially "CCSP 1 through 211," which appeared to Inv. Capelli to be part of the Lionberg/Schmal master file, and which file Investigator Capelli also believes to have been delivered by CCSP Detective Lowrey from the "detective section" of the "south investigations unit" (Petitioner's Add'l Auth's and Mat'ls Ex. 8, at 70-72, 79-81);
- Inv. Capelli's January 9th, 1998 deposition identification of file document "97" as that of Lt. Vanick and "107" as that of David Orsini, both Sheriff's police officers, which were documents that preceded and succeeded "CCSP" document "104," or the Sherry McCraney notes (See Petitioner's Add'l Auth's and Mat'ls Ex. 8, at 56-61, 71-81);
- Respondent's failure to submit counter-affidavit proof or other evidence that these notes were not part of the CCSP investigative master file for the subject crimes, or that the notes were not generated by the Cook County Sheriff's police, and;
- evidence in this post-judgment proceeding that the CCSP suppressed, lost or destroyed proofs, not unlike the Sherry McCraney notes, tending to show the innocence of Paula Gray and the Ford Heights Four, or the guilt of other persons of the subject crimes. [See Memorandum "Preliminary Findings of Law" para. 8, at 281 (Willie King Watson's written statement to CCSP, or Respondent's Group Ex. 11 Item K at PD00289), and 295, for discussion regarding pattern of CCSP suppression of exculpatory evidence]. [Note that the Sherry McCraney notes would be favorable to Petitioner by tending to rebut the various incriminating testimonies of her husband, Charles McCraney, where he stated that within "minutes" of Dennis Williams' breaking a street light on the night and near the scene of the subject crimes, Mr. Williams, Kenneth Adams, and Willie Rainge entered 1528 Cannon Lane where Ms. Schmal's body was later found. With the exception of one reference that these accused entered 1528 at 2:15 a.m., all of the times indicated by Mr. McCraney in various trial proceedings were at or after 2:30 a.m., when the victims were last known to be alive, or between 2:30 to 2:45 a.m. Thursday morning [May 11th, 1978]; within a few minutes of the period between 2:30 and 3:00 a.m. that same Thursday morning; a few minutes after 3:10 or 3:15 a.m. on May 11th, 1978; or between 3:26 and 3:30 a.m. Thursday morning [May 11th, 1978]. (Respondent's Group Ex. 11 Item G at 1184,1999-1202; Williams, 93 Ill.2d at 319; Rainge, 112 Ill.App.3d at 400; Williams, 147 Ill.2d at 199-200). The Sherry McCraney notes, on the other hand, would counter these times by setting the broken light incident at "*...before 2:00 a.m.*" (emphasis added), leaving only whether this occurred Wednesday night

[May 10th, 1978] in question. (See Petitioner's 2-1401 Mot. Ex. H)]. Evidence of CCSP suppression, loss or destruction of favorable evidence, or proofs as to the guilt of others, and which tends to show that the CCSP withheld the Sherry McCraney notes as well, includes their suppression of the Capelli notes. [See Petitioner's Add'l Auth's and Mat'ls Ex. 8, at 61, for Investigator Capelli's January 9th, 1998 deposition testimony that he didn't prepare a formal report from the notes because "there was nothing significant in [them] that related to [their] investigation [of the Lionberg/Schmal crimes]," which suppression was compounded by evidence that apparently Lt. Vanick ordered Marvin Simpson, whom he questioned as the source of these notes, not to disclose the May 17th, 1978 hospital interview to anyone, and not to say anything to anybody, and that "they" would get back to him, but the CCSP never did. (See Petitioner's Add'l Auth's and Mat'ls Ex. 6, at 185, 191, 195-96)]. [Note that in Marvin Simpson's September 11th, 1997 deposition testimony in the civil action emanating from the Lionberg/Schmal case, he stated that the "older" "white [guy or sheriff's police officer]" "was asking [him] questions" at the May 17th, 1978 hospital interview and that "the young [white] guy [or sheriff's police officer] was writing everything down." He specifically indicated that it "wasn't Nance" who was questioning him. (Petitioner's Add'l Auth's and Mat'ls Ex. 6, at 185-86; see also Petitioner's Add'l Auth's and Mat'ls Ex. 6, at 189, where Mr. Simpson reiterated in the same September 11th deposition testimony that "[t]he older guy...was asking [him] the questions [at the hospital interview]." Based on this deposition testimony, the Court finds that Lt. Vanick was posing the questions to Mr. Simpson and that Inv. Capelli, as he has confirmed in his January 9th, 1998 deposition testimony (see this para. Item No. 4 below), took notes of the May 17th, 1978 hospital interview]. Mr. Simpson complied with Lt. Vanick's orders and never disclosed the Capelli note information to anyone for over nineteen years, from May 17, 1978 until September 11, 1997 (see Petitioner's Add'l Auth's and Mat'ls Ex. 6, at 185, 195-96). Still more evidence of CCSP suppression, loss or destruction of evidence favorable to Petitioner is their loss or destruction of the affidavit, warrant and return authorizing the seizure and search of a Buick 225 matching the alleged perpetrators' vehicle as described in the Capelli notes (see also Item No. 10). [Note too that People v. Moore, 178 Ill.App.3d 531, 540 (1st Dist. 1988), has held that "...a statement made to law enforcement personnel or officers...is considered to be within the State's possession or control"];