

IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,439

FILED

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KRISHNA MAHARAJ,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE SUMMARY DENIAL
OF A MOTION FOR POSTCONVICTION RELIEF BY
THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.
HON. LEONARD E. GLICK, CIRCUIT JUDGE.**

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Hon. Harold Solomon (trial judge)

Derrick Moo Young (deceased victim)

Duane Moo Young (deceased victim)

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STATEMENT OF THE CASE AND FACTS

A. Introduction.

This appeal arises from the summary denial of a motion for postconviction relief in a capital case (R 202-203).^{1/} Krishna Maharaj, the defendant, is currently incarcerated on Death Row. He sought to vacate his convictions and sentences, including a sentence of death,^{2/} by filing a motion to vacate on December 2, 1993 (R 17). The Florida Supreme Court previously affirmed the convictions and sentences. *Maharaj v. State*, 597 So. 2d 786 (Fla. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1029 (1993).

Throughout this case, Krishna Maharaj has consistently proclaimed his innocence of the charges. The postconviction motion focused on trial court deficiencies and newly obtained evidence which strongly suggested Krishna Maharaj was not blameworthy in the murders. Maharaj passed a polygraph test which focused directly on the murders. The polygrapher was of the opinion that Maharaj was not deceptive in answering all relevant polygraph questions (R 103-109). This is to be contrasted with the polygraph result of the state's chief witness, Neville Butler, who was deceptive and withheld information

^{1/} The Record on Appeal consists of the record of the postconviction proceedings. In this brief, the defendant refers to the record in the defendant's direct appeal, Supreme Court Case No. 71,646. *Maharaj v. State*, 597 So. 2d 786 (Fla. 1992). The defendant requests that this court take judicial notice of that prior court file. *E.g.*, *Allstate Ins. Co. v. Greyhound Rent-A-Car, Inc.*, 586 So. 2d 482, 483 (Fla. 4th DCA 1991), *rev. denied*, 598 So. 2d 75 (Fla. 1992)(judicial notice may be taken of all judicial records); *City of West Palm Beach v. Mann*, 387 So. 2d 531 (Fla. 4th DCA 1980)(judicial notice taken of court's own records).

^{2/} Krishna Maharaj was convicted of two counts of first degree murder, two counts of kidnapping, and possession of a firearm while engaged in a crime. Circuit Case No. 86-030610 (Dade County). He received the following sentences: (1) death for the murder of Duane Moo Young; (2) life imprisonment for the murder of Derrick Moo Young; (3) life imprisonment for the kidnapping convictions; and (4) fifteen years imprisonment for the firearm conviction.

regarding his knowledge of the murders (R 110-112).^{3/}

The postconviction motion was a comprehensive effort on the part of Krishna Maharaj to evaluate the trial evidence and all other relevant facts, many of which were withheld from the jury, in order to demonstrate that he was legally blameless in the murders. He asserted in the postconviction motion his inability to demonstrate his innocence due to the failure of his defense counsel to represent him effectively as well as the repeated failures by the prosecution to produce favorable evidence which would have been essential in establishing that Krishna Maharaj did not commit the murders. As set out in the motion, defense counsel persuaded and pressured Mr. Maharaj to abandon his alibi defense and waive his right to testify on his own behalf (R 55).

Among the persuasive matters raised in the postconviction motion was the failure of defense counsel to present convincing alibi evidence at trial, even though a pretrial notice of alibi had been filed (R 67-69) and witnesses were available to prove the alibi. Krishna Maharaj was not and could not have been at the scene of the crime in order to commit the murders. The jury did not hear this compelling evidence of the defendant's innocence; the lower tribunal did not even permit an evidentiary hearing to determine the validity of the alibi evidence or the reasons, if any, for counsel's failure to present this favorable evidence. The absence of an evidentiary hearing, this brief argues, is a miscarriage of justice which compounds the already questionable verdicts.

The postconviction motion also raised a serious factual allegation which demonstrates that others had strong motives to commit the murders. This evidence was

^{3/} The state misled the defense as to Butler's polygraph results, inaccurately suggesting that Butler passed the lie detector test (R 114).

covered up by the prosecution. Unbeknownst to the defense until after trial was the fact that the victims had obtained \$1 million life insurance policies shortly before the homicides, and that Shaula Ann Nagel, the daughter of Derek Moo Young, had filed a life insurance claim after the deaths. That alleged beneficiary, posttrial investigation revealed, committed perjury during her pretrial discovery deposition, and told a completely different version of the facts when her death benefits claim was investigated by William Penn Life Insurance Company.

At the core of this newly obtained evidence was proof that the victims were involved in drug trafficking, about which the state had extensive information but withheld much of it from the defense prior to trial. Had the full extent of this information been known to the defense or made available by the prosecution prior to trial, the outcome of the trial unquestionably would have been different. The Moo Young victims, just prior to their murders, had been involved in drug trafficking and a \$100 million bank fraud scheme, and a Colombian national was upset with them. The lower tribunal refused to consider this evidence, deciding instead to find the postconviction assertions insufficient.^{4/}

This appeal explores these and other legal issues which cast substantial doubt on the integrity of the defendant's convictions and death sentence. Because fundamental fairness dictates that Krishna Maharaj is entitled to a full and fair opportunity to demonstrate his innocence, this brief seeks an evidentiary hearing in the lower tribunal

^{4/} The postconviction jurist should not have considered the motion, but should have referred the entire case to another judge. Judge Glick supervised the trial prosecutors in the State Attorney's Office at the time of the trial and was considered a good friend of both prosecutors. (See Transcript of August 24, 1994 hearing at 35-37, which is reproduced in the Addendum to this brief at Addendum 13-16).

which will ultimately result in the defendant's discharge.

B. Procedural History.

1. The Trial Proceedings.

The events which led to the defendant's convictions began with the deaths of Duane Moo Young and Derrick Moo Young on October 16, 1986. The State charged Maharaj with the premeditated deaths of the victims and also with kidnapping them, possessing a firearm in the commission of a crime, aggravated assault, and armed burglary (R 1-6). The defendant, asserting his innocence of all charges, demanded a jury trial.^{5/} The defendant filed a notice of alibi (R 67-69). At the conclusion of the trial, held October 5-19, 1987, the jury found the defendant guilty of the murder, kidnapping, and firearm charges.^{6/}

At the penalty phase, the jury recommended a life sentence for the Derrick Moo Young murder by a vote of 6 to 6, and death for the Duane Moo Young murder by a vote of 7 to 5 (Trial Transcript 4498-4499). Consistent with the jury recommendation, the trial court imposed the death penalty for the Duane Moo Young murder and life imprisonment for the Derrick Moo Young killing (Direct Appeal Record 1783-1784).

2. Direct Appeal Proceedings.

Krishna Maharaj promptly initiated his direct appeal to the Florida Supreme Court. Although this court affirmed the convictions and sentences, the court was not unanimous in its holding. *Maharaj v. State*, 597 So. 2d 786 (1992). Only then-Chief Justice Shaw and Justices Overton and Grimes concurred fully in the per curiam opinion. Justice

^{5/} Krishna Maharaj was declared indigent

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^{6/} A charge of kidnapping Neville Butler was nolle prossed prior to trial (R 164 n. 1).

Barkett concurred in the result only. Justice Kogan concurred in the conviction, but concurred in the result only as to the sentence. Justice McDonald dissented from the sentence without written opinion.^{7/}

During the pendency of the direct appeal but before preparation of the appellate record, the defendant moved to stay the appeal and relinquish jurisdiction to permit the filing of a writ of error coram nobis based on newly discovered evidence obtained by the Miami law firm of Shutts & Bowen. The newly discovered evidence was the life insurance claim by Shaula Ann Nagel to the \$1 million life insurance policies taken out on each of the victims shortly before their deaths. The same insurance investigation revealed that both victims were involved in illegal business transactions, including a \$100 million fraudulent letter of credit scheme, and narcotics trafficking. The newly discovered evidence produced unquestionable proof that Nagel's testimony given during her discovery deposition was fundamentally false. The Supreme Court granted the motion and relinquished jurisdiction for 90 days to enable the lower tribunal to conduct an evidentiary hearing. Through no fault attributable to the defendant, the lower tribunal did not conduct an evidentiary hearing and returned jurisdiction to the Supreme Court, which refused to order a further relinquishment of jurisdiction. The merits of that new trial claim have never been addressed by the court.

Maharaj thereafter submitted his appellate brief to the Supreme Court, raising the following points pertaining to the guilt phase of the trial.

1. The erroneous admission into evidence of prejudicial newspaper articles.

^{7/} The appellate decision is reproduced in the Addendum to this brief at Addendum 1-7).

2. Error arising from evidence about an uncharged, unrelated murder attempt.

3. The court's failure to advise Maharaj fully about the effects of a mistrial occasioned by the arrest of the trial judge for judicial bribery.

4. The improper reference by state witnesses to the defendant's prior possession of weapons, even though that possession was legal and had no relevance to the charged crimes.

5. The refusal to admit the failed polygraph test of the defendant's chief accuser, Neville Butler.

The Supreme Court concluded that none of the asserted errors warranted appellate relief, and that the evidence of guilt was otherwise sufficient to support the convictions. *Maharaj*, 597 So. 2d at 790-791.

The defendant also raised six challenges to the penalty phase of his trial.

1. The sentence of death was improper in view of the state's failure to charge participant Neville Butler with any crime.

2. The court failed to restrict examination during the penalty phase to aggravating and mitigating circumstances.

3. The state made improper reference to the jury's advisory role in the sentencing process.

4. The sentencing court erroneously found that the murder of Duane Moo Young was heinous, atrocious, or cruel.

5. The court's finding that the murder was committed in a cold, calculated, and premeditated manner did not comport with the evidence.

6. The finding in aggravation that the murder was committed to avoid apprehension was erroneous.

The court affirmed the death sentence, but concluded that the heinous, atrocious, and cruel aggravator was not properly found. The court nonetheless held "that the improper use of the aggravating circumstance of heinous, atrocious, or cruel would not make any difference in the sentence imposed, given the other aggravating and mitigating circumstances in the record in this case. *Maharaj*, 597 So. 2d at 791-792.^{8/}

3. **Supreme Court Certiorari Review.**

Krishna Maharaj then petitioned the United States Supreme Court for certiorari review, raising the following issues:

1. Does due process compel the granting of a new trial when the judge is arrested for bribery while the trial is ongoing?

2. Whether the court's failure to define the "heinous, atrocious, or cruel" aggravator required the vacation of the death sentence?

3. Did the prosecution's comments minimizing the jury's role in the sentencing process deny the defendant due process?

The United States Supreme Court denied certiorari on January 11, 1993. *Maharaj v. Florida*, ___ U.S. ___, 113 S. Ct. 1029 (1993). Justice Blackmun voted to grant certiorari.

4. **Postconviction Proceedings.**

Krishna Maharaj filed his motion for postconviction relief in December 1993, well within the two-year limitations period provided by Rule 3.850(b) of the Florida Rules of Criminal Procedure (R 18-60). The motion requested that the lower tribunal schedule an

^{8/} Justice McDonald dissented from affirmance of the death sentence. *Id.* at 792.

evidentiary hearing. The motion included a comprehensive appendix of documents and sworn statements supporting the defendant's claim of innocence (R 61-163).

The motion raised seven specific, articulable grounds which warranted an evidentiary hearing and ultimately the vacation of the convictions and sentences. At the core of the motion was the observation that Krishna Maharaj was innocent and blameless in the deaths of Derrick and Duane Moo Young. The motion raised and argued these grounds for relief.

Claim No. 1: Krishna Maharaj received constitutionally ineffective assistance of counsel due to forty-five separate, actionable deficiencies. The motion spelled out and presented factual support for defense counsel's shortcomings (R 22-34).

a. Counsel's unexplained failure to present witnesses during the guilt phase, notwithstanding the defendant's continued and persistent claims of innocence and assertion of an alibi buttressed by credible witnesses.

b. Counsel's fundamental failure to fully inform the defendant of the right to present evidence and testify at trial, notwithstanding the defendant's repeated proclamations during trial that he was prepared to prove his innocence, and counsel's persistent pressure that the defendant should not present witnesses.

c. Counsel's failure to seek a mistrial upon the removal of the trial judge after the judge was arrested for bribery.

d. Counsel waived sequestration of the jury after the judge's arrest.

e. Counsel inexplicably and without consent waived the defendant's presence during conferences following the removal of Circuit Judge Gross.

f. Counsel waived the presence of a juror for the reading of the court's instructions following the substitution of Circuit Judge Solomon for the removed judge.

g. Counsel's failure to object to the state's introduction of highly inflammatory newspaper articles from a Caribbean newspaper.^{9/}

h. Counsel's repeated failure to challenge the state's presentation of uncharged misconduct evidence, including the testimony of Tino Geddes.^{10/}

i. Counsel's failure to object to the irrelevant and highly prejudicial testimony of Elsee Carberry regarding an unrelated alleged death threat by the defendant.

j. Counsel's failure to object to the testimony of prosecution witness Carberry concerning the defendant's purported forgery of a \$243,000 check.

k. Counsel's failure to protest the testimony of Carberry vouching for the credibility of Tino Geddes.

l. Counsel failed to object to testimony and evidence which implicated the defendant in a collateral act of alleged misconduct.

m. Counsel failed to act when the prosecution introduced evidence of the defendant's possession of a weapons arsenal having no relevance to the crimes.

^{9/} The Supreme Court ruled on appeal that defense counsel's lack of an objection resulted in the waiver of this issue on appeal. *Maharaj*, 597 So. 2d at 790 ("At trial, Maharaj failed to object when the articles were presented and admitted into evidence. Consequently, we find that he did not preserve the issue for appellate review.").

^{10/} The Supreme Court, once again, ruled that defense counsel did not preserve this issue for appellate review: "Counsel failed to object when Geddes' testimony was introduced at trial; consequently, this issue has not been preserved for review." *Maharaj*, 597 So. 2d at 790.

n. Counsel's failure to object to the admission of phone records which were not linked to the defendant.

o. Counsel's failure to challenge the repetitious and prejudicial comments of chief prosecution witness Neville Butler, which at one point prompted the court to note defense counsel's failure to object (T 3022-3023).

p. Counsel failed to object to the blood evidence testimony of Det. Rhodes.

q. Defense counsel failed to recognize and object to the admission of hearsay evidence which helped establish the prosecution's case.

r. Defense counsel did not object to the effort to link the murder weapon to the defendant. Defense counsel never introduced compelling evidence that Krishna Maharaj's gun had been taken from him three months prior to the homicides.

s. Defense counsel did not object to crucial hearsay testimony of a hotel employee placing Krishna Maharaj at the hotel at a time near the murders.

t. Defense counsel failed to challenge the inaccurate contention of a prosecution witness which justified the law enforcement failure to conduct residue tests on the defendant and the defendant's principal accuser, Neville Butler.

u. Defense counsel offered no explanation to counter the presence of the defendant's fingerprints in the hotel room where the murders occurred, even though counsel knew Maharaj was a frequent visitor to the hotel, may have stayed in that same hotel room on other occasions, and had been in that room before any murders occurred.

v. Defense counsel failed to seek a mistrial upon a comment by Det. Buhrmaster that referred to deficiencies of the defense investigator.

w. Counsel was unprepared to cross-examine prosecution witness Butler, having admitted to leaving his examination materials at home.

x. Defense counsel failed to object to the jury instruction regarding the aggravating circumstance of heinous, atrocious, and cruel.

y. Counsel failed to conduct even a minimum amount of investigation into the background of the victims, including their involvement in fraud, money laundering, and narcotics trafficking, all of which could have led to admissible evidence that other individuals were responsible for the homicides.

z. Defense counsel neglected to present evidence that Derrick Moo Young was in Panama in September 1986, conducting an illegal business transaction with a \$100 million fraudulent letter of credit.

aa. Defense counsel failed to obtain the polygraph records of chief prosecution witness Butler which would have demonstrated the witness lied under examination.

bb. Defense counsel failed to obtain the victims' passports, which would have demonstrated their travel to Panama consistent with their involvement in illegal conduct.

cc. Defense counsel failed to object to the ballistic expert's testimony regarding the firearm and further failed to introduce into evidence the expert report which would have suggested the use of multiple weapons. This failure prompted the trial court to note defense counsel's lack of an objection (T 3302).

dd. Counsel did not argue and presented no evidence to the jury showing that the ballistic reports established that two different bullets killed the victims (Brazilian and Smith & Wesson projectiles), thereby disproving the state's theory of guilt and supporting the defense claim of innocence and the contention that the victims were killed by two or

more gunmen for reasons which had nothing to do with the defendant.^{11/}

ee. Defense counsel failed to seek suppression of the defendant's post-arrest statement introduced into evidence by the prosecution. Krishna Maharaj has always contended that the purported statement was an outright fabrication by Det. Buhrmaster. The purported statement was neither witnessed, recorded, signed, or notarized, contrary to the procedure used in Dade County homicide cases. Furthermore, defense counsel failed to argue that the defendant was threatened and deprived of his right to counsel during his post-arrest contact with the police. The motion to vacate further alleged that Det. Buhrmaster has since admitted to and been disciplined for fabricating evidence. The defendant intended to present evidence to that effect at an evidentiary hearing.

ff. Defense counsel failed to introduce the defendant's polygraph test.

gg. Defense counsel failed to challenge the prosecution's Williams Rule evidence by presenting unimpeachable evidence which established that the Tino Geddes testimony about the defendant driving a rented van was untrue.

hh. The defense failed to refute false testimony by Tino Geddes that three weeks before the murders, the defendant attempted to lure the victims to the hotel for the purpose of murdering them. A witness, Roopnarine Singh, was available to defense counsel and would have established the falsity of Tino Geddes' accusation.

ii. Defense counsel failed to show the defendant's gun could not have been the murder weapon. Neville Butler's statement to the police established this fact.

^{11/} Regarding this point, defense counsel failed to seek the admission of the ballistics report dated November 5, 1986, which reflected that the subject evidence had been delivered to the crime laboratory *nearly two months before the crime ever occurred.*

jj. Counsel did not inform the court that the prosecution had falsely represented to the defense that witness Butler had passed the polygraph. The defendant did not learn Butler failed the polygraph until after conviction.

kk. Defense counsel failed to contest the prosecution's claim that the killing of Duane Moo Young was done to avoid arrest.

ll. Defense counsel failed to seek suppression of or object at trial to a suggestive and tainted photo lineup of the defendant.

mm. Defense counsel failed to introduce the testimony of Det. Rivero who stated that Det. Buhmaster had previously claimed that Krishna Maharaj said he left the hotel in the morning, prior to the shootings. Det. Rivero's statement was directly contrary to the trial testimony of Det. Buhmaster.

nn. Defense counsel failed to object to the granting of the prosecution's motion in limine regarding the victims' drug dealing and money laundering activities.

oo. Defense counsel failed to argue that the state's photographs of the crime scene demonstrated the inaccuracy of the prosecution's theory of the murders.

pp. Defense counsel failed to refute Det. Buhmaster's claim that the defendant changed clothes after the murder and bought new ones. Counsel had photographs of the defendant immediately after his arrest, which revealed the defendant was not wearing new clothes and that his clothing was not bloody, torn, or soiled.

qq. Counsel failed to cross-examine prosecution witness Geddes regarding a prior exculpatory statement which corroborated the defendant's claim of innocence.

rr. Counsel neglected to impeach Geddes with a letter of resignation authored by the witness which contrasted with the claim that Geddes had been the editor of the

defendant's newspaper until the business closed after the murders.

ss. Defense counsel failed to object to the prosecution's vouching for the credibility of witness Neville Butler.

Claim No. 2: Trial counsel was ineffective in failing to present the alibi defense, which would have established the defendant could not have been involved in the murders (R 34-38). This contention included a detailed proffer of the alibi evidence.

Claim No. 3: The prosecution's systematic withholding of discoverable and favorable evidence deprived the defendant of due process and a fair trial (R 38-42). This claim included 18 specific instances of prosecution withholdings.

Claim No. 4: The defendant was denied due process by persistent and repeated prosecutorial and police misconduct which affected the integrity of the case (R 43-48).

a. The grand jury indictment was based on perjured testimony of Neville Butler and Det. Buhrmaster.

b. Prosecutors in closing argument falsely told the jury that the defendant had forged checks given to him by the victims.

c. The prosecution's closing argument was highly prejudicial, particularly when prosecutor Ridge began crying and was given a handkerchief by prosecutor Kastrenakis.

d. The prosecution succeeded in having the defendant placed in administrative segregation as a result of the false claim that the defendant was plotting a jail escape. This false report occurred the same day that members of the prosecution team met with Shaula Nagel at Monty Trainer's Restaurant in Coconut Grove.

e. Prosecutors withheld information that \$1 million life insurance policies had been taken out on the victims six weeks before the murders. The prosecution also

withheld evidence about the victims' participation in a \$100 million letter of credit fraud, as well as the victims' drug trafficking transaction on September 26, 1986. The prosecution was fully aware of this *Brady* information well in advance of trial.

f. The prosecution predicated its ballistics evidence upon a report analyzing evidence which had been delivered to the laboratory two months prior to the crimes.

g. Law enforcement officers failed to analyze the defendant's clothing.

h. Police failed to analyze the defendant for gun powder residue.

i. Police failed to investigate the identity of a mysterious individual who had a relationship with Eddie Dames, and who may well have been the murderer.

j. The police also failed to conduct any investigation based on information provided by Eduardo Anillo that the unknown individual was seen speaking with Eddie Dames and had occupied a room in the same hotel on the same day as the murders.

k. As a result of police misconduct, law enforcement officers conducted an unfairly suggestive photographic lineup of hotel employees.

l. The police failed to retrieve or analyze clothing worn by chief prosecution witness Neville Butler at the time of the murders, even though a witness reported seeing blood stains on Butler's clothing and shoes, and Butler's shirt ripped.

m. The lead detective lied to the defense investigator about having returned the victims' passports, when in fact the passports were retained by the detective and were introduced into evidence by the prosecution, thus preventing the defense from knowing about the victims' travels in furtherance of their criminal activities.

n. At the time of the defendant's arrest, Det. Buhrmaster refused to allow the defendant to contact his attorney or the British Consul as the defendant repeatedly

requested, even though the British Bilateral Consular Convention between the United States and the United Kingdom requires that contact.

o. The lead detective threatened the defendant and manufactured the defendant's purported post-arrest statement.

p. The prosecution withheld evidence that Det. Buhrmaster routinely lied about obtaining suspects' confessions.^{12/}

q. Police officer Amato consistently failed to appear for her pretrial deposition.

r. Police failed to investigate the statement of George Abchal, who was employed by an individual who held the victims' corporate power of attorney. Law enforcement officers knew Abchal's employer was the business partner of a Bahamian lawyer whose drug trafficking client, Mr. Mejias of Medellin, Colombia, occupied the room across from the murder scene at the same hotel on the day of the killings. A statement by George Abchal reflects his knowledge of the victims' drug dealings and provided strong corroboration the victims were killed because of their drug activities.

s. Police failed to investigate Mr. Mejias, who rented Room 1214 across the hall from Room 1215, the scene of the shooting. Police were aware that Mr. Mejias departed from the hotel immediately after the murders.

t. The prosecution gave preferential treatment to Neville Butler, who admitted complicity in the homicides, while Krishna Maharaj received the ultimate penalty of death.

Claim No. 5: The prosecution presented false and misleading testimony at trial, which deprived the defendant of fundamental fairness (R 48-52), including:

^{12/} Since this case, Det. Buhrmaster has admitted to having lied and coercing others to lie and cover up evidence. Det. Buhrmaster was removed from homicide.

- a. Coercion by the state of witnesses Butler and Tino Geddes.
- b. The prosecution represented prior to trial that Butler passed a polygraph test when, in fact, Butler failed substantial portions of the polygraph.
- c. Prosecution witness Butler was pressured by the prosecution, after he failed his polygraph, to change his initial version of the facts to a version which profoundly incriminated Krishna Maharaj. Butler's trial recantation of his prior statements was an outright fabrication resulting from the prosecution's threats.
- d. Prosecutors traveled to Jamaica to testify for Tino Geddes.
- e. The prosecution influenced the testimony of Geddes, after having provided substantial benefits which enabled Geddes to avoid imprisonment in Jamaica. The prosecution misled the court as to the purpose of the travel to Jamaica.
- f. The state knowingly presented false and perjured testimony by Tino Geddes, particularly with regard to events which occurred on the day of the homicides.
- g. The prosecution was aware of and failed to correct the perjurious deposition testimony of Shaula Nagel.
- h. Prosecution complicity with Det. Buhrmaster in refusing to make the victims' passports available to the defendant's investigator acted to cover up knowledge of the victims' drug dealing in Panama.
- i. The prosecution sought to mislead Dr. Stillman into giving false testimony.

Claim No. 6: The defendant did not knowingly or intelligently waive his right to testify, resulting in a deprivation of fundamental constitutional rights. The defendant was pressured and coerced by defense counsel into abandoning extensive defense witnesses and alibi defense, and was instructed by defense counsel not to testify (R 52-56).

Claim No. 7: The defendant is entitled to access to public records of his case and individuals associated with the case to present a full and fair challenge to his unconstitutional convictions (R 56-60). The request encompassed all prosecution files.

The lower tribunal, through a judge who did not preside at trial or sentencing, summarily denied the motion for postconviction relief without holding an evidentiary hearing on any issues (R 202-203). The court made the following rulings:

a. Claims 3 (withholding of evidence), 4 (prosecutorial misconduct), 5 (knowing use of false testimony), and 6 (lack of knowing and intelligent waiver of right to testify) were "procedurally barred, as they are claims which either were, or could have, or should have been raised on direct appeal of the judgment and sentence."

b. Claims 1 (ineffective assistance), 2 (failure to present alibi defense), 3, 4, 5, and 6 were "legally insufficient, for the reasons articulated in the State's Response filed July 8, 1994, and attached hereto, in that they do not allege sufficient facts to require an evidentiary hearing."

c. The claims regarding the failure to present defense witnesses "are conclusively refuted by the record wherein the defendant stated that he conferred with defense counsel, that he understood his constitutional right to testify, that he was electing not to testify, and that he was specifically waiving his right to call witnesses at trial."

d. Claim 7 (access to public records) "is without merit where the material which was withheld was reviewed in camera and found to be exempt under Chapter 119 as work product of the prosecutor."

In denying the motion to vacate, the court incorporated the entire record on direct appeal and trial transcripts, specifically attaching only three transcript pages.^{13/}

The defendant timely filed his notice of appeal (R 204).

C. Factual Recitation.

In affirming the defendant's convictions and sentences, the Supreme Court outlined the facts of the case in its written opinion. Those facts are excerpted for purposes of presenting the facts as found to exist by the Supreme Court.

According to the prosecution's evidence, the murders occurred as a result of an ongoing dispute between Derrick Moo Young and Krishna Maharaj. Maharaj was arrested after an accomplice, Neville Butler, was questioned and inculpated Maharaj.

During the trial, the primary prosecution witness was Neville Butler. Butler testified that in June 1986, he worked for *The Caribbean Echo*, a weekly newspaper directed to the West Indian community in South Florida. Prior to Butler's employment, the *Echo* published an article, in May 1986, accusing Derrick Moo Young of theft. When Butler joined the *Echo*, he assisted publisher Elsee Carberry in a July 1986 article accusing Maharaj of illegally taking money out of Trinidad. Butler testified that on October 10, 1986, the *Echo* accused Maharaj of forging a \$243,000 check. According to the article, the forged check was the basis for a lawsuit Derrick Moo Young filed against Maharaj.

Butler testified that in September 1986, unhappy working for the *Echo*, he contacted Maharaj seeking employment with *The Caribbean Times*, a newspaper owned by Maharaj. Butler testified that, at Maharaj's urging, he arranged for a meeting between

^{13/} The record on appeal in this case, prepared by the Clerk of the lower tribunal, does not contain the entire record on appeal from the defendant's direct appeal.

Derrick Moo Young and Maharaj at the DuPont Plaza Hotel in Miami so Maharaj could obtain a confession from Moo Young regarding his extortion of \$160,000 from Maharaj's relatives in Trinidad. Butler arranged this meeting for October 16, 1986, using the pretext of a business meeting with Bahamian individuals named Dames and Ellis, at Dames' suite at the hotel. No mention was made of Maharaj.

According to Butler, Maharaj wanted to (1) extract a confession of fraudulent activity from Derrick Moo Young, (2) require Derrick Moo Young to issue two checks to repay Maharaj for the fraud, and (3) have Butler go to the bank with the checks to certify them, at which time Maharaj would allow Moo Young to leave. Butler stated that Derrick Moo Young and, unexpectedly, Duane Moo Young, his son, appeared at the hotel room. Once inside, Maharaj appeared from behind a door with a gun and a small pillow. An argument broke out between Maharaj and Moo Young over the money owed. Maharaj shot Derrick Moo Young in the leg. At that time, Derrick Moo Young attempted to leave. Maharaj ordered Butler to tie up Duane Moo Young with immersion cords. Maharaj also ordered Butler to tie up Derrick Moo Young; however, before he could do so, Derrick Moo Young lunged at Maharaj. Maharaj fired three or four shots at Derrick Moo Young.

After shooting Derrick Moo Young, Maharaj questioned Duane Moo Young. During this time, Derrick Moo Young crawled into the hallway. Maharaj shot him and pulled him back into the room. Duane Moo Young then broke loose and hurled himself at Maharaj, but Butler held him. Maharaj took Duane Moo Young to the second floor of the suite and questioned him again. Later, Butler heard one shot. Maharaj came downstairs and both he and Butler left the room. They both waited in the car for Dames.

Sometime later, Butler met with Dames and Ellis. They encouraged Butler to tell the police of the murders. Later that day, Maharaj called Butler asking that they meet at Denny's so they could get their stories straight. Butler called Det. Buhrmaster and told him what had transpired. The detective drove Butler to Denny's to meet Maharaj and, at a prearranged signal, the detectives arrested Maharaj.

The State also presented the testimony of Tino Geddes, a journalist and native of Jamaica. Geddes testified that in December 1985, he began working for Carberry, the *Echo* publisher. Geddes stated that while working for Carberry, he met Maharaj and he and Carberry went to Maharaj's home to discuss an article concerning Derrick Moo Young. Carberry agreed to publish the article for \$400. The article was published in the May 2, 1986 edition of the *Echo* and detailed the background of a civil suit filed against Derrick Moo Young by Maharaj's wife. Geddes further testified that, because of the *Echo's* subsequent favorable coverage of Derrick Moo Young, Maharaj became hostile toward Carberry. Geddes stated that Maharaj purchased exotic weapons and camouflage uniforms and, on several occasions, he and Maharaj had tried to harm Carberry. On one occasion, Maharaj had Geddes meet him at the bar of the DuPont Plaza Hotel; then he took him to a hotel room. Maharaj had a light-colored automatic pistol and a glove on one hand. Maharaj told Geddes to call and lure Carberry and Moo Young to the hotel room. Fortunately, Geddes was unable to get either Carberry or Moo Young to come to the hotel room.

The State called Elsee Carberry. Carberry testified he knew both Maharaj and Derrick Moo Young before his paper started publishing the articles. Carberry stated that he was approached by Maharaj's accountant, who requested that he publish a front-page

article about Moo Young. Carberry refused this request until he met with Maharaj. A meeting was arranged and Carberry was provided documentation for the article. Carberry testified Maharaj told him that Moo Young stole money from him and he had documents to prove it. They agreed on a center spread and Maharaj paid \$400 to have the article published.

Carberry testified that Maharaj wanted a weekly article on Moo Young. Carberry refused and Maharaj attempted to buy *The Caribbean Echo*. When this failed, Maharaj started his own newspaper. Shortly thereafter, Carberry was contacted by Derrick Moo Young, who wanted to tell his side of the story. Carberry met with Moo Young, who provided documentation to refute Maharaj's allegations. Carberry began his own investigation and published articles unfavorable to Maharaj in June, July, and October 1986.

On July 5, the *Echo* printed an article that the newspaper could not be bribed. The July articles charged Maharaj with taking money illegally out Trinidad. The October article accused Maharaj of forging a \$243,000 check and explained that Derrick Moo Young was filing a lawsuit against Maharaj. During this time Maharaj severed his relationship with Carberry.

The State presented other corroborating evidence. The hotel maid testified she cleaned the room in the early morning of October 16, 1986, and, upon entering it, found it had not been used the previous evening. When she left the room, it was in perfect order, including the fact that the "Do Not Disturb" sign was still on the inside of the door. At 12:15 p.m., she and her boss were asked to check the room. They attempted to enter the room, but were unable to do so because it was locked from the inside. She

explained that the room could not be locked from the inside unless someone was in the room. Ten minutes later, she returned with a security guard, and they noticed that the "Do Not Disturb" sign was hanging on the door knob. This time when she tried the master key, it worked; she opened the door and noticed that the furniture had been moved and there were two bodies.

A fingerprint expert testified he found Maharaj's prints on: (1) the "Do Not Disturb" sign of Suite 1215; (2) the exterior of the entrance door; (3) the downstairs bathroom; (4) the top of the desk; (5) an empty soda can; (6) the telephone receiver; (7) the television set; (8) a glass table top; (9) a plastic cup; (10) the *Miami News* newspaper; (11) a *USA Today* newspaper; and (12) torn packages that held immersion heaters. Butler's prints were found on a glass, the telephone, the desk, the front door, and the television.

A firearms expert testified that the eight bullets were fired from a pre-1976 Smith & Wesson model 39, a nine-millimeter semiautomatic pistol with a serial number under 270000. Evidence established that Maharaj owned a Smith & Wesson nine-millimeter pistol, having a serial number of A235464.

The medical examiner stated that Derrick Moo Young had six gunshot wounds, the most serious of which entered the right side of the chest and exited the lower back. The one gunshot wound in Duane Moo Young entered the left side of the face and exited the right side of the neck, having been fired at close range. The medical examiner found that this wound was consistent with Moo Young kneeling or sitting with his head close to and facing the wall of the room.

During the State's case, the chief judge of the criminal division announced that the judge who had been presiding over the trial would not be able to continue. Counsel for

Maharaj stated he did not seek a mistrial. The newly assigned judge questioned Maharaj about a mistrial; Maharaj responded he wished to proceed. The new trial judge certified he had read the testimony and proceeded with the trial.

The defense did not present any witnesses. The jury found Maharaj guilty as charged except for armed burglary and aggravated assault.

In the penalty phase, the medical examiner described the nature of the wounds of each victim and explained the pain and effect of such wounds. Maharaj presented character witnesses including: (1) a congressman who testified concerning Maharaj's character for truthfulness, honesty, and non-violence; (2) his civil lawyer, who testified that he was hired to litigate the claims against Derrick Moo Young and that these claims had a substantial chance of prevailing prior to the victims' deaths; (3) a retired judge from Trinidad who testified that he had known Maharaj for forty years, that Maharaj was not a violent person, and that Maharaj was an individual who donated money to charitable causes; and (4) a doctor from Trinidad, who stated that he had known Maharaj for over forty years and knew Maharaj was not prone to violence. Maharaj testified in his own behalf. Maharaj denied he murdered either Derrick or Duane Moo Young and asked the jury to spare his life so he could establish his innocence. He also prepared a letter to the jury outlining his numerous charitable gifts over the years.

After argument by counsel, the jury returned an advisory sentence as to the murder of Derrick Moo Young of life imprisonment by a six-to-six vote, and, as to the murder of Duane Moo Young, the jury voted seven to five in favor of the death penalty.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the lower tribunal err in summarily denying postconviction relief where the motion alleged sufficient facts to warrant an evidentiary hearing and where the Supreme Court had previously ordered a hearing on the newly discovered evidence claims?

2. Did the defendant's ineffective counsel claims raise sufficient factual and legal questions that required the setting of an evidentiary hearing?

3. Does a postconviction claim of systematic withholding by the prosecution of favorable and discoverable evidence warrant postconviction relief?

4. Was the lower tribunal required to conduct an evidentiary hearing on the defendant's contention that prosecutorial misconduct and false testimony deprived the defendant of due process?

5. Is the defendant entitled to disclosure of the State Attorney's prosecution files in order to present a full and complete postconviction challenge to convictions and a death sentence?

6. Was the lower tribunal required to disclose his supervisory relationship with the trial prosecutors and to recuse himself from consideration of the defendant's postconviction motion?

SUMMARY OF THE ARGUMENT

1. The defendant filed a factually explicit and legally sufficient motion to vacate, raising numerous constitutional claims which are properly presented in a motion for postconviction relief. The facts presented were not conclusively refuted by the files and records. Nonetheless, the lower tribunal refused to conduct an evidentiary hearing. As

a matter of law, the defendant is entitled to an evidentiary hearing to establish factual support for his postconviction claims of actual innocence and prosecutorial misconduct.

2. The defendant alleged in great detail that defense counsel did not provide competent, constitutionally effective representation. His postconviction motion satisfied the *Strickland v. Washington* test for alleging ineffective assistance of counsel. The defense lawyer's failure to conduct an adequate investigation or to present alibi evidence prevented the jury from knowing Krishna Maharaj was actually innocent of the charges. Summary denial was wholly improper.

3. The defendant alleged the existence of a concerted effort on the part of the prosecution to withhold favorable evidence from the defense. The information was not reasonably available and was not discovered by the defense until after trial. Had the information been made available in a timely fashion, the defendant would have been able to use the evidence at trial, resulting in a different outcome in both the guilt and sentencing phases of the case. The defendant is entitled to a new trial or, at a minimum, an evidentiary hearing to prove the compelling nature of the withheld evidence.

4. When a conviction is obtained as a result of prosecutorial misconduct and false testimony, the defendant is entitled to a new trial. The defendant made out a more than sufficient case of perjury and official misconduct. The allegations were not refuted by the record. The defendant is entitled to an evidentiary hearing.

5. The defendant is entitled to disclosure of the State Attorney's files to present a full postconviction challenge to his convictions and death sentence. The lower tribunal erred in withholding portions of the prosecution files deemed to be work product.

6. The postconviction judge was required to recuse himself from the case. As a prosecutor, the judge supervised the trial prosecutors during the time of the defendant's trial. The judge did not reveal this prior association with the defendant's case. The defendant did not waive the right to have his postconviction claims evaluated by a neutral and detached jurist. The case must be remanded for further proceedings before a neutral judge.

ARGUMENT

POINT 1

THE LOWER TRIBUNAL ERRED IN SUMMARILY DENYING POSTCONVICTION RELIEF WHERE THE MOTION ALLEGED SUFFICIENT FACTS TO WARRANT AN EVIDENTIARY HEARING.

In the postconviction relief motion, the defendant raised seven specific and factually supported claims upon which relief should be granted. None of the claims had been presented on direct appeal. None of the claims were capable of being raised on direct appeal. None of the claims were refuted by the record of proceedings in the lower tribunal. Each claim included a detailed factual discussion of the basis for the postconviction assertion, and the supporting material included evidence and sworn witness statements. Several of the claims presented facts which were not known to the defense prior to trial. Other claims alleged that the prosecution systematically withheld favorable evidence from the defense and fabricated other evidence. One claim challenged the constitutional effectiveness of the defense counsel's trial representation. Another claim raised an allegation that defense counsel pressured and coerced the defendant into waiving his right to testify and present a compelling alibi defense.

When faced with such a detailed and comprehensive legal and factual presentation justifying the granting of postconviction relief, the court had a single option: to grant an evidentiary hearing to enable Krishna Maharaj to prove he was improperly and unconstitutionally convicted and sentenced. By refusing to order a hearing, the lower tribunal departed from clear and controlling precedent. The court did not even follow the only other available option, requiring the court to attach those portions of the files and records which conclusively show that Krishna Maharaj is not entitled to relief. Abdicating his judicial responsibilities to review the record and examine each claim raised by the defendant, the lower tribunal merely ordered that the *entire record on direct appeal* accompany the order of denial (R 203).

The lower tribunal refused to hold a hearing for two reasons. First, some of the claims (Claims Nos. 3, 4, 5, & 6) were procedurally barred because they were, could have been, or should have been raised on direct appeal. Second, all issues, including the ineffective assistance of counsel claim, "do not allege sufficient facts to require an evidentiary hearing." (R 202). This ruling was erroneous and warrants expedited reversal so that Krishna Maharaj has a fair opportunity to establish his innocence at an evidentiary hearing.

There is no question that Krishna Maharaj is entitled to an evidentiary hearing on his postconviction claims. His factually explicit and detailed motion raised issues which were legally proper for postconviction relief. The factual contentions advanced in support of his motion to vacate, none of which were discounted by the record, were sufficient to challenge the procedural fairness of the trial and the reliability of the verdict and sentences. The motion for postconviction relief made a substantial showing that Krishna

Maharaj was innocent of the murders. The compelling alibi evidence (which was not presented by defense counsel) and the defendant's successful polygraph test are strong indicators that this case requires a close and careful reexamination by this court.

A. Death Penalty Cases Require Careful Judicial Scrutiny.

The United States Supreme Court has noted "death is different." *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S. Ct. 2909, 2932 (1976). Death penalty cases require the utmost care and scrutiny when evaluating claims of unfair, improper, or unconstitutionally obtained convictions. Even more attention is required when a serious question exists as to the innocence of the death row defendant. This court recently grappled with the difficult question of the degree to which postconviction review is available upon a defendant's claim of innocence in *Spaziano v. State*, ___ So. 2d ___, 20 Fla. L. Weekly S461 (Fla. Sept. 8, 1995). Confronted with newly obtained evidence of a recantation by the prosecution's principal witness, this court ordered an evidentiary hearing on the issue of the recanted testimony and ultimately stayed the defendant's execution. *Spaziano v. State*, ___ So. 2d ___, 20 Fla. L. Weekly S464 (Fla. Sept. 12, 1995).

In ruling that Spaziano was entitled to an evidentiary hearing on the newly discovered witness recantation, this court acknowledged that it "recently broadened the test to allow a new trial when evidence would 'probably' affect the verdict rather than requiring that it must 'conclusively' affect the verdict. *Jones v. State*, 591 So. 2d 911 (Fla. 1991)." *Id.* Justice Kogan, concurring in part and dissenting in part, emphasized that care must be taken in evaluating claims of innocence and tainted convictions.

Krishna Maharaj's case suffers from the same essential taint which led this court to order an evidentiary hearing in *Spaziano*. Krishna Maharaj has raised a more than

colorable claim that his trial lawyer was seriously ineffective, that alibi evidence which would have demonstrated his innocence was kept from the jury, that his convictions resulted from a web of prosecutorial and law enforcement misconduct which deprived the defendant of access to favorable evidence, and that the prosecution introduced fabricated and possibly perjured testimony at trial. These are the types of claims which justify an evidentiary hearing. Because of the seriousness of the ultimate penalty imposed on Krishna Maharaj, his case deserves no less exacting examination.

This court previously announced its policy which "encourages holding evidentiary hearings whenever a colorable issue is raised under rule 3.850." *State v. Henry*, 456 So. 2d 466, 468 (Fla. 1984). See *Porter v. State*, 626 So. 2d 268 (Fla. 2d DCA 1993)(counsel's tactical decisions should be considered at an evidentiary hearing). That policy enables the courts to evaluate the facts supporting postconviction claims, and fosters full and fair judicial review of criminal convictions. That is why motions for postconviction relief may be denied without an evidentiary hearing only where the motion and record conclusively demonstrate the defendant is not entitled to the relief requested. *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). In the latter situation, the court must attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted. *Witherspoon v. State*, 590 So. 2d 1138 (Fla. 4th DCA 1992).

B. Failure to Attach Portions of the Record Supporting Denial of Relief.

In ordering the denial of postconviction relief, the lower tribunal attached three pages of the trial transcript and then ordered that the entire appellate record from the defendant's direct appeal, including the appellate briefs, accompany the order (R 202-

203).^{14/} The three pages of trial transcript involved only the defendant's waiver of the right to present witnesses. No other identified portions even address the claims of ineffective counsel, fabricated evidence, suppression of favorable evidence, or newly obtained evidence. The court's failure to attach sufficient portions of the record which refute the postconviction contentions is inconsistent with the requirement that a summary denial order include "portions of the files and records conclusively showing the appellant is entitled to no relief." *Rodriguez v. State*, 592 So. 2d 1261 (Fla. 2d DCA 1992). See also *Brown v. State*, 596 So. 2d 1026, 1028 (Fla. 1992). "The law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." *O'Callaghan v. State*, 461 So. 2d 1354, 1355 (Fla. 1984).

Certain postconviction claims necessarily require an evidentiary hearing in order to evaluate the merits of the claims. *Heiney v. Dugger*, 558 So. 2d 398, 400 (Fla. 1990).

The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing, denial of that right would constitute denial of all due process and could never be harmless.

Holland v. State, 503 So. 2d 1250, 1252-1253 (Fla. 1987). Ineffective representation by defense counsel is the type of postconviction issue which, when sufficiently pled, entitles a defendant to an evidentiary hearing. E.g., *Anthony v. State*, ___ So. 2d ___, 20 Fla. L. Weekly D2108 (Fla. 4th DCA Sept. 13, 1995)(court errs in summary denial of motion alleging counsel failed to present alibi evidence; determination of tactical decision can

^{14/} The court order and attachment is reproduced in the Addendum at Add. 8-12.

only be made after evidentiary hearing). Thus, when the defendant argues that his lawyer failed to call witnesses, refused to investigate and present crucial defenses, or persuaded the defendant into waiving a constitutional right, an evidentiary hearing is the norm. *O'Callaghan v. State*, 461 So. 2d at 1355 (allegation that defense counsel failed to call witnesses at penalty phase merited hearing); *Routly v. State*, 590 So. 2d 397 (Fla. 1992)(hearing granted upon postconviction allegation that counsel was ineffective in failing to investigate various matters and incompetently cross-examining witnesses); *Vann v. State*, 605 So. 2d 920 (Fla. 1st DCA 1992)(allegation that counsel failed to investigate alibi required either hearing or showing that record conclusively refuted claim); *Cobb v. State*, 582 So. 2d 81 (Fla. 1st DCA 1991)(allegation of coerced plea sufficient to require hearing); *Williams v. State*, 601 So. 2d 596 (Fla. 1st DCA 1991)(allegation that counsel prevented defendant from testifying merits hearing). That is because these issues raise constitutional violations which could, if proved, result in a vacation of the defendant's convictions.^{15/}

The only record portion attached to the denial order was the three-page trial transcript showing that Krishna Maharaj agreed with counsel's decision to present no evidence (Add. 8-12). That transcript excerpt, however, does not address the issue of counsel's coercion and pressure, and certainly does not establish that the failure to present witnesses was a voluntary and intelligent decision on the defendant's part, as required by *United States v. Teague*, 953 F.2d 1525, 1530-1533 (11th Cir.)(en banc), *cert.*

^{15/} Allegations in a Rule 3.850 motion must be accepted as true for purposes of determining entitlement to a hearing. *Lighbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989); *cert. denied*, 494 U.S. 1039, 110 S. Ct. 1505 (1990); *Montgomery v. State*, 615 So. 2d 226, 228 (Fla. 5th DCA 1993).

denied, ___ U.S. ___, 113 S. Ct. 127 (1992)(after *evidentiary hearing*, court made factual finding that defendant's will was not overborne by counsel in not testifying); *Williams v. State*, 601 So. 2d at 598 (allegation that defense counsel would not let defendant testify sufficient to require hearing). Because the record excerpt does not conclusively refute this contention, an evidentiary hearing is required. *Demps v. State*, 416 So. 2d 808, 809 (Fla. 1982)("Needless to say, these are serious allegations which warrant a close examination. Because we cannot say that the record conclusively shows [the defendant] is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing.").

No record portions were attached to rebut or refute the other ineffective counsel contentions. Allegations that counsel was ineffective in not objecting to evidence, in failing to seek exclusion of uncharged misconduct evidence, in refusing to investigate the victims' prior criminal history as a motive for other persons committing the murders, in failing to obtain and seek to present the polygraph examination of Neville Butler, in declining to seek suppression of the defendant's questionable post-arrest statement, or in failing to seek the introduction of the defendant's successful polygraph test results, were not capable of being refuted by the record. See generally *Taylor v. State*, 589 So. 2d 450 (Fla. 4th DCA 1991)(attachments do not address postconviction claims raised and were therefore insufficient).

Furthermore, no record portions dispute the defendant's specific allegation that the prosecution withheld favorable evidence from the defense, including evidence that the victims had obtained two \$1 million life insurance policies six weeks before the murders, that Nagel made a claim to the insurance money and gave a statement to the insurance

investigators which conflicted with her deposition testimony, that the victims went to Panama shortly before the murders to perpetrate drug trafficking and a \$100 million fraud scheme, and that the lead detective routinely manufactured confessions in other investigations and lied to his superiors about the confessions.^{16/} These allegations of prosecution suppression of favorable evidence, because they were not refuted by the record, compel the granting of an evidentiary hearing. See *Arango v. State*, 497 So. 2d 1161 (Fla. 1986)(claim that state suppressed *Brady* material requires evidentiary hearing).

The defendant's postconviction motion included numerous other factual contentions which were not refuted by the record and as to which the lower tribunal did not attach any portion of the files and records. While the lower tribunal appears to have accepted the state's response as supportive of the denial of postconviction relief (R 202), the state's response is not a sufficient basis upon which to deny the motion. *Surratt v. State*, ___ So. 2d ___, 20 Fla. L. Weekly D2079 (Fla. 2d DCA Sept. 8, 1995); *Oehling v. State*, ___ So. 2d ___, 20 Fla. L. Weekly D1953 (Fla. 5th DCA Aug. 25, 1995)("Ruling with a response from the state, by itself, does not transform the proceeding into a non-summary one no longer requiring the alternative attachment of records ...").

In conclusion on this point, the trial court's failure to attach record portions which *conclusively* demonstrate that Krishna Maharaj is not entitled to relief requires the lower tribunal to set an evidentiary hearing on all claims raised.

^{16/} The state raised material questions of fact by denying pretrial knowledge of this information (R 175)("subclaims B-J, L-N, and R were unknown to the prosecution at the time of trial and, accordingly, could not have been disclosed during discovery."). That fact issue is itself justification for an evidentiary hearing.

C. An Evidentiary Hearing Is Required.

Krishna Maharaj established, to the satisfaction of this court during direct appeal proceedings, his entitlement to an evidentiary hearing on the suppression of evidence and newly discovered evidence claims. During pendency of the direct appeal but before preparation of the record on appeal, the defense obtained an order from the Supreme Court relinquishing jurisdiction to conduct coram nobis proceedings regarding newly discovered evidence. The defense had only recently learned that the prosecution had suppressed evidence regarding questionable life insurance claims on the victims' deaths. The law firm of Shutts & Bowen had been investigating the \$1 million life insurance claims on each decedent. The policies had been taken out shortly before the deaths. The law firm discovered that the victims were involved in the sinister world of drug trafficking and a fraud scheme involving a \$100 million fraudulent letter of credit. This information, known by the prosecution but not disclosed prior to trial, substantially conflicted with information and sworn testimony provided by prosecution witnesses. As a result of these serious allegations, the Supreme Court relinquished jurisdiction for 90 days for an evidentiary hearing.

Through no fault of the defendant, no evidentiary hearing was ever held by the trial court. The lower tribunal refused to provide counsel to the indigent defendant, and further refused to seek an extension of the 90-day remand period to enable the defendant to arrange counsel or prepare for a hearing pro se. When jurisdiction was returned to the Supreme Court, no evidentiary hearing had been held and no ruling on the defendant's *Brady* and newly discovered evidence claims had been made.

The defendant's subsequent postconviction motion incorporated the *Brady* and newly discovered evidence allegations, but went far beyond the limited evidence known at that earlier time. Because the defendant had already demonstrated entitlement to an evidentiary hearing on the coram nobis claims but no evidentiary hearing was held, the lower tribunal was obligated to conduct a postconviction hearing at least on those issues. The state's factual claim that it was unaware of the newly discovered information does not take the place of a hearing.

Other claims raised in the postconviction motion also compel the granting of an evidentiary hearing, particularly the ineffective counsel claims. This court announced the test for determining whether an evidentiary hearing should be held in an ineffective assistance claim in *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992):

To receive an evidentiary hearing on a claim of trial counsel's ineffective assistance, "the defendant must allege specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant."

With respect to Krishna Maharaj's postconviction motion, "[a]ccepting the allegations ... at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." *Lightbourne v. Dugger*, 549 So. 2d at 1365.

The motion for postconviction relief raised substantial, serious allegations which go to the fundamental fairness of the defendant's convictions and to the propriety of his death sentence. The lower tribunal unfairly minimized the ineffective counsel and suppressed evidence claims without giving the defendant the opportunity to demonstrate the fundamental flaws in his convictions. The lower tribunal's approach trivializes the death penalty process and effectively forecloses the defendant from proving his

innocence. The defendant's ineffective assistance of counsel claim, at a minimum, warrants an evidentiary hearing. The allegation was sufficient to satisfy the ineffective assistance of counsel test of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The record did not negate or rebut the defendant's claims. As the remainder of this brief demonstrates, each postconviction claim was procedurally correct and legally sufficient to justify relief in the form of a vacation of the convictions and sentences.

POINT 2

THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WERE SUFFICIENTLY PLED TO REQUIRE AN EVIDENTIARY HEARING.

The defendant's motion to vacate raised two claims of ineffective counsel. Claim No. 1 questioned the ineffectiveness of trial counsel by outlining 45 separate, actionable deficiencies, while Claim No. 2 alleged counsel's ineffectiveness in refusing to present the defendant's meritorious alibi defense. Each contention set out detailed factual support identifying counsel's failures and also, when necessary, proffered the facts to be established at a hearing. Instead of allowing the defendant to present the facts proving counsel's constitutional ineffectiveness, the lower tribunal denied relief on procedural grounds. According to the court, the claims were either "legally insufficient ... in that they do not allege sufficient facts to require an evidentiary hearing" or were "procedurally barred, as they are claims which either were, or could have, or should have been raised on direct appeal of the judgment and sentence." (R 202). The court also held that Krishna Maharaj waived his right to challenge the failure to present alibi evidence (R 202 ¶3). These rulings are plainly wrong.

Trial counsel bears a constitutional obligation to bring such skill and knowledge to a trial to ensure the trial will be a reliable adversarial testing process which protects the defendant's fundamental right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must allege facts showing counsel performed in a substandard manner and as a result a reasonable probability exists that the trial outcome would have been different. *Strickland*; *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985); *Johnson v. State*, 593 So. 2d 206 (Fla.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 119 (1992). So long as the motion presents facts showing that counsel's conduct was "outside the range of professionally competent assistance," and that counsel's performance affected the outcome of the case, postconviction relief is properly ordered. *Turner v. Dugger*, 614 So. 2d 1075, 1079 (Fla. 1992).

The ineffective assistance allegations in the defendant's motion set forth sufficient facts which were not rebutted by the record and which demonstrate the unconstitutionality of his convictions. These are allegations which, by their very nature, require an evaluation upon the granting of an evidentiary hearing. "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing, denial of that right would constitute a denial of all due process and could never be harmless." *Holland v. State*, 503 So. 2d 1250, 1252-1253 (Fla. 1987).

A. No Defense Waiver Occurred.

On the failure of defense counsel to present evidence, including alibi testimony, and to permit Krishna Maharaj to testify, the lower tribunal ruled that the defendant waived his right to present a defense by his on the record agreement with trial counsel's decision (R 202 ¶13). The court offered a three-page transcript excerpt in support of that waiver ruling (Trial Transcript 3731-3733).^{17/} The court's waiver finding, however, completely avoided the allegation raised by the postconviction motion, that counsel's decision was not valid and that the defendant's agreement was the result of counsel's pressure and coercion.

The motion raised extensive factual grounds supporting the validity of the alibi evidence claim. The motion also alleged that Krishna Maharaj had always intended to testify and present evidence (R 55). The motion explained that throughout pretrial and trial proceedings defense counsel assured the defendant that the case would include defense evidence. It was only

[a]t the very last minute, however, after the State closed its case, trial counsel directed Mr. Maharaj not to testify. He insisted Mr. Maharaj waive the right to testify. He told Mr. Maharaj he had won his previous seven first degree murder cases including one in which his client had confessed, he said he had ten years experience and knew what he was doing, and told Mr. Maharaj he had "nothing to worry about." This entire retreat from the promise that Mr. Maharaj would be able to address the jury occurred within five minutes providing no opportunity to discuss the matter, at all, with trial counsel. In fact, trial counsel rested the defense case without then discussing the matter with Mr. Maharaj at all. During the brief recess which followed, counsel insisted that Mr. Maharaj not

^{17/} The excerpted transcript included an advice of the defendant's constitutional rights and the defendant's statement acknowledging those rights. The court made no voluntariness finding and made no inquiry about coercion, threats, or promises.

testify. Mr. Maharaj felt he had no choice in the matter and the decision was, in fact, trial counsel's and not Mr. Maharaj's.

(R 55). The purported "waiver" colloquy does not rebut any of these compelling allegations, because the trial judge's inquiry was not whether Krishna Maharaj made the decision to forego a defense case of his own free will or whether he was coerced into waiving that constitutional right by threats and promises. At a minimum, the postconviction motion called into question the validity of the waiver, an issue which can only be evaluated after giving the parties an opportunity to present their evidence.

A defendant has an absolute right to testify and present evidence at trial. *E.g.*, *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704 (1987). The waiver of that right must be knowing and intelligent, and must be the defendant's personal decision. *See United States v. Teague*, 953 F.2d at 1532; *Rogers-Bey v. Lane*, 896 F.2d 279, 283 (7th Cir.), *cert. denied*, 498 U.S. 831, 111 S. Ct. 93 (1990); *United States v. Martinez*, 883 F.2d 750, 756 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1471 (9th Cir.), *cert. denied*, 501 U.S. 1249, 111 S. Ct. 2886 (1991); *United States v. Long*, 857 F.2d 436, 447 n. 9 (8th Cir. 1988). A compelled, coerced, or unintelligent waiver is no waiver at all. In *Gill v. State*, 632 So. 2d 660 (Fla. 2d DCA 1994), the defendant claimed counsel rested the case without giving the defendant an opportunity to testify. Postconviction relief was summarily denied but the appellate court remanded for a hearing to determine if counsel negligently or deliberately interfered with the exercise of a constitutional right. *Id.* at 662.

The decision in *Wilson v. State*, 647 So. 2d 185 (Fla. 1st DCA 1994), is even more on point. That defendant alleged he repeatedly advised counsel of his desire to testify, but his will was overborne by the lawyer's threats that if the defendant did not do as counsel instructed, counsel would withdraw from the case. Summary denial of the claim

was erroneous, according to the First District, which remanded the case for a hearing.

In *Middleton v. State*, 603 So. 2d 46 (Fla. 1st DCA 1992), a defendant alleged that the defense lawyer gave misleading information about the sentence. That allegation justified an evidentiary hearing into counsel's effectiveness inasmuch as the plea documents did not refute the allegations. Similarly, in *Williams v. State*, 601 So. 2d 596 (Fla. 1st DCA 1992), an allegation that counsel refused to let the defendant testify was held to be sufficient for an evidentiary hearing.

Such is the situation presented here. Mr. Maharaj did not validly waive his right to call witnesses or testify. The waiver colloquy, relied on by the lower tribunal in denying relief, is legally inadequate to overcome the defendant's claim that he did not knowingly, intelligently, and voluntarily waive the right to testify and present a defense. The waiver colloquy is silent on the issue of coercion. An evidentiary hearing is in order. See *Brunson v. State*, 605 So. 2d 1006 (Fla. 1st DCA 1992)(allegation that counsel failed to investigate intoxication defense warrants hearing, even though defendant agreed he was satisfied with counsel's performance); *Eady v. State*, 604 So. 2d 559 (Fla. 1st DCA 1992)(allegation that defendant coerced into plea sufficient for hearing).

On this record, the defendant has alleged sufficient facts to warrant a hearing on his claim that he was unconstitutionally deprived of the right to present evidence and testify. This court must remand this case for an evidentiary hearing.

B. The Ineffective Assistance of Counsel Claims Were Sufficiently Pled and Were Not Refuted by the Record.

The motion to vacate contains numerous allegations of defense counsel's failure to investigate, to call witnesses, to cross-examine prosecution witnesses, to seek a mistrial after the trial judge was arrested for bribery, to request the sequestration of the

jury after the judge's criminal conduct was revealed, to object to the introduction of prejudicial evidence, and to seek the suppression of the defendant's post-arrest statement. Each contention was supported by detailed factual allegations and, in several instances, documentary support and sworn witness statements. These deficiencies "so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla.), *cert. denied*, 479 U.S. 972, 107 S. Ct. 474 (1986).

1. Failure to Present Alibi Evidence.

The lower tribunal, in ruling that the defendant's ineffective assistance claims did not meet the *Strickland* standard, required the defendant to meet an impossible, and constitutionally unacceptable standard. An allegation that defense counsel failed to present alibi evidence is sufficient to require an evidentiary hearing, particularly where Mr. Maharaj's complete alibi defense - including a proffer of the alibi testimony, sworn statements of the alibi witnesses, and a showing of the validity of the alibi defense - was included in the motion and supporting exhibits. The prosecution's response was that the defendant failed to preserve the issue and that the alibi witnesses were factually incapable of proving the defendant did not commit the murders (R 177-189).^{18/}

Counsel's failure to call alibi witnesses is an actionable deficiency which passes the *Strickland* test. In *Harley v. State*, 594 So. 2d 352 (Fla. 2d DCA 1992), the court recognized that counsel's ineffectiveness in failing to call alibi witnesses, while perhaps

^{18/} The prosecution's argument that "the defendant has failed to specifically plead what the witnesses would have testified to and how their testimony would have altered the outcome of the trial" (R 179) is flatly refuted by the record containing proffers and witness statements (R 34-38, 70-102).

a tactical decision by counsel, can only be determined through an evidentiary hearing. *E.g., Comfort v. State*, 597 So. 2d 944 (Fla. 2d DCA 1992). A failure to subpoena available defense witnesses is a constitutional deficiency for which relief is available. *Pew v. State*, 639 So. 2d 693 (Fla. 5th DCA 1994). Questions of what witnesses to call at trial may well be tactical decisions by counsel, but summary denial is improper when the defendant identifies the witnesses and the nature of the exculpatory evidence. *Prieto v. State*, 573 So. 2d 398 (Fla. 2d DCA 1991). Tactical questions and issues of defense counsel's strategy are postconviction issues best made after a hearing. *Anthony v. State; Dauer v. State*, 570 So. 2d 314 (Fla. 2d DCA 1990).

In this case, the alibi evidence is compelling. Witnesses were not called who would have proved that Krishna Maharaj did not and could not have murdered the Moo Youngs. These witnesses were available to testify. While the prosecution disputes the accuracy of the alibi and claims it is an outright fabrication, the record does not support that contention. The credibility of alibi evidence is a matter for the jury. In this case, had the jury considered the alibi evidence and the evidence pointing to narcotics retribution as the reason for the victims' murders, the outcome of the case most assuredly would have been different. *Krishna Maharaj is innocent*. He is absolutely entitled to a chance to prove his innocence in a forum untainted by incompetent representation.

2. Failure To Seek Suppression of Post-Arrest Statement.

For some inexplicable reason, defense counsel failed to seek suppression of the defendant's post-arrest statement. Mr. Maharaj claimed the statement was an outright

fabrication and was otherwise involuntary. (Claim No. 1(EE); R 28-30).^{19/} The statement, moreover, was made in defiance of the defendant's repeated requests for counsel. *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486 (1990); *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880 (1981). Because defense counsel did not raise this issue, no hearing was ever held on the voluntariness question. An allegation that counsel failed to seek suppression of an involuntary statement is sufficient to order an evidentiary hearing, especially when the statement played a role in the outcome of the case. *Mancera v. State*, 600 So. 2d 550 (Fla. 2d DCA 1992); *Allen v. State*, 579 So. 2d 200 (Fla. 2d DCA 1991).

3. Failure to Investigate the Victims.

Defense counsel's failure to investigate the background of the victims led to a total absence of evidence that the victims, engaged in narco-trafficking and a fraud scheme of gigantic proportions, were killed by others as retribution for their criminal activities. This serious deficiency, coupled with the prosecution's failure to reveal this exculpatory information, is without legal justification. Had counsel conducted the minimally required investigation, the defense would have been in a position to prove a Colombian, Mr. Mejias, and Eddie Dames were involved in the murders, not Krishna Maharaj. Counsel's failure to investigate relevant issues constitutes a valid claim of ineffective assistance for which a hearing is required. See *Mallory v. State*, 577 So. 2d 987 (Fla. 4th DCA 1991).

In *Kilgore v. State*, 631 So. 2d 334 (Fla. 1st DCA 1994), the court held that defense counsel's failure to adequately investigate and interview witnesses provided sufficient

^{19/} After trial, the defendant learned the lead detective had a history of manufacturing confessions. The prosecution withheld this exculpatory evidence (R 47 ¶P).

grounds for the court to grant an evidentiary hearing on the issue of ineffective counsel. *Kilgore* does not stand alone, as courts routinely require evidentiary hearings upon claims that counsel was ineffective by failing to conduct a thorough investigation. *E.g.*, *Routly v. State*, 590 So. 2d 397 (Fla. 1991)(evidentiary hearing held on motion raising, among others, claim of inadequate defense investigation); *Brunson v. State*, 605 So. 2d 1006 (Fla. 1st DCA 1992)(allegation that counsel failed to investigate intoxication defense sufficient to obtain hearing). Counsel's substandard representation comes within the purview of *Strickland* and qualifies for an evidentiary hearing.

4. Failure to Request Mistrial.

Not often does a trial judge get arrested for bribery, and not often does such an arrest affect an ongoing first degree murder trial. When it happens, as it did in this case, counsel must be especially sensitive to the inevitable repercussions and must be ready to discuss the appropriate relief with the accused, who can then determine what course of action to take. Here, Krishna Maharaj was not given any adequate explanation of his rights or of the impact the Judge Gross arrest might have on his case. The decision to forego a mistrial was made unilaterally by counsel. That decision constitutes ineffective assistance (Claim No. 1(C)). The defendant's apparent waiver (Trial Transcript 2853-2858) was not knowingly or intelligently made, and was merely an automatic response to counsel's instructions. An evidentiary hearing is needed.

5. Failure to Seek Jury Sequestration.

Upon the arrest of the trial judge and the inevitable avalanche of publicity, defense counsel did not seek to sequester the jury, waived the presence of the defendant during conferences following the judge's removal, and allowed a juror to be absent during the

court's instructions after the substitution of a new trial judge (Claim No. 1(C, D, E)). Counsel's failures are inexcusable, particularly his refusal to discuss these issues with the defendant in any meaningful manner. This deficiency raised a colorable claim of ineffective assistance of counsel which affected the outcome of the case.

6. Failures to Make Objections and Preserve Errors.

The motion to vacate raises sixteen separate, factually supported instances of defense counsel's repeated, systematic failures to object to prejudicial evidence, to preserve issues for appellate review, to contest the prosecution's improper comments, and to object to erroneous jury instructions (R 22-34). These deficiencies add up to one conclusion: defense counsel was woefully unprepared to protect the defendant's rights at trial. Counsel had absolutely no excuse for ignoring valid evidentiary objections which affected the outcome of the case. Defense counsel's failure to object and preserve errors for review sufficiently state a claim of ineffective assistance of counsel. *Rhue v. State*, 603 So. 2d 613 (Fla. 2d DCA 1992)(counsel can be ineffective by failing to preserve issues); *Hardman v. State*, 584 So. 2d 649 (Fla. 1st DCA 1991).

7. Failures to Challenge Prosecution Evidence.

Defense counsel was unprepared to defend Krishna Maharaj. He was not familiar with the evidence, did not investigate the facts, and could not adequately examine prosecution witnesses. Repeatedly, counsel did not examine witnesses on critical points which would have established favorable evidence. Even defense counsel's failure to seek the admission of the polygraph evidence, either at trial or sentencing, constitutes a serious deficiency, especially in a capital case where such evidence has value. See *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723 (1991); *State v. Bartholemew*, 101 Wash.

2d 631, 683 P.2d 1079 (Wash. 1984). Allegations of counsel's failure to challenge state witnesses and offer exculpatory evidence are sufficient to warrant an evidentiary hearing.

C. Conclusion.

The motion to vacate raised a litany of defense counsel's deficiencies, all of which were factually articulated and legally sufficient. Allegations of ineffectiveness of defense counsel are proper matters for postconviction relief. *McKinney v. State*, 579 So. 2d 80 (Fla. 1991). The defendant is entitled to an evidentiary hearing on his ineffective assistance of counsel allegations.

POINT 3

THE PROSECUTION'S SYSTEMATIC WITHHOLDING OF FAVORABLE AND DISCOVERABLE EVIDENCE ENTITLED THE DEFENDANT TO POSTCONVICTION RELIEF.

Krishna Maharaj asserted in Claim No. 3 that he was denied fundamental fairness and due process by the prosecution's systematic refusal to disclose favorable evidence to the defense (R 38-42). Included among the actionable contentions were claims that the prosecution withheld evidence about the victims' criminal activity, the failure of the principal prosecution witness to pass a polygraph test, the use of aliases by the victims to perpetrate criminal conduct, the questionable insurance claim made by Shaula Nagel on the victims' insurance policies, the victims' recent travels to Panama to further a drug and \$100 million fraud transaction, and the use of perjured testimony by prosecution witnesses. The motion alleged that the described information was discovered by the defense after trial by postconviction counsel.

The state responded to these contentions by going outside the record in proclaiming that the prosecution was unaware of the undisclosed evidence, that the

issues should have been raised on direct appeal, and that the undisclosed facts would not have made a difference in the case (R 175-176). The trial court embraced the state's response and ruled the claim was procedurally barred and insufficiently pled (R 202). That ruling must be overturned because the defendant is entitled to an evidentiary hearing on this claim.

The prosecution's suppression of exculpatory evidence constitutes a constitutional *Brady*^{20/} violation upon a showing (1) the prosecution possessed favorable evidence, (2) the defendant neither knew nor reasonably could have known of the evidence, (3) the prosecution suppressed the evidence, and (4) had the evidence been disclosed a reasonable probability exists that the outcome would have been different. *Hegwood v. State*, 575 So. 2d 170, 171 (Fla. 1991)(citing *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir.), *cert. denied*, 493 U.S. 932, 110 S. Ct. 322 (1989)). The prosecution's obligation to disclose information relevant to guilt or punishment is premised on considerations of fairness. *State v. Gillespie*, 227 So. 2d 550, 553 (Fla. 1969).

The withheld evidence was not made known to the defense until after trial. To obtain a new trial or sentencing on the basis of newly discovered evidence, the evidence (1) must have been unknown to the defense and could not have been discovered by the exercise of due diligence, and (2) the evidence is of such a nature that it would probably have produced a different result. *Scott v. Dugger*, 596 So. 2d 1026 (Fla. 1992); *Dailey v. State*, 594 So. 2d 254 (Fla. 1992).

The extensive list of information withheld by the prosecution is more than capable of resulting in a different jury verdict and sentence. The undisclosed evidence goes

^{20/} *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

directly to the defendant's claim of innocence and shows that the murders were likely committed by others. It is not enough for the prosecution to disclaim knowledge of the undisclosed information. As in *Jones v. State*, 591 So. 2d 911 (Fla. 1991), the court ruled that a hearing was required to evaluate the claim of undisclosed and newly discovered evidence.

Had the defendant been given the now available evidence, all of which was alleged to have been known to the prosecution, that the victims were drug traffickers and fraud operators who took out \$1 million insurance policies shortly before the killings, and that a Colombian national with connections to South American drug traffickers and to Eddie Dames was occupying the hotel room across the hall from the murder scene, that information would most certainly have affected the outcome of the case. At a minimum, it would have enabled the defense to investigate who actually killed the Moo Youngs and what role Neville Butler really played in the murderous scheme. The prosecution's withholding of the victims' passports was another sinister attempt to keep the defense in the dark about the victims' international travels in pursuit of a life of crime.^{21/}

A prosecution failure to disclose evidence that tends to support the contention that another person is the killer, even if not material on the issue of guilt, is nonetheless relevant to both the trial and sentencing phases of a capital case. *Scott v. State*, 657 So. 2d 1129 (Fla. 1995)(evidentiary hearing ordered). When undisclosed evidence "may well have been the final piece of the puzzle to complete the picture of [the defendant's] defense," an evidentiary hearing is required. *Cipollina v. State*, 501 So. 2d 2 (Fla. 1986),

^{21/} The trial transcript reflects the defense investigator was never given the passports (Trial Transcript 2186).

rev. denied, 509 So. 2d 1119 (Fla. 1987).

When the prosecution fails to disclose impeaching evidence from an important witness, as occurred in the case of the Shaula Nagel conflicting statements which were never revealed to the defense, a new trial is in order. See *Randall v. State*, 604 So. 2d 36 (Fla. 1st DCA 1992)(alleged victim's statement indicating desire not to prosecute was withheld from defense), *approved*, 616 So. 2d 20 (Fla. 1993); *Beasley v. State*, 315 So. 2d 540 (Fla. 1975)(two witnesses told state they would corroborate defense, but prosecutor did not disclose that development).

Even the prosecution's failure to disclose polygraph results, as occurred with Neville Butler,^{22/} is material to impeachment of a crucial witness. See *United States v. Lindell*, 881 F.2d 1313, 1326 (5th Cir. 1989), *cert. denied*, 496 U.S. 926, 110 S. Ct. 2621 (1990)("[i]mpeachment evidence includes the results of polygraph tests."). This is especially important in a capital case, where such evidence is relevant and admissible to show mitigation. See *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723 (1991); *State v. Bartholemew*, 101 Wash. 2d 631, 683 P.2d 1079 (Wash. 1984). An evidentiary hearing is the only effective way to determine the truth in this case. Krishna Maharaj should be given that opportunity to establish his innocence.

^{22/} The state argued in the lower tribunal that Butler's unsuccessful polygraph was fully disclosed to the defense (R 175). Yet, the defendant argued, and the record does not refute the contention, that the prosecution never fully or timely disclosed Butler's perjury and false statements (R 193).

POINT 4

THE LOWER TRIBUNAL WAS REQUIRED TO CONDUCT AN EVIDENTIARY HEARING TO EVALUATE THE DEFENDANT'S CONTENTION THAT PROSECUTORIAL MISCONDUCT AND KNOWING USE OF PERJURED TESTIMONY RESULTED IN A DEPRIVATION OF DUE PROCESS.

The defendant became aware, well after his convictions, of an orchestrated prosecutorial endeavor to prove him guilty of the murders through police misconduct, false testimony, and hidden evidence. The defendant raised these objections in his motion to vacate as Claim Nos. 4 and 5. The lower tribunal paid no attention to these claims, finding they were procedurally barred and inadequately pled (R 202). The defendant is entitled to have these well-pled claims aired at an evidentiary hearing.

Where any reasonable likelihood exists that a conviction was obtained on the basis of false testimony, a new trial is required. *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995). Maharaj's motion demonstrates convincingly that the state repeatedly ignored evidence of the defendant's innocence, rejected witness information indicating others who had both motive and opportunity to kill the Moo Youngs, suggested to witnesses that the defendant was at the scene at the time of the murders, and pressured or influenced witnesses into changing testimony to inculpate the defendant. The state failed to correct false testimony when it occurred, including the important testimony of Tino Geddes and Shaula Nagel's deposition statements.

Claims of false testimony and prosecutorial misconduct, when presented with the exacting detail as found in this defendant's motion, jeopardize the constitutional integrity of the convictions and sentences. These claims should not be dismissed merely because the state raised doubts as to the integrity of the allegations. It is the defendant who has

raised enormous doubts about the integrity of his convictions. Those doubts strongly suggest the danger of mistaken murder convictions and a death sentence.

Considerations of fundamental fairness require that these issues be explored in an evidentiary setting. It is an inescapable fact of our justice system that innocent people are too often convicted. Here, the defendant has raised substantial questions which go to the very heart of the prosecution's case. Because these questions have not been raised and answered in any other forum, the defendant must be given the opportunity to prove entitlement to a new trial in the lower tribunal.

POINT 5

**THE DEFENDANT IS ENTITLED TO DISCLOSURE OF THE
ENTIRE PROSECUTION FILE IN SUPPORT OF HIS CLAIM
FOR POSTCONVICTION RELIEF.**

The Florida Public Records Act entitles a postconviction defendant in a capital case to examine the State Attorney files pertaining to the case. *State v. Kokal*, 562 So. 2d 324 (Fla. 1990). The lower tribunal refused to order disclosure of portions of the prosecution's files, finding after an in camera review the portions were exempt from disclosure as "work product of the prosecutor." (R 202). Although defense counsel has not been given an opportunity to review the sealed portions of the file deemed to be exempt, we question the application of the work product exemption to the sealed documents. The trial court's ruling did not restrict disclosure of only *preliminary materials* which were merely intended to guide the lawyers, which is the only legitimate exception to the *Kokal* required disclosures. *Id.* at 327. We request that this court permit defense access to the entire file, consistent with *Roesch v. State*, 596 So. 2d 1214 (Fla. 2d DCA 1992), *cert. question answered*, 633 So. 2d 1 (Fla. 1993), and permit the defendant to

supplement his motion with any information obtained from the withheld files.

POINT 6

THE LOWER TRIBUNAL WAS REQUIRED TO DISCLOSE HIS SUPERVISORY RELATIONSHIP WITH THE TRIAL PROSECUTORS AND TO RECUSE HIMSELF FROM CONSIDERATION OF THE DEFENDANT'S POSTCONVICTION MOTION.

Circuit Judge Glick, who presided at the defendant's postconviction proceedings, was a supervisory attorney in the Dade County State Attorney's Office at the time of the Krishna Maharaj trial. Although the judge disclosed his professional and social acquaintance with the two trial prosecutors,^{23/} the judge did not inform the defendant or defense counsel of his supervisory status during the Maharaj prosecution. Neither of the prosecutors disclosed the judge's supervisory status to counsel. It was not until counsel obtained and reviewed the judge's State Attorney's Office file that the discovery was made that Judge Glick supervised the trial prosecutors during the time of the Maharaj trial.

Judge Glick was obligated, as a matter of law, to disclose his prior prosecutorial relationship to the case and to disqualify himself from all proceedings. "Where the judge is conscious of any bias or prejudice which might influence ... official action against any party to the litigation, [the judge] should decline to officiate *whether challenged or not.*"

^{23/} "The Court: ... Quite frankly, if we did go to an evidentiary hearing I would not be able to handle the case because it is my belief that one or more of the prosecutors handling the case originally would have to testify, if it becomes a credibility issue, as to testimony, and then in good faith I don't think that I could hear the case because of the long term association professionally and socially with the lawyers.

But on the surface I don't have a problem with it, if you don't." (Transcript August 24, 1994 hearing, at 36-37)(Add. 13-16). The defendant was not present.

Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980)(emphasis in original). The judge is obligated to inform the parties of the relevant facts which might warrant recusal. See *Funt v. Nadler*, 530 So. 2d 1107 (Fla. 3d DCA 1988); *United States v. Garrudo*, 869 F.Supp. 1574 (S.D.Fla. 1994)(judge under criminal investigation required to recuse self from all criminal cases).^{24/} This obligation is premised on fundamental fairness grounds.

The courts of this state are firmly committed to the proposition that the due process guarantee of a fair trial contains in its core the principle that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. *State ex rel. Davis v. Parks*, [141 Fla. 516, 194 So. 613 (1939)]; *State v. Steele*, 348 So. 2d 398 (Fla. 3d DCA 1977).

Pistorino v. Ferguson, 386 So. 2d at 67.

The decision of *Duest v. Goldstein*, 654 So. 2d 1004 (Fla. 4th DCA 1995), is controlling on this point. There, the trial judge was disqualified from presiding at resentencing after reversal of a death sentence because the judge was a prosecutor in the same State Attorney's Office at the time the defendant's case was tried, was the supervisory state attorney in the division in which the defendant was tried, and delivered a document to the trial attorney during the trial. According to the court, the judge's status as a supervisory prosecutor at the time of the defendant's trial was "sufficient to create"

^{24/} Canon 3 of the Code of Judicial Conduct states, in applicable part at §E(1):

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

* * *

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it ...

a well-founded fear of judicial prejudice. The court was particularly focused on the illegitimate appearance of bias such a relationship causes:

In a death penalty case, the question of judicial bias is of particular importance, since the judge will be called upon to make what is literally a life-or-death decision. *Chastine v. Broom*, 629 So. 2d 293, 294 (Fla. 4th DCA 1993)(citing *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983)). To leave that decision to a judge who assisted in securing the death sentence in petitioner's first trial seems to us to create more than a reasonable fear of bias on the part of the judge.

E.g., *Cave v. State*, ___ So. 2d ___, 20 Fla. L. Weekly S484 (Fla. Sept. 21, 1995)(disqualification of judge who was a prosecutor at time of defendant's prosecution).

Krishna Maharaj is in no different position. Judge Glick supervised the trial prosecutors during the trial. He failed to disclose his prior relationship to this case. He then denied postconviction relief, after noting that he would not have been able to fairly evaluate the merits of the claims involving the prosecutors because of his longstanding professional and social acquaintance with them. How much more conspiratorial could the proceedings appear to be, particularly when the postconviction motion raised colorable claims of prosecutorial misconduct and law enforcement mischief! The proceedings should never have gone forward with Judge Glick at the helm. Due process and fundamental fairness require that the order denying the motion for postconviction relief be vacated and the case remanded for initial review and an evidentiary hearing before another judge. The Constitution demands no less.

CONCLUSION

The lower tribunal erred by summarily denying postconviction relief. The claims raised by the motion were procedurally sound, legally sufficient, and factually supported. The motion demonstrated that Krishna Maharaj's convictions and sentences were fatally

flawed. The motion alleged more than enough facts to cast the validity of the convictions into doubt, and showed that Mr. Maharaj is actually innocent of the charges. He is entitled to an evidentiary hearing to prove that he was unjustly accused and convicted in violation of constitutional precepts of fundamental fairness and justice. Krishna Maharaj must be given a full and fair opportunity to prove that there is insufficient evidence to support his convictions and that his death sentence is not warranted. Furthermore, the postconviction proceedings were fundamentally flawed because the judge had a supervisory hand in obtaining the defendant's convictions and death sentence. This court must, accordingly, vacate the order denying postconviction relief and remand this case for an evidentiary hearing before a different, bias free judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered
by mail this 5th day of October 1995, to:

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ADDENDUM

CONTENTS OF ADDENDUM

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