IN THE FIFTH JUDICIAL CIRCUIT IN
AND FOR LAKE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

Vs.

ERNEST THOMAS,
Defendant,
And

STATE OF FLORIDA,
Plaintiff,
Vs.

SAMUEL SHEPHERD,
Defendant,
And

STATE OF FLORIDA,
Plaintiff,
Vs.

WALTER IRVIN,
Defendant,
And

STATE OF FLORIDA,
Plaintiff,
Vs.

CHARLES GREENLEE.
Defendant.
_____/

CASE NO. 1949-CF-1369

ORIGINAL

MOTION TO DISMISS INDICTMENTS OF ERNEST THOMAS AND SAMUEL SHEPHERD, MOTION TO SET ASIDE JUDGMENT AND SENTENCE OF CHARLES GREENLEE AND WALTER IRVIN AND MOTION TO CORRECT RECORD WITH NEWLY DISCOVERED EVIDENCE

COMES NOW the State of Florida, by and through the undersigned State Attorney, and pursuant to *Florida Rule of Criminal Procedure*

3.850, hereby files this Motion to Dismiss Indictments, Motion to Set Aside Judgment and Sentence, and Motion to Correct Record, and in support thereof, states as follows:

THE PROCEEDINGS LEADING TO THIS MOTION

In December of 2018, Attorney General Pam Bondi directed the Florida Department of Law Enforcement (FDLE) to conduct a review of the 1949 criminal case in which Charles Greenlee, Walter Irvin, Samuel Shepherd, and Ernest Thomas were charged with the rape of a seventeen-year-old woman in Lake County, Florida. This case became known as "The Groveland Four."

Specifically, FDLE was asked to "*conduct an immediate review of this case to begin the process of posthumously clearing the individuals' names*" and "*. . .if innocent, the Groveland Four should have their names cleared through the court system.*" On July 28, 2021, the Florida Department of Law Enforcement referred their investigation to me, as the prosecuting authority for Lake County, Florida.

PROCEDURAL HISTORY

All four men were charged with rape on the same indictment, issued by the same grand jury, in July of 1949. Ernest Thomas, while indicted, was shot and killed on July 26, 1949, before he could be arrested. It does not appear from the record that the indictment against him was ever dismissed by the court. The three

remaining defendants all proceeded to trial and all were convicted as charged. Charles Greenlee, 16 years of age at the time, received a recommendation of mercy from the jury, and received a life sentence which he did not appeal.[1] Walter Irvin and Samuel Shepherd were sentenced to death and did prosecute an appeal that was eventually successful. Ultimately, the United States Supreme Court vacated the convictions of Shepherd and Irvin and ordered a new trial for each. *Shepherd v. Florida*, 341 U.S. 50 (1951).

Following that order, a new indictment was issued on July 6, 1951, this time naming only Shepherd and Irvin. While being transported back to Lake County for arraignment on the new indictment, Sheriff Willis McCall shot and killed Shepherd, and gravely wounded Irvin. For reasons lost to history, Shepherd's indictment, like that of Thomas, was never dismissed. Walter Irvin, however, was retried, convicted and again sentenced to death. Irvin's death sentence was commuted to life in prison in 1955.

Mr. Greenlee was paroled in 1962 and died in 2012. Mr. Irvin was paroled in 1968 and died a year later.

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[1] Under the law at the time, the sentence for rape was death unless the jury returned a recommendation of mercy, as happened in Greenlee's case. The law apparently would have exposed Greenlee to a death sentence on retrial if he had successfully appealed his conviction - - this is reportedly the reason that Greenlee did not appeal.

THE INDICTMENTS

Ernest Thomas

Mr. Thomas died on July 26, 1949, before he could be arrested and brought to trial. Because that is so, the presumption of innocence that attaches to any defendant and remains until the time of conviction has never been overcome. Mr. Thomas was never brought to trial and remains presumptively innocent -- the indictment against him should have been dismissed in 1949, if for no other reason than to ensure an accurate record. This Court should enter its order dismissing the indictment against Ernest Thomas. It is true that the Clemency Board's pardon includes Mr. Thomas. It is also true that Mr. Thomas was never arrested for the offense charged in the indictment, let alone convicted for it. While he is obviously connected to this case in the view of the public, this Court cannot change the inability to prosecute as a result of his death. Aside from dismissing the indictment, no action can be taken with respect to Mr. Thomas.

Samuel Shepherd

Mr. Shepherd's case has a longer history -- he was convicted and sentenced to death, and the conviction and sentence were affirmed by the Florida Supreme Court. *Shepherd v. State*, 46 So. 2d 880 (Fla. 1950). The United States Supreme Court reversed the conviction and sentence and remanded the case to the Florida

Supreme Court with directions to order a new trial in a decision issued on April 9, 1951. *Shepherd v. Florida*, 341 U.S. 50 (1951). The Florida Supreme Court entered its order executing that mandate on May 22, 1951. *Shepherd v. State*, 52 So. 2d 903 (Fla. 1951). Mr. Shepherd's conviction was erased, as if it never happened, by the decision of the United States Supreme Court. Mr. Shepherd died in November of 1951 before he could be retried -- he remains presumptively innocent. To the extent that any further discussion is necessary, the United States Supreme Court has made this fundamental truth clear:

> . . . once those convictions were erased, the presumption of their innocence was restored. See, *e.g., Johnson v. Mississippi,* 486 U.S. 578, 585, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (After a "conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge.")

Nelson v. Colorado, 137 S. Ct. 1249, 1255, 197 L. Ed. 2d 611 (2017). Mr. Shepherd died while he was presumptively innocent, and the indictment against him, like the indictment against Mr. Thomas, should be dismissed.

Strictly speaking, Mr. Shepherd has not been convicted of anything, and there is, technically, nothing that he can be pardoned for in the first place -- Governor DeSantis alluded to this as to both Mr. Thomas and Mr. Shepherd during the clemency hearing. While it might be technically possible to expunge the

record of Mr. Shepherd's arrest, he, like Mr. Thomas, has no conviction that this Court could set aside.

BACKGROUND

There is no way to simply summarize what occurred in the Groveland Four case. However, to put this motion into proper context, it is important to provide the Court with some relevant background.

Since the first trial in 1949, the case of the "Groveland Four" has been widely covered by local, national, and international news media. It has been the subject of literally hundreds, if not thousands of articles, press inquiries and even books and television productions. Pre-trial coverage of this case was so extensive that it formed, at least in part, the basis for the reversal of the conviction by the United States Supreme Court in *Shepherd v. State*, 341 U.S. 50, 71 S. Ct 549, 95 L.Ed. 740 (1951). While the stated reason was the discriminatory practice of preventing blacks from serving on grand juries, (*Cassell v. State of Texas*, 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839), Justices Frankfurter and Jackson, concurring with the majority in result, wrote the following:

> …this trial took place under conditions and was accompanied by events which would deny defendants a fair trial before any kind of jury
> . . . .

> To me, the technical question of discrimination in the jury selection has only theoretical importance. The case presents one of the best examples of one of the worst menaces to American justice. It is on that ground that I would reverse.

341 U.S. at 55.

Upon reversal, The Groveland Four (now Irvin and Shepherd) were again the subject of intense media scrutiny when, upon being returned from the state prison in Raiford, they were both shot by Sheriff Willis McCall during an alleged escape attempt in November of 1951. Shepherd died as a result, but Irvin survived. The retrial of Walter Irvin, which concluded February 14, 1952, resulted in another conviction and death sentence.[2]

The killing of Samuel Shepherd and shooting of Walter Irvin caused J. Edgar Hoover to expand the already ongoing FBI investigation to include the circumstances surrounding the shooting by McCall.[3] While not the basis for relief relied on in this motion, the files obtained from the FBI many years later revealed that exculpatory evidence was withheld by the prosecutor.[4] *See* Exhibit 1.

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[2] Following the shooting, Judge Truman Futch granted a motion to change venue to Marion County on December 6, 1951.
[3] The FBI was already investigating the case of the Groveland Four.
[4] On 9/2/49 the FBI interviewed Dr. Geoffrey Binneveld who examined the victim on July 16, 1949, the morning of the incident. Dr. Binneveld noted the lack of spermatozoa present during the exam and stated that, if asked whether or not the victim had been raped, he would have to say "I don't know." The defense was not made aware

In 1953, Governor LeRoy Collins ordered an executive investigation into the trial, and, as a result, commuted Irvin's death sentence. *See* Exhibit 2. Since that time, while the intensity of the media scrutiny of this case has waxed and waned, it has never completely subsided.

In 2013, author Gilbert King released his book *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America*, which reignited interest in the case. Then, in 2017, the Florida Legislature issued a unanimous resolution formally apologizing to the Groveland Four. *See* Exhibit 3.

In December of 2018, Attorney General Pam Bondi ordered the Florida Department of Law Enforcement to conduct a full review of the case. On January 11, 2019, the Governor granted the Groveland Four a posthumous pardon. On July 28, 2021, the Florida Department of Law Enforcement sent their findings to the undersigned as I am the sole Constitutional Officer with jurisdiction over the matter.

The FDLE report concluded "*this investigation did not identify or develop any new verifiable and substantial evidence (as per F.S. 961.03) to corroborate or contradict the established information pertaining to the Groveland Four's innocence or their*

(continued from previous page) of these facts and Dr. Binneveld was not made available to testify at either trial.

alleged participation in The Incident."[5] This finding was not unexpected, considering the constant media attention, appeals, and public interest that has surrounded this case for the last 71 years.

THE STATE ATTORNEY'S OFFICE REVIEW

As part of this review, the undersigned spoke with Gilbert King, who advised that, following the publication of his book, he received an email from Broward Hunter, the grandson of Jesse Hunter, the State Attorney who prosecuted the Groveland Four case. In this email, Broward Hunter stated that his grandfather, and trial Judge Truman Futch, knew at the time of the second trial that there was no rape.[6] *See* Exhibit 4.

THE EMAIL

On August 30, 2021, the undersigned and Inspector Keith Riddick, from the Florida Department of Law Enforcement, met in the home of Broward Hunter to conduct a sworn recorded statement regarding the email he sent Gilbert King. During this interview,

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[5] F.S. 961.03 is Florida's claim bill Statute. It provides a remedy for those who have had their conviction overturned by the trial court based on an actual innocence determination. It is the first step in the process for a wrongfully incarcerated individual to apply for compensation and is the closest definition of exoneration available in the Florida Statutes.

[6] Gilbert King provided FDLE Agents with documents during his interview, but not this email. Both Hunter's email, and his sworn statement, constitute hearsay. Neither, independently, form the sole basis for this motion.

the undersigned learned of two additional pieces of information that were of significance to this motion. *See* Exhibit 5.

First, Broward Hunter testified that Jesse Hunter spoke with Walter Irvin in the hospital after he was shot, and that Walter Irvin said he and Shepherd were both involved in Bolita.[7]

> BH: -- because he -- it was in the family. Everybody in the family -- I think everybody knew that, uh, Granddad had sneaked into Irvin's room -- hospital room at, like, 5:00 in the morning with the deputy asleep -- is what the family story, the way it went -- and that he told his story. And his story was that he and Shepherd were Bolita runners.
>
> WG: Okay.
>
> BH: That they were carrying tickets and money from a place in Orlando out to Groveland, you know, paying off people, that that was what this was about, and that they had nothing to do with any rape and didn't know this white girl or anything about her. And, uh, uh, he was -- you know, he -- well, actually, what I found out in '71 was that he had had a detective check out their story.
>
> WG: Your -- your grandfather had --
>
> BH: My grandfather had a detective check out the story and that, uh, he believed it, and he had contacted, uh, uh, Judge Futch.
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> p.8

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[7] "BH" indicates Broward Hunter is the speaker. "WG" indicates William Gladson is the speaker. Bolita was an illegal gambling operation that started in Cuba in the late 1800's and made its way to Florida shortly thereafter. It has been reported that Willis McCall was involved in the Bolita syndicate. It was previously suspected that only Sam Shepherd was involved in Bolita.

The second, and perhaps more significant revelation, was that Broward Hunter, while cleaning out Jesse Hunter's law office, came across correspondence that convinced him that Jesse Hunter and Judge Truman Futch knew at the time of the second trial that there was no rape. See excerpt of his sworn statement below:

BH: -- in this one office. And so, we started out cleaning that office and taking all the books off the shelf, throw them into the dumpster, and cleaning out everything we could, and getting the office cleaned up, and he and I both did that so he could show me what all he wanted done. Then he took his office and assigned me grandfather's office. Now, grandfather's office was off of the main lobby office, uh, the waiting room and all, and it -- the door was locked, and there was a chair that had been placed in front of it, and it hadn't been opened in years. As far as I knew, it had not been opened since the late '50s, since a couple years -- -

WG: Wow.

BH: -- after he died. They just locked it up, and that was that. So, uh -- so, I went in there and started by, you know, dumping the law books and all. I noticed there was shelf paper of old newspapers that were dated 1946. So, that was the last time that the office had been cleaned. So, most everything, the junk and whatnot, was '46 to '55 or -- or thereabouts. So, uh, I went through and -- and -- and just started, you know, cleaning things out and cleaning the papers out, getting the -- uh, and I did kinda look through the files and, uh, looking for things having to do with the -- the case, and the files had been cleaned out. There -- there was nothing on that case in the file cabinets. Uh, the -- but -- and in his -- and I cleaned out his -- his -- his desk. Nothing that interesting.

But now this -- he had this long table. Actually, the sorting table I'm using in there is out of Uncle

Richard's office. It was the poorest of the three conference tables. Uh, Granddad's was the nicest of the conference tables. The biggest, nice top and all that. And my father had the next to nicest, and the cheap one was in Uncle Richard's office. And, uh, this, uh, conference table, uh, had drawers in it on one side only. So, you didn't really even notice they were there unless you got on the -- the side that they were, and there were no handles on them to open them. You had to reach underneath and -- and start the drawer out. But it had three drawers in it, and these drawers were full of stuff. And, uh, what got me and I've since thought, wow, what -- what a coincidence, because the first thing that I come across is a letter from Judge Coonts, which got me to reading it 'cause I like Judge Coonts a real lot.

And so, I read this letter, and that's what started me actually reading into some of this stuff. Uh, the incoming letters -- and there wasn't a whole lot interesting in incoming letters. Uh, but his letters, they were all second and third carbons. Old second and third carbons, very difficult to read. The lettering was -- was pretty brown on a -- a yellow onionskin paper that turned yellow. And so, they were real difficult to read. So, as I -- I started trying to figure out, you know -- I did read some, and that's where I found out that he had, uh -- had definitely told, uh, uh, Judge Futch, you know, about the Bolita --

WG: Okay.

BH: -- operation and that, uh -- now, he also told -- according to what I was told, he also told Mable Norris Reese [phonetic] that, uh, she also knew --

WG: She's the reporter from --

BH: She was the reporter from the -- The Topic, that was, uh, a friend of his. And, uh, he told her that he knew that they were not guilty. So -- and, uh, how -- how much he convinced Judge Futch, I don't know because letters from Judge Futch were not there.

WG: So --

BH: So --

WG: So we're clear, so I understand -- 'cause I thought they were incoming letters that you were looking at. They were third copies -- second or third copies of outgoing letters from --

BH: Uh, mostly --

WG: -- your grand --

BH: -- outgoing letters, they were cursive originals.

WG: Okay.

BH: There were notes. There were reports. Uh, some from, uh, detectives. Other -- there was, uh -- I started -- uh, what happened is --

WG: Well, before -- before you go there -- and I don't want you to forget that thought, but what you said in your email was that they knew that there was no rape, the governor's office and the judge --

BH: Well --

WG: -- and your --

BH: -- the governor's office not in '53. Uh, that was a -- a mistake.

WG: Okay.

BH: That was '55.

WG: Okay.

BH: Not '53.

WG: But -- but the judge and your grandfather -- what you're saying is that there were letters written from your grandfather to the judge --

BH: Yes.

WG: -- telling the judge, hey, I found out about this whole Bolita operation.

BH: Yes.

WG: Was there anything specific about --

BH: That he had verified it.

WG: Okay. Was there anything about whether or not the -- the rape had occurred?

BH: (No audible response).

WG: I mean, was -- was there a discussion where he said, I don't think these guys committed this rape? Did you read that in the letters at all?

BH: No, I didn't read that in the letters.

WG: Okay.

BH: Uh, I know myself now that he didn't, and that's why he --

BH: [Unrelated conversation removed]

WG: So, how -- about how many letters -- I'll wait till that's done. (unintelligible). About how many letters are we talking about that you saw?

BH: I started collecting. Now, I found out that he had a xerox machine in the office at the time. I found out if I took one of these letters and put it on the xerox machine and copied it, then the -- the wording would turn black, and it was readable. It wasn't, you know, easy to read, but it was very readable. You could read the letters then. So, I started collecting them. I was, you know, a bit under the gun. We had this rented thing out there, and -- and my father was poking along on, you know, let's get this office cleaned out. And -- but I got, uh, really stopped on looking at these letters. But I started -- since I knew that I could xerox them and look at them, read them later, I started really looking

at the letter just to see if it had something to do with the case and, uh, uh - and collecting them into a cardboard box.

WG: Okay.

BH: Now, there were, uh, over 50 pieces of letter and reports and stuff like that that I had collected in this box. They were --

WG: Just related to this case?

BH: Just related to this case that were there. Uh, that, uh -- uh, when -- when I got through with the three drawers and had a -- a -- a stack in the cardboard box like that of -- of letters and -- and papers, uh, I told my father, uh, that he needed to okay what I had found; and he said, "Oh, yeah, that was in there." And he -- that's when he told me, yes, he knew that, uh -- that it was, uh, not a rape case and that Granddad knew it and he knew it, and, uh, I don't remember whether he said himself that Judge Futch knew it. But I -- I remember that. But I do know that the next morning we went to the office, and I went to get my box, and it was gone.

WG: Okay.

BH: And my father said he got rid of it. And he told me point-blank that if there were people -- that if they knew I had -- that I even knew that, much less that I had that, that I would be killed. This was 1971. Willis was still king of the county. That, uh, uh -- that -- now -- now also I know -- and I knew from the letters, that the -- by the time they had the second trial, that the investigation was still going on, but it wasn't an investigation of the rape. It was an investigation of Willis McCall, and this was what the other letters were about, was he was investigating Willis McCall.

WG: Could -- could it be -- 'cause remember, before the second trial, that's when Sheriff McCall shot Shepherd and Irvin, and then the FBI got involved, that they were regarded -- they were in reference to that FBI investigation 'cause that was going on -- am -- am I right on the timeline?

KR: Yes, sir.

WG: Um, that was going on after the first trial. And before the second trial, that's when Shepherd --

BH: Yeah. Well, it was while Irvin was wounded --

WG: Uh-huh.

BH: -- and lying in the hospital room that, uh -- that -- that's when Granddad found out that it was, uh, not a rape case, and I'm sure he -- he quit thinking anything about the rape case at that point.

WG: So, let me ask. Why do -- why do you think he went to trial on the second -- the second time, then?

BH: Because there was no way that he wasn't gonna get convicted? There was no way -- and I can believe this because I was there, and I know that -- well, for instance, they tried to try Willis for murder. He was released.

WG: Right.

BH: You couldn't get a conviction on a white man for killing a black person.

WG: Okay.

BH: And you couldn't not get a conviction on a black man for raping a white woman. So -- and, uh, he didn't want to spill the beans. He did not want Willis to find out they were investigating him. But by then, Granddad thought that this was -- this whole thing was Willis's -- that Willis was involved in the Bolita operation, and that he was eliminating competition.

WG: All right. So, think it -- let me -- let me ask you about these letters, then. So, you've got you said approximately 50 letters or so. They're outgoing letters from your grandfather.

BH: Yes.

WG: Um, were they all to --

BH: (unintelligible) --

WG: -- Judge Futch, or were they --

BH: Oh, no, no, no.

WG: Okay.

BH: These were -- were different people. I don't -- I'm not sure.

WG: Okay.

BH: Uh, uh, could've been even FBI. I don't -- I don't remember now because after getting -- after -- like, I remember the one with Judge Futch 'cause it was shocking.

WG: Uh-huh.

BH: It shocked me so much that I can remember it. Mostly what I remember is I remember seeing these letters. I remember the yellow paper, the brownish ink, and I remember scenes. I remember seeing the drawers -- you know, opening the drawers. These were, like, special moments.

WG: Uh-huh.

BH: And I can remember pictures better than I can remember words. And once I got down to I'm really just looking for dates and, uh, anything that lets me tie this into this investigation. But I can say that by the time of the second trial, he was still having an investigation. He was, uh, having, uh, uh, detectives investigate Willis McCall.

WG: Got it.

BH: And he thought that this whole thing, rather than being a rape case, was Willis McCall using a domestic argument or something like that as a -- you know, a -- a way to get some people that were on his shit list.

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DEPUTY JAMES YATES

In addition to the email from Broward Hunter, the undersigned learned troubling information about the State's primary witness in the Groveland Four case, Deputy James Yates. In both the 1949 trial and 1951 re-trial, the State's main law enforcement witness was Deputy James Yates. Through Deputy Yates, the State introduced all of the physical evidence used in the trials, including Walter Irvin's shoes, shoe casts, pants, the cotton fibers and handkerchief found at the scene, as well as the gun in the possession of Charles Greenlee.

In the second trial, the defense, in addition to attacking the State's failure to conduct laboratory testing of the stains also challenged Deputy Yates' qualifications to collect the shoe and tire casts. In fact, the defense expert concluded, and so testified, that Deputy Yates manufactured the foot-casts that linked Walter Irvin to the crime scene in Okahumpka.

During cross examination, the defense's expert witness, H.V. Bennett, testified; "My opinion is that there was no foot in that shoe when the impression was made." T.T. 437.

While there is no way to know for certain that there was "no foot" in Walter Irvin's shoe at the time of the impression, it seems very likely that the defense expert was correct. In the years following Walter Irvin's trial, Deputy Yates was accused of

manufacturing plaster of paris shoe casts and using them in trial. In fact, in 1972, Federal District Judge Charles R. Scott vacated the convictions of Robert Shuler and Jerry Chatman, two black men also convicted of raping a white woman in Lake County. These convictions, had been based, in part, on Deputy Yate's perjured testimony and fabricated evidence:

> There is no issue that the "new evidence" was discovered by petitioners herein subsequent to their convictions in the trial court. This new evidence that the plaster of paris footcasts was falsified by officials of the State springs from such reliable sources that it would appear doubtful whether the footcasts would be introduced by the prosecution at a new trial. However, regardless of the State's tactics at a new trial, it is the considered opinion and conclusion of this Court that, if the "new evidence" were presented at trial, it would probably result in an acquittal of the defendants. Indeed, rational and fair men cannot honestly and ethically dispute the point.

He went on to state:

> It is difficult, to the point of being nearly impossible, to imagine how such petitioners, convicted upon the State's deliberate presentation of testimony known to be perjured, could ever better prove a case for post-conviction relief.
>
> This Court will not permit the conviction of these petitioners on such tainted and falsified testimony. The organs of government do not need convictions based upon such testimony. A strong and free nation cannot abide this type of "justice". Not only our Constitution, but the interests of justice itself, require and demand a new trial. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Mesarosh v. United States*, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956). Consequently, upon consideration of this issue alone, this Court hereinafter grants and issues this writ of habeas corpus.

Shuler v. Wainwright, 341 F. Supp. 1061, 1069-70 (M.D. Fla. 1972), *vacated*, 491 F.2d 1213 (5th Cir. 1974). The Fifth Circuit Court of Appeals reversed the grant of habeas corpus relief as to the footcast evidence matters and remanded for a hearing on unrelated grounds.[8] However it is noteworthy that Deputy Yates, who was accused of having falsified the footcast evidence by making the plaster molds in the backyard of another deputy, did not testify at the State court commissioner's hearing, but rather invoked his right to remain silent -- the evidence from him, such as it was, consisted of an affidavit denying any wrong-doing.[9] *Shuler v. State*, 161 So. 2d 3, 5 (Fla. 1964).[10] The Federal District Court

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[8] The reversal is based on the issue of the deference owed by a Federal Court to a State Court finding of fact. In the context of this case, the evidence adduced at the State court hearing, and how it should be viewed, is debatable. However, the testimony set out by the District Court is disturbing, especially when the rebuttal to it is based on a bare affidavit, the admissibility of which is questionable.

[9] The District Court described this testimony in the following way: "I could state that the soil that I removed from the six casts could not have come from the scene of the alleged rape . . .". *Shuler v. Wainwright*, 341 F. Supp. at 1067.

[10] The collateral proceedings in State Court were litigated as a petition for writ of *habeas corpus* and took place prior to the adoption of the predecessor of *Florida Rule of Criminal Procedure* 3.850. Whether the affidavit of Yates relied on by the Commissioner was admissible is questionable -- it appears, at least now, to be hearsay not subject to any exception. *Robinson v. State*, 707 So. 2d 688, 692 (Fla. 1998).

described that testimony as "[an FBI agent testified that the] plaster of paris casts varied from what he would normally expect to find in such casts made by people moving in the sand." *Shuler v. Wainwright*, 341 F. Supp. at 1068. That testimony is functionally identical to the testimony of the defense expert in Mr. Irvin's trial. And, while the Court of Appeals set aside the District Court's order, the fact remains that the testimony in *Shuler* is a striking and disturbing bit of evidence, the convergent validity of which cannot and should not be discounted.[11]

THE PARDON

Mr. Greenlee and Mr. Irvin are the principal beneficiaries of the 2019 pardon. In general terms, a pardon "involves forgiveness and not forgetfulness." *Randall v. Fla. Dep't of L. Enf't,* 791 So. 2d 1238, 1244 (Fla. 1st DCA 2001), *case dismissed,* 845 So. 2d 892 (Fla. 2003).[12] [internal quotations and citations omitted]. And, "[a pardon] carries an imputation of guilt; acceptance a confession

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[11] A Ft. Myers newspaper reported that Yates was indicted by an Orange County Grand Jury on December 20, 1962 for perjury in the Shuler trial.

[12] The effect of a pardon has been litigated with some frequency in the context of whether or not a pardon "blots out the conviction" enabling the individual to have their criminal record expunged. Under Florida law, a pardon does not lead to expungement, but the law varies from state to state. *See, In re Petition for Expungement of Crim. Rec. Belonging to T.O.*, 244 N.J. 514, 534, 242 A.3d 842, 854 n. 4 (2021). (collecting references).

of it." *Randall v. Fla. Dep't of L. Enf't,* 791 So. 2d at 1245. However, the pardon issued in this case is atypical -- it is "executive grace" based on a miscarriage of justice instead of the usual forgiveness based on demonstrated "pardon-worthiness." This case is in a category all its own, and, because that is so, it requires a remedy that is tailored to its unique (and hopefully never-repeated) facts.[13]

The pardon granted all four defendants by the Executive Clemency Board is based squarely on the Board's determination that the convictions in this case were obtained through a miscarriage of justice. Arguably, the pardon alone could satisfy the first component of the newly discovered evidence standard - - the pardon was issued in 2019, and Mr. Irvin's trial took place in the early 1950s. Mr. Greenlee's trial took place in 1949. The pardon does not squarely fit into the second component of newly discovered evidence because it is so unique. However, one could argue that it should be treated as a pardon based on a determination of innocence. In other words, there has been a determination by the

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[13] To the extent that any elaboration is necessary, this case is not like any other, and nothing said in this position or advocated by the State in any hearing should be treated or referred to as precedent of any sort in any other case. This case is limited to its facts - - hopefully such facts will never be seen again.

Executive Clemency Board that a miscarriage of justice took place that resulted in wrongful convictions.

THE STATE'S OBLIGATION

The obligation of the State Attorney's Office under the *Rules Regulating the Florida Bar* is to seek justice. The comment to Rule 4-3.8 is clear -- "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." The comments also clearly state that Florida has adopted the American Bar Association Standards of Criminal Justice Relating to Prosecution Function. The ABA Standard on Prosecutorial Function, 3-8.3 states:

> If a prosecutor learns of credible information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor should comply with ABA Model Rules of Professional Conduct 3.8(g) and (h).

ABA Model Rule 3.8 (g)&(h) states that when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor "shall … disclose the evidence and … seek to remedy the conviction." In discharging these responsibilities, the State, through the undersigned State Attorney, moves this Court to grant relief as specifically described below.

NEWLY DISCOVERED EVIDENCE STANDARD

Florida Rule of Criminal Procedure 3.850 governs Motions to Vacate, Set Aside or Correct Sentences. Pursuant to this rule, such motions shall not be considered if filed more than 2 years after the judgment and sentence has become final unless:

> The facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, and the claim is made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence.

Fla. R. Crim. P. 3.850 (b)(1).

To prevail on a claim of newly discovered evidence a defendant must show that "the evidence was unknown to the movant or his counsel" and "could not have been uncovered by due diligence at the time of trial" and that "the evidence is such that it would probably produce an acquittal on retrial." *Himes v. State*, 310 So. 3d 542, 544 (Fla. 1st DCA 2016). The second prong of this test is satisfied if the newly discovered evidence "weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability." *Melton v. State*, 193 So. 3d 881, 885 (Fla 2016). *See also, Long v. State,; Mitchell v. State,* 2021 WL 2933635, ___So. 3d___ (Fla. 1st DCA 2021).

THE NEWLY DISCOVERED EVIDENCE

The second, and more significant, development in this case was that FDLE agents, while confirming that the evidence from the

original trial could not be located, were advised that the evidence was in the possession of the Lake County clerk.[14] *See* Exhibit 6. Following this revelation, this office secured an order to review the evidence for possible scientific testing. *See* Exhibit 7.

THE STATE CONDUCTED NEW SCIENTIFIC TESTING

In both the 1949 trial of Irvin, Shepherd, and Greenlee, and the 1951 trial of Irvin, the State presented several pieces of evidence to the jury as part of their case in chief. Among them were a handkerchief, a few pieces of fiber, a gun, shoes and shoe casts, as well as a pair of pants. The shoes and pants belonged to Walter Irvin and were collected and placed into evidence by Deputy James Yates.[15] Yates, incidentally, also made the shoe and tire casts that were the subject of much controversy during the trial.

In the first trial, both Deputy James Yates and Deliah Irvin testified about Walter Irvin's pants.[16] Nearly all the testimony they provided surrounded who they belonged to and how they were collected. There was no mention of stains, smears or semen. This office has not been able to locate the closing arguments from the

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[14] The evidence was transferred from Marion County to Lake County by Judge William Swigert in 1999.
[15] The seizure of pants was the subject of an unsuccessful motion to suppress filed by the defense in the second trial. (T.T. 536)
[16] Without the closing argument, it was difficult to discern the evidentiary significance of the pants. However, with the benefit of the second trial, and the expert witness called by the defense, the significance of the pants became clear.

first trial and it's not clear that closings were even transcribed.[17] In a situation where a party is entitled to an appeal and a transcript is missing, trial courts are charged with the responsibility of reconstructing the record. Record reconstruction is usually a collaborative effort involving all the parties to the case. Accurately reconstructing the closing argument for the first Groveland Four trial is simply not possible. It seems logical, however, given that the State referenced the pants during closing argument in the second trial,[18] that they did so during the first trial as well.[19] When a party is entitled to an appeal, and the record is either lost or destroyed, and cannot adequately be reproduced, a new trial is mandated. See *Catala v. Unemployment Appeals Commission*, 691 So. 2d 517 (5th DCA 1997); *Coyle v. Western Union*, 542 So. 2d 475 (Fla. 1st DCA 1989). To be entitled to relief, a defendant must "demonstrate that there is a basis for a claim that the missing transcript would reflect matters which prejudiced the defendant." *Terry v. State*, 263 So.3d 799, 805 (Fla 4th DCA 2019); *Brown v. State*, 309 So.3d 677 (4th DCA 2021).

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[17] Transcripts received from the State archive do not include closing argument.
[18] T.T. 471.
[19] It also explains why the defense, in the second trial, retained an expert to testify that the stain on the pants should have been tested for semen.

In the second trial, Walter Irvin's pants were again placed into evidence. This time, however, the prosecutor referenced "smears" on the pants as the following excerpt from the trial demonstrates:

Mr. Hunter continuing Direct Examination [of James Yates]:

Q: Now, Mr. Yates, are there any smears on the front of those pants?
A: Yes, sir, there are.
Q: There are smears all down the side?
A: Yes, sir, there is.

Mr. Hunter: May it please the court, I would like the jury to examine the pants, which have been received as State's Exhibit Number 3.

(At this point the pants were passed around among the jury.)

Mr. Hunter:

Q. Now, Mr. Yates, did those same smears which appear on those pants at this time, did they appear on those pants at the time you got them from Irvin's mother?
A. Yes sir.
Q. And they appeared to be in the same condition as they were when used in the former trial?
A. Yes, sir.

T.T. 357.

While the prosecution never did use the word "semen" when discussing the smear, the implication to the jury was obvious. In response, the defense called an expert, H.V. Bennett, who testified as follows:

Mr. Akerman:

Q. *Now, Mr. Bennett, do you know whether or not the Federal Bureau of Investigation has a laboratory equipped with the necessary equipment to do this type of work?*

A. *Yes, sir.*

Q. *Do you know whether or not the services of the Federal Bureau of Investigation are available to both State and local law enforcement officials?*

A. *Yes, they are, for that purpose, that is the purpose they were created for, to serve local and State law enforcement officials in their work.*

Q. *And do you know whether or not there would be a sufficient time in which without any detraction of the stain on the clothes, to send an article of clothing to have it determined scientifically and unequivocally whether or not that stain or those stains on any particular garment were semen?*

A. *Well, I would say that if the garment had been sent within three weeks, the semen would have remained there, and could have been distinguished by using the process I have just described.*

Q. *And it could be shown conclusively whether or not it was semen on the garment?*

A. *That is correct.*

Q. *And you say a period of three weeks can elapse in which such a test can be conclusive?*

A. *Yes, sir.*

T.T. 423-4.

As one can see from the transcript of the Irvin trial, the State never had his pants tested for the presence of semen, even though they had the ability to do so.[20] Instead, the jury was left with the improper suggestion that Walter Irvin's pants contained evidence of the rape for which he was ultimately convicted.

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[20] Based on H.V Bennett's expert testimony during the second trial, scientific testing to detect semen could have been conducted during the first three weeks from the incident in 1949.

NO SEMEN IDENTIFIED ON WALTER IRVIN'S PANTS

On September 9, 2021, State Attorney Investigator Penni Norris took photographs of all of the evidence, including the area where the purported stain was located on the pants. On that same day, FDLE agents transported the pants to the crime lab in Orlando for scientific testing and examination. The undersigned then sent three of these photographs, along with the relevant portions of the trial transcript, to the FDLE crime laboratory. *See* Exhibit 8. On September 16, 2021, the report concluded: "Using microscopy, no semen was identified on Item 1." [21]

The significance of this finding cannot be overstated. It was a major part of Irvin's defense that there was no scientific testing conducted by the State. A full ten pages of expert testimony was presented by the defense to counter the lack of scientific testing in this trial. (T.T. 420 to 430). *See* Exhibit 9.

So significant was the failure of the State to avail itself of scientific testing, that it formed, in part, the basis for

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[21] FDLE Item 1 was Walter Irvin's Pants. The lab took five samples, including the area suggested by the trial prosecutor to contain the stain. This finding was also consistent with Dr. Binneveld's findings that there was no spermatozoa detected during the physical exam of the victim on the day of the incident. The victim's representative was contacted when the evidence was located and advised that she declined to assist the State with any additional scientific testing.

Walter Irvin's commutation by Governor LeRoy Collins in 1955. In his report to Governor Collins, special counsel Bill Harris stated this:

> With regard to all of this evidence, while if the jury chose to believe the stories told, there is certainly legal sufficiency for finding that they can be tied directly to the defendant, or the car in which he admits having been riding the night and morning of the crime, the significant omission on the part of the State in the preparation and prosecution of this case, is that, there was no attempt whatever, either immediately after the crime or within such time as would be reasonable, to call into the case the available scientific crime analysis experts who could have nailed this case down and removed any reasonable doubt which might arise from the manner in which the case actually was prepared. (emphasis added)

p. 7.

In this same report, under the paragraph titled "Smears on Trousers," Bill Harris also wrote:

> In the case of the trousers, it appears that it would have been awfully simple for the smears on those trousers to have been turned over to a competent analyst for determination as to whether or not this substance was, in fact, semen. This could have been done at any time within three weeks (T. 439) after the smears got on the trousers.

P. 8.

Finally, in his most powerful statement regarding the lack of scientific testing, Harris wrote:

> Under these circumstances the State of Florida well realized its duty to introduce corroborating testimony. The State was fortunate in uncovering within a few hours after the crime a considerable amount of potentially significant physical evidence. Footprints and tire tracks were found (R. 327, 328, 341-342). And, the very

> morning after the crime, the State took possession of the trousers and shoes which the defendant wore on the night in question. (R. 328-329. With the proper scientific analysis, this evidence could have afforded the basis for a clear-cut determination of defendant's guilt or innocence. Facilities for accurate scientific analysis were available for local law enforcement officers (R. 424,427,432). However, instead of availing themselves of these sources, the local law enforcement officials proceeded crudely and primitively to make out a case designed to send defendant to his death. The physical evidence was not scientifically analyzed - it was literally thrown into the jury's law (sic) replete with prejudicial innuendoes.

p. 12-13.

THE RELIEF REQUESTED

Pursuant to the newly discovered evidence provisions of *Florida Rule of Criminal Procedure* 3.850, more specifically, the FDLE lab report that indicates that there is no semen detected on Walter Irvin's pants, and the lack of a complete record of the first trial as it relates to Charles Greenlee, the State requests this Court to order as follows:

1. Dismiss the July 1949 indictment returned by the Grand Jury of Lake County charging Ernest Thomas with rape, restoring Ernest Thomas with his Constitutional presumption of innocence.

2. Dismiss the superseding indictment returned by the Grand Jury of Lake County charging Samuel Shepherd with rape, restoring Samuel Shepherd with his Constitutional presumption of innocence.

3. Set aside and vacate the conviction of Charles Greenlee, restoring his Constitutional presumption of innocence.

4. Set aside and vacate the conviction of Walter Irvin, restoring his Constitutional presumption of innocence.

CONCLUSION

Even a casual review of the record reveals that these four men were deprived of the fundamental due process rights that are guaranteed to all Americans. Given these facts today, no fair-minded prosecutor would even consider filing these charges and no reasonable jury would convict. The evidence strongly suggests that the sheriff, the judge, and the prosecutor all but ensured guilty verdicts in this case. These officials, disguised as keepers of the peace and masquerading as ministers of justice, disregarded their oaths, and set in motion a series of events that forever destroyed these men, their families, and a community. I have not witnessed a more complete breakdown of the criminal justice system, nor do I ever expect I will again.[22]

In undertaking this review, I was mindful of the fact that Irvin and Greenlee's convictions were affirmed by the Florida Supreme Court. Our judicial system, with good reason, favors finality. Absent compelling new evidence, final judgments cannot and should not be disturbed. There are times, however, when the

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[22] I've been both a prosecutor, and a law enforcement officer, in Lake County. These men and women are among the most professional and dedicated public servants in the State.

past merges with the present, and we are forced to confront our sins. This is one of those moments. For in the end, it is "Justice, and only Justice we shall seek…"[23]

WHEREFORE, based on the foregoing, William McDonald Gladson, the State Attorney for the Fifth Judicial Circuit, moves this Court to dismiss the indictments against Ernest Thomas and Samuel Shepherd, vacate the convictions and dismiss the indictments of Charles Greenlee and Walter Irvin, and correct the record with the newly discovered evidence.

Respectfully Submitted on this 25 day of October, 2021.

William M. Gladson
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352-671-5900

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered the Clerk of the Court, on this 25 day of October 2021.

William M. Gladson

[23] Deuteronomy 16:20.