V. MR. NELSON WAS DEPRIVED OF DUE PROCESS, IN VIOLATION OF *NAPUE V. ILLINOIS* AND *GIGLIO V. UNITED STATES*, WHEN THE STATE KNOWINGLY PRESENTED FALSE TESTIMONY DURING THE SENTENCING PHASE.

The Fourteenth Amendment forbids the State to knowingly elicit false testimony or fail to correct testimony it knows to be misleading, as the Supreme Court recognized in *Napue v. Illinois*, 360 U.S. 264, 265-72 (1959). In *Giglio v. United States*, 405 U.S. 150 (1972), the Court further explained that, when the State has reason to know that a witness may expect a benefit from testimony, the State violates due process if it fails to disclose that potential source of bias. *See id.* at 153-54. "*Giglio* and *Napue* set a clear precedent, establishing that where a key witness has received consideration or potential favors in exchange for testimony and lies about those favors, the trial is not fair." *Tassin v. Cain*, 517 F. 3d 770, 778 (5th Cir. 2008). A *Giglio/Napue* violation requires a new trial if the truth, such as a witness's deal with prosecutors, could "in any reasonable likelihood have affected the judgment of the jury." *Id.* at 780 (quotation omitted).

At Mr. Nelson's sentencing phase, inmate Rick Seely falsely testified that he had made no deal with prosecutors and did not expect any benefits from the State in exchange for his testimony against Mr. Nelson. He was the only eyewitness to testify about the Holden incident, and his testimony was the linchpin of the State's punishment case against Mr. Nelson.

A. Rick Seely Falsely Testified That He Did Not Expect to Receive Any Benefits For His Testimony.

Seely testified at the sentencing phase of Mr. Nelson's trial that he had witnessed Mr. Nelson commit murder on Mr. Nelson's cell block while Mr. Nelson was awaiting trial. Seely stated that he did not expect to receive any favorable treatment in consideration of his testimony. 40 R.R. 44. Seely explicitly testified that he had had no discussions with the State about his coming eligibility for parole. *Id.* at 43 ("A. I'm up for parole; I should be out in January. Q. So

you didn't have that discussion with the D.A.'s at all? A. No.").[58] That was false. Seely states that following Mr. Holden's death, but prior to Mr. Nelson's trial, he met with Bob Gill and his assistant "who offered to reduce [his] two-year sentence so that [he] would receive early parole" in exchange for his testimony against Mr. Nelson. Declaration of Rick Seely (Dec. 9, 2016) ¶ 5, Ex. 177 at NELSON 1477. Seely maintains that he believed he "would serve less time in exchange for [his] testimony against Mr. Nelson. For that reason, [he] testified for the State." *Id.* ¶ 6 And "Bob Gill and his assistant were aware, at the time of Mr. Nelson's trial, that [Seely] anticipated receiving a benefit in exchange for his testimony." *Id.* ¶ 7.

A letter dated January 4, 2013, from Seely to prosecutor Catherine Simpson, confirms as much: Seely expresses his understanding of a reduced sentence in exchange for his testimony against Mr. Nelson. Seely wrote: "Bob had told me that he (yall) would help me make parole for my efforts in the trial." Letter from R. Seely to P. Simpson (Jan. 4, 2013), Ex. 20 at NELSON 269. Later in the letter he also asked for the prosecutors to "please assist [him] once more." *Id.* at NELSON 270. This letter to the prosecutor at Mr. Nelson's trial reflects a deal with their lead witness that was never disclosed to the defense. At no point during Mr. Nelson's trial did the State correct Seely's false statement that no benefit was expected.

B. There Is a Reasonable Likelihood That the False Testimony Affected the Jury's Answer to the Future Dangerousness Special Issue.

Seely gave the only testimony from which the jury could have concluded that Mr. Nelson caused Mr. Holden's death—shoring up the State's case for death after the jury found Mr. Nelson guilty only as a party to the underlying capital offense. As the sole testifying eyewitness to Mr. Holden's death, Seely provided crucial testimony supporting the State's burden to prove

[58] Seely testified that he previously received a plea bargain from the State on his cases which was unrelated to his testimony at Mr. Nelson's trial. *See* 40 R.R. 42 (A. "[] What happened was the deal that I was offered before all of this ever happened is the deal I received, which was my wife's deal with the prosecutor [sic] wanted me for two years.").

Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date."

The letter that Seely wrote to the State was unavailable to Mr. Nelson when he filed his initial state application because he only discovered it on August 16, 2016, when Mr. Nelson's counsel came upon this document while searching through the prosecutor's files. Additionally, Seely's statements about his understanding that he would serve less time in exchange for his testimony were obtained during federal habeas counsel's interview of Seely. The State inexplicably failed to disclose the letter and meetings with Seely and the State where Seely expected he would receive a deal in exchange for his testimony, despite multiple requests for *Brady* material during trial. Mr. Nelson should accordingly be permitted to exhaust this claim in state court, and renew it in this Court as necessary thereafter.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of habeas corpus and grant all other relief to which he may be entitled.

Mr. Nelson. Seely has recanted this testimony, signing a sworn affidavit stating that he believed he would receive a reduced prison sentence in exchange for his testimony, and that the prosecution was aware of Seely's belief at trial. Declaration of Rick Seely (Dec. 9, 2016), ¶ 5, Am. Pet. Ex. 177 at NELSON 1477. The veracity of this declaration is supported by the letter Seely sent to the State—which was never turned over by the State. *See* Letter from R. Seely to P. Simpson (Jan. 4, 2013), Am. Pet. Ex. 20 at NELSON 269.[18]

There is also a reasonable likelihood that Seely's false testimony affected the answer to the future dangerousness special issue. Seely was the only eyewitness witness to testify for the State regarding Mr. Holden's death, providing crucial testimony to support the State's theory of future dangerousness. Even if, as Respondent argues, Seely did not recant his testimony that Mr. Nelson was involved in Holden's death, Seely's false statements made his testimony appear more objective. This false impression that Seely testified objectively, and without the promise of a reward for his testimony, had a reasonable likelihood to affect the jury's evaluation of his testimony, and, in turn, the jury's answer to the future dangerousness special issue.

III. CONCLUSION

For the foregoing reasons, and the reasons discussed in the Amended Petition, the Court should grant a writ of habeas corpus and grant all other relief to which Mr. Nelson may be entitled.

[18] Respondent argues that Seely's contemporaneous letter and later declaration are of "dubious value," without offering any reason why. Answer at 148. Seely's declaration and letter, dated years apart, elucidate Seely's understanding of the agreement he had with the prosecution at Mr. Nelson's trial. The fact that the 2013 letter and 2016 statement are consistent with each other supports the veracity of the evidence and the merit of the claim Mr. Nelson now makes.

Applicant's Punishment Evidence

Applicant called John Plunkett, M.D. to testify concerning his opinion as to whether the death of Mr. Holden was a homicide or a suicide. Dr. Plunkett saw nothing to support that Jonathan Holden was pulled up against the jail door as alleged by the State to support the theory that Applicant caused the death of Mr. Holden. There were no injuries to the back of Holden's head or neck. (43 R. R. 28, 31) Dr. Holden verified that is it possible for a person to lean into a blanket to cut off circulation. (43 R. R. 33-34) Dr. Plunkett's conclusion is that Mr. Holden was an active participant if someone else assisted him in death. (43 R. R. 36)