IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,599

McARTHUR BREEDLOVE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

FILED
SID J. WHITE
JUN 20 1990
CLERK, SUPREME COURT
By
Deputy Clerk

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

ELLIOT H. SCHERKER
Assistant Public Defender
Florida Bar No. 202304

Counsel for Appellant

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS.....ii

INTRODUCTION.....1

STATEMENT OF THE CASE.....2

POINT ON APPEAL.....2

STATEMENT OF THE FACTS.....3

SUMMARY OF ARGUMENT.....30

ARGUMENT

THE TRIAL COURT ERRED IN SUMMARILY DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF, WHICH MOTION SET FORTH A *PRIMA FACIE* CLAIM OF SUPPRESSION OF FAVORABLE IMPEACHMENT EVIDENCE BY STATE AGENTS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA.....30

CONCLUSION.....71

CERTIFICATE OF SERVICE.....72

TABLE OF CITATIONS

PAGE

Antone v. State
355 So.2d 777 (Fla. 1978).....33, 46

Antone v. State
410 So.2d 157 (Fla. 1982).....33

Arango v. State
467 So.2d 692, *vacated and remanded,*
474 U.S. 806 (1985), *adhered to on*
remand, 497 So.2d 1161 (Fla. 1986).....31, 34, 37, 46, 54

Barbee v. Warden, Maryland Penitentiary,
331 F.2d 842 (4th Cir. 1964).....38

Borders v. State
433 So.2d 1325 (Fla. 3d DCA 1983).....60

Brady v. Maryland
373 U.S. 83 (1963).....31, 37, 42, 54

Breedlove v. State
413 So.2d 1 (Fla.), *cert. denied,*
459 U.S. 882 (1982).....69

Brewer v. State
386 So.2d 232 (Fla. 1980).....64

Cannon v. Alabama
558 F.2d 1211 (5th Cir. 1977).....62, 63

Carter v. Rafferty
826 F.2d 1299 (3d Cir. 1987),
cert. denied, 484 U.S. 1011 (1988)).....62

Childre v. State
106 Fla. 334, 143 So. 309 (1932).....60

Cintron v. State
508 So.2d 1315 (Fla. 2d DCA 1987).....52

Clark v. O'Leary
852 F.2d 999 (7th Cir. 56

DeConingh v. State
433 So.2d 501 (Fla. 1983), *cert. denied,*
465 U.S. 1005 (1984).....63

Delap v. Dugger
890 F.2d 285 (11th Cir. 1989).....41, 42, 57, 67

Delap v. State
505 So.2d 1323 (Fla. 1987).....36, 37

Dennis v. United States
384 U.S. 855 (1966).....53

Duest v. Dugger
555 So.2d 849 (Fla. 1990).....35, 54

Edwards v. State
548 So.2d 656 (Fla. 1989).....61

Escandar v. Ferguson
441 F.Supp. 53 (S.D. Fla. 1977).....46

The Florida Bar Re Amendment to Rules of Criminal Procedure (Rule 3.850)
460 So.2d 907 (Fla. 1984).....31

Freeman v. State of Georgia
599 F.2d 65 (5th Cir.), *cert. denied,*
444 U.S. 1013 (1979).....40, 42

Fulton v. State
335 So.2d 280 (Fla. 1976).....55

Gamble v. State
492 So.2d 1132 (Fla. 5th DCA 1986).....55

Giglio v. United States
405 U.S. 150 (1972).....33, 47

Gorham v. State
521 So.2d 1067 (Fla. 1988).....53

Halliwell v. Strickland
747 F.2d 607 (11th Cir. 1984), *cert. denied,*
472 U.S. 1011 (1985).....40

Harich v. State
484 So.2d 1239 (Fla.), *cert. denied,*
476 U.S. 1178 (1986).....48

Haynes v. Washington
373 U.S. 503 (1963).....63

Hernandez v. Ptomey
549 So.2d 757 (Fla. 3d DCA 1989).....36, 59

Holland v. State
503 So.2d 1250 (Fla. 1987).....32, 49

Hunt v. Seaboard Coast Line Railroad Company
327 So.2d 193 (Fla. 1976).....55

James v. State
453 So.2d 786 (Fla.), *cert. denied,*
469 U.S. 1098 (1984).....34

Kelly v. State
175 So.2d 542 (Fla. 1st DCA 1965).....52

Keur v. State
160 So.2d 546 (Fla. 2d 1963).....52

Lavette v. State
442 So.2d 265 (Fla. 1st DCA 1983),
review denied, 449 So.2d 265 (Fla. 1984).....55

Lightbourne v. Dugger
549 So.2d 1364 (Fla. 1989), *cert. denied,*
___ U.S. ___, 110 S.Ct. 1505 (1990).....48, 53, 54, 59

Lynumn v. Illinois
372 U.S. 528 (1963).....63

Maddox v. Montgomery
718 F.2d 1033 (11th Cir. 1983).....62

Martinez v. Wainwright
621 F.2d 184 (5th Cir. 1980).....38

McCorkle v. State
419 So.2d 373 (Fla. 1st DCA 1982).....52

McCrae v. State
549 So.2d 1122 (Fla. 3d DCA 1989).....55, 61

McDowell v. Dixon
858 F.2d 945 (4th Cir. 1988), *cert.*
denied, ___U.S.___, 109 S.Ct. 1172 (1989).....69

Miller v. Angliker
848 F.2d 1312 (2d Cir.), *cert. denied,*
___U.S.___, 109 S.Ct. 224 (1988).....69

Miller v. Dugger
820 F.2d 1135 (11th Cir. 1987).....52

Moore v. Illinois
408 U.S. 786 (1972).....31

Moore v. Kemp
809 F.2d 702 (11th Cir.)(en banc), *cert. denied,*
481 U.S. 1054 (1987).....52

Morgan v. State
475 So.2d 681 (Fla. 1985).....31

Napue v. Illinois
360 U.S. 265 (1959).....71

Nash v. Purdy
283 F.Supp. 837 (S.D. Fla. 1968).....39

Payne v. Arkansas
356 U.S. 560 (1958).....63

Pennsylvania v. Ritchie
480 U.S. 39 (1987).....53, 54

Provenzano v. Dugger
15 F.L.W. S260 (Apr. 26, 1990).....53

Robinson v. State
516 So.2d 20 (Fla. 1st DCA 1987).....51

Rogers v. Richmond
365 U.S. 534 (1961).....35, 63

Roy v. Wainwright
151 So.2d 825 (Fla. 1963)).....51

Russell v. State
521 So.2d 379 (Fla. 1st DCA 1988).....51

Sampson v. State
158 So.2d 771 (Fla. 1963).....51

Schneider v. Estelle
552 F.2d 593 (5th Cir. 1977).....39

Sims v. Georgia
389 U.S. 404 (1967).....63

Smith v. Florida
410 F.2d 1349 (5th Cir. 1969).....38

Squires v. State
513 So.2d 138, 139 (Fla. 1987).....53

Stano v. Dugger
901 F.2d 898 (11th Cir. 1990).....38, 42, 62, 65, 69

State v. Alfonso
478 So.2d 1119 (Fla. 4th DCA 1985),
cert. denied, 491 So.2d 280 (Fla. 1986).....33

State v. Del Gaudio
445 So.2d 605 (Fla. 3d DCA), *review denied*,
453 So.2d 45 (Fla. 1984).....33

State v. McClain

525 So.2d 420 (Fla. 1988).....62

State v. Plew
155 Ariz. 44, 745 P.2d 102 (1987).....61

State v. Wadsworth
210 So.2d 4 (Fla. 1968).....60

State v. Zamora
538 So.2d 95 (Fla. 3d DCA 1989).....33, 46

Stein v. New York
346 U.S. 156 (1953).....63

United States ex rel. Smith v. Fairman
769 F.2d 386 (7th Cir. 1985).....38

United States v. Abel
469 U.S. 45 (1984). 55

United States v. Agurs
427 U.S. 97 (1976).....35, 54, 62

United States v. Antone
603 F.2d 566 (5th Cir. 1979).....38

United States v. Bagley
473 U.S. 667 (1985).....32, 35, 54, 62, 67, 69, 71

United States v. Burroughs
830 F.2d 1574 (11th Cir. 1987), *cert. denied*,
___ U.S. ___, 108 S.Ct. 1243 (1988).....62

United States v. Calle
822 F.2d 1016 (11th Cir. 1987).....55

United States v. Severdija
790 F.2d 1556 (11th Cir. 1986).....54

Walden v. State
284 So.2d 440 (Fla. 3d DCA 1973).....36

Walker v. Lockhart
763 F.2d 942 (8th Cir. 1985), *cert. denied*,
478 U.S. 1020 (1986).....38

Washington v. Texas
388 U.S. 14 (1967).....36

Wasko v. State
505 So.2d 1314 (Fla. 1987).....54

Youngblood v. State
261 So.2d 867 (Fla. 2d DCA 1972).....52

Zeigler v. State
452 So.2d 537 (Fla. 1984).....51

OTHER AUTHORITIES

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment.....30

CONSTITUTION OF THE STATE OF FLORIDA

Article I, Section 9.....30

FLORIDA STATUTES (1989)

§ 112.533(2).....53
§ 90.107.....55
§ 90.401.....62
§ 914.04.....36

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.850.....31

1A Wigmore, Evidence § 85 (Tillers rev. 1983).....60

Aaronson & Craig, *Cocaine Precipitation of Panic Disorder*, 143 Am. J. Psychiatry 643 (May 1986).....60

C. Winek, *Forensic Toxicology*, in 2 Forensic Sciences § 31.09(b) (1989).....60

R. Ashley, *Cocaine: Its History, Uses, and Effects* (1975).....60

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,599

McARTHUR BREEDLOVE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

INTRODUCTION

The appellant, McArthur Breedlove, was the defendant in the trial court and the appellee, the State of Florida, was the prosecution. In this brief, the appellant will be referred to as defendant and the appellee as the state.

The symbols "R1," "T1," and "SR1" will be used to designate, respectively, the record, transcript, and supplemental record filed on defendant's direct appeal, which have been incorporated into the present record by order of this Court, and the symbols "R2" and "SR2" to designate the record on appeal and supplemental record filed on this appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Defendant was charged by indictment with first-degree murder and related offenses (R1 1-4A).[1] He was tried on February 27-March 2, 1979, resulting in guilty verdicts on first-degree murder and three of the related counts (R1 16, 154-58).[2] Following an advisory sentencing hearing on March 5, 1979, the jury recommended the imposition of a death sentence, and the court imposed the death sentence (R1 18-19, 178, 183-90).[3] The judgment and sentence were affirmed by this Court on March 4, 1982. *Breedlove v. State*, 413 So.2d 1 (Fla.), *cert. denied*, 459 U.S. 882 (1982).

Defendant's motion for post-conviction relief was filed on November 30, 1982 (R2 3479-84). The motion was summarily denied on January 4, 1990 (R2 3556-67).

POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF, WHICH MOTION SET FORTH A *PRIMA FACIE* CLAIM OF SUPPRESSION OF FAVORABLE IMPEACHMENT EVIDENCE BY STATE AGENTS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

---

[1] Also charged in the same indictment were counts of attempted first-degree murder, burglary, grand theft, and petit theft. *Ibid.*

[2] Defendant was found not guilty on the attempted murder count (R1 155).

[3] A formal order adjudicating defendant and imposing sentence was rendered on April 2, 1979 (R1 183-90). The court imposed prison sentences of life, five years, and sixty days imprisonment on the remaining counts (R1 179).

STATEMENT OF THE FACTS

I. Trial Proceedings

A. First Phase

The charges in this case arose from the burglary of a residence located at 1315 Northeast 146th Street in Miami during the early morning hours of November 6, 1978, and the death of one of the occupants of the house, Frank Budnick (R1 1-4; T1 716-31). The state proceeded at trial solely on a felony-murder theory (T1 466, 532-33, 1158-59, 1199).[4] The only issue was identity (T1 1121-1202, 1207-23).

The surviving occupant, Carol Meoni, was the only eyewitness to the events inside the house, and she did not observe the assault on Budnick; rather, she was awakened as Budnick, having been wounded by the assailant, was leaving their bedroom (T1 716-18, 726-27). Meoni was unable to identify the person who had assaulted Budnick: she testified that she had observed "this, like, shadow or some-

---

[4] In jury selection, the prosecutor explained premeditated first-degree murder and first-degree felony murder to the prospective jurors, taking the position that "[t]he instant case involves the felony murder concept," and that the state would establish "a felony murder, a murder committed during the commission of one of those felony crimes that the legislature talked about, namely: burglary." (T1 466). The state continued to maintain this position in closing argument, asserting that defendant was "guilty of first-degree murder, because in the course of committing a burglary, he killed someone * * * [w]hether he premeditated the killing or not, he killed someone, and therefore it is first-degree murder." (T1 1158-59). The prosecutor re-emphasized the state's position in concluding his argument:

> Ask yourself two simple questions: "Did he commit a burglary, and in the course of that burglary, did he kill someone," and that is all you have to answer to yourself, and you go back there and take that little verdict form that says "first degree murder, guilty as charged."

(T1 1199).

thing going out of the door" before Budnick left the bedroom (T1 726). She followed Budnick out of the house and saw a knife in the doorway; she subsequently found Budnick lying on the ground near the street (T1 726-28).[5]

Joan Fournier, a neighbor of Budnick and Meoni, testified at trial that she had been awakened by noise coming from their residence at approximately 2:30 a.m. on November 6th, and that she had looked out of her window, from which point she had seen a man riding a bicycle on 146th Street approximately 30 feet away (T1 590-93). Fournier was able to see the man for between four and five seconds; according to her testimony, she saw him stop, look back in the direction of her home, and then ride away (T1 593-95). Fournier could not identify this man or give any description of him except that he was "maybe five foot ten, and he looked husky, about 190, but I am not sure about that." (T1 593).[6] She further testified that, as she was watching the man on the bicycle, "[t]he color blue stuck in my mind," but that she was not sure "if it was from the bicycle or from the clothing." (T1 594).

Police officers were summoned to the scene, arriving at ap-

---

[5] Budnick died as the result of a stab wound to his chest, according to the medical examiner, Dr. Kessler (T1 766, 769). The doctor also testified that he had observed "defense wounds" on Budnick's right hand, which wounds were consistent with the deceased having attempted to seize the knife from his assailant (T1 772-73). Dr. Kessler had been called to the scene on the night of the homicide, and had taken photographs of Meoni, showing wounds to her head and "defense wounds" on her hands as well (T1 762-65). Meoni testified that she had been awakened by a "severe pain" in her head, and subsequently realized that she had suffered a wound above her eye (T1 726-31). The injuries to Meoni were the basis for Count II of the indictment, charging defendant with attempted murder (R1 1-2). Defendant was found not guilty of that charge by the jury (R1 155).

[6] Fournier was unable to see whether the man was black or white (T1 593).

proximately 3:00 a.m. (T1 611-12). The knife and other physical evidence were recovered from the house,[7] and numerous latent fingerprints were also lifted from various surfaces (T1 632-33, 642, 669, 675-77, 678-91, 708-13).[8] None of these fingerprints matched those of defendant (T1 844-45). Meoni's purse was found in the back yard,[9] and investigating officers found scratches on the latch plate of a utility room door as well as wood chips on the floor of the room (T1 615, 675-78).[10] Three jalousie window panes were missing from the door to the room, which was open (T1 621).[11]

The two Dade County detectives assigned to the case, Julio Ojeda and Charles Zatrepalek, began their investigation on November 6th (T1 873-77, 1007), and shortly thereafter the officers learned that a blue 10-speed bicycle had been taken from a house near

---

[7] Among the items that were seized was a pillow which from the deceased's bed; the pillow was introduced into evidence and the technician who recovered it testified that there had been a "slash" mark and bloodstains on the pillow and case (T1 642-48).

[8] Among the items that were unsuccessfully dusted for fingerprints was a partially full bottle of "Thunderbird" wine that was found on the front lawn of the house (T1 669, 711). No fingerprints were recovered from the knife (T1 711-12), which Meoni identified at trial as having been taken from her kitchen (T1 739). Two kitchen drawers were found open by crime-scene investigators (T1 664-65). The investigators also found Budnick's trousers on the living room floor (T1 661); Meoni testified that Budnick left the trousers on the bedroom dresser (T1 723).

[9] Meoni testified that the purse had been left on a chair in the living room when she went to bed that night (T1 722). She testified that money and a pocketwatch had been taken from the purse, and that several other items had been taken from the house: another pocketwatch, a watch with rhinestones on the face, and two pairs of earrings (T1 733-35).

[10] Defendant's home was searched after his arrest (with his mother's consent) and a screwdriver was found underneath a sofa on which defendant usually slept (T1 893-97).

[11] Meoni testified that the door had been locked (T1 723).

Meoni's residence (T1 877-81, 1008).[12] Defendant was arrested on unrelated offenses on the night of November 8, 1978 (T1 44-45, 67-81, 797-804), and the stolen bicycle subsequently was discovered at his home (T1 813, 890-93, 1010-11). The detectives questioned defendant's mother, Mary Gibson, and his brother, Elijah Gibson (T1 908-09, 1012).[13] Based upon information obtained from the Gibsons

---

[12] Debbie Layton, the young girl who owned the bicycle, testified that her brother had borrowed it on the night of November 5, 1978, and had left it leaning against the side of the house when he came home at approximately 10:00 p.m. (T1 786). The bicycle was not there on the following morning (T1 787, 828).

[13] The Gibsons did not testify at trial, and their statements were introduced through Detective Ojeda, who testified that they had told him that defendant had had a blue bicycle on the morning of November 6th, that he had had blood on his trousers when he returned home the night before, and that he had been in possession of a rhinestone watch at that time (T1 923-24, 927-31, 937, 939-41). The trial court permitted the prosecutor to elicit these statements before the jury (T1 923-37, 938-41), ruling that they were being introduced only to show "what the defendant heard during the course" of the interrogation (T1 933), and so instructed the jury (T1 936). Defendant's repeated objections were overruled (T1 923-24, 927-32), and his motion for mistrial was denied (T1 934). On appeal, this Court ruled that the trial court had "properly admitted the detective's testimony about what the Gibsons said because it came in to show the effect on Breedlove rather than for the truth of those comments." *Breedlove v. State*, 413 So.2d at 7.

During the pendency of defendant's direct appeal, counsel was permitted by the trial court to examine numerous police reports which had been withheld from trial counsel (SR1 37); defendant's counsel had requested production of reports prepared by police officers who had been listed as prosecution witnesses, but the trial court had ruled that defendant was entitled to disclosure only of those portions of the reports which reflected statements attributed to defendant (R1 31-37; SR1 24-30). Upon gaining access to these documents during the direct appeal, defendant's counsel discovered a report by Detective McElveen which reflected a statement taken from Elijah Gibson, in which Gibson had told the detective that defendant, after having been "thrown out" of their house by their mother on the night of November 6th, had returned home at approximately 2:30 a.m., stayed until approximately 3:30 a.m. and then left, returning again an hour later. Report of Detective S. McElveen (filed in Case No. 56,811) at page 7. It was when defendant returned this last time that Gibson observed blood on defendant's trousers and that the pant legs had been cut off. *Ibid.* Defendant told him that he had been in a fight. *Ibid.* Gibson (Cont'd)

and the discovery of the bicycle, they decided to question defendant, who was then incarcerated in the local jail (T1 961-62).[14]

Defendant denied involvement in the offenses during the first interrogation session on November 9th (T1 921-40), but was placed under arrest for the homicide at the conclusion of the questioning

---

also told the detective that defendant had had two "gold watches" and a "heavy gold chain." *Ibid.* On defendant's direct appeal, it was asserted that the failure to disclose the favorable evidence reflected in Gibson's statement to McElveen was reversible error, Brief of Appellant, Case No. 56,811, at 10-15, and this Court rejected that claim, holding that defendant had "failed to demonstrate that the material contained in McElveen's report could not have been found through reasonably diligent preparation or that nonproduction of this report prejudiced him." *Breedlove v. State*, 413 So.2d at 4.

[14] Prior to trial, defendant moved to suppress the statements that were obtained from him on November 9th, and during a second interrogation on November 21st (R1 69-70). Defendant testified at the pretrial hearing that he had been physically abused by the detectives during the November 9th interrogation (T1 309, 321-33). Zatrepalek denied having abused defendant (T1 348). Defendant also testified that, on November 21st, he had told the officers who brought him from the Dade County Jail to the police station that he did not want to be questioned (T1 312). This decision was based upon the advice of his appointed counsel, who had interviewed him after the November 9th interrogation session and his subsequent arrest and had told him not to make any statements to the police in the absence of an attorney (T1 285-88, 295). Defendant testified that his refusal had been heard by the corrections officer who had taken him from his cell, and his testimony was corroborated by the officer (T1 273-77, 300-02; R1 89-91).

According to Zatrepalek, defendant had been brought to the homicide office for interrogation by a Hallandale officer, Detective Nagle, who suspected defendant of involvement in a 1974 case in his jurisdiction (T1 112-16, 223), and, upon defendant's arrival, he asked for and was given an opportunity to speak with his mother (T1 229-30). Zatrepalek testified that Ms. Gibson thereafter told him that defendant would speak with him, and he then obtained an inculpatory statement from defendant (T1 229-40). Nagle questioned defendant on the following day (T1 120, 242), and Zatrepalek testified that defendant had asked for him to be present during the interrogation (T1 351). Defendant denied having asked Zatrepalek (whom defendant called "Charlie" at the officer's suggestion because he "couldn't remember his last name") to be present at this interrogation (T1 324, 331), and testified that Zatrepalek had ignored his requests to see his lawyer, telling him that it would be a "waste of time" because "they was [sic] going to get a confession." (T1 313). Defendant further testified that he had (Cont'd)

(T1 943-44).[15] In a second interrogation on November 21st, defendant made inculpatory statements to Zatrepalek,[16] which statements were introduced into evidence at trial (T1 1030; R1 130-34).

Zatrepalek related defendant's statement: he testified that defendant stated that he entered the house through the back door, obtained the knife from the kitchen, took a purse outside and emptied it, and stabbed the Budnick inside the bedroom when Budnick awakened as defendant was attempting to open a jewelry box (T1 1030). Zatrepalek further testified that defendant had admitted taking the bicycle from a nearby house after the murder (T1 1030).

In his stenographically-recorded statement, defendant told Zatrepalek that he had entered the house through the back door between 1:30 and 2:00 a.m. on November 6th by "walk[ing] in the back door," which had been left unlocked (R1 131).[17] He took a purse which he found on a couch in the living room and "dumped it" in the

---

made the November 21st statement "because I was threatened that I would be beaten again." (T1 315).

[15] According to Ojeda, defendant made certain statements (while Zatrepalek was out of the room) which were deemed significant (T1 988). Specifically, Ojeda testified that defendant had stated that he had taken the blue bicycle "'two doors down from the murder,'" and that no fingerprints would be found inside the house because he "'was not in that house'" or because he had been wearing socks on his hands (T1 938, 940-42). Additionally, defendant told the officers that he had had blood on his trousers when he had returned home that night, but that the blood had been from a fight at a convenience store; Ojeda testified that defendant, during the course of accusing the officers of "'fram[ing]" him, said: "'I suppose the blood on my pants, you are going to say comes from the man inside the house?'" (T1 939-40). Ojeda believed that this admission was of importance because neither he nor Zatrepalek had told defendant of the sex of the deceased prior to that time (T1 941).

[16] Ojeda, who injured his back between the two interrogation sessions, was not present on November 21st (T1 945).

[17] According to defendant's statement, the utility room door did not have jalousie windows. *Ibid.*

backyard of the house, taking a watch and money from the purse (R1 132).[18] Defendant then went back into the house "to look for more jewelry and money," and obtained a knife from a table in the living room (R1 132-33). He described the fatal encounter as follows:

> A. . . . I started going through . . . a jewelry box, the dresser drawers, and I made some noise, and the guy woke up and grabbed m[e] by my shirt, and I swung back with the knife, and I ran.
>
> * * *
>
> A. I jumped, panicked. He just grabbed my shirt. I swung back with the knife . . . and then he turned loose of my shirt and I ran.

(R1 133-34).[19] Defendant further stated that he had run out of the house[20] and had taken a bicycle from a nearby residence, on which he rode home, arriving at approximately 2:30 a.m. (R1 134).

At the sentencing phase of the trial, the prosecution presented: a sergeant from the Los Angeles Police Department, who gave testimony with regard to two sexual assaults for which defendant previously had been convicted, Dr. Ronald Wright, a medical examiner who testified regarding the pain suffered by the deceased prior his death,[21] and two psychiatrists (T1 1291-1323, 1392-1417). In

---

[18] Under questioning by Zatrepalek as to whether the watch had been "unusual," defendant stated that "[i]t had some stones like diamonds * * * [i]n the face of it." (R1 132). He told Zatrepalek that he subsequently had sold the watch to a "junkie" (R1 135).

[19] Under questioning, defendant denied having stabbed or otherwise injured Meoni (R1 134).

[20] He told Zatrepalek that he "assume[d]" that he had dropped the knife, along with a pair of trousers that he "picked up" as he was running out and dropped in the hallway as he ran (R1 134).

[21] Dr. Wright testified that the stab wound inflicted upon the deceased would have caused him "considerable" pain, and that he would have been conscious and aware of the pain prior to his death (T1 1319-22). Objections to this testimony on the ground that it (Cont'd)

mitigation, defendant proffered his lack of intent to cause death and his impaired mental and emotional condition (T1 1324-86, 1442-54).[22] The jury returned a verdict recommending imposition of a death sentence (R1 1573), which sentence was thereafter imposed by the trial court (R1 1576-83).[23]

III. Post-Conviction Proceedings

A. The Motion for Post-Conviction Relief

Defendant's motion for post-conviction relief alleged, *inter alia*, that Detectives Ojeda and Zatrepalek, who had taken his post-arrest statements and were critical witnesses against him at trial, had been, at the time of the investigation and trial, engaged in extensive criminal activities, including the use of, and trafficking in, narcotics (R2 3480-81, 3485-505). The motion was supported

---

was irrelevant to whether the homicide was within Section 921.141 (5)(h), Florida Statutes (1989), were overruled (T1 1311-14).

[22] The state's expert witnesses testified that defendant did not suffer from brain dysfunction or schizophrenia, but that he had "long-standing behavioral and personality difficulty," that he "has had emotional problems for a prolonged period of time, from childhood or adolescence, . . . manifested by his misuse of drugs," that it was possible that he "had a diminished capacity as a result of drug and alcohol intoxication," and that he is a "sociopath" with "a certain amount of impairment." (T1 1397, 1399, 1400, 1409-10, 1415). Defendant presented three expert witnesses who reached the following conclusions: that defendant suffers from "an extreme mental condition," *i.e.*, "chronic paranoid schizophrenia" (T1 1369, 1371), that he has neurological dysfunction (T1 1328, 1343), and that, as a result, he "has definite impairment" which renders him likely to respond with inappropriate hostility in a stressful situation (T1 1329, 1348, 1372-73).

[23] On appeal, defendant claimed, *inter alia*, that the failure to disclose the police reports, see n.13, *supra*, violated *Brady v. Maryland*, 373 U.S. 83 (1963), that the trial court erred in denying his motion to suppress statements, see n.14, *supra*, that the admission into evidence of the out-of-court statements of his mother and brother, see n.13, *supra*, violated the Confrontation Clause, and that the death sentence was imposed in violation of the Eighth and Fourteenth Amendments. Brief of Appellant, Case No. 56,811, at 10-39, 48-86. This Court rejected those arguments and affirmed the judgment and sentence. *Breedlove v. State*, 413 So.2d at 4-10.

by an appendix comprised of excerpts from the trial record in *United States v. Alonso, et al.*, U.S.D.C. No. 81-270-Cr-JP, in which Ojeda was a defendant and Zatrepalek the lead government witness (testifying in exchange for a bargained guilty plea and promise of immunity in both state and federal courts), involving a major police-corruption prosecution of numerous Dade County homicide detectives. *See United States v. Alonso,* 740 F.2d 862, 866 (11th Cir. 1984), *cert. denied,* 469 U.S. 1166 (1985).

1. Criminal Activities of Ojeda and Zatrepalek

The indictment in this case, which was filed on July 13, 1981, charged Ojeda and several other Public Safety Department detectives with numerous federal crimes (SR2 1-39).[24] The essence of the indictment was that the detectives had used the homicide section of the Public Safety Department as a racketeering "enterprise," in violation of the federal Racketeering Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1961, from July of 1977 through October of 1979, and had committed numerous state and federal crimes in connection with that enterprise. *Ibid.*

The evidence adduced at the federal trial established that Ojeda, Zatrepalek, and other homicide detectives had become involved with Mario Escandar, a well-known south Florida organized-crime figure, following Escandar's arrest on kidnapping charges in November of 1977, and that the detectives had frequented his home in Miami Springs on a regular basis for the purpose of obtaining and

---

[24] The other named defendants were: Fabio Alonso, Robert Derringer, Raymond Eggler, Thomas Gergen, Pedro Izaguirre, Steven McElveen, Charles Rivas, and David Ward (SR2 1). Zatrepalek was not charged because he had been cooperating with the government since June of 1980 (R2 2555-56).

using cocaine, consorting with prostitutes procured by Escandar, and accepting money and gifts from him (R2 641-775). The relationship between Escandar and the detectives was characterized by the Court of Appeals for the Eleventh Circuit in its decision affirming the convictions resulting from the federal trial, as follows:

> Detectives Rafael Hernandez and Ojeda . . . arrested Escandar in 1977 for kidnapping. Escandar became friendly with Hernandez and Ojeda as well as with Detectives Alonso, Izaguirre, Derringer, Charles Rivas, George Pontigo, and Charles Zatrapalek [sic]. The men often visited Escandar at his home after he was released on bond.
>
> While Alonso and Ojeda were in his house, Escandar ingested cocaine in their presence. Ojeda received some of the drug and took it with him. Eventually many of the defendants began using cocaine supplied by Escandar or Melvin Adler, Escandar's associate. Escandar even gave them money and gifts and provided prostitutes for them.
>
> During this period of time, the kidnapping charges against Escandar were still pending. In an effort to dispose of the case, Escandar sought Ojeda's help in reducing the penalty. In response to Escandar's inquiries, Ojeda assured him that he could receive a six month sentence without too much trouble. According to Escandar, he spent $500.00 to $1,000.00 a day on the parties for the officers in his quest for a light sentence. Ojeda told the prosecutor that Escandar was providing him with good contacts and information and that he did not want Escandar to spend much time in jail. Based on Ojeda's recommendations, Escandar, facing a maximum of life imprisonment, was sentenced to fifty-nine days in jail and five years probation.

United States v. Alonso, 740 F.2d at 866.

Escandar testified at trial that he had provided Ojeda, Zatrepalek, and other detectives with liquor, jewelry, and cocaine, and that the purpose of these gifts had been to secure a lenient sentence (R2 661-73, 676-77, 682-84, 701-14, 774-75). Zatrepalek testified that Ojeda had introduced him to Escandar in December of

1977 and had thereafter given him cocaine obtained from Escandar (R2 2567, 2569, 2573). Zatrepalek went to Escandar's home on many occasions, beginning in February of 1978 and continuing into 1979 (R2 2578, 2581). He described these visits as "[m]ainly social," *i.e.*, for the purpose of using cocaine, drinking, and playing pool (R2 2581-82), and stated that he and Ojeda been given cocaine by Escandar "[s]everal times in '78." (Tr. 2585-86). Zatrepalek further testified that he and Ojeda had used cocaine at Escandar's house when it was provided to them (Tr. 2587-88).

Zatrepalek described their drug use as follows:

> A. . . . [I]n the homicide office, his house, my house. There would be sometimes that we would be in the car together than we would use it. He would have it or I would have it. He would give it to me or I would give it to him.
>
> Q. How often did that happen?
>
> A. Several times in 1978.
>
> Q. How many times is "several"? More than five or less?
>
> A. Much more than five.
>
> Q. More than ten?
>
> A. I couldn't give you a specific number. I know it happened quite often in '78. It wasn't a daily thing. You know, it wasn't a type of thing we did everyday. It happened. If it happened on the week-end or happened on the Friday night or during the middle of the week.

(R2 2589-90). Zatrepalek further testified that he and other detectives had continued to use cocaine in 1979 "amongst ourselves . . . at the homicide office, bars, social occasions at houses." (R2 2766-68). He stated that "Ojeda and I used it in the homicide

office, in vehicles, and different bars." (R2 2778).[25]

In addition, the transcript of the federal trial reflects that Ojeda and Zatrepalek "ultimately participated in an illicit enterprise involving drugs and money." *United States v. Alonso,* 740 F.2d at 866. The incidents which occurred prior to and during the time that defendant's case was pending in circuit court may be summarized as follows:

> (1) On September 11, 1978, Zatrepalek and Detective Izaguirre (another indicted officer) stole approximately one pound of cocaine from a homicide scene; they sold the cocaine and netted approximately $6,000 each (R2 432, 2589, 2609).
>
> (2) On December 5, 1978, Zatrepalek, Ojeda, and other officers entered the home of Armando Fiallo, pretending to be involved in an official investigation. They took $98,000 in cash (of which they kept $36,000, placing the remainder in the property room) and a quantity of marijuana, which they sold (R2 428, 2644-57)

---

[25] George Pontigo, another homicide detective who cooperated with the government in the case, testified that he had first used cocaine in July or August of 1978 at Zatrepalek's house in the company of two other officers, Dave Simmons and Mike McDonald (Tr. 1486-87). After that, he used cocaine with Ojeda in the parking lot of the Holiday Inn near the police department on Northwest 12th Avenue in Miami, which he described as Ojeda's "hangout" (R2 1490-91). He stated that Ojeda had produced a vial of cocaine and that they had both "snorted" the drug, and that he thereafter had continued to use cocaine "on a recreational type basis, several times a week," obtaining the drug "[a]t times" from Zatrepalek and also from Escandar (R2 1491). Pontigo described the drug situation among the homicide detectives as "wide open," and testified that Ojeda, Zatrepalek, and the other indicted detectives used cocaine in the motel parking lot and the homicide office on a regular basis (R2 1491-97). Other witnesses called by the government also attested to cocaine use at Escandar's home by Ojeda and Zatrepalek during this period of time (R2 1730-35, 2025-30, 2254-58).

(3) In January of 1979, Ojeda and another officer stole money and quaaludes from a homicide scene. They divided the money and drugs with Zatrepalek, who subsequently sold his share of the quaaludes (R2 429, 2670-73).

(4) On January 18, 1979, Ojeda, Zatrepalek, and another officer arrested Raymond Tateishi, a man whom Escandar had victimized in a confidence game, so as to prevent him from seeking a return of his money, for which they were paid $1,000 each by Escandar. The detectives seized cocaine and $12,000 from Tateishi; they kept the drugs and put the money in the police property room, from which they later removed it illegally in exchange for being paid another $1200. Ojeda and Zatrepalek thereafter arranged to have the prosecutor dismiss charges against Tateishi and a companion whom they also had arrested (R2 425-26, 762-68, 1738-53, 2031-40, 2044-67, 2077-82, 2683-2743, 3081-3113).

(5) In January of 1979, Zatrepalek and Derringer (another indicted officer) assisted Escandar and an associate in stealing money from several persons who had planned to buy marijuana from Escandar. At Escandar's request, the detectives went to his home and detained the prospective buyers while Escandar's associate burglarized their automobile, and the proceeds were divided among the participants in the scheme (R2 431, 2846-53).

(6) In April of 1979, Ojeda and Zatrepalek agreed to assist Mel Adler and Ronnie Solomon, two drug dealers whom they had met through Escandar, in a "protection" scheme by feigning police surveillance of a boat dealership. As a

result of the scheme, Adler and Solomon obtained a large amount of marijuana, and paid the detectives $5,000 each (R2 430-31, 1765-99, 2427-40, 2854-59).[26]

2. State Knowledge of Criminal Activities

Defendant's motion further alleged that knowledge of the detectives' criminal activities was imputable to the state in that (1) there had been an internal-review investigation of Ojeda in 1978, which investigation was still pending as late as 1982, (2) one of the trial prosecutors, Assistant State Attorney Lance Stelzer, was personally aware of the detectives' close relationship with Escandar and had been present when Ojeda used cocaine, and (3)

---

[26] The detectives' criminal activities continued through October of 1979, and included a scheme with Adler and Solomon to steal drugs from Columbian marijuana smugglers (R2 424-25) and thefts of impounded money from the police property room (R2 2628-42, 2913-25). Escandar became embroiled in a dispute with the Columbian smugglers as a result of the theft, and he turned for assistance to Joe Dawson, an FBI agent, in the summer of 1979 (R2 943-47); unknown to the detectives, Escandar had been an FBI informant since 1972. *United States v. Alonso,* 740 F.2d at 867. This contact led to electronic surveillance of Escandar's home. *Ibid.* Mel Adler and Rafael Asse (another Escandar associate) were arrested in October of 1979 and cooperated with the government (R2 2250-52).

By November of 1979, local newspapers were publishing articles detailing the detectives criminal activities, leading Zatrepalek and Ojeda to alter police reports in an effort to conceal their conduct (R2 2790-93, 2906-12). Zatrepalek was suspended in November of 1979, and, in June of 1980, entered into a cooperation agreement with the federal government (R2 2554-56). On March 24, 1981, Escandar was arrested for soliciting a murder and began actively to cooperate with the federal investigation (R2 1150).

Zatrepalek's agreement with the government called for a guilty plea to a narcotics conspiracy charge prior to the trial (R2 434). Ojeda ultimately was convicted of conspiracy to conduct and conducting a RICO enterprise, two counts of unlawful arrest under color of state law, two counts of possession of cocaine with intent to distribute, unlawful appropriation of property, conspiracy to defraud the government, and two counts of tax evasion, for which convictions he was sentenced to a total of 14 years of imprisonment. *United States v. Alonso,* 740 F.2d at 865-66 n.1.

the detectives knew of their own illegal activities (R2 3494-500). The internal-review file supplied by defendant to the trial court with his motion (SR2 40-66) had been disclosed in the trial after having been provided to the federal prosecutors by the police department (R2 580-83).

This internal review file reflects that the Drug Enforcement Administration contacted the Dade County Public Safety Department internal review section in January of 1978, and that Sergeant James Wander, an internal-review investigator, questioned a DEA informant, Eduardo Lavin, on January 4, 1978 (SR2 40-41). Wander's notes set forth a summary of his interview: Lavin told him that he had been an informant for Ojeda and another officer, Detective Hernandez and had been "burned" six months earlier; Ojeda and Hernandez thereafter made arrangements for him to stay at Escandar's house and he remained there for 10-12 days in December of 1977; while staying with Escandar, Lavin observed large amounts of cocaine at the house, saw Escandar give expensive jewelry and whiskey to Ojeda and Hernandez, and, on one occasion, give Ojeda a "small bottle of cocaine." (SR2 41-44,53-62).

Based on this information, Wander and another investigator, Detective Lyle Bellerdine, instituted a surveillance operation at Escandar's home, under internal review file number 78-007 (SR2 47-49). Wander's notes reflect that, on January 6, 1978, he saw Ojeda and Pontigo go into the house, and, looking through the window, saw them in the company of Escandar and other people, including another officer, Detective Alonso (SR2 47-48). An unknown man was seen to hand "something" to Escandar, who then held it under his nose (SR2 48). At the trial of the detectives in federal court, Wander

identified the officers he had seen at Escandar's house on that night as Detectives Ojeda, Alonso, Rivas and McElveen,[27] and testified that he and Bellerdine had looked through a rear window of the house, through which they saw Escandar seated at a kitchen table with Ojeda while the other detectives were in another room playing pool (R2 521-22). Wander described his observations as follows:

> In the kitchen area, where Escandar and Ojeda were, there was a clear plastic bag, we could see on the kitchen table. It contained a white powder. It appeared that both Escandar and Ojeda were placing portions of that white powder either on their hands or some other instrument and placing it to their nose[s].

(R2 522).[28]

Wander and Bellerdine had Lavin polygraphed on January 17, 1978 (R2 3554-55).[29] The report of the polygraph examiner reflects that Lavin specifically was tested on his statements that Ojeda had been given a gold necklace and a pill bottle by Escandar, and that his responses had indicated he was being truthful (R2 3554-55).[30]

---

[27] All of these detectives were indicted. See n.24, *supra*.

[28] Wander acknowledged on cross-examination that the notes did not reflect his observation that Ojeda had been using cocaine (Tr. 539-40). He testified that he had made notes of his own observations, but that he had given them to Bellerdine, who was acting as the lead investigator and prepared a final version of their surveillance report (R2 519-20). At the time of the trial, Bellerdine had moved to New York and Wander was unaware of his address (Tr. 554).

[29] The polygraph was part of the same internal-review file as the surveillance notes; it was supplied to defendant's counsel by the state during the 3.850 proceedings and was filed as a supplemental appendix (R2 72-73, 236-38, 245-46, 3537). The statement taken from Ojeda and a memorandum from Sergeant Bellerdine to his supervisor, which are discussed *infra*, were supplied by the state at the same time. *Ibid*.

[30] According to the examiner's report, his first test of Lavin resulted in an opinion "that there was insufficient date indicative of deception," and that Lavin was therefore truthful (R2 3554). For reasons which do not appear on the report, a second test was (Cont'd)

Ojeda was questioned by the internal review investigators on January 26, 1978, and denied Lavin's allegations (R2 3538-49). On June 6, 1978, Sergeant Bellerdine prepared a final memorandum of the investigation, which was sent to his supervisor (R2 3552-53). The memorandum recites the information obtained from Lavin and that the investigators interviewed Detectives Ojeda, Hernandez, Pontigo, Alonso and Rivas,[31] and states that the detectives all "denied any criminal neglect or wrong doing [sic]," claiming that Escandar "was presently being used as an informant and is providing valuable information." (R2 3553-54). The memorandum further states that Lavin's polygraph showed that he had been "truthful in regards to the exchange of gifts and lying about Detective Ojeda obtaining cocaine." (R2 3554). Bellerdine represented that he had been "unable to develop any evidence to substantiate the allegations" made by Lavin, and stated that "this investigation is being suspended at this time." (R2 3553).[32]

---

administered, which test showed "isolated activity," leading the examiner to "confront[]" Lavin in a "mild 'between test interrogation,'" in the course of which Lavin stated "that he was not certain whether what he thought was cocaine was in a pill bottle or aluminum packet" and "was not certain the necklace was gold." (R2 3554). The examiner eliminated the question regarding the pill bottle, reformulated the question about the necklace, and added a question about Escandar giving Ojeda a watch (R2 3555). His ultimate conclusion was that "[b]ased upon the lack of significant response to these questions . . . it is assumed that [Lavin's] answers were truthful." (R2 3555).

[31] It appears from the record of the 3.850 proceedings that there are other documents in the internal-review file, including the statements of the other named detectives, which were not obtained by, or otherwise supplied to, defendant's counsel (R2 248-50), and which reflect other information obtained by the investigators prior to the June 6th memorandum being prepared. See pp.22-25, *infra*.

[32] Captain Robert McCarthy, the head of the Public Safety Department internal-review section, testified before the court in the detectives' trial when file number 78-007 was disclosed that there (Cont'd)

With regard to Assistant State Attorney Stelzer, court records reflect that he was one of the prosecutors in the 1977 kidnapping case against Escandar, see *Escandar v. Ferguson*, 441 F.Supp. 53 (S.D. Fla. 1977)(granting Escandar bond despite life-felony kidnapping charge), and Escandar, in his testimony at the detectives' trial, identified Stelzer as having attended a party at his home to celebrate a conviction in another criminal case (R2 676).[33] Stelzer, in testimony before the court on a government proffer,[34] acknowledged that he had attended a party at Escandar's home following the conviction of a defendant identified as Jose Miguel Battle (R2 3293-94).[35] He testified that Ojeda, Pontigo, Hernandez, and Alonso also had attended the party, and that he had stayed at Escandar's home until approximately 6:00 a.m. (R2 3294-96). Stelzer further testified that, during the period between 1977 and 1979, Pontigo offered him a substance which appeared to be cocaine and that he he had attempted to inhale it, but had sneezed (R2

---

is information in that file which "could be followed up on." (R2 607). He explained that "we will continue with the investigation at the completion of this [trial] going on in [f]ederal [c]ourt now, to determine whether or not additional information is gleaned." (R2 607-08). McCarthy further testified that the file had been made available for "public access" at some point prior to the trial and that, upon learning that a newspaper reporter was attempting to look at it, he had barred any further access to the file on the ground that it involved "an ongoing investigation." (R2 608).

[33] One of the taped conversations, see n.26, *supra*, between Escandar and two other indicted detectives, Alonso and Pontigo, includes a reference to Stelzer as "Lance," described as their "friend" in the prosecutor's office (R2 1235, 1316, 1323).

[34] Stelzer refused to answer questions regarding the detectives' activities until granted immunity by the court, at the government's request (R2 3241).

[35] The docket in *State of Florida v. Jose Miguel Battle*, Dade County Circuit Court Case No. 77-26442, reflects that the defendant in that case was found guilty on November 11, 1977 (SR2 68).

3296-97). He also stated that he had a "mental picture" of Ojeda using cocaine on "[o]ne, two maybe three" occasions (R2 3297-98).[36]

In his testimony, which was given in federal court on August 31, 1982, Stelzer also stated that the FBI first had contacted him three and one-half years earlier with regard to criminal activities by Dade County homicide detectives (R2 3284).[37] He testified that he had "disclosed to them certain information but not other information" (R2 3258), a statement which he elaborated on as follows:

> Mr. Josefsberg [Stelzer's counsel] accompanied me to that meeting and at the outset . . ., said to all concerned, that I would be happy to discuss . . . any matters relating to any allegation of any impropriety by any of the detectives of the Dade County Public Safety Department, but that if your sole concern was to discuss whether any of them had personally used any drugs, that we were not interested in talking to you, therefore, everything was discussed other than personal use of drugs.

(R2 3284).

B. Trial Court Proceedings

In its initial response to the motion, the state argued that the detectives' criminal activities were inadmissible (R2 3506-22). The trial court granted an evidentiary hearing "on the knowledge of

---

[36] When asked if he recalled the location of Ojeda's apparent drug use, Stelzer responded as follows:

> It is conceivable that it was sometime after a lot of drinking had gone on at the Holiday Inn near the Justice Building on a Friday night. . . . I cannot place any other location to an absolute certainty . . . . It is possible that it was at the home [i]n Miami Springs, but I cannot be certain because the condition I was in and because of the length of time that has passed.

(R2 3298).

[37] He originally testified that it had been two and one-half years earlier (R2 3257-58, 3278), but corrected himself. *Ibid.*

the State," finding that the transcript of the federal trial would likely suffice to establish the illegal activities (R2 65-66).[38] The prosecutor, Assistant State Attorney Musto, refused to agree that the evidence within the knowledge of Ojeda and Zatrepalek had been "suppressed" by the state (R2 29-41, 80-81), and sought an opportunity to litigate that issue after the court granted the evidentiary hearing (R2 110). At the same time, Musto disclosed to the court and counsel that a total of 22 internal-review files had been opened by the police department in the wake of the federal trial; he further disclosed that three Organized Crime Bureau detectives had been detached from the police department to work with the FBI in the investigation of the homicide section, and that the director of the Public Safety Department as well another high-ranking officer were aware of this (R2 74-75).[39]

Counsel requested access to these files prior to the evidentiary hearing (R2 76-77, 80-81, 98). The court deferred ruling on this request until it decided the question whether the knowledge on the part of the detectives of their own criminal activities would be attributed to the state (R2 99-100, 108-10). The state thereafter filed a further response to the motion, in which it argued that the detectives' Fifth Amendment privilege "outweigh[s]" defendant's

---

[38] The prosecutor never completely committed the state to a stipulation to the facts set forth in the trial transcript: after the evidentiary hearing was granted, he stated that "it is reasonable to say in all likelihood we would stipulate if they had a hearing these people would testify they did certain things" (R2 72), and, at subsequent hearings, he represented that he anticipated an eventual stipulation (R2 90, 154, 224, 351).

[39] It was at this hearing that the prosecutor supplied defendant's counsel with additional documents from internal-review file number 78-007. See n.29, *supra*.

"right to discovery" of their criminal activities, and that Ojeda and Zatrepalek had "obtained the knowledge in question in their personal capacities, not as government officials," asserting that "such personal knowledge cannot be deemed attributable to a government official." (R2 3523-24, 3528-29). The trial court accepted this argument, ruling as follows:

> It has got to go beyond the bounds of anything I have ever heard of to say that a police officer is required to incriminate himself; if he does not, then the State is charged with knowledge.
>
> In any event, I am convinced [Zatrepalek] and Ojeda's knowledge is not the State's knowledge, not in a case where the only knowledge [Zatrepalek] had, where [Zatrepalek] himself was engaged in criminal activity during this period of time.
>
> I am convinced they cannot be charged with that type of knowledge. . . . .
>
> . . . I am going to rule that [Zatrepalek's knowledge was not chargeable to the State when the knowledge that he possessed was only knowledge that he, [Zatrepalek] was committing criminal offenses, it cannot be chargeable to the State. Ojeda is the same thing.

(R2 162-63).

Defendant's counsel thereupon renewed his request for access to the internal review files, arguing that the files would reflect knowledge on the part of other police officers, some of whom were not charged in the federal case, of the detectives' illegal activities (R2 164-65, 170).[40] The court refused to compel the state and the police department to provide the files to counsel, and, upon their agreement to an *in camera* inspection by the court, ruled that it would undertake an examination of the files to "look[] for

---

[40] Counsel relied upon indications in the federal record that other police officers, including a number who were not charged in the federal indictment, had been present during some of the criminal episodes in which Ojeda and Zatrepalek had been involved (R2 428, 432, 433, 436 645-73, 717-19, 2596-607; SR2 43-47).

knowledge on the part of anyone connected with the State that Ojeda and Zatrepalek were engaged in criminal activity, knowledge that does not have to incriminate them prior to March of 1979." (R2 171, 178, 181, 183).[41] The parties agreed that the police department's legal counsel would supply the files to the court for review, and that the files would be preserved (R2 187).[42]

The court conducted further hearings upon completion of its inspection of the files (R2 192-260), and, while noting that Zatrepalek had "named just about everybody in the police department" (R2 215), ruled as follows:

> I see nothing in those files to indicate that prior to March of '79 there could have been a reasonable belief on the part of the State that Ojeda and Zatrepalek were engaged in criminal behavior. Yes, there were allegations, but, you know, lots of allegations are made against lots of people.
>
> I do not see any purpose to be served or any reason at this point for me to disclose those files.
>
> * * *
>
> . . . I find nothing in here that could be helpful to you at this point, at least as of March 19, 1979.

(R2 250-51).[43] The only file as to which the court made specific

---

[41] The court further ruled that if pertinent information were to be found, "I intend to speak to the State . . . and tell them that absent some compelling reason otherwise, I will make that . . . known to the defendant so he can at least argue it." (R2 185-86).

[42] The files have been sealed and transmitted to this Court (R2 185, 187, 251, 391, 417-18) and, on May 18, 1990, this Court denied counsel's motion for leave to examine the files in connection with this litigation.

[43] The court restated its ruling at a subsequent hearing, as follows:

> [T]he Court did review in camera approximately twenty-two internal review files of the Metro-

(Cont'd)

findings was No. 78-007, portions of which had been obtained and filed by defendant's counsel; the court informed counsel that there were additional documents in that file, including statements from other police officers, and that Sergeant Wander's notes in that file did not reflect the cocaine use to which he had testified at the detectives' trial (R2 248-50).[44]

The state sought and was granted an opportunity to relitigate defendant's right to an evidentiary hearing (R2 220, 259).[45] De-

---

> politan Dade County Police Department. Some of those files contained various memos from what was apparently an ongoing FBI investigation of Zatrepalek, Ojeda and others to determine whether there was anything contained in those internal review files that would indicate that the State was aware of either ongoing criminal activity of Ojeda and Zatrepalek, or the use of cocaine.
>
> The Court has found no such evidence in those internal review files, that the State was prior to [defendant's trial].
>
> * * *
>
> There was nothing in those files that would indicate that they had knowledge.

(R2 390).

[44] In response, counsel pointed out that a determination of the credibility of Wander's testimony would be inappropriate without an evidentiary hearing, and the court stated, "I am not suggesting it is not true." (R2 250; see R2 343). The court further stated: "I am assuming that everything is true, not just in . . . the petition for relief, but that all facts that have been brought out so far on on these hearings, as being part of your petition." (R2 345).

[45] After first ruling that an evidentiary hearing would be granted, the court several times re-affirmed that ruling, stating, "I do not think there any question or dispute that there is a need for an evidentiary hearing," and that "the petition really shows the grounds for an evidentiary hearing." (R2 115, 127, 134-35). In granting the state's request for further litigation on the question, the court observed: "I think when I said that I was going to give you an evidentiary hearing on this, I am not sure how familiar I was with everything that was going on." (R2 259-60).

fendant's counsel argued that, particularly without access to the internal-review files, a hearing on the question of state knowledge of the illegal activities would require that the trial prosecutor, Assistant State Attorney Stelzer, and Sergeant Wander, the internal-review investigator, be called to testify (R2 339-43). After hearing further argument of counsel (R2 266-346), court thereafter orally ruled that the motion would be denied summarily (R2 391-97).

The court's subsequently-entered written order[46] initially addresses the question whether the state could be charged with knowledge of the detectives' criminal activities (R2 3558-63). The court first ruled that "the officers' knowledge of their own criminal activities cannot be imputed to the prosecution" (R2 3559), supporting that ruling as follows:

> The fact that some matter is known to an individual who is also a government official does not in and of itself mandate the conclusion that the State is charged with constructive knowledge.
>
> * * *
>
> Here, the knowledge of these two police officers that they were engaged in illegal activities is not a fact that was readily available to, or imputable to the state.
>
> The detectives in gaining the knowledge in question (their own criminal activity) were not acting as an arm of the prosecution, or as government officials.

---

[46] The court requested the state to prepare a proposed order (R2 397), and, at the final hearing in the matter, acknowledged that its order was taken from the state's proposal (R2 409). The Court stated that it had "set down everything that went into the Court's thinking in denying your motion" (R2 409), and that it had "tr[ied] . . . to put everything into the order that went into my thinking so that . . . the appellate court knows what went into my thinking." (R2 412). The order, as drafted, "assume[s]" that "everything in the [m]otion, as well as the proffered testimony, the internal review files and the thousands of pages of transcripts are provable and true." (R2 3559).

> The Court also finds that to hold that the detective's knowledge of their own criminal activities was required to be disclosed by these detectives, would be to say that Defendant's right to discovery, a right which is not a constitutional right, would outweigh the detectives' rights against self-incrimination.

(R2 3559-60).

The court also rejected the argument that the prosecutor had had actual knowledge: it found that Assistant State Attorney Stelzer's testimony in federal court "was uncertain as to whether it was Ojeda he observed, whether it was cocaine, whether Ojeda used cocaine, and when the use occurred." (R2 3561). With regard to the internal-review investigator's reports and testimony, the court found as follows:

> Officer Wander testified that on January 6, 1978, while he was on surveillance at Mario Escandar's house, he saw Detective Ojeda place portions of a white powder on his hands or other instrument and place it to his nose. (A. 3,240-3246). However, Wander admitted that his original internal review notes indicated that Ojeda was playing pool, and did not mention that Ojeda was seen using cocaine. A. 3264).

(R2 3561-62).[47]

---

[47] The court found that the documents in internal review file number 78-007 did not support a finding of knowledge attributable to the state:

> The investigation involved allegations made by an informant named Eduardo Lavin that various members of the homicide division, including Detective Ojeda, had visited a crime figure named Mario Escandar, and received cocaine and gifts from Escandar. The conclusion of the investigator was that he could not develop any evidence to substantiate the allegation of Lavin, and the investigation was suspended.

(R2 3563). The court found that the testimony at the federal trial demonstrated that "at some time, perhaps before [d]efendant's trial and perhaps after, Ojeda became aware of an investigation" by internal review (R2 3562), and that defendant had "failed to support (Cont'd)

The court found further support for its finding of no state knowledge in the internal-review files that had been reviewed *in camera*:

> This Court also reviewed, in camera, nineteen (19) Metro-Dade Police Department Internal Review files, . . . and found nothing to support the Defendant's contention that the State had any knowledge of the officer's [sic] criminal activities or Ojeda's alleged use of cocaine at the time of Defendant's trial, nor did these files reveal any pending investigations of either Ojeda or Zatrapalek [sic] at the time of Defendant's trial.

(R2 3562).

Turning to the materiality of the undisclosed testimony, the court first ruled that the testimony of the detectives' criminal activities would not have been admissible because "the information in question does not show a bias toward [d]efendant or possible untruthfulness in regard to the events of the crime charged, but simply go[es] to bad character and general credibility." (R2 3564). The court next noted that defendant had not raised at trial a claim that his post-arrest statements had been coerced, although he had done so in his pretrial challenge to the admissibility of the statement (R2 3564), and held that there was other evidence of the confession's reliability: (1) that defendant's mother had been present at the police station, (2) that defendant had confessed to the Broward County detective, Nagle, after asking for Zatrepalek to be present, (3) that defendant had referred to Zatrepalek as "Charlie," (4) Ojeda's testimony that in defendant's initial interrogation he "said that he took the bicycle [from] the house two

---

his contention either that there was an ongoing investigation or that the detectives were aware of such at the time they testified at trial." (R2 3564).

houses down from the murder, even though he had not been told that there had been a murder there," (5) "when Ojeda told defendant that he did not believe his story about how blood got on [d]efendant's pants, [d]efendant responded that he supposed that Ojeda would tell him that the blood belonged to the man," although defendant "had not been told that the murder victim was a man," and (6) defendant "told Ojeda that he would not find [d]efendant's fingerprints because he was wearing socks" on his hands, and no fingerprints were found in the case (R2 3565-66).[48]

The court's ultimate ruling was as follows:

> After reviewing the pleading[s], memoranda of law, appendices, internal review files, and the trial transcripts and court files submitted in this case, this Court is compelled to find that the standard for relief set forth in *United States v. Bagley*, [473 U.S. 667 (1985)] has not been met by the allegations contained in the Defendant's motion for post-conviction relief, or supporting documents.

(R2 3566-67).

---

[48] The court, which at one time had referred to the confession as "ninety-five percent of the case that the State had" against defendant (R2 159), found that there was "significant corroborative evidence," *i.e.*, that the blue bicycle taken from a neighbor of the deceased on the night of the crime had been found in defendant's yard, that defendant had cut off his trouser legs that night, that defendant had been confronted with statements by his mother and brother and had told them that he had been drinking either Mogen David "20/20" wine or "Thunderbird" wine, that a partially full bottle of "Thunderbird" wine had been found in the deceased's front yard, and that defendant had been in possession of a rhinestone watch when he returned home on the night of the crime (R2 3565-66). The court acknowledged that much of the foregoing drew on out-of-court statements by defendant's mother and brother, noting that it was relying upon "statements made to the police by the [d]efendant's mother and brother which were testified to, but not admitted for the truth of the matter asserted, at the suppression hearing." (R2 3564).

SUMMARY OF ARGUMENT

The state, through its prosecution-team agents, suppressed evidence of the extensive criminal activities and cocaine abuse of the two investigating detectives in this case: it was undisputed before the trial court that the detectives had been engaged in a pattern of conspiratorial narcotics offenses, and that they had been using cocaine on a regular basis, during the time that they were assigned to this case and at the time of defendant's trial. The trial court's determination that the evidence was not suppressed was erroneous as a matter of law because the undisclosed facts were known to the officers themselves, and if that ruling were to be found correct, the court erred in refusing to order an evidentiary hearing on the question where the record did not conclusively refute defendant's allegation that other state agents were aware of the the detectives' criminal activities.

The suppressed evidence was favorable in that it would have been properly used to impeach the officer's testimony. The evidence was material in that the detectives' testimony that defendant's confession had been voluntarily obtained and their recitations of his oral statements were critical components of the state's case, both on the admissibility of the statements and at the trial-in-chief.

ARGUMENT

THE TRIAL COURT ERRED IN SUMMARILY DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF, WHICH MOTION SET FORTH A *PRIMA FACIE* CLAIM OF SUPPRESSION OF FAVORABLE IMPEACHMENT EVIDENCE BY STATE AGENTS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

A. Introduction

Brady v. Maryland, 373 U.S. 83 (1963), established the principle that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The three elements of a *Brady* claim are that (1) the prosecution suppressed evidence, (2) the suppressed evidence was "favorable" to the accused, and (3) the evidence was "material." *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *Arango v. State*, 467 So.2d 692, 693-94 (Fla.), *vacated and remanded*, 474 U.S. 806 (1985), *adhered to on remand*, 497 So.2d 1161 (Fla. 1986). Defendant's motion for post-conviction relief alleged that agents of the prosecution had failed to disclose facts within their actual or constructive knowledge which would have served powerfully to impeach the testimony of the two critical witnesses against him -- police detectives who had been engaged in significant criminal activities at the time of their investigation of this case and when they testified at trial (R2 3480-81, 3485-505). The question before this Court on this appeal is whether "the motion and the files and records in the case conclusively show that [defendant] is entitled to no relief," Fla.R. Crim.P. 3.850,[49] so as to justify the trial court's summary denial

---

[49] The 1984 amendment to Rule 3.850 added a provision for requiring the state to respond to a facially-sufficient motion, *The Florida Bar Re Amendment to Rules of Criminal Procedure (Rule 3.850)*, 460 So.2d 907 (Fla. 1984), and a trial court may consider matters set forth in a state response "in determining whether an evidentiary hearing is required." *Morgan v. State*, 475 So.2d 681, 682 n.* (Fla. 1985)(citation omitted). In the present case, however, the state's responses did not place any additional facts before the trial court, limited as they were to legal arguments based upon the matters brought before the court by defendant's counsel (R2 (Cont'd)

of the motion (R2 3558-67). *E.g. Holland v. State*, 503 So.2d 1250, 1251-52 (Fla. 1987).

At the outset, there was no dispute in the trial court that defendant's motion alleged a *prima facie* claim that "favorable" evidence had been suppressed, *i.e.*, the motion alleged that impeachment evidence had not been disclosed to defendant's counsel by agents of the prosecution (R2 3480-81). As the Supreme Court recognized in *United States v. Bagley*, 473 U.S. 667 (1985), evidence which is pertinent to impeach prosecution witnesses is well within the reach of *Brady*:

> Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule. Such evidence is "evidence favorable to an accused," so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.

Id. at 676 (citations omitted).

Nor was there any meaningful dispute before the trial court that the facts which defendant claimed had been concealed from him were true: the transcripts of the federal trial of several Dade County homicide detectives establish beyond question that Detectives Zatrepalek and Ojeda, the investigators in this case, had been -- and were, at the time of defendant's trial -- engaged in massive and wide-ranging criminal activities, and the trial court's order appropriately treats these matters as established facts (R2 3557-59).[50] The two points on which the parties disagreed, and on

---

3506-29). The state attorney did provide defendant's counsel with additional documents pertinent to the *Brady* claim, which documents were thereafter filed as a supplement to the exhibits filed in support of the motion (R2 72-73, 236-38, 245-46, 3537-55).

[50] When initially ruling that an evidentiary hearing would be granted, the court found that the transcript of the federal trial would likely suffice to establish the illegal activities (R2 65-(Cont'd)

which the trial court ultimately ruled against defendant, were (1) whether the evidence was "suppressed," and (2) whether the evidence was sufficiently "material" to warrant relief (R2 3558-66). These issues will be addressed in the forthcoming sections of this brief.

B. Suppression By State Agents

1. Knowledge of the Police Officers of Their Criminal Activities.

"The prosecutor's office is an entity and as such it is the spokesman for the Government." *Giglio v. United States*, 405 U.S. 150, 154 (1972); *accord, Antone v. State*, 355 So.2d 777, 778 (Fla. 1978)("[j]ust as there is no distinction between different prosecutorial offices within the executive branch of the United States government for the purposes of a *Brady* violation, there is no distinction between corresponding departments of the executive branch of Florida's government for the same purpose"). Thus, "[t]he State Attorney is responsible for evidence which is being withheld by other state agents, such as law enforcement officers, and is charged with constructive knowledge and possession thereof." *State v. Del Gaudio*, 445 So.2d 605, 612 n.8 (Fla. 3d DCA), *review denied*, 453 So.2d 45 (Fla. 1984); *accord, e.g., State v. Zamora*, 538 So.2d 95, 96 (Fla. 3d DCA 1989); *State v. Alfonso*, 478 So.2d 1119, 1121 (Fla. 4th DCA 1985), *cert. denied*, 491 So.2d 280 (Fla. 1986). Although it "is clear that in the absence of actual suppression of favorable evidence, the prosecution does not violate due process by denying discovery," *Antone v. State*, 410 So.2d 157, 162 (Fla. 1982)

---

66), and the prosecutor, while continuing to seek a summary denial of the motion, acknowledged that "it is reasonable to say in all likelihood we would stipulate if they had a hearing these people would testify they did certain things (R2 72), and, at subsequent hearings, represented that he anticipated an eventual stipulation to the federal trial record (R2 90, 154, 224, 351).

(citations omitted); *accord, e.g., James v. State*, 453 So.2d 786, 790 (Fla.), *cert. denied*, 469 U.S. 1098 (1984), it is equally fundamental that "the state may not withhold favorable evidence in the hands of the police, who work closely with the prosecutor." *Arango v. State*, 467 So.2d at 693.

Invoking these principles, defendant asserted before the trial court that, all other matters notwithstanding, the detectives' awareness of their own criminal activities was sufficient to establish constructive knowledge on the part of the prosecution (R2 3500).[51] The trial court, accepting the state's arguments that the detectives' Fifth Amendment privilege "outweigh[s]" defendant's "right to discovery" of their criminal activities, and that Ojeda and Zatrepalek had "obtained the knowledge in question in their personal capacities, not as government officials" (R2 3523-24, 3528-29), held that their knowledge was not attributable to the prosecution:

> This Court finds that the officers' knowledge of their own criminal activities cannot be imputed to the prosecution.
> . . . The fact that some matter is known to an individual who is also a government official does not in and of itself mandate the conclusion that the State is charged with constructive knowledge.
>
> * * *
>
> Here, the knowledge of these two police officers that they were engaged in illegal activities is not a fact that was readily available to, or imputable to the state.
> The detectives in gaining the knowledge in

---

[51] As the trial court found, the resolution of this issue did not turn upon disputed facts: there was no question but that the detectives had been engaged in these criminal activities, and the issue was presented as a matter of law (R2 99-100, 108-10). The issue is in the same posture on this appeal.

> question (their own criminal activity) were not acting as an arm of the prosecution, or as government officials.
>
> The Court also finds that to hold that the detective's knowledge of their own criminal activities was required to be disclosed by these detectives, would be to say that Defendant's right to discovery, a right which is not a constitutional right, would outweigh the detectives' rights against self-incrimination.

(R2 3559-60).

The most fundamental flaw in the court's reasoning on this issue is its denigration of defendant's *Brady* entitlement as "a right which is not a constitutional right," and which was therefore outweighed by the detectives' Fifth Amendment privilege. *Ibid.* While *Brady* did not "create a broad, constitutionally required right of discovery," *United States v. Bagley,* 473 U.S. at 675 n.7, "[t]he *Brady* rule is based on the requirement of due process," *id.* at 675, which binds the prosecution regardless of whether the state's dereliction "constitutes a discovery violation" under Florida law. *Duest v. Dugger,* 555 So.2d 849, 851 (Fla. 1990). Thus, contrary to the trial court's pinched view of the rights vouchsafed under *Brady,* that decision established a "*constitutional* duty of disclosure." *United States v. Agurs,* 427 U.S. 97, 108 (1976); *accord, United States v. Bagley,* 473 U.S. at 675-76. The trial court's rejection of this aspect of defendant's claim must accordingly be rejected as having been grounded upon an erroneous legal standard. *E.g., Rogers v. Richmond,* 365 U.S. 534, 547 (1961)("[h]istorical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions").

The only precedent which arguably supports the trial court's reliance upon the detectives' personal motives and privilege

against self-incrimination as pertinent to the *Brady* inquiry is *Delap v. State*, 505 So.2d 1323 (Fla. 1987).[52] The *Brady* claim raised in that case on a post-conviction motion was disposed of by this Court as follows:

> Delap contends that his due process rights were violated by the prosecution's failure to disclose impeachment evidence concerning state's witness Len Brumley [chief investigator for the prosecutor's office] which it did not actually

---

[52] The court below did not rely upon *Delap*, and the only decision cited in the court's order of its ruling on this question, *Walden v. State*, 284 So.2d 440, 441 (Fla. 3d DCA 1973), *ibid*, is completely inapposite. In that case, the defendant filed a motion for post-conviction relief, appending to his motion a sworn statement of one Perkins, in which statement Perkins admitted having committed the robbery and assault of which the defendant had been convicted. 284 So.2d at 440-41. At a hearing on the motion, Perkins refused to confess, invoking the Fifth Amendment privilege, and the court denied the motion. *Id.* at 441. The appellate court held that Walden could not compel Perkins' testimony:

> [T]he appellant was not encountering an evidentiary rule, but rather a witness invoking his Fifth Amendment privilege against self-incrimination. The U.S. Supreme Court has recognized that while a state may not deny a defendant the right to put a witness on the stand, a testimonial privilege such as the privilege against self-incrimination constitutes an exception. [citing *Washington v. Texas*, 388 U.S. 14, 23 n.21 (1967).] . . . [W]hen the Fifth Amendment guarantee collides with the Sixth Amendment in circumstances such as these, the Sixth Amendment right must yield because to require one to incriminate himself in order to afford help to another would be both unwise and unrealistic. [citation omitted].

Ibid. Here, in vivid contrast, it was the *state* which called Ojeda and Zatrepalek as witnesses, and, had the detectives been questioned regarding their criminal activities on cross-examination, Section 914.04, Florida Statutes (1989), would have protected them from from having their testimony "received against [them] upon any criminal investigation or proceeding." *See Hernandez v. Ptomey*, 549 So.2d 757, 758 & n.2 (Fla. 3d DCA 1989)(police officer could be compelled to answer bias-directed questions on cross-examination regarding pending internal-review investigations despite statute making disclosure a misdemeanor). *Walden* is thus no support for the trial court's ruling.

> possess. Some time after Delap's conviction, Brumley was tried and convicted on federal charges of participation in an illegal narcotics smuggling conspiracy which had occurred during the time of Delap's trial. Formulating an argument deriving from *Brady v. Maryland*, [citation omitted] Delap contends that Brumley's status as a member of the prosecution team requires us to impute knowledge of his criminal wrongdoing to the prosecution in order to find a duty to disclose. We find this argument meritless, and repeat our observation that "[i]n the absence of actual suppression of evidence favorable to an accused . . . the state does not violate due process in denying discovery."

Id. at 1323 (citations omitted). If this Court intended to hold in *Delap* that a police officer's knowledge cannot be imputed to the prosecution when the officer's own possibly-criminal conduct is at issue, its decision was a complete departure from well established precedent.

In *Arango v. State*, for example, involving a post-trial *Brady* claim in a homicide case, the defendant asserted that the state had withheld exculpatory evidence which would have corroborated his defense that the murder of which he had been convicted had been committed by three other persons, one of whom had "jump[ed] off the bedroom balcony" to escape. *Arango v. State*, 467 So.2d at 693. The defendant in that case discovered after his trial that a "semi-automatic pistol was found under the balcony of his apartment the day following the crime and that it was turned over to the police investigating the murder." *Ibid.* The lead investigator acknowledged that she had received the gun, but claimed "she did not and still does not think the pistol . . . was involved in the crime." *Ibid.* The prosecutor did not know of the existence of the gun prior to trial, but this Court ruled that the detective's knowledge of the gun was attributable to the prosecution and that there had been

"state suppression of evidence favorable to the defense." *Id.* at 693-94. This is the uniformly-applied rule. *E.g., Stano v. Dugger,* 901 F.2d 898, 903 (11th Cir. 1990)(en banc); *United States ex rel. Smith v. Fairman,* 769 F.2d 386, 392 (7th Cir. 1985); *Walker v. Lockhart,* 763 F.2d 942, 958 (8th Cir. 1985), *cert. denied,* 478 U.S. 1020 (1986); *Martinez v. Wainwright,* 621 F.2d 184, 186-87 (5th Cir. 1980); *United States v. Antone,* 603 F.2d 566, 569-70 (5th Cir. 1979); *Barbee v. Warden, Maryland Penitentiary,* 331 F.2d 842, 846 (4th Cir. 1964).

In support of its holding in *Arango,* this Court relied upon *Smith v. Florida,* 410 F.2d 1349 (5th Cir. 1969), a decision which is pointedly appropriate in analyzing the trial court's order in this case. In *Smith,* an accomplice testified against the defendant in a robbery trial, and thereafter, in a subsequent proceeding in another county, testified that the police had induced him to testify falsely. *Id.* at 1349-50. He was denied relied on a state motion for post-conviction relief and on his subsequent petition for habeas corpus because the prosecutor testified that "he had no knowledge" of any inducements by the police to obtain false testimony. *Id.* at 1350. Finding that "[t]he term 'prosecuting officials' has here been given a narrow interpretation to mean only the prosecuting attorney," the Fifth Circuit held that "it makes no difference if the withholding is by the prosecutor or by officials other than the prosecutor" because "'[t]he police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure.'" *Id.* at 1351 (quoting *Barbee v. Warden,* 331 F.2d at 846).

Smith is instructive because there, as in the present case, an

argument could be fashioned that the officers were guilty of criminal acts in the suppression of evidence, yet the court attributed their knowledge to the prosecution team.[53] Similarly, in *Schneider v. Estelle*, 552 F.2d 593 (5th Cir. 1977), the defendant was convicted of robbery in state court, based upon the testimony of a police officer, Nicholson, who, acting in an undercover capacity, purportedly attempted to buy drugs from the defendant, who terminated the transaction by robbing the officer. *Id.* at 594. The defendant testified at trial that he had stolen the money by artifice, not by force. *Ibid.* After his conviction, the defendant obtained an affidavit from one Hardin, a police informant who had introduced Nicholson to Schneider, in which Hardin related a statement by Nicholson which conflicted with his trial testimony and corroborated Schneider's version of the events. *Id.* at 594-95. Hardin further averred that Schneider had concocted the robbery accusation to "cover up the fact that he had been 'burned'" by Schneider. *Id.* at 595. Following *Smith*, the Fifth Circuit rejected the state's argu-

---

[53] To like effect is the earlier district court decision in *Nash v. Purdy*, 283 F.Supp. 837 (S.D. Fla. 1968), in which a defendant convicted of conspiracy to steal 1,000 cases of whiskey produced post-trial statements from an alleged accomplice (who had entered a guilty plea and did not testify at trial) that he had told investigators of Nash's innocence. *Id.* at 840-41. Evidence taken at a hearing on Nash's habeas corpus petition established that the prosecutor had been unaware of the statement by the accomplice, *id.* at 841, but the court held:

> The fact that any evidence allegedly suppressed from the defense was also withheld from the prosecuting attorneys has no bearing on this issue. It is clear that non-disclosure is not neutralized when the deception is practiced on the prosecuting attorney as well as the defendant.

Ibid (citing *Barbee v. Warden*).

ment that the prosecutor's unawareness of Nicholson's false testimony barred relief:

> Nicholson was a state law enforcement officer. As such, he was a member of the prosecution team. If the state through its law enforcement agents suborns perjury for use at the trial, a constitutional due process claim would not be defeated merely because the prosecuting attorney was not personally aware of this prosecutorial activity.

Ibid (citations omitted); *accord, Halliwell v. Strickland,* 747 F.2d 607, 609 (11th Cir. 1984)(following *Schneider*'s holding that "the government may not just assert ignorance of information another branch of the government may have")(footnote omitted), *cert. denied,* 472 U.S. 1011 (1985). In *Schneider,* as in the present case, the officer could be said to have been "not acting as an arm of the prosecution," in "cover[ing] up" his own ineptitude, yet in that case the officer's knowledge nonetheless was imputed.

Smith and *Schneider* were relied upon by the court in *Freeman v. State of Georgia,* 599 F.2d 65 (5th Cir.), *cert. denied,* 444 U.S. 1013 (1979), a decision which applies their rationale utterly to reject the proposition relied upon by the trial court in this case, *i.e.*, that a police officer's nondisclosure of favorable evidence cannot be attributed to the state when personal motives may have led to the nondisclosure. In *Freeman,* an eyewitness to the homicides of which the defendant was convicted "seemed to disappear" after she briefly had been held as a material witness in the case. *Id.* at 68-69. At trial, the lead investigator in the case, Sgt. Fitzgerald, "consistently maintained that he did not know of her whereabouts," while, as was learned after the trial, "Fitzgerald had not only located Darlene [the witness] but had become her trusted confident [sic]," whom, "[f]or apparently personal rea-

sons," he concealed from both the prosecution and the defense. *Ibid.*[54] Rejecting the state's argument that Fitzgerald's undisputedly-personal motivations for concealing the witness relieved the state of constructive responsibility for the suppression of evidence in the case, the Court held:

> We find, however, that Sgt. Fitzgerald's conduct is attributable to the state *regardless of his motivation* . . . .
>
> First, we cannot accept the state's reasoning that because Sgt. Fitzgerald's actions were personally motivated and the other state officers' conduct was proper, Fitzgerald's actions cannot be imputed to the state. *We feel that when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the state as part of the prosecution team.* [citing *Smith v. Florida*]. *Smith* relied on *Barbee v. Warden* [citation omitted] where the Fourth Circuit Court of Appeals stated:
>
> > The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure . . . .
> > The duty to disclosure is that of the state, which ordinarily acts through the prosecuting attorney, but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused.

Id. at 69-70 (citations omitted).[55]

---

[54] The detective's purported motive was "to shield the witness from some apprehended danger involving her violence prone husband or some other spurious or illogical reason, allegedly involving politically warring factions" within the local police department. *Ibid.* As the decision states, "[t]his close relationship developed into an O'Henry ending as Darlene married Sgt. Fitzgerald one year after the trial." *Ibid.*

[55] *Freeman* was cited with approval in the decision of the Eleventh Circuit in *Delap v. Dugger,* 890 F.2d 285 (11th Cir. 1989), in deciding the appeal by the defendant in *Delap v. State* from an order denying his petition for writ of habeas corpus. The Eleventh Cir- (Cont'd)

The decision in *Delap*, if read to require actual knowledge by a prosecutor of a police officer's criminality for a viable *Brady* claim to be made, and the ruling of the court below are irreconcilable with the foregoing precedent. The requirement of a bad-faith motive on the part of the police to prejudice an accused in the litigation, as opposed to any other improper motive which leads to the suppression of favorable evidence, is also completely inconsistent with *Brady* itself, which dispensed with any notion that "the good faith or bad faith of the prosecution" is relevant when favorable evidence goes undisclosed. *Brady v. Maryland*, 373 U.S. at 83. The knowledge of the detectives in this case of their criminal activities must therefore be imputed to the prosecution, and the suppression of evidence in this case is thereby established.

2. Knowledge of Other State Agents.

If the trial court is nonetheless deemed to have ruled correctly that the detectives' knowledge should not be imputed to the

---

cuit disposed of the case by ruling against Delap on the materiality of the undisclosed information, *id.* at 298-99, as is discussed at p.57, *infra*, but, citing *Freeman*, stated: "we assume *arguendo* but expressly do not decide that Brumley's knowledge of his own illegal activities, as a member of the prosecution team, was imputed to the prosecution." *Id.* at 298 n.16.

More recently, in *Stano v. Dugger*, the Eleventh Circuit considered a claim that a detective, the defendant's lawyer, and a mental health expert had conspired "to take advantage of Stano's psychological weaknesses and to induce Stano to confess" to the homicide at issue to "promote [their] ulterior motives . . . for fame and fortune" in connection with possible book contracts regarding their involvement with a "serial killer" case. 901 F.2d at 899-900. Although the detective was employed "in a county other than the one in which the . . . murder was prosecuted," the Court ordered an evidentiary hearing on the question of constructive knowledge, holding that if the detective "was part of the prosecution team in the . . . case, then the state is reponsible for his knowledge." *Id.* at 903 (citation omitted). Again, the personal motives which led to the alleged misconduct of police officers did not give the court much pause in attributing "police knowledge," *ibid*, to the prosecution.

state, error must be found in the court's refusal to conduct an evidentiary hearing on defendant's allegation in his motion that other state agents had actual knowledge (R2 3480-81, 3495-96). The information available to defendant's counsel prior to the filing of the motion, and such other limited evidence as was supplied by the state during the trial court proceedings, provided an ample basis to find that the allegation was made in good faith and required evidentiary development before being ripe for final ruling.

First, the portions of one internal-review file which were released in connection with the federal trial of the Dade County officers (R2 580-83; SR2 40-66) reflect that the Drug Enforcement Administration contacted the Dade County Public Safety Department internal review section in January of 1978, and that Sergeant James Wander, an internal-review investigator, questioned a DEA informant, Eduardo Lavin, on January 4, 1978 (SR2 40-41). Wander's notes set forth a summary of his interview: Lavin told him that he had been an informant for Ojeda and another officer, Detective Hernandez and had been "burned" six months earlier; Ojeda and Hernandez thereafter made arrangements for him to stay at Escandar's house and he remained there for 10-12 days in December of 1977; while staying with Escandar, Lavin observed large amounts of cocaine at the house, saw Escandar give expensive jewelry and whiskey to Ojeda and Hernandez, and, on one occasion, give Ojeda a "small bottle of cocaine." (SR2 41-44,53-62).

Based on this information, Wander and another investigator, Detective Lyle Bellerdine, instituted a surveillance operation at Escandar's home, under internal review file number 78-007 (SR2 47-49). Wander's notes reflect that, on January 6, 1978, he saw

Pontigo and Ojeda go into the house, and, looking through the window, saw them in the company of Escandar and other people, including another officer, Detective Alonso (SR2 47-48). An unknown man was seen to hand "something" to Escandar, who held it under his nose (SR2 48). At the trial of the detectives in federal court, Wander identified the officers he had seen at Escandar's house on that night as Detectives Ojeda, Alonso, Rivas and McElveen, and testified that he and Bellerdine had looked through a rear window of the house, from where they saw Escandar seated at a kitchen table with Ojeda while the other detectives were in another room playing pool (R2 521-22). Wander described his observations:

> In the kitchen area, where Escandar and Ojeda were, there was a clear plastic bag, we could see on the kitchen table. It contained a white powder. It appeared that both Escandar and Ojeda were placing portions of that white powder either on their hands or some other instrument and placing it to their nose[s].

(R2 522).[56]

Ojeda was questioned by the internal review investigators on

---

[56] Wander and Bellerdine had Lavin polygraphed on January 17, 1978 (R2 3554-55). The report of the polygraph examiner reflects that Lavin specifically was tested on his statements that Ojeda had been given a gold necklace and a pill bottle by Escandar, and that his responses had indicated he was being truthful (R2 3554-55). According to the examiner's report, his first test of Lavin resulted in an opinion "that there was insufficient date indicative of deception," and that Lavin was therefore truthful (R2 3554). For reasons which do not appear on the report, a second test was administered, which test showed "isolated activity," leading the examiner to "confront[]" Lavin in a "mild 'between test interrogation,'" in the course of which Lavin stated "that he was not certain whether what he thought was cocaine was in a pill bottle or aluminum packet" and "was not certain the necklace was gold." (R2 3554). The examiner eliminated the question regarding the pill bottle, reformulated the question about the necklace, and added a question about Escandar giving Ojeda a watch (R2 3555). His ultimate conclusion was that "[b]ased upon the lack of significant response to these questions . . . it is assumed that [Lavin's] answers were truthful." (R2 3555).

January 26, 1978, and denied Lavin's allegations (R2 3538-49). On June 6, 1978, Sergeant Bellerdine prepared a final memorandum of the investigation, which was sent to his supervisor (R2 3552-53). The memorandum recites the information obtained from Lavin and that the investigators interviewed Detectives Ojeda, Hernandez, Pontigo, Alonso and Rivas, and states that the detectives all "denied any criminal neglect or wrong doing [sic]," claiming that Escandar "was presently being used as an informant and is providing valuable information." (R2 3553-54). The memorandum further states that Lavin's polygraph showed that he had been "truthful in regards to the exchange of gifts and lying about Detective Ojeda obtaining cocaine." (R2 3554). Bellerdine represented that he had been "unable to develop any evidence to substantiate the allegations" made by Lavin, and stated that "this investigation is being suspended at this time." (R2 3553).

This internal-review file plainly shows that other law enforcement agents had ample reason to believe that Ojeda had been involved in criminal activities with Escandar. Moreover, the federal trial record plainly reflects that numerous other law enforcement officers, including several who were not charged in the federal indictment, had been been present during various criminal episodes in which Ojeda and Zatrepalek had been involved (R2 428, 432, 433, 436 645-73, 717-19, 2596-607; SR2 43-47). Even if the trial judge's limitation on the general rule that a police officer's knowledge is imputable to the state for *Brady* purposes is acceptable, there can be no dispute that actual knowledge of *other* law enforcement agents of Ojeda's criminal activities must be deemed within the constructive knowledge of the prosecution team. *E.g.*,

Arango v. State, 467 So.2d at 693; *Antone v. State*, 355 So.2d at 778; *State v. Zamora*, 538 So.2d at 96.

The second aspect of defendant's claim of knowledge on the part of other state agents concerns Assistant State Attorney Lance Stelzer, one of the prosecutors in defendant's 1979 trial (T1 1). Court records reflect that he also was one of the prosecutors in the 1977 kidnapping case against Escandar, see *Escandar v. Ferguson*, 441 F.Supp. 53 (S.D. Fla. 1977)(granting Escandar bond despite life-felony kidnapping charge), and Escandar, in his testimony at the detectives' trial, identified Stelzer as having attended a party at his home to celebrate a conviction in another criminal case (R2 676).[57] Stelzer, in testimony before the court on a government proffer,[58] acknowledged that he had attended a party at Escandar's home following the conviction of a defendant identified as Jose Miguel Battle (R2 3293-94).[59] He testified that Ojeda, Pontigo, Hernandez, and Alonso also had attended the party, and that he had stayed at Escandar's home until approximately 6:00 a.m. (R2 3294-96). Stelzer further testified that, during the period between 1977 and 1979, Pontigo offered him a substance which appeared to be cocaine and that he he had attempted to inhale it, but had sneezed (R2 3296-97). He also stated that he had a "mental

---

[57] One of the taped conversations between Escandar and two other indicted detectives, Alonso and Pontigo, includes a reference to Stelzer as "Lance," described as their "friend" in the prosecutor's office (R2 1235, 1316, 1323).

[58] Stelzer refused to answer questions regarding the detectives' activities until granted immunity by the court, at the government's request (R2 3241).

[59] The docket in *State of Florida v. Jose Miguel Battle*, Dade County Circuit Court Case No. 77-26442, reflects that the defendant in that case was found guilty on November 11, 1977 (SR2 68).

picture" of Ojeda using cocaine on "[o]ne, two maybe three" occasions (R2 3297-98).[60]

In his testimony, which was given in federal court on August 31, 1982, Stelzer also stated that the FBI first had contacted him three and one-half years earlier with regard to criminal activities by Dade County homicide detectives (R2 3284).[61] He testified that he had "disclosed to them certain information but not other information" (R2 3258), a statement which he elaborated on as follows:

> Mr. Josefsberg [Stelzer's counsel] accompanied me to that meeting and at the outset . . ., said to all concerned, that I would be happy to discuss . . . any matters relating to any allegation of any impropriety by any of the detectives of the Dade County Public Safety Department, but that if your sole concern was to discuss whether any of them had personally used any drugs, that we were not interested in talking to you, therefore, everything was discussed other than personal use of drugs.

(R2 3284). Indisputably, actual knowledge by a prosecutor of favorable evidence is chargeable to the state. *E.g., Giglio v. United States,* 405 U.S. at 154.

While acknowledging these facts (R2 3560-63), the trial court applied a manifestly erroneous standard of review in determining

---

[60] When asked if he recalled the location of Ojeda's apparent drug use, Stelzer responded as follows:

> It is conceivable that it was sometime after a lot of drinking had gone on at the Holiday Inn near the Justice Building on a Friday night. . . . I cannot place any other location to an absolute certainty . . . . It is possible that it was at the home [i]n Miami Springs, but I cannot be certain because the condition I was in and because of the length of time that has passed.

(R2 3298).

[61] He originally testified that it had been two and one-half years earlier (R2 3257-58, 3278), but corrected himself. *Ibid.*

that defendant was not entitled to an evidentiary hearing. The controlling rule is that the allegations of knowledge in defendant's motion must be "treat[ed] . . . as true except to the extent that they are conclusively rebutted by the record." *Harich v. State,* 484 So.2d 1239, 1241 (Fla.), *cert. denied,* 476 U.S. 1178 (1986). However, nowhere in the trial court's order in the present case is there *any* finding that the record conclusively rebuts defendant's claim of knowledge on the part of state agents; rather, the court -- utterly ignoring the governing rule -- rejected defendant's claim of entitlement to an evidentiary hearing on this aspect of the claim upon a finding that "there is no support in either the proffered testimony or the internal review files to support the [d]efendant's contention of knowledge by the [s]tate" of the detectives' criminal activities (R2 3563). This was manifest error: the trial court was required to accept defendant's allegation "at face value" in determining whether an evidentiary hearing was required. *Lightbourne v. Dugger,* 549 So.2d 1364, 1365 (Fla. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 1505 (1990).

What the trial court did, moreover, was to pass upon the credibility of the facts urged by defendant as indicative of actual state knowledge. For example, the court, despite initially recognizing that it could not pass upon Wander's credibility without a hearing,[62] ultimately did so:

---

[62] When the court informed counsel that there were documents in the file to which counsel had not had access, and that Wander's notes in the file did not replicate his trial testimony regarding cocaine use, counsel counsel pointed out that a determination of the credibility of Wander's testimony would be inappropriate without an evidentiary hearing, and the court stated, "I am not suggesting it is not true." (R2 250; see R2 343).

> Officer Wander testified that on January 6, 1978, while he was on surveillance at Mario Escandar's house, he saw Detective Ojeda place portions of a white powder on his hands or other instrument and place it to his nose. (A. 3,240-3246). However, Wander admitted that his original internal review notes indicated that Ojeda was playing pool, and did not mention that Ojeda was seen using cocaine. (A. 3264).

(R2 3561-62). And, with regard to Assistant State Attorney Stelzer, the court found that his testimony testimony in federal court "was uncertain as to whether it was Ojeda he observed, whether it was cocaine, whether Ojeda used cocaine, and when the use occurred." (R2 3561). Without taking their testimony,[63] the trial court was not entitled to pass upon their credibility to reject defendant's claim that Wander had actual knowledge of Ojeda's criminality. *See, e.g., Holland v. State,* 503 So.2d at 1252.

Finally, the court committed serious error in relying upon matters which were not disclosed to defendant's counsel in the proceedings below. In the proceedings after defendant's motion was filed, Assistant State Attorney Musto, representing the state in the post-conviction proceedings, disclosed to the court and counsel that a total of 22 internal-review files had been opened by the police department in the wake of the federal trial; he further disclosed that three Organized Crime Bureau detectives had been detached from the police department to work with the FBI in the investigation of the homicide section, and that the director of the Public Safety Department as well another high-ranking officer were aware of this (R2 74-75). Counsel's request for access to these files was denied and the court undertook an *in camera* inspection to

---

63 Defendant specifically requested that he be permitted to call Wander and Stelzer at an evidentiary hearing (R2 339-43).

"look[] for knowledge on the part of anyone connected with the State that Ojeda and Zatrepalek were engaged in criminal activity, knowledge that does not have to incriminate them prior to March of 1979." (R2 76-77, 80-81, 98, 164-65, 171, 178, 181, 183).

After reviewing the files, which the court described as "contain[ing] various memos from what was apparently [a]n ongoing FBI investigation of Zatrepalek, Ojeda, and others", the court refused to order disclosure (R2 250-51, 390).[64] However, in ruling on defendant's right to an evidentiary hearing, the court specifically stated that it had had "review[ed] the pleading[s], memoranda of law, appendices, *internal review files,* and the . . . court files" (R2 3566-67; see R2 3559), and that the internal review files provided support for a summary denial of the motion:

> This Court also reviewed, in camera, nineteen (19) Metro-Dade Police Department Internal Review files, . . . and found nothing to support the Defendant's contention that the State had any knowledge of the officer's [sic] criminal activities or Ojeda's alleged use of cocaine at the time of Defendant's trial, nor did these files reveal any pending investigations of either Ojeda or Zatrapalek [sic] at the time of Defendant's trial.

---

64 The court found as follows:

> I see nothing in those files to indicate that prior to March of '79 there could have been a reasonable belief on the part of the State that Ojeda and Zatrepalek were engaged in criminal behavior. Yes, there were allegations, but, you know, lots of allegations are made against lots of people.
>
> I do not see any purpose to be served or any reason at this point for me to disclose those files.

(R2 250-51; see R2 390). The files have been sealed and transmitted to this Court (R2 185, 187, 251, 391, 417-18) and, on May 18, 1990, this Court denied counsel's motion for leave to examine the files in connection with this litigation.

(R2 3562).[65]

It was egregious error for the trial court to bar defendant's counsel from access to the internal-review files and then to rely upon those same files to find that defendant had failed to prove his claim. From its inception (as Criminal Procedure Rule No. 1, see *Roy v. Wainwright*, 151 So.2d 825, 287-28 (Fla. 1963)), Rule 3.850 was intended to bar such *ex parte* matters from entering into the decision to deny an evidentiary hearing:

> While a return, ex parte affidavit or document submitted in opposition to a Rule 1 motion can serve to create an issue of fact, it cannot, at this initial juncture, be relied upon as determinative of a factual issue. To permit consideration of extra-record documents would be, in effect, to permit a hearing without all of the attendant requisites of such hearings.

Sampson v. State, 158 So.2d 771, 773 (Fla. 1963). Since that time, the Florida ccurts repeatedly and uniformly have condemned trial court reliance upon extra-record documents to deny an evidentiary hearing. *E.g., Zeigler v. State*, 452 So.2d 537, 539-40 (Fla. 1984) (conflicting affidavits submitted to trial court in post-conviction proceeding raising bias of trial judge; held that evidentiary hearing was required); *Russell v. State*, 521 So.2d 379, 380 (Fla. 1st DCA 1988)("affidavit is not part of the files and records" and "could not be considered . . . by the trial court in determining the facial sufficiency of the motion")(citations omitted); *Robinson*

---

[65] With specific regard to the file opened in connection with Sergeant Wander's investigation in 1978, the court informed counsel that the state had provided documents from that file which had not been given to the defense (R2 248-50), and it considered the entire file in ruling that defendant had "failed to support his contention either that there was an ongoing investigation or that the detectives were aware of such at the time they testified at [defendant's] trial." (R2 3562-64)

v. State, 516 So.2d 20 (Fla. 1st DCA 1987)(same); *McCorkle v. State*, 419 So.2d 373, 374 (Fla. 1st DCA 1982)(same); *Youngblood v. State*, 261 So.2d 867, 868 (Fla. 2d DCA 1972)(court cannot resolve claim presented by conflicting affidavits without evidentiary hearing); *Keur v. State*, 160 So.2d 546, 548 (Fla. 2d 1963)("a determination on facts dehors the record cannot form the basis for summary denial" of post-conviction motion).

As was held some years ago, where the records do not conclusively show that the motion should be summarily denied, the Rule 3.850 requires that the state produce "competent, substantial evidence at the hearing before the court" to disentitle the defendant to ultimate relief, since "[i]n no other way could the said hearing comport with the requirements of due process of law." *Kelly v. State*, 175 So.2d 542, 544 (Fla. 1st DCA 1965); *accord, e.g., Cintron v. State*, 508 So.2d 1315, 1316 (Fla. 2d DCA 1987)(affidavit which contradicts allegations in motion "serves as the functional equivalent of testimony" and "[a]s such, it ought to have been subject to confrontation by [defendant] at an evidentiary hearing")(citations omitted). Particularly is this true where, as in the present case, the defendant is not permitted even to see the evidence upon which the court relies to deny his motion. *Moore v. Kemp*, 809 F.2d 702, 730 (11th Cir.)(en banc)(denial of defense access in post-conviction to file which "contained information highly relevant" to *Brady* claim denied defendant "the opportunity to prove his claim" and hearing therefore "was not full, fair, and adequate"), *cert. denied*, 481 U.S. 1054 (1987).[66]

---

[66] This is not to say that *in camera* inspections are never appropriate; to the contrary, as the Supreme Court of the United (Cont'd)

Accordingly, even if the trial court properly should have reached the question whether state agents other than the detectives themselves had actual knowledge of the favorable evidence at issue, defendant's allegation that such was the case was not conclusively refuted by the records of the case and the trial court should not have gone beyond that critical point in summarily denying the motion. The appropriate relief, should this Court not find knowledge as a matter of law because the detectives were aware of their own criminal activities, as set forth in subpoint B1, *supra,* is an evidentiary hearing on the knowledge of other state agents. *E.g., Lightbourne v. Dugger,* 549 So.2d at 1365; *Gorham v. State,* 521 So.2d 1067, 1069 (Fla. 1988); *Squires v. State,* 513 So.2d 138, 139 (Fla. 1987).

C. Materiality

Favorable evidence is "material" under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the

---

States agreed in *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987), confidential information (in that case, a child's youth-services file) to which an accused might be entitled as *Brady* material may first be reviewed by a trial court for a determination as to its materiality so as to not "sacrifice unnecessarily" a state's "compelling interest in protecting its child abuse information. *Id.* at 59-60; *accord, Miller v. Dugger,* 820 F.2d 1135, 1136-37 (11th Cir. 1987). In the present case, it appears (although, having not examined the files, counsel cannot so state to a certainty) that the records at issue involve now-closed investigations (R2 189-90), and have accordingly become public records. § 112.533(2), Fla.Stat. (1989)(internal investigative files become public records after conclusion of investigation, with or without findings of probable cause). *See Provenzano v. Dugger,* 15 F.L.W. S260, 262 (Apr. 26, 1990)(public records may be disclosed by trial court in Rule 3.850 proceeding). In any event, however, the issue in this case changed inalterably once the trial court chose to *rely* upon the undisclosed files: while defendant does not abandon his claim that the record shows a strong basis for the court to have disclosed the files during litigation, there is no question but that disclosure to a party of all facts upon which a trial court bases a decision is a fundamental component of due process of law. *E.g., Dennis v. United States,* 384 U.S. 855, 873-74 (1966).

defense, the result of the proceedings would have been different." *United States v. Bagley*, 473 U.S. at 682; *accord, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *Duest v. Dugger*, 555 So.2d at 851; *Wasko v. State*, 505 So.2d 1314, 1316 (Fla. 1987).[67] The trial judge in the present case found that this standard was not satisfied because (1) the suppressed evidence would not have been admissible at defendant's trial, and (2) other evidence supports the reliability of defendant's confession (R2 3564-67).

1. Admissibility of the Suppressed Evidence

The trial court ruled that the evidence of the detectives' criminal activities would not have been admissible because "the information in question does not show a bias toward [d]efendant or possible untruthfulness in regard to the events of the crime

---

[67] Prior to *Bagley*, the Supreme Court had applied a tiered standard to *Brady* claims, a standard first set forth in *United States v. Agurs*, 427 U.S. 97 (1976). In *Agurs*, the Court tied "materiality" tests to the nature of the violation, as follows: (1) where the prosecution knowingly uses perjured testimony, the evidence is material if there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury," *id.* at 103 (footnote omitted), (2) where the prosecutor fails to provide favorable evidence in the absence of a specific request therefor, the evidence is material if it "creates a reasonable doubt that did not otherwise exist," *id.* at 112, and (3) where the prosecutor failed to respond to a specific request for favorable evidence, a more lenient (albeit undefined, *United States v. Bagley*, 473 U.S. at 682 & n.12) standard of materiality would apply than in the "no-request" situation. *United States v. Agurs*, 427 U.S. at 106. However, the *Bagley* Court found that the test set forth in the text was "sufficiently flexible to cover" the three *Agurs* categories, *United States v. Bagley*, 473 U.S. at 682, and thereby created "a single standard for materiality of nondisclosed evidence." *United States v. Severdija*, 790 F.2d 1556, 1560 (11th Cir. 1986); *see id.* at 1560 n.2 (main opinion in *Bagley* and concurring opinions, see 473 U.S. at 682, 685, "adopted the 'reasonable probability' test as the single standard for determining the materiality of undisclosed evidence"). This Court has recognized this major shift in *Brady* jurisprudence. *E.g., Lightbourne v. Dugger*, 549 So.2d at 1365; *Arango v. State*, 497 So.2d at 1162.

charged, but simply go[es] to bad character and general credibility." (R2 3564). As a general rule, of course, specific acts of misconduct are indeed inadmissible to impeach a witness' credibility. *E.g. Fulton v. State*, 335 So.2d 280, 284 (Fla. 1976). However, "[m]erely because [evidence] would not be admissible for one purpose does not mean it is not admissible for another." *Hunt v. Seaboard Coast Line Railroad Company*, 327 So.2d 193, 195 (Fla. 1976)(citation omitted); *accord, McCrae v. State*, 549 So.2d 1122, 1124 (Fla. 3d DCA 1989); *see* § 90.107, Fla.Stat. (1989)("[w]hen evidence that is admissible . . . for one purpose, but inadmissible . . . for another purpose, is admitted, the court, upon request, shall restrict such evidence to its proper scope"). Evidence of prior acts of misconduct is therefore properly introduced when relevant to a witness' bias or motive. *McCrae v. State*, 549 So.2d at 1123-24 (defendant improperly barred from testifying that victim in shooting case was a "drug dealer" when such was relevant to show motive falsely to accused defendant of crime); *accord, Gamble v. State*, 492 So.2d 1132, 1133-34 (Fla. 5th DCA 1986); *Lavette v. State*, 442 So.2d 265, 267 (Fla. 1st DCA 1983), *review denied*, 449 So.2d 265 (Fla. 1984). The controlling rule is that "evidence that happens to include prior misconduct still may be admissible when offered to show the witness' possible bias or self-interest in testifying." *United States v. Calle*, 822 F.2d 1016, 1021 (11th Cir. 1987).

This principle was applied by the Supreme Court of the United States in *United States v. Abel*, 469 U.S. 45 (1984), a case that is instructive in evaluating the trial court's ruling in the present case. In *Abel*, the defendant in a robbery case sought to impeach a

cooperating accomplice, Ehle, with evidence from a joint acquaintance, Mills, that Ehle had confessed his intention falsely to accuse the defendant of the robbery to secure favorable treatment from the government. *Id.* at 47. The government, in response, was permitted to cross-examine Mills about his membership in the "'Aryan Brotherhood,' a secret prison gang that required its members always to deny the existence of the organization and to commit perjury, theft, and murder on each member's behalf." *Id.* at 47-48. When Mills denied membership in the organizatiion, the prosecution was permitted to recall Ehle, who testified that the defendant, Mills, and he were members of the organization and subscribed to its tenets. *Id.* at 48. The Supreme Court held that "the evidence showing Mills' and [the defendant's] membership in the prison gang was sufficiently probative of Mills' possible bias towards [the defendant] to warrant its admission," *id.* at 49, and, rejecting the defendant's argument that the testimony was inadmissible as impeachment by specific acts of criminal misconduct, ruled as follows:

> [T]here is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. . . . .
>
> We intimate no view as to whether the evidence of Mills' membership in an organization having the tenets ascribed to the Aryan Brotherhood would be a specific instance of Mills' conduct which could not be proved against him . . . . It was enough that such evidence could properly be found admissible to show bias.

Id. at 56; *accord, Clark v. O'Leary,* 852 F.2d 999, 1004 (7th Cir. 1988)(defendant entitled under *Abel* to cross-examine prosecution witness regarding gang membership for proof of bias).

In *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989), it was argued that the state had suppressed evidence of a state attorney investigator's involvement in drug smuggling activities. *Id.* at 298. The defendant had been tried twice, the second time in 1978, and, in 1981 the investigator, Brumley, pled guilty to conspiracy to import marijuana during the period from October of 1977 to July of 1981. *Ibid.* Brumley and other police officers had been involved in taking Delap's confession, which confession was challenged, in part, on a claim that the police used improper "interrogation techniques" and had induced him to confess "by promises of psychiatric treatment" and threats by the police "that they knew he was guilty and that he had better confess." *Id.* at 295, 299 n.17. Delap contended that "exposure of Brumley's illegal activities to the jury would have cast substantial doubt on his credibility," *id.* at 299, a contention which the Eleventh Circuit rejected:

> First of all, it is highly questionable whether the evidence would have been admissible under Florida law. Brumley had not been charged nor convicted during Delap's first or second trials. Brumley was not indicted until late 1981, well after Delap's October 1978 second trial. Therefore, his illegal activities would not be admissible as a prior criminal conviction . . . . Nor is it likely that the evidence would be admissible . . . as evidence of bias in this case, where no criminal proceeding or even an investigation had begun.

Ibid (citations omitted).

In this case, however, unlike *Delap*, there *was* evidence of pending investigations, as alleged in defendant's motion (R2 3495-96), and that critical fact distinguishes this case from *Delap*.[68]

---

[68] It is also worth noting that, unlike the situation in *Delap*, the suppressed evidence would have impeached *both* of the detectives, who were the only police officers to have been involved in taking defendant's confessions.

First, the documents obtained by defendant's counsel and filed in support of his motion[69] establish beyond question that an internal-review investigation of Ojeda and other detectives began in January of 1978, and that Ojeda could not but have been aware of that investigation, since he was questioned by the internal-review investigators in connection therewith (SR2 40-66; R2 3538-49, 3552-53).[70] Second, Zatrepalek's testimony in the federal trial reflects Ojeda's statement to him in the latter part of 1978 that the "Organized Crime Bureau was looking at him and investigating him or watching him for some reason or another and he was very hot at the time." (R2 2609).[71] As proffered by the state attorney in the proceedings below, Ojeda was correct: the prosecutor informed the trial court that three organized crime detectives had been assigned to work with the FBI in connection with the investigation of the homicide section in July of 1978, with the knowledge of the director of the department and another high-ranking officer (R2 74-

---

[69] However, it appears from the record below that there are other documents in the internal-review file, including the statements of other detectives, which were not obtained by, or otherwise supplied to, defendant's counsel (R2 248-50).

[70] While the trial court's order disparages the reliance upon Escandar's testimony in defendant's motion for proof of Ojeda's knowledge of the pending investigation (prior to counsel's receipt of additional portions of the internal-review file, including Ojeda's statement, from the state attorney (R2 72-73, 236-38, 245-46, 3537)), the testimony at issue plainly addresses the period during which the informant Lavin was cooperating with the internal-review investigators in the inquiry which included taking Ojeda's statement (R2 716-24).

[71] The trial court's order notes this testimony, but fails to give it any weight (R2 3563). The context in which Zatrepalek testified to this conversation places it almost exactly at the time that proceedings were pending in defendant's case: Zatrepalek testified that he had approached Ojeda to seek his help in selling cocaine which had been taken from the scene of a homicide on September 11, 1978 (R2 432, 2589, 2603, 2609).

75).

The court below nonetheless ruled that defendant had proved only that "at some time, perhaps before [d]efendant's trial and perhaps after, Ojeda became aware of an investigation" by internal review (R2 3562), and that defendant had "failed to support his contention either that there was an ongoing investigation or that the detectives were aware of such at the time they testified at trial." (R2 3564).[72] Not only is this ruling incorrect, as set forth above, the court -- as it did on the question whether the evidence had been suppressed -- misconceived its role: the court was required to determine whether defendant's claim that investigations had been pending was conclusively *refuted*, and, if not, to grant him an evidentiary hearing, not to place the burden ultimately of proving the claim on a litigant who was never afforded the opportunity to do so. *E.g., Lightbourne v. Dugger*, 549 So.2d at 1365.[73] There was nothing in the record before the trial court to conclusively refute the existence of pending investigations, and it was error for the court to make a final determination without an evidentiary hearing.

Furthermore, unlike *Delap*, there is the undisputed evidence

---

[72] The court recognized -- as does established Florida law *e.g., Hernandez v. Ptomey*, 549 So.2d 757, 758 (Fla. 3d DCA 1989) -- that "if Ojeda and Zatrepalek were aware that they were the subjects of an investigation, such evidence may have been admissible for showing a motive or bias for the witness's testimony." (R2 3564).

[73] And the court's error in placing the burden upon defendant without a hearing was further exacerbated by its continued reliance upon matters set forth in the undisclosed internal-review files: in supporting its ruling, the court noted that the undisclosed files did not "reveal any pending investigations of either Ojeda or Zatrepalek at the time of [d]efendant's trial." (R2 3562). As set forth at pp.48-53, *supra*, defendant never had the opportunity to examine those files and litigate that aspect of the court's ruling.

that Ojeda and Zatrepalek had become habitual cocaine users by the time of their involvement in this case (R2 1490-97, 1730-35, 2025-30, 2254-58, 2567, 2569, 2573, 2578, 2581-90, 2766-68, 2779). As Zatrepalek testified, he, Ojeda, and other homicide detectives used cocaine in 1978 and 1979 "at the homicide office, bars, [and] social occasions," as well as in "different bars." (R2 2589-90, 2766-68, 2778). "A condition of intoxication . . ., as involving a peculiar condition of the body and faculties, may be of probative value as showing that the person could or could not do the act in question." 1A Wigmore, Evidence § 85 (Tillers rev. 1983). And "evidence of prior intemperate habits of a person is relevant to, and may be given as corroborating evidence on, the question of whether such person was intoxicated at any given time and place, when intoxication at such time and place is a material issue." *State v. Wadsworth*, 210 So.2d 4, 6-7 (Fla. 1968); *see Childre v. State*, 106 Fla. 334, 143 So. 309 (1932); *Borders v. State*, 433 So.2d 1325, 1326 (Fla. 3d DCA 1983).

The effects of cocaine abuse are now well known and beyond question. *E.g.*, R. Ashley, *Cocaine: Its History, Uses, and Effects* 153 (1975)(abnormally aggressive behavior caused by cocaine intoxication); C. Winek, *Forensic Toxicology*, in 2 Forensic Sciences § 31.09(b) (1989)(cocaine "produce[s] symptoms of euphoria, excitation and restlessness" with "[f]eelings of heightened physical and mental abilities"); Aaronson & Craig, *Cocaine Precipitation of Panic Disorder*, 143 Am. J. Psychiatry 643, 644 (May 1986)(cocaine "precipitate[s] . . . depression, mania and acute psychosis" and induces "[p]anic attacks" after chronic use). Its tendency to induce violent behavior has been recognized as relevant to support

a claim of self-defense when an accused claims that deadly force was required to defend against aggression by a person under the influence of cocaine. *State v. Plew*, 155 Ariz. 44, 745 P.2d 102, 106-07 (1987). Where, as here, a question is presented whether a confession was violently coerced by police officers,[74] evidence of the officers' cocaine abuse similarly is highly relevant.[75]

"Relevant evidence is defined as any evidence which tends to

---

[74] As will be set forth in more detail *infra*, defendant testified at the pretrial hearing that he had been physically abused by the detectives during the November 9th interrogation (T1 309, 321-33). Defendant further testified that he had made the November 21st statement "because I was threatened that I would be beaten again." (T1 315). Zatrepalek denied having abused defendant (T1 348), setting up a direct conflict of testimony before the trial court.

[75] In *Edwards v. State*, 548 So.2d 656 (Fla. 1989), this Court held that a witness' drug use will be

> exclude[d] . . . for the purpose of impeachment unless: (a) it can be shown that the witness had been using drugs on or about the time of the incident which is the subject of the witness's testimony; (b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or (c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember, and recount. . . . .

Id. at 658. Since defendant's trial counsel had no inkling of the detectives' drug use, there was obviously no predicate laid for impeachment cross-examination on this basis; and, without an evidentiary hearing, the trial court in post-conviction could not make a determination that the proposed cross-examination was improper under *Edwards*.

And, indeed, the court did not do so: eschewing any reliance upon *Edwards*, the trial judge lumped the evidence of the detectives' use of cocaine with their other illegal activities, and held the evidence inadmissible as tending only to establish bad character (R2 3563-64). Moreover, as pointed out earlier, the rule of limited admissibility permits a party to introduce evidence that is properly presented for one purpose although the evidence would be inadmissible if introduced for another purpose, *e.g.*, *McCrae v. State*, 549 So.2d at 1124, and, even if *Edwards* applies here, the theory of admissibility set out above would nonetheless support introduction of the detectives' drug use.

prove or disprove a material fact." *State v. McClain*, 525 So.2d 420, 421 (Fla. 1988)(citing § 90.401, Fla.Stat. (1989)). The material issue in the present case was whether defendant's confession had been obtained voluntarily, and evidence of the detectives' cocaine abuse would have "tend[ed] to prove" that it was; their misconduct "would have been enthusiastically exploited by defense counsel, would have fit the defense strategy like a glove and would have provided forceful impeachment of the major evidence" in the case, *i.e.*, defendant's confessions, and the suppressed evidence must therefore be deemed material. *Stano v. Dugger*, 901 F.2d 898, 903 (11th Cir. 1990(footnote omitted).

2. Other Evidence

Of course, an "assessment of the materiality of the suppressed evidence depends in part on the strength or fragility of the state's case as a whole." *Stano v. Dugger*, 901 F.2d at 903 (citing *Carter v. Rafferty*, 826 F.2d 1299, 1308-09 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988)); *accord, United States v. Burroughs*, 830 F.2d 1574, 1579 (11th Cir. 1987)("[m]ateriality is a function of the strength of the government's case"), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1243 (1988). In making this assessment, a review the *entire* record is required, *United States v. Bagley*, 473 U.S. 682-84; *United States v. Agurs*, 427 U.S. 97, 112-13 (1976), that is, "an analysis of the evidence adduced at trial *and* of the probable impact of the undisclosed information." *Cannon v. Alabama*, 558 F.2d 1211, 1214 (5th Cir. 1977); *accord, e.g., Maddox v. Montgomery*, 718 F.2d 1033 (11th Cir. 1983). Thus, a reviewing court "cannot merely consider the evidence in the light most favorable to the government but must instead evaluate all of the evidence as it

would bear on the deliberations of a factfinder." *Cannon v. Alabama*, 558 F.2d at 1214.

The first flaw in the trial court's assessment of the evidence is its refusal to consider in the weighing process the direct conflict of testimony at the hearing on defendant's pretrial motion to suppress: the court focused exclusively on the trial-in-chief, and, after finding that there was evidence supportive of the reliability of the confession and other incriminatory circumstances, concluded that "the impeachment value of the alleged *Brady* material would not have been great." (R2 3564-66). However, if defendant had prevailed on his pretrial motion to suppress and the trial court had found the confession to have been obtained by force and threats, other evidence suggestive of the reliability of the confession would have been utterly *irrelevant*; under fundamental due process tenets, the court would have been required to suppress the confession. "[A] confession produced by violence or threats of violence is involuntary and cannot constitutionally be used against the person giving it," *Sims v. Georgia*, 389 U.S. 404, 407 (1967), in light of the universal treatment of "any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt." *Stein v. New York*, 346 U.S. 156, 182 (1953). And it is equally fundamental that "even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence . . . of the coerced confession vitiates the judgment." *Payne v. Arkansas*, 356 U.S. 560, 568 (1958); *accord, e.g., Haynes v. Washington*, 373 U.S. 503, 518-19 (1963); *Lynumn v. Illinois*, 372 U.S. 528, 537 (1963); *Rogers v. Richmond*, 365 U.S. at 541;

DeConingh v. State, 433 So.2d 501, 502-03 (Fla. 1983), *cert. denied*, 465 U.S. 1005 (1984); *Brewer v. State*, 386 So.2d 232, 235-36 (Fla. 1980).

Defendant testified at the pretrial hearing that he had been physically abused by the detectives during the November 9th interrogation (T1 309, 321-33), and Zatrepalek denied having abused him (T1 348).[76] There was evidence, however, which tended to corroborate defendant's claim: defendant's first public defender testified at the hearing that he had interviewed defendant after the November 9th interrogation -- but *before* the confession was obtained on November 21st -- and that defendant had told him at that time that "he had been beaten" by the police (T1 287);[77] and

---

[76] The trial court appears to have given weight to the fact that Detective Ojeda had not been present when the November 21st confession was taken, having injured his back between the two interrogation sessions (T1 945); the order denying the motion states that defendant "never claimed that Ojeda threatened, beat or coerced him at all, only that Zatrepalek did, and the allegations of use of cocaine and pending investigations seem to be directed at Ojeda." (R2 3566). The court seems to have misread the trial record in this regard: defendant plainly testified at the suppression hearing that Zatrepalek was "one of the ones" that had beaten him on November 9th (T1 318) and that Zatrepalek and another detective who had questioned him on that date had *both* physically abused him (T1 308-09); and, according to Zatrepalek and Ojeda, they were the two detectives who had questioned defendant on November 9th (T1 348, 921-40). While Ojeda was in fact not present on November 21st, defendant's testimony was, as set forth in the text, that he had been threatened with further abuse at that time by Zatrepalek, and the court mischaracterized defendant's claim in this regard insofar as the order suggests that the suppressed evidence only related to Ojeda. As is set forth in subpoint C(1), *supra*, the evidence at the federal trial -- particularly Zatrepalek's own testimony -- establishes that Zatrepalek was a full participant in the illegal activities which form the basis of defendant's *Brady* claim.

[77] The lawyer, David Finger, and another assistant public defender, advised defendant "to persist in his silence." *Ibid.* When they subsequently learned of the November 21st confession and reinterviewed defendant, he told the lawyers that the police had "threatened him with beating and harassed him, and rather than go on with more harassment and threats and another beating similar to (Cont'd)

defendant's testimony that, on November 21st, he had told the officers who brought him from the Dade County Jail to the police station that he did not want to be questioned (T1 312), was verified by a corrections officer (T1 273-77, 300-02; R1 89-91). The trial judge was required to resolve the conflict in the testimony on what occurred during the interrogation sessions, and, without the benefit of the suppressed evidence, did so in the detectives' favor. It cannot be said with the requisite certainty under *Bagley* that the powerful impeachment evidence now disclosed could not have influenced the court's judgment on this hotly-disputed issue, and the evidence must be found to be material. *Stano v. Dugger*, 901 F.2d at 903 (impeachment of detective who took defendant's confession with suppressed evidence could have led to suppression of confession which was "linchpin of the prosecutor's case" and was therefore material).

Moreover, the trial court's depiction of the trial record is manifestly erroneous. The court found that other evidence showed the reliability of defendant's confession, *i.e.*, (1) that defendant's mother had been present at the police station, (2) that defendant had confessed to a Broward County detective, Nagle, in another case, after asking for Zatrepalek to be present, (3) that defendant had referred to Zatrepalek as "Charlie," (4) Ojeda's testimony that in defendant's initial interrogation he "said that he took the bicycle [from] the house two houses down from the murder, even though he had not been told that there had been a murder there," (5) "when Ojeda told defendant that he did not believe his

---

the one he had gone through prior to my first conversation, he talked to them." (A1 291-92).

story about how blood got [d]efendant's pants, [d]efendant responded that he supposed that Ojeda would tell him that the blood belonged to the man," although defendant "had not been told that the murder victim was a man," and (6) defendant "told Ojeda that he would not find [d]efendant's fingerprints because he was wearing socks" on his hands, and no fingerprints were found in the case (R2 3565-66).

The most telling flaw in the court's treatment of the evidence is -- as reflected on the face of the order -- that virtually *all* of the purportedly-extrinsic evidence of the confession's reliability is derived from the testimony of Ojeda and Zatrepalek, and not otherwise corroborated by independent testimony.[78] And the appropriate inquiry on *Brady* materiality in a case in which impeachment evidence is suppressed is plainly *not* whether the impeachable wit-

---

[78] Indeed, the only aspects of the detectives' testimony relied upon by the court below and which were otherwise corroborated are of very little, if any, impact on the reliability of the confession. It was, for example, established through the testimony of defendant's mother at the suppression hearing that she had been at the police station (T1 134-36). Mrs. Gibson testified that defendant had been crying when she saw him at the police station; she stated that he had not mentioned being subjected to physical abuse at that time (although he did tell her that he was suffering from pain in his chest), and that he had telephoned his family at a later time from the jail to report that he had been beaten (T1 137-39, 143). Defendant testified at the suppression hearing that he had asked for his mother to be brought to the station so that he could tell her "that I had been beaten," but, after seeing her and realizing from their conversation that Zatrepalek had "got[ten] in pretty good with her" so that she likely would repeat their conversation to him, abandoned that hope (T1 314-15). Zatrepalek testified that Mrs. Gibson had not been present for the interrogation (T1 232).

Similarly, it was Zatrepalek who testified that defendant had asked for him to be present at the interrogation by Detective Nagle, while defendant denied it (T1 324, 331, 351). Defendant also testified that he had referred to Zatrepalek as "Charlie," but that he done so at the detective's suggestion because he "couldn't remember his last name." (T1 324, 331).

ness gave testimony that would have supported a conviction: obviously, if the witness' testimony did *not* support a conviction, any *Brady* error would not have had a sufficient effect on the factfinding process to warrant relief. *See, e.g., Delap v. Dugger,* 890 F.2d at 299 (where impeachable investigator "was not the only officer present during Delap's interrogation" and, even if investigator had been impeached with suppressed evidence, "the other officers present could testify as to Delap's confession," suppressed evidence was not material). With the powerful effect of the potential impeachment established, the testimony of Ojeda and Zatrepalek cannot be used to establish its own reliability.[79]

Rather, the case must be analyzed as if the suppressed evidence had been "disclosed *and used effectively,*" *United States v. Bagley,* 473 U.S. at 676, and the proper inquiry is whether *other* evidence in the case "was sufficiently powerful" so that, even if Ojeda and Zatrepalek had been successfully impeached, "there was not a reasonable probability that the outcome of [the] trial would have been different." *Delap v. Dugger,* 890 F.2d at 299. The trial

---

[79] Moreover, the trial court utterly failed to consider the numerous inconsistencies between defendant's confession and established facts in the case: defendant told the police that he had entered the residence through an unlocked rear door which did not have jalousie windows (R1 131), while the testimony showed that the door had been locked (T1 723) and the physical evidence revealed that the door had jalousie windows, three of which had been removed, and the door clearly had been forced (T1 615, 621, 675-78); defendant told the police that he had taken a watch and money from a purse in the house (R1 132), while the testimony was that several items of jewelry also had been taken (T1 722, 733-35); and, most importantly, defendant testified that he had "swung" at the deceased with the knife as the latter awakened and found him in the bedroom (R1 133-34), while the physical evidence showed that the deceased had suffered "defense wounds" and that his companion, Ms. Meoni, had been stabbed above her eye (T1 762,66, 772-73). As to this last inconsistency, the jury resolved it by acquitting defendant of the attempted murder of Ms. Meoni (R1 1-2, 155).

court in this case made no such finding; instead, while acknowledging that the confession was "ninety-five percent of the case that the State had" against defendant (R2 159), it found only that there had been "significant corroborative evidence" produced at trial (R2 3565).

And even that finding is unsupported by the record of the trial. The court below set forth the "corroborative evidence" upon which it relied, as follows: that the blue bicycle taken from a neighbor of the deceased on the night of the crime had been found in defendant's yard, that defendant had cut off his trouser legs that night, that defendant had been confronted with statements by his mother and brother and had told the detectives that he had been drinking either Mogen David "20/20" wine or "Thunderbird" wine, that a partially full bottle of "Thunderbird" wine had been found in the deceased's front yard, and that defendant had been in possession of a rhinestone watch when he returned home on the night of the crime (R2 3565-66). However, of this evidence, the *only* fact established independently of the detectives' testimony was the blue bicycle had been found in defendant's yard on the morning after the homicide (T1 813, 890-93, 1010-11). It was *Ojeda* who testified at trial to the statements of defendant's mother and brother regarding the defendant's alleged activities on the night of the homicide and his possession of the unique watch, and *Ojeda's* recitation of defendant's unrecorded statements which included the reference to drinking wine (T1 923-24, 927-31, 937, 939-41). The trial court again was attempting to bolster the credibility of Ojeda and

Zatrepalek with nothing more than their own testimony at trial.[80]

In the final analysis, this Court cannot overlook -- as the trial court attempted to -- the complete absence of physical evidence linking defendant to the homicide (T1 711-12 844-45) and that the *only* independent evidence in the case was that a blue bicycle

---

[80] Moreover, as the trial court acknowledged, Ojeda's recitation of the statements by defendant's mother and brother regarding the rhinestone watch -- the only truly incriminating aspect of the testimony set forth in the text -- was unsupported by any direct evidence, but was based, as were other portions of Ojeda's testimony in this regard, on out-of-court statements by the mother and brother, who did not testify at trial (R2 3564). Indeed, as the record reflects, the judge at defendant's trial permitted the prosecutor, over defense counsel's objections, to elicit the Gibsons' statements before the jury, ruling that they were being introduced only to show "what the defendant heard during the course of the interrogation." (T1 923-37, 933, 936, 938-41). On defendant's direct appeal, this Court ruled that the trial court had "properly admitted the detective's testimony about what the Gibsons said because it came in to show the effect on Breedlove rather than for the truth of those comments." *Breedlove v. State,* 413 So.2d at 7. There was no evidence introduced before the court below to establish that the Gibsons would have testified at trial consistent with Ojeda's version of their statements; rather, the prosecutor merely suggested to the court that Elijah Gibson's statement regarding the rhinestone watch was an "appropriate matter[]" to be considered and that the statement "would have come in" had defendant proceeded with a full-blown coercion claim at trial (R2 296-97). The court acknowledged that Gibson's statement had not been subject to cross-examination at trial (R2 297).

As the Supreme Court noted in *Bagley,* a post-trial *Brady* claim must be analyzed "with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken" had the suppressed evidence been disclosed. *United States v. Bagley,* 473 U.S. at 683. In conducting an inquiry into the materiality of undisclosed testimony, it must obviously be assumed that the defendant would have used the evidence at the trial, *e.g., id.* at 682; *Stano v. Dugger,* 901 F.2d at 903, but that does not give the state free rein to speculate as to other evidence that the *prosecution* might have introduced. *Miller v. Angliker,* 848 F.2d 1312, 1323 (2d Cir.)("the State is not entitled to minimize the materiality of the withheld information by arguing that it could have produced additional evidence at a fuller trial"), *cert. denied,* ___ U.S. ___, 109 S.Ct. 224 (1988); *accord, McDowell v. Dixon,* 858 F.2d 945, 950 (4th Cir. 1988), *cert. denied,* ___ U.S. ___, 109 S.Ct. 1172 (1989). Particularly should this be so, where, as here, there is absolutely no assurance of the speculative testimony's reliability.
(Cont'd)

was stolen from a house near the residence where the homicide occurred sometime on the night in question and the bicycle was found at defendant's home two days later (T1 786-87, 813, 828, 877-81, 890-93, 1008-11). The surviving eyewitness could not identify the perpetrator (T1 726), and a neighbor who had been awakened by screams from the house and saw a man riding away on a bicycle could not determine the man's race or give any description except that he had been "maybe five foot ten, and he looked husky, about 190, but I am not sure of that." (T1 590-93).[81] Under any view of the case, defendant's confession was absolutely critical to a successful prosecution, and the trial court could not have concluded otherwise.

"'The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the wit-

---

Indeed, there is ample reason, based on extant records, to distrust Ojeda's recitation of Elijah Gibson's statements. As is reflected in the records of defendant's direct appeal, his counsel discovered after the trial, in the course of reviewing police reports to which this Court afforded him access (R1 31-37, SR1 24-30), a report of another detective, McElveen, in which Gibson had told the detective that defendant, after having been "thrown out" of their house by their mother on the night of November 6th, had returned home at approximately 2:30 a.m., stayed until approximately 3:30 a.m. and then left, returning again an hour later. Report of Detective S. McElveen (filed in Case No. 56,811) at page 7. It was when defendant returned this last time that Gibson observed blood on defendant's trousers and that the legs had been cut off. *Ibid.* Defendant told him that he had been in a fight. *Ibid.* Gibson also told the detective that defendant had had two "gold watches" and a "heavy gold chain." *Ibid.* The trial record established that the offense occurred between 2:30 and 3:00 a.m. (T1 590-93, 611-12), and, if the state be permitted to speculate on the effect of Gibson's testimony, this powerful exculpatory evidence should also be weighed.

[81] The neighbor also testified that, as she was watching the man, "[t]he color blue stuck in my mind," but that she was not sure "if it was from the bicycle or from the clothing." (T1 594).

ness in testifying that a defendant's life or liberty may depend.'" *United States v. Bagley*, 473 U.S. at 676 (quoting *Napue v. Illinois*, 360 U.S. 265, 269 (1959). Under the facts and circumstances of the present case, there exists the required "reasonable probability," *i.e.*, a "probability sufficient to undermine confidence in the outcome," *United States v. Bagley*, 473 U.S. at 682, that the detectives' illegal activities and drug abuse, if disclosed, would have led to a different result either in the pretrial suppression hearing or before the jury, and the trial court accordingly erred in summarily denying defendant's motion.

CONCLUSION

Based on the foregoing, defendant requests this Court to reverse the order of the trial court and to remand for appropriate proceedings.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: Elliot H. Scherker
ELLIOT H. SCHERKER
Assistant Public Defender
Florida Bar No. 202304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to MICHAEL J. NEIMAND, Assistant Attorney General, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33125 this 18TH day of June, 1990.

Elliot H. Scherker

ELLIOT H. SCHERKER
Assistant Public Defender