IN THE SUPREME COURT
OF FLORIDA

CASE NO. 81-12190 CF 10

APPEAL NO. 77,366

DAVID KIDD GORHAM,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court
of the Seventeenth Judicial Circuit
in and for Broward County, Florida

INITIAL BRIEF

OF

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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in denying GORHAM's Rule 3.850 motion where the State failed to disclose to the defense (1) that the key State witness had made a sworn, written statement to the court that the lead detective and the prosecutor in this case had recommended leniency for her; (2) that this witness was a confidential informant who had received monetary payments and other consideration from the Pompano Beach Police Department; and (3) that there were two other suspects in the Peterson murder for which GORHAM was charged.

2. Whether the trial court erred in denying GORHAM's Rule 3.850 motion, where his trial counsel failed to properly interview or call at trial a witness to the crime scene who would have testified that GORHAM could not have been the murderer.

3. Whether a new trial is required where GORHAM's conviction rests upon tainted testimony.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

DAVID KIDD GORHAM was convicted after a trial by jury of first degree murder and attempted robbery on October 26, 1982. The jury recommended a life sentence but the judge overrode the jury recommendation and imposed the death penalty. The conviction and sentence were affirmed by this Court in Gorham v. State, 454 So.2d 556 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S. Ct. 941, 83 L.Ed.2d 953 (1985).

GORHAM subsequently obtained new undersigned counsel. A post-trial investigation revealed that the State had significant information material to GORHAM's defense that it never disclosed to GORHAM's trial counsel. This information included evidence of a deal between the State and its key witness, Ada Johnson, and the existence of a witness to the crime, Loretta Forehand, whose testimony would have exonerated GORHAM. On the basis of this information, GORHAM filed a motion to vacate his conviction and sentence pursuant to Florida Rule of Civil Procedure 3.850. See Tr., Vol. VI, pp. 697-746.[1/]

The trial court denied GORHAM's Rule 3.850 motion without an evidentiary hearing. GORHAM appealed the trial court's summary denial of his Rule 3.850 motion to this Court which remanded for an evidentiary hearing on certain issues, see Gorham v. State, 521 So.2d 1067 (Fla. 1988), Tr., Vol. VI, pp. 688-695, and instructed the trial court to determine:

> (1) whether the state failed to disclose promises of leniency made to Ada Johnson, a key state witness, in exchange for favorable testimony;
>
> (2) whether the state should have furnished an oral statement allegedly made by Loretta Forehand to police officers at the scene;
>
> (3) whether the state should have disclosed the existence of two other suspects; and

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[1/] Throughout this brief, "Tr." refers to the Record which consists primarily of the transcript of the Rule 3.850 evidentiary hearing. An index to the Record can be found in Volume VI. "Trial" refers to the transcript of GORHAM's October 1982 trial.

(4) whether GORHAM was deprived of effective assistance of counsel because his trial attorney failed to interview Loretta Forehand.

Id.

II. THE EVIDENCE AT TRIAL: A CIRCUMSTANTIAL CASE

GORHAM was convicted of the murder of Carl Peterson solely on the basis of circumstantial evidence. No witness testified to having seen GORHAM commit the murder. The State's key witness was Ada Johnson, who testified that, although she was a block away, she saw the back of a man running from the crime scene who she thought was GORHAM because he was wearing clothing similar to what GORHAM had worn earlier in the day.[2/] Trial 530-31. Johnson also stated that, on the morning of the murder, GORHAM had a pistol with him and said he would try to get rent money he needed. Trial 526-527. On cross-examination, Ada Johnson explicitly denied making a deal with the State in exchange for her testimony. Trial 540. In closing, the State emphasized this point, stating that Ada Johnson was believable because she "had nothing to gain." Trial 721.

Kenneth Gardner, an inmate who heard shots while on work release and reported the crime to the police, contradicted Ms. Johnson's testimony. Although he was called by the State, Gardner testified unequivocally that he saw someone fleeing the crime scene soon after hearing the shots but that this individual was not DAVID

2/ Ms. Johnson had given a prior statement to the Pompano Beach Police Department in which she stated that she saw nothing regarding the murder. See Defense Exhibit 5.

GORHAM. Gardner testified that he was positive that he had never seen GORHAM before in his life. Trial 457-468. Gardner also revealed that, prior to trial, the prosecutor offered to reinstate his probation if Gardner would change his testimony and identify GORHAM as the person who ran from the crime scene.[3/] Gardner testified that he would not lie about such an important matter and refused to falsely implicate GORHAM in the Peterson murder. Trial 466-467.

Apart from Ada Johnson's testimony, the State's case rested on the fact that GORHAM's fingerprints were found on a paper receipt located near Peterson's body and GORHAM's use of the dead man's credit cards. However, it was established at trial that the crime scene had not been secured for at least 35 minutes after the murder, Trial 362, and that possession of the credit cards did not show participation in the murder and robbery.

The State also introduced statements made by GORHAM to the police. Although he initially denied being in the vicinity of the murder, GORHAM later admitted fraudulent use of the credit cards and claimed that he bought them from two men. Trial 625, 631. GORHAM later stated that he found the credit cards on the road in a wallet outside the garage where Peterson was killed. Specifically, GORHAM stated he was walking near the garage and heard shots. He looked down the street and saw two or three men flee to a car, then noticed a wallet on the ground. GORHAM picked

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[3/] The prosecutor admitted to the Court that: "I told him I would be perfectly happy to write to the Parole Commission if he did cooperate and tell them that fact." Trial 448.

up the wallet, took out the credit cards, and then dropped the wallet back on the ground outside the garage. Trial 641. This would explain his fingerprints on a receipt. At all times, in all statements, GORHAM steadfastly denied participating in the robbery or murder of Carl Peterson.

GORHAM's court-appointed defense counsel, Michael Gelety, rested immediately after the State's case was completed. No alternative theory of the case was given. No witness was called to testify.

The jury convicted GORHAM of first degree murder. At the sentencing hearing, Gelety presented no mitigating evidence on GORHAM's behalf and instead moved for a continuance to compel the attendance of witnesses that he allegedly had subpoenaed. Trial 780, 784. The trial court denied the continuance motion and, after the State presented its evidence of aggravating circumstances, Gelety again immediately rested. Trial 796. As stated previously, the judge imposed the death penalty overriding the jury's recommendation of a life sentence.[4/]

III. EVIDENCE AT THE RULE 3.850 HEARING

At the Rule 3.850 evidentiary hearing, GORHAM presented substantial testimony and documentary evidence on the issues designated by this Court's order of remand.

4/ This Court, on review, ruled that two of the aggravating circumstances found by the trial judge were not supported by the evidence. Because there was no mitigating evidence presented, however, this Court affirmed the trial court's override of the jury recommendation for a life sentence.

A. The State's Failure To Disclose Impeachment Evidence Concerning Its Most Important Witness

It is GORHAM's position that Ada Johnson, the State's "key witness" according to this Court, Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988), falsely testified at trial that she had no deal with the State and that evidence of this deal was unlawfully withheld from the defense. In support of this claim, GORHAM introduced into evidence a motion for mitigation and reduction of sentence filed by Ms. Johnson in a case where she had been convicted of grand theft and sentenced to three years imprisonment. Defense Exhibit 2.[5/] In the motion, she swore that she had been given mitigation recommendations by Assistant State Attorney Thomas Kern, the prosecutor in the GORHAM case, and Detective Sergeant Daniel Murray of the Pompano Beach Police Department, the lead detective in the GORHAM case. See Defense Exhibit 2. Neither Kern nor Murray had any involvement in Johnson's grand theft case. Ms. Johnson admitted that she filed this motion for mitigation in May of 1982, Tr., pp. 288-289. Ms. Johnson testified that it was her understanding she was, in fact, given mitigation recommendations by Kern and Murray. Tr., pp. 290-293. This written motion for mitigation was never turned over to Gelety by the State. Tr., p. 541.[6/]

[5/] For this Court's convenience, a copy of Ada Johnson's motion for mitigation and reduction of sentence, Defense Exhibit 2, is appended as Exhibit A to this Brief.

[6/] Ms. Johnson's motion for mitigation was denied on May 26, 1982 because the court found that it was without jurisdiction to grant such a motion.

Kern and Murray denied the existence of a deal. However, GORHAM introduced into evidence a sworn statement by Ada Johnson in which she admitted that she had made a deal with the State in exchange for her testimony against GORHAM. Tr., Vol. V. Ms. Johnson was interviewed by GORHAM's appellate counsel and an investigator in November 1989. During this interview, Ms. Johnson admitted that she had made a deal with the State and gave a taped sworn statement to this effect. Id.[1/] Specifically, she stated that the State had agreed not to seek probation violation charges against her children's father, Jim Oscar Smith, if she "cooperated" in the GORHAM case. Id.

This sworn statement is corroborated by the facts surrounding the arrest of Jim Oscar Smith. Shortly after GORHAM was arrested, Ada Johnson and Jim Oscar Smith were involved in a high speed chase with the Pompano Beach police. Tr., pp. 578-579. During the arrest, Smith struggled with the police, Tr., pp. 579-580, and was charged with resisting arrest. Tr., pp. 583-584. At the time of this arrest, Jim Oscar Smith was on probation for armed robbery and faced a revocation of this probation. Tr., p. 615. Mr. Smith, however, was not prosecuted on probation violation charges and was placed back on probation. Tr., p. 586.

Ada Johnson's testimony concerning what she saw the night of the murder substantially changed after she and Jim Oscar Smith were arrested. In a sworn statement Ada Johnson gave to the

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[1/] For this Court's convenience, a copy of the taped transcript of Ms. Johnson's sworn statement taken on November 1, 1989, Tr., Vol. V, is appended as Exhibit B to this Brief.

police on December 18, 1981, Defense Exhibit 5, she did not make any mention of having seen GORHAM at the time of the shooting. Moreover, she recounted in that statement that she had been questioned by the police on the night of the shooting and had told them that she had not seen or heard anything. Id. Ms. Johnson and Mr. Smith were arrested on December 28, 1981 for grand theft and resisting arrest. When Ms. Johnson subsequently testified at GORHAM's trial, however, she claimed that she saw someone dressed as GORHAM had been dressed earlier that day flee from Carl Peterson's garage shortly after the shots were fired. Trial 530-31.

Ada Johnson recanted the sworn statement concerning her deal with the State at the Rule 3.850 evidentiary hearing, Tr., p. 245, claiming GORHAM's appellate counsel had offered to buy her a white couch for this statement, Tr., p. 267, and that she thought the statement was not to be used in court. Tr., pp. 248-250, 256. Steve Sessler, an investigator who was present when Ms. Johnson made her sworn statement, vehemently denied that Ms. Johnson was told that her statement would not be used in court, Tr., pp. 407-408, and that she was promised a white couch in exchange for her statement. Tr., p. 408.[8/]

GORHAM also established that at the time that she testified against GORHAM, Ms. Johnson worked for the Pompano Beach Police Department as an informant under the code name "Apple."

[8/] The trial court prohibited Ms. Skolnick, one of GORHAM's appellate counsel, from testifying as to what occurred.

Tr., pp. 215-217, 273, 275, 467, 469, 587. Moreover, while Ms. Johnson was incarcerated during the period between GORHAM's two trials, she received money and other consideration from the police. GORHAM introduced into evidence a "receipt for a confidential informant" containing Ada Johnson's name and the file number for the Peterson murder. Defense Exhibit 19. This receipt revealed that approximately $10.00 was given to Ada Johnson in June of 1982 by the Pompano Beach police, before GORHAM's October trial. Id. See also Tr., pp. 477-478. Detective Murray also testified that he provided Ms. Johnson with talcum powder, other sundries and spending money while she was incarcerated. Tr., pp. 480-481, 484.

Kern admitted that the motion for mitigation was not disclosed to the defense because he was unaware of it. Tr., p. 542. Detective Murray admitted that he did not inform Kern that Ada Johnson was an informant or that she had received payments from the police. Tr., p. 469. Kern acknowledged that he never received this information. Tr., p. 534. Moreover, Kern admitted that information that a state witness is a paid informant was Brady material and that he was obliged to disclose it to the defense. Tr., p. 537. In fact, Kern testified that if he had been aware about Ada Johnson, he "certainly" would have provided this information to the defense, even if there had been no specific request for it. Id.

Gelety testified that he would have impeached Ada Johnson with her motion for mitigation and the fact that she was

a paid confidential informant had it been disclosed to him. Tr., pp. 78-79, 81-82. According to Gelety, this information, if presented properly, could have substantially undermined Ada Johnson's credibility. Tr., pp. 78-79, 81-82. Moreover, in Gelety's opinion, the fact that this motion for mitigation was denied would not have lessened its impact of confronting her with the motion. Tr., pp. 108-109. The written motion would have been important because it would have demonstrated that Ms. Johnson did in fact have a deal with the state, and moreover, had lied under oath by denying gaining anything for her testimony. Tr., p. 109.

B. The State's Failure To Disclose Evidence Of Other Suspects

Detective Murray testified that the Pompano Beach Police Department had information pertaining to two men with a history of attacking Carl Peterson and a handwritten note based upon an interview with Charles Slocumb who provided the police with this information. Tr., pp. 453. See also Defense Exhibit 17. The police had also issued an intelligence bulletin for a "Willie Pickett" who was believed to have information relating to the murder. Tr., pp. 444, 452. Kern was never given the information about Willie Pickett, Tr., p. 453, nor was he told about the two men with a history of attacking Peterson or given the handwritten note. Tr., pp. 454-455. Murray testified that he failed to give Kern the note pertaining to the two other suspects because of oversight, and not because he made a determination that this information was irrelevant. Tr., p. 455. Kern acknowledged that

he never received any of this information from the police and that he, therefore, did not disclose it to Gelety. Tr., pp. 543-546. Kern also testified that, had he known about Willie Pickett and the other two suspects, he would have disclosed this information to Gelety. Tr., pp. 543, 546.

According to Gelety, he would have utilized the information relating to Willie Pickett and the existence of other suspects, had it been disclosed to him. Tr., pp. 37-38, 46, 49, 71-72, 74-75. This information was also material to GORHAM's defense because it corroborated the defense theory that others had committed the crime. Tr., pp. 74-75.

C. Ineffective Assistance of Trial Counsel

Gelety was appointed by the trial court to represent GORHAM in this first degree murder case shortly after he left the State Attorney's Office and began practicing as a criminal defense attorney.[9/] He was a sole practitioner and did not have anyone else working on the case with him. Tr., p. 28-29. He never requested any funds from the court to hire an investigator. Tr., p. 29, relying instead upon GORHAM and his friend, Louise Owens, to find witnesses for him. Tr., p. 60. Gelety testified that he

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9/ Gelety testified at the Rule 3.850 hearing, on November 20, 1989, that he had been practicing law for approximately thirteen (13) years. Tr., p. 38. He further testified that he spent his first five and one-half (5 1/2) years of his career as a prosecutor before opening his own practice as a defense attorney in Broward County. Tr., p.39.

never did an area canvas or even visit the scene of the crime. Tr., p. 100.

As a result of this inadequate investigation, Gelety failed to call a witness at trial who would have proven GORHAM innocent. This witness, Loretta Forehand, was an elderly woman and a life-long South Florida resident. She worked as a Christian volunteer and was collecting money for her church when she saw GORHAM walking on the street outside Peterson's garage at the time of the murder. Tr., pp. 121-123, 129-130.[10/]

Ms. Forehand testified that she was standing near Peterson's garage when she heard two shots and saw muzzle flashes inside the garage. Tr., p. 121. The garage door was half open and Ms. Forehand could see into the building from outside. Tr., p. 128. After no more than three or four minutes, she saw two men running from the direction of the garage and past her. Tr., pp. 122-123. At the time that she saw the flashes and heard the gunshots, she saw GORHAM walking towards her from the opposite direction. Tr., p. 122. She saw GORHAM stoop down and pick something up from the ground. Tr., p. 123. In short, if Forehand's testimony was credible, GORHAM could not have committed the murder of Carl Peterson. Gelety should have properly interviewed and called this crucial witness on GORHAM's behalf.

10/ Pursuant to a Stipulation between the defense and the State, a videotaped deposition of Ms. Forehand was played at the hearing. This deposition is part of the record and available for this Court's review. See generally Tr., pp. 113-193. For this Court's convenience, a copy of the transcript of Loretta Forehand's videotaped deposition is appended as Exhibit C to this Brief.

Gelety was even put on notice that Forehand was a material witness. Louise Owens testified that she spoke with GORHAM at the jail before his trial. Tr., p. 429. GORHAM told her that there was a witness who saw him the night that Carl Peterson was murdered. More specifically, GORHAM told her that there was a church lady named Ms. Forehand that could help him. Tr., p. 430. Ms. Owens located Ms. Forehand and gave her name and phone number to Gelety. A copy of the letter sent by Ms. Owens to Gelety with the names of potential witnesses, including Loretta Forehand, was admitted as Defense Exhibit 14.

Gelety testified that he met with Ms. Forehand but spent, in his own words, "a minimal amount of time" with her. Tr., p. 84. This meeting was conducted outside the courtroom in the middle of GORHAM's first trial,[11/] Tr., p. 85 and lasted about five or ten minutes, and possibly as little time as thirty seconds. Tr., p. 84. Gelety would not even characterize his discussions with Ms. Forehand as an "interview". Tr., p. 83. He never spoke to her in his office, Tr., p. 85, nor did he remember speaking to her again after that first meeting. Tr., p. 86. According to Gelety, he asked her what she knew about the case and she said she knew nothing. Tr., p. 62. He noted that she appeared to be an "eccentric individual" who had a tendency to "go off track." Tr., p. 65. He also remembered that her "wig was

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[11/] A mistrial was declared and a second trial was held in October.

crooked". Tr., pp. 65-66, 86.[12/] Gelety testified, however, that "the major factor" in his decision not to call Ms. Forehand as a witness was that "it was time for us to put up or shut up and she had nothing to say". Tr., p.66.

In fact, Gelety's own notes from his file demonstrated that Ms. Forehand had substantial information about the case, even though he failed to elicit the full scope of what she had seen. According to Gelety's handwritten notes, Defense Exhibit 3, Ms. Forehand told him that "the Pickett boy had done it," that there were two boys who were trying to get her to buy stolen credit cards and that GORHAM "could not be the murderer." Tr., pp. 94-95. See also Defense Exhibit 3.

When he was confronted with his own notes, Gelety admitted that this was significant information, and that he never followed up on it. Tr., pp. 87-88. Also, contrary to his testimony that he had no use for Ms. Forehand at GORHAM's October trial because she did not appear to be a good witness, Gelety's notes demonstrate that he thought Ms. Forehand should be subpoenaed her for both the guilt and sentencing phases of GORHAM's trial. See Defense Exhibit 3. Gelety tried to contact her by mail for GORHAM's October trial, but his letter was returned because the address was incorrect. See Defense Exhibit 4. After the letter was returned, he made no further efforts to contact Loretta Forehand. Tr., pp. 103-104.

[12/] At another point in his testimony, Gelety indicated that his conversation with Ms. Forehand may not have been in person, but by telephone. Tr., pp. 94-95.

Brian McDonald, a senior trial attorney with the Public Defender for the Eleventh Judicial Circuit of Florida in Dade County, testified as an expert witness concerning effective assistance of counsel in a first degree murder case. Mr. McDonald has represented approximately fifty persons in capital murder cases, thirty or thirty-five of whom went to trial. He reviewed Ms. Forehand's videotaped deposition, the trial transcript and Mr. Gelety's testimony at the Rule 3.850 hearing and concluded unequivocally that the manner in which Gelety interviewed Ms. Forehand was unreasonable under the circumstances. Tr., p. 347.

McDonald opined that Gelety acted unreasonably in interviewing Ms. Forehand in that he only spoke to her for an extremely short period of time during a trial break. According to McDonald, Gelety could not have made a reasonable determination as to Loretta Forehand's value as a defense witness under those circumstances. Tr., p. 348. Gelety's failure to call Ms. Forehand thus could not be justified as a tactical decision in light of the inadequate interview. Id. McDonald concluded that had Gelety conducted a proper interview of Loretta Forehand, he would have learned what she knew about the case and that with proper preparation, she would have been a credible witness. Moreover, according to McDonald, there is a reasonable probability that her testimony would have affected the trial outcome. Tr., p. 354. McDonald noted that Loretta Forehand's testimony was particularly important because it could have explained GORHAM's presence at the scene and would have given Gelety "the reasonable hypothesis of innocence

that he needed to argue to the jury." Tr., p. 356. Finally, McDonald concluded that Gelety's unprofessional errors prejudiced GORHAM at trial. Tr., pp. 353, 356-358.

IV. THE TRIAL COURT'S RULE 3.850 ORDER

The trial court denied GORHAM's Rule 3.850 motion. Tr., Vol. VI, pp. 754-755. The trial court found, with respect to GORHAM's Brady claim, that "the police gave all information that was deemed pertinent to the case to the state attorney" and further found that "defendant has not proved that any information not forwarded by the police would have been relevant to the defendant's defense." Tr., Vol. VI, p. 754. In addition, the trial court found that Ada Johnson received no consideration from the State and that the defendant had not proved an agreement between the State and Ms. Johnson. Id.

GORHAM's ineffective assistance of counsel claim was also rejected. The trial judge apparently believed Loretta Forehand's probative testimony was that she "claimed to have seen certain persons near the scene of the crime." Tr. Vol. VI, p. 755. Gelety's decision not to call Forehand was upheld on the basis of his testimony that Ms. Forehand did not know anything about the crime, appeared unstable, and that "her wig was crooked" Tr., Vol. VI, p. 755. The trial court did not discuss the adequacy of Gelety's investigation of this witness.

SUMMARY OF ARGUMENT

This is not a "routine" Rule 3.850 motion in a capital case, broadly challenging the constitutionality of the death penalty or raising technical issues regarding the conduct of the proceedings. The issues presented here go to the fundamental fairness of GORHAM's trial and raise the real prospect that an innocent man has been convicted of murder and sentenced to death. When a man is convicted solely on circumstantial evidence, when the key State witness' deal with the State is not disclosed, and when the defense attorney fails to call a witness to the crime scene whose testimony exonerates the defendant, the minimal level of fairness required by the Fifth, Sixth and Fourteenth Amendments has been denied. Unfortunately, that is the situation here -- for several independent reasons.

First, GORHAM was denied the benefit of material information to which he was entitled under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). GORHAM was entitled to a motion filed by the State's key witness, Ada Johnson, reciting that the GORHAM prosecutors had given her leniency recommendations. GORHAM was also entitled to learn of an oral deal made with Ada Johnson -- which she admitted post trial and then recanted, and the vouchers showing that Johnson was a paid police informant. Without this evidence, GORHAM could not impeach Johnson's statement at trial that she had nothing to gain from her testimony. The State's justification for failing to produce these documents -- the prosecutor's lack of knowledge that

the items were in his office or the police file -- has been definitively rejected by the courts.

Second, GORHAM was denied effective assistance of counsel under the test set down in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). It is bad enough when a lawyer calls no defense witnesses and presents no alternative theory of the case. That becomes constitutionally intolerable where, as here, there exists a witness, Loretta Forehand, to the crime scene who saw GORHAM on the street at the same time she heard the shots being fired. GORHAM's counsel, Michael Gelety, failed to properly interview and ascertain the pivotal elements of Loretta Forehand's testimony and, ignoring his own notes to the contrary, failed to subpoena her to testify at trial. The trial judge's opinion misapprehends the significance of Loretta Forehand's testimony. Forehand did not simply see "certain persons near the scene of the crime;" she saw GORHAM on the street as the shots were fired. A strategic decision not to call a witness must be informed and defensible; Gelety's decision not to call Loretta Forehand as a witness was neither. If the jury believed Loretta Forehand's testimony, they could not have found GORHAM guilty. At a minimum, if they had heard her testimony, there is a reasonable probability that the jury would have had a reasonable doubt as to GORHAM's guilt.

Finally, this Court should order a new trial under Mesarosh v. United States, 352 U.S. 1, 77 S. Ct. 8, 1 L.Ed.2d 1

(1956) because GORHAM was convicted upon Ada Johnson's now tainted sworn testimony.

ARGUMENT

I. THE STATE WITHHELD MATERIAL BRADY EVIDENCE

It is well-settled constitutional law 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." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196 10 L.Ed.2d 215, 218 (1963). Information that the prosecution is required to disclose under Brady includes impeachment as well as exculpatory information. See United States v. Bagley, 473 U.S. 667, 1055 S. Ct. 3375, 87 L.Ed.2d 481 (1985); Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972). According to the Court in Bagley, "impeachment evidence is 'evidence favorable to the accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." Id., 473 U.S. at 676, 105 S. Ct. at 3380, 87 L.Ed.2d at 490. The Court further noted that: "When the 'reliability of a given witness may well be determinative of guilt or innocence,' non-disclosure of evidence affecting credibility falls within the general rule of [Brady]." Id., 473 U.S. at 677, 105 S. Ct. at 3381, 87 L.Ed.2d at 490, quoting Giglio v. United States, 405 U.S. at 154, 92 S. Ct. at 766, 31 L.Ed.2d at 108. The Brady rule applies irrespective of the good faith or bad faith of the prosecution; it is a rule of fairness and minimum prosecutorial obligation. United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392,

49 L.Ed.2d 342 (1976); United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978), cert. denied, 440 U.S. 947, 99 S. Ct. 1426, 59 L.Ed.2d 636 (1979).

A. The State Was Required To Disclose Impeachment Evidence About Ada Johnson

Gelety presented the State with a discovery demand form which asked the State to disclose any written and oral impeachment or exculpatory information to the defense that it had in its possession. Tr., pp. 29-30. See also Defense Exhibit 1. Despite this specific request, Gelety was never given Ada Johnson's motion for mitigation even though it was important impeachment evidence that the State was required to disclose. See United States v. Esposito, 523 F.2d 242, 248 (7th Cir. 1975), cert. denied, 425 U.S. 916, 96 S. Ct. 1517, 47 L.Ed.2d 768 (1976); United States v. Deutsch, 475 F.2d 55, 57 (5th Cir. 1973), ovr'ld on other grounds, 749 F.2d 203 (5th Cir. 1984).

In its Order denying GORHAM's Rule 3.850 motion, the trial court found there was no Brady violation because GORHAM had not proved the existence of an agreement between the State and Ada Johnson. This conclusion cannot withstand appellate scrutiny.

As a threshold matter, the trial court improperly focused upon the existence of a formal agreement between the State and Ada Johnson. However, GORHAM did not need to prove that there was a firm, iron-clad agreement in order to establish a Brady violation. Evidence that even a tentative promise of leniency to a state witness was withheld from the defense can form the basis of

a Brady violation. See Marrow v. State, 483 So.2d 17 (Fla. 2d DCA 1985). See also United States v. Moreno-Rodriguez, 744 F. Supp. 1040, 1042 (D. Kan. 1990) (ordering government to disclose even informal agreements with its witnesses). Indeed, even government conduct which may have led a witness to believe that his prospects for lenient treatment depended on the degree of his cooperation can be considered impeaching information that should be disclosed. See United States v. Leonard, 494 F.2d 955, 963 (D.C. Cir. 1974); United States v. McCrane, 527 F.2d 906 (3d Cir. 1975), aff'd after remand, 547 F.2d 204 (3d Cir. 1975) (per curiam). Ada Johnson's motion for mitigation based upon her belief that she received recommendations for leniency by Kern and Murray thus clearly falls within the type of exculpatory material which must be disclosed under Brady. The jury should have been able to make its own determination as to whether Ada Johnson's understanding that Kern and Murray were recommending leniency affected the nature of her testimony.

At the hearing, the State argued that Kern never knew of Ada Johnson's mitigation motion and would not have received a copy of it even though the State Attorney's Office did itself have a copy. Such an argument is without legal merit. The State is deemed to have knowledge of the motion even if Kern himself had no specific knowledge. See Giglio v. United States, 405 U.S. at 154, 92 S. Ct. at 766, 31 L.Ed.2d at 109 (court stated that prosecutor's office was an entity and recognized that though this places a burden on large prosecution offices, procedures and

regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it).

Gelety was also never told that Ada Johnson worked as a confidential informant for the Pompano Beach Police Department and that, while incarcerated, she received money and other consideration from the police. Kern conceded that this information was Brady impeachment information which he would have disclosed, had he been provided it by the police. Tr., p. 537. In addition, it is well-established that the fact that a witness is a paid confidential informant is Brady information which must be disclosed to the defense. See United States v. Shaffer, 789 F.2d 682, 684 (9th Cir. 1986). It is also established that material in possession of the police is deemed to be in the possession of the state attorney's office. See cases cited at pp. 23-24, infra.

B. The State Was Required To Disclose Evidence Of Other Suspects

GORHAM established that Gelety was never told about Willie Pickett or the existence of two men with a history of attacking the victim. The trial court's finding that "the police gave all information that was deemed pertinent to the case to the state attorney," Tr., Vol. VI., p. 754, is clearly in error as it is unsupported by the evidence. In fact, the evidence showed that the police never made a relevancy determination and simply forgot to turn the information over to Kern. Murray admitted that he failed to turn over the complete police file, Tr., p. 454, and

stated that his reasons for not turning over the complete file were not because he [Murray] felt that the information was not pertinent.

> Murray: It was something I couldn't get to at that particular time; not that it wasn't relevant. It was something I couldn't get to at that particular time.

Tr., p. 455, emphasis added. Kern confirmed that he never received this information and admitted that, had he received it, he would have disclosed it to Gelety. This information relating to the existence of two other suspects was exculpatory information that the State was required to disclose to defense counsel. Brady v. Maryland, 373 U.S. at 87, 83 S. Ct. at 1196, 10 L.Ed.2d at 218.

The fact that the Pompano Beach Police Department had possession of potentially exculpatory information which it never turned over to the State Attorney's Office does not relieve the State of its Brady obligations. Information possessed by the police is deemed to be possessed by the State Attorney's Office because they are both instruments of the State. See Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984); Fulford v. Maggio, 692 F.2d 354, 358 n.2 (5th Cir. 1982), rev'd on other grounds, 462 U.S. 111, 103 S. Ct. 2261, 76 L.Ed.2d 794 (1983); Schneider v. Estelle, 552 F.2d 593, 595 (5th Cir. 1977); Smith v. Florida, 410 F.2d 1349 (5th Cir. 1969); Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964) (the duty to disclose is that of the state, which ordinarily acts through the pro-

secuting 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). See also Arango v. State, 467 So.2d 692, 693 (Fla. 1985), vacated on other grounds, 474 U.S. 806, 106 S. Ct. 41, 88 L.Ed.2d 34 (1985) (the state may not withhold favorable evidence in the hands of the police who work closely with prosecutor); State v. Del Gaudio, 445 So.2d 605, 612 n.8 (Fla. 3d DCA 1984) (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). Therefore, even if the police never gave Brady information to the State Attorney's Office, Brady is violated because, ultimately, it is the fact that defense counsel never received the information that is critical. This is especially so since Brady violations do not depend upon good faith or bad faith on the State's part. Brady v. Maryland, 373 U.S. at 87, 83 S. Ct. at 1196, 10 L.Ed.2d at 218.

C. The Non-disclosed Evidence Was Material

The standard of materiality with respect to Brady violations was established by the United States Supreme Court in United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 746 (1976), and further elucidated by the Supreme Court in United States v. Bagley, 473 U.S. 667, 1055 S. Ct. 3375, 87 L.Ed.2d 481 (1985). According to the Court, non-disclosed evidence is material if there is a reasonable probability that, had the

evidence been disclosed to the defense, the result of the proceeding would have been different. Id., 473 U.S. at 682, 105 S. Ct. at 3383, 87 L.Ed.2d at 494. A "reasonable probability" was defined as a probability sufficient to undermine confidence in the outcome. Id.

The non-disclosed information about Ada Johnson and the existence of other suspects certainly undermines one's confidence in the outcome of this case. Had the jury been apprised that, contrary to her testimony at trial, Ada Johnson had previously stated under oath that the prosecutor and the lead detective in this case had recommended leniency for her and that she was a confidential informant, there is a reasonable probability that the result of GORHAM's trial would have been different.

The case against GORHAM was wholly circumstantial as stated by the prosecutor himself, Tr., p. 546, and hinged, in large part, upon Ada Johnson's testimony and credibility. Even this Court has previously characterized Ada Johnson as a key state witness. See Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988). Therefore, any information that could have affected Ada Johnson's credibility was material and could have affected the trial outcome. See Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L.Ed.2d 1217, 1221 (1959) ("[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence"); United States v. Blalock, 449 F. Supp. 916 (N.D. Ga. 1978), appeal dismissed 575 F.2d 1151 (5th Cir. 1978) (new trial warranted where Government relied

heavily on perceived credibility of government informant and non-disclosed information substantially diminished informant's credibility). See also Marrow v. State, 483 So.2d 17, 20 (Fla. 2d DCA 1985) (where witness' testimony was vital to the prosecution, any evidence that could have been used to impeach him was crucial to the [defendant]).

In United States v. Shaffer, 789 F.2d 682, 685-86 (9th Cir. 1986), for example, the defendant moved for a new trial based on the prosecution's failure to disclose facts which could have impeached the critical government witness including the fact that he was a paid informant in an unrelated case and had received consideration in exchange for his cooperation. Id. at 684. Noting that the witness' testimony was critical to the defendant's conviction, the court stated that "the jury's assessment of [the witness'] credibility was crucial to the outcome of the trial." Id. The court, therefore, concluded that the prosecution's failure to disclose the impeachment evidence regarding this crucial witness, including the fact that he was a paid informant in another case, undermined confidence in the outcome of the trial. Id.

Likewise, Ada Johnson was the key witness against GORHAM whose testimony linked him to the crime. The jury's assessment of her was, therefore, crucial. If the jury disbelieved her, there is reasonable probability that GORHAM would not have been convicted. As in Shaffer, the state's failure to disclose impeachment evidence regarding Ada Johnson including the fact that she

was a confidential informant undermines confidence in the outcome of GORHAM's case.

The information concerning the two other suspects was also material to the defense. Gelety testified that this information was important as "it was consistent with [his] theory of the defense in this case, which is there were some other guys involved." Tr., p. 49. The existence of the two other suspects substantially corroborates Kenneth Gardner's testimony that he saw two men outside Peterson's garage before the shooting and, as Gelety noted, strengthens GORHAM's defense theory that others had committed the crime. Gelety added that this corroborative information could have raised a reasonable doubt in the jury's mind, Tr., pp. 71-72, 74-75, making it material to GORHAM's defense.

Therefore, the trial court's finding that GORHAM had not proved that the non-disclosed Brady information would have been relevant has been clearly refuted both by the evidence on the record and by established case law. Accordingly, this Court must reverse the trial court's Order denying GORHAM's Rule 3.850 motion.

II. GORHAM'S TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE: HE FAILED TO CALL A WITNESS TO THE CRIME WHOSE TESTIMONY EXONERATES GORHAM

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) set forth a two-part test to be utilized in determining whether a defendant's right to effective assistance of counsel has been

violated. The first prong requires a defendant to show that, considering all the circumstances, his trial counsel acted unreasonably. Id., 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. The second prong requires the defendant to show that the deficient performance prejudiced the defense. Id., 466 U.S. at 692, 104 S.Ct. at 696, 80 L.Ed.2d at 2067. The defendant need only show:

> that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id., 466 U.S. at 694, 104 S.Ct. at 698, 80 L.Ed.2d at 2068.

As for the first prong, the court in Strickland stressed a defense counsel's duty to investigate and stated that ". . . counsel has a duty to make reasonable investigations or to make a decision that makes particular investigations unnecessary." Id., 466 U.S. at 691, 104 S.Ct. at 695, 80 L.Ed.2d at 2066. And, said the Court, ". . . a particular decision not to investigate must be directly assessed for reasonableness in all circumstances . . ." Id. Other courts have likewise expounded on a trial counsel's duty to investigate. The Fifth Circuit, in Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979), stated that "since investigation and preparation are the keys to effective representation . . . court-appointed counsel have a duty to interview potential witnesses and 'make an independent examination of the facts, circumstances, pleadings and laws involved.'" See Douglas v. Wainwright, 714 F.2d

1532, 1556 (11th Cir. 1983); vacated on other grounds, 486 U.S. 1206, 104 S.Ct. 3575, 82 L.Ed.2d 874 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983); Kennedy v. Maggio, 725 F.2d 269, 272 (5th Cir. 1984); Bell v. Watkins, 692 F.2d 999, 1009 (5th Cir. 1982), cert. denied, 464 U.S. 843, 104 S.Ct. 142, 78 L.Ed.2d 134 (1983). See also Sorgman v. State, 549 So.2d 686, 687 (Fla. 1st DCA 1989) (failures alleged in defendant's Rule 3.850 motion, which included an allegation that trial counsel failed to interview and call witnesses who he was told might have been able to cast doubt on the defendant's guilt and that trial counsel failed to conduct an adequate pretrial investigation, could constitute ineffective assistance of counsel).

While it is true that a defense counsel's decision whether or not to call a particular witness is a matter of trial strategy, see Fuller v. Wainwright, 238 So.2d 65, 66 (Fla. 1970), such a decision cannot validly be made without first conducting a reasonable investigation to determine whether or not a witness is helpful. Therefore, the deference normally given to a trial counsel's decision not to call a particular witness should only be accorded when trial counsel has properly interviewed a witness. Strategic choices are unchallengeable only "after thorough investigation of the law and facts." Downs v. State, 453 So.2d 1102, 1108 (Fla. 1984). "A strategic decision, however, implies a knowledgeable choice." Stevens v. State, 552 So.2d 1082, 1087

(Fla. 1989), quoting Eytzy v. State, 536 So.2d 1014, 1017 (Fla. 1988) (Barlett, J. dissenting). Moreover, certain decisions cannot be defended as "strategic." The failure to call a witness to the crime whose testimony would prove the defendant innocent cannot be justified on these grounds. A strategic decision must be fully informed to be meaningful. Gelety's brief discussion with Ms. Forehand was completely inadequate to even determine whether she was a reliable witness and, hence, his tactical decision not to call her as a witness cannot be termed "strategic." See Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (deference generally granted to strategic choices of trial counsel is not required due to counsel's lack of preparation). See also Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985).

Gelety stated that his "tactical decision" not to call Ms. Forehand as a witness was premised on his belief that all she would have said was that GORHAM was "a nice guy." Tr., p. 93. However, this decision was not a reasonable tactical one because it was not based upon a full investigation of the facts. See Stevens v. State, 552 So.2d at 1087 (rejecting trial counsel's claim that failure to call witnesses was a strategic decision where "it is apparent . . . that trial counsel's failure . . . was not the result of an informed decision"). Gelety never stated that he would have made a tactical decision not to call Ms. Forehand if he had known that she would testify that she was at the crime scene and that GORHAM had not committed the crime. In fact, he indicated

that if he had known about a witness who would so testify, he would have tried to find her. Tr., p. 59.

Therefore, Gelety's failure to thoroughly interview Loretta Forehand and to investigate the information that she gave him cannot be termed reasonable under any circumstance. Had Gelety properly interviewed Ms. Forehand -- rather than talking to her for approximately five minutes during a trial recess -- he would have learned that she would have provided important, exculpatory testimony. His failure to fully interview Ms. Forehand is even more unreasonable given the fact that Gelety had her phone number well before GORHAM's October trial. After waiting six months, he finally sent her a letter during GORHAM's trial but it was returned to him because of an incorrect address. He failed to take any further steps to track her down to be a witness. Tr., pp. 103-104.

The trial court misapprehended the significance of Loretta Forehand. She didn't jus see "certain persons near the scene of the crime." Loretta Forehand saw GORHAM on the street at the same time the shots were fired. The trial court also gave undue weight to Gelety's own protestations that his performance was effective. Tr., Vol. VI, pp. 754-755. Gelety was an unreliable and wholly incredible witness concerning his dealings with Ms. Forehand. Gelety first stated unequivocally that Loretta Forehand knew nothing about the case. Tr., p. 86. See also Tr., pp. 86-93. He further stated that "the major factor" in his decision not to call Ms. Forehand as a witness was that "she had nothing to

say." Tr., p. 66. He was then confronted with his own handwritten notes which were taken during his meeting with her. Tr., pp. 94-95. These notes proved that, contrary to his testimony, Loretta Forehand did have material information pertaining to the guilt phase of GORHAM's case -- so much information, in fact, that he made a notation to subpoena her for trial and for the sentencing. See Defense Exhibit 3.

In addition, Gelety testified that, after he spoke to Ms. Forehand during the first trial and determined that he would not call her as a witness, he was "not going to have any further contact with her in the October trial." Tr., p. 101. Gelety was again impeached with the envelope from his office addressed to Loretta Forehand with a date stamped on it of October 19, 1982. See Defense Exhibit 4. Therefore, despite Gelety's testimony that Loretta Forehand was not needed for GORHAM's second trial, there is documentary evidence that he deemed her important enough to try to contact her. If, as Gelety claimed, Ms. Forehand was so unreliable and unpredictable a witness, why then did he attempt to contact her for GORHAM's second trial?

In circumstances, such as here, where a trial court has obviously relied on the incredible testimony of a severely impeached witness, a reviewing court should not defer to the trial court's credibility determination. See e.g. Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518, 529 ("documents or objective evidence may contradict the witness' story . . . where such factors are present,

the court of appeals may well find clear error even in a finding purportedly based on a credibility determination"); United States of America v. United States Gypsum Company, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948). Accordingly, since Gelety was contradicted by documentary evidence and since the trial court relied extensively on his incredible testimony, this Court should find clear error in the trial court's determination that Gelety's decision to not call Loretta Forehand was not ineffective assistance of counsel.

The second prong of the Strickland test requires GORHAM to show a reasonable probability that "but for counsel's unprofessional errors," the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 698, 80 L.Ed.2d at 2068. Loretta Forehand's story, by itself and in conjunction with Kenneth Gardner's testimony, proves GORHAM innocent. Ms. Forehand's account was particularly important because her testimony would have explained why GORHAM's fingerprint was found on a receipt which Gelety stated was "damaging evidence" against GORHAM. Tr., p. 45. She saw GORHAM stoop and pick something up from the ground which corroborates GORHAM's statement that he found the victim's wallet on the street outside the warehouse, picked it up and went through it before dropping it back down again. Her testimony, together with GORHAM's statement to the police, credibly explains this "damaging piece of evidence" against GORHAM. See also Tr., p. 357.

Brian McDonald agreed that there is a reasonable probability that Loretta Forehand's testimony would have affected the trial outcome. Her testimony "would have given Mr. Gelety the reasonable hypothesis of innocence that he needed to argue to the jury." Tr., p. 358.

In sum, Loretta Forehand was an important defense witness whose story was never heard by the jury because Gelety unreasonably failed to conduct an adequate interview, to conduct any investigation and to call her as witness. See Chambers v. Armontrout, supra, (failure to interview or call a witness who would have testified favorably for the defense was ineffective assistance of counsel even where this witness' testimony may have contained negative aspects); Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985) (finding that trial counsel's failure to adequately investigate prejudiced the defendant); Wilson v. Cowan, 578 F.2d 166 (6th Cir. 1978) (failure of trial counsel to call an alibi witness who was willing to testify when coupled with arguably less egregious errors was ineffective assistance of counsel). See also Majewski v. State, 487 So.2d 32, 33 (Fla. 1st DCA 1986) (court noted that allegations of defendant's 3.850 motion, which included the failure of trial counsel to call to trial or even to interview alibi witnesses, if found to be true, could support a finding of ineffective assistance).

III. FUNDAMENTAL FAIRNESS REQUIRES GRANTING GORHAM A NEW TRIAL

Even aside from the above grounds, this Court should order a new trial. The State's key witness, Ada Johnson, has given directly conflicting statements, all under oath, concerning whether she had a deal with the State in return for her testimony; at trial she denied such an agreement. Particularly since Ada Johnson's identification of GORHAM conflicts with the police report taken from her shortly after the crime, the veracity of her testimony at trial is very much in question. The United States Supreme Court and this Court have both ordered new trials in such circumstances.

In Mesarosh v. United States, 352 U.S. 1, 77 S. Ct. 8, 1 L.Ed.2d 1 (1956) the United States Supreme Court held that a new trial is warranted where a government witness has given false testimony. The Solicitor General, in that case, moved for a remand to determine a government witness' credibility after learning that this witness had given false testimony, of a similar nature, in proceedings both before and after the trial. Id., 352 U.S. at 6, 77 S. Ct. at 5, 1 L.Ed.2d at 5. Finding that the credibility of this witness had been wholly discredited and that the conviction was tainted, the Court instead granted the defendant a new trial. Id., 352 U.S. at 7, 77 S. Ct. at 5, 1 L.Ed.2d at 6. The Court stated that "the dignity of the United States Government will not permit the conviction of any person on tainted testimony." Id.

This Court rendered a similar result in Goldberg v. State, 351 So.2d 332 (Fla. 1977). There a government witness had

apparently testified falsely in another similar case. This Court stated that "the failure of the trial judge to grant appellant's motion for a new trial under these circumstances runs squarely afoul of Mesarosh v. United States." Id. at 335. The Court also noted that the Mesarosh rule "has been applied to situations in which the defense, rather than the prosecution, brings to light the unreliability of a prosecutorial witness' testimony in another proceeding in the same field of activity." Id. at 336. This Court should not allow GORHAM's conviction to stand as it does on Ada Johnson's tainted testimony since Ms. Johnson has demonstrated that she has no compunction about changing her sworn testimony at will.

There can be no question that Ada Johnson's testimony is as tainted as that of the state witnesses in Mesarosh and Goldberg. Ada Johnson gave a sworn statement that the State Attorney "assured" her that Jim Oscar Smith would be released if she cooperated in the GORHAM case -- a critical issue to her as Smith was her "main source of income." Tr., Vol. V p. 4. According to Johnson, the prosecutors "got together and decided that I was an important witness to their case, they decided that Jim [Oscar Smith] wasn't important enough at all." Tr., Vol. V p. 7. Johnson elaborated that to prove she was serious, she initially "didn't go to Court and they [the prosecutors] decided I was serious . . . I was really going to go crazy and lose my mind and have a sudden loss of memory and not be sure, . . . And then, they decided well, yes, they can definitely work something out." Tr., Vol. V, p. 8. In answer to the question "What were you promised?", Johnson

replied: "I was assured that he [Smith] would be released, that his probation would not be violated." Tr., Vol. V, p. 6.

At the evidentiary hearing on the Rule 3850 motion, Johnson recanted this testimony and denied being offered any benefit to Jim Oscar Smith in consideration for her testimony. Tr., p. 245. She purported to explain the perjury thusly: "I lied in that [earlier] statement because it was not supposed to be able to be used in Court. It was for my own personal purposes for think that you had some money for me or were going to help me get me my white couch." Tr., p. 267.

What is important under Mesarosh and Goldberg is not which statement is the lie and which the truth, but the unreliability of the witness. Johnson testified at trial, and the prosecution emphasized in closing, that she received no "benefits from her testimony." This testimony, and her purported identification of GORHAM running from the crime scene, is now tainted by her willingness to commit perjury not simply "in other proceedings in the same field of activity," as in Mesarosh and Goldberg, but on the very same point in the very same case. A new trial was granted for these reasons in Mesarosh and Goldberg. Certainly no less is required where a man's life is at stake.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court's Order denying GORHAM's Rule 3.850 motion, vacate GORHAM's conviction and sentence and order a new trial.

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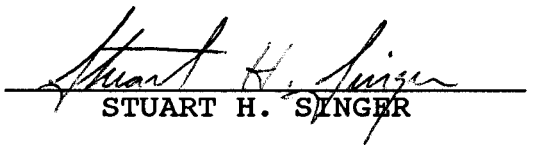
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Appellant's Initial Brief was delivered by U.S. Mail to: CELIA TERENZIO, ESQ., Assistant Attorney General, Attorney General's Office, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 3rd day of July, 1991.



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