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**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**

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# REPLY BRIEF OF APPELLANT

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## SUMMARY OF ARGUMENT

It bears repeating that this is not a typical death penalty appeal. This is a situation where a man has been convicted and sentenced to die on the testimony of a demonstrably incredible witness whose incentives to testify favorably for the State were improperly withheld from the jury; where other exculpatory information was similarly kept from the jury and; where, perhaps most egregiously, the testimony of a witness who would have exonerated GORHAM was never heard by the jury because GORHAM's trial counsel failed to conduct a proper interview. Stated in the simplest terms, GORHAM did not receive a fair trial. This Court cannot allow its imprimatur to be placed on the highly questionable and clearly unconstitutional proceedings that led to GORHAM's conviction. Fundamental fairness requires that GORHAM's conviction and sentence be vacated and that he be granted a new trial.

## ARGUMENT

### I. THE STATE FAILED TO DISCLOSE CRITICAL AND MATERIAL INFORMATION TO GORHAM

#### A. GORHAM does not have to Prove the Existence of a Formal Deal Between the State and Ada Johnson

The State denies the existence of a formal deal between Ada Johnson and the State. Answer Brief, pp. 9-12.[1/] GORHAM, however, is not required to prove the existence of a formal deal. See Porterfield v. State, 472 So.2d 882 (Fla. 1st DCA 1985). The only relevant consideration is whether Ada Johnson herself thought she had made a deal with the State and she has admitted that she

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[1/] GORHAM will use the same abbreviations that he used in his Initial Brief. The State's Answer Brief of Appellee will be referred to throughout this Reply Brief as "Answer Brief."

thought that she had been given mitigation recommendations by Kern and Murray. Tr., pp. 290-293. The State has even conceded that Ms. Johnson thought that Kern and Murray "would speak on her behalf." Answer Brief, p. 5.

Ms. Johnson testified against GORHAM believing that she would receive lenient treatment from the State. GORHAM was entitled to explore, before a jury, whether Ms. Johnson's testimony against him was premised on notions, true or false, that she would gain resulting lenient treatment. At the very least, GORHAM was entitled to explore, before a jury, whether the State conducted itself in a manner that would lead Ada Johnson to believe that she would receive lenient treatment in exchange for her testimony against GORHAM. 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).

The importance of the witness' own perception of a "deal" is illustrated by Marrow v. State, 483 So.2d 17 (Fla. 2d DCA 1985), where the court granted the defendant a new trial because the State had failed to disclose an "agreement" with a key witness that it would attempt to mitigate unrelated sentences in exchange for this witness' testimony against the defendant. Although the witness admitted that he had not received a definite promise of mitigation from the State, he stated that he had the State's promise "in mind . . . when he testified" against the defendant. Id. at 19. Finding that there was at least a "tentative promise of leniency", the appellate court stated that:

> . . . the focus should be on whether a 'tentative promise of leniency might be interpreted by [the] witness as contingent upon the nature of his testimony.'

Id. at 19-20. Because the witness was a key witness against the defendant, the court stated that "any evidence which could be used to impeach [this witness] would obviously be crucial to [the defendant]," and granted a new trial. Id. at 20. See also Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979).

Similarly, as in Marrow, any evidence which could have been used to impeach Ada Johnson, the key State witness, would obviously be crucial to GORHAM. The State's failure to disclose Ada Johnson's motion for mitigation which clearly would have been critical impeachment information for GORHAM is, therefore, reversible error under Marrow.

The State also relies on the fact that Ada Johnson gave the same testimony in GORHAM's October trial as in his first trial despite the fact that her motion for mitigation was denied in the interim. Answer Brief, p. 11. Ms. Johnson's consistent trial testimony is hardly surprising since she would have faced perjury charges had she changed her story from GORHAM's first trial. In addition, Ms. Johnson had no reason to change her testimony because her motion for mitigation was denied purely on jurisdictional grounds and not because Kern and Murray failed to give her mitigation recommendations. Therefore, the fact that Ada Johnson gave the same testimony in both of GORHAM's trials despite the fact that her motion for mitigation was denied in the interim

is irrelevant to whether Ms. Johnson believed, albeit falsely, that she had a deal with the State.

### B. Ada Johnson's Confidential Informant Status Was Required to be Disclosed

Even though the State concedes that Ms. Johnson was a confidential informant for the Pompano Beach Police Department, it claims, in its Answer Brief, that because she was not a confidential informant in the GORHAM case, her confidential informant status was not required to be disclosed. Such an argument is also without both factual and legal merit. GORHAM produced irrefutable documentary evidence that Ms. Johnson received money from the police in the GORHAM case. Defense Exhibit 19. The "receipt for confidential informant" contained Ada Johnson's name and the file number of the Peterson murder for which GORHAM was tried.

Even assuming, arguendo, that Ada Johnson was not a confidential informant in the GORHAM case, her admitted confidential informant status was still required to be disclosed. See United States v. Shaffer, 789 F.2d 682 (9th Cir. 1986). According to the State, the unrelated confidential informant activity in Shaffer was only relevant to impeach a critical witness' statement that he had never participated in any heroin transactions other than the one for which the defendant was being tried. Answer Brief, p. 12. On the contrary, noting that the jury's assessment of this witness' credibility was crucial to the outcome of the trial, Shaffer, 789 F.2d at 689, the court stated that not only could the undisclosed evidence have contradicted the witness' prior testimony but it also could have been construed as evidence that the witness was paid for

his cooperation and could have implied that a tacit agreement of leniency was reached between the witness and the government. Id. (Emphasis added). The court concluded that the government's failure to disclose this impeachment evidence "undermine[d] confidence in the outcome of . . . trial," id. citing United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and affirmed the granting of a new trial. Id. at 691.

As in Shaffer, the jury's assessment of Ada Johnson was crucial to the outcome of GORHAM's trial. Had the jury chosen not to believe her testimony, there is a reasonable probability that GORHAM would not have been convicted. Unable to contest the fact that GORHAM was deprived of the opportunity to impeach Ms. Johnson's credibility with her confidential informant status, the State chooses instead to attack the materiality of this information. Under Shaffer, however, this information is critical and material to the impeachment of a key State witness and should have been disclosed. Therefore, Ada Johnson's confidential informant status should have been disclosed to GORHAM and the State's failure to do so constitutes a Brady violation which warrants the granting of a new trial.

The State's argument that it is not required to disclose Ms. Johnson's confidential informant status is also a reversal of its original position. Assistant State Attorney Kern admitted at the Rule 3.850 evidentiary hearing that the confidential informant status of a state witness is Brady information. Tr., p. 537. Kern even stated that, had he known about Ms. Johnson's confidential

informant status, he would have disclosed it to the defense, even if there had been no specific request for this information. Id.

### C. Information Relating to the Existence of Other Suspects was Discoverable Brady Information

The State next argues that the evidence relating to the existence of two other suspects and to Willie Pickett was not discoverable Brady information and attempts to discount the materiality of this information by stating that Willie Pickett was never a suspect in the GORHAM case and that a "BOLO", or intelligence bulletin, was never formally issued for him. Answer Brief, p. 15. Whether or not a "BOLO" was formally issued for Willie Pickett is irrelevant; the fact is that the Pompano Beach Police Department considered him important enough to initially issue a BOLO for him. Defense Exhibit 18. Fundamental fairness mandates that GORHAM's trial counsel should have been apprised of this information.

The State also claims that GORHAM's trial counsel could have obtained information as to the existence of two other men with a history of attacking the victim through "reasonably diligent preparation." Id. at 14. But, how could GORHAM's trial counsel have accessed this information through more "reasonably diligent preparation?" He requested that the State turn over all exculpatory information and it failed to do so.

Given GORHAM's defense that two other men were responsible for the murder, Kenneth Gardner's testimony that he saw two men outside the Peterson garage before the shooting, Loretta Forehand's testimony that she saw two men running from the vicinity

of the garage just after the shooting, and Ms. Forehand's previous statement that two men tried to sell her stolen credit cards, this information was highly relevant and material to GORHAM's case. Therefore, unlike the situations in Breedlove v. State, 413 So.2d 1 (Fla. 1982), and Perry v. State, 395 So.2d 170 (Fla. 1980), cited by the State in its Answer Brief,[2] this information was not just mere information contained in a police investigatory file. In fact, the non-disclosure of this information relating to the existence of other suspects "is of sufficient significance [as] to result in the denial of [GORHAM's] right to a fair trial." United States v. Agurs, 27 U.S. 97, 108, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976).

## II. GORHAM'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL -- IN EFFECT, HE PROVIDED NO REPRESENTATION AT ALL

GORHAM's trial counsel, Michael Gelety, failed to provide effective assistance of counsel. He failed to call any witnesses on GORHAM's behalf either at trial or at sentencing. He failed to hire a private investigator even though he was a sole practitioner defending a man charged with a capital crime. And, perhaps most

[2] Both Breedlove, supra, and Perry, supra, involved attempts by the defendant to obtain through discovery the entire police investigatory file. GORHAM makes no such demand here that he was entitled to the disclosure of the entire police file. GORHAM, however, does assert that he was entitled to disclosure of material, exculpatory information contained in the police files. The information relating to the existence of other suspects is exactly the kind of material, exculpatory information contained in the files of the Pompano Beach police that the State was required to disclose. Indeed, Assistant State Attorney Kern testified that he would have disclosed this information to the defense, had he known about it. Tr., pp. 543, 546.

egregiously, he failed to properly interview and present the testimony of Loretta Forehand who saw GORHAM on the street at the time that she heard shots being fired from the victim's garage.

The State points to State v. Bolender, 503 So.2d 1247 (Fla. 1987), for the proposition that there is a strong presumption of effective assistance that is attached to Michael Gelety's, GORHAM's trial counsel's, performance. Answer Brief, p. 16. In Bolender, the defendant argued that his trial counsel rendered ineffective assistance because he failed to call the defendant's mother and sister at sentencing to testify that "he was a nice person who had helped support his family." Bolender, 503 So.2d at 1249. According to the defendant's trial counsel, he checked out the trial judge's reputation and concluded that "such nebulous nonstatutory mitigating evidence would have had little effect on the judge." Id. Noting that trial counsel had investigated the advisability of putting on such testimony before that particular judge, this Court gave great weight to the trial counsel's tactical decision not to call these witnesses and found that the trial counsel gave effective assistance. Id. at 1250.

This case is not like Bolender. Loretta Forehand would not simply have testified that GORHAM was a "nice person." She was a witness to the crime scene and saw that GORHAM was on the street when the shots were fired inside the garage! Moreover, in Bolender, the trial counsel conducted a reasonable investigation. Conducting a reasonable investigation before making the strategic decision not to call Loretta Forehand as a witness is precisely what Gelety failed to do. See Initial Brief of Appellant, pp. 11-

14, 27-33. Gelety's brief discussion with Ms. Forehand for a few minutes outside the courtroom during a trial break hardly qualifies as a proper investigation allowing him to make a reasonable determination about Ms. Forehand's credibility and a strategic decision not to call her as a witness. Moreover, his notes show that he planned to subpoena her as a witness at trial. His failure to secure her testimony was oversight and carelessness, not strategy.

Jones v. State, 528 So.2d 1171 (Fla. 1988), also cited by the State, is likewise distinguishable. In Jones, the defendant argued that his trial counsel was ineffective because he failed to call two alleged eyewitnesses whose testimony could have exonerated the defendant and failed to call a potential suspect, Glenn Schofield, as witnesses. Holding that the defendant's trial counsel was not ineffective, this Court pointed out that the trial counsel had, inter alia, (1) enlisted the aid of the defendant's family to locate potential witnesses and arrange meetings; (2) made several unsuccessful efforts to locate the two eyewitnesses; and (3) attempted to speak to Schofield who refused to speak with trial counsel. Id. at 1173-4. This Court also noted that the testimony of the two eyewitnesses would have been cumulative. Id. Under these circumstances, this Court found that the trial "counsel had conducted a reasonable investigation," id., and gave effective assistance of counsel.

In marked contrast to Jones, Gelety failed to conduct a reasonable investigation regarding Loretta Forehand. He made one unsuccessful attempt to contact her before GORHAM's October trial. See Initial Brief of Appellant, p. 14. After he briefly spoke to

Ms. Forehand during GORHAM's April trial, Gelety made notes to subpoena her for trial and sentencing as a witness for GORHAM. He then failed to secure her attendance at the October trial. Most importantly, Ms. Forehand's testimony was not cumulative, as were the eyewitnesses' in Jones; she would have been the only one to testify that she saw GORHAM on the street outside the Peterson garage at the same time that she heard shots coming from the garage. Given Gelety's failure to properly interview Ms. Forehand and to further investigate her story, his performance cannot be compared favorably to the performances of the trial counsels in Bolender and Jones and cannot be considered as effective assistance under any circumstance. Given his notes suggesting that she should be subpoenaed, Gelety's failure to call Ms. Forehand is simply indefensible.

The State next attempts to discount the materiality of Ms. Forehand's testimony by stating that it "does nothing to explain how he [GORHAM] obtained the victim's credit cards as Ms. Forehand also stated that the two men she saw running from the scene did not drop anything." Answer Brief, pp. 17-18. In fact, Ms. Forehand only testified that she did not see the two men drop anything. Tr., p. 130. (Emphasis added). This testimony, in no way, suggests that the two men did not drop anything. The fact that Ms. Forehand also did not see GORHAM drop anything does not prove that he did not do so and, in no way, contradicts "appellant's assertion that he dropped the victim's papers on the street and some unknown person must have picked them up, went into the warehouse and placed the papers next to the body." Answer

Brief, p. 18. Also, the fact that GORHAM himself never told Gelety about Loretta Forehand is insignificant because GORHAM told Louise Owens to tell Gelety about Loretta Forehand and Owens did so inform Gelety. Gelety had the opportunity to properly interview Loretta Forehand to ascertain her relevance and importance to GORHAM's defense.[3]

In any event, GORHAM does not have to prove that Ms. Forehand's testimony would have completely exonerated him; all he has to show is that there is a reasonable probability that, had Gelety performed with professional competence and called Loretta Forehand as a witness, the result of GORHAM's trial would have been different. See Strickland v. Washington, 466 U.S. 668, 694, 104

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[3] GORHAM wishes to correct the State's misleading assertion that Loretta Forehand "denies ever speaking with Michael Gelety," GORHAM's trial counsel. Answer Brief, p. 4. In truth, Ms. Forehand testified that Gelety never called her on the telephone to ask her what she knew about GORHAM's case. Tr., p. 134. That is correct, Ms. Forehand briefly spoke to Gelety in person in the hall outside the courtroom before GORHAM's first trial. In addition, during cross-examination, Ms. Forehand was asked:

> Q. Now, is your testimony you never talked to Mike Gelety, David's counsel?
>
> A. No. I never --
>
> Q. When did you find out . . .

Tr., p. 157. (Emphasis added). Since Ms. Forehand's response was cut off by the cross-examiner, her answer "no" may well have been to the question posed (i.e, is that your testimony?) rather than a response to the question whether she spoke with Gelety. Loretta Forehand testified clearly to being at court for the first trial, Tr., p. 137, where Gelety says he briefly interviewed her.

S. Ct. 2052, 2068, 80 L.Ed.2d 674, 696 (1984).[4] GORHAM has more than adequately made such a showing.

## III. THE STATE FAILED TO ADDRESS GORHAM'S ARGUMENT THAT FUNDAMENTAL FAIRNESS REQUIRES THE GRANTING OF A NEW TRIAL

GORHAM notes that the State's telling failure to address his argument that fundamental fairness requires granting him a new trial because his conviction rests primarily on Ada Johnson's tainted testimony. <u>See</u> Initial Brief of Appellant, pp. 35-37. Because the State mentions the fact that Ada Johnson recanted her statement that she had made a deal with the State in exchange for lenient treatment, <u>see</u> Answer Brief, p. 11, GORHAM is compelled to briefly reiterate this argument. It is irrefutable that Ms. Johnson lied at least once under oath about whether she had made a deal with the State to testify against GORHAM in exchange for promises of leniency. Which statement is the lie and which the truth does not matter; Ada Johnson has been conclusively proven to be unreliable as a witness. It is also clear that since Ms. Johnson was a key State witness, <u>see</u> <u>Gorham v. State</u>, 521 So.2d 1067, 1069 (Fla. 1988), GORHAM's conviction hinged primarily on her testimony. Any conviction resting primarily on Ada Johnson's tainted testimony violates fundamental fairness and must be vacated, in accordance with this Court's decision in <u>Goldberg v. State</u>, 351 So.2d 332

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[4] Inasmuch as the actual videotaped deposition of Loretta Forehand has now been made part of the record, GORHAM invites the Court to view this videotape and ascertain for itself the substance and import of Ms. Forehand's testimony.

(Fla. 1977), and the United States Supreme Court's decision in Mesarosh v. United States, 352 U.S. 1 (1956).

## CONCLUSION

For the reasons set forth above and in GORHAM's Initial Brief, 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.

Respectfully submitted,

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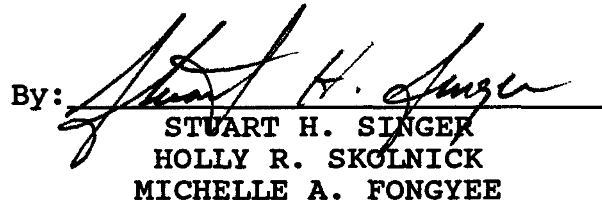

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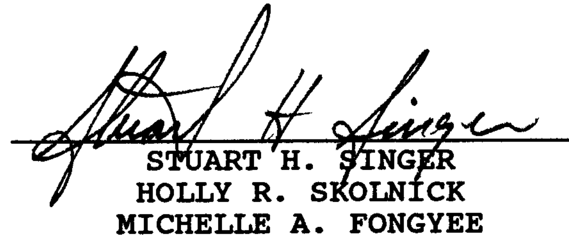
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply 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 30th day of September, 1991.



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