A.

PROSECUTORIAL MISCONDUCT OCCURRED WHEN THE STATE ELICITED THE FALSE AND MISLEADING TESTIMONY OF DAVID SWANN THAT HIS CAR DID NOT HAVE TINTED WINDOWS WHERE, IN FACT, IT DID AND THEN USED THIS INFORMATION TO DISCREDIT THE DEFENSE THEORY THAT KARYN HEARN SLOVER DID NOT GO THE SLOVER RESIDENCE AFTER WORK ON THE DAY SHE WAS ABDUCTED. TO THE EXTENT THIS INFORMATION WAS DISCOVERABLE PRIOR TO TRIAL THE SLOVERS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO HIGHLIGHT THIS FALSE AND MISLEADING TESTIMONY.

OVERVIEW

It is undisputed that Karyn Hearn Slover left the parking lot of the Decatur Herald and Review at approximately 5:05 p.m. on Friday, September 27, 1996. Where Karyn went after that is a matter of dispute and the critical fact that led to the conviction of Michael Slover, Sr.(Senior), Jeanette Slover, and Michael Slover, Jr. (Junior) for the murder of Karyn Hearn Slover.

The State's theory was that Karyn left work and went straight to the Mt. Zion residence of Senior and Jeanette Slover to pick up her son, Kolten, before going to the mall to look for a dress. The State supported this theory through the testimony of several co-workers who said Karyn told them that she was going to do just that. However, the State was unable to present any witnesses that placed Karyn in Mt. Zion after 5:00 p.m. September 27, 1996.

The defense theory was that Karyn left the Decatur Herald and Review and drove towards Champaign taking the back roads through Cerro Gordo. The defense presented the testimony of several disinterested witnesses who claim to have seen the car Karyn was driving in and around Cerro Gordo immediately after leaving work. The car was recognizable to the witnesses because it was a dark

colored Pontiac Bonneville with a unique license plate, CADS7. Some of these witnesses further identified the car as having tinted windows.

A central issue in the case became whether the car owned by David Swann, and driven by Karyn Hearn Slover that night, had tinted windows. The State presented the testimony of David Swann that his car windows were "factory clear" and ridiculed defense witnesses who said the car they saw had tinted windows. The fact of the matter is that David Swann's car had factory tinted windows; the type of tinting was described accurately by defense witnesses; and, the timing of the sightings was consistent with Karyn Hearn Slover leaving work and driving toward Champaign. The question in this case is whether it is permissible for the State to knowingly offer false and misleading testimony in order to create a fact in controversy where no such controversy exists?

Newly Discoverd Evidence the CADS7 Car had Tinted Windows

Mark Camper, a student working with the Downstate Illinois Innocence Project, read the testimony described above and investigated whether the CADS7 car owned by David Swann had tinted windows. As part of his investigation, Mr. Camper contacted Albert J. Brown, a service advisor at S & K Pontiac GMC, to determine if records were available to show whether the CADS7 car had tinted windows. (*See* Affidavit of Mark Camper, Appendix A, pp. 7-8)

Mr. Brown was able to access the computer data base at Pontiac and was able to determine the original equipment of automobiles built by Pontiac. The CADS7 car had factory tinted windows. This particular car was manufactured with a green tint in all of the windows of its windows, including rear, front and side windows. Mr. Brown also reviewed the testimony of Vicki Gagnon (below) and

determined that the description of the car as having light tinting was accurate. (*See* Affidavit of Albert J. Brown, Appendix A, pp. 57-59)

Further investigation has revealed that the tinted windows in the CADS7 car were EZ Cool tinted windows. (*See* Affidavit of Autumn Andris, Appendix A, pp. 95-97 at 96) In addition the current owners of the CADS7 car are located in New Tazwell Tennessee and they indicated that the car had tinted windows. (Appendix A, p. 96) The Innocence Project was unable to send investigators down to Tennessee to take pictures of the car and obtain affidavits from the owners due to a lack of resources.

Trial Testimony

David Swann

In its case-in-chief, prior to the introduction of any evidence that Vicki Gagnon reported seeing the CADS7 car and that it had tinted windows, the State's Attorney, Jack Ahola, questioned David Swann extensively concerning whether his car had tinted windows.

Q: How long had you had that vehicle?

A: Approximately a year and a half.

Q: **Did it have tinted windows?**

A: **No, sir, it did not.**

* * *

Q: Mr. Swann, I have some photographs of the car only. I would like you to take a look at it on screen. . . .

Q: What does slide 1 show?

A: It is a picture of my 1992 Pontiac Bonneville.

Q: That's what you saw when you were summoned to the interstate?

A: Yes, it is.

Q: Go to the next photo, please. Photo No. 2, what is that?

A; That is a picture of my car, also.

Q: Is that a fair and accurate picture of how it was when you saw it on the interstate that night?

A: I would like you to look at some pictures of the interior. Go to the next one, please. Photo No. 3, what is shown in this one?

A: Driver's side door open . . .

Q: And do you see on this picture any of the windows of the vehicle?

A: Yes, sir. On the back window you can see it is partially open, **and you notice that they are not tinted windows**.

Q: And that's about two inches open? (Appendix A p. 60)

A: Yes, sir, I would say, approximately two, two and a half.

Q: Next picture please. What is picture number 4?

A: It is a picture of my '92 Pontiac Bonneville.

Q: **And that shows an absence of any tinted windows?**

A: **That is correct.**

(Vol. LVIX, R. 1517; 1540-41)

On cross-examination, Mr. Swann repeated that the windows on his car were not tinted.

Q: Did you purchase that [the car] new or used?

A: It was used.

Q: You didn't have the windows tinted, is that correct?

A: That's correct.

Q: **What color were the windows**?

A: **Factory color**.

Q: **Was it smoky color?**

A: **No.**

Q: Just like somebody's glasses?

A: Factory windows.

Q: I don't know what color factory windows are, sir, that's why I am asking you.

A: I would know.

Q: Pardon me?

A: I would know.

Q: It was your car and you owned it for how long?

A: **Factory windows**.

Q: **Can you describe the color**?

A: **Clear.**

(Vol. LVIX, R. 1564-65)

Vick Gagnon

In attempting to establish that Karyn Hearn Slover did not go directly to the Slover residence as the State had theorized, defense counsel presented the testimony of several disinterested witnesses who saw the car Karyn was driving between Decatur and Champaign on the evening of September 27, 1996. Perhaps the most critical of these witnesses was Vicki Gagnon a school bus driver who

knew precisely the time frame she would have seen the car, around 5:25, which would mean Karyn would not have had time to go to the Slover residence after work that day.

Q: What was your purpose in being at the [Cerro Gordo] high school?

A: I was taking the high school football players to a game in Bement.

* * *

Q: How do you know that you left the high school at 5:15?

A: Because this coach was very punctual, and I always look at my watch when I'm leaving because I have to keep track of our time, that's how we get paid.

* * *

Q: And as you are driving on 105 and around Milmine Road, what happens?

A: A car passes me going pretty fast.

* * *

Q: Did you notice anything about the license plates?

A: Yes because I read license plates. It is a thing I have.

Q: What did you notice about the license plates?

A: That it said CADS7.

* * *

Q: At what time would you have been passed then; if you left school at 5:15, how long after you left the school did this happen?

A: I would say it was 5:25.

* * *

Q: Ma'am, as the car was passing you, what, if any, difficulty did you have looking inside the car – I am back on Friday now, I'm sorry.

A: That's all right. **The windows were tinted**.

Q: When you say tinted, what do you mean?

A: **Well they were darker; not real dark but they were tinted**.

* * *

Q: Okay. You said the car that passed you on Friday had windows of some tinting?

A: Right.

Q: You are holding an exhibit now that show what?

A: **Except for this picture here, they look like they are a little tinted**.

Q: Okay. Let me ask you this. In the Group Exhibit that you are holding, No. 12, how does the car that's depicted in those pictures, how does that line up, or compare, if at all, with the car that you saw pass you? (Appendix A, p. 61-63

A: **It looks like the same car**.

(Vol. LXV, R. 2999-3013)

After this testimony, the State aggressively cross-examined Ms. Gagnon concerning the tinting of the windows on the car she saw. By the time the State was finished, her credibility was destroyed and the State had won a major victory

in its attempt to establish that the car that was seen by numerous people was not the car occupied by Karyn Hearn Slover.

Q: And did you look inside this car as it went by?

A: No.

Q: And when did you look inside the car?

A: I didn't.

Q: **Well, you told the defense attorney that the windows were tinted, right?**

A: **Yes.**

Q: **And you told Officer Dunlap that you couldn't see inside the car because the windows were tinted didn't you?**

A: **Yes.**

Q: So, you must have looked inside the car or tried to?

A: I just looked over at the car.

Q: And could you see inside?

A: No.

Q: I am going to hand you what's been marked as People's Exhibit No. 8, referring to page 28, which shows some pictures of the vehicle. (Appendix A, p.60)

Now, you are saying that the vehicle shown on page 28 is the same car that passed you?

A: Yes.

Q: **You see any tinting on any of these windows?**

A: **No.**

* * *

Q: You are looking at page 28, right?

A: Right

Q: You see three pictures of a car?

A: Right.

Q: And the top two show numerous parts of the windows, right?

A: Right.

Q: **And none of these windows are tinted are they?**

A: **No.**

* * *

Q: **But the car you saw had windows that were tinted?**

A: **Correct.**

* * *

Q**: So, the car that you saw did not have the same windows as the car in the photographs?**

Vignari: Objection, Your Honor. He is asking about the windows in the car and the windows in the car on the photograph. I think that's comparing apples to oranges. My objection is to the form of the question.

Court: Overruled. Do you remember the question?

A: I am not sure I do.

Q: **The car that you saw, did it have tinted windows**?

A: **I believe so, yes.**

Q: **And the pictures that you just saw in the book, that car does not have tinted windows in the book, right?**

A: **Correct.**

Q: Did the car that you saw have the same windows as the one in the book?

A: I would assume, so, yes.

Q: **So where are these tinted windows that you refer to?**

A: **I don't know.**

Q: **Do you remember if the car windows were tinted or not?**

A: **I was pretty sure they were. Not really dark, just like a light tinting.**

(Vol. LXV, R. 3020-3023)

In essence, through this intense cross-examination of Vicki Gagnon, the State established in the minds of the jurors that Ms. Gagnon must have seen a different car. The car she saw had tinted windows and the State was very successful in making everyone in the courtroom believe that the windows in David Swann's car were not tinted. The State accomplished its goal, first through the false and misleading testimony of David Swann, and then through the use of carefully selected photographs to discredit the testimony of Vicki Gagnon. Unfortunately, the reality is the testimony of David Swann was false and the carefully selected photos used by the State were misleading and do not tell the whole story.

In fact, a second witness described seeing the CADS7 car between 7:45 and 8:00 p.m. at a rest stop on I72 East between Decatur and Champaign and he described the car as having tinted windows. David Requarth was traveling with his wife when he stopped to clean his windshield. Requarth testified the CADS7

car pulled into the rest stop and he was unable to see into the car because the windows were tinted. (Vol. LXVI, R. 151-52) The State attempted to cross-examine Mr. Requarth in the same manner as they did with Vicki Gagnon with a much different result.

Q. Did you observe how many people were in it [the car] as it went by?

A. I couldn't see anybody when it went by.

Q. **Because the windows were tinted?**

A. **The windows had to be tinted. You couldn't see a shape inside of the passenger side.**

* * *

Q. **I am going to hand you People's Exhibit Number 8, refer you to page 28, the first two photos in that page. How are those windows different than the windows in the vehicle you saw?** (Appendix A, p. 60)

A. **Well, to me, the seating interior, the color of the seats would be the same color as the panel on the door, no the plastic, but what would be the cloth area of the door, those would be the same color; and since the seats are kind of green or darker color, then that rear window is tinted.**

Q. But you can see in it can't you?

A. Yes, I can.

Q. If you look at the next photo can you see in that vehicle?

A. Yes, and it still looks tinted.

Q. But you can see in that vehicle there?

A. **You guys – I don't know what you have done, either the spot light of the camera or something, you have got a dome light on inside this vehicle. No dome light came on that night. If there is a dome light on, it will light up the interior. I could not see inside the interior of the vehicle.**

Q. You say photo (28) on number 8, there has to be a dome light on in that picture --

A. That is what it looks like, or else the lighting you have behind the camera has lit that stuff up. . . .

(Vol. LXVI, R. 165)

Subsequent to the testimony of David Requarth the State never mentions the non-tinting of the windows again. Even in closing argument, the State never mentions the car sightings in its argument in chief. It never mentions its highly effective cross-examination of Vicki Gagnon demonstrating that the car she saw had tinted windows but the CADS7 car did not. Only in rebuttal, does that State argue:

Now, I've been challenged by defense counsel. Why didn't they talk about the car sightings the prosecution must be scared to death about those car sightings. Do you know what this is? Elvis was in Central Illinois Friday night, September 27th of 1996.

(Vol. LXXV, R. 148)

This is the comment that resonated with the jury. During deliberations, they asked to see the "Elvis map." (Vol. LXXV R. 169) The State had been successful

in discrediting the car sightings through the false and misleading testimony of David Swann.

ANALYSIS

A State's Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, 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, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). "A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, 427 U.S. at 103

A defendant's right to a fair trial is violated when a prosecutor allows false or misleading testimony to be presented to the jury. *See Napue v. Illinois,* 360 U.S. 264, 3 L.Ed.2d 1217 (1959); *People V. Perkins*, 292 Ill.App.3d 624, 630-32, 686 N.E.2d 663, 668-69 (1st Dist. 1997). It is not necessary to find that a witness committed perjury in order to establish a due process violation. *Perkins*, 292 Ill.App.3d at 628; *People v. Nino*, 279 Ill.App.3d 1027, 1037, 665 N.E.2d 847, 853 (3d Dist. 1996) A defendant's right to a fair trial is violated if the State allows the jury to be misled by testimony. *Perkins*, 292 Ill.App.3d at 632 (finding a due process violation where the testimony of two cooperating witnesses was "literally true," but the jury was nevertheless misled); *Nino*, 279 Ill.App.3d at 1037 (finding a due process violation even though it was unclear whether the witness committed perjury, because the witness "appeared in a misleading light, and his credibility before the jury was not impeached").

In order to establish a violation of due process, the prosecutor actually trying the case need not have known that the testimony was false; rather, knowledge on the part of any representative or agent of the prosecution is enough. *People v. Brown*, 169 Ill. 2d 94, 103, 214 Ill. Dec. 257, 660 N.E.2d 964 (1995). However, given the facts in the present case, the circumstantial evidence certainly points to a prosecution team that was fully aware of the fact that David Swann's car had lightly tinted windows and yet presented testimony to the contrary.

First, David Swann's car was in police custody for several days as they processed the car for evidence. Numerous pictures were taken of the car during this time. Yet, the State chose to impeach the testimony of Vicki Gagnon that the car had tinted windows with pictures on Page 28, of People's Exhibit Number 8. (Appendix A, p. 60) The top picture on this page has the car door open and, obviously the dome light is on. A close examination of the second picture on the page shows the front license plate to be brightly lit as if a light is being shined on the car. It also appears that the dome light is on in this picture giving one the impression that the windows are clear.

The prosecution team in this case cannot credibly argue that these were the only pictures available and they truly believed the windows to be clear. Defendant's Exhibit Number 19 clearly shows David Swann's car to have tinted windows. (Appenidx A, p. 64) This picture was never shown to Vicki Gagnon or David Swann for reasons unknown and this failure is the subject of a claim of ineffective assistance of counsel later in this argument.

A second factor in considering whether this prosecution team knowingly used the false and misleading testimony of David Swann concerning the tinting of the windows on his car, is the circumstantial evidence that the prosecution encouraged this testimony. What could possibly motivate David Swann to testify that his windows were clear when, in fact, they were lightly tinted. The only logical explanation is that when prosecutors were preparing his testimony they informed Swann of the fact that Vicki Gagnon saw Karyn's car in Cerro Gordo at 5:25 p.m. and that she described Swann's car as having tinted windows. The prosecution team would also know that if Karyn was in Cerro Gordo at 5:25 p.m. she did not go to the Slover residence after work to pick up Kolten and that would mean the Slovers are innocent of this crime because the State can no longer prove the Slovers any the opportunity to commit this crime..

However, this Court does not have to conclude the State went into trial intending to deceive the jury with David Swann's testimony – an individual who was originally a suspect in the murder of Karyn Hearn Slover and had a built in bias to see the Slovers convicted of this crime. As difficult as it is to believe the prosecutors may attempt to argue they honestly believed that Swann's car did not have tinted windows. However, once David Requarth testified and pointed out the dome light was on in the pictures and that the windows were, indeed tinted, the State had an affirmative duty to investigate and notify the trial court of Swann's false and misleading testimony. Leaving this inconsistency for the jury to decide is unacceptable behavior on the part of the prosecution. There is no gray area to

argue – either the windows were tinted or they were not and the effect of Swann's false and misleading testimony created a critical fact in controversy where there was none.

Courts have uniformly held that where the State's case includes the knowing use of false and misleading testimony a strict standard of materiality applies, and a court of review must overturn the conviction "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *People v. Coleman*, 183 Ill. 2d 366, 392, 701 N.E.2d 1063, (1998) citing *United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 349-50, 96 S. Ct. 2392, 2397 (1976). "This standard is equivalent to the harmless error standard ***." *People v. Olinger*, 176 Ill. 2d 326, 349, 680 N.E.2d 321, 223 Ill. Dec. 588, *citing People v. McNeal*, 175 Ill. 2d 335, 354-55, 222 Ill. Dec. 307, 677 N.E.2d 841 (1997). "We note that this standard of materiality is the most lenient to the defendant." *People v. Coleman*, 183 Ill.2d 366, 392, 701 N.E.2d 1063, 1077 (1988).

The United States Supreme Court has clarified that materiality does not require demonstration by a preponderance that disclosure would have resulted ultimately in defendant's acquittal. Kyles *v. Whitley*, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 506 (1995) Rather, the inquiry turns on whether the "[g]overnment's evidentiary suppression 'undermines confidence in the outcome of the trial'", which, the Court stressed, "is not a sufficiency of evidence test." *Kyles*, 514 U.S. at 434, 131 L. Ed. 2d at 506, *quoting United States v. Bagley*, 473 U.S. 667, 678,

87 L. Ed. 2d 481, (1985) Materiality 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." *Kyles*, 514 U.S. at 435, 131 L. Ed. 2d at 506. Moreover, once a reviewing court applying *Bagley* has found constitutional error, that error "cannot subsequently be found harmless." *Kyles*, 514 U.S. at 436, 131 L. Ed. 2d at 507. Finally, the cumulative effect of the false and misleading testimony affects the materiality determination. *Kyles*, 514 U.S. at 436-37, 131 L. Ed. 2d at 507.

In this case, the cumulative affect of David Swann's false and misleading testimony ripples throughout much of the State's case. By destroying the credibility of Vicki Gagnon, the State successfully argued that if she was wrong all of the sightings of the CADS7 car were erroneous. In fact, during its rebuttal argument the State argued that, because there were so many sightings of the CADS7 car that "Elvis was in Central Illinois Friday night, September 27th of 1996." (Vol. LXXV, R. 148) In fact, this characterization of the car sightings resonated with the jury when they sent out a question asking to see the "Elvis map." (Vol. LXXV, R. 169)

Although this tactic used by the prosecutors was highly effective to persuade the jurors that Karyn was never in the Cerro Gordo area the evening of her disappearance, it is logically incorrect. Each claimed sighting of the CADS7 car is an independent event whose credibility must be determined exclusive of the other claimed sightings. For example, if a teacher gives a test to 10 students and

the first eight students get question number two wrong, it does not logically follow that the ninth and tenth students will also get the answer incorrect. These events are mutually exclusive of one another. The same is true in judging the car sightings. Simply because somebody claims to have seen the CADS7 in Pana does not mean that Vicki Gagnon and James Huff did not see the car in Cerro Gordo. The credibility of the sightings must be judged independently and the use of Swann's false and misleading testimony to destroy the credibility fo the sightings by Vicki Gagnon, James Huff and David Requarth constituted prosecutorial misconduct.

Not only does the fact that the CADS7 car had tinted windows bolster the credibility of Vicki Gagnon that she saw the CADS7 car around 5:25 p.m. it is supported by the time line provided by James Huff who saw the car immediately prior to Vicki Gagnon. Their testimony is consistent with one another and, more important, an investigation their testimony establishes the accuracy of the drive time placing Karyn in Cerro Gordo if she left the Herald an Review parking lot at 5:05 p.m.

In its investigation of the murder of Karyn Hearn Slover, the Downstate Illinois Innocence Project conducted experiments on whether it was possible to be in the Cerro Gordo area at the time Vicki Gagnon and James Huff testified that he saw the CADS7 car. On February 19, 2006, Sean Flynn, Sara Carpenter, and Bill Clutter of the Downstate Illinois Innocence Project participated in a drive

through of the most logical route Karyn Hearn Slover would have taken if she had decided to take the back roads to Champaign the evening of September 27, 1996.

The results of this experiment were astonishing. They left the Herald and Review parking lot at 5:05 p.m. and activated a stop watch to time their results. It took 16 minutes and 42 seconds to travel from the Herald and Review parking lot to the point where James Huff claimed to have seen the CADS7 car on September 27, 1996. Huff claimed to see the speeding CADS7 car sometime between 5:20 and 5:25 p.m. heading toward Millmine Road and the test drive placed the car at that spot at 5:21:42. (*See* Affidavit of Sean M. Flynn, Appendix A, pp. 65-85 at 67-68)

On Friday, March 31, 2006, Sean Flynn participated in a second drive through with Dave Dulakis of the Downstate Illinois Innocence Project. They proceeded on a similar path and passed the point where James Huff saw the CADS7 car at 5:23 p.m. and continued to the point where Vicki Gagnon saw the CADS7 car and it was 5:26 p.m. (*See* Affidavit of Sean Flynn, Appendix A, p. 68)

These drive times were essential evidence the jury should have been told of and the failure of defense counsel to present this evidence is the subject of a claim of ineffective assistance of counsel later in this argument.

THE JURY HAD THE RIGHT TO KNOW OF THIS FALSE AND MISLEADING TESTIMONY IN ORDER TO JUDGE DAVID SWANN'S TESTIMONY IN OTHER CRITICAL AREAS OF THE STATE'S CASE.

Not only does David Swann's false and misleading testimony critically damage the defense case concerning Karyn's whereabouts after she got off of work, but it also calls into question other aspects of his testimony the State used to prove the Slovers guilty of this crime.

For example, the State made much of the fact that Junior entered Ronnies after talking with his mother and told the bartender that Karyn's car had been found on the side of the road and that her purse was there. The State relied heavily on David Swann's testimony to establish that there is no way that Junior could have known this fact unless his parents were the real killers.

To support this allegation, the State used the testimony of David Swann to establish that he had no idea Karyn's purse had been found prior to arriving at the scene and, more important, that he had no opportunity to relay this information to the Hearns. Transcripts of the conversation between Swann and the Piatt County Sheriffs' office demonstrate Swann knew Karyn's purse had been found and phone records support the conclusion he relayed this information to the Hearns who then had the opportunity to relay this information to Junior. However, David Swann denied being told that Karyn's purse had been found or that he had told the Hearns this information. Absent knowledge of Swann's willingness to testify falsely, the jury could have believed that Swann did not

remember being told by police that Karyn's purse had been found or that he was in such a panicked state that this information did not register at the time.

David Swann testified that he made two phone calls to the Hearns. The first one took place immediately prior to him being notified by the Piatt County Sheriff's office that his car had been found. The second phone call took place immediately after Swann was notified the his car had been found on the side of the road. The State never asked David Swann if he received any phone call from the Hearns. According to the Hearns they left the house immediately after talking with Jeannette Slover and finding out that Kolten was safe. (Vol. LIII, R. 188-89, Appendix A, pp. 91-92) The Hearns also could not "remember" talking to Junior that evening at 10:30 p.m.

The problem is that the phone records do not support the story told by Swann or the Hearns. The phone records indicate that Swann and the Hearns accurately state that they had two phone conversations: one at 10:02 p.m. before Swann is notified that the car has been found and one at 10:09 p.m. after Swann is notified his car had been found. However, the phone records clearly indicate that these were not the only phone calls between the Hearns and Swann. At 10:24 p.m., phone records show a phone call from the Hearns residence to David Swann occurred at 10:24 p.m. and lasted 4 minutes and 54 second. Thus, the Hearns did not immediately leave their residence after the second call from Swann as they testified at trial. More important, phone records show that after

they hang up that phone call at 10:29 p.m. the Hearns received a phone call from Ronnie's Lounge, the phone Junior was using, that lasted one minute.

There is no mention at trial of this 4:59 second phone call between the Hearns and Swann and only a passing question as to whether the Hearns received a phone call from Junior at 10:30 p.m. – a time the Hearns say they were at the scene of the crime. This evidence is critical in explaining how Junior would know about the fact Karyn's purse had been found with the car and to the extent defense counsel should have explored this line of questioning it is included as a claim of ineffective assistance of counsel later in this argument. However, the point is the State deliberately misled the jury as to the nature of these phone calls during their closing argument

The State used a visual aid in order to show the jury the phone calls that took place the day Karyn disappeared. The visual aid shows a phone call at 10:02 p.m. from Swann to the Hearns. It also shows a second phone call from Swann to the Hearns at 10:09 p.m. conspicuously missing from the State's chart of the phone calls is the 4 minute and 54 second phone call that took place between the Hearns and Swann that began at 10:54 p.m. (Appendix A, p. 98) There was more than ample time to relay the information regarding the purse during this 4 minute and 54 second phone call.

Whether this phone call actually took place was not a fact in dispute. The State stipulated to these phone calls. The visual aid used by the State was a blatant attempt to get the jury to overlook the fact this phone call took place. The

State was free to argue the Swann's claim that he did not know about the purse and the Hearn's claim that they did not know about the purse until they got to the roadside where the CADS7 car was found. However, it was deceptive of the State to pretend this call never took place and the jury never had the chance to judge the credibility of these claims in light of the State's willingness to present false and misleadng testimony to the jury.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND APPELLATE COUNSEL

The United States Constitution, Amendment VI, and the Constitution of the State of Illinois, Article I, Section 8, guarantee assistance of counsel in criminal trials. U.S. Const. amend. VI; Ill. Const. art. I, §8. The performance inquiry is whether counsel's assistance was reasonable considering all of the circumstances. The test is whether counsel's performance fell below an objective standard of reasonableness and whether his failure prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed. 2d 674, 699 (1984); *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246, 85 Ill. Dec. 441 (1984), *cert. denied*, 471 U.S. 1044, 105 S.Ct. 2061, 85 L.Ed. 2d 335 (1985).

Any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. *Strickland*, 466 U.S. 668, 692, 80 L.Ed. 2d 674, 697. However, defendant need not prove by a preponderance that the outcome of the case would have been different. Defendant need only show that there is a reasonable probability that, but for counsel's professional errors, the result of the proceedings would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. 668, 692, 80 L.Ed. 2d 674, 698; *People v. Moore*, 279 Ill. App. 3d 152, 663 N.E.2d 490, 215 Ill. Dec. 479, 485-87 (5th Dist. 1996).

The law is well-established that a claim of actual innocence based on newly discovered evidence may be raised in a post-conviction petition. *People v. Washington*, 171 Ill.2d 475, 665 N.E.2d 1330, 1337 (1996); *People v. Burrows*, 172 Ill.2d 169, 665 N.E.2d 1319, 1324 (1996). For a free-standing claim of actual innocence to prevail, the supporting evidence must be new, material, non-cumulative and of such a conclusive character as would "probably change the result on trial." *Washington,* 171 Ill.2d 475 at 489 (internal citations omitted).

In the present case, the entire strategy by defense counsel, in addition to challenging the State's circumstantial evidence, was to show that Karyn Hearn Slover did not go the residence of Jeanette and Michael Slover, Sr. after work on September 27, 1996. These efforts were deficient if two respects. First, defense counsel failed to properly counter David Swann's false and misleading testimony that the CADS7 car did not have tinted windows. Second, defense counsel failed to adequately investigate the fact that the sightings of the CADS7 car by Vicki Gagnon and James Huff were perfectly consistent with the drive time of Karyn leaving the Herald and Review parking lot at 5:05 p.m. and going to Cerro Gordo. Neither of these omissions were trial strategy but instead were deficient performance on the part of trial counsel.

The most critical testimony that Karyn Hearn Slover left the Herald and Review parking lot after work and went towards Cerro Gordo was provided by Vicki Gagnon. Her testimony was unassailable as to the time and place of her sighting of the CADS7 car.

The sighting had to take place on Friday, September 27, 1996, because Ms. Gagnon was the bus driver for the Cerro Gordo football team and was driving them to their game at Bement. Thus, the State could not possibly argue that this sighting actually happened on another day. More important, the testimony of Ms. Gagnon as to the time of the sighting, around 5:25 p.m. was equally unassailable by the State because she knew that the team bus left precisely at 5:15. Ms. Gagnon knew this was the time because the football coach demanded punctuality and that was the scheduled time to leave the Cerro Gordo high school parking lot and she looked at her watch as she began to pull the bus out of the parking lot in order to fill out her time sheet. (Vol. LXV, R. 3002, appendix A, p. 19)

The only way the State was able to attack Vicki Gagnon's testimony was the fact she testified that the car she saw had tinted windows. The State attacked this description through the false and misleading testimony of David Swann that the CADS7 car did not have tinted windows and the use of highly misleading photographs. This attack by the State established in juror's minds that Ms. Gagnon may have seen a car of similar make model and color but that it was a different car. It also would explain the sighting by James Huff that took place minutes before as a car other than the one driven by Karyn Hearn Slover.

In attempting to prove that the CADS7 Vicki Gagnon saw had tinted windows defense counsel showed her Defendants' Group Exhibit12. (Appendix A, pp.61-63) While it is arguable that these pictures show a car with tinted windows they are not dispositive on the issue. Defense counsel had in its possession Defense Exhibit 19 which clearly shows beyond all doubt that the windows of David Swann's car were tinted. (See Appendix A, Page 64)

A second deficiency in proving that Karyn Hearn Slover left work that night and went towards Cerro Gordo, and not the Slover residence, was the failure to provide evidence to the jury that the timing of the sightings by James Huff and Vicki Gagnon fit perfectly with the amount of time it would take Karyn to drive from work to Cerro Gordo.

In its investigation of the murder of Karyn Hearn Slover, the Downstate Illinois Innocence Project conducted experiments on whether it was possible to be in the Cerro Gordo area at the time Vicki Gagnon and James Huff testified that he saw the CADS7 car. On February 19, 2006, Sean Flynn, Sara Carpenter, and Bill Clutter of the Downstate Illinois Innocence Project participated in a drive through of the most logical route Karyn Hearn Slover would have taken if she had decided to take the back roads to Champaign the evening of September 27, 1996.

The results of this experiment were astonishing. They left the Herald and Review parking lot at 5:05 p.m. and activated a stop watch to time their results. It took 16 minutes and 42 seconds to travel from the Herald and Review parking lot to the point where James Huff claimed to have seen the CADS7 car on

September 27, 1996. Huff claimed to see the speeding CADS7 car sometime between 5:20 and 5:25 p.m. heading toward Millmine Road and the test drive placed the car at that spot at 5:21:42. (*See* Affidavit of Sean M. Flynn, Appendix A, pp. 66-69)

On Friday, March 31, 2006, Sean Flynn participated in a second drive through with Dave Dulakis of the Downstate Illinois Innocence Project. They proceeded on a similar path and passed the point where James Huff saw the CADS7 car at 5:23 p.m. and continued to the point where Vicki Gagnon saw the CADS7 car and it was 5:26 p.m. (*See* Affidavit of Sean Flynn, Appendix A, pp. 66-69)

These drive times were essential evidence the jury should have been part of the defense case. The entire strategy of defense counsel was to show that Karyn Hearn Slover did not go to the residence of Senior and Jeaneatte after she left work at 5:05 on Friday, September 27, 1996. Demonstrating to the jury that the timing of the sightings of the car by James Huff and Vicki Gagnon fit perfectly with the actual time it would have taken Karyn to get to Cerro Gordo would have gone a long way to proving that these sightings had more substance to them than sightings "Elvis" in central Illinois. There is simply no strategic reason to not give the jury the information necessary to determine the credibility of your key witnesses.

To the extent appellate counsel could have raised the issue of the tinted windows on direct appeal due to the fact the inconsistent pictures were in the record on appeal, the Slovers received ineffective assistance of appellate counsel.

B.

THE SLOVERS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FAILURE TO INVESTIGATE AND PRESENT EVIDENCE TO THE JURY REGARDING THE SEARCH FOR BLUE WOOL FIBERS AND EVIDENCE THAT COULD TIE THOSE BLUE WOOL FIBERS TO ALTERNATIVE SUSPECTS.

OVERVIEW

Two crime scenes were positively identified in the Karyn Hearn Slover murder investigation. The first was the black Pontiac Bonneville Ms. Slover was driving on the night she disappeared. The second was at lake Shelbyville where certain body parts were found in grey plastic garbage bags. In both the car and the grey plastic garbage bags, police found short blue wool fibers. The importance of the blue wool fibers was signified by the fact that every search warrant applied for by police listed the short blue wool fibers as one of the items police were seeking. (Appendix B, pp. 31; 33; 36-40)

Early in the investigation Doreen Requarth and her husband, David, were interviewed by police. They had seen the car driven by Karyn at around 8:00 p.m. on the night she disappeared. It was parked suspiciously at a rest stop located between Decatur and Champaign in the east bound lane of I72. Doreen told police she saw a long haired white male who appeared to be a truck driver standing inside the rest area wearing a blue flannel shirt. The dictionary defines flannel as a fabric made of wool. (Affidavit of Doreen Requarth, Appendix B, p. 1-4)

Also early in the investigation, the police received information that a pair of young men in their teens had made statements against penal interest about having killed a woman. On October 3, 1996, the Decatur police received a call from a young woman who lived in Charleston who told her that April Pierce told her "last Saturday, before she knew about Slover's death, that some person had bragged of killing and dismembering Slover . . . These persons stated that Josh [White] and Tim [Roach] had actually committed the killing. (Appendix B, p. 51)

On Sunday, September 29, 1996, at 4:25 a.m., hours before the first body bag surfaced in Lake Shelbyville, Grant Park Police Officer, Thomas C. Hardwood stopped a stolen Ford Mustang driven by James Stanford with Tonya Linder and Robin Rollins as passengers. In the course of this traffic stop a Suzuki automobile, owned by Tim Roach and driven by Josh White, attempted to run down Officer Hardwood. Following their arrest, pictures were taken inside the car and there was a blue flannel shirt in the back seat. (Appendix B, p. 57) In addition, tapings containing hair and fiber evidence were taken from the stolen car but were never processed by the crime lab. In fact, by October 16, 1996, Roach and White were eliminated as suspects in the Slover murder even as tips continued to come in implicating the two men.

The jury never heard of the search for the blue wool fiber. They never heard of the man with long hair and a blue flannel shirt seen at the rest stop by Doreen Requarth. The jury was never told of the blue flannel shirt found in the back of Suzuki automobile nor were they ever told of the information police received

implicating White and Roach in the murder of Karyn Hearn Slover. This was not a trial strategy on the part of defense counsel. It was a product of a failure to investigate alternative suspects in the murder of Karyn Hearn Slover.

ANALYSIS

A defendant is guaranteed the right to the effective assistance of counsel under the United States and Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const., art. I, sec. 8; *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984); *People v. House*, 141 Ill.2d 323, 566 N.E.2d 259 (1990). A defendant is denied his right to the effective assistance of counsel where his attorney's representation falls below professional norms and when the deficiencies in performance undermine confidence in the outcome of the proceedings or deprive the defendant of a fair trial. *Strickland*, 466 U.S. 668; *House*, 141 Ill. 2d 323; *People v. Perez*, 148 Ill. 2d 168, 592 N.E.2d 984 (1992). To succeed on a claim of ineffective assistance of counsel, a defendant must show both that his attorney's performance was deficient, and that counsel's deficient performance prejudiced his defense. *Strickland*, 466 U.S. 668 at 688; *People v. Mejia*, 247 Ill. App. 3d 55, 63, 617 N.E.2d 799, 805 (1st Dist. 1993). A reviewing court will not find ineffective assistance when counsel's acts or omissions are part of a sound trial strategy; however, if there is no sound tactical reason to support the acts or omissions, then these acts or omissions will not be considered to be trial strategy. *People v. Garza*, 180 Ill. App. 3d 263, 269, 535 N.E.2d 968, 971 (1st Dist. 1989).

Failure to interview witnesses or seek evidence favorable to a defendant's case may indicate incompetence of trial counsel. *People v. Stepheny*, 46 Ill.2d 153, 263 N.E.2d 83 (1970). In *Stepheny*, following the defendant's conviction for voluntary manslaughter, the defendant filed a *pro se* post-conviction petition. *Stepheny*, 46 Ill.2d at 155. In his petition, the defendant alleged incompetency of trial counsel, specifically claiming that crucial witnesses had not been interviewed, and consequently favorable testimony was not presented at trial. *Id.* Defendant further asserted that the testimony of these witnesses would have altered the outcome of the trial. *Stepheny*, 46 Ill.2d at 158.

In the present case, police received several tips early in their investigation that Josh White and Tim Roach had made incriminating statements regrading murdering a woman from Decatur and dumping her body into Lake Shelbyville. This information was shared by Roach and White on Saturday night – before Karyn's body parts were discovered in lake Decatur. Police investigated this information and quickly ruled Roach and White out as suspects. However, a subsequent investigation into the activities of Roach and White has shed new light into the possibility that they were involved in the murder of Karyn Hearn Slover.

1.

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PRESENT EVIDENCE OF THE BLUE WOOL FIBER TO THE JURY.

In the present case there were three items of evidence collected that the police were unable to connect to the Slovers. The first was found on the Findlay Bridge and consisted of a fingerprint that was inches away from a blood stain that was genetically matched to Karyn Hearn Slover. The second was a long human head hair that was found with one of the grey plastic bags that was used to dispose of parts of Karyn Hearn Slover's body. Both of these two pieces of evidence were tested and were ruled out as to have coming from the Slovers. This evidence was presented to the jury.

The third piece of evidence was blue wool fibers that were found in the black Pontiac Bonneville Karyn was driving the night she disappeared and in the grey plastic garbage bags used to dispose of Karyn Hearn Slover's body. The police were unable to connect these blue wool fibers to anything owned by the Slovers despite numerous search warrants that listed the search for the source of these blue wool fibers. This evidence was never given to the jury. It cannot be explained away as "trial strategy" where part of the trial strategy was to show that someone else committed the murder of Karyn Hearn Slover.

Blue Wool fibers Are Found at Both known Crime Scenes

"Short blue wool fibers have been located in the vehicle that Karyn Slover was driving, in at least one gray plastic bag which contained body parts of

Karyn Slover, and on the duct tape used to seal the gray plastic bag. The source of these short blue wool fibers has not been located." (M/Sgt. Colin McClain, Investigative Summary Sept. 27 thru Dec. 31, 1996, at p. 2, Control # 2208, Appendix B, p. 6)

Forensic Scientist Mark Mills reported: "Hair like fibers were collected from underneath the duct tape on Exhibits 1, 3, and 6 and sub-exhibited as 1A, 3A, and 6A. . . . Exhibits 1A, 3A, 6A and 8A have been forwarded to the Microscopy Section of the Southern Illinois Forensic Center in Carbondale. (Mills report Oct. 11, 1996, Control # 1707 B and C, Appendix B, pp.10-11). Exhibit 8A contained debris that was found in a corner of a grey garbage bag Exhibit 8.

Susan Kidd, was the forensic scientist at the Carbondale crime lab who conducted microscopic examination of hair and fiber evidence. (See Oct. 10, 1996 report Control # 1707 D, E, Appendix B, p. 12-13). In a Jan. 9, 1997 report, Kidd wrote: "Several fibers (including blue wool) were observed on several of the items of evidence examined." (Control # 3041, Appendix B, p. 17)

Police Seek Evidence Linking Slovers to Blue Wool Fibers

Feb. 6, 1997 search of the Slovers

Five months into the investigation, when the focus of the investigation began to turn toward Jeanette and Michael Slover Sr., the blue fiber evidence was cited by investigators in their application for a search warrant on Feb. 6, 1997 that focused on gathering evidence from the residence of Jeanette and Michael

Slover Sr. located at 1130 Kruse Road in Mt. Zion and Miracle Motors, the business Michael Slover Sr. operated in Mt. Zion.

The Complaint for Search Warrant specifically sought "Any clothing containing Blue Wool Fibers" among the list of ten (10) specific items of evidence police were searching for. (See Control #2226J, Appendix B, p. 32) The Complaint also described the significance of the blue wool fiber evidence using language identical to that contained in Colin McClain's investigative summary:

> "Short blue wool fibers have been located in the vehicle that Karyn Slover was driving, in at least one gray plastic bag which contained body parts of Karyn Slover, and on the duct tape used to seal the gray plastic bag. The source of these short blue wool fibers has not been located." (Complaint for Search Warrant, Control #2226K, Appendix B, p. 33)

Master Sergeant David Crouch was in charge of the overall search. CST Paul Schuh was in charge of the team of crime scene investigators that included Crime Scene Technicians Kyrouac, Trummell, Wamsley, Martin and Siefferman. CSIs searched for "Any clothing containing blue wool fibers;" while Forensic Scientist Susan Kidd was brought in specifically to search for trace evidence looking for blue fibers that may have been left at their home and at Miracle Motors. "Forensic Scientist Susan Kidd will be at the scene to assist in the search for blue wool fibers." (Control # 2226 A, D, F, Appendix B, p. 26; 29; 31) Yet, even with all of this personnel on hand to search for the blue wool fibers, the police found none.

March 10, 1998 search

On March 10, 1998, case agent Michael Mannix of the Illinois State Police executed search warrants again for Miracle Motors in Mt. Zion. (Control # 2458, Appendix B, p. 36) The search warrant sought "blue fibers" as the number one item of evidence out of a list of five things that were being sought for a particular vehicle that police suspected may have been used to commit the murder—a 1978 Ford E150 van located at Miracle Motors. (Control # 2458F, Appendix B, 37)

Numerous blue items were seized from Miracle Motors, including but not limited to, blue carpet fibers, blue carpet floor mats, blue-colored scrubs, a blue tire cover, a series of blue colored fibers from vehicles on the premise, fragments of blue material, plastic-like blue material, blue thread, a blue carpet runner, blue material from the ground, a blue blanket, and cloth-type fabric material, to name a few. Even with these numerous searches of property owned by the Slovers, the blue wool fibers in question were never located on Miracle Motors property or in the home of Jeanette and Michael Slover Sr.

At no point during the trial did defense counsel attempt to elicit any testimony concerning the search for the blue wool fibers or the fact that no such fibers were found on the Slover properties. This cannot be considered trial strategy. It was an oversight on the part of defense counsel especially when one considers the evidence connecting a blue flannel shirt being worn by a man near the CADS7 car on the night Karyn and the potential evidence of a blue flannel

shirt that was found in a car driven by Tim Roach and Josh White which was also never given to the jury to consider.

2.

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO CALL DOREEN REQUARTH TO THE STAND

On Oct. 2, 1996, Doreen Requarth and her husband were interviewed by task force investigator R. Chaney. They described seeing the black Bonneville with CADS 7 license plates parked suspiciously at the rest stop between Decatur and Champaign located off the east bound lane of I-72. This sighting was at 8 p.m. on the evening Karyn Slover disappeared. Doreen Requarth observed a white male with long hair who was wearing a blue flannel shirt: "Doreen told me that the only thing she noticed was that there was a long-haired white male who appeared to be a truck driver standing inside the rest area wearing a blue flannel shirt." (Control # 132 at A, Appendix B, p. 43). Jimmy Fulk, an associate of Tim Roach and Josh white, fits this general description of a long haired man.

The individual observed by Doreen Requarth could have been the source of the short blue wool fibers. This person also could have been the source of the long hair that was found on one of the grey garbage bags. According to a Feb. 1997 search warrant complaint, "Police have learned from the State Crime Laboratory that one eight inch long hair was recovered from one of the gray plastic bags containing Karyn Slover's body parts. This is a human hair the source of which is unknown." (Control # 2226L, Appendix B, p. 34)

Yet defense counsel failed to call Doreen Requarth to the stand and, instead, called her husband David Requarth who did not see the man with the long hair and blue flannel standing in the rest area. In fact, Ms. Requarth told defense attorneys about the man in the blue flannel shirt but they did not seem interested. (Doreen Requarth's Affidavit, Appendix B, pp. 2-3) More significant is the fact that when Doreen Requarth was shown a picture of the blue flannel shirt found in the back of the car driven by Tim Roach and Josh White she stated that "[t]he blue check pattern in the shirt in the photograph is the same pattern on the flannel shirt that was worn by the long haired man I saw at the rest stop." (Doreen Requarth's Affidavit, Appendix B, p. 3-4) This evidence was never presented to the jury because defense counsel was never aware that a blue flannel shirt was found in the car driven by Roach and White.

This was another piece of the puzzle that defense counsel failed to present to the jury implicating other individuals in the murder of Karyn Hearn Slover. Defense counsel knew Doreen Requarth saw a man in a blue flannel shirt near the CADS7 car at the rest area that night; however, they "did not seem interested" in this information. Of course, the man in the blue flannel shirt is only important if the jury is first told of the search for the blue fiber evidence found at the two known crime scenes. The man in the blue flannel shirt also had long hair which could explain the eight inch long hair found with one of the grey plastic bags used to dispose of Karyn Hearn Slover's body.

3.

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PRESENT EVIDENCE OF TIM ROACH AND JOSH WHITE'S POSSIBLE INVOLVEMENT IN THE MURDER OF KARYN HEARN SLOVER.

Part of the trial strategy was to show that someone else committed the murder of Karyn Hearn Slover. Yet, defense counsel never presented the jury with an alternative theory on *who* could have committed this murder. However, early in the investigation the police received numerous tips that Tim Roach and Josh White were involved in this murder. Not only did they make numerous statements against penal interests but they also had the opportunity to commit the crime and when they were arrested for a seemingly unrelated crime they were in possession of a blue flannel shirt.

The defense theory at trial was that Karyn Hearn Slover was seen on the back roads between Decatur and Champaign after work on the night of Friday, September 26, 1996. This could lead one to conclude that she was going to the mall in Champaign to look for a dress for a wedding the next day. Josh White, Tim Roach, and others were at the mall in Champaign that day and staying at a motel next to the mall in Champaign. More important, Roach bought a blue Hugo Boss shirt for one of his friends while at the mall. (See Affidavit of Tonya Linder, Appendix B, pp. 45-50)

Police also received information that a pair of young men in their late teens had made statements against penal interest about having killed a woman. On Oct. 3, 1996, the Decatur police received a call from young woman who lived in

Charleston, who reported that April Pierce told her "last Saturday, before she knew about Slovers death, that some persons had bragged of killing and dismembering Slover . . . these persons stated that Josh and Tim actually did the killing . . ." (Control # 175 B, Appendix B, p. 51)

The morning after this statement was made, on Sunday Sept. 29, 1996, at 4:25 a.m., hours before the first body bag surfaced in Lake Shelbyville, Grant Park Police Officer Thomas C. Harwood made a traffic stop on a stolen Ford Mustang driven by James Stanford, Tonya Linder and Robin Rollins are passengers. (Control # 194 C, Appendix B, p. 53-56)

The Illinois State Police prepared a tow-in-report taking inventory of the contents of 1996 Suzuki owned by Tim Roach. Inside the vehicle, on the floor board behind the driver's seat is a "blue plaid shirt." (Control # 194 B, Appendix B, p. 53) On Oct. 4, at 6:20 p.m., crime scene technician Joel Siefferman photographed the contents of the Suzuki. He photographed the blue flannel shirt, but did not collect the shirt as evidence, according to his report. (See Control # 1840 K, Appendix B, p. 57) (Photo of Blue Flannel Shirt)

According to the search warrant inventory that was returned and filed with the court in Macon County, no items of evidence were seized from the Suzuki where the blue flannel shirt was found. (Control # 3092 D, Appendix B, p. 61) Hairs and fibers were seized from the stolen Mustang, according to the inventory returned on the search warrant. (Control # 3092 B, Appendix B, p. 60)

On Oct. 15, 1996, forensic scientist Kevin Lumney of the state police crime lab in Springfield reported that seven "Tapings from a 1995 mustang" have been forwarded to the Carbondale crime lab for microscopic examination, "the results of which will be reported separately." (Control # 1707 J, Appendix B, p. 62) On Oct. 16, 1996, forensic scientist Susan Kidd reported that the seven tapings containing hair and fibers seized from the 1995 Mustang "Exhibits #44 through 50 will not be examined as per agency request." (Control # 3041, Appendix B, p. 63-64)

State police investigators had abandoned any further investigation of Roach or White as suspects, less than two weeks after receiving information about their possible involvement. The blue flannel shirt was never tested against the blue fibers found in the CADS7 car and the tapings from the bags used to put Karyn's body parts. In addition, there was no testing of the tapings taken from the stolen Mustang. Yet, this failure to collect and test evidence was never given to the jury to consider. This is true even though defense counsel had access to an interview conducted by one of their investigators on March 8, 2001.

Bill Clutter interviewed April Pierce concerning her conversation with Tim Roach and Josh White. (Appendix B, pp.65-79) Ms. Pierce confirmed that Josh White told her that Tim Roach had killed a woman from Decatur and the Tim Roach "freaked out" that Josh White had said anything. (Appendix B, p. 72) Ms. Pierce also confirmed that Tim Roach had a gun in his vehicle when he and Josh White were pulled over by police in Kankakee and he had gotten out of the car to

ditch the gun. (Appendix B, pp. 76-77) Tim Roach later approached April Pierce in a McDonald's parking lot in Charleston and "threatened to kill me [April] and Josh and put us in body bags and put us in a river if we talked or said anything." (Appendix B, p. 78) The Downstate Innocence Project has attempted to get a list of guns found in the Kankakee area since the arrest of Roach and White but this request was denied. Appointed counsel with subpoena power is needed to investigate this critical fact.

In addition to the statements made by April Pierce implicating Josh White and Tim Roach in a murder Robin Rollins and Rachel Hutchcraft apparently heard similar stories from Roach and White prior to the time the body of Karyn Hearn Slover was found in Lake Shelbyville. (See affidavit of Virginia Lynn Payton, Appendix B, pp. 80-90) In fact, Rachel was concerned that the boys may have borrowed her van to dispose of the body. (Appendix B, p.82) Although Robin said the woman killed was from Terr Haute, Ms. Payton felt it could have been Karyn Hearn Slover because Robin was afraid of Roach and White and no women were missing from Terre Haute in this time period.

This evidence would have been admissible if presented at trial. In *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297 (1973), the defendant was prevented under Mississippi's evidentiary rules from cross-examining McDonald, who had confessed to the crime but subsequently recanted, and introducing the testimony of witnesses to McDonald's confessions. The United States Supreme Court reversed the conviction because the indicia of trustworthiness of

McDonald's confession were so overwhelming that exclusion of evidence of the confession violated fundamental fairness. McDonald was not a co-defendant, had spontaneously confessed the crime to close friends on three separate occasions within 24 hours of its occurrence, and gave a subsequent sworn confession. Also, one eyewitness stated that he saw McDonald shoot the victim, and another stated that he had seen McDonald holding a gun immediately after the shooting; thus, each confession was corroborated by some other evidence. Finally, McDonald was available as a witness and could have been cross-examined. *Chambers*, 410 U.S. at 287-301, 35 L. Ed. 2d at 304-12, 93 S. Ct. at 1041-49.

Chambers identified four factors to help determine the reliability of a hearsay statement: (1) the statement was spontaneously made to a close acquaintance shortly after the crime occurred; (2) the statement is corroborated by some other evidence; (3) the statement is self-incriminating and against the declarant's interests; and (4) there was adequate opportunity for cross-examination of the declarant. *Chambers*, 410 U.S. at 300-01, 35 L. Ed. 2d at 311-12, 93 S. Ct. at 1048-49. The *Chambers* factors are merely guidelines to admissibility rather than hard and fast requirements; the presence of all four factors is not a condition of admissibility. *See People v. Keene*, 169 Ill. 2d 1, 29, 660 N.E.2d 901, 915 (1995). "Rather, the question to be considered in deciding the admissibility of such an extrajudicial statement is whether it was made under circumstances which provide 'considerable assurance' of its reliability by

objective indicia of trustworthiness." *People v. Thomas*, 171 Ill.2d 207, 216, 664 N.E.2d 76, 81 (1996)

The failure to present this evidence to the jury to consider was ineffective assistance of counsel. The list of "coincidences" is too long to ignore. The defense theory at trial was that Karyn was taking the back roads to the mall in Champaign the night she was abducted. Josh White and Tim Roach and others were at the Champaign mall that night and staying at a motel across the street the night Karyn was abducted. While at the mall, Tim Roach bought a blue Hugo Boss shirt.

The police found blue wool fibers in the car driven by Karyn Hearn Slover and the garbage bags used to dispose of her body. The police were unable to connect these blue wool fibers to the Slovers despite numerous attempts to do so. Doreen Requarth saw a man in a blue flannel shirt at a rest stop where the CADS7 car was seen and the blue flannel shirt worn by this man is the same pattern as the blue flannel shirt found in the car driven by Josh White and Tim Roach. Josh White and Tim Roach claim to have killed a woman from Decatur before the body of Karyn Hearn Slover begins to surface. In addition, there is some evidence that the reason Josh White tried to run down the officer in Kankakee was to give Tim Roach the opportunity to dispose of the gun used to kill Karyn.

This is the type of evidence the jury needed to see in order to properly weigh the circumstantial case against the Slovers. This theory is at least as

plausible as the theory the State presented to the jury. It amounts to reasonable doubt.

C.

THE FAILURE TO ENSURE THAT HAIR AND FINGERPRINT EVIDENCE WAS EXPOSED TO THE APPROPRIATE SCIENTIFIC TESTING WAS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

OVERVIEW

In addition to the blue wool fibers discussed previously, there were two pieces of physical evidence that did not support the State's theory that the Slovers: a fingerprint found within inches of a blood stain that belonged to Karyn Hearn Slover on the Findlay Bridge and an eight inch long human head hair that was found with one of the bags that contained Karyn's body parts. Evidence at trial showed that these items of physical evidence were tested against samples supplied by the Slover family and neither of these pieces of evidence were consistent with the defendants. Discovery documents further show that this physical evidence was compared to samples supplied by associates of the Slovers and no matches were found. What discovery does not show is that the fingerprint was ever entered into the AFIS database for comparison with fingerprints of known criminal throughout the country or that nuclear or mitochondrial DNA testing was ever attempted on the human head hair that was found. If these tests were not conducted, the Slovers received ineffective assistance of trial counsel.

ANALYSIS

Master Sergeant Colin McClain of the Illinois State Police prepared a detailed synopsis summarizing the case and evidence in which he described the latent fingerprint on the bridge as legible and usable:

> "Forensics Services have been evaluating several pieces of evidence obtained from various sources. Fingerprints and blood samples were obtained from the north side of the Bruce-Findlay Bridge on Lake Shelbyville. The blood sample was tested and found to belong to Karyn Slover. The fingerprints were found to be legible and a usable print has been retained for later comparisons." [Illinois State Police Investigative Summary, 9-27-96 thru 12-31-96, Master Sergeant Colin McClain, Document Control # 2208, Appendix C, p. 2)

Master Sergeant David W. Crouch, presented the above summary to the grand jury on April 7, 1997, prompting one juror to ask about the fingerprint that was found on the bridge:

> *Questions by Grand Juror*:
>
> Q: When you were reading awhile ago, you said something about a fingerprint that was found.
>
> A: We do have a fingerprint that was found on the bridge where we believe the body parts were thrown and six inches from that fingerprint or so is a blood sample that can be traced by DNA to Karyn Slover.
>
> Q: But the fingerprint is capable –
>
> A; We have not been able to find whose fingerprint it is yet.
>
> Q: It is not necessarily related?
>
> A: We believe it could possibly be since it is six inches from the blood.
>
> [Control # 3042 Grand Jury testimony of David W. Crouch, April 7, 1997, pp.371, 386-387] (Appendix C, pp. 5-6).

Case agent Crouch believed this fingerprint on the bridge railing was likely left by the perpetrator due to it's proximity to the blood on the guard rail. Clearly, this evidence was considered to be crucial evidence in law enforcement efforts to solve the homicide.

Yet, the State apparently decided not to run this crucial evidence through AFIS. During a hearing held on May 24, 2001, defense counsel was asking for funds for a fingerprint expert and to run this fingerprint through AFIS because the State refused to do so:

> MR. VIGNARI: I want the Court to understand that this thing kind of ebbs and flows. That's not to say that down the road there wouldn't be something come up where we have another need. One would be a fingerprint expert and the reason for that is, at least at this point in time, there was as the Court knows, trash bags found floating in Lake Shelbyville. . . . There is a guard rail along that bridge. These body parts are thought to have been placed in body bags and perhaps thrown over the side of that because on the galvanized steel guardrail there was blood that DNA matched Karyn Slover's blood. Six inches from that blood, I believe is a thumb print and the State Police have, it is our understanding the crime lab there, the fingerprint expert there has matched it against anybody who would be a suspect and then probably some other people from whom they

have obtained samples. *What we would like to do is have that run through the AFIS data base which is my understanding contains I don't know how many different known fingerprints of people* with *criminal records. It is our understanding it has not been run through AFIS. If the State would run that, they would have the crime lab run it through AFIS, we wouldn't be requesting this. Maybe the State crime lab has run the thumb print through AFIS, but we're unaware that they have done that from my reading of the discovery. Unless I am wrong, it has not been done and that's what we are seeking to do.*

THE COURT: What does the discovery disclose to you at this point? That it is not the thumb print of anybody involved in the case or any witness or anything else?

MR. VIGNARI: Correct. Yes.

THE COURT: And you want to identify whose thumb print it is, is that correct?

MR. VIGNARI: Yes. I wouldn't think it would cost very much. *I don't know how much it costs to run it through AFIS. I'd suspect the State could do it for free, but I guess they are not inclined to do so.*

THE COURT: Well, do you want to find out how much it is and come to the Court, I will consider it. Fingerprints can remain on a surface for years so —.

MR. VIGNARI: True.

THE COURT: So again, we're getting back to proportionality. So the thumb print on the guardrail, it may be 6 inches away, you know, find out what it costs and come back and we will see if that's an appropriate and necessary expenditure. What else do you need?

(Vol. XXXIII, R. 61-63)

At no point during this hearing did the State volunteer to run the fingerprint through AFIS nor did it volunteer that they already had. More important, there is no question the Slovers had a constitutional right to have this evidence tested upon request and the trial court was wrong when it believed that the fingerprint on the bridge could have been there for years.

Weather records reveal that the fingerprint was most likely placed on the guard rail after Karyn Slover was abducted. Heavy rainfall fell near Lake Shelbyville on Thursday Sept. 26, 1996. Over an inch of rain was recorded at the Lake Shelbyville Dam during the following period:

Thursday Sept. 26, 1996	.80 inches
Friday Sept. 27, 1996	.30 inches
Saturday Sept. 28, 1996	No precipitation

(Affidavit of Adrianne Stickels, Appendix C, pp. 7-67, The National Climatic Data Center)(Appendx C, p. 43-44)

When a fingerprint is exposed to sunlight or rain, the print can be damaged or destroyed. The print in this case had been exposed to the elements. (Vol. LXVIII, R. 92-93; *see also* Appendix C, p. 49) Thus, given the rain fall on the Friday night Karyn disappeared it is highly likely that the fingerprint was put on the Findlay bridge sometime between Saturday, September 28th, 1996 and the time it was discovered on Sunday afternoon. Yet, there is no evidence in the discovery that this fingerprint was ever run through AFIS.

However, the fingerprints found on the Hardees bags discovered in the CADS7 car were run through AFIS and no match was found. (Appendix C, p. 52) In an effort to determine whether the fingerprint from the bridge was run through AFIS the downstate Innocence Project filed a Freedom of Information Act Request (FOIA) for the date and results of that test, if they were run, and this request has been denied. The position of the Illinois State Police is that these records must be subpoenaed by appointed counsel. Even if the fingerprint had been run at the time of the investigation into Karyn Hearn Slover, the data base has expanded exponentially and, according to Ron Jordan of the Illinois State Police, "the quality of the AFIS database has been improved recently." (Appendix C, p. 66-67)

There is also no evidence in discovery that the fingerprints found on the Hardees bag were ever compared with the fingerprint found on the Findlay

Bridge. If there was a match between any of fingerprints found on those two items at two separate crime scenes we would have our killer.

In addition to the fingerprint found on the Findlay Bridge, there was also an eight inch long human head hair that was found with one of the bags used to dispose of Karyn Hearn Slover's body parts. At trial, Suzanne Kidd, a forensic scientist with the Illinois State Police did hair comparisons for the Slover case. (Vol. LXXII, R. 72) Kidd was shown Senior's Exhibit Number 33 which included two human hair fragments removed from one of the bags containing the remains of Karyn Slover. (Vol. LXXII, R. 75) Kidd did a hair comparison between Exhibit 33 and Senior's Exhibit 41 which was the hair standard from Karyn Slover. It was determined that the hair in Exhibit 33 did not originate from Karyn Slover. (Vol. LXXII, R. 77) Kidd also determined that the two human head hairs found in Exhibit 33 did not originate from Senior (Exhibit 38), Jeannette (Exhibit 39), or Junior (Exhibit 40). (Vol. LXXII, R. 78-81)

There was no evidence presented at trial, nor in discovery, that this human head hair was ever submitted for DNA analysis. Even if there was no nuclear DNA, it would be possible to extract mitochondrial DNA from the hair to compare against known suspects. There are databases that can be used to compare with known samples of mitochondrial DNA to determine the possibility that an individual could be the source of the hair based on ethnicity and regions of various countries.

To the extent that defense counsel did not insure that the fingerprint from the bridge was run through AFIS and the human head hair was subjected to DNA analysis, the Slovers received ineffective assistance of trial counsel. Once they were excluded as the source of this forensic evidence there is no strategic reason not to perform these tests. Unfortunately, the only way to prove prejudice by this lack of testing is to conduct these test on this evidence. Therefore, the petitioners are respectfully requesting that this testing be done at this time.

D.

THE SLOVER'S RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN THERE WAS NOT A CHALLENGE TO THE CHAIN OF CUSTODY OF THE BUCKETS OF DIRT COLLECTED FROM THE MIRACLE MOTORS PROPERTY AND STORED IN AN UNSECURED WAREHOUSE WAITING TO BE SIFTED PRIOR TO THE DISCOVERY OF THE BUTTONS AND RIVETS. TO THE EXTENT APPELLATE COUNSEL COULD HAVE RAISED THIS ISSUE ON DIRECT APPEAL, THE SLOVERS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

When the State seeks to introduce an object into evidence, the State must lay an adequate foundation either "through its identification by witnesses or through a chain of possession." *People v. Stewart*, 105 Ill. 2d 22, 59, 473 N.E.2d 840 (1984); *People v. Kabala*, 225 Ill. App. 3d 301, 305, 587 N.E.2d 1210 (1ST Dist. 1992) Where an item has readily identifiable and unique characteristics, and its composition is not easily subject to change, an adequate foundation is laid by testimony that the item sought to be admitted is the same item recovered and is in substantially the same condition as when it was recovered. *People v. Irpino*, 122 Ill. App. 3d 767, 773, 461 N.E.2d 999 (2d Dist. 1984); *People v. Gilbert*, 58 Ill. App. 3d 387, 390, 374 N.E.2d 739(1st Dist. 1978).

However, in cases where the physical evidence is not readily identifiable or may be susceptible to tampering, contamination or exchange the State is required to establish a chain of custody. *See People v. Bynum*, 257 Ill. App. 3d 502, 510, 629 N.E.2d 724(1st Dist. 1994); *People v. Hominick*, 177 Ill. App. 3d 18, 29, 531 N.E.2d 1049 (2d Dist.1988). In the present case, the State conducted an search of the Miracle Motors property in March of 1998. During this search,

investigators dug dirt and placed it into buckets. The buckets were then moved from Miracle Motors and placed in a warehouse where they sat for several weeks, unsealed, prior to being sifted for evidence. These buckets of dirt were susceptible to tampering and the State failed to present an adequate chain of custody for their introduction into evidence. However, defense counsel failed to properly preserve this issue and, because of the nature of the buckets of dirt, this failure was ineffective assistance of counsel.

THE SEARCH

Richard Munroe, of the Winnipeg Police Department, testified that he participated in the execution of a third search warrant at Miracle Motors on March 10-12, 1998. (Vol. LXI, R. 2064) At the time of the search, there was snow on the ground and the search crew brought in a large military tent and propane heaters which were used to heat the area to be searched. (Vol. LXI, R. 2074-75) Fire brick, which is used to melt asphalt was brought in from the highway department to melt the snow and thaw the ground. (Vol. LXI, R. 2076; 2080-81) Two to three inches of soil was then scraped off with new shovels and placed into plastic buckets. (Vol. LXI, R. 2076-77) Searching the buckets was difficult on site and they were taken to another location to be searched at a later date. (Vol. LXI, R. 2078-79)

The car lot was divided into grids and the searchers dug in different areas of the car lot and put the dirt into buckets and identified the buckets by grid number and a letter to determine what order the buckets were filled with dirt –

i.e., bucket one from area 36 would be labeled 36A bucket 2 would be 36B, etc. (Vol. LIII, R. 285-290) Deputy Jeff Thomas concentrated his efforts by digging in areas 36, 38, and 40 which were located near a burn barrel. At one point, Deputy Thomas received a metal button from one of his co-workers, David Reed. (Vol. LIII, R. 300) The button was found in a bucket from area 36 and given to Munroe who was supervising the search. (Vol. LIII, R. 302-03)

Deputy Thomas admitted that he did not know how many buckets of dirt had been taken from area 36. There were several people digging in that area. Each area of the grid was approximately four feet by ten feet. (Vol. LIII, R. 307-11; 328) Investigators were schooled on how to dig and were told the type of buttons they wanted to find. (Vol. LIII, R. 330-32) The buckets remained in a shed on the Motor Miracles property overnight and Deputy Thomas was not sure if the shed was locked although an officer remained at the scene overnight. (Vol. LIII, R. 333-34)

Rodney Miller of the Illinois State Police would dig and fill buckets in area 38 and give them to Deputy Thomas who put them into a metal shed adjacent to the dig. (Vol. LXIV, R. 2601-04) Trooper Miller transported 60 buckets of dirt to the Task Force Facility in his Toyota pick-up truck. This took three trips. The task force building also housed seized vehicles and people other than law enforcement officers had access to the building. (Vol. LXIV, R. 2605-07)

On cross-examination, Trooper Miller admitted that none of the buckets had lids on them and anyone in the building had access to the buckets. The

buckets remained in the task force building for a couple of months while the sifting took place. (Vol. LXIV, R. 2614-17) Miller could not remember if there was any security at the site. (Vol. LXIV, R. 2625-29) Mike Mannix testified that an individual had to have permission to be in the building and that the building had a burglar alarm. (Vol. LXIV, R. 2660)

In all, there were over 20 people at Miracle Motors during the search and not all of them were from law enforcement. (Vol. LIV, R. 433-34) Deputy Sims was there when the buckets were removed from the lot at Miracle Motors but he did not see who moved bucket 38(c). (Vol. LIV, R. 434-35) Sims could not recall who was present when he found the button in bucket 38(c). (Vol. LIV, R. 436-397)

Detective Roger Ryan, who helped sift through buckets of dirt taken from the property, discovered a rivet from a pair of Paris Sports Club jeans in bucket 38-(o) and gave it to Officer Mike Mannix. (Vol. LVIII, R. 1348-52)

Detective Ryan stated there were twenty people involved in the search including members of the Macon County State's Attorney's office. (Vol. LVIII, R. 1355-56) The sifting of the buckets occurred in a warehouse on West Main Street in Decatur. Bucket 38-(o) was not sealed in any way from the time it was taken from Miracle Motors during the March search until it was sifted on April 8, 1998. (Vol. LVIII, R. 1357-58)

Numerous people had access to the area where the excavation took place. The buckets were not in a secure facility during this process. Nobody had to sign

in or out in order to enter the room where the buckets were kept. Both law enforcement and non-law enforcement personnel were in the room at various times. (Vol. LX, R. 1900-01) In addition, law enforcement personnel were given specific items of clothing to look for during the excavation. (Vol. LX, R. 1909)

ANALYSIS

In cases where the items seized are not readily identifiable and susceptible to tampering, the State must show that the police took reasonable protective measures to protect the evidence from the time that it was seized and that it was unlikely that the evidence has been altered. *People v. Woods*, 214 Ill.2d 455, 467, 828 N.E.2d 247, 255 (2005). In the present case, the police collected buckets of dirt from the Miracle Motors site; transported them, unsealed, to a warehouse; where the buckets remained for several weeks while waiting to be sifted. The buckets remained unsealed and access to the area where the buckets were kept was not limited. Under these circumstances, it can hardly be said that the police "took reasonable protective measures to protect the evidence."

Anybody could have planted evidence in those buckets of dirt in the days they sat unattended in the warehouse. The rivet found in bucket 38(o) was not recovered until April 8, 1998, several weeks after the bucket had been removed form the Miracle Motors lot. Detective Sims was unable to tell who discovered the button found in bucket 38(c). This evidence should have never been allowed into evidence; however, defense counsel failed to properly preserve this issue and thus waived the argument on direct appeal.

The waiver rule is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level. *People v. Rodriguez*, 313 Ill. App. 3d 877, 887, 730 N.E.2d 1188(2d Dist. 2000). This rule does not preclude a claim of ineffective assistance of counsel on post-conviction because the State would be given the opportunity to correct any deficiencies at a hearing on the petition.

The United States Constitution, Amendment VI, and the Constitution of the State of Illinois, Article I, Section 8, guarantee assistance of counsel in criminal trials. U.S. Const. amend. VI; Ill. Const. art. I, §8. The performance inquiry is whether counsel's assistance was reasonable considering all of the circumstances. The test is whether counsel's performance fell below an objective standard of reasonableness and whether his failure prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed. 2d 674, 699 (1984); *People v. Albanese*, 104 Ill.2d 504, 473 N.E.2d 1246 (1984), *cert. denied*, 471 U.S. 1044, 105 S.Ct. 2061, 85 L.Ed.2d 335 (1985).

Any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. *Strickland*, 466 U.S. 668, 692, 80 L.Ed. 2d 674, 697. However, defendant need not prove by a preponderance that the outcome of the case would have been

different. Defendant need only show that there is a reasonable probability that, but for counsel's professional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. 668, 692, 80 L.Ed.2d 674, 698; *People v. Moore*, 279 Ill.App.3d 152, 663 N.E.2d 490, 215 Ill.Dec. 479, 485-87 (5th Dist. 1996). The failure of counsel to challenge the chain of custody of some the prosecution's most damaging evidence can lead to a claim of ineffective assistance of counsel.

By failing to challenge the chain of custody at the trial level, counsel forfeited this claim on direct appeal because the "lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level." *People v. Woods*, 214 Ill.2d 455, 470, 828 N.E.2d 247, 257 (2005). The prejudice in this case is obvious. The State's case was entirely circumstantial. Every piece of evidence the State purported to link the Slovers to the murder of Karyn Hearn Slover was critical to their case. Failing to challenge the chain of custody in this case allowed the State to present evidence that they had found two buttons and a rivet from the same type of jeans Karyn was wearing on the night she was murdered and it also allowed evidence that the found a button consistent with the button found on Karyn's sweater.

This made the evidence much more significant than if it was just a single button found by David Reed at the Miracle Motors property. It is obvious that David Reed knew exactly what they were looking for and had access to the same

type of button and rivets given the fact he was the coroner who examined Karyn's body. A successful challenge to the chain of custody would have resulted in the State having to rely on this single button found at the scene and made their button evidence much less convincing in the eyes of the jury. There is no strategic reason to allow the jury to receive evidence that was otherwise inadmissible due to a failure to establish a sufficient chain of custody.

To the extent this issue could have been raised by appellate counsel under the plain error standard, the Slovers received ineffective assistance of appellate counsel.

E.

THE SLOVER'S DUE PROCESS RIGHTS AND RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED WHEN THE STATE BLOCKED ACCESS TO THE CAPITAL LITIGATION TRUST FUND AT A TIME WHEN MACON COUNTY WAS TEETERING ON THE EDGE OF BANKRUPTCY AND WAS UNABLE TO ADEQUATELY FUND THE DEFENSE.

OVERVIEW

The Capital Litigation Trust Fund was established in 2000 to provide a shield for defendants facing capital murder charges. The impetus for establishing this fund was the unprecedented number of innocent individuals convicted of capital crimes. The fund was designed to provide a level playing field by balancing the financial resources between the State and defendants by funding investigators, forensic experts and private counsel for defendants.

In the Slover case, the State turned this shield into a sword to deny much needed resources from the defendants in what is considered one of the most complicated cases in the history of Macon County. The result of the State removing the death penalty from consideration was a complete collapse in the ability of defense counsel to prepare for this case. The trial court judge, because of the restraints of the county budget, systematically disarmed the defense team. It is not as if this was an unexpected result. From the first day it was announced that the State would not seek the death penalty, defense counsel warned of the consequences.

A COMPLEX CASE

Karyn Hearn Slover was murdered on the weekend of September 27, 1996. Michael Slover, Sr., Jeanette Slover, and Michael Slover, Jr. were indicted for her murder on January 27, 2000. Prior to the indictments in this case, the State employed a multi-jurisdictional task force employing dozens of investigators who interviewed hundreds of potential witnesses; collected over 700 pieces of physical evidence; conducted over a 1,000 hours of overhear tapes; conducted numerous searches of property owned by the Slovers; utilized the services of the Illinois State Police Crime lab to analyze numerous pieces of evidence; and, employed outside forensic experts from various fields. (Appendix E, pp. 65-73) Although the exact cost of this investigation is not known by the defendants, it easily topped the million-dollar mark. On the other hand, the defense investigation was significantly hamstrung by the lack of funding.

INVESTIGATION WITH ACCESS TO THE CAPITAL LITIGATION FUND

Bill Clutter, Director of the Downstate Innocence Project, has been employed as an investigator in over 20 death penalty cases and was one of the original defense investigators paid for by the Capital Litigation Trust Fund (CLTF) in the Karyn Hearn Slover murder. (Appendix E, 1-21) In his 20-year career, the Slover case was the most complex case Mr. Clutter had ever known. (Appendix E, p. 8) During the year that the defendants had access to the CLTF, counsel employed three investigators who worked a total of 489.45 hours and charged the State of Illinois $29,427.46. The rates being charged by the investigators ranged

from $50 to $60. (Appendix E, p. 35-42) This spending hardly seems outrageous when compared with the amount of money spent by the State in building its case.

According to Mr. Clutter, prior to conducting interviews with potential witnesses a good investigator must begin with reading the discovery in a case. (Appendix E, p. 8) In the Slover case, discovery constituted more than 17,000 pages. (Appendix E, p.2) The importance of an investigator pouring over discovery is exemplified in Mr. Clutter's work on the infamous Nicarico murder case that led to the wrongful convictions of Rolando Cruz and Alejandro Hernandez.

> The magnitude of the information in the Slover case dwarfs even the Nicarico case, which I was assigned from 1988 thru 1991. My client, Alejandro Hernandez was exonerated in 1995, after being convicted twice and sentenced to death. My investigation, pouring through the transcripts of Mr. Hernandez's first trial, discovered key information that allowed me to pursue exonerating evidence. Reading the trial transcript, I discovered the testimony of a crime scene investigator who described lifting plaster casts of fresh tire tracks where eye-witnesses observed the suspect vehicle making a three point turn on the Prairie Path were the victim's body was found. This led to further investigation identifying the print as a Viva glass belted Goodyear tire, which matched

> the tires that were on the vehicle owned by Brian Dugan, the confessed killer. Dugan, now facing capital murder charges, was charged last year with the murder of Jeanine Nicarico. The review of the discovery in that case took hundreds of hours, without which it would not have been possible to pursue and develop exonerating tire track evidence.
>
> (Exhibit E, p. 9)

There is no need to speculate on the impact the removal of the CLTF from this case had on the Slover's defense.

Bill Clutter had just begun to investigate the other suspects discussed in Issue B of this petition. (Appendix E, p. 10) Mr. Clutter was unaware of the "blue fiber evidence" police sought in connection with the murder of Karyn Hearn Slover because he had not completed his review of the discovery. (Appendix E, pp. 14-15) Without knowledge of the blue fiber evidence, the fact that the alternative suspects were arrested the day Karyn's body parts were found and the suspects had a blue flannel shirt in the back seat, would be inconsequential. (Appendix E, p. 15) Conducting a good investigation is more than simply interviewing witnesses: it includes putting the pieces together with the knowledge that comes from reading discovery. In fact most, if not all, of the issues contained in this petition could have been avoided with the proper funding of investigative services.

In addition, the lack of investigative services led certain members of the investigative team to run roughshod over the Slover investigation. We now know beyond all reasonable doubt that Agent Mike Mannix testified falsely on February 22, 2002, when he testified that he did not tape an interview with Jackie Bond. (Exhibit E, pp. 130-37) He testified this way even though his report clearly indicated that he had recorded the interview; had trouble with the recorder; fixed the problem and then completed the interview. (Exhibit E, pp. 129)

Mannix had to know defense counsel did not have the time or funds to find out if this interview had been taped. The Downstate Innocence Project has since interviewed Jackie Bond and the interview was taped. (Appendix E, pp. 116-19) Although Bond told the UIS students the written report seemed to accurately portray his tip, the question now is what was on that tape that Mike Mannix did not want defense counsel to know about. More importantly, a detective willing to testify falsely himself in regards to taping an interview would surely be willing to plant evidence to get a conviction. It seems like more than a mere coincidence that the Slover investigation was going nowhere for months until Mike Mannix took over the lead investigator's job.

There is simply no way to determine the impact a properly funded investigation would have accomplished in this case. Instead, defense counsel was limited to taking the word of investigators like Mike Mannix that their reports were accurate.

INVESTIGATION AND REPRESENTATION SANS THE TRUST FUND

On February 2, 2001, the State filed notice that declined to seek the death penalty in this case. (Appendix E, p. 32) Prior to filing the notice the State's Attorney was in contact with Larry Hearn, the father of Karyn Hearn Slover. Mr. Hearn shed light into the motivation behind the decision:

> Hearn said the state's attorney is trying to force the Slovers' lawyers to go to trial or plea bargain by removing the death penalty from the case.
>
> If you take away the death penalty, they can't tap into that slush fund. As long as they've got that slush fund available, they're going to use it," said Hearn. "It's all coming down to money. This cuts off the money flow.
>
> Macon County State's Attorney Scott Rueter did not deny the allegations, and said the Capital Litigation Trust Fund was one of the issues discussed in the decision making process. But Rueter also said, " It's not a main reason for what we're doing. Any aspect that may affect the litigation of the case is a factor, and I can't deny that we looked at that issue. …I don't believe it was a main emphasis."
>
> (Appendix E, pp. 33-34)

The "slush fund," as Mr. Hearn referred to the CLTF, had provided over $100,000 to the Slover defense team prior to this announcement – only 29,000 of which was used for investigative services.

The timing of this announcement also coincided with the implementation of Illinois Supreme Court Rule 416 which was scheduled to take effect on March 1, 2001. Rule 416 required minimum standards of legal competency—the requirement of being defended by two qualified attorneys—and access to enhanced fact finding tools, as in allowing for the deposition of witnesses, a right only available in civil cases in Illinois. The purpose of the rule, according to the Court, was "[t]o assure that capital defendants receive fair and impartial trials . . . and . . . [t]o minimize the occurrence of error to the maximum extent feasible and to identify and correct with due promptness any error that may occur."

Thus, not only did the election to not seek the death penalty lead to the firing of the investigators on the case but it also led to attorneys Mark Morthland and Jon Baxter being pulled from the defense. Prior to this announcement Mark Morthland was working for a reduced rate of $75 an hour assisting in the criminal defense. His services were terminated by the trial court once the county became responsible for funding the defense. In addition, John Baxter, chief public defender was unable to replace Morthland due to the extraordinary demands already placed on the Macon County Public Defender's Office and he too no longer helped in the defense. (Appendix E, p. 11; 98-109)

At the time of this ruling, Mr. Morthland argued that the fact that Macon County was going broke should not motivate the Court in this decision:

> "If the Court decides to vacate my appointment, that would absolutely be 'fundamentally unfair' to the Slover family, but also, I believe that it will be 'fundamentally unfair' to Mr. Vigneri and to Mr. Rau to burden them with 20,000 pages of police reports, 750 overhear tapes, 600 pieces of evidence." Mr. Vigneri concurred, stating: "The Supreme Court of the United States in Gideon versus Wainwright taught us all that a size of a person's wallet shouldn't affect the type of defense or trial that they get and the same can be said, and I'll echo Mr. Morthland's comments, that the size of Macon County's wallet shouldn't affect the type of defense or trial that Michael Slover Jr. gets." (Appendix E, pp. 101-03)

In fact, the demands of attempting to balance their duties as public defenders and their representation of the Slovers, Attorneys Joe Vignari and Brad Rau both asked to be excused from this case citing the ABA standards for handling criminal defense cases. (Appendix E, pp. 11-12)

It was no secret that Macon County was in dire financial straits almost immediately after the decision to block access to the CLTF was made. In fact, the entire annual budget for investigative services in the Macon County Public Defender's office is $38,000. (Appendix E, p. 67) This compares to the three

Investigators employed by the Macon County State's Attorneys' office who receive in excess of $100,000 in compensation. (Appendix E, p. 48)

On March 3, 2001, the Decatur Herald and Review reported that a closed door meeting was held by the Macon County Board Finance Committee to discuss funding of the Slover case. Defense counsel had estimated that they needed $470,000 to properly prepare their defense. (Appendix E, 110-11) The trial court Judge was quoted as saying: "I will commit to you that we will do all we can to limit the costs. The sums of money we're looking at are shocking to me . . . This is unprecedented and comes at a very bad time in the county's history. I'm concerned about the people of Macon County being able to pay for what the state requires us to do." (Appendix E, p. 111)

Although compete numbers are not available to the defendants the court approved much less than $470,000 to fund the defense. On March 12, 2001, the trial court unilaterally cut one investigator's hourly rate to $25 per hour. (Appendix E, p. 42) On May 8, 2001, the trial court denied a request to hire Bill Clutter and pay the going rate for investigator which was between $40 and $75 per hour. (Appendix E, pp. 7-8; 46-49) The total requested budget for investigative services was 1,000 hours at $50 per hour for a total of $50,000. (Appendix E, p. 49) This motion was denied and the trial court suggested $25 per hour.

Even after being told that defense counsel was unable to find a licensed investigator willing to work for $25 per hour the trial court refused a defense

request for $7,000 in investigative services. Prior to trial the court did approve a request for $1,500 at a rate of $25 per hour in investigative fees to be split between counsel for Michael Slover, Sr. and Michael Slover, Jr. (Appendix E, p. 10) A complete figure as to the amount of money allowed by the trial court to be paid for investigative services out of the county coffers in unknown to the defendants at this time. It is also unknown the qualifications of the investigators who eventually accepted the case for $25 per hour. What is known is that the amount of money that was approved was inadequate given the complexity of this case and the amount of money spent by the State in investigating and prosecuting the defendants.

The result of the lack of funding in this case is exemplified when defense counsel asked for money to fund a fingerprint expert.

> MR. VIGNARI: I want the Court to understand that this thing kind of ebbs and flows. That's not to say that down the road there wouldn't be something come up where we have another need. One would be a fingerprint expert and the reason for that is, at least at this point in time, there was as the Court knows, trash bags found floating in Lake Shelbyville. . . . There is a guard rail along that bridge. These body parts are thought to have been placed in body bags and perhaps thrown over the side of that because on the galvanized steel guardrail there was blood that DNA matched Karyn Slover's blood. Six inches from

that blood, I believe is a thumb print and the State Police have, it is our understanding the crime lab there, the fingerprint expert there has matched it against anybody who would be a suspect and then probably some other people from whom they have obtained samples. *What we would like to do is have that run through the AFIS data base which is my understanding contains I don't know how many different known fingerprints of people* with *criminal records. It is our understanding it has not been run through AFIS. If the State would run that, they would have the crime lab run it through AFIS, we wouldn't be requesting this. Maybe the State crime lab has run the thumb print through AFIS, but we're unaware that they have done that from my reading of the discovery. Unless I am wrong, it has not been done and that's what we are seeking to do.*

THE COURT: What does the discovery disclose to you at this point? That it is not the thumb print of anybody involved in the case or any witness or anything else?

MR. VIGNARI: Correct. Yes.

THE COURT: And you want to identify whose thumb print it is, is that correct?

MR. VIGNARI: Yes. I wouldn't think it would cost very much. *I don't know how much it costs to run it through AFIS. I'd*

suspect the State could do it for free, but I guess they are not inclined to do so.

THE COURT: Well, do you want to find out how much it is and come to the Court, I will consider it. Fingerprints can remain on a surface for years so —.

MR. VIGNARI: True.

THE COURT: So again, we're getting back to proportionality. So the thumb print on the guardrail, it may be 6 inches away, you know, find out what it costs and come back and we will see if that's an appropriate and necessary expenditure. What else do you need?

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The fact that Macon County was so strapped for cash that there was any question as to whether defense counsel needed money for a fingerprint expert or that the fingerprint should be run through AFIS is indicative of the inability of defense counsel to properly prepare this case.

The rulings of the trial court amounted to a due process violation where defense counsel was unable to adequately investigate the State's case. This led to ineffective assistance of trial counsel. To the extent that counsel on direct appeal could have raised this issue, the defendants received ineffective assistance of appellate counsel.