Item No. 3 - interview notes of Paula Gray (Petitioner's Add'l Auth's and Mat'ls Ex. 9, at CCSP/000105-000106) - in possession or control of CCSP prior to Petitioner's September 1978 trial based on the same grounds set forth in Item No. 2 above. Note also that Item No. 3 contains Bates stamp "CCSP/000105-000106," evidencing possession or control by the CCSP both by name and (sequential) number, as previously discussed regarding Item No. 2. Additionally, these notes clearly relate to the Lionberg/Schmal case because Petitioner's statement indicates that she was engaging in innocent, non-inculpatory conduct with Kenneth Adams and Dennis Williams in front of her home on the courtway side facing the building of the subject crimes on the night of and prior to the commission of these offenses. (See Petitioner's Add'l Auth's and Mat'ls Ex. 9, at CCSP 000105-000106). [Recall that Petitioner resided at 1525 Hammond Lane across a courtway from the building where the crime(s) occurred and where Ms. Schmal's body was recovered at 1528 Cannon Lane, and that Paula Gray, Dennis Williams, Kenny Adams and others frequented this courtway location in front of the Gray house. See Gray, 87 Ill.App.3d at 144; Williams, 93 Ill.2d at 318; Tr. of Evidentiary Hr'g of 4/29/99, at 267, 272; 4/30/99, at 7, 67; Memorandum "Evidentiary Hearing" Dennis Williams at 77, 78, Kenneth Adams at 93, Paula Gray at 100]. Finally, Ms. Gray's statement as set forth in Item No. 3 is consistent with the May 14th, 1978 alibi statements of Mr. Williams and Mr. Adams contained in ASA DiBenedetto's felony review folder, as well as Dennis Williams' 1978 trial testimony, further evidencing the relationship of these notes to the Lionberg/Schmal case. See Petitioner's Add'l Auth's and Mat'ls Ex. 9, at CCSP/000105-000106, Ex.14, at 047485; Rainge, 112 Ill.App.3d at 404-05. [Regarding Kenneth Adams, the various Illinois Supreme and Appellate Court opinions with respect to the 1978 trial of Petitioner and three of the Ford Heights Four do not relate the specifics of Mr. Adams' testimony, but only that he presented an "alibi [defense]." See Williams, 93 Ill.2d at 321. Presumably, his alibi testimony was consistent with that contained in ASA DiBenedetto's felony review folder, or the State would have impeached him, which was not indicated by these opinions. As such, Ms. Gray's statement as contained in Item No. 3 was more likely than not consistent with Kenny Adams' 1978 alibi trial testimony as well];

Item No. 4 - the Capelli notes or "street file" (interview of Marvin Simpson at St. James Hospital in Chicago Heights on May 17th, 1978 by Lt. Howard Vanick and Inv. David Capelli of the CCSP, as well as Sgt. George Nance of the Ford Heights or East Chicago Heights Police Department) - the first part of this document up to but not including "Sapit and I [Inv. Capelli] checked through..." was in the possession or control of the CCSP on May 17th, 1978. The second part of the Capelli notes starting with "Sapit and I [Inv. Capelli] checked through..." on down, were in the possession or control of the CCSP on May 18th, 1978. This factual finding

is based on Investigator Capelli's January 9th, 1998 deposition testimony identifying these notes, and the dates each section was produced, in the above described manner. (See Petitioner's Add'l Auth's and Mat'ls Ex. 8, at 56-63), and; Sgt. Nance's evidentiary hearing testimony indicating that Inv. Capelli took notes of the May 17th, 1978 Simpson interview, also attended by Lt. Howard Vanick of the CCSP, regarding the Lionberg/Schmal case. (Tr. of Evidentiary Hr'g of 4/29/99, at 21, 32, 95; Memorandum "Evidentiary Hearing" George Nance, Jr. at 55, 58, 63);

Item No. 5 - the George Nance report of the Marvin Simpson hospital interview on May 17th, 1978 - in possession or control of the Ford Heights or East Chicago Heights Police Department prior to Petitioner's September 1978 trial. This finding is based on:

- Sgt. Nance's evidentiary hearing testimony, which the Court finds credible, that he took notes of this interview on May 17th, 1978, the date of the interview being established via Mr. Nance's identification of the Capelli notes, or Item No. 4., of the May 17th, 1978 interview, as a rough draft of the police report regarding the same Simpson interview of which he took notes (Tr. of Evidentiary Hr'g of 4/29/99, at 32-34, 36, 46, 47, 57-58; Memorandum "Evidentiary Hearing" George Nance, Jr. at 58, 60);
- that he submitted his notes and a report in connection with his notes to the Ford Heights [or East Chicago Heights] Police Station (Tr. of Evidentiary Hr'g of 4/29/99, at 32, 57-58, 59; Memorandum "Evidentiary Hearing" George Nance, Jr. at 58, 60), and;
- that he was repeatedly advised by his superiors at the East Chicago Heights (or Ford Heights) Police Department that the CCSP, or Investigator Capelli, were handling the investigation of the Lionberg/Schmal case and he was also ordered not to get involved in the sheriff's police investigation (Tr. of Evidentiary Hr'g of 4/29/99, at 15, 59-60, 78, 78-79, 79-80; Memorandum "Evidentiary Hearing" George Nance, Jr. at 54, 60, 61-62). As previously found, the CCSP, excepting the Sept. 15, 1978 forensic report, completed its investigation of the subject crimes prior to Petitioner's 1978 trial. The Court thus finds, based on a reasonable view of this evidence, that Sgt. Nance submitted his notes and report of the Simpson interview to the East Chicago Heights (or Ford Heights) Police Department prior to Ms. Gray's September, 1978 trial;

Item No. 6 - the unreported microscopic pubic hair comparison findings of Michael Podlecki, forensic scientist with the Illinois State Police in 1978, that the pubic hair standards of the Ford Heights Four did not match pubic hair fibers found at the crime scene on the green socks of one of the victims of the Lionberg/Schmal crimes. (See Tr. of Evidentiary Hr'g of 4/29/99, at 120, 137-39, 150-153, 161, 162-64; Memorandum "Evidentiary Hearing" Michael Podlecki at 66, 67, 67-68; Plaintiff's [or

Petitioner's Evidentiary Hr'g] Ex. #2-A, at 00055, 00058-00059; Petitioner's Add'l Auth's and Mat'ls Ex. 16, at 50-51, 55-56, 58-59) - this information was in the possession or control of the government on July 17th, 1978, the date of Mr. Podlecki's forensic report regarding this pubic hair comparison test or tests, which according to his January 15th, 1999 deposition testimony in the civil actions, falsely stated contrary to his foregoing actual findings, that the results of his pubic hair examination comparing the "Negroid" pubic hairs of Item 21, that were mounted and saved upon their recovery by Mr. Podlecki from the victim's green socks, with the pubic hair standards of the Ford Heights Four, disclosed "nothing of evidential value." (Tr. of Evidentiary Hr'g of 4/29/99, at 137-39, 150-153, 161,162-64; Memorandum "Evidentiary Hearing" Michael Podlecki at 66, 67, 67-68; Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. #2-A, at 00055, 00058-00059; Petitioner's Add'l Auth's and Mat'ls Ex. 16, at 50-51, 55-56, 58-59). [Note that based on the evidence of this proceeding, the Court can reasonably conclude and finds that the "victim" upon whose "clothing" or "green socks" "Negroid" *pubic* hairs were found was Carol Schmal, because Ms. Schmal, and not Mr. Lionberg, was sexually assaulted]. The Court also premises its finding regarding the July 17th, 1978 date of the State's possession or control of Item No. 6 on Mr. Podlecki's deposition and evidentiary hearing testimony, which is credible because it constitutes an admission, or statement against penal interest, in that he effectually concedes both the knowing falsity of his testimony at Petitioner's 1978 trial regarding his pubic hair comparison test results and also that he knowingly authored and submitted false forensic documents, to wit, his foregoing pubic hair comparison findings. (See Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. #2-A, at 00058-00059). [Note that not unlike with police personnel or officers, possession or control of discoverable material or information by crime laboratory personnel is considered to be in the possession or control of the State. See People v. Thompkins, 121 Ill.2d 401, 425-26 (1988); People v. Curtis, 48 Ill.App.3d 375, 382 (1st Dist. 1977)];

Item No. 7 - the information that Mr. Podlecki's 1978 trial testimony was false when he stated that his pubic hair comparison test results were of no "evidential value" when in fact they were - this information was in the possession or control of the government on October 12th, 1978 when Mr. Podlecki falsely stated the foregoing information, under oath, at Petitioner's 1978 trial - this finding is based on the same grounds set forth in Item No. 6 above, including Mr. Podlecki's January 17th, 1978 forensic report and January 15th, 1999 deposition testimony, confirming that his October 12th, 1978 testimony falsely related that his pubic hair comparison test results constituted "nothing of evidential value." Note also that Mr. Podlecki testified at the January 15th, 1999 deposition that the finding of dissimilarity between the pubic hairs found on the victim's socks and that

of the Ford Heights Four *is* a matter of evidential value. (See Petitioner's Add'l Auth's and Mat'ls Ex. 16, at 58-59);

Item No. 8 - the information that Mr. Podlecki requested that a prosecutor (and evidence technicians) obtain the head hair standards of the Ford Heights Four for comparison with the head hairs found on the green socks, but officials failed and/or refused to obtain the requested head hair standards of the defendants. [Note that Mr. Podlecki did not testify that he spoke to any police officers regarding the head hair standards of the Ford Heights Four] - this information was in the possession or control of the prosecution on September 15th, 1978, the date of Mr. Podlecki's final forensic report in this matter - the Court's finding is based on Mr. Podlecki's evidentiary hearing testimony, which is again credible for the reasons set forth in Item No. 6, that he advised ASA Cliff Johnson that he had found Negroid head and pubic hairs "[o]n items in the case," and subsequently made an initial request for the head (and pubic) hair standards of the Ford Heights Four, with two follow-up requests directly to ASA Cliff Johnson for the head hair standards of the defendants. (Tr. of Evidentiary Hr'g of 4/29/99, at 152-54, 155, 156, 157-59, 160; Memorandum "Evidentiary Hearing" Michael Podlecki at 66, 67). In both follow-up calls, Mr. Podlecki advised Mr. Johnson that he had not received the head hair standards, and in the second call that he needed the standards "to complete the examination [or he'd] have to issue the report," and by the third call, that he would need the standards "to conduct the rest of the examinations." (Tr. of Evidentiary Hr'g of 4/29/99, at 155, 156, 157-59; Memorandum "Evidentiary Hearing" Michael Podlecki at 67). The only response Mr. Podlecki recalls ASA Johnson making was "we'll take care ever [sic] it," "Okay," or "he [Mr. Johnson] didn't tell [Podlecki] anything." (Tr. of Evidentiary Hr'g of 4/29/99, at 157; Memorandum "Evidentiary Hearing" Michael Podlecki at 67; Petitioner's Add'l Auth's and Mat'ls Ex. 16, at 58). Additionally, Michael Podlecki spoke at least twice to the evidence technicians, after his initial request, about the missing head hair standards. (Tr. of Evidentiary Hr'g of 4/29/99, at 126, 155, 157-59, 159; Memorandum "Evidentiary Hearing" Michael Podlecki at 66, 67). However, Mr. Podlecki never received the head hair standards of the Ford Heights Four from either the prosecution or the evidence technicians, and gave up his effort to obtain the Ford Heights Four head hair standards, thereafter issuing a final Lionberg/Schmal forensic report dated September 15, 1978. (Tr. of Evidentiary Hr'g of 4/29/99, at 153, 154, 160, 164; Memorandum "Evidentiary Hearing" Michael Podlecki at 66, 67, 69; Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. #2-A, at 00063);

Item No. 9 - ASA DiBenedetto's Felony Review notes regarding Paula Gray indicating that "this witness is reluctant" - in the possession or

control of the prosecution on May 15th, 1978 - this finding is based on the same grounds set forth in Item No. 1, because the Item No. 9 notes came from the same page of Mr. DiBenedetto's felony review folder as Item No. 1, or Bates number "047486";

Item No. 10 - consists of the following information regarding the seizure and search of a Buick 225 similar to the vehicle identified by Marvin Simpson in the Capelli notes, including the lost or destroyed affidavit, warrant and return on the warrant, for towing and investigating the vehicle:

two-page CCSPD "Motor Vehicle Incident Case Report" by Inv. R. Nigro (#371), date stamped August 30th, 1978, for a Buick 225, indicating (amongst other information) that "Robert L. Watson" owned the vehicle; CCSPD "Evidence Technician's Report," dated August 26th, 1978 (Job Number 11574/Case Report Number 745880); Bureau of Identification Evidence Receipt dated "8/28/78"; two-page handwritten property receipt dated "20 Sept 78" and signed by Investigator D. Capelli for property received from Officer Sarbiesk inventoried under numbers "23345 - 23346 - 23347 - 23348" "for court"; and Michael Podlecki's September 15th, 1978 report as to the results of his forensic examination of the vehicle (Petitioner's Add'l Auth's and Mat'ls Ex. 10) - in the possession or control of the government by September 15th, 1978, or the latest known date of the foregoing documents as evidenced by the dates of the documents of Exhibit 10 of Petitioner's Additional Authorities and Materials, which is one day *after* the September 14th commencement of Ms. Gray's 1978 trial. Also, Investigator Nigro's above referenced Motor Vehicle Case Report indicated that the foregoing 225 Buick was:

> towed after a *search warrant* was executed on same at 15th & Hanover, Chgo. Hts. 2010 Hrs. 25 Aug 78. Vehicle to be held for investigation per South Investigations. (emphasis added).

(Petitioner's Add'l Auth's and Mat'ls Ex. 10).

Based on the foregoing Item No. 10 information, the Court finds that the supporting affidavit and warrant for the 225 Buick were in the possession or control of the CCSP as of August 25th, 1978. Also, the Court finds that any return to the court of things or items seized pursuant to the foregoing affidavit and warrant was effected prior to Petitioner's September, 1978 trial because excepting the Sept. 15th report, the CCSP completed its investigation of the subject crimes prior to Ms. Gray's 1978 trial, and 1977 statutory law required such return "without unnecessary delay" before the judge issuing the warrant. See Ill.Rev.Stat., ch. 38, §108-10 (1977);

Item No. 11 - the information that Charles McCraney was shown a photo spread by Sheriff's officers [prior to Petitioner's 1978 trial] and that Willie [King] Watson appeared in a line-up a week after the bodies were found - the Court will not render a finding of fact regarding the government's "possession or control" of this evidence, because it will find in its Brady analysis that the information regarding Willie [King] Watson's line-up appearance would not have been material to the outcome of a prospective 1987 trial of Petitioner on the perjury count and all other charges of the 1984 information. (See Memorandum "Preliminary Findings of Law" para. 8., at 308). Also, Mr. McCraney's viewing of a photo spread does not constitute newly discovered evidence, as he testified to this viewing at Petitioner's 1978 trial, and Petitioner therefore knew of its existence prior to her 1987 plea. [See Respondent's Group Ex. 11 Item G at 1168-69, 1187-89, 1231-32; Patterson, 192 Ill.2d at 139, holding that evidence is new when it exists or becomes known *after* the trial (or judgment), and is "of such character" that it could not have been discovered prior to trial (or judgment) with the exercise of due diligence], and;

Item No. 12 - the affidavit of David Jackson recanting his inculpatory 1978 trial testimony against [three of] the Ford Heights Four, stating that it was false and manufactured by the prosecutors, in exchange for a deal, and that he had no contact with the Ford Heights Four while in jail, as he previously testified to in the 1978 trial; and the affidavit of Bernard Robinson corroborating David Jackson's foregoing affidavit recantation - the Court will not render a finding of fact regarding the government's "possession or control" of the information contained in David Jackson's affidavit, because it finds this evidence to constitute recantation testimony, not unlike that of Mr. Podlecki in Item No. 7. However, while Mr. Podlecki testified before the Court regarding his recantation, and the Court was able to assess his credibility, Mr. Jackson did not. Nor did the Court preside over any previous trial in the Lionberg/Schmal case in which David Jackson rendered testimony. As such, while his affidavit evidence is admissible (see Sanchez, 115 Ill.2d at 285; Memorandum "Findings of Fact" para. 3, at 195), and Brady material, if found to be credible, the Court cannot assess the reliability of his affidavit recantation because it never heard him testify. [See People v. Hernandez, 298 Ill.App.3d 36, 40 (1st Dist. 1998), which remanded the denial of a defendant's post-conviction petition for an evidentiary hearing on the validity of recanted testimony, holding that "we do not understand how the question of the credibility of [a witness'] recantation could be resolved by a judge who never heard [the witness] testify"]. Also, because the Court cannot assess the credibility of Mr. Jackson's affidavit recantation, Bernard Robinson's affidavit (or Plaintiff's [or Petitioner's Evidentiary Hr'g] Exhibit 4-A), which was introduced by Petitioner to corroborate David Jackson's

> foregoing recantation (see Petitioner's Post-Hearing Mem. at 6 & n.1; Memorandum "Petitioner's Post-Hearing Memorandum" at 161-62), is rendered irrelevant and cannot be considered by the Court in this proceeding.

[Based on the above findings regarding Item No. 11 (including the later analysis and ruling that Item No. 11 does not constitute Brady material in Memorandum "Preliminary Findings of Law" para. 8., at 308) and Item No. 12, the Court will hereinafter refer to Petitioner's allegation of *twelve (12)* items of Brady (and 412(c)) evidence as *ten (10) items* of Brady (and 412(c)) evidence, or Items No. 1 through 10 of para. 6.a. above].

b. At the time of Ms. Gray's 1978 trial, her counsel, Mr. Archie Weston, "filed" a pretrial "discovery" request that the State and police provide him with "all evidence that would tend to negate his client's [or Paula Gray's] guilt." (Tr. of Evidentiary Hr'g of 4/28/99, at 243, 264; Memorandum "Evidentiary Hearing" Archie Weston at 50, 52). [Note that although Mr. Weston arguably made a general request for Brady material for Petitioner *and* three of the Ford Heights Four whom he also represented in 1978 (excluding Kenneth Adams), the Court will limit its para. 6. discussion and determinations to Ms. Gray]. The Court can reasonably conclude, based on the foregoing testimony by Mr. Weston, that he filed a *written* pretrial request on behalf of Petitioner for the government's production of Brady and 412(c) evidence, and so holds. Also, Mr. Weston specifically testified to not having received seven of Item Nos. 1 through 10 discussed in para. 6.a. above (or Item Nos. 1-2, 4-6, 9-10) and alleged by Petitioner as Brady (and 412(c)) evidence suppressed by the government from 1978 until at least July 1, 1997, nor any information regarding these seven items, as to which the Court renders a finding of fact. (See Tr. of Evidentiary Hr'g of 4/28/99, at 204-05, 210, 217, 218-19, 225, 227, 230, 231-32, 232, 234-35; Memorandum "Evidentiary Hearing" Archie B. Weston, Sr. at 47, 48, 48-49, 49, 50). Mr. Weston added that the discovery he received in "Paula Gray's case" was a "page or two" Cook County Sheriff's report dated June 6th, 1978, which testimony the Court further rules to constitute the facts of this proceeding. (Tr. of Evidentiary Hr'g of 4/28/99, at 194, 195; Memorandum "Evidentiary Hearing" Archie B. Weston, Sr. at 47). Also, the Court can reasonably conclude and so holds, that the "page or two" of discovery dated "June 6th, 1978" was the only discovery received by Mr. Weston from the State pursuant to his pretrial written discovery request. These factual findings are again based on the Court's assessment of Mr. Weston's testimony as credible and honest. In addition, Respondent has failed to controvert or contest Mr. Weston's foregoing testimony by counter-affidavit or other proofs, which would render it true pursuant to First District case law, on which the Court additionally bases its above findings of fact regarding his testimony. See Chicago Judo and Karate Ctr., 328 N.E.2d at 95, 27 Ill.App.3d at 1077. Also, Respondent's countervailing argument in its Post-Hearing Brief at 15-16, n.6., that Mr. Weston "may have forgotten what was in his possession because he examines witnesses based on reports which are in addition to the one report he recalled having" is not only speculative, but also without any evidentiary support in this matter, and is therefore denied.

Item No. 12 is not being considered by the Court in its analysis of alleged newly discovered Brady (and 412(c)) evidence for the reasons set forth in para. 6.a. above regarding this item. Nor will Charles McCraney's photo identification contained in Item No. 11 be

included in the Court's Brady analysis because this information does not constitute "new evidence" pursuant to the ruling of para. 6.a. at 210. Willie King Watson's line-up evidence, also included under Item No. 11, will be discussed in the Court's Brady materiality analysis for determining that this information does not constitute Brady evidence.

Also, the Court can reasonably conclude and rules that Item No. 3 was not received by Mr. Weston, because pursuant to the Court's previous findings of fact, the only discovery Mr. Weston received from the State was dated "June 6th, 1978," and Item No. 3 contains no date. (See Petitioner's Add'l Auth's and Mat'ls Ex. 9, at CCSP/000105-000106). Additionally, the pubic hair standards of the Ford Heights Four forming the basis of Item No. 7, or Mr. Podlecki's allegedly false pubic hair comparison test result testimony, were not even received by him until June 7th, 1978, which was *after* the June 6th, 1978 date of the entirety of State discovery received by Mr. Weston. (Plaintiff's [or Petitioner's] Evidentiary Hr'g Ex. #2-A, at 00058-00059; Petitioner's Add'l Auth's and Mat'ls Ex. 16, at 54-56). As such, the Court finds that Item No. 7 was not received by Mr. Weston for the same reason previously cited with respect to Item No. 3. Item No. 8, or information regarding the prosecution's, or Cliff Johnson's, failure and/or refusal, pursuant to Mr. Podlecki's *three* requests, to obtain the head hair standards of the Ford Heights Four for comparison with the "Negroid" head hairs found on the victim's (or Carol Schmal's) green socks, was not received by Mr. Weston. This finding is based on Mr. Podlecki's evidentiary hearing testimony, which the Court again finds credible, that his initial request to Mr. Johnson for the head (and pubic) hair standards was during the first week of June, 1978. (Tr. of Evidentiary Hr'g of 4/29/99, at 152-54, 155; Memorandum "Evidentiary Hearing" Michael Podlecki at 66). He thereafter, as previously discussed, received the pubic hair standards of the four defendants on June 7th, 1978, conducted his comparative hair tests and *thereafter* requested the head hair standards from Cliff Johnson on two more occasions to no avail. (Tr. of Evidentiary Hr'g of 4/29/99, at 155, 156, 157-59, 164; Memorandum "Evidentiary Hearing" Michael Podlecki at 67, 69; Petitioner's Add'l Auth's and Mat'ls Ex. 16, at 55). Accordingly, Petitioner has presented evidence that Item No. 8 constituted a continuing failure and/or refusal by the prosecution to provide Mr. Podlecki with the defendants' head hair standards needed to complete his comparative tests, consisting of three requests by Mr. Podlecki and corresponding failure and/or refusal by the State to provide him with the necessary head hair standards. Clearly, at least two of his requests to the prosecution were made *after* June 6th, 1978, so that the Court can reasonably conclude that Mr. Weston could not have received the information of Item No. 8 by June 6th. Moreover, it would be wholly nonsensical that the prosecution would disclose information to the defendant regarding items it has failed and/or refused to disclose or produce for its own forensic scientist in this matter, notwithstanding Mr. Podlecki's repeated requests.

c. Prior to Dennis Williams' 1987 retrial for the Lionberg/Schmal crimes (in which sentence was last entered on April 16th, 1987), as well as Petitioner's April 23rd, 1987 perjury plea, the prosecution was in knowing possession of the Capelli notes, which it disclosed to Mr. Williams' 1987 trial counsel. This factual finding is based on the Respondent's documentary evidence in this matter of Dennis Williams' Motion for Remand to the Trial Court filed with the Illinois Supreme Court on May 10th, 1996, which stated that the Capelli notes or "street file" was produced by the People in advance of Williams' January 15th, 1987 retrial, and that his trial

counsel's failure to adequately investigate this information, "where performance of a basic investigation would have led to exculpatory evidence," constituted ineffective assistance of counsel. (Respondent's [Evidentiary Hr'g] Ex. #10, para. 11.; Jimerson, 166 Ill.2d at 227, regarding Petitioner's perjury plea occurring *after* her testimony against Williams and Rainge (in their 1987 retrial); Memorandum at 7-8; Memorandum "Judicial Notice" para. 5.a., at 225 (judicial notice that Dennis Williams' 1987 retrial commenced on January 15th, 1987 and ended on April 16th, 1987 when he was sentenced to death for the remaining Lionberg/Schmal murder charges, as well as 30 year concurrent terms for the rape and aggravated kidnapping offenses for which he was convicted on February 13th, 1987; and that on March 4th, 1987, Mr. Williams was sentenced to death for one count of murder for which he was also convicted on February 13th, 1987));

d. From February 23, 1979 (or one day after Petitioner's 1979 judgment) until April 23, 1987, neither Mr. Reddy nor Mr. Morrissey received any of the ten items alleged by Petitioner as Brady (and 412(c)) evidence suppressed by the government from 1978 until at least July 1, 1997. The foregoing factual finding is based on a showing in this proceeding that neither of these attorneys received any of the ten items. Recall Mr. Reddy's testimony, which the Court finds credible, that he never saw the discovery materials in Ms. Gray's case and that they were served on Mr. Morrissey. (Tr. of Evidentiary Hr'g of 5/4/99, at 57; Memorandum "Evidentiary Hearing" James Reddy at 137). Mr. Morrissey, on the other hand, testified he didn't recall if he filed any discovery requests on behalf of Ms. Gray, nor did he indicate that he received either the ten alleged Brady (and 412(c)) items, nor any other discovery material from the People while representing Ms. Gray. (Tr. of Evidentiary Hr'g of 5/4/99, at 170; Memorandum "Evidentiary Hearing" George Michael Morrissey at 153). Nor, significantly, did Respondent introduce any evidence that they served these items on Petitioner's 1983 to 1987 trial counsel, notwithstanding the State's continuing duty to do so, even where no defense request has been made for Brady and 412(c) proofs. [Note that the prosecutor has a *continuing* constitutional and statutory duty to disclose Brady and 412(c) evidence, or evidence that is favorable and material to a defendant's case, whenever that information comes to its attention or is discovered, even where *no defense request* has been made. People v. Clemons, 277 Ill.App.3d 911, 917 (1st Dist. 1996; People v. Gennardo, 184 Ill.App.3d 287, 303 (1st Dist. 1989). Hence, the prosecution was required to disclose any Brady and 412(c) material in its possession or control not only to Mr. Weston, pursuant to his discovery request, but also to Mr. Morrissey and/or Mr. Reddy, as Petitioner's 1983 to 1987 trial counsel, who apparently made no request for Brady and 412(c) evidence based on the evidence of this proceeding. In any event, the prosecution had a continuing duty to disclose such evidence to Mr. Morrissey and/or Mr. Reddy pursuant to Mr. Weston's 1978 request].

e. Mr. Thomas Decker became Petitioner's attorney for purposes of litigating this 2-1401 petition as of May 1st, 1997. This finding is based on Mr. Decker's affidavit dated April 11th, 1999 and similar oral representations made by him to the Court at the evidentiary hearing. (Petitioner's Second Add'l Auth's Ex. B., paras 1.-4.; Tr.of Evidentiary Hr'g of 4/30/99, at 187). According to Atty. Decker, in May or June of 1997 (which the Court will deem May 1st, 1997), Ms. Gray requested that Mr. Decker "attempt to assist her in vindicating her [2-1401] rights" and Atty. Decker "agreed to do so." (Petitioner's Second Add'l Auth's Ex. B., paras. 1.-4.). Mr.

Decker further asserted that prior to that date, or in February of 1996, he first represented Paula Gray in her capacity as a potential State witness in the Jimerson case. (Tr. of Evidentiary Hr'g of 4/30/99, at 187; Tr. of Evidentiary Hr'g of 5/4/99, at 196). The Court holds that Mr. Decker's foregoing affidavit and oral representations are credible and honest, and that Mr. Decker was not granted the authority by Ms. Gray, nor did he accept the authority, to represent her in this post-judgment proceeding until May 1st, 1997. As such, he did not become her counsel in this litigation until May 1st, 1997. [See Petitioner's Second Add'l Auth's Ex. B paras. 1.-4.; McConnell v. McPartlin, 192 Ill.2d 505, 528 (2000), holding that "[t]he trial judge's determination as to counsel's credibility is entitled to great deference"; Simon v. Wilson, 291 Ill.App.3d 495, 509 (1st Dist. 1997), holding that "[t]he attorney-client relationship is consensual and arises only when both the attorney and the client have consented to its formation...[and] [citation omitted] [t]he client must manifest her authorization that the attorney act on her behalf, and the attorney must indicate his acceptance of the power to act on his client's behalf. [citation omitted]." Simon concluded by reiterating case law authority that "[a]n attorney's duty to a client is measured by *the representation sought by the client* and *the scope of the authority conferred*" (emphasis added); In re Estate of Wrage, 194 Ill.App.3d 117, 125 (1st Dist. 1990), where the First District found that attorneys in this case "never represented respondent in any matter," because "[t]here [was] nothing in the record indicating that *respondent manifested her authorization that the attorneys act on her behalf,* or that *the attorneys indicated an acceptance of that power*" (emphasis added)].

Also, Respondent has introduced no counter-affidavit or other evidence controverting these affidavit and oral assertions by Mr. Decker, which is an additional grounds upon which the Court renders a finding of fact as to Mr. Decker's sworn statements that he did not represent Ms. Gray for purposes of this petition until May 1st, 1997. See Chicago Judo and Karate Ctr., 328 N.E.2d at 95, 27 Ill.App.3d at 1077.

[Note in addition that the May 1st, 1997 date that Thomas Decker became Ms. Gray's attorney for purposes of litigating this petition was prior to her retention of John R. Berg in this proceeding. This finding is based on the fact, as previously determined, that Mr. Decker began representing Ms. Gray in February of 1996 in the Verneal Jimerson grand jury and retrial proceedings, which was prior to the May 1st, 1997 inception of his post-judgment representation of Paula Gray. Neither in Mr. Decker's oral representations to the Court (see Tr. of Evidentiary Hr'g of 4/30/99, at 187; Tr. of Evidentiary Hr'g of 5/4/99, at 196; Memorandum "Evidentiary Hearing" Paula Gray at 115), nor his April 11th, 1999 affidavit (see Petitioner's Second Add'l Auth's Ex. B), did he make any reference that Mr. Berg was his co-counsel or predecessor counsel for Ms. Gray in either the Verneal Jimerson matters, or on the May 1st, 1997 date of inception of his post-judgment representation of Petitioner. Further support for the Court's determination is that:

- Professor Protess stated in his January 8th, 1999 deposition testimony in the civil actions emanating from the Lionberg/Schmal matter that he referred Ms. Gray to Mr. Decker, and no other attorney, in or about February of 1996. (Respondent's Joint Mot. Ex. H at 114-117); note that Professor Protess indicated only "February 8th " as the date of his referral in the excerpt of his deposition testimony, but recall Mr. Decker's oral representations to the Court, previously

found credible, that he began representing Paula Gray in February of *1996*. (See Respondent's Joint Mot. Ex. H at 114-16; Tr. of Evidentiary Hr'g of 5/4/99, at 196);

- on June 18th, 1996, when Ms. Gray gave her statement to Inv. Kelly regarding her February 8th, 1996 recanting affidavit in support of Dennis Williams' Motion for Remand to the Trial Court, Mr. Decker, and no other attorney, was present to represent her in this interview. (See Respondent's Joint Mot. Ex. G at 041098; Memorandum "Preliminary Findings of Law" para. 4., at 240; see also "Findings of Fact" para. 1., at 185-86);

- Thomas D. Decker, and no other attorney, filed Ms. Gray's federal civil action under Case No. 97 C 4698 against Cook County and other parties emanating from the Lionberg/Schmal matter. (See Memorandum "Judicial Notice" para. 7.a., at 227; para. 6.f. below; Petitioner's Second Add'l Auth's Ex. B at para. 5);

- Thomas D. Decker, and no other attorney, filed Ms. Gray's state civil action under Case No. 98 L 5019 against Cook County and other parties emanating from the Lionberg/Schmal matter (see Memorandum "Judicial Notice" para. 7.a., at 227; para. 6.f. below; Petitioner's Second Add'l Auth's Ex. B at para. 5.), and;

- John R. Berg was not Ms. Gray's counsel, of record, in any of the civil actions arising out of the Lionberg/Schmal case (Case Nos. 97 C 4698 and 98 L 5019) until the filing of the herein petition on March 2nd, 1999].

f. On July 1st, 1997, Mr. Decker instituted a civil action in federal court on behalf of Ms. Gray emanating from the Lionberg/Schmal matter entitled Gray v. Pastirik, 97 C 4698, U.S. Dist.Ct., N.D. Ill. (Petitioner's Second Add'l Auth's Ex. B. para. 5.; Memorandum "Judicial Notice" para. 7.a., at 227 (judicial notice of the matters contained in the foregoing statement)). On April 30th, 1998, Mr. Decker filed this case in the Circuit Court of Cook County, Law Division, Case No. 98-L-005019, upon transfer from the Northern District Court. (Petitioner's Second Add'l Auth's Ex. B. para. 5.; Memorandum "Judicial Notice" para. 7.a., at 227 (judicial notice of the matters contained in the foregoing statement));

g. On March 2nd, 1999, Mr. Decker and Mr. Berg filed Ms. Gray's herein petition (Nos. 78-4865, 84 C 5343[sic]) in the Circuit Court of Cook County, Sixth Municipal District. (See Petitioner's 2-1401 Mot. for Clerk of Circuit Court's file date stamp);

h. The Court finds that subsequent to the July 1st, 1997 filing by Ms. Gray of her civil case in federal court, Mr. Decker received the following ten (10) items of alleged Brady (and 412(c)) evidence on the dates indicated later in this paragraph (6.h.). This finding is based on Mr. Decker's affidavit asserting that Petitioner did not receive these items until after the July 1st, 1997 filing of her civil case, which the Court finds credible and honest, and consistent with the evidence in this proceeding. An additional ground for this finding is that with the exception of part of the evidence of Item No. 10, the People have introduced no counter-affidavit or other evidence controverting Mr. Decker's affidavit that he received these ten (10) items of evidence after July 1st, 1997, pursuant to Petitioner's civil action as set forth in para. 6.f. above. Therefore, these affidavit assertions by Mr. Decker must be accepted by the Court as true. See Hiram Walker Distributing Co., 99 Ill.App.3d at 881.

Also, the Court can reasonably conclude, and rules that Petitioner was neither aware of nor received any of the ten (10) items of alleged Brady (and 412(c)) evidence, prior to the July 1st, 1997 institution of her federal civil law suit, including during her 1979 and 1987 judgements, or other evidence of government misconduct, based on her affidavit statement in this matter and evidentiary hearing testimony, which the Court views as credible, that she did not receive or become aware of this information until after the foregoing lawsuit was commenced. (Memorandum "Judicial Notice" para. 7.a., at 227 (judicial notice that Mr. Decker filed civil action in federal court on July 1st, 1997); Petitioner's Second Add'l Auth's Ex. A. para. 2.; Tr. of Evidentiary Hr'g of 4/30/99, at 129-31; Memorandum "Evidentiary Hearing" Paula Gray at 112). Further support for this finding is provided by Mr. Decker's assertions in this paragraph regarding Petitioner's non-receipt of the alleged Brady (and 412(c)) evidence until after July 1st, 1997; Mr. Weston's testimony regarding the People's failure to disclose to him, after request, seven (7) of the ten (10) items alleged by Petitioner as constituting Brady and (412(c)) evidence (Tr. of Evidentiary Hr'g of 4/28/99, at 204-05, 210, 217, 218-19, 225, 227, 230, 231-32, 232, 234-35; Memorandum "Evidentiary Hearing" Archie B. Weston, Sr. at 47, 48, 48-49, 49, 50; Memorandum "Findings of Fact" para. 6.b., at 211-13); and the Court's "Findings of Fact" para. 6.d., at 213-14, regarding George Morrissey's and James Reddy's non-receipt of these items, coupled with the failure by Respondent to make any showing that they did not violate their initial and continuing duty to disclose Brady (and 412(c)) evidence (including the knowing use of perjured scientific testimony) regarding Ms. Gray and the Ford Heights Four.

[As previously noted, some of the evidence of Item No. 10, or the CCSPD's "Motor Vehicle Incident Case Report" by Inv. R. Nigro, and CCSPD Evidence Technician's Report dated August 26th, 1978 for a Buick 225, was disclosed to Petitioner when she was represented by the Public Defender's Office. (See Respondent's Group Ex. 11 Items J, K; Petitioner's Add'l Auth's and Mat'ls Ex. 10). However, according to oral representations by Mr. Decker to the Court, the public defender was Petitioner's counsel in both her 1987 case, as well as in connection with the pending Jimerson trial in January of 1996. (Tr. of Evidentiary Hr'g of 5/4/99, at 196). Also, as previously indicated, Mr. Decker stated that he "took over" Ms. Gray's representation in this case from a public defender in February of 1996 who had been appointed to represent her in the Jimerson case. (Tr. of Evidentiary Hr'g of 5/4/99, at 196). Again, the Court finds his representations as an attorney credible and honest, and renders a finding of fact as to same. Based on the foregoing evidence, the Court cannot find for Respondent that their foregoing actions constitute disclosure of Item No. 10 prior to Petitioner's 1987 perjury judgment. First, there has been no showing in this proceeding that Petitioner's counsel received this evidence either prior to or during 1987, as opposed to 1996. Also, and more significantly, even assuming the People disclosed this evidence during Ms. Gray's 1987 case, they only effected partial disclosure of Item Nos. 1 through 10 in para. 6.a. above, which Ostendorf, 89 Ill.2d at 282, has ruled does not constitute "full and truthful" disclosure as contemplated by the Illinois discovery rules, and would therefore constitute fraudulent concealment (until disclosure of all ten items) for purposes of tolling the two-year post-judgment statute of limitations. Furthermore, again assuming the People disclosed this evidence prior to Petitioner's 1987 plea, the State did not even effect full disclosure of Item No. 10 in that they divulged only two of the five items of evidence as set forth in Petitioner's Add'l Auth's and Mat'ls Ex. 10, and failed to include the Bureau of Identification Receipt dated "8/28/78," the two-page property receipt for four items of

property "for court," as well as Michael Podlecki's September 15th, 1978 forensic report stating the results of his examination of the 225 Buick. (See Respondent's Group Ex. 11 Item K). Therefore, the Court finds that the People did not disclose Item No. 10 during either Petitioner's 1987 plea *or* 1996 (Jimerson) matter].

The dates that Respondent effected disclosure of the ten (10) items of alleged Brady (and 412(c)) evidence to Petitioner are as follows:

Item No. 1 - January 28th, 1999 based on the date of the cover letter from ASA Burnham for prosecution materials produced for Petitioner, including Item No. 1 (Petitioner's Add'l Auth's and Mat'ls Ex. 14, at [1]);

Item No. 2 - July 1st, 1997 based on the filing date of the civil proceeding in federal court as set forth in para. 6.f. above and pursuant to which Petitioner received her ten alleged Brady (and 412(c)) proofs;

Item No. 3 - July 1st, 1997 based on the filing date of the civil proceeding in federal court as set forth in para. 6.f. above and pursuant to which Petitioner received her ten alleged Brady (and 412(c))proofs;

Item No. 4 - July 1st, 1997 based on the filing date of the civil proceeding in federal court as set forth in para. 6.f. above and pursuant to which Petitioner received her ten alleged Brady (and 412(c)) proofs;

Item No. 5 - July 1st, 1997 based on the filing date of the civil proceeding in federal court as set forth in para. 6.f. above and pursuant to which Petitioner received her ten alleged Brady (and 412(c)) proofs;

Item No. 6 - January 15th, 1999 based on Michael Podlecki's deposition testimony of the foregoing date in the civil actions of Petitioner and the Ford Heights Four emanating from the Lionberg/Schmal case (Petitioner's Add'l Auth's and Mat'ls Ex. 16);

Item No. 7 - January 15th, 1999 based on Michael Podlecki's deposition testimony of the foregoing date in the civil actions of Petitioner and the Ford Heights Four emanating from the Lionberg/Schmal case (Petitioner's Add'l Auth's and Mat'ls Ex. 16);

Item No. 8 - January 15th, 1999 based on Michael Podlecki's deposition testimony of the foregoing date in the civil actions of Petitioner and the Ford Heights Four emanating from the Lionberg/Schmal case. (Petitioner's Add'l Auth's and Mat'ls Ex. 16);

Item No. 9 - January 28th, 1999 based on the date of the cover letter from ASA Burnham for prosecution materials produced for Petitioner, including Item No. 9 (Petitioner's Add'l Auth's and Mat'ls Ex. 14, at [1]);

Item No. 10 - July 1st, 1997 based on the filing date of the civil proceeding in federal court as set forth in para. 6.f. above and pursuant to which Petitioner received her ten alleged Brady (and 412(c)) proofs;

i. The transcript of Martin Carlson's March 4th, 1987 testimony at Dennis Williams' sentencing hearing for his 1987 conviction constitutes a court document which includes Dennis Johnson's August 18th, 1980 statement to

Mr. Carlson, Rene Brown, James Williams, Margaret Roberts, and [Mara Siegal]. (Respondent's [Evidentiary Hr'g] Ex. 8, at 3-5, 7, 8-9; Respondent's Group Ex. 11 Item A at 3-5, 7, 8-9). Mr. Carlson's testimony related a statement by Dennis Johnson which was essenti

ally the same as that indicated by the two below referenced news articles, including an assertion that the Ford Heights Four were not responsible for the subject crimes, and that he (Dennis Johnson) knew the names of the four men responsible (not including him),

but he didn't name these men, and indicated he would testify against three of the four men only if he was granted immunity, because he feared prosecution and retaliation. Mr. Johnson also related that he probably would not testify against his friend under any circumstances

, who was one of the four men involved, along with adding that his friend told him that the vehicle used in the crimes was an off-gray 1970 or 1971 Buick Electra 225; that two guns, or a .25 caliber and a .38 caliber, were used in the subject offenses; that he

(Dennis Johnson) bought the .38 used in the crimes from one of the four men who "virtually admitted he shot Ms. Schmal," and sold it to a friend who went to Minnesota; and that he (Dennis Johnson) had bought one of the leather and blue jean vests taken

from the gas station for seven dollars from the same man who sold him the .38. The People's (or Scott Arthur's) cross-examination of Mr. Carlson contested the veracity of this testimony.

The news accounts contained in the Chicago Lawyer article dated July, 1982, entitled "Will We Execute An Innocent Man?," by Rob Warden (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 11A), and The Star article dated June 7, 1984, entitled "For some, the mystery remains," by Michael Walsh (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 10A), constitute public knowledge information as of the dates of these articles. The relevant public knowledge information of the Chicago Lawyer article, which is hearsay, was that an unnamed "potential witness" interviewed by Mr. Warden indicated that he was with three men (none of which were the Ford Heights Four) in a 1971 Buick Electra who used a ".38" gun to rob the subject Clark station near Homewood of "cigarettes, money, soda pop

and some vests" and abduct Larry Lionberg and Carol Schmal "so they would not call police." (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 11A, at 8/004882). [See also Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 11A, at 2/004876, regarding Mr. Warden's indication in the Chicago Lawyer article that "neither physical evidence nor eyewitness testimony–...link [Dennis Williams, who was awaiting execution,] to the [Lionberg/Schmal] crimes." The article's unnamed "potential witness" further stated that "[a]fter driving for awhile, [he] asked to be dropped off" and later learned from the driver of the Electra that "'things had gotten out of hand and that they had killed the attendant and the girl.'" (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 11A, at 8/004882)].

The relevant public knowledge information of the Star article, also hearsay, was the identification of the unnamed "potential witness" in Mr. Warden's July, 1982 Chicago Lawyer article as Dennis Johnson, who "[had] not volunteered to come forward" and gave essentially the same account of the Lionberg/Schmal crimes as in the July, 1982 article, but added that the Clark Station was on Halsted near Homewood; identified one of the three other men as an "unnamed Hispanic" and another of the perpetrator's as "a light-skinned black man known as 'Red.'" (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 10A). The article also indicated that Dennis Johnson "wanted to 'deal' with prosecutors for immunity from prosecution in exchange for his story." (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 10A). The article additionally stated that Dennis Williams identified Dennis Johnson and Johnson's fear to come forward in a statement or petition Mr. Williams filed with the U.S. Supreme Court on September 1st, 1980. (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 10A). That petition also contained a quote from James Williams, Dennis Williams' brother, that Dennis Johnson wanted to tell his account to a judge if he could be protected and paid "before he risked dying." (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 10A). In addition, according to the petition, Dennis Johnson claimed "'he knew who shot them folks' and where authorities could find the gun used in the slayings," which the police never recovered. (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 10A). The story noted ASA Scott Arthur's remarks that they "couldn't subpoena" Rob Warden after publication of his July, 1982 article because there "'was no trial in progress,'" which the article indicated could change that summer with the pending retrial of Williams and Rainge. (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 10A).

The Court finds both Petitioner and Respondent to have been aware of the contents of the above referenced documents as of July, 1982 for the Chicago Lawyer article, as of June 7, 1984 for the Star article, and as of March 4th, 1987 for Martin Carlson's testimony. [See People v. Nischt, 23 Ill.2d 284, 291 (1961), finding defendant knowledgeable with respect to

information (or favorable evidence) "widely publicized" by local newspapers; In re Marriage of Johnson, 232 Ill.App.3d 1068, 1074 (4th Dist. 1992), holding that "[t]he file of a court case is a public record to which the people and the press have a right of access"].

The Court also finds, based on a review of these materials, that none of the ten (10) items of alleged Brady (and 412(c)) evidence is contained in these three (3) documents. In fact, only the Capelli notes (or Item No. 4) bear any substantive similarity to the foregoing materials, but these notes are significantly different in that they (or Marvin Simpson) *name each of the four perpetrators of the Lionberg/Schmal crimes* within days of Ms. Gray's May 16th, 1978 grand jury testimony and years before the two news articles and Martin Carlson's testimony. Also, Marvin Simpson was arguably available to testify on behalf of Petitioner or the Ford Heights Four during their 1978, 1985 and 1987 trials, as contrasted with Dennis Johnson's reticence to come forward, absent prosecutorial immunity. Lastly, Mr. Carlson's foregoing testimony was hearsay on hearsay, because Dennis Johnson's August 18th, 1980 account of the crimes to Mr. Carlson was based on what a "friend" had told him, while the two news accounts contain both hearsay, and hearsay on hearsay accounts by Dennis Johnson (i.e. the reporter's hearsay account of Dennis Johnson's personal account about the robbery and abduction up to the time he was "dropped off at the pool hall," and the latter half of Mr. Johnson's story to the Star reporter about the rapes and murders, which was hearsay on hearsay, because it consisted of Dennis Johnson repeating to the reporter what the driver of the Buick Electra 225, or a friend, had purportedly told Mr. Johnson). A newspaper article is a collection of hearsay statements and thus constitutes improper "new evidence" for collateral relief. Also, the Respondent, who would appear to be arguing that these documents constitute public knowledge information chargeable to Ms. Gray as of the dates they were published or rendered, and thus defeat her petition on due diligence grounds, has not explained why this hearsay would be admissible at a newly granted trial for any purpose, and therefore constitute appropriate evidence in support of Ms. Gray's post-judgment action. Recall also, as previously noted, that Dennis Johnson refused to cooperate with the authorities or to testify in support of the Ford Heights Four unless he received immunity, which only the State, and not Petitioner or her counsel, had authority to grant. [See Patterson, 192 Ill.2d at 125, which in rejecting the sufficiency of a newspaper article, among other proofs, as new evidence which petitioner's counsel allegedly failed to file in support of his post-conviction action, thereby rendering counsel ineffective, stated that "a newspaper article...is simply a collection of hearsay statements [and the] defendant fail[ed] to explain why this hearsay would have been admissible [on retrial] for any purpose"; People v. Silas Jayne, 52 Ill.App.3d 990, 1016 (1st Dist. 1977), which denied a post-

judgment petition on, among other grounds, that "[t]he newspaper articles produced by the defendants [in support of their section 72 action], insofar as they supported the notion that illegally obtained evidence had been used against the defendants [pursuant to information provided by unnamed "I.B.I. sources"], were hearsay in the extreme, or hearsay on hearsay, as were the allegations of the petition itself." See also People v. Frascella, 81 Ill.App.3d 794, 798 (1st Dist. 1980), holding that "[t]he right to grant immunity is a power awarded to the State by the legislature"], and;

j. Mr. Rob Warden's evidentiary hearing testimony regarding his 1982 interview of Mr. Charles McCraney is not "new evidence" for purposes of Ms. Gray's post-judgment petition. This finding is based on Rob Warden's July, 1982 Chicago Lawyer article referenced by para. 6.i. above, which contains the same information as his foregoing testimony in the hearing, and therefore constitutes public knowledge information in existence prior to Petitioner's April 23, 1987 perjury judgment. [Recall Patterson's ruling that "new evidence" consists of proofs existing *after* the judgment sought to be vacated. Patterson,192 Ill.2d at 139].

7. Michael Podlecki testified at the evidentiary hearing that prior to Petitioner's 1978
trial, ASA Cliff Johnson asked him if "[he] was familiar" with the Royal Canadian Mounted Police hair comparison (or Gaudette) study, to which Mr. Podlecki responded that "[he] read it." (Tr. of Evidentiary Hr'g of 4/29/99, at 168; Memorandum "Evidentiary Hearing" Michael Podlecki at 70). Mr. Johnson also asked Mr. Podlecki if he was "familiar with the probability of one in 45 hundred," to which Michael Podlecki responded that he was. (Tr. of Evidentiary Hr'g of 4/29/99, at 170; Memorandum "Evidentiary Hearing" Michael Podlecki at 70).

Mr. Podlecki additionally explained at the evidentiary hearing that the Royal Canadian "study said," or "what Mr. Gaudette...did in his study," was that if two hairs appear to be similar, the odds are 4500 to one against those hairs coming from different people. (Tr. of Evidentiary Hr'g of 4/29/99, at 168-69; Memorandum "Evidentiary Hearing" Michael Podlecki at 70). He then indicated that this Royal Canadian or Gaudette study neither had anything to do with, nor could be compared with the kind of hair comparison examination conducted in 1978 by the Illinois Forensic Crime Lab [or Illinois Department of Law Enforcement's Bureau of Scientific Services] in the Ford Heights Four case, because the Crime Lab looked at three basic characteristics, while the Gaudette study "did a lot of different types of comparisons" [or apparently an examination of at least 20 characteristics]. (Tr. of Evidentiary Hr'g of 4/29/99, at 169, 170-71, 173; Memorandum "Evidentiary Hearing" Michael Podlecki at 70). Mr. Podlecki also stated at the evidentiary hearing that in 1978 there were no studies for odds of two similar-looking hairs coming from different

people when the examiner had looked at two or three points of comparison [as did the forensic lab in the Ford Heights Four case]. (Tr. of Evidentiary Hr'g of 4/29/99, at 192; Memorandum "Evidentiary Hearing" Michael Podlecki at 70). According to Mr. Podlecki's evidentiary hearing testimony, he related the one in 4500 odds to Petitioner's 1978 trial jury in response to ASA Johnson's questions. (Tr. of Evidentiary Hr'g of 4/29/99, at 170, 172; Memorandum "Evidentiary Hearing" Michael Podlecki at 70). [Note that Michael Podlecki testified before juries for both Petitioner, and Williams, Rainge and Adams, at their 1978 trial. See Petitioner's Add'l Auth's and Mat'ls Ex. 15 for text of Archie Weston's October 12th, 1978 cross-examination of Mr. Podlecki in the case of "People v. Paula Gray," "Indictment No. 78 C 4865"].

[Additionally note that ASA Johnson made a substantially revealing remark in the transcript of the August, 1978 grand jury which appears to have indicted Petitioner (or G.J. No. 401), when he responded to a grand juror's question about the accuracy of hair samples as a means of identification, apparently in reference to Inv. Pastirik's earlier testimony to the grand jury that Mr. Podlecki's report to the CCSP "stated there were no dissimilarities between the hair standards taken from victim [sic][Schmal and Lionberg] and the hair exemplars recovered from [Dennis Williams' red Toyota]." (Respondent's Group Ex. 11 Item K at PD00112-13, 119-20, 129). ASA Johnson stated that "[he has] been told [the accuracy of hair identification testimony] is one in forty-two hundred." In view of Mr. Podlecki's evidentiary hearing testimony that there were *no odds* for the type of hair comparison tests he conducted in the Lionberg/Schmal case, which the Court finds credible, Mr. Johnson was obviously relating to jurors, as early as August of 1978, the odds of the Canadian study which bore no relationship to the evidence of Mr. Podlecki's hair examination results in the subject case. (Respondent's Group Ex. 11 Item K at PD00129-30). Also, as previously noted, the Illinois Supreme Court opinion for Dennis Williams' 1978 trial, who was tried jointly with Petitioner (as well as Willie Rainge and Kenneth Adams), confirms that Mr. Podlecki testified about the Royal Canadian hair comparison study and its 4500 to 1 odds, and also that he made no reference to his evidentiary hearing testimony about this study and its odds having nothing to do with the type of hair comparison study conducted by he and the Illinois Forensic Crime Lab in the Ford Heights Four case. In addition, the Gaudette study and odds were elicited from Mr. Podlecki by ASA Johnson on re-direct, after Mr. Podlecki had previously testified on cross-examination that he could not say with certainty that the hairs found in Mr. Williams' vehicle in fact came from the victims. Williams, 93 Ill.2d at 321].

The Court finds the above referenced uncontroverted evidentiary hearing testimony of Mr. Podlecki credible, because it constitutes his admission, or statement against penal interest, as previously discussed in this Memorandum "Findings of Fact" para. 6.a., Item No. 6, at 207; see also "Preliminary Findings of Law" para. 8., at 298-99. As such, the Court renders a finding of fact with respect to this testimony. The Court additionally finds that ASA Johnson was aware of and in fact presented the odds of the Canadian study (albeit somewhat erroneously) to grand jurors who apparently indicted Ms. Gray in August or September of 1978, and also to the jurors of Petitioner's 1978 trial, and that he raised the existence of this study and its odds with Mr. Podlecki prior to his forensic testimony in Petitioner's 1978 trial. Therefore, ASA Johnson knew, or certainly should have known, in view of the foregoing evidence showing his familiarity with the Gaudette study and its odds, that both the Canadian study and its odds (heavily favoring the state) were unrelated to the type hair comparison tests conducted and testified to in 1978 by Mr. Podlecki in the Lionberg/Schmal case, for which there were no studies indicating odds. Nor has the Respondent presented any controverting evidence, which provides additional support for this finding of fact.

8. Petitioner has alleged three evidentiary items in support of her actual innocence
grounds consisting of vacatur of the judgments and dismissal of the charges for the Lionberg/Schmal crimes against the Ford Heights Four, as well as gubernatorial pardon of these four men based on their innocence of the subject offenses; arrest and conviction of the real perpetrators of these offenses (Ira Johnson, Aruthur Robinson and Juan Rodriguez, with Dennis Johnson being deceased); and three affidavits from two of the real perpetrators (Ira Johnson and Arthur Robinson) stating that Paula Gray was not in any way involved in the subject crimes.

The Court finds that the documents evidencing the gubernatorial pardons filed in this matter by Petitioner (see Petitioner's Add'l Auth's and Mat'ls Ex. 18), and also the certified court transcripts, Cook County Circuit Court and Circuit Court Clerk documents judicially noticed in this Memorandum "Judicial Notice" paras. 4., 5.c., 6.e.-i., at 225, 225-26, 226-27, showing or confirming the vacatur of the judgments and dismissal of the charges for the Lionberg/Schmal crimes against the Ford Heights, as well as the convictions and sentencing of Ira Johnson, Arthur Robinson and Juan Rodriquez for the subject offenses, constitute public documents which are "readily verifiable from sources of indisputable accuracy," as to which the Court renders a finding of fact for the information contained therein. See People v. Henderson, 171 Ill.2d 124, 134 (1996) cited in Memorandum "Judicial Notice" at 224.

The affidavits of Ira Johnson and Aruthur Robinson exonerating Ms. Gray are corroborated, at least implicitly, by:

- the June 24th, 1996 trial court dismissal of Verneal Jimerson's indictment charging these crimes; the People's July 2nd, 1996 agreement to the grant of a new trial for Williams, Rainge and Adams and then moving for and being granted dismissal of all the indictments charging the Lionberg/Schmal crimes against these three co-defendants;
- the DNA testing exonerating the Ford Heights Four and linking other(s) to the subject offenses;
- the People's theory of prosecution throughout the course of three trials involving the Ford Heights Four (1978, 1985 and 1987) that *four men* were the principals of the Lionberg/Schmal crimes, their error, of course, being the identity of the four individuals;
- the gubernatorial pardon of the Ford Heights Four based on their innocence of the subject offenses, and;
- the People's arrest, prosecution and conviction of Ira Johnson, Arthur Robinson and Juan Rodriquez for the subject crimes.

When the foregoing proofs are combined with the evidence of this proceeding that clearly establishes Paula Gray neither associated with nor even knew any of the real perpetrators of the subject offenses, or Dennis Johnson, Ira Johnson, Arthur Robinson and Juan Rodriquez, there is substantial corroboration of the truthfulness of Ira Johnson's and Arthur Robinson's affidavits attesting to Ms. Gray's non-involvement in the Lionberg/Schmal offenses. Respondent has not presented any counter affidavits or proofs. Therefore, the Court finds that these affidavits are both reliable and truthful, and renders a finding of fact as to the information contained therein.

B. Judicial Notice

In Henderson, 171 Ill.2d at 134, the Illinois Supreme Court affirmed the trial court's exercise of judicial notice of copies of decisional law in a post-conviction proceeding ruling that:

[i]t is well established that courts may take judicial notice of matters which are commonly known or, if not commonly known, are readily verifiable from sources of indisputable accuracy. [citations omitted] The cases defendant offered with his post-conviction petition are public documents which fall within the category of readily verifiable matters. (See also May Dept. Stores Co. v. Teamsters Union Local No. 743, 64 Ill.2d 153, 159 (1976), stating that "no sound reason exists to deny judicial notice of public documents which are included in the records of other courts"; Kirchner v. Greene, 294 Ill.App.3d 672, 677 (1st Dist., 1998),

ruling that facts in a prior court opinion are subject to judicial notice; All Purpose Nursing Service v. Human Rights Commn., 205 Ill.App.3d 816, 823 (1st Dist. 1990), stating that "the circuit courts may take judicial notice of matters of record in other cases in the same court.").

Based on the above referenced case law, the Court takes judicial notice of the
following matters, as well as the information contained in the below cited documents:

1. The Illinois Appellate and Supreme Court opinions for Paula Gray
(People v. Gray, 87 Ill.App.3d 142 (1st Dist. 1980)), Dennis Williams (People v. Williams, 93 Ill.2d 309 (1982); People v. Williams, 147 Ill.2d 173 (1991)), Verneal Jimerson (People v. Jimerson, 127 Ill.2d 12 (1989); People v. Jimerson, 166 Ill.2d 211 (1995)), and Willie Rainge (People v. Rainge, 112 Ill.App.3d 396 (1st Dist. 1983); People v. Rainge, 211 Ill.App.3d 432 (1st Dist. 1991)), in the matter of the Lionberg/Schmal crimes.

2. The November 16th, 1983 opinion of the United States Court of Appeals for the Seventh Circuit (U.S. ex rel. Gray, 721 F.2d 586 (1983)), and the May 7th, 1984 order of the United States District Court, Northern District of Illinois, Eastern Division (Cause No. 81 C 4545)(Hon. Susan Getzendanner) granting Petitioner's writ of habeas corpus. The text of the May 7th order states, in relevant part, that:

Judge Paul F. Gerrity, Presiding Judge, Sixth District Circuit Court of Cook County, Markham, Illinois, is directed to release petitioner Paula Gray on July 7, 1984 if she has not been retried by that date.

3. a. The Circuit Court of Cook County, County Department -- Criminal Division "Memorandum of Orders," or judicial half sheet, in the matter of "The People of the State of Illinois v. Paula Denise Gray, Case No. 78 C 4865," indicating the "Date[s]," "Judge[s]," and "Orders Entered" for this Sixth Municipal District proceeding from "9-5-78" through "5-11-84" ["8-18-86" lists "Samuels" as the judge presiding over this matter on that date, but has no entry under "Orders Entered"];

b. The Circuit Court of Cook County, County Department -- Criminal Division "Memorandum of Orders," or judicial half sheet, in the matter of "The People of the State of Illinois v. Paula Denise Gray, Case No. 84 C 5543," indicating the "Date[s]," "Judge[s],"
and "Orders Entered" for this Sixth Municipal case from "5-11-84" through "12-06-99" ;

4. The transcript of Verneal Jimerson's Motion to Dismiss Indictment of 6/24/96, in the matter of "The People of the State of Illinois v. Verneal Jimerson," No. PC 84 C 14214, before Hon. Sheila Murphy;

5. a. The Certified Statement of Conviction/Disposition from the Clerk of the Circuit Court of Cook County, Illinois, in the matter of the "People of the State of Illinois vs. Dennis Williams," No. 84 C 60529101, indicating that Mr. Williams' 1987 trial for the Lionberg/Schmal crimes was commenced before Judge Meekins on January 15th, 1987, that on February 13th, 1987 he was found guilty of five counts of murder, one count of rape, and three counts of aggravated kidnapping, and on March 4th, 1987 was sentenced to death for one count of murder, and on April 16th, 1987 was sentenced to death for four counts of murder and 30 year concurrent sentences for each of the remaining charges for which he was convicted consisting of one count of rape and three counts of aggravated kidnapping [when read in conjunction with People v. Williams, 147 Ill.2d at 196. Note, however, that the Williams opinion indicates that Mr. Williams received "concurrent terms of 30 years," along with a sentence of death, while the "Certified Statement of Conviction/ Disposition" indicates that Dennis Williams' received a *60* year sentence for rape "to run concurrent" with 30 year sentences for each of the three aggravated kidnapping counts, in conjunction with a death sentence. The Court, of course, will follow the opinion of the Illinois Supreme Court, and further notes that the foregoing "60" year notation on Mr. Williams' "Conviction/Disposition" statement appears to be a typographical error];

b. The Certified Statement of Conviction/Disposition from the Clerk of the Circuit Court of Cook County, Illinois, in the matter of the "People of the State of Illinois vs. Willie Rainge," No. 84 C 60529102, indicating that Mr. Rainge's trial for the Lionberg/Schmal crimes was commenced before Judge Meekins on January 15th, 1987, that on February 13th, 1987 he was found guilty of murder, rape and aggravated kidnapping, and that on March 10th, 1987 was sentenced to life imprisonment for murder and 30 years for each of the remaining offenses for which he was convicted;

c. The transcript of Dennis Williams, William Rainge and Kenneth Adams' Petition for Post-Conviction Relief of 7/2/96, in the matter of "The People of the State of Illinois v. Dennis Williams, William Rainge, Kenneth Adams," Case Nos. 84 C6 5291, 78 I6 5186, before Hon. Thomas R. Fitzergerald;

6. a. The Certified Statement of Conviction/Disposition from the Clerk of the Circuit Court of Cook County, Illinois, in the matter of the "People of the State of Illinois vs. Ira Johnson," No. 91 CR 2596601 [note that the "01" suffix to case number 25966 identifies defendant "01," or Ira Johnson, in a multiple defendant case], indicating that this matter was commenced against Ira Johnson on or about October 31, 1991, and that on March 21st, 1995 he was adjudged guilty of the murder of a Matteson woman [when read in conjunction with item 6.b. below];

b. The Certified Plea Transcript in the matter of "The People of the State of Illinois vs. Ira Johnson," No. 91 CR 25966, dated March 21, 1995, before the Hon. John A. Wasilewski, in which Mr. Johnson pled guilty to the murder of a Matteson woman;

c. The Circuit Court of Cook County Adult Probation Department Investigative [or Pre-Sentence] Report by Dave Madden, Adult Probation Officer, dated March 22, 1995, for Ira Johnson, DOB April 22, 1960, IR# 770081, FBI# 841338EAO, Case No. 91 CR 2596601, Judge John Wasilewski;

d. The Certified "All Criminal Index" for Ira Johnson from the Clerk of the Circuit Court of Cook County regarding Case# 91 CR 2596601, DOB "042260", FBI# 841338EAO; and Case# 96 CR 1914501, IR# 0770081; which documents verify that on March 21, 1995, before the Hon. John A. Wasilewski, Ira Johnson pled guilty to murder, and that on March 24, 1995, also before Judge Wasilewski, Ira Johnson was sentenced to 74 years imprisonment in the Illinois Department of Corrections. Ira Johnson entered the foregoing guilty plea and received the 74 year sentence for the murder of a Matteson woman in October, 1991 [when read in conjunction with items 6.b.-c. above]. Also, the Ira Johnson in Case No. 91 CR 2596601 is the same Ira Johnson subsequently convicted and sentenced to life imprisonment on June 16th, 1997, under Case# 96 CR 1914501, for the Lionberg/Schmal murders [when read in conjunction with items 6.a-c., e.-g.];

e. Ind. No. 452 dated August 9, 1996, in the matter of The People of the State of Illinois v. Ira Johnson (01), Arthur Robinson (02), and Juan Rodriguez (03), General No. 96 CR 19145, charging these defendants with the Lionberg/Schmal murders [when read in conjunction with item 6.f. below];

f. The Certified Plea Transcript in the matter of "The People of the State of Illinois vs. Ira Johnson," No. 96-19145, dated June

16th, 1997, before the Hon. Daniel J. Kelley, in which Mr. Johnson pled guilty to the Lionberg/Schmal murders;

g. The Certified Statement of Conviction/Disposition from the Clerk of the Circuit Court of Cook County, Illinois, in the matter of the "People of the State of Illinois vs. Ira Johnson, No. 96 CR 1914501 [note again that the "01" suffix to case number 19145 identifies defendant "01," or Ira Johnson, in this multiple defendant case], indicating that the Lionberg/Schmal case against Ira Johnson was commenced on or about August 9th, 1996, and that Ira Johnson was adjudged guilty of the Lionberg/Schmal murders on June 16th, 1997 [when read in conjunction with items 6.e.-f. above];

h. The Certified Statement of Conviction/Disposition from the Clerk of the Circuit Court of Cook County, Illinois, in the matter of the "People of the State of Illinois vs. Juan Rodriguez," No. 96 CR 1914503 [the "03" suffix to case number 19145 identifies defendant "03," or Juan Rodriguez, in this multiple defendant case], indicating that the Lionberg/ Schmal case was commenced against Mr. Rodriguez on or about August 9th, 1996, and that Mr. Rodriguez was adjudged guilty of the Lionberg/Schmal murders on April 28th, 1997 [when read in conjunction with items 6.e.-f. above], and;

i. The Certified Statement of Conviction/Disposition from the Clerk of the Circuit Court of Cook County, Illinois, in the matter of the "People of the State of Illinois vs. Arthur Robinson," No. 96 CR 1914502 [the "02" suffix to case number 19145 identifies defendant "02," or Arthur Robinson, in this multiple defendant case], indicating that the Lionberg/Schmal case was commenced against Mr. Robinson on or about August 9th, 1996, and that Mr. Robinson was adjudged guilty of the Lionberg/Schmal murders on June 23rd, 1997 [when read in conjunction with items 6.e.-f. above].

7. a. The civil action instituted by Thomas D. Decker against Cook County and other parties on behalf of Paula Gray (No. 98 L 5019), involving her arrest, convictions and incarceration arising out of the Lionberg/Schmal crimes. Ms. Gray's action was filed by Thomas D. Decker with the Clerk of the Circuit Court of Cook County on April 30th, 1998 upon transfer from the Federal District Court, where it was filed on July 1st, 1997 as Gray v. Pastirik, 97 C 4698, U.S. Dist. Ct., N.D. Ill. [See Petitioner's Second Add'l Auth's Ex. B para. 5; Certified copy of 19-page Complaint filed on "97 Jul 1" by Thomas D. Decker in the "United States District Court, Northern District of Illinois, Eastern Division," Case No. "97 C 4698," on behalf of "Paula Gray" against "Cook County, Illinois" and various other parties; Certified copy of 22-page Complaint filed on

"98 Apr 30" by Thomas D. Decker "In The Circuit Court of Cook County, Illinois, County Department, Law Division," Case No. "98L 005019," on behalf of "Paula Gray" against "Cook County, Illinois" and various other parties; Certified "Law Electronic Docket" sheet from the Clerk of the Circuit Court of Cook County for Case No. "98-L-005019" for "Gray Paula" indicating that Case No. "98-L-005019" was filed on "04/30/98" by "Decker Thomas Assoc"];

b. The civil actions instituted against Cook County and other parties by Dennis Williams on April 28th, 1997 (No. 97 L 4886), Verneal Jimerson on May 19th, 1997 (No. 97 L 5934), Willie Raines on July 1st, 1997 (No. 97 L 7773), and Kenneth Adams on April 24th, 1998 (No. 98 L 4778), involving their respective arrests, convictions and incarceration arising out of the Lionberg/Schmal crimes. [See Certified "Law Electronic Docket" sheets from the Clerk of the Circuit Court of Cook County for Case Nos. "97-L-004886" for "Williams Dennis," "97-L-005934" for "Jimerson Verneal," "97-L-007773" for "Raines Willie," and "98-L-004778," for "Adams Kenneth"]. Dennis Williams' lawsuit was later consolidated with those of Jimerson, Raines, Adams and Gray. On March 5, 1999, four of these plaintiffs, with the exception of Paula Gray, received $36 million from the County as settlement for their claims. On March 26, 1999, the Hon. William D. Maddux ordered dismissal of the above referenced lawsuits by Williams, Raines, and Adams "Pursuant to Stipulation of the Parties," and "all claims having been compromised and settled," as well as the dismissal of Verneal Jimerson's lawsuit, with the exception of two claims, "Pursuant to Stipulation of Certain Parties" and "all such claims having been compromised and settled."

C. Preliminary Findings of Law

1. The People's "Response to Petition of Paula Gray to Vacate Convictions" contained in its Joint Motion, constitutes an answer to Ms. Gray's petition. Though not termed an "Answer," nor contesting the material factual allegations of the petition by asserting "explicit admission[s] and denial[s] to each [of its] allegations," the "Response" substantively serves the purpose of an answer by alleging specific "factual deficiencies" of the petition, and thus denies its pertinent underlying facts. Indeed, the Court granted the evidentiary hearing held in this case, as required by case law, because the People's "Response" controverted central facts of Ms. Gray's petition material to whether 2-1401 relief is warranted. [See Memorandum "Evidentiary Hearing" at 31-32 for eight (8) factual issues raised by the parties' pleadings; see also La Rabida Child. Hosp. & Res. Ctr. V. Harrison, 263 Ill.App.3d 790, 797 (1st Dist. 1994), holding that "*[i]f [a party's] answer controverts the central facts of the...section 2-1401 petition*, an evidentiary hearing must be held."

(emphasis added)]. Therefore, Ms. Gray's contention that Respondent has failed to plead to her petition is denied.

2. The Court holds that the grant of Petitioner's 1983 federal writ of habeas corpus rendered her 1979 judgment void, but did not reverse or vacate this judgment. Respondent concedes this construction of the law in its Supplemental Post-Hearing Memorandum at 2-3, and the Court's finding has support in federal case law. [See Snyder v. City of Alexandria, 870 F.Supp. 672, 684 (E.D.Va. 1994), holding that upon the grant of a federal writ, that "'while the state court judgment is *neither reversed nor vacated*, the prisoner is released and the state court judgment is *authoritatively declared void*'" (emphasis added) citing Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 277 (4th Cir. 1977)]. To date, no Illinois state court has vacated Ms. Gray's 1979 judgment.

Also, the information the State filed against Ms. Gray on May 18th, 1984 in Case No. 84 C 5543 (on which Petitioner's 1987 perjury plea is based), alleges identical counts for the same crimes as those of the indictment in Case No. 78 C 4865 (on which Petitioner's 1979 judgment for murder, rape and perjury is based). [Respondent and Petitioner concur that the 1984 information contains the same allegations or counts, in both number and content, as those of the 1978 indictment against Petitioner. (See Respondent's Joint Mot. Ex. E; Respondent's Supplemental Post-Hearing Memorandum at 1; Petitioner's Add'l Post-Hearing Mem. at 2-4)]. However, the 1984 information, as a successor charging instrument, does not automatically supercede, abate or quash the 1978 indictment. [See People v. Miscichowski, 143 Ill.App.3d 646, 654 (2nd Dist. 1986), holding that "a subsequent indictment does not automatically quash a prior indictment"; People Lowell a/k/a Lindner, 75 Ill.App.3d 1007, 1008-09 (2nd Dist. 1979), noting that the "general rule in other jurisdictions appears to be that '[i]n the absence of a statute, where two indictments are pending against a person for the same offense, the second does not supersede or abate the first. Both indictments stand and prosecution may be had under either, prior to conviction or acquittal under one, the state or government having a right to elect on which it will proceed.'" The court then determined that "where there has been no claim of double jeopardy or abuse of prosecutorial authority to file successive charging instruments, the State was free to proceed on the initial complaint after the trial court dismissed the count of the subsequent information, charging the same offense."].

Therefore, as a matter of record, *both* the 1978 indictment alleging the murder, rape and perjury counts (minus the *nolle prossed* gas station charges), as well as the 1979 judgment thereon, remain pending.

Recall, however, that Petitioner's 1983 federal writ rendered her 1979 judgment

for murder, rape, and perjury "authoritatively *void*." (emphasis added). In Ligon v. Williams, 264 Ill.App.3d 701, 706 (1st Dist. 1994), a section 2-1401 proceeding, the court held that a "[i]t is axiomatic that a void judgment can be attacked at any time, directly or *collaterally*...[and that] a petitioner need not demonstrate due diligence and a meritorious claim or defense if seeking relief from a void judgment." (emphasis added). See also Bank of Matteson v. Brown, 283 Ill.App.3d 599, 606 (1st Dist. 1996), citing 735 ILCS 5/2-1401(f) (West 1994), which states that "'[n]othing contained in [section 2-1401] affects any existing right to relief from a void order or judgment'" and thereafter ruling that "'if the movant mislabels his motion attacking the judgment [as a section 2-1401 motion], the courts should be liberal in recognizing the motion as a collateral attack upon a void judgment'" and thereafter finding that despite the litigant's mislabeled motions, "the time constraints and due diligence requirements of section 2-1401 are inapplicable"; Reymar Clinic Pharmacy, Inc., 246 Ill.App.3d at 841, holding the "[t]he differences between a section 2-1401 motion and a motion attacking a void judgment are largely procedural in that an attack on a void judgment is not subject to the time constraints of a section 2-1401 motion, nor is it subject to any due diligence requirements." Thus, Petitioner is not subject to either the time constraints, due diligence, or meritorious claim or defense requirements of section 2-1401, and has moved for vacatur of her 1979 judgment. Based on the 1983 Seventh Circuit Court of Appeals grant of Petitioner's writ of habeas corpus voiding her 1979 judgment, the Court vacates Ms. Gray's 1979 judgment for murder (Counts 1-4, 7), rape (Count 8), and perjury (Count 17).

[Note also that the People's theory of prosecution and ultimate judgment against Petitioner in her 1978 trial is based on her accessorial conduct to that of her alleged principals, the Ford Heights Four. (See Gray 87 Ill.App.3d at 147-49; see also People ex rel. Gray, 721 F.2d at 587). But where Petitioner's principals have been rendered *innocent* (by reason of newly discovered evidence of gubernatorial pardon), her guilt based on the legal accountability for their *crimes* is rendered a nullity as a matter of law. See People v. Stanciel, 153 Ill.2d 218, 233 (1992). As such, the Court grants additional vacatur of Petitioner's 1979 judgment for murder (Counts 1-4, 7) and rape (Count 8), on the *2-1401* grounds of equity, or that the foregoing judgment has been shown by Petitioner's newly discovered evidence as to the innocence of her four alleged principals to be unfair, unjust or unconscionable. (Recall Ostendorf's ruling that a post-judgment petition invokes the equitable powers of the court to prevent enforcement of an unfair, unjust, or unconscionable judgment. Ostendorf, 89 Ill.2d at 285; see Memorandum "Preliminary Findings of Law" para.

3., at 237-38, para. 8., at 256, for further case law discussion regarding equity and 2-1401 proceedings. See also Memorandum "Analysis" para. 4., at 324-32, for discussion and rulings that Ms. Gray's petition has satisfied the post-judgment requirements of due diligence, meritorious defense, as well as the standards of People v. Burrows, 172 Ill.2d at 180, and People v. Hallom, 265 Ill.App.3d 896, 906 (1st Dist. 1994), for 2-1401 relief based on newly discovered evidence). As a corollary to this ruling, any Brady evidence tending to negate the guilt of Petitioner's alleged principals, the Ford Heights Four, or to prove their innocence, would necessarily be relevant to Petitioner as their purported accessory].

The Court having vacated the 1979 (final) judgment, it therefore has the entire 1978 controversy and record (as well as the parties) before it, in addition to the authority, pursuant to case law, to vacate or amend an interlocutory order at any time prior to entry of a final order or judgment, to correct such order it considers erroneous. The Court is also required to vacate an interlocutory order if changed circumstances render it unjust. [See Kemner v. Monsanto Co., 112 Ill.2d 223, 240 (1986), holding that "[a]n interlocutory order may be reviewed, modified, or vacated at any time before final judgment"; Leopold v. Levin, 45 Ill.2d 434, 446 (1970), ruling that "[a]n interlocutory order may be modified or vacated at any time before final judgment"; People v. Walensky, 286 Ill.App.3d 82, 91 (1st Dist. 1997), citing to previous case law that the "trial court retains jurisdiction to vacate or modify an unappealable interlocutory order until final order is entered"; Peoples Gas Light & Coke Co. v. Austin, 147 Ill.App.3d 26, 32 (1st Dist. 1986), stating that "[a] trial judge is not bound by the order of another judge; he has a right to review the order if he believes it is erroneous, and he is obligated to do so if changed circumstances make the prior order unjust"; Thornton, Ltd. v. Rosewell, 51 Ill.App.3d 373, 377 (1st Dist. 1977), aff'd 72 Ill.2d 399, determining that "[a]t any time before the entering of [a] final judgment the whole record is before the court, and an erroneous ruling theretofore made may be set aside and the error corrected"; Richichi v. City of Chicago, 49 Ill.App.2d 320, 325 (1st Dist. 1964), ruling that "[a]n interlocutory order may be modified or vacated at any time. [citations omitted]. 'Apart from statute, an interlocutory order may be amended or vacated after the term at which it was made, if no final judgment or order has put the case out of court...' [citation omitted]. As stated in 23 ILP, Judgments, sec 163: 'The rule against amending or vacating a judgment after the expiration of the statutory period has no application to interlocutory judgments, and such judgments may be opened, amended, or vacated at any time while the proceedings remain in fieri [pending], and before the final judgment.'"].

The Court additionally has inherent power to correct its own records. [See In re Hirsch, 135 Ill.App.3d 945, 955 (1st Dist. 1985), holding that a court has "inherent power...to correct its own records."].

As Respondent has correctly argued, an order of *nolle prosequi* is a non-appealable, interlocutory order. This determination was made clear by People v. Woolsey, 139 Ill.2d 157, 163 (1990), which held that:

the [trial court] order granting the State's motion for nolle prosequi was an *interlocutory*, rather than a final, order. No appeal lies from an interlocutory order in the absence of a statute or rule specifically authorizing such review. [citation omitted]. Although this court has provided by rule for appeals in criminal cases from certain interlocutory judgments (107 Ill.2d 604), this rule does not authorize an appeal by a defendant from the grant of a nolle prosequi. (emphasis added).

Consequently, the October 16th, 1978 orders of *nolle prosequi* in this matter constitute interlocutory, non-appealable orders, as to which the Court has jurisdiction until the entry of either final orders, or a final judgment. (For discussion and rulings regarding vacatur of the 1987 orders of *nolle prosequi* and dismissal of the underlying charges, see Memorandum "Analysis" para. 6., at 335-37, para. 7., at 337-49). The Court also has the authority to vacate or modify, prior to final judgment, an interlocutory order it considers erroneous, and the obligation to vacate such order where changed circumstances render it unjust.

With these legal principles in mind, the Court addresses the issue of vacatur of the 1978 orders of *nolle prosequi* regarding the gas station charges. Notwithstanding the fact that these allegations and *nolle prosse* orders were not the legal basis for Petitioner's custody, nor the subject of her habeas corpus petition, these charges could not thereafter be properly prosecuted, including pursuant to the 1984 information, based on acquittal and double jeopardy grounds. This is because these offenses were *nolled prossed after the jury had been impaneled and sworn*. [See People v. Daniels, 187 Ill.2d 301, 310, 312 (1999), holding that "[i]n a jury trial, jeopardy attaches when the jury is empaneled and sworn...[and]...the granting of a motion to nol-pros after jeopardy attaches has the same effect as an acquittal, and the State may not pursue those charges in a subsequent trial"; People v. Blake, 287 Ill.App.3d 487, 491 (1st Dist. 1997), finding that "...while the State may refile charges nolled before jeopardy attaches...the State is barred from subsequently prosecuting charges nolled after jeopardy has attached"; 720 ILCS 5/3-4(a)(3), indicating that the state is barred from prosecuting the same offense if the former prosecution "was terminated improperly after the jury was impaneled and sworn," and the committee comments to section 3-4 stating that a *nolle prosequi* by the

prosecution after jeopardy has attached would be considered an improper termination of a proceeding and thus bar further reprosecution. Ill.Ann.Stat., ch. 38, par. 3-4, Committee Comments, at 126 (Smith-Hurd 1989); Petitioner's Add'l Post-Hearing Mem. at 7; see also People v. Foley, 162 Ill.App.3d 282, 287 (2nd Dist. 1987), holding that "[a]n improper prosecution after the trial has commenced results in a bar to subsequent prosecutions. *(Ill.Rev.Stat. 1983, ch. 38, para. 3 -- 4(a).)* A nolle prosequi entered by the prosecution after jeopardy has attached is such a termination." (emphasis added)].

As such, the State can no longer properly institute a new prosecution against Petitioner on the 1978 *nolle prossed* gas charges, based on the foregoing acquittal and double jeopardy grounds. These *nolle prosse* or interlocutory orders are therefore in error and unjust by reason of these changed circumstances. Accordingly, pursuant to the Court's inherent power and duty to vacate such interlocutory orders and to correct its own records, the Court *sua sponte* construes Ms. Gray's 2-1401 petition to vacate the 1978 *nolle prossed* gas station charges as a motion to vacate non-final, non-appealable interlocutory orders, and vacates the October 16th, 1978 orders of *nolle prosequi* regarding the gas station charges (Counts 5-6 and 9-16 of the 1978 indictment).

Vacatur of the 1978 *nolle prosse* orders, however, results in reinstatement of these charges. [See Daniels, 187 Ill.2d at 312, reiterating prior case law that a "nolle prosequi is not a final disposition of the case, and will not bar another prosecution for the same offense. It is not an acquittal, but it is like a *nonsuit* or discontinuance in a civil suit, and leaves the matter in the same condition in which it was before the commencement of the prosecution." (emphasis added); People v. Sanders, 86 Ill.App.3d 457, 467 (1st Dist. 1980), reiterating that a "nolle prosequi...is like a *nonsuit* or discontinuance in a civil suit..." (emphasis added); Kelch v. Watson, 237 Ill.App.3d 875, 877 (3rd Dist. 1992), holding that "[t]he substantive effect of [an] order vacating [a] voluntary dismissal [is] to restore the parties to their original status in the case; the vacatur [operates] as if the voluntary dismissal [which is equivalent to a *nonsuit* or order of *nolle prosequi*] had never been entered."]. As previously discussed, Petitioner was legally acquitted of the gas station offenses at the end of the People's case in 1978. The Illinois Supreme Court held in People v. Newberry, 166 Ill.2d 310, 313-314 (1995), that:

...a trial judge...has inherent authority to dismiss an indictment for reasons other than those listed in section 114-1(a) [of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1991, ch. 38, par. 114-1(a)(now 725 ILCS 5/114-1(a) (West 1992) entitled 'Motion to dismiss charge'][citation omitted]. Specifically, the court may exercise such authority 'when failure

to do so will effect a deprivation of due process or result in a miscarriage of justice.'

Accord People v. Dasaky, 303 Ill.App.3d 986, 992 (1st Dist. 1999).

Also, the First District in People v. Fleet, 168 Ill.App.3d 126, 130 (1st Dist. 1988), has cited a Second District case, or People v. Schroeder, 102 Ill.App.3d 133, 135-36 (2nd Dist. 1981), for its holding that a court has power "*on its own motion*, or the motion of the defendant...to dismiss criminal charges before trial...[pursuant to among other grounds]...*a due process violation*." (emphasis added). Furthermore, Respondent was afforded due process notice by Ms. Gray's 2-1401 petition that she was moving for dismissal of the charges of the 1978 indictment, and also afforded the opportunity to present opposing argument, briefs, and counter-affidavits, as well as countervailing documentary and testimonial proofs at an evidentiary hearing.

Failure to dismiss the gas station charges for which Petitioner has been legally acquitted would constitute a violation of Petitioner's due process rights and would also result in a miscarriage of justice. [Note also that the State is barred from properly reprosecuting the 1978 gas station charges against Petitioner on the grounds of double jeopardy and improper termination of a prosecution after a jury has been impaneled and sworn. See Daniels, 187 Ill.2d at 312; Blake, 287 Ill.App.3d at 491; Foley, 162 Ill.App.3d at 287; 720 ILCS 5/3-4(a)(3) (1999) and Committee Comments to section 3-4]. Therefore, based on Ms. Gray's 1978 acquittal of the gas station counts of the 1978 charging instrument, as well as case law authority for dismissal of charges on the Court's own motion for due process violation, the Court *sua sponte* dismisses, with prejudice, the gas station charges (or Counts 5-6 and 9-16) of Ms. Gray's 1978 indictment.

Regarding the murder (Counts 1-4, 7) and rape (Count 8) charges alleged by the 1978 indictment, the People have elected to proceed on a successor charging instrument, or the 1984 information, by accepting Petitioner's 1987 perjury plea to this information, and seeking and being granted the 1987 orders of *nolle prosequi* as to all remaining charges, including the same murder and rape charges alleged by the 1978 indictment. People v. Woolsey, 139 Ill.2d at 168, has determined that "...[a] nolle prosequi dismisses the indictment or charge as to which it is entered and terminates all further prosecution under the dismissed indictment. No criminal charges pend against the defendant when an indictment is nolprossed and *the State must file a new charging instrument to reinstate its prosecution."* (emphasis added). See also Respondent's Post-Hearing Brief at 10, citing People v. Tannenbaum, 218 Ill.App.3d 500, 502 (2nd Dist. 1991), for its holding that "[n]o criminal charge

remains pending against defendant when a charge is *nolle prossed*, and *the State must file a new charging instrument to reinstate its prosecution*" (emphasis added). Thus, theoretically, with the exception of the gas station charges (which were again *nolle prossed* in 1987) and the perjury count (to which Petitioner pled guilty), the State could presently prosecute Petitioner on the remaining murder and rape counts under the 1978 indictment *without being required to refile these charges.* To leave Petitioner legally susceptible to future prosecution by the People under the 1978 indictment on murder and rape charges it *nolle prossed* in 1987 pursuant to a successive (or 1984) charging instrument, without the required refiling of such charges, would not only defeat the purpose of an order of *nolle prosequi* requiring that such charges be refiled before commencing prosecution, but would also be fundamentally unfair to Petitioner. Accordingly, the Court *sua sponte* dismisses, with prejudice, the murder (Counts 1-4, 7) and rape (Count 8) charges of the 1978 indictment because failure to do so would effect a miscarriage of justice and result in a deprivation of Ms. Gray's due process rights.

[It should be pointed out that Petitioner's Post-Hearing Memorandum at 15 gave Respondent at least general notice that Ms. Gray was seeking dismissal of the 1978 murder and rape charges in that it requested a judgment "dismissing all charges...against her..," to which the People had opportunity to respond or contest. Also, Petitioner's Post-Hearing Memorandum at 1 somewhat unclearly moved for dismissal of these charges by requesting that the "*orders*" for "[t]he murder and rape counts of which Petitioner was convicted in 1978" be "vacated and *dismissed*" (emphasis added). Furthermore, while a 2-1401 petition cannot properly afford dismissal relief as previously determined (<u>see</u> Memorandum "Issues/Court's Determination of Issues" para. 9., at 21-22; <u>S.C. Vaughan Co.</u>, 181 Ill.2d at 497 and Memorandum at 4; <u>Newberry</u>, 166 Ill.2d at 313-14), the Court's foregoing *sua sponte* dismissal of these counts is pursuant to its own authority, consistent with the above cited case law (<u>see</u> <u>Fleet</u> and <u>Schroeder</u> at 232), and not Ms. Gray's 2-1401 petition. Moreover, because the Court premised its due process dismissal of the 1978 murder and rape charges on the same rationale asserted by Respondent (i.e. a *nolle prossed* charge constitutes its dismissal and can only be reprosecuted by filing a new charging instrument), the State has effectually concurred in the Court's ruling].

With respect to the perjury count (17) of the 1978 indictment, Petitioner pleaded guilty to this same charge, on the same facts (or Count 17 of the 1984 information), on April 23rd, 1987. To reprosecute Ms. Gray for an offense she has previously pled guilty to would constitute a miscarriage of justice and violation of her due process rights. [Note also that the People cannot properly reprosecute the perjury charge against Ms.

Gray after her April 23rd, 1987 plea, by reason of double jeopardy and a former prosecution resulting in a conviction for the same offense, on the same facts. See People v. McCutcheon, 68 Ill.2d 101, 106 (1977), holding that "[j]eopardy [attaches]...at the time the guilty plea [is] accepted by the court..."; 720 ILCS 5/3-4(a)(1), barring prosecution for the same offense if the former prosecution resulted in a conviction]. Therefore, the Court additionally *sua sponte* dismisses, with prejudice, the perjury charge (or Count 17) of the 1978 indictment, because Petitioner would suffer a miscarriage of justice and violation of her due process rights were the Court to fail to so act.

Again, as previously noted by the Court, Petitioner's Post-Hearing Memorandum at 15, gave Respondent general notice that she was seeking dismissal of the 1978 perjury count, with which the State had opportunity to respond or contest. Also, the Court premised its due process dismissal of this charge on its own authority, pursuant to Fleet and Schroder, and not Ms. Gray's 2-1401 petition. Finally, any failure of notice to the State that Petitioner was seeking dismissal of the 1978 perjury count was waived by the government's conduct in this case nullifying, or at least conceding to the nullity of, the 1978 perjury charge. This conduct involved the People having filed, after the grant of Ms. Gray's 1983 federal writ, a successive 1984 charging instrument, or the 1984 information alleging the same perjury count, on the same facts, as the 1978 indictment, and thereafter securing Ms. Gray's April 23rd, 1987 perjury plea pursuant to the 1984 information. [Recall the earlier cited ruling of Lowell that "prosecution may be had under either [of two pending indictments] *prior to conviction* or acquittal *under one*..." (emphasis added). Lowell a/k/a Lindner, 75 Ill.App.3d at 1008-09].

3. Respondent argues that the 1983 grant of Petitioner's federal writ of habeas corpus, which voided Ms. Gray's 1979 judgment (see Memorandum "Preliminary Findings of Law" para. 2., at 228-29), effectively terminates or precludes any consideration by this Court of the facts underlying that judgment. (Tr. of Evidentiary Hr'g of 4/28/99, at 80-86; Tr. of Evidentiary Hr'g of 4/29/99, at 179-80). The Petitioner argues that it does not. (Tr. of Evidentiary Hr'g of 4/28/99, at 80-86; Tr. of Evidentiary Hr'g of 4/29/99, at 181-82). The Court rules that the grant of Petitioner's writ does not preclude its consideration of the facts prior to and at the time of Petitioner's 1978 trial and 1979 judgment in determining whether it should order 2-1401 vacatur of Petitioner's 1987 perjury judgment.

First, in deciding the question of whether Petitioner should have been granted a writ, the federal courts neither reviewed, nor ruled upon the newly discovered evidence presently alleged by Ms. Gray's petition, because these new proofs were either directly or indirectly suppressed by

the government in 1983. Moreover, the writ was granted because of the ineffective assistance of Ms. Gray's 1978 trial counsel, based on the conflict of interest in the joint representation of Petitioner and her two co-defendants, Dennis Williams and Willie Rainge. People ex rel. Gray, 721 F.2d at 596-598.

Secondly, in considering whether post-judgment vacatur of Petitioner's 1987 perjury judgment should be granted, the Court may consider all the circumstances of the 1987 proceeding, as well as those both *prior* and subsequent to the 1987 conviction, and is vested with wide ranging equitable powers, invoked by the 2-1401 petition, to prevent an unjust result. [See American Reserve Corp. v. Holland, 80 Ill.App.3d 638, 645 (1st Dist. 1980), holding that "[t]he court may consider the circumstances *preceding* the default judgment as well as the conduct of the parties after the judgment is entered"; Eastman Kodak Co. v. Guasti, 68 Ill.App.3d 484, 487 (1st Dist. 1979), citing to earlier First District case law and ruling that with respect to a section 72 petition, "[t]he court must consider all the circumstances of the proceedings [or multiple default judgments] and liberally construe the scope of the relief available to prevent an unjust result"; Chase v. Cunningham, 64 Ill.App.3d 54, 56 (1st Dist. 1978), stating that "[w]hether or not ...a [section 72] petition should be granted depends upon consideration of all the circumstances." See also People v. [Jason] Gray, 247 Ill.App.3d 133, 142 (1st Dist. 1993), holding that "[a]lthough the [section 2-1401] petition is usually characterized as a civil remedy, its remedial powers extend to criminal cases"].

Petitioner has alleged ten (10) items of fraudulently concealed "exculpatory" or "Brady" evidence, which became existent before or during her 1978 trial. Petitioner also asserts that the Respondent's fraudulent concealment from her of these ten (10) items of Brady evidence beginning in May, 1978 and ending after July 1st, 1997, tolled section 2-1401's two year limitations period. Brady evidence is the same evidence as that required pursuant to Illinois Supreme Court Rule 412(c).[Recall that Rule 412(c) codified, eff. Oct. 1, 1971, the Brady rule, or the prosecution's constitutional duty to disclose to defendant materially favorable evidence in the government's possession or control]. To show fraudulent concealment, Petitioner can prove violation of the Supreme Court's discovery rules, including Rule 412(c). [See Ostendorf, 89 Ill.2d at 282, a case previously cited in which the prevailing party effected partial disclosure in response to the opposing party's interrogatories, while failing to produce reports material to the issue(s) of the trial and resulting judgment. The Court held that "as a matter of law, failure to comply with the obligation of full and truthful disclosure imposed on litigants by our discovery rules constitutes fraudulent concealment for purposes of tolling...[the section 72 or 2-1401] statute of limitations"].

Therefore, to determine whether these ten items constitute Brady and 412(c) evidence (i.e. favorable to Petitioner, in the possession or control of Respondent, and material to a prospective 1987 trial), of which suppression by the People would toll the 2-1401 statute until *full and truthful* disclosure to Petitioner, the Court must examine, among other factors, the circumstances both prior to and at the time of the 1978 trial, when the 10 items came into existence, including, of course, the trial evidence.

Moreover, the Respondent itself, contrary to its argument otherwise, has analyzed the facts, circumstances and/or evidence prior to and during the 1978 trial in support of its position that Petitioner either failed to show that Respondent fraudulently concealed these items, or that certain of the items were not exculpatory in nature, or were already known to Ms. Gray prior to expiration of the 2-1401 limitations period, or were irrelevant. (See Respondent's Post-Hearing Brief, at 13-18). It thus appears that Respondent has conceded by its written arguments, notwithstanding the grant of Petitioner's 1983 federal writ voiding her 1979 trial judgment, the necessity of reviewing the facts, circumstances and/or evidence prior to and at the time of Ms. Gray's 1978 trial and 1979 judgment to determine whether Petitioner should be afforded 2-1401 relief, including vacatur of her 1987 perjury judgment.

Furthermore, a review of the government's conduct at the time of Petitioner's 1978 trial to determine Brady violation is necessary for deciding the question of whether Ms. Gray's 1987 plea and judgment are void on the grounds that it was wrongfully induced or coerced by the prosecution's threat, among other allegations (or proofs), outside the presence of Petitioner's counsel, of an unfair trial after issuance of the 1983 writ, or a trial without the State effecting disclosure of Brady and 412(c) evidence, along with the prosecution's promise of immediate release from prison if Ms. Gray pleaded guilty to perjury and incriminated the Ford Heights Four at trial; and also because Petitioner's 1987 plea was not informed (as required by law) due to the prosecution's failure to disclose Brady proofs prior to or at the time of her plea.

Third, the People did not agree to Petitioner's *unconditional* release from prison, pursuant to her federal writ, by declining to take her case to trial by a date certain. [Recall James Reddy's testimony that Paula Gray's decision on whether she wanted to cooperate with the State eventually became a "now or never situation" because "it was either a matter of Paula agreeing to cooperate or *her case was going to begin trial*." (emphasis added)(Tr. of Evidentiary Hr'g of 5/4/99, at 38, 39; Memorandum "Evidentiary Hearing" James Reddy at 134). Recall also

George Morrissey's testimony that subsequent to the grant of Ms. Gray's 1983 federal writ, her *"trial was being scheduled"* and "the issue was, were we going *to proceed with Paula's trial* depending on what Paula decided to do." (emphasis added)(Tr. of Evidentiary Hr'g of 5/4/99, at 171; Memorandum "Evidentiary Hearing" George Michael Morrissey at 153) Note also that pursuant to the Court's finding of an agreement between the State and Petitioner, and the terms of that deal (see Memorandum "Findings of Fact" para. 4., at 196-97, 199), the People *conditioned* Ms. Gray's release on her incriminatory testimony against three of the Ford Heights Four in their 1985 and 1987 trials, as well as her plea of guilty to perjury. (Kenny Adams' 1978 trial judgment was never reversed. See Adams, 112 Ill.App.3d at 427)]. Hence, as a practical (and legal) matter, the federal writ simply placed Ms. Gray in her pretrial 1978 status. She still faced the same charges with what she was led by the government to believe was the same evidence that had placed her in prison under a 50 year sentence, five plus years of which she had already served.

Finally, Petitioner has alleged, or presented evidence, of unfair conduct by the government (including that occurring at the time of Ms. Gray's 1978 trial) in securing the 1987 judgment against her, and also that the 1987 judgment constituted an unfair, unjust or unconscionable result, which is cognizable by the equitable powers invoked by the herein petition. As such, it would be unfair to Petitioner for the Court to preclude, by reason of a writ that did not address the merits of Petitioner's 1978 case (see earlier finding of this fact in this paragraph), a 2-1401 review of the circumstances of the 1987 judgment based on her newly discovered evidence, including the evidence and circumstances, as previously discussed, of the 1978 trial. Such preclusion could also result in the affirmance of an unfair result (i.e. the 1987 judgment), in violation of the very purpose of a 2-1401 petition. The Court declines this course of action. The unfair State conduct, or unconscionable result (of the 1987 judgment), alleged by Petitioner, or as to which Ms. Gray has introduced evidence, includes:

- the perjury plea is involuntary because it was the result of Respondent's wrongful inducement or coercion as set forth in Memorandum "Analysis" para. 1., at 313-18, which wrongful inducement or coercion was unknowingly corroborated by Petitioner's 1983 to 1987 trial counsel due to the government's suppression of ten Brady/412(c) evidentiary items, and because it was not informed by reason of Respondent's misconduct as set forth in Memorandum "Analysis" para. 2., at 318-19;
- Respondent induced Petitioner's 1987 plea by deluding and misleading Ms. Gray as to what the facts and issues in the Lionberg/Schmal case really are by suppressing ten items of Brady (and

412(c)) proofs from 1978 until 1999 (including evidence that they knowingly used perjured and prejudicial scientific evidence at her 1978 trial), while promising Petitioner her immediate release from prison if she inculpated the Ford Heights Four in the subject crimes and also pleaded guilty to perjury. The People's inducement was unknowingly corroborated by her 1983 to 1987 trial counsel because of the government's suppression of the foregoing Brady/412(c) evidentiary items. (See Memorandum "Preliminary Findings of Law" para. 8., at 311; Analysis" para. 5.b., at 333-35);

- suppression by the CCSP of their knowledge that they coerced Paula Gray, notwithstanding her persistent claims of innocence, to tell their fabricated lie, inculpating she and the Ford Heights Four in the subject crimes, to various sheriff's police, assistant State's Attorney's, and the May 16th, 1978 grand jury. (See Memorandum "Findings of Fact" para. 1., at 181-91; "Preliminary Findings of Law" para. 4., at 238-45);

- the Ford Heights Four are innocent of the Lionberg/Schmal crimes (based on gubernatorial pardon), and the arrest, conviction and incarceration of three other persons for the subject offenses. (See Memorandum "Findings of Fact" para. 8., at 223-24; "Preliminary Findings of Law" para. 7., at 253);

- the perjury plea is based on Ms. Gray's truthful, and not "false statement," under oath, at the June 19th, 1978 preliminary hearing as to the innocence of the Ford Heights Four, or alternatively, the CCSP coerced Petitioner to tell (and testify to) a police fabricated lie, inculpating her alleged principals, to the May 16th, 1978 grand jury, sheriff's police and assistant State's Attorneys, coupled with the truthfulness of her preliminary hearing testimony. (See Memorandum "Findings of Fact" para. 1., at 181-91, para. 8., at 223-24; "Preliminary Findings of Law" para. 4., at 238-45, para. 7., at 253), and;

- Petitioner is innocent of the Lionberg/Schmal crimes. (See Memorandum "Findings of Fact" para. 8., at 223-24; "Preliminary Findings of Law" para. 7., at 253; "Analysis" para. 4., at 324-30).

[See Airoom, 114 Ill.2d at 228-229, holding that a court can exercise its equitable powers, invoked by a 2-1401 petition, to vacate a default judgment where the moving party provides evidence "which would demonstrate unfair, unjust, or unconscionable behavior, or any indication that [the party obtaining the judgment] was deceptive in obtaining the default judgment..."; Ostendorf, 89 Ill.2d at 285, in which the court vacated a jury trial judgment where the prevailing party failed to fully and truthfully disclose as required by the discovery rules, holding that "[o]ne of the guiding principles in the administration of section 72 relief 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," and additionally cited prior Supreme and Appellate

Court case law that "the unfair conduct of counsel was a factor in the court's determination that section 72 relief was warranted [in its case]."; People v. B.R. MacKay & Sons, Inc., 262 Ill.App.3d 389, 392 (1st Dist. 1993), a section 2-1401 case affirming the trial court's vacatur of a final order on the grounds of newly discovered evidence and fraudulent concealment of evidence by the opposing party, holding that vacating this order "[was] intended to achieve a fair and just result and to avoid unjust, unfair or unconscionable circumstances"; Brewer v. Moore, 121 Ill.App.3d 423, 428 (1st Dist. 1984), holding that "[a]mong the circumstances to be examined in adjudging a section 72 petition is whether 'a party has procured an unconscionable advantage through the extraordinary use of court process'"] .

Moreover, Respondent has cited no case law in support of its contention that the federal writ precludes this Court's post-judgment review of the facts and circumstances prior to and at the time of Petitioner's 1978 trial and conviction in determining the appropriateness of section 2-1401 vacatur of Ms. Gray's 1987 perjury judgment.

Accordingly, based on the foregoing reasons, the Court holds that the 1983 federal writ does not preclude such review.

4. Petitioner's "substantial new evidence" that the CCSP coerced her to tell a police fabricated lie inculpating she and the Ford Heights Four in the subject crimes, to various sheriff's police, assistant State's Attorneys, and the May 16th, 1978 grand jury as set forth in the Court's findings of fact (see Memorandum "Findings of Fact" para. 1., at 181-91; "Preliminary Findings of Law" para. 4., at 238-45), establishes by a preponderance of the evidence that her will was overborne by the CCSP's coercive, intimidating, suggestive (or fabricated) and deceptive conduct in May of 1978 causing her to repeat their concocted story to these parties and the May 16th grand jury.

Moreover, when this new evidence is coupled with the already existent proofs in this matter, which the new evidence places in a wholly different light, Petitioner has clearly established the foregoing CCSP coercion and fabrication by a preponderance of the evidence. [Recall Wakat's authority to "[rehear] the evidence upon the claim asserted." Wakat, 415 Ill. at 710); recall also the King ruling granting an evidentiary hearing for a "fresh examination" of the circumstances underlying petitioner's confession to authorities. King, 192 Ill.2d at 198].

The test for voluntariness is whether the defendant's will was overborne at the time he or she confessed. Reck, 367 U.S. at 440; Brown,

169 Ill.2d at 144; Kincaid, 87 Ill.2d at 117. People v. MacFarland, 228 Ill.App.3d 107, 117 (1st Dist. 1992), has held that:

> [v]oluntariness of a confession is determined by examining the totality of the circumstances, with consideration given to both the individual characteristics of the accused and the details of the interrogation. Relevant factors of the individual characteristics include the defendant's age, education, mental capacity, emotional characteristics, previous experience with the criminal system, and whether the confession was induced by police deception. Relevant factors of the interrogation include the duration of the questioning, whether defendant was subjected to physical punishment, offers of leniency, other offers or promises that induce the confession, falsely aroused sympathy, prior refusals to answer questions, and whether defendant was informed of his constitutional rights.

(See also Brown, 169 Ill.2d at 144).

First, as this Court has found (see Memorandum "Findings of Fact" para. 1, at 186-88), in May of 1978 Petitioner was suggestible or susceptible to police authority, suggestion (or fabrication), coercion, intimidation, and deception by reason of her young age (17), slight mental retardation and I.Q. of between 57 and 71, limited education (slightly more than the 8th grade in primarily EMH classes), upbringing in an "intellectually unfortifying environment" coupled with lack of life experience, further impairing her condition of mental retardation (family was not intellectually active, no magazines regularly in her home, never been very far away from home, including downtown Chicago, Lake Michigan, a movie or play, and her family was indigent" and did not own a car or have a telephone), complete lack of experience in criminal matters having never been arrested or questioned by the police before, and particular fearfulness of being separated from her family. (Petitioner's 2-1401 Mot. Ex. A; Tr. of Evidentiary Hr'g of 4/28/99, at 87; Tr. of Evidentiary Hr'g of 4/30/99, at 72, 73, 76, 87; Tr. of Evidentiary Hr'g of 5/4/99, at 164; Memorandum "Evidentiary Hearing" Dr. David Scott Levin at 37; Paula Gray at 100, 100-01, 101; George Michael Morrissey at 152).

Relevant factors of the interrogations include:

a. Petitioner was subjected to mental coercion by being isolated from her mother and family while being subjected to at least two multiple hour interrogations by several different CCSP, some known and some unknown, at the Homewood Cook County Sheriff's Facility, and a third interrogation by seven unknown plain-clothed policemen in a single motel room. (Tr. of Evidentiary Hr'g of 4/30/99, at 77, 87, 88-89, 91-92; Memorandum "Evidentiary Hearing" Paula Gray at 101, 102-03;

Respondent's Joint Mot. Ex. G at 041099). [The 1st interrogation was "overnight" from Friday, May 12th, 1978 until Saturday, May 13th, 1978. The 2nd interrogation was from Saturday "evening," May 13th, 1978 until Sunday, May 14th, 1978, when "[i]t was light outside." (Tr. of Evidentiary Hr'g of 4/30/99, at 77, 87, 88-89, 91-92, 101; Memorandum "Evidentiary Hearing" Paula Gray at 100, 102-03, 104; Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 6-A, at 1197:12-1197:22 (Paulette Gray testified at Petitioner's 1978 trial that she was "never in any room with Paula or the police while she was making any conversation with them"); Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 7-A, at 1172:01-1174:03 (Mrs. Louise Gray testified at Petitioner's 1978 trial that she arrived at the Homewood police station at approximately 8:45 p.m, Saturday, May 13th, 1978, and that Paula had "already been down to the station"); Rainge, 112 Ill.App.3d at 407 (Mrs. Gray testified at the 1978 trial that "she did not know what Paula had told the police"). Information regarding the motel interrogation is based on Inv. Kelly's June 25th, 1996 report of Ms. Gray's June 18th, 1996 statement, pertaining to her affidavit supporting Dennis Williams' Motion for Remand to the Trial Court, as to which the Court previously rendered a finding of fact. (See Respondent's Joint Mot. Ex. G; Respondent's [Evidentiary Hr'g] Ex. #10, at 046272-046273; Memorandum "Findings of Fact" para. 1., at 185-86). Petitioner was unsure of the exact date and time of this (motel) interrogation, indicating it was perhaps a day after she was (initially) picked up by the police. (Respondent's Joint Mot. Ex. G at 04199). It would appear, however, based on the evidence in this proceeding, that the motel interrogation took place between the 1st and 2nd above referenced interrogations].

[Note that the foregoing report of Ms. Gray's June 18th, 1996 statement upon which information regarding the motel interrogation is based is not an affidavit. However, this report is in the nature of a deposition under oath, as counsel for both sides were present to question Petitioner when she rendered her statement (Thomas Decker for Petitioner and Mike Baumel for the prosecution), and ASA Baumel did in fact pose a specific question to her; it also constitutes Ms. Gray's firsthand knowledge; and there is or was a legal recourse for the court or an injured party litigant against Petitioner at or about the time she made the statement should it have subsequently proved false (i.e. obstruction of justice for furnishing false information to a police investigator which obstructed or impeded the then prosecution of Dennis Williams, or the later prosecution of the real perpetrators, pursuant to 720 ILCS 5/31-4(a)(1996)). See People v. Perkins, 260 Ill.App.3d 516, 518-19 (1st Dist. 1994), affirming denial of post-judgment relief based on the hearsay affidavit of the attorney, holding that 2-1401 relief must be supported by the affidavit of a person asserting firsthand knowledge, or by some other appropriate showing, because *a false affidavit* based on hearsay, and *not "under oath or in any judicial proceeding," would provide no legal recourse either for the court or the*

aggrieved party litigant such as "a prosecution for perjury or a court imposed sanction for contempt of court." (emphasis added). Therefore, the June 25th, 1996 report of Petitioner's June 18th, 1996 statement, or Respondent's Joint Mot. Ex. G, is admissible in this matter because it is in the nature of a deposition under oath. Also, based on the evidence of this proceeding, as well as the assessment of Ms. Gray's credibility, the Court additionally finds that the foregoing report of Ms. Gray's June 18th, 1996 statement is both truthful and credible. (See also Memorandum "Findings of Fact" para. 1., at 185-86)];

b. Petitioner was additionally mentally coerced by never being left alone without a policeman present during her 1st interrogation (Tr. of Evidentiary Hr'g of 4/30/99, at 88; Memorandum "Evidentiary Hearing" Paula Gray at 102), as well as the motel interrogation. In fact, during the motel interrogation, all seven of the officers remained with Petitioner overnight in the same room questioning her about the murders. (Respondent's Joint. Mot. Ex. G at 041099). The police at the 1st interrogation also showed Ms. Gray photos of the deceased victims. (Tr. of Evidentiary Hearing of 4/30/99, at 79; Memorandum "Evidentiary Hearing" Paula Gray at 101);

c. Petitioner was verbally intimidated and threatened at the 1st and 2nd interrogations by being subjected to a continual CCSP barrage of being called "bitch," "whore," and "slut" whenever she claimed her innocence. (Tr. of Evidentiary Hr'g of 4/30/99, at 80, 92, 93; Memorandum "Evidentiary Hearing" Paula Gray at 101, 103). The Sheriff's police at the 1st interrogation who called her these names were Jackson and Houlihan. (Tr. of Evidentiary Hr'g of 4/30/99, at 77, 78, 87, 88-89; Memorandum "Evidentiary Hearing" Paula Gray at 101). Ms. Gray didn't know the names of police at the second interrogation, nor the ones at the motel. (Tr. of Evidentiary Hr'g of 4/3099, at 92; Memorandum "Evidentiary Hearing" Paula Gray at 103; Respondent's Joint Mot. Ex. G at 041099). At the 1st interrogation, Jackson and Houlihan kept accusing her of lying and taking up for the Ford Heights Four whenever she said she didn't know anything and hadn't seen anything, until she got scared and wanted to go home. (Tr. of Evidentiary Hr'g of 4/30/99, at 79; Memorandum "Evidentiary Hearing" Paula Gray at 101). Jackson and Houlihan told Petitioner they wanted her to put the Ford Heights Four away for life and then threatened her that if she didn't do what they wanted her to do, she would go away to prison for life. (Tr. of Evidentiary Hr'g of 4/30/99, at 85; Memorandum "Evidentiary Hearing" Paula Gray at 102). Jackson and Houlihan told her the inculpatory concoction they wanted her to say [not unlike her grand jury testimony]. (Tr. of Evidentiary Hr'g of 4/30/99, at 80, 81, 82, 84; Memorandum "Evidentiary Hearing" Paula Gray at 101, 102). Petitioner got scared, at which point they told her she would never see her family again and that what happened

to the woman (Carol Schmal) would happen to her. (Tr. of Evidentiary Hr'g of 4/30/99, at 85; Memorandum "Evidentiary Hearing" Paula Gray at 102). At the motel interrogation, the seven policemen constantly questioned Ms. Gray about the murders, telling her the facts of the case and that the Ford Heights Four had killed the people. (Respondent's Joint Mot. Ex. G at 041099). Ms. Gray at one point got so scared she locked herself in the bathroom. (Respondent's Joint Mot. Ex. G at 041099). They kept pressuring her to say she was involved, and threatening her with getting into trouble, going to jail, and never seeing her family again if she didn't tell them what happened. (Respondent's Joint Mot. Ex. G at 041099). The policemen repeatedly told her that Kenny, Dennis, Verneal and Willie killed the people and that she could also be raped and murdered (Respondent's Joint Mot. Ex. G at 041099). The 2nd interrogation was a repeat of the 1st interrogation when in response to her claims of innocence, the CCSP continuously cursed and called her the same names, along with telling Petitioner what to say and threatening her with the same thing that happened to Ms. Schmal, and also with being sent to jail. (Tr. of Evidentiary Hr'g of 4/30/99, at 91-92, 92, 93, 94; Memorandum "Evidentiary Hearing" Paula Gray at 102-03, 103);

d. Ms. Gray was physically intimidated at the 1st interrogation when Jackson grabbed and squeezed her wrist until it hurt, and Houlihan flicked his finger on her head. (Tr. of Evidentiary Hr'g of 4/30/99, at 80; Memorandum "Evidentiary Hearing" Paula Gray at 101);

e. At the 1st interrogation, Petitioner was deceived by Inv. Patrick Pastirik who came into the interrogation room while Houlihan and Jackson were still there and told her Paulette had told him that she (Paula Gray) had previously confessed to her (Paulette Gray). (Tr. of Evidentiary Hr'g of 4/30/99, at 85-87; Memorandum "Evidentiary Hearing" Paula Gray at 102). Inv. Pastirik then continued this deception and emphasized its apparent truthfulness to Petitioner by declaring "I got you nigger," when in fact Paulette Gray did not relate this story or any other incriminating evidence to him regarding Paula Gray (Tr. of Evidentiary Hr'g of 4/30/99, at 87; Memorandum "Evidentiary Hearing" Paula Gray at 102; Petitioner's Answer to Respondent's Mot. to Dismiss Ex. C, at 4410:01-4411:03, 4419:05-4424:23, Ex. D, at 0945:01-1198:02); Rainge, 112 Ill.App.3d at 407);

f. At the 1st and 2nd interrogations, the CCSP repeatedly made known to Petitioner, while simultaneously applying the mental coercion and deception, as well as verbal and physical intimidation, threats and abuse as described by para. 4.a.-e. above, that they wanted her to reject her account of innocence (consistent with her June 19th, 1978 preliminary hearing testimony exculpating she and the Ford Heights Four) and adopt their concocted inculpatory story (that she later related to sheriff's police, assistant State's Attorneys, and the May 16th, 1978 grand jury). (Tr. of

Evidentiary Hr'g of 4/30/99, at 80, 81, 82-85, 92, 93; Memorandum "Evidentiary Hearing" Paula Gray at 101, 101-02, 102-03). Specifically, at the 1st interrogation, Jackson and Houlihan wanted her to put the Ford Heights Four away for life by telling their concocted inculpatory account (which she repeatedly rejected). In fact, when Petitioner told her account of innocence, they added to it their fabricated version, followed by threats of imprisonment and a similar fate as that of Ms. Schmal if she didn't agree to their lie. (Tr. of Evidentiary Hr'g of 4/30/99, at 82-85; Memorandum "Evidentiary Hearing" Paula Gray at 101-02). At the motel interrogation, while the CCSP subjected Petitioner to their mentally coercive and intimidating environment (as set forth by para. 4.a.-b. above), verbal threats (as set forth by para. 4.c. above) and suggestion (or fabrication)(as set forth by para. 4.c. above), they kept pressuring her to say she was involved and constantly told her Williams, Adams, Jimerson and Rainge killed the people. At the 2nd interrogation, the CCSP repeated their concocted account when she claimed innocence, and again threatened jail confinement and Carol Schmal's fate. (Tr. of Evidentiary Hr'g of 4/30/99, at 92, 93, 94; Memorandum "Evidentiary Hearing" Paula Gray at 102-03, 103). Petitioner finally agreed to tell the police story and the CCSP kept going over it with her, telling her to repeat it after them. (Tr. of Evidentiary Hr'g of 4/30/99, at 98-99; Memorandum "Evidentiary Hearing" Paula Gray at 104). Petitioner repeated the story a number of times, stating she had "no other choice but to do it." (Tr. of Evidentiary Hr'g of 4/30/99, at 99; Memorandum "Evidentiary Hearing" Paula Gray at 104);

g. Even after agreeing to tell the CCSP incriminating concoction, Petitioner was taken during the night of the 2nd interrogation by the CCSP, including Lt. Vanick and Inv. Houlihan, who were the only officers she knew by name, to the dark, abandoned premises and creek, where the crimes occurred. (Tr. of Evidentiary Hr'g of 4/30/99, at 91-92, 94, 96-97, 98-99; Memorandum "Evidentiary Hearing" Paula Gray at 102-03, 103,103-04, 104). Ms. Gray initially thought she was being taken home, which was less than a block away. (Tr. of Evidentiary Hr'g of 4/30/99, at 94-95, 95-96; Memorandum "Evidentiary Hearing" Paula Gray at 103). When Petitioner learned she was going to the scene of the crimes, she was scared to enter the building but again felt she had no choice. (Tr. of Evidentiary Hr'g of 4/30/99, at 96; Memorandum "Evidentiary Hearing" Paula Gray at 103). She was taken by flashlight upstairs and shown the victim's blood as well as the physical layout, and also told details of the crimes, and what she was supposed to say vis-a-vis the physical setting. (Tr. of Evidentiary Hr'g of 4/30/99, at 96; Memorandum "Evidentiary Hearing" Paula Gray at 103-04). The same thing was done when she was taken out by the creek. (Tr. of Evidentiary Hr'g of 4/30/99, at 96-97; Memorandum "Evidentiary Hearing" Paula Gray at 103-04). Before leaving, a policeman pulled a gun on her at

which point she thought she was going to die and began crying and wanted to go home. (Tr. of Evidentiary Hr'g of 4/30/99, at 97; Memorandum "Evidentiary Hearing" Paula Gray at 104), and;

h. Petitioner was again separated from her family by being returned to the jail, where she remained overnight, notwithstanding that the subject premises the CCSP took her to was less than a block from her home. (Tr. of Evidentiary Hr'g at 4/30/99, at 94-95, 99; Memorandum "Evidentiary Hearing" Paula Gray at 103, 104). [Recall that the CCSP picked Petitioner up from her home for the 2nd interrogation, so they were aware of where she lived. (Tr. of Evidentiary Hr'g of 4/30/99, at 91-92; Memorandum "Evidentiary Hearing" Paula Gray at 102-03)].

Clearly, the totality of the circumstances in this case establishes by a preponderance of the evidence that Petitioner's will was overborne at the time she rejected her account of innocence and agreed to the CCSP fabrication inculpating she and the Ford Heights Four in the subject crimes, in view of Ms. Gray's individual characteristics rendering her susceptible to CCSP authority, as well as coercive, intimidating, threatening and suggestive (or fabricated) police conduct; coupled with the foregoing details of the CCSP "interrogations" of Paula Gray which subjected her to their mental coercion (as set forth in para. 4.a.-b., g.-h. above), verbal intimidation and threats (as set forth in para. 4.c. above), deception (as set forth in para. 4.e. above), and physical intimidation (as set forth in para. 4.d. and g. above, the latter including the CCSP threat of Ms. Gray with a gun), while simultaneously and repeatedly making known to Petitioner, as set forth in para. 4.f. above, that they wanted her to reject her account of innocence and adopt their concocted story, which fabrication they constantly repeated to her. When Petitioner capitulated, the CCSP caused her to repeat back the fabricated story a number of times (as set forth in para. 4.f. above).

Case law supports this finding. [See Reck, 367 U.S. at 441, holding a confession involuntary because the "total combination of circumstances" were "inherently coercive," which consisted of six to seven hour interrogations by groups of police officers, over an eight day period, of a young (19), borderline mentally retarded defendant, with no criminal record or experience, where he was without food, counsel, family or friends. Reck warned against "a mere color-matching of cases" and stressed the application of a "total combination of circumstances" analysis or test; Fikes, 352 U.S. at 197, 198, finding a confession involuntary where it was obtained from a "highly susceptible" petitioner due to schizophrenia, because he was kept in isolation for a week, from his father, lawyer, friends and relatives, except for periods of questioning, which overpowered his weak of will or mind; Higgins, 239 Ill.App.3d at 261, which after stating that the "validity of a confession is to be

determined from the particular facts of each case," affirmed the finding of a confession as involuntary where the defendant was a special education student of 17 with an I.Q. of 67, the police were aware of the defendant's mental deficiency, the defendant was told by his grandmother, with whom he lived, to go with the police and give them a statement, the defendant was subjected to police subterfuge when being told that his fingerprints were obtained from the scene (when no one's fingerprints were recovered), the defendant was shown photos of the two victims of the arson, and the defendant was told he flunked a polygraph test, after which he confessed. The court found this police conduct to constitute "mentally coercive tactics," which when combined with defendant's mental capacity and suggestibility, became a "coercive tactic designed to make the defendant confess and ...[undermined] the voluntariness of his confession; Berry, 123 Ill.App.3d at 1045, ruling that a defendant with subnormal mentality (EMH student with an I.Q. of 80), who was 17, with lack of education and complete lack of experience in criminal matters, suggested an increased susceptibility to coercion and intimidation, which when coupled with the "intimidating, coercive and deceptive atmosphere of the interrogation" consisting of isolation from his mother and lack of legal counsel, questioning regarding an unrelated offense, suggestion that fingerprints were found at the scene of the crime, and the police interrogator vowing that he intended to obtain a confession, rendered his resultant statement involuntary].

Additional (previously existent) evidence of CCSP coercion and fabrication which is put in a different light by reason of Petitioner's "substantial new evidence" of coercion and police concoction (Memorandum "Findings of Fact" para. 1, at 181-91; "Preliminary Findings of Law" para. 4., at 238-45), includes the suppressed written statement of her innocence to the CCSP consistent with her exculpatory June 19th, 1978 preliminary hearing testimony (Petitioner's Add'l Auth's and Mat'ls Ex. 9, at CCSP/000102, CCSP/000105-CCSP/000106); ASA DiBenedetto's May 15th, 1978 notation in his felony review notebook or folder in the Lionberg/Schmal crimes, also suppressed, indicating that "this witness [Paula Gray] is reluctant" (Petitioner's Add'l Auth's and Mat'ls Ex. 14, at 047486); Kenny Adams' evidentiary hearing testimony that Paula Gray started crying and stopped speaking, when she saw his hysterical reaction at the police station on Saturday, May 13th, 1978, as she began telling him, in the presence of the CCSP, the incriminating portion of her story (Tr. of Evidentiary Hr'g of 4/30/99, at 35-36, 37; Memorandum "Evidentiary Hearing" Kenny Adams at 97); Willie King Watson's evidentiary hearing testimony that during the week following his Friday and Saturday police questioning he saw Petitioner exiting the vehicle of two plainclothes Sheriff's policemen, and observed that her hair and clothes were disheveled and she looked "like she had been raped and tortured," with her mother having to slap her to bring her back (Tr. of

Evidentiary Hr'g of 4/29/99, at 249-50, 250; Memorandum "Evidentiary Hearing" Willie King Watson at 75-76); and Petitioner's admission into an East Chicago Heights hospital (or St. James Hospital) on or about May 22, 1978 with a diagnosis of "catatonic schizophrenia" later determined by the admitting physician and consulting psychiatrist to have been brought on by police questioning (Tr. of Evidentiary Hr'g of 4/29/99, at 108, 109, 111, 114-15, 117-18; Memorandum "Evidentiary Hearing" Dr. Robert Clinton Watkins, Jr. at 64, 65).

The Court also observed Ms. Gray's upset while testifying about the above CCSP conduct toward her, to the degree that it offered her a break, and also noted the fact that Petitioner paused for 10 to 15 seconds before answering each question in order "to get her thoughts together." [Recall Inv. Kelly's similar observation in his June 25th, 1996 written account of Petitioner's exculpatory statement, noting that in one instance "it took nearly 60 seconds before [Ms. Gray] gave a response." (Respondent's Joint Mot. Ex. G at 041102)].

The First District held in People v. Patterson, 140 Ill.App.3d 421, 425 (1st Dist. 1986), aff'd People v. Thomas, 166 Ill.2d 290 (1987), aff'd Patterson v. Illinois, 487 U.S. 285 (1988), that "[e]ven where individual facets of police conduct would not be coercive if taken singly, a combination of circumstances may act together to create sufficient pressure on the accused to produce a confession that is not 'voluntary.'" In this matter, the combination of circumstances or evidence, both new, previously existent, direct and circumstantial, overwhelmingly establishes by a preponderance of the evidence that in May of 1978 the CCSP coerced Petitioner to tell their concocted story, inculpating she and the Ford Heights Four in the subject offenses, to various sheriff's police, assistant State's Attorneys, as well as the May 16th, 1978 grand jury.

[It should be noted that we now know that Ms. Gray was not fearful of the Ford Heights Four, or more specifically, Dennis Williams. The Court can and does reasonably conclude that she was fearful of and suffering the mental and emotional devastation of the foregoing conduct by the CCSP forcing her, as a mentally deficient innocent rendering her particularly malleable to police authority, to falsely accuse her friends of having committed numerous horrendous offenses].

A corollary of the Court's foregoing finding that the CCSP coerced and fabricated Ms. Gray's incriminatory story is that Investigator Houlihan and Investigator Pastirik perjured themselves at Petitioner's 1978 trial.

Inv. Houlihan, as previously found, was directly involved in coercing Ms. Gray to tell his and Inv. Jackson's inculpatory concoction to

various sheriff's police, assistant State's Attorneys, and the May 16th, 1978 grand jury, and he thereafter testified at Petitioner's trial, in relevant part, that "[Ms. Gray]...told [he and Officer Jackson] that Dennis Williams, Kenny Adams, and Tuna [Willie Rainge] were present the night of the murders," without making any reference to he and Officer Jackson having forced Petitioner to tell their fabricated story, notwithstanding her persistent claims of innocence. See Gray, 87 Ill.App.3d at 144. Inv. Houlihan also testified about taking Ms. Gray to the scene of the homicides without mentioning that one of the sheriff's police officers pulled a gun on Petitioner, or that Ms. Gray was shown the crime scenes while being told what to say relative to the physical layout. Gray, 87 Ill.App.3d at 145. Inv. Pastirik, again as found by this Court, was at least indirectly involved in the CCSP coercion and concoction of Ms. Gray's incriminating story by deceiving her in untruthfully telling her that her sister, Paulette, related to him that Petitioner admitted to Paulette that she (Paula) was involved in the subject crimes before the police recovered the victims' bodies, while emphasizing his deception with the epithet "I got you nigger." However, at Petitioner's 1978 trial, Inv. Pastirik related, under oath, Paulette's statement regarding Paula's incriminating story, adding that Paulette told Petitioner that she (Paulette) had informed the investigators about Paula's presence during the homicides, while omitting that he told Ms. Gray that "I got you nigger." Gray, 87 Ill.App.3d at 144-45. [Recall also Paulette Gray's specific denial at Petitioner's 1978 trial that Paula never spoke to her about the (Lionberg/Schmal) murder case, or told her (Paulette) of the incidents of May 11th, 1978. Paulette Gray additionally "denied [at trial] making any statements to the police about her [Paulette's] knowledge of the events and the involvement of her sister [Paula]." See Memorandum "Findings of Fact" para. 1, at 189; Petitioner's Answer to Respondent's Mot. to Dismiss Ex. C at 4410:01-4411:03, 4419:05-4424:23; Rainge, 112 Ill.App.3d at 407].

The Court rules, based on the previous rationale, law and findings of this paragraph, that the foregoing 1978 trial testimony of Inv. Houlihan and Inv. Pastirik was perjured.

5. The Court finds that Petitioner cannot collaterally attack the legal sufficiency of the 1984 perjury information on which her 1987 plea is based, because an insufficient charging instrument is voidable, not void. [See People v. Davis, 156 Ill2d 149, 156 (1993), holding that a void judgment is one rendered where jurisdiction is lacking and "may be attacked either directly or collaterally," but that "a voidable judgment is one entered erroneously by a *court having jurisdiction* and is not subject to collateral attack; People v. Benitez, 169 Ill.2d 245, 256 (1996), ruling that "...a charging instrument which fails to charge an offense does not deprive the circuit court of jurisdiction." See also Petitioner's Add'l Post-Hearing Memorandum at 8 citing Benitez for the previously stated rule of law]. Also, the Respondent correctly alleges additional grounds that a section 2-

1401 petition cannot challenge the legal sufficiency of an indictment, citing People v. Stevens, 127 Ill.App.2d 415, 418-19 (1st Dist. 1970), which as previously noted held that a section 72 [or 2-1401] petition can only address "errors of fact that are unknown to the court...[and not]...an error of law." Stevens concluded that the legal sufficiency of an indictment constitutes both an error of law and a matter of record, for which a section 72 petition is "not available." The Court thus denies Petitioner 2-1401 relief by reason of the legal insufficiency of her 1984 perjury charge, to wit, the People's failure to allege the nature or substance of Ms. Gray's "false statement" at the June 19th, 1978 preliminary hearing. The Court also denies Petitioner 2-1401 relief based on the People's alleged improper instructions on accountability law given to the 1978 grand jury regarding the gas station offenses. Again, as previously discussed, the resulting 1978 indictment as to these charges would at best be rendered voidable, not void, and therefore not subject to 2-1401 attack. [But see discussion and rulings in Memorandum "Analysis" para. 7., at 338-39, 343, regarding harassment of Petitioner by the prosecution in securing the 1978 indictment against Ms. Gray on the gas station charges where no evidence was presented to the grand jury connecting Petitioner to these offenses; Paula Gray's acquittal of these offenses when they were *nolle prossed* on the People's motion after the 1978 jury had been impaneled and sworn (and no supporting evidence was presented by the State at trial); and the 1984 reprosecution of Petitioner for same the gas station offenses for which she'd previously been acquitted].

Also, Petitioner's counsel is correct that courts dismiss legally insufficient indictments on constitutional due process grounds. See People v. DiLorenzo, 169 Ill.2d 318, 321 (1996), holding that "[t]he failure to charge an offense is the kind of defect which implicates due process concerns." However, the Illinois Supreme Court made clear in its Davis decision that although "the infringement of certain constitutional rights, like due process and equal protection, is constitutionally impermissible...[and the] violation of such rights may present a proper subject for an exercise of the court's jurisdiction, *the rights do not, themselves vest a court with subject matter jurisdiction."* (emphasis added). Davis, 156 Ill.2d at 157. In short, even a violation of constitutional rights does not render a judgment or order void, and thereby subject to post-judgment review on voidness grounds. Additionally, In re Charles S., 83 Ill.App.3d 515, 517 (1st Dist. 1980), expressly held that because a section 72 petition is addressed to errors of fact, and not law, that it "is not a proper vehicle to collaterally attack alleged denials of constitutional rights." See also Universal Outdoor, Inc. v. City of Des Plaines, 236 Ill.App.3d 75, 81 (1st Dist. 1992), citing In re Charles S. for its ruling that "a petition under section 2-1401 is not appropriate for review of errors of law." As such, the Court denies Petitioner 2-1401 relief based on the foregoing constitutional grounds.

However, both parties strongly disagree in their respective construction of the perjury charge and plea. Petitioner alleges that this plea and charge are based on the "false statement" made by Ms. Gray, under oath, at the June 19th, 1978 preliminary hearing, that the Ford Heights Four "had not participated in the murder and rape of Carol Schmal or the murder of Larry Lionberg." Respondent, on the other hand, contends that the 1987 perjury plea and charge are based on "contradictory statements," under oath, made by Paula Gray, material to the issue or point in question, at the grand jury proceeding on May 16th, 1978, inculpating she and the Ford Heights Four in the subject crimes, and at the June 19th, 1978 preliminary hearing, asserting the innocence of she and the Ford Heights Four as to the Lionberg/Schmal crimes. Respondent further argues, citing to § 32-2(b) of the 1987 perjury statute and case law, that it need not allege or prove which contradictory statement is false.

The Illinois Supreme Court in its Jimerson decision, 127 Ill.2d at 23, indicated in its recitation of facts that Ms. Gray's "perjury count [of her 1978 indictment] was based on her testimony at the [June 19th,1978] preliminary hearing [for Verneal Jimerson, Dennis Williams, Kenny Adams and Willie Rainge]." As the perjury count of the 1984 information against Petitioner is identical to that of the 1978 indictment (see Memorandum, "Preliminary Findings of Law" para. 2., at 228), Jimerson's statement of fact that Ms. Gray committed perjury by "false" testimony at the June, 1978 preliminary hearing, arguably constitutes a collateral estoppel (or *res judicata*) bar to any alternative construction of the 1984 perjury charge. Furthermore, based on the foregoing Jimerson statement, the Court additionally finds that the facts in support of the 1987 plea consist of those evidencing perjury by false testimony at the June 19th, 1978 preliminary hearing, and not perjury by contradictory testimony as alleged by Respondent.

Moreover, the Court cannot relax the doctrine of collateral estoppel (or *res judicata)* in the interests of fundamental fairness with respect to this issue, because Respondent has neither alleged, nor proven in this matter, substantial new evidence that Ms. Gray's perjury plea was based on "contradictory statements" under oath. [See Patterson, 192 Ill.2d at 139, as previously discussed in Memorandum "Findings of Fact" para. 1., at 181, holding that "in the interests of fundamental fairness, the doctrine of *res judicata* can be relaxed if [a party] presents substantial new evidence"]. Again, the "substantial new evidence" must be "of such conclusive character that it will probably change the result upon [trial]"; and also material; not merely cumulative; and must have been discovered after the [plea] and could not have been discovered prior to [the plea] by the exercise of due diligence. Patterson, 192 Ill.2d at 139. The only evidence Respondent cites in support of its position that Petitioner's plea

was based on contradictory testimony, is the evidence contained in the record of Ms. Gray's April 23rd, 1987 plea, which does not constitute "new" evidence. (See Respondent's Joint Mot. at 16-17; Respondent's Post-Hearing Brief at 4-7). Hence, the Jimerson decision's statement or finding that Petitioner's 1978 perjury indictment, and by extension Ms. Gray's 1984 perjury information, alleges perjury by false testimony at the June 19th, 1978 preliminary hearing of the Ford Heights Four, constitutes a collateral estoppel (or *res judicata*) bar to relitigation of this issue by this post-judgment proceeding.

However, assuming a*rguendo*, that collateral estoppel (or *res judicata*) does not bar Respondent's claim that the 1984 information charges perjury by "contradictory" testimony, the Court will engage in a legal sufficiency type analysis to construe the 1984 perjury charge, as well as the facts in support of that charge, and upon which Petitioner's 1987 plea and judgment are based.

The 1987 perjury law states:

§ 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 trial, the prosecution need not establish which statement is false.

S.H.A. Ch. 38, § 32-2 (1987).

The 1987 perjury statute is identical to the 1977 perjury law. (See also Respondent's Post-Hearing Brief at 6 alleging the similarity between the 1987 and "1978" perjury provisions).

As previously indicated, both Respondent and Petitioner concur that the 1984 perjury information upon which Ms. Gray's 1987 perjury plea is based (84 C 5543), contains the same allegations or counts, in both number and content, as those of the 1978 indictment against Petitioner (including the perjury count) upon which her 1978 jury trial conviction is based (78 C 4865). (See Memorandum "Preliminary Findings of Law" para. 2., at 228; Respondent's Joint Mot. Ex. E; Respondent's Supplemental Post-Hearing Mem. at 1; Petitioner's Add'l Post-Hearing Mem. at 2-4).

Therefore, the 1984 perjury information states, as set forth by the 1978 perjury indictment [the Court not having been provided a copy of the 1984 information], that:

on June 19th, 1978, Paula Denise Gray committed the offense of perjury in that she, knowingly when under oath, in a proceeding where by law such an oath was required, to wit: the case for preliminary hearing, entitled the People of the State of Illinois v. Kenneth Adams, Willie Rainge, Dennis Williams and Verneal Jimerson, numbers 78-6-011035, 78-6-011036, 78-6-011037 and 78-6-011038, in the Circuit Court of Cook County, Illinois[,] County Department[,] Municipal Division[,] Sixth District, she made a *false statement*, material to the issue and point in question, relating to the presence and participation of Kenneth Adams, Willie Rainge, Dennis Williams and Verneal Jimerson in the armed robbery, aggravated kidnapping and rape murder of Carol J. Schmal and murder of Larry Lionberg when in fact she testified before the Cook County Grand Jury May term 1978, Grand Jury #235, under oath that she was present and witnessed Willie Rainge, Dennis Williams, Kenneth Adams and Verneal Jimerson rape and murder Carol J. Schmal and murder Larry Lionberg, *in violation of* Chapter 38, Section 32-2*(a)*, of the Illinois Revised Statutes 1977, as amended, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois. (emphasis added).

(Petitioner's 2-1401 Mot. Ex. K; Respondent's Joint Mot. Ex. E (1st page only)).

People v. Mitchell, 44 Ill.App.3d 399, 400 (4th Dist. 1976), a case cited by Respondent's Post-Hearing Brief at 6, states that perjury can involve either "a single *false statement* made under oath in violation of section 32 – 2*(a)*," or "*contradictory statements*, the type of perjury contemplated by section 32 – 2*(b)*," the latter having been alleged in People v. Ricker, 45 Ill.2d 562, 563-564 (1970) (emphasis added). [See also People v. Walker, 28 Ill.2d 585, 587 (1963), where the indictment charged both perjury by false statement and "perjury by contradictory statements"; People v. Penn, 177 Ill.App.3d 179, 181 (5th Dist. 1988), in which the information alleged that the defendant committed perjury because he "made contradictory statements"; People v. Mason, 60 Ill.App.3d 463, 464 (4th Dist. 1978), where the charging instrument "alleged perjury based on section 32-2*(a)*...[because the defendant]...under oath, made *false statements*," as well as "perjury under section 32-2*(b)*, in that [the defendant] made *contradictory statements*.." (emphasis added); People v. Roberts, 54 Ill.App.3d 506, 508 (4th Dist. 1977), commenting that "it is not clear from the [perjury] statute that recantation is a defense under section 32 – 2(c) when no allegation of *contradictory statements* under section 32 – 2*(b)* is charged" (emphasis added)].

As previously indicated, the 1984 perjury information against Petitioner alleges, in relevant part, that Paula Gray, in the "case for preliminary hearing [of the Ford Heights Four]...made a *false statement*...in violation of Chapter 38, Section 32-2*(a)*, of the Illinois Revised Statutes 1977, as amended...." (emphasis added). (Respondent's Joint Mot. Ex. E; Petitioner's 2-1401 Mot. Ex. K). The above cited case law clearly indicates that a charging instrument asserting a "*false statement*" in violation of section "32 – 2*(a)*" constitutes perjury by false statement, and not perjury based on "*contradictory statements*" pursuant to section "32 – 2*(b)*." (emphasis added). Also, the 1984 perjury information fails to allege or include the terms "contradictory statements," as set forth in the above cases; nor does it cite to or assert violation of section 32-2*(b)*, which pursuant to the same referenced case law, is the correct section with which to assert perjury by "*contradictory statements*." (emphasis added). The information does not even cite generally to section 32-2, but rather specifically to section "32-2*(a)*," which as earlier noted is the statutory provision for perjury by "false statement." (emphasis added).

Additionally, the Illinois Supreme Court ruled, in People v. Sullivan, 21 Ill.2d 232, 237 (1961), that "[t]he [trial] court, in construing an indictment, is not at liberty to depart from the words of the indictment itself and speculate as to the possible intention of the writer of the indictment nor to supply matters of substance which have been omitted." As such, the Court cannot properly depart from the words of the 1984 perjury information of "*false statement*...in violation of...Section 32-2*(a)*," nor speculate as to the People's intention, or add the terms "contradictory statements," which are clearly matters of substance that have been omitted if the 1984 information alleges, as Respondent contends, perjury by "contradictory statements." (emphasis added).

Further support that the 1984 perjury information is based upon the allegation of a "false statement" under section 32-2(a), and not "contradictory statements" pursuant to section 32-2(b), is provided by the plain and ordinary meaning of section 32-2(b) of the perjury statute. Also, any ambiguity in section 32-2(b) must be construed and resolved in favor of the defendant. [See People v. Whitney, 188 Ill.2d 91, 97 (1999), holding that "statutory language should be given its plain and ordinary mean...Where statutory language is clear and unambiguous, its plain meaning will be given effect...[P]enal statutes are strictly construed in favor of the defendant. Any ambiguity in a penal statute should be construed and resolved in favor of the defendant." See also People v. Robinson, 172 Ill.2d 452, 457 (1996), finding that "...as a general matter, any ambiguities in a criminal statute must be resolved in favor of the defendant"].

Section 32-2(b) of the perjury law states, in relevant part, that "[a]n indictment or information for perjury *alleging* that the offender, under oath, has *made contradictory statements*..." (emphasis added). This section plainly requires that the charging instrument state or include in its allegations the terms "contradictory statements." Again, the above cited Supreme Court cases support this construction. Also, pursuant to case law, any ambiguity in the meaning of section 32-2(b) must be resolved in favor of the Petitioner, thereby requiring the allegation "contradictory statements" in any indictment or information based on section 32-2(b). These terms, of course, were not asserted by the 1984 perjury information.

The Court therefore finds that the 1984 perjury information against Petitioner constitutes perjury by false statement, and not perjury based on contradictory statements, in that Ms. Gray "on June 19th, 1978...under oath...in the case for preliminary hearing [of the Ford Heights Four]...made a false statement, material to the point and issue in question, relating to the presence and participation of Kenneth Adams, Willie Rainge, Dennis Williams and Verneal Jimerson in the armed robbery, aggravated kidnapping and rape murder of Carol J. Schmal and murder or Larry Lionberg."

Next, the Court must determine the content of the facts underlying Ms. Gray's April 23, 1987 perjury plea to the 1984 information. This determination is guided by the Illinois Supreme Court's ruling in <u>People v. Peeples</u>, 155 Ill.2d 422, 494 (1993), that "'[w]hen a plea of guilty is fairly and understandingly made, *it admits every material fact alleged in the indictment* and all the elements of the crime with which an accused is legally charged, and obviates the need of any proof whatsoever." (emphasis added). [Note that for purposes of this analysis, the Court will assume that Petitioner's plea was "fairly and understandingly made." However, Ms. Gray has clearly challenged that the plea was "fairly...made" by alleging her actual innocence as equitable grounds for vacatur of the 1987 perjury plea, and also asserting her failure to understand the charges and the various trial proceedings in which she's participated, as evidence of her "legal disability" under the civil law, as opposed to the criminal law of incompetency. (Petitioner's Post-Hearing Mem. at 3, 8, 10). In addition, the evidentiary proofs of this proceeding establish by a preponderance, as this Court later holds, that the prosecution wrongfully induced or coerced Ms. Gray's 1987 perjury plea. (<u>See</u> Memorandum "Analysis" para. 1., at 313-18).

The material allegations of the 1984 perjury information are that on "June 19th, 1978," "Paula Denise Gray" "made a false statement," "under oath," in a "preliminary hearing" of the Ford Heights Four "material to the issue and point in question""relating to the presence and participation" of "Kenneth Adams, Willie Rainge, Dennis Williams and

Verneal Jimerson" in "the armed robbery, aggravated kidnapping and rape murder of Carol J. Schmal and murder of Larry Lionberg." (Respondent's Joint Mot. Ex. E.; Petitioner's 2-1401 Mot. Ex. K).

The People's factual recitation in support of Petitioner's April 23rd, 1987 perjury plea sets forth only one statement made by Petitioner at the "June 19th, 1978...preliminary hearing," which is that Ms. Gray "did in fact" state "...under oath[,]...for the case [involving the Ford Heights Four][,]...that Kenneth Adams, Willie Rainge, Dennis Williams, and Verneal Jimerson had not participated in the murder and rape of Carol Schmal or the murder of Larry Lionberg..." (Respondent's Joint Mot. Ex. E.)

A review of the 1984 perjury information and factual recitation in support of the plea, clearly indicates that the 1984 information alleges that "Paula Gray" made a "false statement" at the same preliminary hearing, regarding the "presence and participation" of the same parties, victims and crimes, as the factual recitation underlying the 1987 perjury plea. Accordingly, the Court can reasonably conclude that the factual recitation underlying the 1987 perjury plea that the "[Ford Heights Four] had not participated in the [commission of the Lionberg/Schmal crimes]" both supports and constitutes a "false statement" as materially alleged by the 1984 perjury information.

Further support for this finding is provided by the People's very conduct in their prosecution of the Ford Heights Four in which they presented the testimony of the Petitioner, as a State's witness, at the 1985 and 1987 trials of Verneal Jimerson, Dennis Williams and Willie Rainge, which both inculpated she and the Ford Heights Four in the subject crimes and was significantly identical to her grand jury testimony as alleged by the Respondent's 1984 information against Ms. Gray. Presumably, it is Respondent's current position that this testimony by Paula Gray, and corresponding grand jury testimony alleged by her 1984 perjury charge, are truthful. As at least one of the two statements, under oath, attributed to Ms. Gray by the 1984 information (i.e. her grand jury testimony *or* preliminary hearing testimony) must be false in order to prove perjury, the Court can reasonably conclude that the Respondent's position, based on their aforementioned conduct, is that Ms. Gray's preliminary hearing testimony or statement is false. [See People v. Davis, 164 Ill.2d 309, 311-312 (1995), holding that the perjury statute of 1961, requires "that the [alleged false statements] be given under oath or affirmation; *that they be false*; that they be material to the issue or point in question; and that the person making the statements believes them not to be true" (emphasis added); In re Obartuch, 386 Ill. 323, 332 (1944), ruling that "'[p]erjury' is willfully, corruptly and *falsely* testifying in a matter material to the issue or point in question" (emphasis added); People v. Anderson, 57 Ill.App.3d

95, 98 (1st Dist. 1978), holding that "...there can be no perjury so long as the witness spoke the truth, (regardless of the defendant's intention to answer falsely to certain questions); People v. Toner, 55 Ill.App.3d 688, 694 (1st Dist. 1977), ruling that "...the [perjurious] response must be *factually false*, as a conviction for perjury will not lie where the accused has merely drawn an erroneous or illogical conclusion." (emphasis added)].

Accordingly, the Court finds that the 1984 perjury information alleges that Paula Gray committed perjury by "false statement" at the June 19th, 1978 preliminary hearing of the Ford Heights Four, and that Petitioner's "false statement," or factual basis in support of Ms. Gray's 1987 perjury plea, is that these four men "had not participated" in the commission of the Lionberg/Schmal crimes. [Note that this finding of law is rendered purely for determining the issue as to "errors of fact" underlying the 1987 perjury judgment presented by this 2-1401 proceeding. It does not constitute a ruling as to the legal sufficiency of either the 1984 perjury information or the 1987 perjury plea].

Therefore, on both collateral estoppel *(or res judicata)* grounds, as well as this Court's foregoing construction of the 1984 perjury information and facts in support of the April 23rd, 1987 plea, the Court finds that Petitioner was charged with perjury by "false statement" under oath at the June 19th, 1978 preliminary hearing of the Ford Heights Four by asserting the innocence of the Ford Heights Four of the subject offenses, and that the 1987 recitation of facts by the People support or evidence Ms. Gray's foregoing perjury by "false" preliminary hearing testimony asserting the innocence of the Ford Heights Four of the Lionberg/Schmal crimes.

6. Respondent argues that Petitioner's preliminary hearing testimony as to the innocence of the Ford Heights Four in the commission of the Lionberg/Schmal crimes is irrelevant to this proceeding. Petitioner argues in support of its relevancy.

Ms. Gray's statement of innocence of the Ford Heights Four at their June 19th, 1978 preliminary hearing is relevant to her 1987 perjury conviction, because that judgment, as this Court found in Memorandum "Preliminary Findings of Law" para. 5., at 252, was based on the falsity of that very same testimony. Therefore, this testimony by Petitioner is relevant to the Court's determination of whether the newly discovered evidence alleged by Ms. Gray's petition would have prevented entry of her 1987 perjury judgment, for a showing of its truthfulness, or that the Ford Heights Four were innocent of the Lionberg/Schmal crimes as she stated on June 19th, 1978, would have prevented the 1987 conviction. [See Memorandum "Preliminary Findings of Law" para. 5., at 251, for holdings of Davis, 164 Ill.2d at 311-12; In re Obartuch, 386 Ill. at 332; Anderson,

57 Ill.App.3d at 98; Toner, 55 Ill.App.3d at 694, each requiring the showing of a *false* statement or affirmation under oath to prove perjury. See also Memorandum "Preliminary Findings of Law" para. 2, at 229-30, for ruling that any exculpatory evidence with respect to Petitioner's alleged principals, the Ford Heights Four, is relevant to Ms. Gray as their purported accessory].

Furthermore, assuming *arguendo* and consistent with Respondent's position in this matter, that Petitioner's 1987 perjury judgment is based on her contradictory testimony at the May 16th, 1978 grand jury and June 19th, 1978 preliminary hearing, Ms. Gray's preliminary hearing testimony of the innocence of the Ford Heights Four would still be relevant to this proceeding.

This is based on the Illinois Supreme Court ruling in People v. Ricker, 45 Ill.32d at 565, that under section 32-2(b) of the 1967 perjury statute, proof that a person has made contradictory statements under oath creates a *rebuttable* presumption that one of the two statements is false and that the person cannot believe both statements to be true. The court went on to hold that:

[i]t is, of course, arguable that the [contradictory] statements were made because of excusable mistake or some other *valid reason*...[and while in most instances perjury will have been committed, the rare exception] ordinarily will be shown by evidence more readily available to the defendant than to the State. Under such circumstances, *a rebuttable presumption which puts the burden of going forward with the evidence on the defendant* is constitutionally permissible. (emphasis added).

As such, Petitioner can rebut in this 2-1401 proceeding the foregoing presumption that she committed perjury by contradictory testimony with the "valid reason," based on newly discovered evidence, that her May 16th, 1978 grand jury testimony was coerced and fabricated by the CCSP (as this Court has held in Memorandum "Findings of Fact" para. 1., at 181-91; "Preliminary Findings of Law" para. 4., at 238-45), and that her June 19th, 1978 preliminary hearing testimony as to the innocence of the Ford Heights Four was truthful based on her newly discovered proofs; thus rendering Ms. Gray's preliminary hearing testimony regarding the innocence of the Ford Heights Four additionally relevant to perjury by contradictory statements (under oath) as alleged by Respondent.

Accordingly, the Court finds that Petitioner's preliminary hearing testimony regarding the innocence of the Ford Heights Four is relevant to this 2-1401 proceeding.

7. The First District in People v. Gholston, 297 Ill.App.3d 415, 419 (1st Dist. 1998), has clarified the nature of evidence that would properly support an assertion of actual innocence based on new proofs in holding that:

[a]n allegation of newly discovered evidence of innocence is not intended to question the strength of the State's case. An allegation of newly discovered evidence of innocence seeks to establish the defendant's actual innocence of the crimes for which he has been tried and convicted. *Washington*, 171 Ill.2d at 495 (McMorrow, J., specially concurring).

The facts in support of Petitioner's assertion of actual innocence are the vacatur of the judgments and dismissal of the charges for the Lionberg/Schmal crimes against the Ford Heights Four, as well as gubernatorial pardon of these men for the subject offenses due to their innocence; the arrest and conviction of the three (3) real perpetrators of these crimes, the fourth being deceased; and the three affidavits of two of the real perpetrators attesting to the non-involvement of Ms. Gray in the subject offenses. (See Court's "Findings of Fact" para. 8., at 223-24). The Court finds that these facts seek to establish Petitioner's innocence of the crimes for which she was convicted in both 1978 and 1987, and are not intended to question the strength of the People's case. As such, the Court finds that these facts properly assert a claim of actual innocence.

8. Petitioner alleges, or has presented evidence (as did the Respondent), that the State, in effect, obtained the 1979 and 1987 judgments against her unfairly by withholding or suppressing, and perhaps destroying or losing, evidence favorable to Ms. Gray's case, and material to (or determinative of) the outcome of her 1978 trial, as well as her 1987 perjury plea. These allegations are in addition to Petitioner's "free-standing claim" of "actual innocence," and her showing by a preponderance of CCSP coercion and fabrication of her 1978 incriminating statement to ASA's and the sheriff's police, as well as her inculpatory testimony to the May 16th, 1978 grand jury. (see Petitioner's 2-1401 Mot. at 1; Memorandum at 1; Memorandum "Findings of Fact" para. 1., at 181-91; "Preliminary Findings of Law" para. 4, at 238-45).

This materially favorable evidence consists of, according to Petitioner, ten (10) items of documentary and testimonial proofs that exculpate her (or the Ford Heights Four), or inculpate others, for commission of the subject crimes, including evidence:

a. that reliably pointed to the guilt of four people other than the Ford Heights Four as early as May 18th, 1978;

b. that the State presented perjured forensic testimony at Petitioner's 1978 trial, and;

c. that the State failed and/or refused to conduct probable exculpatory forensic tests at the time of Ms. Gray's 1978 trial.

Petitioner also alleges that the foregoing ten items were suppressed, lost or destroyed by the government and not disclosed to her, for and during at least an 18 year period, including when the State secured the 1979 and 1987 judgments against Ms. Gray.

Petitioner additionally asserts that had Respondent disclosed this evidence to her for the 1978 trial, she would have been acquitted; and that had the State disclosed this evidence to her prior to her 1987 perjury plea, she would have declined pleading guilty and insisted instead on a trial.

Petitioner properly terms these ten items "Brady" evidence, because the applicable law in a criminal context in determining whether a trial conviction or plea has been obtained unfairly because of the prosecution's suppression of materially favorable evidence from the accused, and/or the knowing use of perjured testimony, is a determination of whether the evidence constitutes Brady proofs.

However, Brady and its progeny, which will be discussed more fully later in this paragraph, is constitutionally based, and the denial of constitutional rights cannot be collaterally attacked with a section 2-1401 petition. (See In re Charles S., 83 Ill.App.3d at 517; Memorandum "Preliminary Findings of Law" para. 5., at 246). Nonetheless, Ms. Gray's assertion that her ten (10) items constitute newly discovered Brady evidence does not render her post-judgment petition constitutionally based. This is because the nature of these newly discovered proofs, to wit, Brady evidence, goes to the weight to be assessed these proofs in determining whether 2-1401 vacatur of her 1987 judgment is appropriate.

More specifically, a determination of whether her new proofs constitute Brady evidence goes to the degree, if any, of materiality of her newly discovered evidence. A post-judgment petition based on newly discovered evidence requires, among other elements, proof of materiality of such evidence on the outcome of

the trial. [See Burrows, 172 Ill.2d at 180, a combined post-judgment and post-conviction proceeding based, in part, on newly discovered evidence, which reiterated the long standing rule that "a request for a new trial based on *newly discovered evidence* must...present evidence which was not available at the defendant's trial and which the defendant could not have discovered sooner through the exercise of due diligence[;]...[and] the evidence...must be of such convincing character that it would likely change the outcome of the trial." (emphasis added). Burrows, 172 Ill.2d at 180, then cited two post-conviction cases in support of these criteria, or People v. Albanese, 125 Ill.2d 100, 111 (1988) and People v. Molstad, 101 Ill.2d 128, 134 (1984), both quoting People v. Baker, 16 Ill.2d 364, 374 (1959), which involved a post-trial motion based on newly discovered evidence, also cited by Burrows in support of its newly-discovered evidence criteria; see also Hallom, 265 Ill.App.3d at 906, a First District case which held that "[i]n order to be entitled to relief under section 2-1401, the newly discovered evidence must be (1) so conclusive that it would probably change the result if a new trial is granted; (2) discovered after trial; (3) of such character that it could not have been discovered prior to trial in the exercise of due diligence; (4) material to the issues; and (5) not merely cumulative to the trial evidence"]. Simply put, for the Court *not* to assess Brady level materiality, if proven, with respect to Petitioner's ten (10) items of purportedly newly discovered evidence, would effectively ignore the materiality determination of Ms. Gray's new proofs as required by the foregoing law for determining whether 2-1401 relief should be granted on newly discovered evidence grounds. Such action would also be unfair to Petitioner in not assessing the import of new proofs presented by her. In effect, Brady proofs are no different from other forms of newly discovered evidence as to which post-judgment relief can be granted provided the new proofs meet the foregoing requirements of Burrows and Hallom.

Also, if Ms. Gray's petition were constitutionally based on Brady, proof of a Brady violation, or abrogation of Petitioner's due process right to a fair trial because of prosecutorial suppression of materially favorable evidence, would, without further evidence, constitute grounds for 2-1401 vacatur of her 1987 judgment. Such result in this proceeding, however, is not the case as a matter of law, for a Brady violation does not *ipso facto* satisfy the previously discussed materiality element for post-judgment relief on newly discovered evidence grounds. In fact, Petitioner's materiality burden for the herein 2-1401 matter is even *greater* than Brady materiality according to the ruling of United States v. Bagley, 473 U.S. 667, 680-81 (1985), one of the Brady progeny, which

specifically stated that the Brady standard of materiality is "stricter than the harmless-error standard *but more lenient to the defense than the newly discovered evidence standard.*" (emphasis added). (See this para. at 262).

Still further reason that Ms. Gray's petition is not constitutionally based is that a Brady analysis and determination of her ten (10) items is necessary for deciding the question of equity, because as previously discussed, a post-judgment proceeding invokes the equitable powers of the court to prevent enforcement of a judgment when it would be unfair, unjust or inequitable. [Recall the Court's previous finding, based on well settled case law, that any "unfair, unjust or unconscionable behavior" by the government in obtaining the 1987 judgment against Petitioner (including their unfair, unjust or unconscionable conduct at the time of Petitioner's 1978 trial involving the same offenses, charges and parties), is cognizable by the Court pursuant to the equitable powers invoked by Ms. Gray's post-judgment petition. (See Memorandum "Preliminary Findings of Law" para. 3, at 237-38, and this para. at 256)].

Brady and its progeny, again as will be discussed later in this paragraph, is premised on prosecutorial disclosure requirements, as well as the prosecutor's facilitation of the truth-seeking function of the trial process, to ensure that the accused receives a fair trial. Accordingly, Petitioner's allegations that the government obtained the 1979 and 1987 judgments against Ms. Gray in violation of Brady, if true, would clearly be unfair and inequitable, as would the trial and resultant judgments, and thus fall within 2-1401 purview to "prevent injustice" or an "unjust result." [See Ellman v. De Ruiter, 412 Ill. 285, 354-53 (1952), holding that a section 72 motion "may...be addressed to the equitable powers of the court, when the exercise of such power is necessary to prevent injustice"; Ostendorf, 89 Ill.2d at 285, ruling, as previously indicated, that "[o]ne of the guiding principles in the administration of section 72 relief 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"; accord Elfman v. Evanston Bus Co., 27 Ill.2d 609, 613 (1962); see also Cartwright v. Goodyear Tire & Rubber Co., 279 Ill.App.3d 874, 885 (1st Dist. 1996), holding that "[s]ection 2-1401 invokes the equitable powers of the court to avoid an unjust result"; Robinson v. Commonwealth Edison Co., 238 Ill.App. 436, 441 (1st Dist. 1992), ruling that a "section 2-1401 petition is addressed to the equitable powers of the trial court, which must consider all the

circumstances and liberally construe the scope of relief available to prevent an unjust result"].

Accordingly, based on the foregoing grounds, the Court finds that a determination of whether Petitioner's alleged ten (10) newly discovered items constitute Brady evidence goes to the weight or degree of 2-1401 materiality to be assessed these new proofs, and also to whether the 1987 judgment constitutes an unfair, unjust or unconscionable result. The Court further finds, based on the same grounds, that Ms. Gray's Brady allegations do not render her petition constitutionally based.

A Brady analysis and determination of these items is also necessary in determining whether Petitioner's 1987 plea is void on voluntariness grounds, or wrongfully induced or coerced by Respondent's promise and threat while suppressing Brady evidence, and not informed because the Respondent misled Petitioner through its suppression of Brady evidence.

In summary, a Brady analysis and determination of Ms. Gray's ten (10) items is relevant to, and goes to the weight and degree of 2-1401 materiality to be assessed these purported newly discovered proofs, in the Court's determination of whether Petitioner's 1987 plea:

a. is void on voluntariness grounds (or wrongfully induced or coerced by Respondent's promise and threat while suppressing Brady evidence, and because not informed due to the Respondent having misled Petitioner by suppressing Brady evidence), and;

b. is subject to section 2-1401 vacatur on the grounds of newly discovered evidence; lack of a factual basis; inducement or coercion by Respondent; and equity. [See Memorandum "Issues/Court's Determination of Issues" para. 1.j.-m., at 12-14; Petitioner's Post-Hearing Mem. at 2, 3, 6-7, alleging, in relevant part, that had the ten items of Brady evidence been disclosed to Ms. Gray prior to her 1987 plea, "she would have insisted on a trial," and that 2-1401 vacatur of her 1987 judgment should be granted because newly discovered evidence establishes that her preliminary hearing testimony was truthful, and also constitutes equitable grounds for vacatur, because "justice would only be served by doing so"].

In addition, should Ms. Gray establish Brady violations regarding her purported newly discovered evidence, she will have

clearly proven a discovery rule or 412(c) violation for purposes of tolling the two-year post-judgment statute of limitations.[See Ostendorf, 89 Ill.2d at 285; Memorandum "Preliminary Findings of Law" para. 3, at 235. See also Illinois Supreme Court Rule 412(c), which codified Brady on October 1, 1971; People v. Uselding, 217 Ill.App.3d 1063, 1074 (1st Dist. 1991), holding that "[t]he standard under Illinois Supreme Court Rules 412(c) and 415 [regarding the prosecutor's continuing duty to disclose favorable information and sanctions for discovery rule(s) violation(s)] is coextensive with that set forth in Brady under considerations of Federal due process"; People v. Gutierrez, 205 Ill.App.3d 231, 255 (1st Dist. 1990), stating that "[i]t is well established that violations of the pretrial discovery requirements of Illinois Supreme Court Rule 412 are governed by the same standard as Federal due process claims under Brady and its progeny"; People v. Lann, 194 Ill.App.3d 623, 632 (1st Dist. 1990), ruling that "[v]iolations of the pretrial discovery requirements of Rule 412 are governed by the same standard of Federal due process claims decided under Brady v. Maryland [citation omitted] and its progeny"].

It should be noted, however, that while evidence of Brady disclosure violations would simultaneously constitute violation of Rule 412(c), and also provide stronger support for vacatur of Ms. Gray's 1987 perjury judgment than non-Brady disclosure violations, case law does not require proof that Brady was abrogated to establish a 412(c) violation. [See People v. Norris, 303 Ill.App.3d 163, 174 (1st Dist. 1999), holding that "[w]hile *failure to comply with* [the] *requirements [of Rules 412(c)* and 415(b)] *does not require a reversal absent a showing of undue prejudice*, these discovery requirements are mandatory; the State is not free to disregard them." See also Committee Comments to paragraph (c) of Rule 412 stating, in relevant part, that this paragraph was included in the rule to comply with the constitutional requirement pursuant to Brady v. Maryland that the prosecution disclose "evidence favorable to an accused...where the evidence is material either to guilt or innocence," and that "[a]lthough 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." As such, the prosecution can violate 412(c) and not be sanctioned with reversal absent the accused showing that they were unduly prejudiced by the State's failure to disclose. A Brady violation, of course, requires reversal of the judgment on constitutional due process grounds. See Brady and its progeny discussed below. Also, Norris engaged in a Brady (or Bagley)

materiality analysis of the evidence the prosecution suppressed in violation of Rule 412(c) to determine whether the judgment should be reversed as a discovery sanction on undue prejudice grounds. Norris, 303 Ill.App.3d at 174-75; accord Clemons, 277 Ill.App.3d at 917-18; People v. Velez, 123 Ill.App.3d 210, 218-19 (1st Dist. 1984).

However, as previously ruled, to decline a Brady analysis and determination of Petitioner's ten (10) items because less evidence is required to establish violation of Rule 412(c), would ignore the weight and degree of post-judgment materiality to be properly assessed these alleged newly discovered proofs, as well as a full and fair decision as to the equity or justness of Ms. Gray's 1987 perjury judgment.

Furthermore, even if Petitioner's Brady allegations render her 2-1401 petition constitutionally based, the Court must opt for the equitable mandate of a post-judgment proceeding, for if what Ms. Gray has alleged is true, she has clearly been subjected, among other allegations and findings, to egregiously unfair evidentiary and trial misconduct by the government in obtaining the 1979 and 1987 judgments against her. Our Illinois Supreme Court has granted post-judgment vacatur of a civil judgment in a virtually identical factual scenario. In Lubbers v. Norfolk & Western Railway Co., 105 Ill.2d 201, 213 (1984), the court affirmed post-judgment vacatur of a civil judgment upon holding that it was not:

dealing with new evidence of noninspection [of allegedly defective railroad signals at a crossing involving a train/vehicular collision resulting in fatalities,] but with allegations of conduct [of intentionally withholding the names of material witnesses and falsifying an interrogatory response] which was intended to and did frustrate the discovery process and impeded [petitioner] in his attempts to formulate a theory of the case and a strategy for trial. Such conduct is especially to be condemned because discovery is supposed to enable counsel to decide in advance of trial not only what the evidence is likely to be but what legal issues can credibly be argued [citation omitted]; indeed, it is partly for this reason that parties are permitted to amend their pleadings at any time before trial or judgment. [citation omitted]. Parties should not be permitted to avail themselves of a verdict obtained by deluding an opponent as to what the facts or issues in a case really are. We believe that the *'outcome-determinative' requirement of section 2-1401 is met if it reasonably appears that the undiscovered evidence which* was *wrongfully withheld or falsified in discovery* would

have prevented the entry of judgment against petitioner. (emphasis added).

The herein matter, though addressing a criminal as opposed to a civil judgment, is nonetheless a mirror image of Lubbers factually. Petitioner has made the same allegation that the opposing party wrongfully withheld Brady proofs, and knowingly presented false evidence, which would have prevented the entry of the 1987 perjury judgment against her. A showing of Brady violation, as previously discussed, constitutes proof of discovery rule or 412(c) violation. [Note that the basis of this argument is that the section 2-1401 grounds for relief in both Lubbers and the herein matter is *discovery rule violation*, or suppression and falsification of evidence that would prevent entry of the respective judgments, with the principle distinction being that Petitioner's matter involves a showing of Brady violation to trigger abrogation of discovery Rule 412(c)]. In short, assuming Brady violation in this matter, Petitioner will have established that Respondent wrongfully withheld or suppressed evidence in violation of discovery Rule 412(c) (including the use of false evidence at trial) which proofs would have prevented entry of the 1987 perjury judgment against Ms. Gray. As Lubbers has afforded post-judgment vacatur for almost identical conduct in a civil proceeding, 2-1401 vacatur of Ms. Gray's perjury judgment in a criminal case would constitute both equal and fair treatment. Moreover, a post-judgment petition, though civil in nature, is applicable to criminal, as well as civil judgments. [See People v. Baskin, 213 Ill.App.3d 477, 483 (1st Dist. 1991), ruling that section 2-1401 of the Code of Civil Procedure, "although civil in nature, has been held to extend to criminal proceedings"; see also Burrows, 172 Ill.2d at 172, 179, a combined *post-judgment* and post-conviction proceeding in a criminal matter].

Additional grounds for incorporating a Brady analysis and determination of the ten (10) evidentiary items in this proceeding, even if it renders Ms. Gray's petition constitutionally based, is that according to Petitioner's allegations, the only reason she could not institute a post-conviction action, which *is* constitutionally based, is because the government withheld Brady evidence for the period that she could properly institute such an action (i.e. while Ms. Gray was actually "imprisoned in the penitentiary," and during the period of her two year sentence of probation on her 1987 perjury plea). [See People v. Haynes, 192 Ill.2d 437, 464 (2000), holding that "[t]he purpose of a post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that have not

been, and could not have been, adjudicated previously upon direct appeal"; People v. Newberry, 55 Ill.2d 74, 75 (1973), ruling that "[t]o be cognizable under the Post-Conviction Hearing Act, a claim must assert the substantial denial of a constitutional right..."; People v. West, 145 Ill.2d 517, 518 (1991), holding that "[t]o invoke post-conviction relief, the statutory language requires that an individual be 'imprisoned in the penitentiary'...[and] [t]his language has been held to include defendants who...have been sentenced to probation," citing People v. Montes, 90 Ill.App.3d 355 (1st Dist. 1980)]. The government should not be permitted to benefit from its own purported unfair conduct, or misconduct, in violation of Brady, by precluding post-judgment consideration because of such Petitioner allegation. [See Niemoth v. Kohls, 171 Ill.App.3d 54, 70 (1st Dist. 1988), reiterating the "well-recognized 'clean hands' maxim that 'equity will not aid any person who has done iniquity or is seeking to take advantage of his own wrong"; see also Ostendorf, 89 Ill.2d at 285, noting that in both Elfman, 27 Ill.2d at 613, and Ellman, 412 Ill. at 292, which vacated judgments on equitable grounds, that "the unfair conduct of counsel was a factor in [their] determination that section 72 relief was warranted"].

As such, it would be unfair and in contravention of the equities of a 2-1401 proceeding, as well as violative of equal protection under the law, for Petitioner not to receive post-judgment review and treatment similar to that of a civil case petitioner, in a factually comparable criminal case setting.

Therefore, based on the foregoing findings of this paragraph, a Brady analysis and determination of Petitioner's ten (10) items is appropriate in this 2-1401 proceeding; Ms. Gray's Brady allegations do not render her petition constitutionally based; and assuming *arguendo* that they do, post-judgment review is proper on equity, fairness and equal protection grounds.

In 1963, the United States Supreme Court held in Brady v. Maryland, 373 U.S. 83 (1963), that in criminal prosecutions the State has an affirmative duty to disclose evidence favorable to a defendant. Coleman, 183 Ill.2d at 391. Brady set forth the general rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Hobley, 182 Ill.2d at 432, citing Brady, 373 U.S. at 87.
Brady explained that this principle is not intended to punish society for the misdeeds of a prosecutor, but to ensure a fair trial for the

accused and to protect the administration of justice. Hobley, 182 Ill.2d at 432, citing to Brady, 373 U.S. at 87-88. The court reasoned that:

> [a] prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,'...

Brady, 373 U.S. at 87-88.

Brady, and its progeny of United States v. Agurs, 427 U.S. 97 (1976), United States v. Bagley, 473 U.S. 667 (1985), and Kyles v. Whitley, 514 U.S. 419 (1995), require the following four (4) elements to prove a Brady violation by the State, or denial of a defendant's federal constitutional due process right to a fair trial:

1. the evidence must be favorable to the defendant (i.e. tends to negate guilt or mitigate punishment);

2. the evidence must be in the possession or control of the State at the time of defendant's trial [or plea];

3. the State suppressed the evidence from the defendant at the time of defendant's trial [or plea], and;

4. the suppressed evidence was material to the defendant's guilt or punishment.

Hobley, 182 Ill.2d at 438; see also People v. Page, 193 Ill.2d 120, 158-59 (2000), holding that "[t]o establish a Brady violation, the suppressed evidence must be both favorable to the accused and material"; People v. Nichols, 63 Ill.2d 443 (1976), which required the above four elements to sustain a Brady violation, including a defendant request for the evidence, the latter requirement abandoned in 1985 by Bagley, 473 U.S. at 682; People v. Jefferson, 64 Ill.App.3d 200, 204 (1st Dist. 1978), holding that "[i]t is well established [pursuant to Brady and Supreme Court Rule 412(c)] that the prosecution is obligated to reveal to an accused any information in its possession or control which is material and tends either to negate guilt or mitigate punishment."

The Brady progeny of Agurs, Bagley, and Kyles redefined or further defined the fourth requirement regarding the "materiality" of the suppressed evidence in a constitutional sense.

On June 24th, 1976, in United States v. Agurs, 427 U.S. 97 (1976), the United States Supreme Court described "'three quite different situations' to which the general rule of Brady applies and set forth varying tests of materiality to determine whether a criminal conviction must be overturned." Coleman, 183 Ill.2d at 391, citing to Agurs, 427 U.S. at 103. The first situation described by the Court, and relevant to this petition, involves "undisclosed evidence [which] demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." Coleman, 183 Ill.2d at 391, citing Agurs, 427 U.S. at 103. Such conduct, noted Agurs, not only violates constitutionally mandated disclosure obligations, but "'involves prosecutorial misconduct'" and constitutes a "'corruption of the truth-seeking function of the trial process.'" Coleman, 183 Ill.2d at 391-92, citing to Agurs, 427 U.S. at 104. This rationale emanated from the court's ruling in Mooney v. Holohan, 294 U.S.103 (1935), which found that if the petitioner's allegations that his conviction was based on perjured testimony are true, it "would establish such fundamental unfairness as to justify a collateral attack on petitioner's conviction." Mooney further stated that:

> [i]t is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Agurs, 427 U.S. at 104, citing Mooney, 294 U.S. at 112.

Therefore, Agurs imposed a "'strict standard of materiality'" in such "cases where the prosecution uses evidence that it knew or should have known was false," whereby "the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Coleman, 183 Ill.2d at 392, citing to Agurs, 427 U.S. at 103.

The second situation "'is characterized by a pretrial request for specific evidence'" followed by the prosecution's

noncompliance with the request. Coleman, 183 Ill.2d at 392, citing Agurs, 427 U.S. at 104. Though the court did not specify a standard of materiality for this situation, it suggested that it might be more lenient to the defendant than where the accused makes no request or a general request by noting that "'[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." Coleman, 183 Ill.2d at 392, citing Agurs, 427 U.S. at 106.

The third situation involved no discovery request or only a general request for "'Brady'" material, and exculpatory matter is withheld by the prosecution. Coleman, 183 Ill.2d at 392, citing to Agurs, 427 U.S. at 112. The standard of materiality established by the court, which is more favorable to the State, is that "[t]he defendant will be entitled to a new trial only if the undisclosed evidence, viewed in the context of the entire record, creates a reasonable doubt that otherwise would not exist." Coleman, 183 Ill.2d at 392, citing to Agurs, 427 U.S. at 112. Agurs also held while discussing the third situation that "if evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise if no request is made." Agurs, 427 U.S. at 107.

On March 20th, 1985, the Supreme Court in United States v. Bagley, 473 U.S. 667 (1985), "abandoned the distinction between the second and third Agurs categories, i.e. the 'specific request' and 'general or no request.'" Coleman, 183 Ill.2d at 392-93. With respect to the second and third situations, Bagley held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government which requires reversal, "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Coleman, 183 Ill.2d at 393, citing Bagley, 473 U.S. at 682. A "'reasonable probability'" of a different result is a "'a probability sufficient to undermine confidence in the outcome.'" Hobley, 182 Ill.2d at 432, citing Bagley, 473 U.S. at 682. Bagley, however, retained the Agurs standard for materiality in the first situation by holding that the defendant's conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. People v. Simms, 192 Ill.2d 348, 389 (2000), citing Coleman's summary of Agurs and Bagley.

Bagley made specific note that it was adopting its foregoing standard of materiality from the Strickland v.Washington "formulation of the Agurs test for materiality," 466

U.S. 668 (1984), in which the court determined whether a new trial was warranted where "evidence [was] not introduced because of incompetence of counsel." Bagley, 473 U.S. at 682. Bagley also observed that this standard of materiality "in the absence of a specific Brady request is...stricter [to the accused] than the harmless-error standard but more lenient to the defense than the newly-discovered evidence standard." Bagley, 473 U.S. at 681. It further stated that:

under the Strickland formulation [which Bagley was adopting] the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response [to a Brady request].

Bagley, 473 U.S. at 683.

Bagley also held that "impeachment evidence," or "evidence [which the prosecutor failed to disclose] that the defense might have used to impeach the Government's witnesses by showing bias or interest,":

...falls within the Brady rule...and constitute[s] 'evidence favorable to an accused,' [along with exculpatory evidence,] Brady, 373 U.S., at 87, so that, if disclosed and used effectively, ...may make the difference between conviction and acquittal.

Bagley, 473 U.S. at 676.

Bagley cited in support of this ruling the holding of Napue v. Illinois, 360 U.S. 264, 269 (1969), that "'[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.'" Moreover, Bagley expressly "rejected any distinction between impeachment evidence and exculpatory evidence," reiterating an earlier decision that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the] general rule [of Brady]..." Bagley, 473 U.S. 677.

Finally, Bagley indicated that the Brady rule required prosecutorial disclosure of evidence that is "both favorable to the accused and 'material either to guilt or to punishment,'" to ensure "that a miscarriage of justice does not occur" and that the defendant is not denied his or her right to a "fair trial." Bagley, 473 U.S. at 674, 675. It underscored that the Brady rule is premised on the following rationale:

By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty...whose interest ...in a criminal prosecution is not that it shall win a case, but that justice shall be done.' Berger v. United States, 295 U.S. 78, 88 (1935). See Brady v. Maryland, 373 U.S., at 87-88.

Bagley, 473 U.S. at 676.

On April 19th, 1995, in Kyles v. Whitley, 514 U.S. 419 (1995), the United Stated

States Supreme Court "clarified the Bagley definition of materiality." Coleman, 183 Ill.2d at 393. Kyles explained that a determination of materiality for either the second or third categories does not require a demonstration by a preponderance that disclosure would have resulted ultimately in defendant's acquittal, or that the accused would more likely than not have received a different verdict with the [suppressed favorable] evidence, "but [instead] whether in [the] absence [of this evidence] he received a fair trial." Kyles, 514 U.S. at 434; Coleman, 183 Ill.2d at 393, citing Kyles, 514 U.S. at 434. More specifically, the inquiry turns on whether the "'government's evidentiary suppression undermines confidence in the outcome of the trial,'" which Kyles held "'is not a sufficiency of evidence test,'" "so...the defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles, 514 U.S. at 434-35; Coleman, 183 Ill.2d at 393, citing Kyles, 514 U.S. at 434. Materiality, in short, is demonstrated "'by showing that the favorable evidence could reasonably be taken to put the whole case [in] such a different light as to undermine confidence in the verdict.'" Coleman, 183 Ill.2d at 393, citing Kyles, 514 U.S. at 435. Also, Kyles found that once a reviewing court applying Bagley has found constitutional error, that error "'cannot

subsequently be found harmless.'" Coleman, 183 Ill.2d at 393, citing Kyles, 514 U.S. at 436.

Kyles stated that "[t]he prudence of the careful prosecutor should not...be discouraged," by emphasizing that such a prosecutor "will resolve doubtful questions in favor of disclosure." Kyles, 514 U.S. 439-40. The court's reasoning reiterated the previously cited Bagley rationale underlying the purpose of the Brady rule:

Such disclosure [by the prudent prosecutor] will serve to justify trust in the prosecutor as 'the representative...of a sovereignty...whose interest...in a criminal prosecution is not that it shall win a case, but that justice shall be done'...Berger v. United States, 295 U.S. 78, 88...[a]nd it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Kyles, 514 U.S. at 439-40.

Kyles thereafter cited to previous Supreme Court cases for the proposition that recognized the general goal of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth.'" Kyles, 514 U.S. at 440.

Hobley, citing to Kyles, stated that the law (in Illinois) is well settled that "[t]he prosecution cannot escape its duty under Brady by contending that the suppressed evidence was known only to police investigators and not to the prosecutor." Hobley, 182 Ill.2d at 433, 438, citing Kyles, 514 U.S. at 509-09. [See also Thompkins, 121 Ill.2d at 426, holding that "[t]he State's failure to disclose to the defense a witness' exculpatory statements cannot be excused by the argument that the assistant State's Attorneys were unaware of the statement's existence, since both they and the police are required to cooperate and ensure that all relevant information will be provided and that discovery will be accomplished"; People v. Goka, 119 Ill.App.3d 1024, 1032 (1st Dist. 1983), finding that the prosecution's failure to disclose to defense counsel 412(c) information, thwarted the goal of furthering the fact-finding process by maintaining a flow of information between the State and its investigative personnel...[and that] "[t]he State's failure to provide the...[Rule 412(c) information] in response to the defense request is not excused by police failure; both [the police and prosecution] are required to cooperate so as to insure that all relevant information will be provided. In support of

this ruling, Goka cited People v. Young, 59 Ill.App.3d 254 (1st Dist. 1978), decided on April 11, 1978, which was prior to Petitioner's 1978 trial, and held in relevant part that "[t]here is no excuse for the failure of the State to fully and timely comply with the requirement of the...discovery rules"; People v. Sakalas, 85 Ill.App.3d 59, 74 (1st Dist. 1980), indicating that "the State is expected to know of the existence of material in the possession of the police department." Recall also the case law discussion in this para. at 257 that violation(s) of Rule 412(c) and other pretrial discovery rules, are governed by the same standard as federal due process claims under Brady and its progeny]. Likewise, Kyles specifically reasoned that "'any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.'" Hobley, 182 Ill.2d at 433, citing Kyles, 514 U.S. at 438.

Finally, Kyles held that in making a determination of materiality under Brady, the court must consider the cumulative effect of all suppressed evidence favorable to the defense, rather than considering each piece individually. Hobley, 182 Ill.2d at 435, citing Kyles, 514 U.S. at 436-41. Specifically, Kyles held that the suppressed evidence must be "considered collectively," and not by way of an "item by item" determination of whether the "favorable significance of a given item of undisclosed evidence is enough to demonstrate a Brady violation." Kyles, 514 U.S. at 436, 437 n.10. Kyles concluded that:

[w]e evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion.

Kyles, 514 U.S. at 437 n.10.

The Kyles decision, even though decided in 1995, is applicable to Petitioner's 1987 perjury judgment. While generally, decisions which announce new constitutional rules of criminal procedure are not to be applied retroactively to cases which have become final, including those on collateral review (see People v. Moore, 177 Ill.2d 421, 430 (1997); People v. Flowers, 138 Ill.2d 218, 237 (1990), vacated on other grounds, 508 U.S. 969 (1993); People v. Kizer, 318 Ill.App.3d 238, 246 (1st Dist. 2000), Kyles did not propound any new rules, but instead applied the law or rules existent at the time Ms. Gray's 1987 judgment became final.

The principal basis for this finding is that the Illinois Supreme Court expressly held that Kyles did not propound a new rule when it stated in Coleman that Kyles "*clarified* the Bagley definition of materiality." (emphasis added). Coleman, 183 Ill.2d at 393. Contrarily, the Illinois Supreme Court ruled in People v. Ward, 154 Ill.2d 272, 261-62, that Agurs "*expanded* Brady." (emphasis added).

Also, the First District held in Kizer, based on decisions of both the United States and Illinois Supreme Courts (Teague v. Lane, 489 U.S. 288 (1989) and Flowers, 138 Ill.2d 218), that if the new rule existed at the time the defendant's conviction became final, it is not a new rule. Kizer, 318 Ill.App.3d at 246. Flowers, which adopted the Teague holding, reiterated that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Flowers, 138 Ill.2d at 237; accord Kizer, 318 Ill.App.3d at 246, 247; People v. Cunningham, 267 Ill.App.3d 1009, 1016 (1st Dist. 1994). A case, however, does not announce a new rule if "it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." Moore, 177 Ill.2d at 431. Also, while Teague, 489 U.S. 333, acknowledged that "few cases on appeal or collateral review are 'dictated' by what came before," a later U.S. Supreme Court case, Butler v. McKellar, 494 U.S. 407, indicated that a rule could be considered new if there had been a significant difference of opinion on the issue in the lower courts before the rule was established.

Applying the foregoing case law lends further support to the Coleman determination that Kyles clarified or reiterated Bagley, and did not create a new rule, in that the Bagley standard of materiality was consistently applied, without any significant difference of opinion, by both the Illinois Supreme and Appellate District Courts from the inception of the Bagley decision in 1985 (or two years prior to Ms. Gray's 1987 judgment), up to and including the 1995 Kyles decision. See People v. Olinger, 112 Ill.2d 324, 342 (1986); People v. Alduino, 260 Ill.App.3d 665, 669 (2nd Dist. 1994); Uselding, 217 Ill.App.3d at 1074; People v. Lipscomb, 215 Ill.App.3d 413, 437 (4th Dist. 1991); People v. Black, 207 Ill.App.3d 304 307 (3rd Dist. 1991); People v. Roby, 169 Ill.App.3d 187, 191 (5th Dist. 1988).

Additional evidence that Kyles did not announce a new rule, pursuant to the foregoing case law regarding this issue, is that

Bagley materiality which Kyles explains and utilizes in its decision, became effective on the March 20th, 1985 date of the Bagley ruling, and was thus existent (and being applied) in 1987 when Petitioner's perjury judgment became final (i.e. the year when the availability of direct appeal by Ms. Gray to the state courts was exhausted. See Kizer, 318 Ill.App.3d at 246, citing Caspari v. Bohlen, 510 U.S. 383 (1994), holding that "'[a] state conviction and sentence [becomes] final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for writ of certiorari has elapsed or a timely filed petition has been finally denied").

Also, Kyles' admonition that a court must consider the cumulative or collective effect of all suppressed evidence favorable to the accused in rendering its materiality determination, has been the law in Illinois since at least March 27, 1978, or almost seven (7) years prior to the March 20th, 1985 Bagley decision. [See People v. Walker, 91 Ill.2d 502, 509 (1982), which applied the cumulative effect of the undisclosed evidence in its materiality determination upon holding, in relevant part, that the "defendant's failure...to use...[alleged Brady] *reports* [suppressed by the State]...could not have...affected the outcome of the trial," citing the Agurs materiality standard applicable at the time (emphasis added); People v. Chambers, 200 Ill.App.3d 538, 544 (1st Dist. 1990), which considered the collective effect of allegedly suppressed *"mugbooks*," used by the identifying witnesses, to determine that the Bagley materiality standard, as reiterated by Olinger, a 1986 Illinois Supreme Court case at 112 Ill.2d 324, was not met; People v. Curry, 167 Ill.App.3d 146, 153 (2nd Dist. 1988), again applying the cumulative effect of the suppressed evidence in its materiality analysis pursuant to Bagley, and reversing and remanding upon concluding that "the failure of the State to disclose the police and medical *reports* seriously undermines our confidence in the result below" (emphasis added); People v. Pagliuca, 119 Ill.App.3d 906, 921 (1st Dist. 1983), which in finding against the accuseds' Brady and Agurs due process arguments stated that "[w]hen the nondisclosures referred to by the defendants are taken *cumulatively*, and evaluated in the context of the entire record, they fail to create a reasonable doubt of defendants' guilt [and]...the defendants [therefore] received a fair trial" (emphasis added); People v. Kosik, 110 Ill.App.3d 930 (1st Dist. 1982), determining Agurs materiality based on the cumulative effect of two items of evidence claimed to have been suppressed by the State when holding that "[d]efendant has not shown the materiality of the alleged *violations*...nor...[that] the

violations...create a reasonable doubt as to defendant's guilt" (emphasis added); People v. Veal, 58 Ill.App.3d 938, 963 (1st Dist. 1978), again applying a cumulative analysis or determination of the suppressed evidence by holding that "under Agurs...the information concerning the juvenile *proceedings* against...[two] brothers [testifying for the State] is not sufficient to create a reasonable doubt of defendants' guilt" (emphasis added)].

Furthermore, as previously noted, prior Illinois case law has been consistent with Kyles in not excusing the State's failure to disclose evidence favorable to the defense on the grounds it was known only to the police and not the prosecutor. [See this para. at 264 for the holdings of Thompkins, 121 Ill.2d at 426; Goka, 119 Ill.App.3d at 1032; Sakalas, 85 Ill.App.3d at 74; Young, 59 Ill.App.3d at 257].

Finally, unlike with the Apprendi v. New Jersey decision, 530 U.S. 466, 475 (2000), which Kizer found to be a new constitutional rule on, among other grounds, that Apprendi was decided "over a strong dissent" which specifically argued the majority had improperly established a "constitutional rule," the dissent in Kyles applied the Bagley standard of materiality, and only disagreed, among other issues, as to the *manner* in which the majority construed the Bagley standard. [See Kyles, 514 U.S. at 460-75, in which Justice Scalia, joined by Chief Justice Renhnquist, and Justices Kennedy and Thomas, argued that the undisclosed evidence did not create a reasonable probability of a different result, in light of, among other factors, the massive core of evidence which the state had presented to the jury].

Therefore, Kyles did not propound a new constitutional rule of criminal procedure, but instead explained and applied the Bagley standard of materiality, which was the rule of law at the time Petitioner's judgment became final in 1987. As such, Kyles is applicable to Ms. Gray's 1987 perjury judgment.

One further observation is that Rule 412(c), which codified Brady on October 1st, 1971, requires the State to effect *pretrial* disclosure to the accused of materially favorable evidence in its possession or control. [See Gutierrez, 205 Ill.App.3d at 254, holding that Rules 412 and 413 "provide for the *pretrial* disclosure of [Brady] evidence," (emphasis added) citing the 1978 case of People v. Keith, 66 Ill.App.3d 93, 96 (5th Dist. 1978), as support for its decision; Lann, 194 Ill.App.3d at 632, indicating that Rule 412 involves "*pretrial* discovery requirements" (emphasis added); People v. Winchel, 159 Ill.App.3d 892, 905 (1st Dist. 1987),

holding that “Brady does not define the point in the proceedings at which disclosure is to be made; in Illinois *pretrial* disclosure is the rule,” citing Rule 412(c) and In re Hatfield, 72 Ill.App.3d 249, 259 (1st Dist. 1979); People v. Trolia, 69 Ill.App.3d 439, 448 (1st Dist. 1979), ruling that “our supreme court has required that an accused receive *before trial* the information to which he is entitled under Brady,” (emphasis added) citing the 1977 matter of People v. Elston, 46 Ill.App.3d 103 (4th Dist. 1977), as authority for its ruling].

Rule 412(c) provides, in relevant part, that:

...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.

107 Ill.2d R. 412(c); People v. Tate, 87 Ill.2d 134, 140 (1981).

The Committee Comments to Rule 412(c), or paragraph (c), explain its purpose, which is not unlike that of Brady and its progeny, in the following manner:

[After initially indicating that this paragraph codifies the Brady prosecutorial disclosure requirement of evidence favorable to the accused which is material to either guilt or punishment, the comment states that]
[a]lthough 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).

Ill.Sup.Ct. R. 412(c), Committee Comments, paragraph (c)(1971)
Again, Rule 412(c) is governed by the same federal due process standard as Brady and its progeny, so that a Brady violation constitutes or triggers a violation of 412(c), and also abrogates the previously cited purpose of this pretrial discovery rule.

Turning to Petitioner’s ten (10) evidentiary items, prior to Ms. Gray’s 1978 trial, Archie Weston filed a written pretrial request that the State and police provide him with “all evidence that would tend to negate [the] guilt [of his client Paula Gray],” or

all Brady and 412(c) evidence regarding this accused. [See Memorandum "Findings of Fact" para. 6.b., at 211; recall also that Bagley and Rule 412(c) do not require a defense request for constitutionally materially favorable evidence in the State's possession or control. Bagley, 473 U.S. at 682; Clemons, 277 Ill.App.3d at 917)]. Pursuant to Illinois discovery rules and case law, the government had a continuing duty to disclose Brady and 412(c) evidence in the Lionberg/Schmal case from prior to Ms. Gray's 1978 trial until "full and truthful" disclosure was effected by them to Petitioner. See Ostendorf, 89 Ill.2d at 282; Clemons, 277 Ill.App.3d at 917. Also, the First District has indicated that it "recognize[s] the prosecution's link to law enforcement agencies and the attendant advantage in obtaining evidence." People v. McDowell, 121 Ill.App.3d 491, 497 (1st Dist. 1984).

This prosecutorial disclosure duty arose prior to Ms. Gray's 1978 trial with respect to all Brady and 412(c) evidence in the government's possession or control, and to any such evidence "whenever that information [was] discovered [by the State]," including up to and during Petitioner's 1978 trial. [See Clemons, 277 Ill.App.3d at 917, requiring the disclosure of Brady and 412(c) evidence "whenever that information is discovered"; People v. Matthews, 299 Ill.App.3d 914, 919 (1st Dist. 1998), holding that the prosecution is required to promptly disclose Rule 412 evidence to the defendant up to and during trial," citing rule 415(b) and People v. Watson, 76 Ill.App.3d 931, 935-36 (5th Dist. 1979). Watson, in turn, cites the 1976 case of People v. Shegog, 37 Ill.App.3d 615, 618 (3rd Dist. 1976), in support of the prosecution's continuing duty to disclose discoverable material coming to its attention after pretrial discovery has been completed, making this duty additionally applicable to Petitioner's 1978 trial, as well as her 1987 guilty plea. Recall also case law in this para. at 267 requiring pre-trial Brady/412(c) evidentiary disclosure, or Gutierrez, 205 Ill.App.3d at 254; Lann, 194 Ill.App.3d at 632; In re Hatfield, 79 Ill.App.3d at 259; Trolia, 69 Ill.App.3d at 448; Keith, 66 Ill.App.3d at 96; Elston, 46 Ill.App.3d at 104, 107]. Also, possession or control of any Brady and 412(c) evidence by the Cook County Sheriff's police, the East Chicago Heights/Ford Heights police, and the Illinois State Forensic Laboratory [or Illinois Department of Law Enforcement's Bureau of Scientific Services], along with the prosecution, was and is considered to be in the possession or control of the State. See Thompkins, 121 Ill.2d at 425-26; Curtis, 48 Ill.App.3d at 382.

Pursuant to the Court's earlier findings of fact, the State was in possession or control of Item Nos. 1 through 10 from prior to or during Petitioner's September, 1978 trial until at least July 1st,

1997. [Recall Mr. Podlecki's September 15th, 1978 report of his forensic examination results for the Buick 225 seized under CCSP warrant contained in Item No. 10 and his false pubic hair comparison test result testimony on October 12th, 1978 in Petitioner's 1978 trial (or Item No. 7). (See Memorandum "Findings of Fact" para. 6.a., at 208, 209). The State's possession or control of Item No's 7 and 10 on September 15th, 1978 and October 12th, 1978 was *after* Ms. Gray's trial began on September 14th, 1978, but as previously noted, the State still had a Rule 412 duty to immediately disclose this report and false testimony to Petitioner (or the Court or jury) at the time it became existent during trial. See this para. at 268-69 for Clemons, Matthews, Watson, Shegog, Thompkins and Curtis].

From prior to Petitioner's 1978 trial until at least July 1st, 1997, again based on the Court's earlier findings of fact, neither Ms. Gray nor her counsel received from the State, nor were aware of the existence of or information contained in Item Nos. 1 through 10. (See Memorandum "Findings of Fact" para. 6.b., d., h.-i., at 211-13, 213-14, 215-21). Pursuant to the factual findings of the Court referenced by this paragraph (or para. 8.), the State suppressed or withheld Item Nos. 1 through 10 from Petitioner and her counsel prior to and during Ms. Gray's 1978 trial, through and including her 1979 and 1987 judgments in this matter.

Two additional arguments by Respondent regarding their suppression of alleged Brady and 412(c) proofs must be addressed. The first involves Item No. 1, or Charles McCraney's statement contained in ASA DiBenedetto's felony review notes that he "saw no faces" the night and location of the subject crimes. Respondent argues in its Post-Hearing Brief at 16 that they did not fraudulently conceal this evidence because it was introduced by the State at Petitioner's 1978 trial, and Ms. Gray thus knew of its existence prior to her 1987 judgment. As Ostendorf and a determination of whether Respondent failed to effect "full and truthful" disclosure of the ten items is the appropriate standard for determining the issue of fraudulent concealment of this evidence by the People, the Court will construe the State's argument as alleging that Item No. 1 was not new to Petitioner because it had been previously introduced at her 1978 trial. Since pursuant to this argument she would have been aware of its existence prior to her 1987 judgment, Item No. 1 would not have constituted newly discovered evidence upon which her petition can be based. (See Patterson, 192 Ill.2d at 139; Memorandum "Findings of Fact" para. 6.a., at 210).

The applicable case law is set forth by People v. Dixon, 19 Ill.App.3d 683, 687 (1st Dist. 1974), which cites People v. Raymond, 42 Ill.2d 564, 568 (1969), for its holding that "disclosure of certain evidence is not required where, '...*the accused is aware of its existence and specific contents*.'" (emphasis added).

Petitioner was not aware of the existence of Mr. McCraney's foregoing statement contained in ASA DiBenedetto's notes, nor of its specific contents as required by Dixon. This is because Mr. McCraney's trial testimony that he initially told the police (or Inv. Pastirik) that "he saw an unknown subject," which implies that he observed the face of a person he did not know, is categorically different from telling an Assistant State's Attorney (or ASA DiBenedetto) that he "saw no faces," both in content and the person to whom the statement was directed. (See Respondent's Group Ex. 11 Item G at 1167-68; Petitioner's Add'l Auth's and Mat'ls Ex. 14, at 047486). Indeed, coupled with the difference in content, the fact that the statement was made to an Assistant State's Attorney (Item No. 1), as opposed to a sheriff's police officer (Charles McCraney's 1978 testimony), indicates that Mr. McCraney's trial testimony pertains to a completely different statement from that contained in Item No. 1. Moreover, his trial testimony clearly does not set forth the "specific contents" of Item No. 1. Nor has Respondent cited any case law in support of its position.

As such, the Court finds that prior to Petitioner's 1987 judgment, and pursuant to case law, she was neither aware of the existence or specific contents of Item No. 1. This item therefore constituted new evidence for purposes of this petition, which was suppressed by Respondent from prior to Petitioner's September, 1978 trial, through and including her 1979 and 1987 judgments. [Additionally, it should be noted that based on the evidence presented by Respondent in this proceeding, the People (ASA Cliff Johnson) actually misled the defense and court at the 1978 trial to believe that they had effected full Brady and 412(c) disclosure of ASA DiBenedetto's felony review notes, because in response to a specific defense request at trial for a written statement by Charles McCraney purportedly given to the CCSP according to his testimony, the State *voluntarily* turned over "a statement by DiBenedetto," without disclosing Item No. 1, or Charles McCraney's "saw no faces" statement contained in ASA DiBenedetto's felony review notes. (See Respondent's Group Ex. 11 Item G at 1224). (Nor did the People disclose Item No. 9, or ASA DiBenedetto's felony review notes indicating, subsequent to

Ms. Gray's initial CCSP interrogations on May 12th and 13th, 1978, that Ms. Gray "is [a] reluctant" witness). Clearly, the People were knowledgeable, or should have been knowledgeable, as to the contents of its own evidence in this matter. Hence, when considered in the context of Respondent's proofs, their argument that Mr. McCraney's 1978 testimony constituted or gave notice to Ms. Gray of Item No. 1 is either negligent or disingenuous].

The second argument averred or suggested by Respondent regarding suppression is that its 1987 pretrial disclosure of Item No. 4, or the Capelli notes, to Dennis Williams prior to Ms. Gray's April 23rd, 1987 plea, constitutes disclosure to Petitioner. Case law again indicates that the People's position is in error. People v. Ward, 301 Ill.App.3d 862, 879-80 (1st Dist. 1998), has held that it was unable to find any case law "supporting [the State's] argument that the disclosure in one defendant's case can be deemed to have been disclosed [sic] pursuant to a discovery request in another defendant's case," even where both defendants are represented by the same counsel in separate trials. Moreover, the Illinois Supreme Court in Skolnick v. Gray, 191 Ill.2d 214, 236 (2000), effectually held that discovery information is not part of the public record like pleadings, motions and other papers filed with the court, the latter information or documents being both public and required to be public in all but the "most extraordinary [of] cases" such as "weighty national security" matters. As such, disclosure of Item No. 4 to Dennis Williams prior to Petitioner's 1987 plea did not constitute or satisfy disclosure to Ms. Gray of this evidence. Nor did the foregoing disclosure constitute a matter of public record for which Petitioner or her counsel could be legally charged with having been placed on notice of its existence at the time of disclosure.

Also, the public knowledge information of Rob Warden's July, 1982 article in the Chicago Lawyer (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 11A), Michael Walsh's June 7th, 1984 article in The Star (Plaintiff's [or Petitioner's Evidentiary Hr'g] Ex. 10A), and Martin Carlson's March 4th, 1987 mitigation testimony for Dennis Williams at his 1987 trial (Respondent's Group Ex. 11 Item A), which information the Court found to be chargeable to both parties as of the foregoing dates of each of these evidentiary items, did not provide, per Dixon, the specific contents of Item No. 4 (i.e. the names of the real perpetrators of the subject crimes), or give Petitioner notice of the existence of the Capelli notes (Item No. 4), nor even of Marvin Simpson's identity and the fact that he was knowledgeable about the subject crimes (including the names of the real offenders). [Recall also the Court's previous

findings that the two news articles constitute hearsay, or hearsay on hearsay, which is not properly admissible as grounds for section 2-1401 relief; and that Rob Warden's article additionally does not constitute "new evidence," as set forth in Patterson, for purposes of Ms. Gray's post-judgment petition. See Memorandum "Findings of Fact" para. 6.i.-j., at 218-21; Patterson, 192 Ill.2d at 139].

Accordingly, Item No. 4 was suppressed by the State from prior to Ms. Gray's 1978 trial, through and including her judgment in 1979 *as well as* 1987.

The First District in People v. Nichols, 27 Ill.App.3d 372, 385-86 (1st Dist. 1975), aff'd 63 Ill.2d 443 (1976), defined the word "'favorable'" in a Brady analysis as "'disposed to favor...giving a result that is in one's favor...indicative of a successful outcome.'"

In determining favorableness, as well as constitutional (or Bagley) materiality, of the ten items, the Court must project or predict the effect this suppressed evidence would have had on the outcome of Petitioner's trial on the Lionberg/Schmal charges, had one been conducted in 1987. "Favorableness" requires that this evidence be "indicative of a successful outcome" of such a trial, and Bagley materiality necessitates a showing that had the evidence been disclosed, there is a reasonable probability, or a probability sufficient to undermine confidence in the outcome of such a trial, that the result of a prospective 1987 proceeding would have been different from a plea of guilty to perjury, or would not have resulted in a conviction of all charges of the 1984 information (including the perjury count). Bagley, 473 U.S. 682; see discussion in following paragraphs.

Support for this analytical approach by the Court is provided by People v. Aguilar, 218 Ill.App.3d 1,10 (1st Dist. 1991), in which the First District reversed defendant's conviction for failure by the People to disclose requested 412(c) evidence because the accused was "denied the full opportunity to prepare his defense and make tactical decisions with the aid of [the suppressed] information" and was thus prejudiced by the nondisclosure of this favorable evidence. The court reasoned that it was not required "to speculate...[regarding] the use a defendant would put undisclosed, favorable information he has requested," citing case law dating to 1976. However, since it had direct knowledge, based on defendant's oral argument, that the accused was prejudiced by the nondisclosure because he may have requested a jury trial, the appellate court concluded that had defendant timely received the

information prior to trial, he may have elected a jury trial, and that "the jury may have come to an altogether different verdict from the one reached by the circuit court."

Further support for the Court's determination of favorableness and constitutional materiality of the ten items in the context of a prospective 1987 trial as to all charges of the1984 information is provided by People v. Jones, 144 Ill.2d 242, 254, 255 (1991). In Jones, the Illinois Supreme Court, while deciding the "'prejudice'" prong of the Strickland ineffective assistance of counsel standard (or counsel was incompetent and counsel's incompetence prejudiced the defendant) in cases involving guilty pleas, cited Hill v. Lockhart, 474 U.S. 52, 59 (1985), for its analytical approach that:

[i]n many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on *a prediction whether the evidence likely would have changed the outcome of a trial...* (emphasis added).

In applying the foregoing analytical approach to the instant matter, recall that the Strickland "prejudice" formulation was adopted *in toto* by Bagley as its constitutional materiality standard for favorable evidence suppressed by the State. Bagley, 473 U.S. at 683; this para. at 262. See also People v. Goldsmith, 259 Ill.App.3d 878, 887-89 (1st Dist. 1994), for additional support for the Court's analytical model which holds, in effect, that the standard for determining Bagley materiality is the same as that for determining prejudice in an ineffective assistance of counsel claim.

Finally, the Respondent itself provides support for the Court's analysis of favorableness and constitutional materiality of the ten items based on a prospective 1987 trial, in that the People alleged in their Post-Hearing Memorandum at 13 that had the Petitioner declined pleading guilty to perjury as she alleged, by reason of her discovery of the ten items, "[i]t therefore follows that the State would not have nolle prossed the charges pending in 1987." Though Respondent thereafter termed this argument

"particularly perplexing," it is not a position without merit, for Petitioner would have had to face trial on all charges of the 1984 information, which the Court's analytical approach based on a prospective 1987 trial specifically addresses and entails.

[Parenthetically, it could be reasonably argued that the foregoing argument is "particularly perplexing" to the State because it cannot understand why Ms. Gray would want a trial on all the charges of the 1984 information where she has already fulfilled, at least in part, her half of the agreement with the People to give incriminatory testimony against three of the Ford Heights Four at their 1985 and 1987 trials (see Memorandum "Findings of Fact" para. 4. at 199), and all she need do is plead guilty to perjury, and have the State *nolle prosse* the remaining charges, to secure her immediate release from prison as promised. Such argument, of course, particularly in the face of Petitioner's contentions of the effect of non-disclosure of alleged Brady proofs, would reflect the State's total disregard not only of its Brady obligations, but also of the underlying purpose of this rule that the People are the representative of a sovereignty whose interest is to ensure "not that it shall win a case, but that justice shall be done" in a criminal prosecution. Bagley, 473 U.S. at 676].

One additional matter should be pointed out regarding materiality. As both parties have argued in their respective pleadings and memoranda of law, the evidence of Petitioner's 1978 trial necessarily informs the Court's decision as to the materiality of the ten items of suppressed evidence on the outcome of a prospective 1987 trial with respect to all charges of the 1984 information. This is because both the 1978 and 1984 cases involved the same parties (Respondent and Paula Gray), the same incident (Lionberg/Schmal crimes), the same charges against Petitioner (Case No. 78 C 4865 [pursuant to the1978 indictment] and Case No. 84 C 5543 [pursuant to the1984 information]), and the same ten items of evidence withheld by the State at both Ms. Gray's 1978 trial and 1987 plea. Moreover, this Court's research has found that the vast majority of cases deciding the materiality, in a constitutional sense, of suppressed evidence, involve an application of the new evidence to *trial* evidence to determine whether such new evidence would likely have changed the outcome, or guilty verdict, of the trial. Therefore, consistent with these case law analyses, the Court can properly apply or analyze the ten suppressed items in the context of *actual* (1978) trial evidence resulting in Paula Gray's conviction, to assist it in determining (or predicting) whether this new evidence likely would have changed the outcome of a 1987 trial. In addition, the

same rationale and analysis is applicable to the Court's determination of the favorableness of Petitioner's ten evidentiary items.

Regarding the question of favorableness, Item Nos. 1 to 10 each constitute favorable evidence or are "indicative of a successful outcome" of a prospective 1987 trial. This is because each of these ten items either:

- exculpate, or tend to exculpate, Petitioner and/or her four alleged principals, the Ford Heights Four (Item Nos. 1-3, 6-9) (recall the Court's finding in the Memorandum "Preliminary Findings of Law" para. 2., at 229-30, that any evidence tending to negate the guilt of Petitioner's alleged principals, the Ford Heights Four, or to prove their innocence, would necessarily be relevant to Petitioner as their purported accessory), or;

- inculpate, or tend to inculpate, others in the subject crimes (Item Nos. 4-5, 10).

As such, these ten items constitute evidence which support Ms. Gray's 1978 theory of defense that she and the Ford Heights Four were innocent of the Lionberg/Schmal crimes, and that she was coerced by the CCSP to tell their concocted inculpatory account to various sheriff's police, and assistant State's Attorneys in 1978, as well as the May 16th, 1978 grand jury. These ten items also controvert the People's theory of prosecution with respect to the guilt of Ms. Gray and the Ford Heights Four of the subject crimes. As such, they are favorable to Ms. Gray. [See also this para. at 293-94, 306, for additional discussion regarding the favorability of Item No. 5 (George Nance notes) and the affidavit, warrant and return of Item No. 10, both of which are unavailable proofs, as well as the applicability of Brady, and not Youngblood or pre-Youngblood law, to these evidentiary items].

The principal issue in this case, however, is the constitutional materiality of the ten items on the outcome of a prospective 1987 trial. Although Bagley materiality is not a sufficiency of evidence test (Kyles, 514 U.S. at 434; Coleman, 183 Ill.2d at 393, citing Kyles, 514 U.S. at 434), Paula Gray's case, and those of the Ford Heights Four, never involved overwhelming evidence of guilt, but rather were closely balanced evidence wise, or premised primarily on circumstantial evidence. [See Williams, 93 Ill.2d at 322, in which the Illinois Supreme Court noted that the evidence against Dennis Williams [Willie Rainge, and Kenneth Adams] in their 1978 trial with Petitioner, was "in large part

circumstantial," notwithstanding Michael Podlecki's hair comparison and Canadian study testimony and that of Charles McCraney and Officer P.J. Pastirik, but *not* that of Paula Gray on behalf of the State; see also Williams, 147 Ill.2d at 223, where the Illinois Supreme Court stated that the evidence in Dennis Williams' [and Willie Rainge's] 1987 trial was "closely balanced", which included the prosecution testimony of Charles McCraney, Paula Gray, Officers David Capelli and Patrick Pastirik, but not the hair comparison and Canadian study testimony of Michael Podlecki].

Also, there was no physical evidence in any of the trials of Paula Gray and the Ford Heights Four connecting them to the Lionberg/Schmal crimes. [See Burrows, 172 Ill.2d at 181, where the Illinois Supreme Court, in affirming the collateral grant of a new trial on the grounds of perjured testimony and newly discovered evidence of actual innocence, observed that "it [was] noteworthy that no physical evidence was ever discovered to link defendant to the crimes," such as the accused's fingerprints or other evidence at the crime scene belonging to or associated with the defendant, nor were any of the victim's possessions found on the accused's person or in his possession].

Therefore, not a great deal of favorable or exculpatory evidence suppressed by the People, particularly when considered cumulatively, is necessary to undermine the Court's confidence that the outcome of a prospective 1987 trial would have been different from Petitioner's plea of guilty to perjury, or a finding of guilt as to all charges of the 1984 information, including the perjury count. Petitioner's ten items, pursuant to the following discussion and determination, substantially meet the foregoing burden of constitutional materiality.

Brady Analysis and Determination

The herein matter presents an almost identical fact situation to that of Kyles and Hobley in their respective collateral findings that the favorable evidence suppressed by the State was constitutionally material to each of their outcomes.

Kyles, a habeas corpus proceeding, involved the robbery and homicide of an elderly shopper, and theft of her vehicle, in the parking lot of the Schwegmann Brothers' store. The police initially had no suspects. The defendant became a suspect two days after the crime through information of an anonymous tipster, Beanie, who knew and was in contact with the accused prior to his

arrest, and simultaneously worked with the police during its investigation of Kyles, pursuant to which they recovered certain physical evidence of the crime, including the victim's car, purse, and pet food that the State argued was purchased by the victim, and the weapon used in her killing. Mr. Kyles was convicted at a second trial (the first resulting in a mistrial) primarily on the testimony of four eyewitnesses. The prosecution also contended that a blown-up photograph of the parking lot taken at the crime scene shortly after the murder showed Kyles' vehicle in the lot. Beanie was not called by either side to testify.

Before trial, defendant's counsel filed a lengthy pretrial motion for disclosure of the suppressed evidence. The withheld evidence consisted of six contemporaneous eyewitness statements taken by police following the murder; records of Beanie's initial call to the police two days after the crime; the tape recording the same day, some two hours later, of the conversation between Beanie and the two investigating officers; the typed and signed statement given by Beanie the next day; the computer printout of license numbers of cars parked in Schwegmann's the night of the murder, which did not list the number of Kyles' car; the internal police memorandum calling for seizure of Kyles' rubbish after Beanie had suggested that the purse might be found there; and evidence linking Beanie to other crimes at Schwegmann's and to the unrelated murder of another elderly shopper committed about eight months prior to the current offense. Kyles, 514 U.S. at 428-29.

After an item by item analysis of each of the foregoing proofs to determine their tendency and force, the court found that the cumulative effect of this suppressed evidence rendered it constitutionally material to the outcome of Mr. Kyles' trial, thus rendering his trial unfair. Specifically, the court held that:

> confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion [i.e. could have been planted in or about defendant's residence by Beanie], that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid.

Kyles, 514 U.S. at 454.

Hobley, a post-conviction matter, involved the defendant's conviction for the multiple homicide and arson of his residential building in which his wife and child were among the seven victims. The Illinois Supreme Court ordered an evidentiary hearing on the grounds that despite his pretrial requests for any "report and results of fingerprint tests," as well as all favorable or exculpatory evidence, the State failed to disclose to him:

- a report that defendant's fingerprints were not on the *two*-gallon gasoline can introduced against him at trial, and;
- a second *one*-gallon gasoline can found at the fire scene.

The State's case was premised on eyewitness accounts that prior to the arson, Mr. Hoblely purchased what they believed to be a *one*-gallon gasoline can at a filling station near the subject residence; and also on police testimony that he confessed the crimes to them. To corroborate the defendant's confession, the People introduced a *two*-gallon gasoline can at trial as the one purchased and used by the accused to start the fire, and later thrown by him, according to the police account of his confessions, into the second-floor *hallway*. After the fire, the *two*-gallon can was found *inside a second floor apartment under the sink*. The occupants of this apartment denied that the two-gallon belonged to them. Also, there was black fingerprint powder on the two-gallon can at the time of its introduction into evidence, to which the prosecution, pursuant to the defendant's request for the fingerprint analysis, stated to the court that no fingerprint examination had been conducted on the can.

Petitioner's theory of defense was that another person had committed the offenses, perhaps a jealous girlfriend for whom he'd initially rented the subject premises and with whom he'd recently broken up with to return to his wife and child; his girlfriend vacated this apartment, because she could not afford the rent alone and contended the accused did not repay her her deposit, and the defendant and his family thereafter took up residence in the premises. A little less than a week before the subject offenses, a suspicious fire occurred in the building on the same floor and near the door of the defendant's and his family's third floor apartment. Mr. Hobley also asserted at trial that the police gave concocted testimonial accounts that he confessed the arson to them; that the police physically abused him on numerous occasions while in their custody; and that he never confessed the crimes to them. The petitioner additionally introduced a media videotape in which he is seen and heard declaring his innocence, while being escorted by a

detective, shortly after he was alleged to have given his confessions.

Hobley found that the foregoing inconsistencies in the State's evidence as to the type of can used in the arson, and between the hallway location where the police claimed the defendant told them he threw this two-gallon can and its discovery under a sink inside of a second floor apartment, "are placed in an entirely different light once they are considered along with the [cumulative effect of the] suppressed fingerprint report [which actually consisted of the negative results of *three* fingerprint analyses] and second gasoline can." Hobley concluded that:

there is a reasonable probability that, had such evidence been disclosed to the defense, the result of the proceeding would have been different...[and that their] confidence in the outcome of defendant's trial has been seriously undermined by the possibility that the State failed to disclose exculpatory evidence of this nature to the defense.

While emphasizing that the materiality of this one-gallon can destroyed by the police is governed by Brady and not, as the People argued, Arizona v. Youngblood, 488 U.S. 51 (1988), which requires the showing of bad faith by the police in failing to preserve potentially useful evidence, and also the importance of the lost or destroyed evidence relative to other proofs presented against the accused, the court went on to hold that petitioner had met the more stringent Youngblood burden as well, in that bad faith was shown by the fact:

- that the government was in possession of and suppressed the second, or one-gallon gasoline can recovered at the fire scene, as well as the fingerprint analyses, despite the accused's request for same;
- that this evidence was apparently catalogued under a different "RD" number than defendant had at trial (the defense claimed this was to mask from them the existence of these items, as to which the State refused to provide any information regarding the destruction absent a court order, which Hobley rectified by issuing an order), and;
- that the one-gallon can was not testified to at trial by an officer "central to the investigation" and was destroyed by the same officer shortly after the police department received the defendant's subpoena pursuant to his post-conviction petition.

Hobley then found that the second or one-gallon can was important relative to the evidence presented against the defendant at trial because of the discrepancies in the State's case regarding eyewitness accounts of the purchase of a one-gallon can, as opposed to the two-gallon can introduced as having been used by defendant to start the fire, and the officers' accounts that defendant stated to them he threw the can into the second floor hallway, while the two-gallon can introduced at trial was discovered inside of a second floor apartment under the sink. The opinion added that the second gasoline can was important in proving a Brady violation, even after the trial, because it evidenced that two different cans were recovered at the scene of the fire and also that "[i]t was not up to the police to decide that only one of these cans was relevant to the case and to deny defendant access to the other one." The court concluded, in agreeing that petitioner had shown a Youngblood violation while "[a]ssuming for the sake of argument that Youngblood [and not Brady was applicable]," that "it strains credulity to suggest" that a second gasoline can was not important relative to the evidence presented against the defendant at trial.

Hobley also stated that it was "deeply troubled by the nature of the allegations in [the] case," as well as that which was suggested by the evidence provided by defendant.

The linchpins of the State's 1978 case against Petitioner were Charles McCraney's testimony placing Ms. Gray and the Ford Heights Four on the crime scene at or about the time of commission of the Lionberg/Schmal offenses; the transcript of Paula Gray's grand jury testimony inculpating she and the Ford Heights Four in the subject crimes, which was corroborated by the trial testimony of Inv. Houlihan and Inv. Pastirik; and the blood and hair comparison testimony of Michael Podlecki linking Petitioner's principals to the crimes. [As previously discussed in this Memorandum "Findings of Fact" para. 7., at 222, Michael Podlecki testified before juries for both Petitioner, and Williams, Rainge and Adams, at their 1978 trial. See Petitioner's Add'l Auth's and Mat'ls Ex. 15 for text of Archie Weston's October 12th, 1978 cross-examination of Mr. Podlecki in the case of "People v. Paula Gray," "Indictment No. 78 C 4865." See also Williams, 93 Ill.2d at 320-21, for Illinois Supreme Court opinion addressing the blood and hair comparison testimony of the State's "expert," or Michael Podlecki, in the 1978 Williams, Rainge, Adams (and Gray) trial].

The People's theory of prosecution in the 1978, 1985, and 1987 trial proceedings has consistently been that the Ford Heights

Four *alone* committed the rape of Carol Schmal, where Petitioner held a Bic lighter, as well as the murder of both Ms. Schmal and Mr. Lionberg, which homicides were witnessed by Ms. Gray. Petitioner's (and the Ford Heights Four) theory of defense, based on their respective alibi accounts, is that she and the Ford Heights Four were engaged in innocent activity wholly unrelated to the Lionberg/Schmal crimes, and that neither she nor they committed the subject offenses. Ms. Gray's additional defense theory is that the CCSP coerced her to make a statement concocted by the sheriff's police, inculpating she and the Ford Heights Four in the subject crimes, to various sheriff's police, assistant State's Attorneys, and the May 16th, 1978 grand jury.

[The alibi accounts, corroborated by various family members and friends of the accused, were that on May 11th, 1978, at the time(s) of apparent commission of the crimes testified to by Mr. McCraney, Paula Gray was at home at 1525 Hammond Lane; Kenneth Adams was at home at 1533 Embassy Lane; Willie Rainge was at home with his girlfriend until 3:00 or 3:30 a.m., drove her to her home, and then returned to his home; Dennis Williams was at home sleeping; and Verneal Jimerson was at home on the northside of Chicago with his wife. See Jimerson, 127 Ill.2d at 28; Rainge, 112 Ill.App.3d at 404-05; Petitioner's Add'l Auth's and Mat'ls Ex. 14, at 047486-04787; Tr. of Evidentiary Hr'g of 4/29/99, at 270-73; Tr. of Evidentiary Hr'g of 4/30/99, at 10, 12-13, 82-84; Memorandum "Evidentiary Hearing" Dennis Williams at 77-78; Kenneth Adams at 94; Paula Gray at 101-02]. Not unlike the suppressed evidence of Kyles, disclosure of the ten items alleged by Petitioner "would have resulted in a markedly weaker case for the prosecution and a markedly stronger case for the defense." Kyles, 514 U.S. 441. In fact, had these ten items been turned over to Petitioner, she could have effectively undercut the State's case in a prospective 1987 trial. [Recall also Kyles' cautionary note that though the jury in its matter could conceivably have convicted on the basis of the eyewitness testimony not affected by the undisclosed Brady evidence, that "the [materiality] question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether [the court] can be confident that the jury's verdict would have been the same." Kyles, 514 U.S. at 453].

At Petitioner's 1978 trial, Mr. McCraney, who testified before the juries for both Ms. Gray, as well as Dennis Williams, Willie Rainge, and Kenneth Adams, stated that from the vantage point of the upstairs front window of his residence at 1533 Hammond Lane, which overlooked a courtyard and diagonally

faced 1528 Cannon Lane, or the abandoned building where Carol Schmal's body was later discovered, and also from the back window of his house facing Hammond Lane, he observed, while looking out for the safety of his vehicle parked on Hammond Lane, Petitioner and her three co-defendants the night of May 11th, 1978, both in front (courtyard or Cannon Lane side) and back (Hammond Lane side) of the Gray residence, which was four doors west at 1525 Hammond Lane. Williams, 93 Ill.2d at 309; Rainge, 112 Ill.App.3d at 399-400; that at approximately 3:00 a.m., according to the 1983 Rainge opinion, he saw Williams in his red Toyota pull up and park next to Kenneth Adams in his beige Toyota "in front of the Gray residence" or the Hammond Lane side. Rainge, 112 Ill.App.3d at 400. [note that what the Rainge court terms the "front" of the Gray home facing Hammond, Mr. McCraney terms the "back"]; that after about 10 to 15 minutes, Rainge pulled up in his yellow Vega next to Williams' and Adams' cars. Range, 112 Ill.App.3d at 400; after a few more minutes, the red Toyota pulled under a street light on Hammond and Williams got out and broke the light with a rock. Rainge, 112 Ill.App.3d at 400; that thereafter, Williams drove over and parked next to Rainge's Vega and Rainge got into Williams' Toyota and they drove away east on Hammond Lane. Rainge, 112 Ill.App.3d at 400; then Charles McCraney went out and checked his car on Hammond Lane and saw Paula Gray and an "unidentified man" sitting in a blue Chevrolet in front of her house (Hammond Lane side). Rainge, 112 Ill.App.3d at 400; that he returned to his house and within a few minutes, heard and observed the red Toyota stuck in the mud in the gangway next to 1528 Cannon Lane. Williams, 93 Ill.2d at 319; Rainge, 112 Ill.App.3d at 400; that Mr. McCraney then observed Adams, from his window overlooking Hammond, amongst a group of four exit the beige Toyota, "run through a gangway and an abandoned townhouse to Cannon Lane." Rainge, 112 Ill.App.3d at 400; he then went to the side of his house overlooking the courtyard and Cannon Lane to observe the group of four from the beige Toyota join the group exiting the red Toyota, which had been freed from the mud. Rainge, 112 Ill.App.3d at 400-01; thereafter he saw "this group of six to eight people" enter 1528 Cannon Lane from the courtyard entrance. Rainge, 112 Ill.App.3d at 401.

On further direct examination, Mr. McCraney identified Rainge, Adams and Williams as three of those who entered 1528. Rainge, 112 Ill.App.3d at 401. Within an hour and a half, Mr. McCraney testified he heard a gunshot from the direction of 1528. Rainge, 112 Ill.App.3d at 401. On cross-examination, Mr. McCraney testified that he saw no women or white people in the

group entering 1528. Rainge, 112 Ill.App.3d at 401. He also admitted that he could only positively identify Williams as one of the persons who entered the building at 1528 Cannon Lane, and that the only time he could positively state to last seeing Adams was when he was exiting the beige Toyota running toward 1528. Rainge, 112 Ill.App.3d at 401.

Accordingly, Item No. 1, or Mr. McCraney's pretrial statement noted by ASA DiBenedetto in his Felony Review folder for May 15th, 1978, that Charles McCraney "saw no faces" the night of the crimes, would have provided Ms. Gray's defense at a 1987 trial, consistent with her theory of innocence, with direct evidence *by Mr. McCraney himself* contradicting his 1978 (and 1985 as well as 1987) testimonies identifying Paula Gray and her co-defendants on the crime scene at or about the time of commission of the offenses. This evidence also would have enabled Petitioner to subject Mr. McCraney's identification testimony to the "assault that was warranted," particularly in view of the inconsistency of his testimony in this regard at not only Ms. Gray's 1978 trial, but also *as between* the three (3) trials he testified in in 1978, 1985 and 1987 (as will be discussed later in this para. at 282-83). [Kyles specifically provides support for such an "assault." In Kyles, the State argued that the inconsistencies or "adjustments to" the testimony of one of the key eyewitnesses between the first and second trial provided the accused with grounds for impeachment without any need to disclose his original statement. The court's response was that:

[t]his is true, but not true enough; inconsistencies between the two bodies of trial testimony provided opportunities for chipping away on cross-examination but not for *the assault that was warranted.* (emphasis added).

Kyles, 514 U.S. at 433].

As such, Item No. 1 would have supported Petitioner's defense theory of innocence and undercut the State's case.

Moreover, Item No. 1 would have provided Ms. Gray with substantial evidence with which to argue a negligent or bad faith investigation, or even prosecution, by the State, that the prosecution paid Mr. McCraney not for his safety via relocation (*three* times, including a car), but for his favorable testimony on their behalf when Paula Gray recanted her inculpatory grand jury testimony at the June 19th, 1978 preliminary hearing. (See also this para. at 284-87).

When Item No. 1 is combined with Item No. 2, or the CCSP notes of the Sherry McCraney interview tending to show an exculpatory time line (the street light being broken "before 2 AM" possibly Wednesday night) and also tending to contradict the inculpatory time line(s) (or time(s) of entry) testified to by her husband (all after 2:30 a.m., except a 1978 reference to "2:30 or 2:15" a.m.), Paula Gray would have had still stronger evidence with which to attack the accuracy and/or truthfulness of Mr. McCraney's identification testimony. Indeed, the apparently *contradictory* testimony of Mrs. McCraney, who was Charles McCraney's *wife* and who presumably viewed the matters contained in the Item No. 2 notes from the same residential vantage point as her husband, would arguably have carried greater weight in undercutting the inculpatory testimony of her husband, than that of an unrelated stranger viewing the matter from a different locale. Conversely, Item Nos. 1 and 2 would have provided Petitioner with enhanced evidence that supported, or tended to support, her alibi defense, and those of the Ford Heights Four. [Recall that Mr. Lionberg was apparently still present at the Clark Oil gas station as late as 2:30 a.m. on May 11th, 1978, because he made a call to a former employee at approximately that time. See Williams, 93 Ill.2d at 315-16. The 1983 Williams decision also held that "[t]he owner of the gas station and the friends who had last seen the victims placed the time of abduction between 2:30 and 6:30 a.m. on May 11." Williams, 93 Ill.2d at 318 . Recall also Mr. McCraney's testimony that within minutes of the street light being broken by Dennis Williams, and certainly no longer than a half hour in any of his testimonies, the accused entered 1528. The Item No. 2 notes, on the other hand, indicate that Mrs. McCraney observed the light being broken perhaps Wednesday night and "later than 11:30 -- before 2 AM." Note also that the "A" in " 2 AM" appears more like an "A" than a "P", for a time of "2 AM."].

At minimum, had Petitioner been in possession of Item No. 2, she could have stressed the failure of the CCSP to follow-up on Mrs. McCraney's account as evidence of their sloppy or negligent investigation. Also, Willie King Watson's evidentiary hearing testimony certainly corroborated the time line statement of Mrs. McCraney, in which he stated that Dennis Williams broke the street light before 2 a.m., or at "dusk" or when it was "getting dark" on Wednesday of the same week the victims were found, while playing around. (Tr. of Evidentiary Hr'g of 4/29/99, at 256-57, 258-59, 259; Memorandum "Evidentiary Hearing" Willie King Watson at 76). And although there has been no showing by

Petitioner that the CCSP were aware of this specific information, and therefore did not violate Brady and 412(c) as to this evidence, the fact that the CCSP kept insisting to Mr. Watson, according to his evidentiary hearing testimony which the Court has found credible, that Dennis Williams broke the light to set up the crimes notwithstanding Mr. Watson's apparent statement to them to the contrary, and thereafter directed him to submit a written statement of Dennis Williams' activities *after* Mr. Watson had repeatedly told them he witnessed Dennis Williams break the street light Wednesday night, certainly constituted materially favorable evidence suppressed by the sheriff's police. (Tr. of Evidentiary Hr'g of 4/29/99, at 235-39, 239, 245, 246, 248; Memorandum "Evidentiary Hearing" Willie King Watson at 74, 74-75, 75; Respondent's Group Ex. 11 Item K at PD00289). This is because these instructions to a witness to submit a *partial* statement of his oral account that did not include what the witness told them he observed the night of the crimes (which was probably exculpatory) not only evidenced a sloppy or negligent investigation, but would also have strengthened an attack by Petitioner on the testimony of Investigators Houlihan and Pastirik as to the sloppiness or negligence of the CCSP in failing to follow-up on the additional time line information of Item No. 2, or Mrs. McCraney's statement to their department.

Respondent's countervailing argument, made with respect to Item No. 11, but equally applicable to Willie King Watson's materially favorable evidence, that Mr. Watson's testimony was available to Petitioner, who was a friend, with due diligence, is without merit. See Dixon, 19 Ill.App.3d at 687, in which the People argued, where the defendant had made a general Brady request as in this matter, that the defense did not show due diligence in obtaining Brady information contained in an eyewitness' statement to them because the defense knew from the trial evidence the approximate area in which the eyewitness lived and also that the eyewitness had been at the apartment of the scene of the crime, though he had left sometime before. Dixon rejected the State's argument, ruling that it knew of "no cases which hold that the prosecution's burden to turn over [Brady] evidence is excused when the defense has sufficient time prior to cross-examination to go out and find the same evidence through its own investigation." Of course, Petitioner was not even provided with trial notice, though insufficient in Dixon, of Mr. Watson's materially favorable evidence. And even if Petitioner *had* received timely notice of Mr. Watson's statement prior to her 1987 plea (which the Court does not hold), this statement, as previously discussed, would not have put Ms. Gray on notice of Mr. Watson's

entire account to the police, because it did not include Mr. Watson's observations as to Dennis Williams' conduct the night of the crimes, particularly the information regarding the time and circumstances of Mr. Williams' breaking of the street light. (See Respondent's Group Ex. 11 Item K at PD00289).

[Note also that although Item No. 2 would be inadmissible at a 1987 trial, timely pretrial disclosure of this evidence by the People would have enabled Petitioner's counsel to investigate and verify the information and call Mrs. McCraney as a defense witness. See Olinger, 112 Ill.2d at 342-43, which indicated, while denying the constitutional materiality of nondisclosed evidence because it was inadmissible hearsay, that *such evidence could be material if the defendant pointed to admissible evidence which this hearsay evidence would have led to*; Nichols, 27 Ill.App.3d at 386, holding that a suppressed shoe found at the crime scene below the window of entry containing an unidentified palm print, and requested by the accused, constituted materially favorable evidence because had it been "examined by defendants, *[it] could conceivably produce evidence or clues* that would substantiate defendant's claim that someone else committed the crimes[; that]...[i]t was [the defendants] who had the right to inspect the shoe for marks or clues favorable to them[; and that]...the shoe, together with the palm print that belonged to some stranger, was material..." (emphasis added); People v. De Stefano, 30 Ill.App.3d 935, 940-41 (1975), where the court reversed defendant's conviction and remanded for a new trial because the State suppressed a file, in violation of Brady and Rule 412(c), evidencing that the homicide victim had previously been subjected to police brutality. The First District ruled that "[t]he State's contention that the contents of the file were not material to the issue of defendant's guilt is without merit, because the *information contained in the file may well have led to the discovery of information that [the homicide victim] had been killed by others*" (emphasis added)].

Indeed, as in Kyles, had Petitioner been in possession of Item Nos. 1 and 2, she could have subjected Mr. McCraney to a withering cross-examination, in a prospective 1987 trial, or the "assault that was warranted," due to the inconsistency between *all* of Charles McCraney's testimonies identifying one or more of the accused in 1978, 1985 and 1987, and the suppressed evidence that "he saw no faces" the night of the incident (Item No. 1), as well as his own wife's testimony that the street light was broken "before 2 AM" on possibly the night of the incident (Item No. 2). Ms. Gray was never put on notice of the matters contained in Item Nos. 1

and 2, which information tended to support her theory of innocence and undercut the State's theory of prosecution.

In addition, Kyles observed that the inconsistencies between the same eyewitness' testimony at the second trial and his suppressed initial statement to the police, "would have fueled a withering cross-examination, destroying confidence in the eyewitness' story [at the second trial] and raising a substantial implication that the prosecutor had coached him to give it." Kyles, 514 U.S. at 443. In a footnote comment, Kyles stated that "[t]he implication of coaching would have been complemented by the fact that the eyewitness' testimony at the second trial was *more precise* and *incriminating* than his testimony at the first, which produced a hung jury." Kyles, 514 U.S. at 443 n.14. Of course, as will discussed, this is the exact situation presented by Charles McCraney's inconsistent, but increasingly favorable testimonies on behalf of the State, from his 1978 account, to those in 1985 and 1987. Moreover, again as will be discussed, Mr. McCraney was paid monies by the State prior to each of his three trial testimonies.

The inconsistencies of Charles McCraney's trial testimonies, previously detailed in this Memorandum "Evidentiary Hearing" Rob Warden at 71-72, 72-73, consist of Mr. McCraney's testimony at the 1978 trial in which he indicated that he saw some of the accused enter 1528 Cannon Lane at "2:30 or 2:15" a.m., and later testified at the same proceeding that the last time he saw the four accused was "roughly" at 2:47 or 2:48 a.m. that morning. (Respondent's Group Ex. 11 Item G at 1184, 1240). At Verneal Jimerson's 1985 trial, Mr. McCraney pushed the time back that he observed the "six to eight people" enter 1528 to sometime *after* 3:00 or 3:15 a.m. Jimerson, 127 Ill.2d at 12. By the 1987 trial of Williams and Rainge, Mr. McCraney pushed back the time of entry into 1528 still further to anywhere from 3:26 to 3:33 a.m. Williams, 147 Ill.2d at 199-201.

Mr. McCraney also gave inconsistent, but increasingly more favorable testimony on behalf of the State regarding the clock(s) in his home on the May 10th-11th, 1978 night of his testimony. In the 1978 trial, he had "no clock" in his home. By the 1985 proceeding, there were "two clocks" in his residence. At the 1987 retrial, he had pared the number down to "one clock." Williams, 147 Ill.2d at 203.

Regarding identification, Mr. McCraney also contradicted himself at various trials. As previously discussed, on direct examination in the 1978 trial, he testified he saw Dennis Williams,

Willie Rainge and Kenneth Adams enter 1528 Cannon Lane the night of May 11th, 1978. See this para. at 279; Rainge, 112 Ill.App.3d at 401. On cross-examination at the same trial, he changed his testimony to seeing only Dennis Williams enter 1528 and to last viewing Kenneth Adams running in the direction of this building. See this para. at 279; Rainge, 112 Ill.App.3d at 401. No mention was made of Verneal Jimerson by Mr. McCraney at the 1978 trial. Jimerson, 127 Ill.2d at 35-36. At the 1985 Jimerson trial, he testified to having seen Verneal Jimerson in a group of people "sometime between 10 p.m. and midnight on May 10[th, 1978]," on which the Illinois Supreme Court premised its decision denying Mr. Jimerson's allegation of ineffective assistance of counsel. Jimerson, 127 Ill.2d at 35-37. However, by the 1987 retrial of Williams and Rainge, Mr. McCraney changed his testimony to having seen Verneal Jimerson at the crime scene at "about 3 a.m." on May 11th, 1978. Williams, 147 Ill.2d at 199.

Also, as noted by the Illinois Supreme Court in Williams, 147 Ill.2d at 203, Mr. McCraney received relatively substantial sums of monies from the State prior to testifying in each of the three trials in 1978, 1985, and 1987, totalling $3,600.00, for *three* relocations and the purchase of a car to facilitate his relocation(s). Charles McCraney also received some "reward money," according to his testimony at the February 2, 1999 deposition in the civil matters for Petitioner and the Ford Heights Four, but didn't remember receiving the $3,600.00 from the People, after initially testifying at the deposition that he didn't receive *any funds other than* his reward monies. (Petitioner's Add'l Auth's and Mat'ls Ex. 13, at 126).

Regarding identification alone, Kyles specifically noted that "[s]ince the evolution over time of a given eyewitness's description can be fatal to its reliability, cf. Manson v. Brathwaite...(reliability depends in part on the accuracy of prior description); Neil v. Biggers...(reliability of identification following impermissibly suggestive lineup depends in part on accuracy of witness' prior description), the...identifications [by the two best eyewitnesses] would have been severely undermined by use of their suppressed statements" in light of their inconsistent identification trial testimonies.

Clearly, Mr. McCraney's inconsistent identification testimonies "over time," combined with his original "saw no faces" statement to the prosecution (Item No. 1), would have undermined his identification testimony. In addition, the inconsistencies of his time of entry testimony throughout the various trials, when

combined with the exculpatory time line testimony of Mrs. McCraney (Item No. 2), would have undercut Mr. McCraney's time of entry testimony. When the foregoing new proofs (Item Nos. 1 and 2) and several inconsistencies, are added to his conflicting testimony regarding the presence or absence of clocks in his home during the period he testified to, Charles McCraney's identification, time of entry and clock testimony is at least "severely undermined," or would constitute "adjustments" in testimony over the course of the three trial proceedings that a "jury would reasonably have been troubled by," as indicated by Kyles, 514 U.S. at 443, 444. [Note that other than Ms. Gray's grand jury testimony, which also has severe reliability problems premised on Petitioner's ten items of alleged newly discovered Brady and 412(c) proofs tending to show her grand jury testimony was CCSP coerced and concocted, Charles McCraney was the only eyewitness to connect Paula Gray to the subject offenses at her 1978 trial. (The Court is not including in its foregoing determination Petitioner's items of newly discovered evidence of actual innocence on which it premised its finding of CCSP coercion and fabrication of Ms. Gray's inculpatory statements to various sheriff's police and assistant State's Attorneys, as well as testimony to the May 16th, 1978 grand jury, because these proofs would have been non-existent for a prospective 1987 trial due to the State's misconduct in this matter. (See Memorandum "Findings of Fact" para. 1., at 181-91; "Preliminary Findings of Law" para. 4., at 238-45; "Analysis" para. 3.c., at 321-24). Also, the jury's rejection of Mr. McCraney's entire testimony would more likely than not have resulted in the acquittal of Dennis Williams, Kenneth Adams, and Willie Rainge at their 1978 trial based on the Jimerson court's observation that Mr. McCraney alone, and not Paula Gray, placed these accused at the crime scene, because Ms. Gray's [grand jury] testimony was not used against these defendants in their 1978 trial. Jimerson, 166 Ill.2d at 228].

In addition, the foregoing new proofs and inconsistencies would have fostered an improved defense argument, consistent with Ms. Gray's defense theory of innocence, that Mr. McCraney's identification, time of entry and clock testimony were simply mistaken. But an even stronger defense argument generated by the new evidence in support of Ms. Gray's defense of innocence, in conjunction with the numerous testimonial inconsistencies of Mr. McCraney, would have been that he was tailoring his testimony, or simply rendering untruthful testimony in favor of the State, in order to receive "reward money," and also monies from the government for relocation to a more desirable residence and for the purchase of an automobile. [Among the matters testified to by Mr.

McCraney at the 1978 trial was that on May 12th, 1978, while in a crowd of onlookers at the field where the CCSP had responded, and prior to the discovery of Ms. Schmal's body, he claimed to having overheard Dennis Williams say to his friends that "[Dennis Williams] saw [the victims] jump when he shot them." Rainge, 112 Ill.App.3d at 402]. As such, armed with Item Nos. 1 and 2, the defense could have subjected Mr. McCraney to a much stronger cross-examination to show that the numerous inconsistencies of his testimonies regarding identification, time of entry and clock evidence were either untruthful in order to effect the receipt of monies from the People, and/or tailored by him to be more favorable to the prosecution each time that he was in receipt from the State of more "relocation" monies, or monies for a vehicle. Also, the new proofs, combined with the many testimonial inconsistencies of Charles McCraney, would have supported a strengthened cross-examination of him by Ms. Gray that he incriminated she and the Ford Heights Four in order to receive "reward money."

[Obviously, not unlike the fact situation of Bagley, Mr. McCraney had a personal financial stake in testifying favorably on behalf of the State. Recall Mr. McCraney's dislike of residing at 1533 Hammond, after only two weeks, calling it a "rat [sic] nest," and indicating that he lost two vehicles while (apparently) there, and that he had previously owned a home. (Respondent's Group Ex. 11 Item G at 1165, 1213). He also stated that he "wanted to relocate...[because] he had kids." (Respondent's Group Ex. 11 Item G at 1179-80). Who is say that he did not perceive an opportunity to improve on his previous relocation(s), and to even secure an automobile, by testifying more favorably on behalf of the State with each successive trial. In fact, that could have been the reason he testified as he did on behalf of the State at the 1978 trial, or for his initial anonymous call. Still further evidence of such a pattern is that Mr. McCraney became aware in 1982, through his interview by Rob Warden, of the importance to the prosecution of having the accused enter 1528 as late as possible after 2:30 a.m., when the victims could have been on the scene. Thereafter, Mr. McCraney's testimonies at the 1985 and 1987 trials regarding the time of entry became progressively later than his initial 1978 testimony of 2:15 a.m., 2:30 a.m., 2:47 a.m. or 2:48 a.m., and of course, his 1985 and 1987 testimonies were each preceded by the receipt of monies from the State. Further evidence of this pattern of money in exchange for favorable evidence by Mr. McCraney was his 1999 deposition testimony in Petitioner's and the Ford Heights Four civil cases, where he initially tried to hide receiving monies (on *three* occasions) from the State by at first denying the

receipt of *any* such funds, but under persistent cross-examination eventually replying "I don't remember it." (Petitioner's Add'l Auth's and Mat'ls Ex. 13, at 126). Additional proofs suggesting this pattern is provided by the earlier discussed fact that Mr. McCraney's claims of threat, upon which the State justified his receipt of "relocation" monies, were never corroborated, or substantiated, nor in any way connected to Petitioner and the Ford Heights Four, who were incarcerated during the 1978, 1985 and 1987 trials. Recall the Williams court finding that Mr. McCraney's allegation of being "threatened" was never linked to Dennis Williams. Williams, 147 Ill.2d at 203, 224].

Furthermore, the new evidence of Item Nos. 1 and 2, coupled with the inconsistencies of Mr. McCraney's identification, time of entry and clock testimony "over time," could have reasonably supported a defense argument, again consistent with Ms. Gray's defense theory of innocence, that the CCSP and prosecution conducted a negligent, or even bad faith investigation (i.e. monies paid to an important eyewitness), by displaying "a remarkably uncritical attitude" regarding the veracity of Mr. McCraney's information and testimony, and in not more closely assessing this evidence, particularly where both the sheriff's police (Inv. Pastirik) and prosecution (ASA DiBenedetto) had personal knowledge of Mr. McCraney's initial pretrial statements that he saw an "unknown subject" (Inv. Pastirik) and "saw no faces" (Item No. 1/ASA DiBenedetto) of the persons at the scene of the crimes, and were obviously aware of his complete turn around and increasingly favorable identification testimony (as well as clock and time of entry testimony) over the course of the 1978, 1985 and 1987 trials. [See Kyles, indicating that "[the disclosure of Beanie's suppressed statement] would have revealed a remarkably uncritical attitude on the part of the police." Kyles, 514 U.S. at 445. Kyles additionally cites Bowen v. Maryland, 799 F.2d 593, 613 (10th Cir. 1986), for its holding that '[a] common tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may, consider such use in assessing a possible Brady violation' and also Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985), in which the court awarded a 'new trial of prisoner convicted in Louisiana state court because withheld Brady evidence 'carried within it the potential...for the... discrediting...of the police methods employed in assembling the case.'' Kyles, 514 U.S. at 446. Furthermore, Kyles noted that the police did not more critically assess the information provided by Beanie, whom the suppressed evidence showed should reasonably have been considered a suspect by the police. Kyles, 514 U.S. 445-47].

Though not a suspect, Mr. McCraney made clear to the police and prosecution that he wanted monies to relocate before he would "identify" the persons he saw outside his windows the night and time of the offenses. (See Respondent's Group Ex. 11 Item G at 1166-69, 1179-80, 1217-19). Mr. McCraney even made a revealing remark at the 1978 trial, not unlike Beanie's to the police in Kyles, 514 U.S. at 448-49, in which Mr. McCraney agreed that the police were "kind of dragging their feet" on the payment of monies to him for identification information, and then added "[t]hey were just interested in solving the case and chips fall [sic] where they may..." (Respondent's Group Ex. 11 Item G at 1218). While the jury could have accepted this as Charles McCraney's observation that the police were more interested in solving the case, than in paying him his relocation monies, the new evidence could have enabled Ms. Gray to make a much stronger argument to the jury for them to conclude that Mr. McCraney was more interested in monies for relocation, than in "solving the case," with the implication, of course, that he'd do whatever favored the State, including tailored or untruthful testimony, to receive such monies. And, of course, Mr. Podlecki's perjured forensic testimony (Item No. 7), and the exculpatory pubic hair comparison results (Item No. 6), coupled with the failure of the CCSP or prosecution to follow-up or investigate the four "Suspects" of the Capelli and Nance notes produced by May 18th, 1978 (Item Nos. 4 and 5), or to provide Mr. Podlecki with head hair standards of the Ford Heights Four for comparative examination with the "Negroid" head hairs found on Ms. Schmal's socks (Item No. 8), would have provided still more evidence in support of a defense argument of a negligent or bad faith investigation by the government. With these new proofs, added to Charles McCraney's testimonial inconsistencies and revealing remark at trial, Petitioner could have more effectively cross-examined Inv. Houlihan and Inv. Pastirik as to the thoroughness of the CCSP investigation of the Lionberg/Schmal offenses.

Also, Mr. McCraney's improved identification, time of entry and clock testimony "over time" in favor of the State, when considered in conjunction with Item Nos. 1 and 2, could have supported a stronger defense argument that the prosecution had coached him, further enhancing Ms. Gray's defense theory of innocence, as well as a more searing cross-examination of Mr. McCraney.

Finally, even without Sherry McCraney's possibly contradictory and exculpatory Item No. 2 time line testimony to that of her husband, the information of Item No. 1 alone could

have been the one new piece of evidence needed by Ms. Gray to more successfully show at a 1987 trial, in view of the many previously cited inconsistencies of Charles McCraney's several testimonies and improved identification, time of entry and clock testimony over time, that the motive for him testifying the way he did was money, and not the truth of what he saw or didn't see the apparent night and location of the crimes. [Recall Bagley's holding, previously discussed, that "[i]mpeachment evidence...falls within the Brady rule...and is 'evidence favorable to an accused,'" reasoning that "'[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.'" Bagley, 473 U.S. at 676. Bagley thereafter ruled that the "possibility of a reward [in the contractual guarantee of monies from the government commensurate with the information furnished] gave [the two key government witnesses] a direct, personal stake in respondent's conviction." Bagley, 473 U.S. at 683. See also People v. Sharrod, 271 Ill.App.3d 684, 688 (1st Dist. 1995), which reiterates the foregoing Bagley decision that "[i]nformation that may cast doubt on the credibility of a State witness tends to negate the guilt of the accused and must be disclosed" pursuant to Brady and Rule 412(c). In addition, recall the purpose of the prosecutorial disclosure obligation pursuant to Brady of ensuring that the accused is subjected to a fair prosecution (or one "whose interest" is centered not on winning a case, but in which "justice will be done, " and in accordance with criminal procedures "'under which criminal defendants are 'acquitted or convicted on the basis of all evidence which exposes the truth,'" Kyles, 514 U.S. 439-40), in addition to a fair trial (Brady, 373 U.S. at 87-88)].

Respondent argues that it need not have disclosed Item No. 1 to Petitioner because Mr. McCraney sufficiently explained the reason for any inconsistency between his identification testimonies at trial and this evidentiary item, to wit, fear of retaliation by the relatives and friends of Petitioner and the Ford Heights Four. This argument is without merit.

First, as previously determined, the evidence of Item No. 1 is not the same statement referred to by Mr. McCraney at Petitioner's 1978 trial while explaining the reason for his inconsistent inculpatory identification testimony with his pretrial statement to the prosecution that he "saw no faces." Secondly, because the information of Item No. 1 is clearly favorable to Ms. Gray, the State is not relieved of its Brady and 412(c) duty to

disclose this *exculpatory* pretrial identification statement, by arguing, *after suppressing it*, that the very same *prosecution* witness asserting it, adequately explained at trial the reason for its inconsistency with his *inculpatory* identification trial testimony. Nor has Respondent argued that Item No. 1 is neither favorable or material to Petitioner's guilt or innocence. [See Dixon, 19 Ill.App.3d at 687, citing to People v. Cole, 30 Ill.2d 375, 381 (1964), holding that:

Our courts have consistently condemned efforts to evade [the case law rules, including Brady, requiring disclosure of evidence favorable to the defendant]. '[T]he State has no interest in interposing an obstacle to the disclosure of facts unless it is interested in convicting accused parties on testimony of untrustworthy persons. * * * Justice requires full and fair disclosure'].

______Third, the State's argument is disingenuous that it need not have disclosed Item No. 1 on the grounds that Charles McCraney sufficiently explained at trial that he was identifying the accused, contrary to his pretrial statement known by ASA DiBenedetto that he "saw no faces," because Mr. McCraney was fearful of retaliation from the friends and relatives of the accused and also that he had been relocated by the State at the time of his identifying testimony. This is because the trial evidence also shows that after Mr. McCraney effectively caused the accused to be arrested by May 14th, 1978 for the subject crimes via identification of certain of their vehicles, and with his identity and address known by the prosecution and CCSP as of May 15th, 1978 according to Mr. DiBenedetto's felony review notes for May 15th (or Item No. 1), Charles McCraney and his family still apparently lived safely for approximately a 3½ month period (from May 15th, 1978 until approximately August 29th, 1978) while maintaining their residence in Ford Heights. (See Williams, 147 Ill.2d at 203-04; Williams, 93 Ill.2d at 316-17; Petitioner's Add'l Auth's and Mat'ls Ex. 14, cover letter and at 0474860, 047486-047487; Tr. of Evidentiary Hr'g of 5/3/99, at 110-11, 112-14; Memorandum "Evidentiary Hearing" Earnest DiBenedetto at 125, 126; Respondent's Group Ex. 11 Item G at 1166-69, 1179-80, 1188-89, 1219). [Note that Mr. McCraney testified that he identified the accused to the police and prosecution approximately a month before his September 29th, 1978 testimony, and if he did not identify anyone to the State until he was relocated as he has testified, he was relocated on or about August 29th, 1978, or 3½ months after May 15th, 1978, when according to Item No. 1 his name and address were known to the authorities. (See

Respondent's Group Ex. 11 Item G at 1187-89, 1231-32). Moreover, even if Mr. McCraney was not relocated until on or after his September 29th, 1978 testimony (the evidence is unclear as to the exact date of his relocation), this later relocation would only strengthen the Court's finding. Of course, Petitioner was unable to make the foregoing showing to more effectively impeach Mr. McCraney's explanation, because the People did not disclose Item No. 1 to Ms. Gray for her 1978 trial (or prior to her 1987 plea)].

Fourth, even assuming disclosure of Item No. 1 at trial and an adequate explanation by Mr. McCraney for his inconsistent identification testimony at one or more of the various trials caused by this evidence, the People's argument addresses only the weight to be given the information of Item No. 1, and not its favorability for purposes of determining materiality. [See Kyles, 514 U.S. at 450-51, in which the State argued that the computer listing of vehicle license numbers for cars in the Schwegmann's parking lot minus that of the defendant's was neither impeachment or exculpatory evidence because the accused could have moved his car, to which the court responded that "such argument...*confuses the weight of the evidence with its favorable tendency*, and even if accepted would work against the State, and not for it," because if the police testified the list was incomplete, such testimony would have "underscored the unreliability of the investigation and complemented the defense's attack on the failure to treat Beanie as a suspect and his statements with a presumption of fallibility" (emphasis added)]. The same, of course, is true in this matter, because as previously discussed in this paragraph and noted by Kyles, had Item No. 1 been disclosed (along with, among other suppressed items, the Capelli and Nance notes, and perjured and exculpatory forensic evidence alleged by Petitioner), coupled with Mr. McCraney's initially exculpatory identification statement at the outset of the investigation (Item No. 1) and its later inconsistency with his inculpatory identification testimonies at trial, Petitioner's argument that the government's investigation of the Lionberg/Schmal crimes was unreliable would have been augmented because the police (and prosecution) did not treat Mr. McCraney's anonymous call, pretrial statement(s), and inculpatory identification testimony with more suspicion and "presumption of fallibility." In fact, quite the contrary, the prosecution paid him, after which his identification testimony became more precise and incriminating with each succeeding trial by going from his initial 1978 Item No. 1 pretrial statement of "saw no faces," to ultimately identifying, by the 1987 trial, Petitioner and *all four* of her alleged principals at the scene and time of the subject offenses.

Fifth, again assuming that Mr. McCraney related the information of Item No. 1
at trial and even adequately explained the reason for his inconsistent identification testimony at one or more of the trials promulgated by this evidence, this explanation certainly did not adequately explain the reason for his inconsistent testimonies with respect to the time of entry into 1528 by the accused, or the presence or absence of clock(s) in his home for the period of his testimony.

Finally, were the Court to accept Respondent's argument, the State would effectually be presenting only its version of Mr. McCraney's account, and the reason for any inconsistency caused by Item No. 1 (as well as Item No. 2), in their prosecution of Petitioner and the Ford Heights Four, without affording this evidence to the accused with which to adequately prepare a defense, and to more effectively cross-examine or contest Mr. McCraney's version, or the credibility of his testimony. To affirm such conduct, of course, would be in direct contravention of our adversarial system of justice, as well as the purpose of Brady of ensuring a fair criminal prosecution and trial. It would also defeat one of the purposes of Rule 412(c) of requiring pretrial disclosure of all Brady and 412(c) material to permit adequate preparation for trial.

[Recall that the Committee Comments to 412(c) indicate that one of the reasons for pretrial disclosure is that it "permits adequate preparation...for trial." Case law reiterates this purpose. Aguilar, as earlier discussed, reversed a judgment upon finding that the People's failure to disclose 412(c) evidence "denied [defendant] the full and fair opportunity to prepare his defense and make tactical decisions with the aid of [the suppressed] information" and the accused was therefore prejudiced by this non-disclosure. Aguilar, 218 Ill.App.3d at 110. See also Dixon, 19 Ill.App.3d at 688, where the State disclosed Brady evidence during trial, and the court held that:

[t]he fact remains that this evidence was not available, as it should have been, to defendant when his defense at trial was being planned and prepared. The belated turnover of these reports after trial was sufficient to deprive defendant of their effective use and in no way cured the harm done by failing to turn them over to defendant initially.

Accord Trolia, 69 Ill.App.3d at 449. Additional First District cases reiterating the rulings of Dixon and Aguilar include People v. Balfour, 148 Ill.App.3d 215, 230 (1st Dist. 1986), determining that "[g]iven ours is an adversary criminal justice system, defense counsel, not the State, should determine whether [suppressed] photographed or videotaped reenactments of a crime by an accused may be useful to the accused's defense"; and People v. Rios, 145 Ill.App.3d 571, 577-79 (1st Dist. 1986), holding that the State was obligated to inform the defendant of the existence and content of a tape recording in its possession favorable to the accused, even though the defendant knew the tape existed prior to trial and heard the tape during trial, on the grounds that the defendant did not know the content of the tape *prior to trial* and therefore "his ability to prepare an effective defense strategy was impaired." The court, however, did not reverse the conviction on Brady due process grounds because the tape recording was not material evidence and there was substantial evidence of the defendant's guilt].

Accordingly, the Court will not affirm Respondent's suppression of Item No. 1 (and Item No. 2) on the basis of Mr. McCraney's explanation, because such ruling would sanction the State's failure to disclose 412(c) evidence to Petitioner, with which she could have mounted a more effective cross-examination contesting Mr. McCraney's credibility, and more substantially supported an alternative argument for his inconsistent testimony. Also, these new proofs would have strengthened Petitioner's cross-examination of Inv. Houlihan, Inv. Pastirik, and ASA DiBendetto (who also testified at Petitioner's 1978 trial) to show that the police and prosecution's investigation was negligent and/or in bad faith. Furthermore, the withholding of this evidence impaired the effectiveness of Ms. Gray's defense strategy, with the concomitant risk of convicting her on untrustworthy testimony. Nor has Respondent cited any case law in support of its position. Accordingly, the State's argument is denied.

Also non-availing is the State's contention that the foregoing credibility evidence, or "newly discovered evidence which merely serves to impeach, discredit, or contradict a witness," cannot constitute grounds for section 2-1401 relief, citing Hallom, 265 Ill.App.3d at 905. This contention, though raised to contest Item No.2, is of course equally applicable to Item No. 1.

First, this is a Brady analysis and determination, and both Bagley and Sharrod have found that credibility evidence can constitute Brady proofs. Secondly, Item Nos. 1 and 2 additionally constitute substantive evidence regarding the subject offenses, as

opposed to credibility evidence alone. Thirdly, Ms. Gray's petition for post-judgment relief is not based "merely" or solely on newly discovered credibility evidence, but includes other new evidence such as the Capelli and Nance notes, pubic hair test results tending to show Petitioner's and the Ford Heights Four innocence, Michael Podlecki's perjured testimony regarding pubic hair comparison test results, the failure and/or refusal of the State to conduct head hair comparison tests, as well as proofs of Petitioner's actual innocence. Also, not unlike a Brady determination, all newly discovered evidence must be considered cumulatively for a post-judgment finding, and not item by item, so Petitioner's credibility evidence cannot be considered singularly or separately from her other alleged newly discovered proofs as grounds for 2-1401 relief. [See Burrows, 172 Ill.2d 169, 179, 181, which granted collateral relief upon "cumulatively" considering petitioner's evidence of perjured testimony by a State witness and newly discovered evidence of petitioner's actual innocence. In addition, the history of the Hallom determination that credibility evidence alone cannot provide the basis for 2-1401 relief, is premised on the reasoning that such newly discovered evidence, *by itself*, is *generally* not so conclusive that it will change the result of a new trial, as there is often other evidence on which criminal conviction or civil liability can be premised. Recall the earlier discussion that Ms. Gray's case, and that of the Ford Heights Four, were closely balanced evidence wise, and did not present overwhelming evidence of guilt. See also People v. Waldroud, 163 Ill.App.3d 316, 318-20 (1st Dist. 1987), cited by Hallom, 265 Ill.App.3d at 906, in support of its (or Hallom's) above referenced rule, in which Waldroud affirmed denial of a defendant's motion for a new trial on the grounds of newly discovered evidence because the new evidence impeaching the complainants' testimony as to lighting at the scene of the crime *was found not to be "such as to probably change the outcome of defendant's trial,"* in that it did not impeach the complaining witness' positive identification of the defendant on the scene, nor their in-court identification of the accused. (emphasis added). Waldroud reasoned that "[g]enerally, evidence which serves only to impeach is not a justification for the granting of a new trial"; People v. Johnson, 60 Ill.App.3d 183, 191 (1st Dist. 1978), cited by Waldroud, 163 Ill.App.3d at 319, in which Johnson affirmed the denial of defendant's motion for a new trial on newly discovered evidence grounds, because the accused failed to demonstrate the new evidence existed, and assuming it did, would have been of *minor impeachment value*; Kaster v. Wildermuth, 108 Ill.App.2d 288, 292-93 (3rd Dist. 1969), cited by Johnson, 60 Ill.App.3d at 191, in which Kaster affirmed denial of a motion for a new trial based on newly discovered evidence tending to impeach witnesses

and mitigate damages, because the *new evidence was not so conclusive that it would have changed the liability or damages verdict against the defendant* due to other evidence of the defendant's liability and of the damages awarded].

______Item No. 3, or Petitioner's pretrial account of her innocence to the CCSP, would also have provided Ms. Gray with evidence with which to more effectively contest the inculpatory testimony of Investigators Houlihan and Pastirik which incriminating account they claimed Petitioner told them. See Gray, 87 Ill.App.3d at 144-45, 146. This is because Item No. 3 provides direct evidence corroborating Petitioner's alibi account of innocence and it also tends to contradict the 1978 testimony of Inv. Houlihan and Inv. Pastirik that Ms. Gray, in effect, voluntarily admitted to them her involvement in the subject offenses, along with that of the Ford Heights Four, while making no reference of her claim of innocence to the CCSP as evidenced by Item No. 3.

At this point, a consideration of Item No. 4, or the Capelli notes, is in order. It should be reiterated that the Capelli notes (and Nance notes of Item No. 5) are based on a May 17th, 1978 hospital interview by Lt. Vanick, Inv. Capelli and Sgt. Nance with Marvin Simpson, an informant of Sgt. Nance whose reliability he vouched for to Lt. Vanick and Inv. Capelli. In addition, Inv. Capelli and (Inv.) Sapit independently confirmed the reliability of Marvin Simpson's May 17th information to them by verifying, on May 18th, 1978, the commission of a two year old apparently unsolved armed robbery by Dennis Johnson (and two others named in the Capelli notes not involved in the subject crimes), Dennis Johnson also being one of the four *other* persons named by Marvin Simpson in the same Capelli notes as having committed the Lionberg/Schmal offenses. (Petitioner's 2-1401 Mot. Ex. G; Petitioner's Add'l Auth's and Mat'ls Ex. 8, at 56-59). The names of these four offenders (of the subject offenses) contained in the Capelli notes were Dennis Johnson, Ira Johnson, Arthur Robinson and Johnnie Rodriguez, whose names were written at the beginning of these notes. (Petitioner's 2-1401 Mot. Ex. G). In fact, the notes identified these four individuals as "*Suspects*," followed by the below listed information:

(1) Dennis Johnson M/N/23
(2) Ira Johnson M/N/18-19; KKA [sic]: 1038 Lexington E. [illegible notation]
(3) Arthur Robinson; AKA 'Red': M/N/24; AmbassDr
(4) Johnnie Rodriguez M/[illegible notation]/18-19; LKA: 13/Seeley; Dr

A 1969/70 Dk.Brn. Buick 225.
Poss has right front damage.

(Petitioner's 2-1401 Mot. Ex. G).

The Capelli notes also contained a reference that a .38 was used in the Lionberg/Schmal crimes, which information was consistent with Walter I. Sherk's June 6th, 1978 forensic report identifying a ".38 caliber" as being involved in the subject offenses. (Petitioner's 2-1401 Mot. Ex. G; Respondent's Group Ex. 11 Item K at PD00067-00068). Mr. Sherk also testified at Verneal Jimerson's 1985 trial that the bullets recovered from the bodies of the victims had been fired from the same gun. Jimerson, 127 Ill.2d at 27. The Capelli notes stated that Ira Johnson still had the .38 used in the crimes under his bed. (Petitioner's 2-1401 Mot. Ex. G). Furthermore, these notes gave a detailed description of the murder and rape of Carol Schmal and the murder of Larry Lionberg, and also indicated that Johnnie wrecked "the car" (apparently his "Buick 225") on Wednesday night, May 10th, 1978, and damaged the "front passenger side." (Petitioner's 2-1401 Mot. Ex. G). Finally, Lt. Vanick advised Mr. Simpson at the time of the May 17th, 1978 hospital interview generating the Capelli (and Nance) notes, not to speak to anyone regarding the information he gave them contained in the Capelli (and Nance) notes (Item Nos. 4 and 5), and that "they would get back to [him]," but they never did. Also, Inv. Capelli had personally confirmed that Dennis Johnson, at least, was capable of violent criminal activity similar to that of the subject offenses, and Sgt. Nance further confirmed to Lt. Vanick and Inv. Capelli that the persons named by Mr. Simpson in the Capelli notes were certainly the sort of individuals who would commit the Lionberg/Schmal rape and murders. Also, George Nance had previously advised both Lt. Vanick and Inv. Capelli at or about the time of the arrest of the Ford Heights Four that they were not the sort of persons to have committed the subject offenses. One last fact is that Paula Gray's inculpatory grand jury testimony which she claimed at trial to have been coerced and fabricated by the CCSP, was given one day earlier, on May 16th, 1978, or *before* the Capelli notes were generated.

Given the naming of the possible offenders of the Lionberg/Schmal crimes, along with their specific designation as "Suspects," the location of the .38 used in the crimes, the detailed description of the offenses, the twice confirmed reliability of the informant, the confirmation that the persons named in the notes were capable of committing the subject crimes and the Ford Heights Four were not, and significantly the CCSP scientific

connection of the information contained in the Capelli notes with the Lionberg/Schmal crimes, these notes certainly constituted a substantial lead, if not a veritable resolution of the subject offenses with a minimally objective investigation. Nor should the four men identified by the notes have been difficult to locate in view of the fact that the notes gave their names (including a street or nickname), race, ages, at least one apparently residential address, and also a detailed description of the vehicle driven by one of these men which was purportedly used in the subject offenses. Furthermore, Marvin Simpson was available to identify each of them. In short, these notes (along with Mr. Simpson), in view of the record of the herein matter, evidence that the police possessed reliable information "which could lead a reasonable police officer to view" Dennis Johnson, Ira Johnson, Juan Rodriguez, and Arthur Robinson as suspects of the Lionberg/Schmal crimes. [See People v. Hawthorn, 244 Ill.App.3d 687, 694 (1st Dist. 1993), where the First District upheld the trial court's suppression of an inculpatory statement by the defendant based on police violation of her Miranda rights in which the trial court found the testimony of two of the investigating police officers to be "incredible." The Appellate Court noted in affirming the foregoing finding by the trial court "that the record...contains evidence that the police possessed information which could lead a reasonable police officer to view [the defendant] as a suspect"].

Accordingly, had Petitioner been in possession of these notes, she could have subjected both Investigators Houlihan and Pastirik to a devastating cross-examination regarding the sloppiness and negligence of the CCSP investigation, or their failure to treat the four men named in the Capelli notes as suspects of the subject offenses and to follow-up on this important lead. She could also have investigated the information contained in the notes herself, or interviewed and called Marvin Simpson and Sgt. Nance as defense witnesses with critical and substantial evidence supportive of her defense of innocence. Indeed, the fact that the CCSP failed to investigate this information received one day after Ms. Gray's inculpatory grand jury testimony that she claimed at trial to be coerced and fabricated by the CCSP, is the strongest direct evidence in support of her defense theory that the CCSP in fact coerced and fabricated her grand jury testimony, for there is no logical reason for the sheriff's police not to have investigated this important lead other than fear that it may have led to the real rapists and killers identified in the notes and thus disclose their misconduct in having forced and fabricated Ms. Gray's inculpatory account as she was alleging. If Inv. Houlihan, whom Petitioner claimed was directly involved in her coercion and CCSP

fabrication (along with Inv. Jackson) and who was also present at 1528 Cannon when Ms. Gray indicated a police officer pulled a gun on her, or Inv. Pastirik , who was Inv. Capelli's partner during the investigation of the subject offenses (see Williams, 147 Ill.2d at 203), stated at a 1987 trial that no follow-up on the notes was necessary because, as indicated by Inv. Capelli at the January 9th, 1998 civil case deposition, "there was nothing significant in [the notes] that related to [the Lionberg/Schmal] case," Petitioner would have had still more evidence that her grand jury testimony was CCSP coerced and concocted in light of the obvious significance of the information contained in these notes. In any event, Petitioner would have had very strong evidence in Item No. 4 that both Inv. Houlihan and Inv. Pastirik had strong personal motives in not following up on the Capelli notes because the arrest and conviction of other persons for the subject crimes, would corroborate Ms. Gray's account that Inv. Houlihan directly threatened her and that Inv. Pastirik engaged in deceptive conduct, to force her to tell the CCSP inculpatory concoction. [Recall also that Ms. Gray has asserted at the evidentiary hearing, and would have testified presumably likewise at a 1987 trial, that Lt. Vanick, who was one of the CCSP officers in direct receipt of the information contained in the Capelli notes, was also present at the abandoned building of the crimes, along with Inv. Houlihan, when a gun was pulled on her the evening of May 13th, 1978 or early morning of May 14th, 1978, to make sure that she reiterated the CCSP concoction].