IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,439

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.

REPLY BRIEF OF APPELLANT KRISHNA MAHARAJ

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Krishna Maharaj, defendant/appellant, certifies that the following persons and entities have or may have an interest in the outcome of this case.

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STATEMENT OF THE CASE AND FACTS

Krishna Maharaj, the defendant in the lower tribunal, realleges the procedural and factual recitation contained in his initial brief at pages 1-24.

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 his convictions and 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?

ARGUMENT

POINT 1

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

The state agrees that a motion for postconviction relief can be denied *only* if the record *conclusively demonstrates* the defendant is not eligible for relief. *Teffeteller v. State*, ___ So. 2d ___, 21 Fla. L. Weekly S107 (Fla. March 7, 1996) ("Moreover, as to those claims which raise ineffective assistance of trial counsel that are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant, [the defendant is] entitled to an evidentiary hearing."[citation omitted]); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). In attempting to justify the lower tribunal's premature decision to deny relief without a hearing, the state's tortured and labored argument contesting the merits of the defendant's claims actually proves the defendant was entitled to an evidentiary hearing.

A. Precedent Compels An Evidentiary Hearing.

At a minimum, the postconviction allegations of ineffective and incompetent counsel, prosecution subornation of perjury, and a biased judge presiding over the postconviction proceedings permit resolution only after an evidentiary hearing. That is because the allegations - such as ineffective counsel, *Brady*[1/] violations, perjured testimony, and prosecutorial misconduct - time and again have been held by this court to require the granting of an evidentiary hearing. Only recently, this court recognized

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1/ *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

once more in *State v. Gunsby*, ___ So. 2d ___, 21 Fla. L. Weekly S20 (Fla. Jan. 11, 1996), that a postconviction motion which presents specific, factually supported claims of defense counsel's ineffectiveness and the wrongful withholding of exculpatory evidence is properly resolved only after an evidentiary presentation. *See, e.g., Bottoson v. State*, ___ So. 2d ___, 21 Fla. L. Weekly S38 (Fla. Jan 18, 1996)(claim of ineffective assistance of counsel resulted in ten-day evidentiary hearing).

Under Florida's system of appellate and postconviction review, a motion to vacate a conviction and sentence is the only authorized mechanism for capital defendants to raise claims concerning matters which arise outside the record. *See Nixon v. State*, 572 So. 2d 1336, 1340 (Fla. 1990). The defendant has presented a powerful postconviction motion which casts tremendous doubt on the fairness of his trial. Indeed, if given the opportunity to prove his postconviction contentions, the defendant will demonstrate that he did not commit the murders. While that should not be his burden, he is well aware that if he does so, it will be evident to all that his trial suffered from the most basic constitutional deficiency -- the trial itself was fundamentally unfair. The justice system and the defendant himself are disserved without a full and fair opportunity to present his meritorious claims. The alternative, allowing the state to hide the pervasive misconduct and fundamentally unfair practices which plagued this case, is unacceptable in our system which holds fairness as a core value of our society.

B. Lower Tribunal's Order Is Deficient.

The state has all but ignored the lower tribunal's failure to attach portions of the record which supposedly support the denial of postconviction relief. As the defendant argued in his initial brief (pages 30-34), the trial court did not even give lip service to this

fundamental requirement. Without offering an explanation, the lower tribunal ordered the attachment of the *entire 21-volume record on appeal*, the appellate briefs, and three identified transcript pages (R 202-203). The court did not identify portions of the record to show the defendant was not entitled to relief. It was as if the lower tribunal was so overwhelmed by the defendant's comprehensive, fact intensive motion that the judge decided to leave it to this reviewing court to find some basis in the record to deny the defendant's claims. This the court cannot do, because the defendant is entitled to develop the record en route to his showing that the jury's verdict was contaminated by a sinister effort on the part of law enforcement to fabricate and suppress evidence, as well as by the unpreparedness of his defense counsel throughout the trial. Just because the state assured the lower tribunal that the postconviction motion was without merit did not satisfy that portion of the rule requiring the attachment of portions of the record showing that relief is not available. *See Oehling v. State*, 659 So. 2d 1226 (Fla. 5th DCA 1995) (state's response is not sufficient to do away with evidentiary hearing). Having failed to attach record excerpts which conclusively refute the postconviction claims, the lower tribunal erred in denying relief.

C. An Evidentiary Hearing Was Previously Ordered.

In demonstrating that an evidentiary hearing was required, the defendant's initial brief argued that this court's prior relinquishment for a coram nobis hearing corroborated the fact-specific nature of the defendant's postconviction claims. Initial Brief at 35-36. The state asserts the relinquishment order "cannot be construed as a finding that the allegations required an evidentiary hearing[,]" but offers no suggestion as to what else this court's order meant. State's Brief at 18. The defendant was entitled to an evidentiary

hearing by reason of the newly discovered evidence that the prosecution had suppressed information regarding the $1 million life insurance policies on the victims. When no hearing was held, through no fault of the defendant, the inclusion of that properly preserved issue in the postconviction motion required a hearing on that compelling issue.

This case raises substantial, serious claims of deliberate deception by the prosecution, utterly false and fabricated testimony by prosecution witnesses, and a postconviction judge who had too close a relationship to the prosecution. Without any fact development, we are left with a case having powerful indicia of a fundamentally flawed conviction, yet the defendant remains on Death Row. Having passed a polygraph test which focused directly on the murders (R 103-109), the defendant has begun to develop a presentation which proves his innocence and which reveals the sordid array of due process deficiencies which undermined the reliability of his trial.

The state, instead of blindly protesting the defendant's claims, should have joined with the defendant in seeking an evidentiary hearing. *See Rose v. State*, 601 So. 2d 1181, 1183-1184 (Fla. 1992) (state agreed evidentiary hearing was required on some facts alleged in postconviction motion). Only then will the truth be revealed. On this unmistakably deficient record, this court must reverse the summary denial of postconviction relief and remand this case for an evidentiary hearing. The allegations, when proved, will establish by a "reasonable probability" that a different jury verdict would have resulted. *E.g., Kyles v. Whitley*, ___ U.S. ___, 115 S. Ct. 1555 (1995).

POINT 2

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

Fact specific claims of ineffective assistance of counsel *almost always* require the development of evidence regarding counsel's conduct, the cause, and its effect. *E.g.*, *Rose v. State*, ___ So. 2d ___, 21 Fla. L. Weekly S109 (Fla. March 7, 1996). That record can be developed only through an evidentiary hearing, an opportunity which was denied the defendant. The postconviction allegations, if true, reveal a persistent pattern of counsel's failures which measurably affected the defendant's case, to his detriment. The result of counsel's deficiencies is that the verdicts were unquestionably different from what would have occurred if counsel effectively represented the defendant.

A. The Postconviction Motion Requires A Hearing.

The state, arguing that the defendant's postconviction motion was neither factually sufficient nor legally persuasive, improperly views the allegations in a negative light. That is inconsistent with the universally accepted rule that allegations in a Rule 3.850 motion must be accepted as true for the purpose of determining whether a defendant is entitled to an evidentiary hearing. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989), *cert. denied*, 494 U.S. 1039, 110 S. Ct. 1505 (1990). The allegations of ineffective assistance of counsel in this case are fact intensive and "demonstrate a deficiency in performance that prejudiced the defendant," thus entitling Krishna Maharaj to an evidentiary hearing. *Teffeteller v. Dugger*, ___ So. 2d ___, 21 Fla. L. Weekly S107 (Fla. March 7, 1996).

As presented in the defendant's initial brief and as conceded in the state's answer brief, a claim of ineffective counsel requires the defendant to satisfy the two-prong standard of *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052 (1984), in order to obtain postconviction relief: "(1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense." *Rose v. State*, 21 Fla. L. Weekly S109. The state mistakenly asserts that this showing must be made in order *to obtain an evidentiary hearing*, when in truth the defendant's procedural burden at this stage is to raise claims of ineffective counsel that "are not conclusively rebutted by the record[.]" *Roberts v. State*, 568 So. 2d 1255, 1259 (1990). Allegations of counsel's unpreparedness are adequate to move the case to an evidentiary hearing stage. *Breedlove v. Singletary*, 595 So. 2d 8 (Fla. 1992). The defendant more than satisfied this burden in his Rule 3.850 motion.

B. Counsel Was Ineffective.

1. Counsel's Failure To Present Evidence.

Defense counsel did not present evidence at trial. The defendant alleged that counsel's decision to call no witnesses, including the defendant himself, was unilateral, made at the last minute, and completely inconsistent with the trial preparation strategy and defense theory. The defendant went along with counsel's decision because he felt he had no choice (R55). In denying the motion to vacate, the court found that the defendant waived his right to testify or present evidence (R202-203), even though the trial colloquy with the defendant was woefully deficient and did not address the point raised in the motion to vacate.

The court's colloquy (Trial Transcript 3731-3733) covered only the court advising

the defendant of his constitutional rights. The court made no inquiry about coercion, threats, or promises, all of which are at the heart of the ineffective counsel claim. The record does not establish the constitutional validity of the defendant's agreement with counsel to forego presentation of a defense. Yet, a waiver of a constitutional entitlement must be knowing, intelligent, and voluntary. *E.g.*, *Wilson v. State*, 647 So. 2d 185 (Fla 1st DCA 1994). Those factors do not exist on this record. Therefore, the state's reliance on a waiver theory is unacceptable because the record does not conclusively disprove that the decision to present no defense evidence was the result of effective representation.

The decision to present no evidence, moreover, was unreasonable and seriously ineffective. The state's trial witnesses relied upon by the state in this portion of its answer brief, Tino Geddes and Clifton Segree, were both extremely disreputable and carried substantial negative baggage. That Geddes or Segree claimed the defendant asked them to provide a false alibi (Trial Transcript 3690-3692) was neither compelling nor truthful evidence, as the other witness to that supposed meeting would have established if the defendant had presented evidence.

Substantial, unimpeachable evidence was available to the defendant to prove the defendant was with Barry Neal, Geddes, and Segree on the night of October 16, yet defense counsel inexplicably never offered that evidence. The defendant, moreover, was in a position to call witnesses who would have documented his whereabouts on October 16, but counsel chose not to do so. The proffers and witness statements attached to the defendant's postconviction motion, including alibi witnesses Kisch, Scott, McKenzie, Bell, and Ramkissoon, are more than sufficient to raise a serious question of why defense

counsel did not present any evidence. Because the Rule 3.850 court did not permit the defendant to make a precise and careful showing of the unpresented evidence and defense counsel's inaction, this court has no way of knowing that the defendant was wrongfully convicted based on misleading and perjured testimony, as well as his own counsel's ineffectiveness. Only after an evidentiary hearing can a trial court be in a position to determine whether counsel's decisions were reasonable or were constitutionally ineffective.

The legal authority relied upon by the state on this point is seriously off the mark, because the cases required an evidentiary hearing for similar ineffective assistance of counsel allegations. For example, *Songer v. Wainwright*, 733 F.2d 788, 789 (11th Cir. 1984), *cert. denied*, 469 U.S. 1133, 105 S. Ct. 817 (1985), is a case in which postconviction relief was denied "after a[n evidentiary] hearing before the trial court." In *Breedlove v. Singletary*, 595 So. 2d 8 (Fla. 1992), similar allegations of ineffective assistance of counsel required an evidentiary hearing. Even in *Jones v. State*, 528 So. 2d 1171 (Fla. 1988), the claim of counsel's ineffectiveness in failing to investigate and present witnesses required an evidentiary hearing. *Downs v. State*, 453 So. 2d 1102 (Fla. 1984), involving claims of ineffective assistance, permitted resolution only after a comprehensive hearing. Finally, in *Torres-Arboleda v. Dugger*, 636 So. 2d 1321 (Fla. 1994), very similar ineffective counsel allegations required an evidentiary hearing to allow for the development of a sufficient record. In summary on this point, the allegations of counsel's failure to present exculpatory evidence at trial warrants an evidentiary hearing.

2. Failure To Seek Suppression Of Statement.

The defendant's alleged statement to the police was an outright fabrication by a

witness, Det. Buhrmaster, who has been shown to have a history of manufacturing false confessions. Notwithstanding that the purported statement never occurred and that this lead detective destroyed the defendant's original statement and rewrote an incriminating version, defense counsel did not even challenge the admissibility or validity of the statement. The state's response to counsel's ineffectiveness is to assert that the defendant's statement was not a "confession" but "an absolute denial of any participation in the murders or even of ever having been present at the scene." (State's Brief at 24). According to the state, the defendant was not even in a position to seek suppression of a statement which is not a confession, notwithstanding that the prosecution used the statement in its case-in-chief.

The state's response is absurd. A defendant is entitled to the full panoply of constitutional protections during any post-arrest interview. *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880 (1981). Ruled 3.190(i) of the Florida Rules of Criminal Procedure extends to the suppression of "any confession or admission obtained illegally from the defendant." Suppression extends to any improperly obtained confession or statement intended to be used by the prosecution. *See Von Horn v. State*, 334 So. 2d 43 (Fla. 3d DCA 1976), *cert. denied*, 341 So. 2d 1086 (Fla. 1977) (defendant gave statement and then confession to police). Manifestly, the prosecution would not have introduced the defendant's statement if it was unquestionably ***exculpatory***, and it is apparent from the trial record that the state attempted to prove the defendant's guilt by introducing this police-fabricated statement.

Plainly, if defense counsel thought, as the state apparently does, that suppressibility depends on the degree of incrimination of a statement, then counsel was

hopelessly ineffective in this regard. Perhaps a reason exists for counsel's failure to seek suppression of an extremely suspect statement. The record does not offer any justification for counsel's inaction, however. Knowing the statement is suspect and was offered by a police officer who has been shown to have a history of fabricating confessions, an evidentiary hearing is unquestionably necessary. *E.g.*, *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995) (counsel's failure to seek suppression of statement requires evidentiary hearing). If the court or the jury knew Det. Buhrmaster as not telling the truth about the defendant's statement, the outcome of the case most certainly would have been different.

3. Failure To Conduct Investigation.

Detailed allegations of counsel's ineffectiveness in failing to investigate a case fully almost always require an evidentiary hearing. *State v. Gunsby*, ___ So. 2d ___, 21 Fla. L. Weekly S20 (Fla. Jan. 11, 1996), involved a claim that defense counsel failed to investigate evidence of the defendant's organic brain damage. That allegation, together with others alleging ineffective counsel, resulted in a "week-long evidentiary hearing[.]" In this case, the postconviction motion establishes that if counsel had conducted even a superficial examination of the victims, counsel would have uncovered proof the victims, who were narco-traffickers and fraud experts, were killed by others in retaliation for their disreputable activities.

"An attorney has a duty to conduct a reasonable investigation" in a death penalty case. *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 532 (1994). Counsel's failure to do so "may render counsel's assistance ineffective." *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir.), *cert. denied*, ___ U.S.

___, 115 S. Ct. 589 (1994). When counsel does not investigate relevant information which would have been helpful to the defendant, courts have not hesitated to grant postconviction relief. *Rose v. State*, ___ So. 2d ___, 21 Fla. L. Weekly S109 (Fla. March 7, 1996).

The state attempts to minimize counsel's undisputed lack of preparedness by claiming the defendant's fingerprints were found throughout the hotel room. Yet, the state has conveniently overlooked the fact that the defendant admitted he was in the hotel room that day, but not near the time of the murders. His successful polygraph test establishes that his earlier presence in the hotel was not in any way linked to the murders. Numerous other fingerprints were found in the hotel room. Conveniently, the police did not attempt to match the fingerprints of Colombian businessman Mejias even though he had rented the only other occupied room on that floor, directly across the hall from the scene of the crime. A spent bullet was even taken out of the panel next to the door of Mejias' room. Witness Neville Butler's testimony, to which the prosecution so often refers, was outright perjury which would have been uncovered had defense counsel conducted a constitutionally necessary investigation. The required evidentiary hearing on this point will enable the defendant to prove these allegations sufficient to overturn the convictions and death penalty.

4. Failure To Request Mistrial.

The defendant's agreement to a substitution of the judge when the original judge was arrested for bribery does not alter the fact that defense counsel was ineffective in not requesting a mistrial. This extremely unusual situation justified the restart of the entire trial, so that a new, untainted judge could begin the case anew. The result of a new,

procedurally fair trial would have been the defendant's vindication.

5. Failure To Seek Sequestration.

Once again, although the defendant agreed on the record with defense counsel's decision to waive sequestration of the jury, that decision was not freely and voluntarily made. Defense counsel misled the defendant when obtaining his consent. Counsel's misconduct in this matter warrants a hearing to allow for a presentation of all relevant facts.

6. Failure To Preserve Trial Errors.

Defense counsel was largely ignorant of numerous evidentiary errors throughout the trial. In responding to this claim, the state once again argues that the substantial nature of the prosecution's case left no doubt as to the defendant's guilt. But the state's argument ignores the perjured testimony of witness Neville Butler and the prosecution threats which made Butler alter his prior exculpatory statements (Trial Transcript 2837).[2/]

The state's citation to *Anderson v. State*, 467 So. 2d 781, 787 (Fla. 3d DCA), *rev. dismissed*, 475 So. 2d 695 (Fla. 1985), is extremely supportive of the defendant's request for an evidentiary hearing. In *Anderson*, although the court ultimately rejected the postconviction allegation that counsel's failure to request a mistrial was ineffective, the court conducted "a full evidentiary hearing." *Id.* at 782. The same procedural protection is required in this case, because an evidentiary hearing will prove that defense counsel's inaction was not the result of any carefully planned trial strategy, but was instead a matter of inattention and unpreparedness.

2/ "[H]e did, in fact, take a polygraph at that period of time and was threatened in March and then at that point in time, he came clean concerning his own involvement." (Trial Transcript 2837).

(a) False Newspaper Articles.

Conclusive evidence is now available that the newspaper articles admitted into evidence without objection were categorically false. The Shutts and Bowen insurance investigation proved that, but none of this was known to trial counsel because of his inadequate preparation. The false articles were a key component of the state's case; the prosecutor even advised the jury to review the articles carefully during their deliberations:

> Well ladies and gentlemen, the best time that you will spend in that jury room deliberating is reading these articles because each and every one of those articles gives you the motive. The only one person who has walked in this courtroom in the past three weeks had a motive to kill Derrick Moo Young, and that's the man right in front of you, Krishna Maharaj, and why? Because he got into a running battle with Derrick Moo Young.

(Trial Transcript 3912-3913).

If the false articles were so important to the state's case, then the falsity of those articles surely undermined the fairness of the trial. Defense counsel had no awareness of this falsity because he didn't do his homework. Even though this was a death penalty case, defense counsel did not even undertake the basic investigation conducted by the insurance company lawyers who were looking at the victims' life insurance claims.

(b) Lawsuit Against Moo Young.

Contrary to the state's assertions (State's Brief at 33), the lawsuit regarding the forged check was initiated by the defendant *against* Moo Young, not the other way around. Defense counsel did not correct the prosecution's false premise, which was tied directly to the false newspaper articles. Since the trial, the defense team has uncovered conclusive evidence that others had substantial reason to murder Moo Young. Defense counsel's lack of preparation in failing to prevent the obviously perjured testimony of

Carberry from being considered by the jury constitutes actionable prejudice.

(c) Truck Rental Records.

Even defense counsel's failure to object to the truck rental record was the result of not knowing the case well enough to provide competent representation. The prosecution offered the rental records to corroborate Geddes' assertion that the defendant intended to cause a collision with the Moo Youngs. Had defense counsel investigated this incident, counsel would have been aware that the defendant was in Orlando on business at the time of the supposed planned crash, and *had received a traffic ticket, thus proving the defendant could not have acted in the manner testified to by Geddes.*[3/] What more convincing proof could exist of a prosecution based on false and perjured testimony than unimpeachable evidence of Geddes' lying. Yet, defense counsel was not sufficiently prepared to object to this evidence and make a convincing showing to the jury. This is evidently the type of prejudice which warrants a finding of ineffective counsel.

(d) Telephone Records.

Even defense counsel's failure to object to the phone records is another example of counsel's lack of familiarity with the evidence. The prosecution claimed the numerous calls by the defendant at or near the time of the murders proved his planning of the murders. Yet, the calls were not and could not have been made by the defendant, who was not even on speaking terms with the Moo Youngs. Instead, the calls were actually

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[3/] This contention was explicitly alleged in the postconviction motion (R30, ¶GG) and is properly the subject of proof at an evidentiary hearing. On a related point, the admission of the unrelated weapons cache in the defendant's trunk was prejudicial error. *See Jackson v. State*, 522 So. 2d 802, 806 (Fla.), *cert. denied*, 488 U.S. 871, 109 S. Ct. 183 (1988).

by Geddes, proof of which would have shown that Geddes was engaged in perjury in an effort to obtain the defendant's conviction.

(e) Hearsay Testimony.

The trial record establishes that defense counsel took the state's case at face value, allowing the prosecution to introduce evidence at will without any meaningful objection. Both prosecution witnesses Carberry and Butler were perjurers who claimed all sorts of suspicious conversations with and actions by the defendant. Much of their testimony was speculative, not based on firsthand knowledge, and inconsistent with facts which should have been known to defense counsel. Defense counsel's continuous inattention to his responsibility to protect the defendant from a conviction based on incompetent and inadmissible evidence is the surest proof of ineffective assistance of counsel.

(f) Photographic Lineup.

The photo lineup used to identify the defendant was a sham. Of all the photographs, the defendant was the only Indian appearing individual. The other photos bore no resemblance to the defendant. The lineup was itself unduly suggestive. *See Washington v. State*, 653 So. 2d 362 (Fla.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 387 (1995) (single photo was unduly suggestive, but harmless where independent basis existed for identification). Defense counsel once again did not protect the defendant from the substantial likelihood of misidentification. This is another example of counsel's ineffectiveness.

7. Failure To Challenge Prosecution's Case.

Defense counsel's blind acceptance of the prosecution's case is a serious example

of ineffectiveness which prejudiced the defendant. Throughout the trial, defense counsel seemed not to know that much of what was being said by the prosecution witnesses or the prosecutors themselves was inconsistent with the facts. Defense counsel failed to even attempt to refute or explain the evidence concerning the defendant's fingerprints on the newspaper at the murder scene. Yet, the facts were that the defendant had purchased a newspaper at the hotel gift shop. His fingerprints were on that paper. A second newspaper was in the same hotel room, this one bearing Eddie Dames' fingerprints and handwriting. The defendant told Det. Buhrmaster about his newspaper purchase, which confirmed that he had not been in the hotel room earlier because the hotel distributed a complimentary newspaper to each room early in the morning, including the very room in which Butler and Dames were located.

Defense counsel also neglected to consult with a firearms expert who could have challenged the prosecution's evidence that "all bullets were fired from the same Smith & Wesson weapon" (State's Brief at 45). The actual evidence was that the projectiles could have been fired from any one of a particular gun model, not a specific weapon or even one gun (Trial Transcript 3331-3335). There was no evidence that the gun the defendant purchased was used to commit the crime, and defense counsel should have obtained independent forensics evidence that the defendant's gun did not fire the bullets in question. The prosecution even attempted to convince the individual who sold the gun to the defendant to give perjured testimony. Defense counsel did not challenge any of these important facts.

The state's assertion concerning the rental truck (State's Brief at 46) is incorrect with regard to counsel's ineffectiveness. The rental truck was not returned the same day

it was rented, July 26, 1986, but was returned July 28. Yet, defense counsel did not introduce the records which would have proven that fact, even though the truck rental charges were on the defendant's credit card bill. Defense counsel has, as yet, given no explanation for his failure to prove the falsity of the state's evidence. That opportunity should come at an evidentiary hearing on counsel's ineffectiveness. When the defendant proves his postconviction contentions, it will be abundantly clear that he was wrongfully convicted.

Counsel's failure to present the compelling evidence of Roopnarine Singh is another example of his ineffectiveness. Geddes had stated - falsely - in his deposition that the defendant conducted a "trial run" of the murder scheme from Roopnarine Singh's hotel room. According to that story, Geddes telephoned both Carberry and Moo Young from that room. Yet, the hotel bill for Singh's room contained no telephone calls, which would have been present if Geddes had made those calls. Roopnarine Singh gave a subsequent statement to the defense investigator admitting having the hotel room but denying that the defendant or anyone else used the room or placed any calls. Yet, defense counsel made no effort to prove this falsity of Geddes' statements or the prosecution's efforts to have Geddes give perjured testimony. Singh's testimony would have done much to prove the weakness of the state's case.

Defense counsel also had evidence at hand to obliterate Butler's testimony, yet did nothing bout it. Butler told Det. Buhrmaster the defendant's gun was "white" (R14, ¶ II). After being threatened by the prosecution, Butler changed his description of the gun to "shiny." This is not a "minor discrepancy" as the state asserts (State's Brief at 47), but a glaring example of deliberate, calculated perjury which went to the very heart of Butler's

credibility and the prosecution's theory of the case. Had defense counsel presented the truth, the defendant would have been vindicated.

Counsel's failure to call Det. Rivero to prove the falsity of Det. Buhrmaster's testimony is another inexplicable deficiency. Det. Rivero's pretrial deposition established the defendant's corroboration that Buhrmaster manufactured what was supposedly said by the defendant. This proof was known *before* defense counsel uncovered evidence of Buhrmaster's history of making up confessions by suspects. Had any of this information been raised by defense counsel, the jury would have understood the prosecution's case against the defendant was based on fraud, deceit, and corruption of prosecution witnesses. This court must permit the defendant to prove these contentions at a properly convened evidentiary hearing.

POINT 3

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

This court has repeatedly held that the state's violation of *Brady* requirements will result in the reversal of a conviction. *E.g.*, *State v. Gunsby*, ___ So. 2d ___, 21 Fla. L. Weekly S20 (Fla. Jan. 11, 1996). The defendant's Rule 3.850 motion sets out a precise and detailed expose of the prosecution's efforts to withhold exculpatory evidence and to present corrupted and perjured trial evidence. The state inaccurately argues that the defendant failed to demonstrate how the suppressed evidence would have affected the case when in fact the entire state's case would have been undercut if the truth had been revealed.

There is absolutely no doubt that witnesses gave false evidence about the victims'

insurance policies and that the prosecution covered up evidence of the victims' narcotrafficking. The defendant was never informed by the prosecution about the insurance policies and did not have any way of finding evidence of the victims' drug dealing. The prosecution's failure to disclose this very valuable information prevented the defendant from showing that others committed the murders.

Inconceivably, even though the *Brady* failures go right to the heart of the case, the lower tribunal rejected the claims without so much as even listening to the available evidence. In an effort to support the lower tribunal's summary denial, the state claims it had no knowledge of the exculpatory evidence. *E.g.*, State's Brief at 64. Yet, that is an issue about which there is disagreement.[4/] That dispute cannot be resolved summarily, because the files and records do not conclusively show the defendant is not entitled to relief.

What the postconviction record does show is that the victims had substantial insurance policies, the victims had interests in offshore accounts which showed evidence of suspicious financial transactions, that Shaula Nagel had control over much of the victims' hidden wealth, and that Adam Hosein was in partnership with the Moo Youngs. These facts, all beyond the reach of the defendant at the time of the trial but well within the state's actual or constructive possession, corroborate the previously undisclosed evidence of the victims' shady business practices, drug dealing, and money laundering. Evidence that others committed the charged murders is certainly admissible evidence.

[4/] The defendant affirmatively asserts that the state was aware of all this undisclosed evidence prior to trial. An evidentiary hearing will include proof the prosecution had documentation about the critical insurance policies long before the trial. The state's denial, therefore, is not entitled to any weight.

State v. Gunsby. Why the prosecution did not disclose this evidence, all of which was sufficient to undermine confidence in the outcome of the case, *Kyles v. Whitley*, is not known. That is what will be uncovered at the required evidentiary hearing, *Jones v. State*, 591 So. 2d 911 (Fla. 1991)(evidentiary hearing required for alleged newly discovered evidence), when the defendant proves the verdicts would have been different if this information had been available.

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.

Against the postconviction contention of prosecutorial misconduct and perjured testimony, the state erroneously claims the issues are procedurally barred (State's Brief at 61-62). When perjured testimony infects a defendant's conviction, there is not a scintilla of doubt that a new trial is required. *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995). If defense counsel did not adequately or capably preserve these issues, then the defendant was prejudiced by his counsel's incompetence. In any event, he is entitled to an evidentiary hearing to prove that this prosecutorial misconduct adversely affected his case.

As the Supreme Court explained in *Schlup v. Delo*, ___ U.S. ___, 115 S. Ct. 851 (1995), a defendant is entitled to a new trial if "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." That is exactly the case here, when an evidentiary hearing will prove that the defendant was denied fundamental

fairness by the prosecution's misconduct and use of perjured testimony.

POINT 5

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

Although a capital defendant is not entitled to disclosure of the state's work product, *Roberts v. Butterworth*, ___ So. 2d ___, 21 Fla. L. Weekly S89 (Fla. Feb. 21, 1996), the lower tribunal's summary ruling was far too broad to come within the capital collateral litigation work product exemption. Absent an itemization by the court of the assertedly protected documents, the defendant has no way of challenging the court's ruling. We ask this court to allow the defense to inspect the state's entire file, particularly in light of the fact that the defense team only recently obtained an important document which was withheld previously. That document, the state's Death Penalty Evaluation Form, is attached as an addendum to this brief. We question what other relevant documents have been left undisclosed.

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.

The state does not dispute that Circuit Judge Glick did not disclose his status as a State Attorney supervisor during the time of the Maharaj prosecution. That position is quite understandable, because Judge Glick was a supervisory part of the prosecution team that put together the Maharaj case. That supervisory association precluded Judge Glick from presiding at the defendant's postconviction proceedings. *Duest v. Goldstein*,

654 So. 2d 1004 (Fla. 4th DCA 1995). Judge Glick's partiality could reasonably be subject to question, *Fischer v. Knuck*, 497 So. 2d 240 (Fla. 1986), especially in view of the judge's failure to disclose this information to the defendant.

When a defendant is not aware of the reason disqualification should have been ordered, he cannot be deemed to have waived an objection to the judge's presence. *See Adams v. United States*, 302 F.2d 307 (5th Cir. 1962) (defense counsel had full knowledge of facts but raised no objection). In *Steinhorst v. State*, 636 So. 2d 498 (Fla. 1994), the court remanded Rule 3.850 proceedings for a determination of whether the defendant knew sufficient information to seek the court's recusal based on a conflict of interest. The court acknowledged that serious due process concerns are involved when a judge conducts proceedings in a matter in which the judge has a conflict. Here, there exists a reasonable doubt about the impartiality of the presiding judge. *See Denison v. State*, 609 So. 2d 627 (Fla. 4th DCA 1992). Fundamental fairness dictates that this Rule 3.850 proceeding be remanded for a hearing on the issue of judicial disqualification.

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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Counsel for Appellant
Krishna Maharaj

By: Benedict P. Kuehne
BENEDICT P. KUEHNE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 29 day of March 1996, to:

Randall A. Sutton, Esq.
Assistant Attorney General
401 N.W. 2d Avenue, Suite N-921
Miami, Florida 33128.

By: Benedict P. Kuehne
BENEDICT P. KUEHNE

ADDENDUM

LAW OFFICE OF THE
CAPITAL COLLATERAL REPRESENTATIVE

State of Florida

Post Office Drawer 5498
Tallahassee, FL 32314-5498
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Michael J. Minerva
Capital Collateral Representative

Martin J. McClain
Chief Assistant CCR

January 9, 1996

Geoff Fleck, Esquire
Sunset Station Plaza
5975 Sunset Drive
Penthouse 802
South Miami, Fla 33143

Re: Krishna Maharaj

Dear Mr. Fleck:

The enclosed information was sent to our office in response to a public records request regarding all Dade County first degree murder cases.

Sincerely,

Jeffrey Walsh
Investigator Supervisor

1533-C South Monroe Street, Tallahassee, FL 32301

STATE ATTORNEY

ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
E. R. GRAHAM BUILDING
1350 N.W. 12TH AVENUE
MIAMI, FLORIDA 33136-2111

KATHERINE FERNANDEZ RUNDLE
STATE ATTORNEY

TELEPHONE (305) 547-0100

December 12, 1995

Rick Hays, Investigator
Capital Collateral Representative
Post Office Drawer 5498
Tallahassee, Florida 32314-5498

Re: Maharaj, Krishna
Case No: F86-30610

Dear Mr. Hays:

This letter is to advise you that after a diligent search I was able to locate the State Attorney's Office Death Penalty Evaluation Form. In compliance with your previous request, please find this document enclosed.

Please do not hesitate to contact me at 547-0174 if I may be of futher assistance in this matter.

Sincerely,

KATHERINE FERNANDEZ RUNDLE
State Attorney

By: _____
~~Luis A. Nieves~~
Records Specialist

F:\Corresp.Doc\LN

DEATH PENALTY - EVALUATION FORM

DEFENDANT'S NAME: KRISHNA MAHARAJ

POLICE AGENCY: MIAMI

POLICE CASE NUMBER: 86-30610

S.A.O. FILE NUMBER: 2891448-K

JUDGE: HOWARD GROSS

ASSISTANT STATE ATTORNEYS: PAUL RIDGE & JOHN KASTRENAKES

DEFENSE ATTORNEY: ERIC HENDON
801L N.W. 22nd
Miami, Fl 33147
Phone: 693-1122

CHARGES: First Degree Murder (2 Cts.), Armed Burglary, Armed Kidnapping (3 Cts.), Aggravated Assault, Unlawful Possession of Firearm While Engaged in a Criminal Offense.

FACTS: See attached Grand Jury outline

AGGRAVATING FACTORS:

a. under sentence of imprisonment — ____ YES — X NO

Proof:

b. previous convictions — X YES — ____ NO

Proof: The State of Florida expects to convict the defendant of all counts of the Indictment and will argue contemporaneous violent convictions during the sentencing hearing.

c. great risk of death — ____ YES — X NO

Proof:

d. felony murder — X YES — ____ NO

Proof: The victims were killed during a kidnapping.

e. arrest or escape — X YES — ____ NO

Proof: After the death of Derrick Moo Young, Duane Moo Young was lead upstairs to a second story bedroom and executed to prevent him from testifying against the defendant. He was shot once in the head with a pillow used as silencer. The defendant ordered the victim to kneel down and place his hands behind his back in a classic execution-style position.

f. pecuniary gain — ____ YES — X NO

Proof:

g. governmental function — ____ YES — X NO

Proof:

h. heinous, atrocious, or cruel — X YES — ____ NO

Not sufficient
H.C.

Proof: The second victim, Duane Moo Young was clearly aware of his inpending death moments before he was killed and had ample opportunity to reflect upon his impending death

MITIGATING FACTORS:

Which may be argued, and what proof of their existence? (1)

The defendant has no significant history of prior criminal activity.

POLICE POSITION: Seek the death penalty.

Yes The family of the deceased has been notified of the Assistant State Attorney's recommendation, and, if they have disagreed, have been given the opportunity to speak with the Chief Assistant State Attorney for Major Crimes, the First Chief Assistant State Attorney or the State Attorney.

A.S.A's RECOMMENDATION: Seek the death penalty in light of the number and quality of the aggravating factors particularly factors b,e, and h.

ASA Signature [signature]

Waiver Approved: YOSS LAESER

Waiver not Approved: YOSS LAESER

Mr. Yoss [signature] SIGNATURE 8/15/87 DATE

Mr. Laeser [signature] SIGNATURE 4/10/87 DATE

REASONS: Facts of crime & especially of killing of 2nd victim are sufficient to have a jury recommend to appropriate sentence. BL 4/10/87

STATE OF FLORIDA,

vs.

KRISHNA MARHARAJ,

Defendant.

GRAND JURY OUTLINE

HISTORY OF THE CASE

On Friday, October 17, 1986, at approximately 2:40 a.m., the defendant, KRISHNA MARHARAJ, was arrested at the Miami Police Department, 400 Northwest 2nd Avenue, Miami, Florida by Detective John Buhrmaster of the Miami Police Department. The defendant was arrested and charged with the crimes of First Degree Murder (2 Counts), Possession of a Firearm While Engaged in a Criminal Offense, and Aggravated Assault.

FACTS OF THE CASE

On Thursday, October 16, 1986, at approximately 12:30 p.m., employees of the Dupont Plaza Hotel discovered the bodies of DERRICK MOO YOUNG and DUANE MOO YOUNG in suite #1215 of the Dupont Plaza Hotel. The hotel employees notified the police department and police officers arrived shortly thereafter. Police discovered the body of DERRICK MOO YOUNG lying face down on the first floor of the suite and the body of DUANE MOO YOUNG in the bedroom on the second floor of the suite.

Police officers began processing the crime scene and interviewing hotel employees when two witnesses by the name of Eddie Dames and Prince Ellis approached the desk in the lobby and asked if there were any messages for room #1215. Upon interviewing these two witnesses the police discovered that Eddie Dames and Prince Ellis were businessmen from the Bahamas staying as guests at the hotel. Eddie Dames was a guest in room #1215 and Prince Ellis was a guest in room #526. Eddie Dames informed the police that a

Eddie Dames and Prince Ellis informed the police they arrived in Miami on Wednesday, October 15th, at 10:15 a.m., and spent the day engaged with their business activities. Eddie Dames informed the police that he met Neville Butler on Thursday, October 16, 1985 at approximately 9:30 a.m. Eddie Dames and Prince Ellis left Neville Butler at the Dupont Plaza Hotel while Eddie Dames and Prince Ellis went to conduct their business activities. Prince Ellis and Eddie Dames returned to the Dupont Plaze Hotel at approximately 3:00 p.m. when they discovered the police were investigating a double homicide in Eddie Dames' hotel room.

Eddie Dames and Prince Ellis gave sworn, formal statements to the police and were allowed to leave the police station. At approximately 10:00 p.m. Eddie Dames and Prince Ellis informed homicide detectives they had located Neville Butler and he wished to talk to the police concerning this homicide.

Neville Butler gave a sworn statement to the police informing them that he was present during the homicide of DERRICK and DUANE MOO YOUNG. He informed the police that the defendant, KRISHNA MAHARAJ, and the victims were former business partners involved in a long-running feud centered around a debt allegedly owed to KRISHNA MAHARAJ by DERRICK MOO YOUNG.

Neville Butler informed the police he arranged a business meeting between himself and the MOO YOUNGS in an effort to establish a business relationship between the MOO YOUNGS and Eddie Dames and Prince Ellis.

Neville Butler was present in room #1215 at the Dupont Plaza Hotel awaiting the arrival of the MOO YOUNGS when the defendant, KRISHNA MAHARAJ, appeared and entered the suite. As they were talking there was a knock on the door and KRISHNA MAHARAJ excused himself to use the bathroom. The MOO YOUNGS entered the suite and sat down. Shortly thereafter, KRISHNA MAHARAJ reappeared

KRISHNA MAHARAJ accused DERRICK MOO YOUNG of stealing $300,000 from him and demanded repayment of the money.

An argument ensued between DERRICK MOO YOUNG and the defendant. During the argument, Neville Butler tried to intervene, however, the defendant pointed the gun at Neville Butler's face and instructed him to not interfer. The defendant turned upon DERRICK MOO YOUNG and shot him once in the leg.

The defendant ordered Neville Butler to bind both victims. Shortly thereafter DERRICK MOO YOUNG managed to get free of his bonds and lunged at the defendant. The defendant started shooting and struck DERRICK MOO YOUNG several times. The defendant threatened DUANE MOO YOUNG and demanded repayment of the money.

DERRICK MOO YOUNG, who had been lying wounded on the floor, got up and tried to escape through the front door. He fell in the hallway directly in front of the door to suite #1215 and KRISHNA MAHARAJ grabbed DERRICK MOO YOUNG and pulled him back into the room.

KRISHNA MARHARAJ ordered DUANE MOO YOUNG from the downstairs living room to the upstairs bedroom. Once they were upstairs Neville Butler heard KRISHNA MARHARAJ order DUANE MOO YOUNG to kneel down and put his hands behind his back. Shortly thereafter, he heard one muffled gunshot.

KRISHNA MARHARAJ came downstairs and forced Neville Butler to follow him out of the apartment at gunpoint. Neville Butler convinced the defendant he should be allowed to leave. Before allowing Neville Butler to leave the defendant instructed him not to say anything to the police or he would be killed.

KRISHNA MARHARAJ telephone Neville Butler later that afternoon and arranged a meeting at a nearby restaurant to establish an alibi for the approximate time of the homicides. When Neville Butler met with the defendant police officers were present and transportd KRISHNA MARHARAJ to the homicide office at the Miami Police Department.

After being advised of his Miranda rights the defendant informed the police he had been to the Dupont Plaza Hotel on prior occasions however he had not been there that day and he had never been in the hallway on the 12th floor or inside suite #1215.

On October 17, 1986, Dr. Charles Wetli performed autopsies upon DERRICK and DUANE MOO YOUNG and opined that the cause of death of DERRICK MOO YOUNG was multiple gunshot wounds and the cause of death of DUANE MOO YOUNG was a single gunshot wound to the head.

Police discovered a pillow in the upstairs bedroom with a one bullet hole which was surrounded by a large quantity of gunshot residue. They also seized seven (7) spent .9 milimeter casings scattered about suite #1215. The defendant's latent fingerprints were also found inside suite #1215.