IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,961

JUAN ROBERTO MELENDEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Melendez's second motion pursuant to Fla. R. Crim. P. 3.850 after an evidentiary hearing. The following symbols will be used to designate references to the record:

"R. " -- record on direct appeal;

"PC-R1. " -- record on appeal of first Rule 3.850 motion;

"PC-R2. " -- record on appeal of instant Rule 3.850 motion.

REQUEST FOR ORAL ARGUMENT

Mr. Melendez has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Melendez, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT i

REQUEST FOR ORAL ARGUMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE AND FACTS 1

A. THE TRIAL RECORD 1

B. THE FIRST RULE 3.850 MOTION 13

C. THE SECOND RULE 3.850 MOTION AND EVIDENTIARY HEARING. 18

SUMMARYOFARGUMENT.... 38

ARGUMENT I

PREVIOUSLY UNAVAILABLE EVIDENCE ESTABLISHES THAT MR. MELENDEZ'S CONVICTION AND DEATH SENTENCE ARE UNRELIABLE AND THAT HE IS THEREFORE ENTITLED TO A NEW TRIAL AND SENTENCING 39

A. MS. CIOTTI, MS. DAWSON, AND MS. JAMES 53

B. DWIGHT WELLS 53

C. JOHN BERRIEN 57

ARGUMENT II

MR. MELENDEZ WAS DENIED AN ADVERSARIAL TESTING BECAUSE THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE AND PRESENTED FALSE TESTIMONY IN VIOLATION OF MR. MELENDEZ'S CONSTITUTIONAL RIGHTS 59

A. JOHN BERRIEN'S TRIAL TESTIMONY RESULTED FROM COERCION AND INTIMIDATION 60

B. THE EVIDENCE CONCERNING MR. BERRIEN'S INTERVIEWS THAT WAS WITHHELD FROM MR. MELENDEZ WAS MATERIAL, EXCULPATORY EVIDENCE 64

ARGUMENT III

MR. MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY FAILED TO ADEQUATELY INVESTIGATE AND PREPARE A DEFENSE 68

ARGUMENT IV

THE CIRCUIT COURT FAILED TO CONSIDER THE CUMULATIVE EFFECT OF ALL THE EVIDENCE DISCOVERED SINCE MR. MELENDEZ'S TRIAL 75

CONCLUSION 80

TABLE OF AUTHORITIES

Page

Battle v. Delo,
64 F.3d 347 (8th Cir. 1995) 75

Brady v. Maryland,
373 U.S. 83 (1963) 38, 64

Breedlove v. Singletary,
595 so. 2d 8 (Fla. 1992) 69

Cammarano v. State,
602 So. 2d 1369 (Fla. 5th DCA 1992) 50

Chambers v. Mississippi,
410 U.S. 284 (1973) 49

Gunsby v. State,
670 So. 2d 920 (Fla. 1996) 46

Hallman v. State,
371 so. 2d 482 (Fla. 1979) 49

Hildwin v. Dugger,
654 So. 2d 107 (Fla. 1995) 69

Jean v. Rice,
945 F.2d 82 (4th Cir. 1991) 65

Jones v. State,
591 so. 2d 911 (Fla. 1991) 38, 45, 48

Kyles v. Whitley,
115 s. ct. 1555 (1995) 43, 65, 75

Melendez v. State,
498 So. 2d 1258 (Fla. 1986) 39, 80

Melendez v. State,
612 So. 2d 1366 (Fla. 1992) 13

Middleton v. Evatt,
77 F.3d 469 (4th Cir. 1996) 75

Ouimette v. Moran,
942 F.2d 1 (1st Cir. 1991) 65

Parker v. State,
641 So. 2d 369 (Fla. 1994) 52

Provenzano v. State,
616 So. 2d 428 (Fla. 1993) 69

Scott v. State,
657 So. 2d 1129 (Fla. 1995) 48

State v. Gunsby,
670 So. 2d 920 (Fla. 1996) 43, 70, 75

Strickland v. Washington,
466 U.S. 668 (1984) 44, 65, 71

Swafford v. State,
679 So. 2d 736 (Fla. 1996) 75

United States v. Agurs,
427 U.S. 97 (1976) 44

United States v. Bagley,
473 U.S. 667 (1985) 64, 65

United States v. Burgos,
94 F.3d 849 (4th Cir. 1996) 75

United States v. Rivenbark,
81 F.3d 152 (4th Cir. 1996) 75

STATEMENT OF THE CASE AND FACTS

On September 13, 1994, Mr. Melendez sought Rule 3.850 relief based on newly discovered evidence. The circuit court ordered an evidentiary hearing which **was** held on May 23 and 24, 1996. On July **17, 1996,** the circuit court ruled against Mr. Melendez and filed an Order Denying Motion to Vacate Judgment and Sentence. Mr. Melendez filed a Motion for Rehearing which was denied. This appeal followed.

Mr. Melendez is innocent of the offense for which he was convicted and sentenced to death. The murder was committed by another man, Vernon James, who confessed his involvement in the crime to at least four people, who testified at the evidentiary hearing in the lower court. Mr. James' confessions are consistent with his possession of money and drugs on the morning after the crime and his possession of Mr. Baker's jewelry. This evidence is also consistent with that of a trial witness, perhaps the last person to see Mr. Baker alive, who **saw** Mr. James and his friend Harold Landrum, aka "Bobo," with Mr. Baker shortly before his death. This new evidence when viewed cumulatively presents a compelling case for Mr. Melendez's innocence.

A. THE TRIAL RECORD

Mr. Melendez was convicted and sentenced to death for the September 13, 1983, murder of Mr. Delbert Baker. The murder occurred at Mr. Baker's beauty school in Auburndale, Florida. Police failed to prevent the contamination of the crime scene and to preserve important evidence that would have assisted their

investigation- Stella Dunlap, a beauty school employee, testified that the police took the sign-in book (R. 274-75). Detective Knapp admitted examining the customer sign-in log at the crime scene, but the police later denied recovering it and failed to produce it for the defense (R. 386-87). Detective Knapp testified that he did not consider this evidence important enough to copy for his records (R. 387). Dr. Drake, the pathologist, testified that the police gave him permission to use the phone at the crime scene although the investigation was incomplete and the phone had not yet been checked for prints (R. 354). The police at the scene were unconcerned with preserving fingerprints on the phone although bloody footprints, presumably left by Mr. Baker's killer, led from the body into the office and were concentrated near the phone (R. 354). The police also failed to properly secure the crime scene when several employee/students were permitted inside the beauty school the day after Mr. Baker's body **was** discovered (R. 264, 275, 287, 290-91). The police checked the victim's car, and although they found a moist substance on the seat, they did not preserve it for testing (R. 388) . The police took a picture at the crime scene of a refrigerator indicating that a bullet had ricocheted off its side (R. 521). However, because their evidence recovery was sloppy, the actual projectile was found twelve days later by a cleaning person (R. 375). The police at the scene also failed to check the many razors that could normally be found in the hair salon for blood or prints although it was obvious at the time that Mr.

Baker's throat had been cut with a sharp knife or razor (R. 389).

The police were equally sloppy in preserving the evidence they did recover from the crime scene. A pair of shoes found near Mr. Baker's body was not checked for evidence and was later lost (R. 391, 523). A large hunting knife with a brown stain on it was found in a drawer near the body but was never checked for prints or submitted to a lab (R. 385-86, 528). Finally, the police retrieved a blood sample at the scene that was believed to belong to Mr. Baker's killer but stored it in an evidence locker despite their awareness that blood must be refrigerated in order to be preserved (R. 529); as result, the sample putrefied and the lab either refused to accept it for testing (R. 523) or sent it back because of its contaminated state (R. 391).

The first lead developed by the police was Terry Barber who testified for the defense that he arrived at the beauty school at about 5:45 p.m. on the night of the murder (R. 572). While he spoke to Mr. Baker, he saw two men in the back room whom he identified as Vernon James and "Bobo," whose real name is Harold Landrum (R. 575, 647-48). Mr. Barber, a frequent customer at the beauty school, testified that he had never seen Mr. Melendez before (R. 579). After speaking to Mr. Baker, Mr. Barber left the beauty school at about 6:15 p.m. (R. 577). Mr. James was picked up for questioning the next morning, and the police seized his clothes and shoes to test for blood or other evidence connecting him to the crime; however, these items were returned to Mr. James without testing and Mr. James was released (R. 631).

Significantly, Mr. James' fingerprints were never compared to those retrieved from the crime scene (R. 642). When Mr. Melendez's trial attorney asked FDLE Agent Roper whether Mr. James had admitted to being present at the crime, the State's objection was sustained (R. 643-44). The defense unsuccessfully argued that such an admission was admissible as a statement against penal interest (R. 644). Harold Landrum, aka "Bobo," was also questioned by the police, and a pair of sneakers with a "dot" tread matching the bloody prints at the crime scene were seized from him (R. 631). However, Mr. Landrum's shoes were never tested and he was released from custody (R. 631).

Police attention focused on Mr. Melendez approximately six months later when David Luna Falcon told Agent Roper of the Florida Department of Law Enforcement that Mr. Melendez had confessed to the murder (R. 440, 468). Mr. Falcon's story was that Mr. Melendez told him that a man named John had driven Mr. Melendez and another black man to Mr. Baker's beauty school (R. 441). After the other man cut Mr. Baker's throat, the victim began "picking up the blood" and throwing it at his assailants (R. 443).[1] Mr. Melendez allegedly told Mr. Falcon that as the victim offered his assailants a million dollars to take him to the hospital, he shot him using a pillow as a silencer (R. 443-44, 456). According to Mr. Falcon's story, Mr. Melendez went to

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'This story is contradicted by the testimony of the Medical Examiner Dr. Drake who testified that the cut to Mr. Baker's throat severed a vein, not an artery, and that the blood was from the gunshots because a severed vein would not cause the victim to bleed profusely (R. 353).

Mr. Baker's to have sex with him and rob him (R. 440, 442). Mr. Falcon contacted Agent Roper about three weeks after Mr. Melendez allegedly told him this story (R. 447).

Mr. Falcon testified that he had worked an undercover operation in Puerto Rico for the Justice Department (R. 435, 463-641, that he sells information to law enforcement (R. 459), and that he was currently working for the Auburndale Police Department (R. 447-49, 459). He admitted that he had been convicted of homicide (R. 452), but testified that he had never carried a gun in Polk County (R. 462). Mr. Falcon denied knowing anything about a shooting incident in Auburndale in which men claiming to be police officers broke into a home (R. 457). However, Detective Glisson, who investigated this incident, testified that the victims, Mr. and Mrs. Reagan, identified Mr. Falcon as the man who broke into their home, kicked down a door, threatened their lives, and shot three bullets into their car and two stray bullets into the neighbor's lawn (R. 560-62). In addition, the State stipulated that if able to testify, Mr. Reagan would identify Mr. Falcon as the man who terrorized his family (R. 425).[2] Mrs. Reagan signed a waiver of prosecution after being told that she could be charged with drug offenses (R. 568), and that Mr. Falcon would get out of jail and return to hurt her (R. 539). Detective Glisson also testified that Mr.

[2]Mr. Melendez sought to have the Reagans testify at his trial and received court approval of the costs for them to travel from New England. However, trial counsel failed to subpoena them and they did not appear for trial.

Falcon was working for him despite his homicide conviction, but denied that he pressured the Reagans to drop the charges against Mr. Falcon (R. 538, 540). Mr. Falcon testified that he and his brother accompanied Detective Glisson when he interviewed John Berrien at the county jail (R. 455).

The State also presented the testimony of John Berrien, a convicted felon who had been charged with first degree murder for Mr. Baker's death (R. 323). John Berrien spent one hundred and six days in jail (R. 328) before he was offered a deal by which he pled no contest to accessory after the fact and would be released and placed on either probation or house arrest in exchange for his testimony against Mr. Melendez (R. 324). John Berrien testified that Mr. Melendez asked for a ride to Mr. Baker's school in Auburndale so that he could have his hair done and pick up some money (R. 305-06). John Berrien did not remember the day or date when this occurred (R. 308), or even whether it was before or after his marriage on September 2, 1983 (R. 474). John Berrien testified that he drove his cousin George Berrien and Mr. Melendez from Lakeland to Mr. Baker's school at about 4:00 p.m. (R. 308). He testified that he observed a bulge in the back of Mr. Melendez's pants that could have been a gun (R. 311), but that he never **saw** either man with **a** gun (R. 311). He testified that he did not know whether George and Mr. Melendez went into the beauty school but that he picked them up at about 5:30 or 5:45 p.m. (R. 333). George Berrien and Mr. Melendez were not excited, scared, or bloody when he picked them up (R. 334).

John Berrien testified that George Berrien and Mr. Melendez spoke to each other in Spanish on the ride back to Lakeland (R. 316). He also testified that sometime later, he was not sure when, he drove George and Mr. Melendez to the train station where George Berrien boarded a train for Delaware after Mr. Melendez gave him two rings, a watch, and a gun to be sold there (R. 320-21).

George Berrien testified for the defense and denied everything, including his ability to speak Spanish (R. 660). He testified that he does not know Mr. Melendez but had seen him once at his cousin John's house (R. 656). Although the State argued at Mr. Melendez's trial that he was "equally guilty" and "equally involved . . . in committing the murder" (R. 786-87), George Berrien was never arrested or charged with any crime (R. 657). George Berrien confirmed only one detail of John Berrien's testimony against Mr. Melendez: that he took a train to Delaware (R. 658, 665); however, he denied that his cousin drove him to the station and testified that his cousin's car was in the repair shop on the day he left for Delaware (R. 665). George Berrien testified that when he told his cousin to stop lying, John Berrien replied that "if he changed his statement, the State Attorney was going to put a murder charge on him, so he was going to stick to what he's saying" (R. 661).

Agent Roper testified that no evidence of the crime was found in John Berrien's car. Fingerprints lifted from the car were sent for comparison with those taken from George Berrien and Mr. Melendez, but no matches were found (R. 642-43). In

addition, no matches were made when the prints found at the crime scene were compared with those inside John Berrien's car (R. 643). The crime lab also found no blood or other evidence in the car to support John Berrien's testimony (R. 641). The police did not compare Mr. James' prints with those found at the crime scene (R. 642), although he was the original suspect.

Mr. Melendez also presented the testimony of Dorothy Rivera that they were together from about 5:00 p.m. on the day of Mr. Baker's death until the next morning (R. 487, 493). Ms. Rivera specifically remembers that she spent that night with Mr. Melendez because it was her first wedding anniversary and her husband was out of the state (R. 484, 487). Ms. Rivera testified that she had a conversation with her sister about her relationship with Mr. Melendez and her plans to spend her wedding anniversary with him (R. 487). Marie Graham and Wilson Angelo Graham, Ms. Rivera's sister and brother-in-law, also testified that during September 1983 Ms. Rivera was living with them but that she spent nights with Mr. Melendez at his apartment (R. 501-02, 506-07) . Ms. Graham specifically remembers that Mr. Melendez was at her house on September 13, 1983, with Ms. Rivera because she had spoken to her sister about spending her wedding anniversary with him (R. 502).

Ms. Rivera, Mr. Graham, and Ruby Colon, Ms. Rivera's mother, also testified that Mr. Falcon had made statements in their presence that he would either get Mr. Melendez in jail or would kill him. Ms. Rivera testified that Mr. Falcon "told me that he

was going to testify on [Mr. Melendezl and put him in jail" (R. 489). When Ms. Rivera asked whether the testimony that Mr. Melendez had confessed was true, "[Mr. Falcon] said no. He said I'm just going to hurt him" (R. 490). Mr. Graham testified that Mr. Falcon had told him that he did not like Mr. Melendez and that he wanted to kill him (R. 506). Ms. Colon also heard Mr. Falcon make these statements about Mr. Melendez. She testified that she heard Mr. Falcon say "[t]hat he was going to get him killed, and if they didn't kill him, he would" (R. 510). Shortly after making this statement, Mr. Falcon made a phone call and then left Ms. Colon's house to meet someone at a stadium three blocks away (R. 510-11). When asked whether Mr. Falcon ever told her where he went when he left her house that night, Ms. Colon responded: "[h]e just say he was trying to get [Mr. Melendezl killed, that what he said, 'cause he didn't like him" (R. 469). Mr. Falcon testified that he called Agent Roper from Ms. Colon's apartment to set up a meeting and then left to tell him that Mr. Melendez had confessed (R. 454-55). Agent Roper's testimony confirms that Mr. Falcon **was** the source of the story that John and George Berrien and Mr. Melendez were involved in Mr. Baker's death (R. 468).

Mr. Melendez also called Mr. James, the original suspect, as a witness. Mr. James **was** first warned by the court that his testimony could be used against him, and he was then appointed a lawyer who recommended that he not testify because his testimony would tend to incriminate him (R. 595). Mr. James then refused

to testify (R. 595). Mr. James later agreed to testify, but only if his cellmate Roger Mims did not testify against him (R. 625-26). Mr. James was concerned that Mr. Mims' testimony would create evidence for the State against him; he feared that Mr. Mims would testify that Mr. James had confessed to cutting Mr. Baker's throat (Id.). Mr. James indicated that he would be willing to tell what he knew about Mr. Baker's death but that he was not present (R. 626). Mr. Melendez's trial attorney indicated to the court that if Mr. Mims did not agree to testify against Mr. James, then Mr. James would testify for the defense (Id.).

Mr. Mims' testimony had already been proffered by the defense because the State objected to its admissibility (R. 598-99). Before he could be questioned about Mr. James' incriminating statements, Mr. Mims expressed his reluctance to testify because he feared for his life (R. 610, 618); he was willing to risk being held in contempt and sentenced to an additional six months in order to avoid testifying (R. 612, 614). Mr. Mims was willing to testify when the State agreed to move him to another county jail (R. 622-23). Mr. Mims then testified that Mr. James had confessed to Mr. Baker's murder and had told him that the two men who were charged had nothing to do with it (R. 634). Mr. James had admitted that he had cut Mr. Baker's throat and that his partners had shot him (R. 635). Further, Mr. Mims testified that Mr. James had specifically said that Mr. Melendez and another man named John were completely uninvolved (R. 635).

Mr. James had told Mr. Mims that the victim was his lover (R. 639) and that the two other men involved in the killing were also homosexual (R. 635). Mr. Mims had contacted the State Attorney's Office with this information and had also spoken to Agent Roper (R. 636).

In closing, the prosecutor argued that the issue in the case was not whether a crime had been committed but "who committed the crime." (R. 691). To decide who committed the crime, the prosecutor urged the jury "to believe what John Berrien testified to" (R. 695), and then went through the conflicts between John Berrien's testimony and other testimony (R. 695-99).

Regarding Falcon, the prosecutor told the jurors they would "have to decide if Mr. Falcon is a person worthly of belief or not" (R. 699), and then pointed out that Falcon was in Puerto Rico in September, 1983, and that Falcon had worked for the Justice Department (R. 700). Later, the prosecutor asked, "Why would [Falcon] lie?" (R. 704). Falcon would not lie, according to the prosecutor, because he "ha[d] nothing to gain in this case." (R. 705). Falcon had "nothing to gain" because "he had already given his testimony in the case, two months before the [Reagan] shooting even happened" and because:

> Oh, he got a little money from the Auburndale Police Department for helping them out on some drug cases, but he was not charged in this case. He did not agree to testify in return for some deal. He had absolutely nothing to gain at all by getting on the witness stand. He even went to the police with the information he got, they didn't come looking for him and say, hey, David, what do you know about the crime. He went out and

> developed information himself as to who committed the crime and went to the police.
>
> Now, probably the reason he did that is because he worked for the police in the past. He had been an informant of -- he called it the Justice Department in the past and had given information to law enforcement in the past, so that's why he did it in this case, but the man stands to gain nothing by his testimony. There is no reason for him to get on the witness stand and lie.

(R. 705-06).

Finally, at the close of the State's rebuttal argument, after responding to the defense evidence, the prosecutor argued, "somebody's lying. That's going to be up to you to decide who's lying and who's telling the truth" (R. 737), and concluded:

> The evidence presented from the witnesses, the State feels, proves beyond a reasonable doubt that Juan Melendez was involved in the murder. Now, Mr. Alcott can throw all sorts of other names at you and say maybe this guy did it, maybe that guy did it, but that doesn't change the fact that John Berrien, who has already entered a plea to his involvement in the offense, says Juan Melendez was taken there that night by him, and David Falcon testifies that Juan Melendez admitted to me he committed the crime and told me the facts of the offense which match what happened, and based on that evidence the State feels it has proven its case beyond a reasonable doubt and Mr. Melendez should be found guilty of the crime for one reason and one reason only, and that is because he is guilty of the crime and he did -- and he was involved in the commission of the murder and the robbery of Delbert Baker. Thank you.

(R. 737-38) (emphasis added).

Mr. Melendez's trial counsel in his opening statement encouraged the jury to evaluate the credibility of the State's case, emphasizing that their key witnesses, Mr. Falcon and John

Berrien, both had reasons for testifying against Mr. Melendez (R. 241). Mr. Alcott told the jury that John Berrien had received lenient treatment and that Mr. Falcon had a personal grudge against Mr. Melendez. He then promised the jury that he would show "the incredibility of the State's key witnesses" (R. 243). Mr. Melendez's trial counsel also emphasized the importance of Mr. James in his closing statement:

> The third aspect of the defense is the fact that someone else committed this crime and someone else has admitted to committing this crime; someone else the police knew as a suspect way back then; the man who the police dragged in very well right away that morning; a person whose clothes were seized from him; a person who was observed there by another witness at the time, Terry Barber. . .

(R. 710).

B. THE FIRST RULE 3.850 MOTION

In 1989, Mr. Melendez filed his first motion under Fla. R. Crim. P. 3.850. The circuit court summarily denied relief, and this Court affirmed. Melendez v. State, 612 So. 2d 1366 (Fla. 1992).

In his first Rule 3.850 motion, Mr. Melendez alleged, inter alia, that due to trial counsel's ineffectiveness and/or State misconduct, the jury did not hear available evidence challenging the credibility of John Berrien and David Falcon. For example, the motion alleged John Berrien provided several prior statements to the police that were markedly inconsistent with his trial testimony, but which the jury did not hear. Mr. Berrien testified in a deposition less than a week before the trial that

his statement to the police was "mostly false," except for the incident at the train station **(PC-Rl. 151)**. The jury was not told about this deposition. The motion alleged that due to Mr. Melendez's trial attorney's failure to adequately investigate, the jury was never told that the police coerced John Berrien to cooperate with them by telling him: "in turn for helping you can get off light," "[t]he right will probably get you homefree," and "we're gonna protect you" (PC-R1. 135).

The motion alleged that John Berrien's trial testimony that he took George Berrien and Mr. Melendez to Auburndale is inconsistent with his prior statement that either "Big Dave" or "a Jamaican" named Taboo was the third person involved (PC-Rl. 136, 140). At trial he stated that George and Mr. Melendez were talking in Spanish and laughing when he picked them up (R. 316-17), while he previously stated that Mr. Melendez "acted a little nervous . , . Quite like, you know, like he was thinking about something" (PC-Rl. 121) and that he was "speaking English most of the time" **(PC-Rl. 140)**. At trial, John Berrien testified that when he dropped Mr. Melendez off, he had a towel around his neck and a bulge in the back of his pants (R. 311, 329), but he had previously stated that Mr. Melendez had a pistol but not a towel (PC-R1. 121). At trial, he testified that he did not see a gun when he picked up Mr. Melendez and his cousin (R. 310-11), while his previous statements specifically indicate that he saw the gun when the two men got in the car (PC-Rl. 140). At trial, he testified that when he picked them up, George was carrying

nothing and Mr. Melendez was carrying a towel but he could not determine whether anything was in the towel (R. 316). He had previously stated that "there was definitely something inside the towel" and "when they got in the car, they showed me some jewelry" (PC-RI. 140). John Berrien testified that when he picked up George and Mr. Melendez, there was a Cadillac parked on the side of the school and a blue Camaro at the back (R. 330), but that when he dropped them off there were two cars parked on the side, one of which was the Cadillac (R. 331). His testimony indicates that although he saw the two cars, he saw no people outside the school; however, he previously stated that he saw two people pull up in a blue Camaro and blow the horn (PC-R1. 140). At trial, he testified that he dropped the two men-off on the side of the road (R. 312), but he previously stated that he dropped Mr. Melendez off at a fish market or "right at the business" (PC-Rl. 121, 140). The first Rule 3.850 motion alleged that had the jury been informed of these inconsistencies in John Berrien's statements, as well as the police coercion and his admission before trial that he had lied to the police, Mr. Melendez would not have been convicted and sentenced to death.

The first Rule 3.850 motion alleged that trial counsel was similarly deficient in investigating and presenting substantial evidence impeaching Mr. Falcon. For example, the motion alleged, Mr. Melendez's trial attorney knew the importance of the Reagan incident but failed to seek subpoenas to ensure their appearance at trial. As a result, when the Reagans failed at the last

minute to appear, the jury was deprived of valuable evidence to assist their evaluation of Mr. Falcon's credibility, as well as that of Detective Glisson (PC-R1. 689). The motion alleged that Detective Glisson, who was the lead detective on the Baker case, acted to protect Mr. Falcon and prevent the filing of charges against him in the Reagan incident. Because this information was not available, Detective Glisson gave the jury the impression that Mr. Falcon was an agent working for the police on drug investigations (R. 563), that Mr. Reagan was a drug dealer on whom Mr. Falcon had supplied information (R. 567), and that the Reagans had voluntarily signed a waiver of prosecution (R. 566). Had the Reagans been present at Mr. Melendez's trial, their testimony would have demonstrated that Mr. Falcon was simply a criminal being protected by the police so that he could testify against Mr. Melendez; specifically, Mr. Falcon had a personal interest in testifying against Mr. Melendez in that it enabled him to avoid prosecution for his own criminal acts (PC-R1. 689).

The motion also alleged that due to trial counsel's neglect to prepare for Mr. Falcon's testimony, the jury was also deprived the opportunity to hear additional impeachment evidence from witnesses who were present at the trial. Dorothy Rivera and Ruby Colon knew about Detective Glisson's relationship with Mr. Falcon but were not asked to provide this information (PC-R1. 745, 741). Ms. Rivera and Ms. Colon both knew that Mr. Falcon had said that the police were paying him $5000 for his testimony against Mr. Melendez (Id.). Both knew that Mr. Falcon had received numerous

phone calls at Ms. Colon's house and that they talked to each other "like they were partners" (Id.). Mr. Falcon had also told Ms. Rivera that he had tried to get away to avoid testifying against Mr. Melendez but that the police were forcing him to testify (PC-R1. 745). Ms. Colon knew **that** Mr. Falcon was angry at Mr. Melendez for refusing to sell drugs for him and refusing to help him in robberies (PC-R1. 741).

The motion alleged that because this evidence was not presented to the jury, Mr. Falcon was able to testify that he could not remember how much he **was** being paid to testify, implying that the amount was insignificant. The State Attorney emphasized this point in closing argument: "Oh, he got a little money from the Auburndale Police Department for helping them out on **some** drug cases . . . . He had absolutely nothing to gain" (R. 705). Mr. Falcon and Detective Glisson were able to present their relationship as that between **a** police officer and a trusted, reliable informant, rather than as "partners" involved in a questionable relationship possibly involving criminal activity. The motion alleged that without hearing the evidence available through Ms. Rivera and Ms. Colon, the jury knew only that Mr. Falcon did not like Mr. Melendez without hearing the reason: that Mr. Melendez had refused to assist Mr. Falcon's criminal activities. Most importantly, the jury did not know that the police were forcing Mr. Falcon to testify. Without this information, the jury could not understand the full significance of the Reagan incident: that the police had something with which

to force Mr. Falcon to cooperate in their prosecution of Mr. Melendez.

The first Rule 3.850 motion also alleged that the State not only failed to disclose the truth about Mr. Falcon, but it affirmatively used his lies about his background and role as a police informant to enhance his credibility, and that Mr. Melendez's trial attorney failed to investigate this key State witness. As a result, the jury that convicted and sentenced Mr. Melendez was deprived of further information regarding Mr. Falcon's background and motivation. Evidence was readily available proving that Mr. Falcon was not an undercover agent in Puerto Rico and a paid informant for the FDLE and police as he testified at trial (PC-R1. 426, 695). In fact, Mr. Falcon had been convicted of a Puerto Rico murder and was released from prison after testifying against his codefendants in a New Jersey multiple murder (PC-R1. 426). In addition, rather than paying him for information as he testified, the FDLE had actually disassociated itself from Mr. Falcon (PC-R1. 695).

C. **THE SECOND RULE 3.850 MOTION AND EVIDENTIARY HEARING**

Mr. Melendez's second Rule 3.850 motion presented evidence discovered since Mr. Melendez's trial and first Rule 3.850 motion which establishes that Mr. James is responsible for Mr. Baker's murder. Deborah Ciotti, a close friend of Mr. James, knew about the drug deal/robbery that was planned for the night of September 12, 1983. She testified at the evidentiary hearing:

> [Vernon James] came to me a few days before Del got killed and told me about this drug

deal that was going down up at the beauty school, and that he intended on taking the money and the drugs, that he was going to rob Mr. Del, him and a couple of his buddies.

(PC-R2. 91-2). Ms. Ciotti spoke to Mr. James again the night of Mr. Baker's murder:

He told me that he was getting ready to go down to the beauty school, and he asked me if I wanted to ride along. He told me that I wouldn't have to get out, that I could sit in the car. And I declined. I told him I had a prior engagement.

Vernon drove off. We were up on Hobbs Lane in Auburndale. I was on the south end of Hobbs, about midways down the street. And he drove up to the corner where the stop sign is, where it turns on Derby, about a block and a half from the beauty school, where he picked up two black males. They got in the car. They turned right.

I crossed over the back side of Hobbs to New Hope. And Vernon was driving Bobo's car at the time, and I saw the car pull into the beauty school.

(PC-R2. 92). Ms. Ciotti's encounter with Mr. James the next morning provides further evidence of his involvement in Mr. Baker's death:

The next morning, when I came back from my previous engagement, I went back up on Hobbs. Vernon was up there, and I approached him and I said, well, did you get what you went for? He didn't reply. He pulled out a wad of money out of his pocket and unrolled this big bag of cocaine.

(PC-R2. 93). On cross-examination, Ms. Ciotti expressed her certainty that Mr. Melendez was not involved in Mr. Baker's death.

A I know [Mr. Melendez] wasn't the one involved in the robbery. I know he

wasn't the one in the car that pulled up in front of the studio. I know that he wasn't the one that had the cash on him.

Q How do you know he was not one of the two that was picked up by Vernon James if you were unable to identify--

A Because, number one, he's not dark enough from here. To me, he's not dark enough to have been the man. And, second off, if he stands up, I bet you he's about six inches taller than the man that I saw get into the car.

Q The man or two men?

A The one of them was about my height. The other was about three inches taller than that.

Q So there were two men?

A There was two black males. They both got in the car, one in the front and one in the back.

* * * *

Q But you do know just from their skin color and size that this man was not one of them?

A No. He was not.

(PC-R2. 106-07).

Mr. James' sister, Sandra Kay James, also testified at the evidentiary hearing regarding her brother's involvement in Mr. Baker's death:

There was rumors going around that he had killed Mr. Del. So we was at our mother's house, and I asked him pointblank did he do it. And he started crying and he said no. He said, I didn't kill him. He said, I set up the robbery and I was there, he said, but I didn't kill him.

(PC-R2. 127).

Janice Dawson, who met Mr. James in 1983 during a first appearance in court, confirms that Mr. James spoke of his involvement in Mr. Baker's death. She also testified at the evidentiary hearing:

> [H]e would write to let me know that they was bringing him back to Polk County to go to court for Mr. Del's murder, and that he could get life or the electric chair in his part of Mr. Del's death

(PC-R2. 114). Ms. Dawson provided additional details that indicate that Mr. James had some of Mr. Baker's jewelry that was missing after his murder. When she and Mr. James were living together in Auburndale in 1985, he gave her this jewelry that had belonged to Mr. Baker:

> A Well, he just brought me -- he said that he had something for me. It was two rings. He went out in the shed and brought back these two rings. I didn't question him. He just said, well, here's two rings that I been had for a few years, I've just been holding onto them.
>
> * * * *
>
> Q And when he showed you the rings, did he -- or around that time, did he mention where the rings had come from?
>
> A From Mr. Del, something to that effect. Like I said, I didn't question him because you just didn't question Vernon about nothing.
>
> Q But it was your understanding that those rings were from -- those rings used to belong to Mr. Del?
>
> A Yes, that's what he said.

(PC-R2. 115-16).

Dwight Wells was John Berrien's attorney in 1984 and represented him **on** the murder and armed robbery charges relating to Mr. Baker's death. Mr. Wells testified that during the seven or eight months that he represented him on these charges, John Berrien consistently maintained his innocence (PC-R2. 191). However, Mr. Wells advised his client to accept the State's plea offer because he was initially charged with first-degree murder and faced the risk of receiving a death sentence; Mr. Wells felt that pleading to accessory after the fact, a third degree felony, was in the best interests of his client (PC-R2. 192).

Mr. Wells was also familiar with Mr. James because he had represented him several times as a public defender (Id.). Sometime before Mr. Melendez's trial, Mr. James requested that Mr. Wells visit him at the county jail; Mr. James was not represented by the public defender's office at this time (PC-R2. 194). During this meeting, Mr. James confessed to Mr. Baker's murder:

> He told me that he was involved in the murder of Mr. Del. He described to me in some detail what had gone on. Mr. James shared with me, however reluctantly, that he was homosexual and that this had started out as an attempt to go back to Mr. Del's place and have some drugs and have a party. That Mr. Del had come on to him in an overly-aggressive way, and that's what led to the homicide.

(PC-R2. 194-95). Although Mr. Wells was not bound by the attorney/client privilege because he was not representing Mr. James at this time, he did not share this information with anyone outside his office (PC-R2. 195). He was aware of the importance

of this information to Mr. Melendez's case but did not share it with his trial attorney Mr. Alcott:

> Q Did you tell anyone about the statements that Mr. James made to you?
>
> A I believe I did, but I can't, as I sit here today, tell you whether it was personnel in the Public Defender's Office, personnel in some other office. I really cannot be specific about that. I obviously knew it was important information. And I -- if memory serves me right, I think Mr. James, in fact, testified in some respect in Mr. Melendez' trial. I don't know how that went down.
>
> Q You said that you thought this was important information. Why did you think that?
>
> A Because from my prior conversations with John Berrien and what he was telling me of his lack of involvement and Mr. James' apparent knowledge of what had happened, I thought that it was extremely important that the people who were trying this case know about it. But, again, I can't be specific as to who I told.
>
> Q Did you ever talk to Roger Alcott about Mr. James' confession?
>
> A I do not believe I did, no.

(Id.). Mr. Wells testified that he would have been willing to testify at Mr. Melendez's trial had that request been made:

> Q Did Mr. Alcott at any time while you were representing Mr. Berrien and he was representing Mr. Melendez, did Mr. Alcott ever discuss the case with you?
>
> A Not that I can recall, no.
>
> Q If Mr. Alcott had asked you or had had any discussion with you about the case, would you have then related Mr. James' statements to Mr. Alcott?

A Certainly.

Q If you had been asked to or subpoenaed to appear at trial, would you have testified at the trial of Mr. Melendez?

A Yes.

(PC-R2. 196).

Roger Alcott, Mr. Melendez's trial attorney, testified that any evidence incriminating Mr. James in Mr. Baker's death would have been consistent with the defense theory at trial (PC-R. 291). Mr. Alcott presented all available evidence demonstrating Mr. James' involvement in Mr. Baker's murder; he testified about the defense trial strategy: "we were trying to show that James was a participant in the offense, not Mr. Melendez. And so anything that would have shown that James was involved would have been something that I would have presented" (Id.). Mr. Alcott testified that he spoke about the Baker case with Mr. Wells when the latter was representing John Berrien; he is sure that Mr. Wells did not disclose Mr. James' confession during these discussions because if he had known of the confession, he would have called Mr. Wells to testify:

Q If you had known that Vernon James had made an incriminating statement to Mr. Wells, would you have asked Mr. Wells to testify at Mr. Melendez' trial?

A It probably -- and I say that because certainly he carried more credibility than the inmate who was in the cell with Mr. James. And what I was trying to prove was that James had made a prior, you know, incriminating statement, you know, against his own penal interest. And so, you know, I was trying to prove that through, in this particular case, an inmate from the cell.

> And if I could have proven that through Dwight Wells, it would have made it a little more credible.

(PC-R2. 297). Mr. Wells, who had no reason to withhold this information from Mr. Melendez's attorney, testified that he would have shared this information with Mr. Alcott if a request for information had been made (PC-R2. 196) .

The second Rule 3.850 motion also presented evidence that Mr. Berrien was threatened by the police to secure his cooperation in the prosecution of Mr. Melendez. He discussed the first interview with the police which was conducted by five officers in the middle of the night at the Lakeland Police Department. He recalled that he initially told the police that he knew nothing about Mr. Baker's murder (PC-R2. 144). Agent Roper confirmed that John Berrien was picked up for questioning in the very early morning hours of March 7, 1984, after Agent Roper's late night meeting with Mr. Falcon (PC-R2. 246) . He also admitted at the evidentiary hearing that the police had discussions with John Berrien that were excluded from the tape recording of the interview: "We had discussed with Mr. Berrien about the murder and that we were investigating a murder and that his vehicle was suspect, and I'm sure that Juan Melendez was suspect. I don't recall word for word what we talked about. That was prior to his statement when he made this statement, as you can see here" (PC-R2. 251). Finally, Agent Roper testified that he heard the "clicks" on the tape when it was played in court, corroborating Mr. Berrien's memory of the manipulation of

the tape recording (PC-R2. 248-49). Although Agent Roper claimed that the tape was stopped for "thought-gathering processes to see what we needed to ask Mr. Berrien" (PC-R2. 249), his cross-examination revealed that the tape was frequently stopped between a question and answer, suggesting that Mr. Berrien was being told how to answer:

> Q Did you hear audible clicks on that tape?
>
> A Yes, I did.
>
> Q And I don't know if you recall, but let's just see. There's a point on the tape where Mr. Berrien is being asked about the friend that Juan Melendez or Faison was supposedly going to see that evening.
> You asked: Do you have any idea exactly where that friend lives?
> Mr. Berrien responds: No, I have never been there.
> Detective Knapp asks: Have you ever seen him running around with that friend or anything, and there's a click.
> Did you hear that click?
>
> A I probably did. I heard the clicks.
>
> Q There's a few lines later, you were asking Mr. Berrien about the towel. You asked: What did it look like?
> Mr. Berrien responded: It looked like it was about like that, about ten inches around.
> You respond: About ten inches, and okay. And then there's a click
>
> A Probably did, if it was there.
>
> Q At another point, you were asking -- excuse me. Detective Knapp was asking Mr. Berrien about whether or not Faison had a gun. Detective Knapp asked: But he did have a gun with him?
> Mr. Berrien says: Yeah.

Detective Knapp says: And you saw the gun?
And you say yeah. And there's a click. Did you hear that click?

A I heard all the clicks.

(PC-R2. 247-49).

John Berrien also described his March 15, 1984, interview with Detective Glisson and Sergeant Knapp of the Auburndale Police Department:

A This was in Auburndale. They was telling -- they said that someone told them that I was involved in killing Mr. Del. And they wanted me to -- they threatened me. They wanted me to give them **a** statement as to what happened. They told me that it was -- that I had planned -- we had planned this murder and that I knew all about it and that I was going to get a cut of the money.

Q So when you say that they threatened you, what kind of threat did they use?

A Well, they told me not to end up like Mr. Del.

Q They said that you could end up like Mr. Del?

A Yes.

(PC-R2. 57-8). John Berrien's memory of a meeting with Detective Glisson at the county jail is consistent with Mr. Falcon's trial testimony that he accompanied Detective Glisson on this interview:

I remember them, they had a friend -- they had this dude with them that said Melendez, said that he did it, told me to go ahead, man, you're all right, help them out. They had a dude with them. I don't remember the guy's name, but they had him with them, and said Melendez already confessed to doing it.

And that's when I told them -- I told them that I dropped my cousin George off with Melendez all the time.

(PC-R2. 158). John Berrien's testimony at the evidentiary hearing also reveals that his statements implicating Mr. Melendez in Mr. Baker's murder were essentially created by the police in their initial interviews:

A They had me -- they had this tape. They was making this tape. They would tell me what they wanted me to say. Then if I made a mistake, they would stop the tape. And then they was talking about what time of day I was supposed to have been in Auburndale, on what day it was supposed to have been. And they was -- also about the -- something about a -- how he was supposed to have killed and stuff like that.

Q So they would ask you questions, they would tell you that it was a certain time of day that you supposedly had dropped Juan Melendez off?

A Yes.

Q And what time of day was that?

A As I recall, it was around 4:00, 4:30.

Q And they would say that -- did they have any time of the week or any time -- any specific date in mind?

A They give me a certain date, but I don't recall the exact day it was.

Q Right. But this -- was it in September?

A Oh, yes, it was in September.

Q So they were pushing you to say that this --

A That on this certain day in September, that I dropped Juan Melendez off

and he was supposed to have robbed Mr. Del and I was supposed to be going to get a cut of it, and I came back and picked him up and I took him to -- back to Lakeland.

Q Was any of this true?

A No.

Q Was it true that you -- that you were involved in the murder of Mr. Del?

A I was not involved in the murder of Mr. Del.

Q Was it true that you knew about the robbery or planned robbery of Mr. Del?

A No, I did not.

Q Was it true that you expected to get a cut out of the robbery?

A No.

* * * *

Q Tell me this: As far as your statement, where it says that you saw Juan Melendez give George two rings, a watch, and a gun --

A I was told that.

Q You was told that by who?

A By the officers.

Q You were told to say that?

A Yeah, what was taken from Mr. Del.

Q What was taken from Mr. Del. Did you ever see Juan Melendez give George Berrien two rings?

A No, I never saw it.

Q Did you see Juan Melendez give George Berrien a watch?

A No.

Q Did you see Juan Melendez give George Berrien a gun?

A No.

Q Did you see Juan Melendez give him a .38 pistol?

A No.

Q So where did these things come from?

A The Auburndale Police Department.

Q When you said that they were turning the tape on and off, exactly how did that work?

A They would tell me what they wanted me to say. They were saying they were going to help me if I would go ahead on and just make this statements for them. So as they would say what they wanted me to say, they would have me to say it on the tape. But after they finished the tape, then they locked me up for first degree murder and strong-armed robbery.

(PC-R2. 138-40).

John Berrien's testimony at Mr. Melendez's trial was based on the lies that he was forced to adopt in this initial interview:

Q At the time you testified at Juan Melendez' trial, did you know what the police was looking for as far a what they wanted you to say?

A Yes, they was not -- I was not supposed to be sentenced until after I testified at the trial.

Q Sentenced, right. So did you think that they wanted you to say that you had dropped Juan off around 4:00?

A Yes.

Q Did you think that they wanted you to say that you had dropped Juan off during the week, versus the weekend?

A During the week.

Q Did you think that they wanted you to say during the trial that you -- that you had saw Juan Melendez give George Berrien two rings?

A Yes, I was told to say that.

Q You was told to say that. Was you also told to say that you saw Juan Melendez give Berrien a gun and a watch?

A Yes.

(PC-R2. 141) .

On cross-examination, John Berrien revealed the many lies he told at Mr. Melendez's trial. This false testimony was coerced by the State when Auburndale police officers told John Berrien what they wanted him to say to help them convict Mr. Melendez. John Berrien lied when he testified that he had seen Mr. Melendez with .38 caliber pistols in the past (PC-R2. 163) and that he had a .38 caliber pistol on the night he drove Mr. Melendez to Mr. Baker's school (PC-R2. 172); the police told him to give this answer (PC-R2. 163, 172). He also lied when he testified that Mr. Melendez had a towel when he came out of the beauty school; he said this because the police had told him to say that Mr. Melendez had Mr. Baker's jewelry in a towel (PC-R2. 167). He lied when he testified that at the train station Mr. Melendez gave George Berrien two rings, a watch, and a gun to sell in Delaware; he told this lie because the police had told him what was stolen from Mr. Baker (PC-R2. 171, 173).

Mr. Berrien explained his motivation for lying at Mr. Melendez's trial:

> A I hadn't been sentenced yet, so I just assumed that they wanted me to say this.
>
> Q You assumed they wanted you to say that?
>
> A Right. I still hadn't been sentenced myself, and that was one of the stipulations of my sentencing, that I testify.
>
> Q It was also a stipulation that you testify truthfully, wasn't it?
>
> A It just said testify.
>
> Q Oh, nobody ever told you had to testify truthfully?
>
> A They told me to testify. They wasn't going to sentence me until after I testified in the Melendez trial.
>
> Q Did you think it mattered what you said?
>
> A At the time, yes.

(PC-R2. 171-72).

> Q Also, you testified that you've testified falsely about the -- seeing Juan Melendez give George Berrien two rings, a watch, and a gun.
>
> A Uh-huh.
>
> Q Why did you testify falsely concerning those?
>
> A Because that's what I was told was taken.
>
> Q So every time that someone came to talk to you, you pretty much told them what you thought they wanted to hear?
>
> A Yes.

Q And so if there's any contradictions in your statements it's really -- it's out of the fact that you was just telling the police what they -- what you thought they wanted to hear?

A Yes.

Q And when you testified in Juan Melendez's case, you knew that they wanted to convict Juan Melendez?

A Yes.

Q So when you made a deal with the state, you knew that your job was to say things that would convict Juan Melendez?

A I said what I thought they wanted to hear.

(PC-R2. 183-84).

Roger Alcott, Mr. Melendez's trial attorney, testified to the importance of John Berrien's testimony to the State's case against Mr. Melendez because it implicated Mr. Melendez in Mr. Baker's death and also corroborated the testimony of the State's other key witness, David Falcon (PC-R2. 288-89). Because John Berrien was essential to the State's case, information showing the unreliability of his testimony would have been helpful to the defense (PC-R2. 288); Mr. Alcott would have used any such evidence had it been available to him to challenge Mr. Berrien's truthfulness (PC-R2. 290).

Dr. Richard Ofshe, a social psychologist specializing in false memories, police interrogation techniques, and coerced confessions, testified for Mr. Melendez at the evidentiary hearing. After examining transcripts and other materials in Mr. Melendez's case, particularly those concerning John Berrien's

testimony and statements to the police, Dr. Ofshe offered his expert opinion on the police interrogation techniques used in this case. He testified that the police used threats and control to obtain statements from Mr. Berrien and that the police intentionally sought an incriminating statement in order to gain control over Mr. Berrien so that he would be forced to cooperate in their prosecution of Mr. Melendez (PC-R2. 316-17).

Dr. Ofshe testified that he had found evidence in the record to support Mr. Berrien's testimony at the evidentiary hearing that the police threatened him during the interrogation (PC-R2. 320, 356). In addition, he noted that even without Mr. Berrien's repudiation of his own testimony, the unreliability of his testimony was obvious from his statements alone: "the series of interrogations themselves show so much variability that one would have to conclude, as a whole, that the totality of this is simply unreliable without independent corroboration" (PC-R2. 320-21). The fact that Mr. Berrien's statements about the threats and coercion were corroborated in the transcripts of his interviews led Dr. Ofshe to believe Mr. Berrien rather than the police officers who deny that threats or coercion were employed (PC-R2. 356-57) . Dr. Ofshe's review of Mr. Berrien's statement revealed eighteen different points that changed substantially over the course of the series of statements (PC-R2. 323-28). When asked to explain the occurrence of inconsistencies in a subject's statements, Dr. Ofshe responded: "Well, the simplest way to

account for them is that this is a story that is being made up in response to coercion" (PC-R2. 327).

Dr. Ofshe also testified that during one interview, Mr. Berrien expressed concern that he might get himself in trouble and was reassured that he could avoid this by helping the police (PC-R2. 330). Dr. Ofshe noted that a subject need only be threatened once with death or incarceration in order for the coercive effect of the threat to pervade and taint the entire interview (PC-R2. 331, 350). Dr. Ofshe was asked his opinion on the interrogation procedures used during the interviews with Mr. Berrien:

> Well, my opinion is that it not only could have produced a false coerced statement, I think the entirety of the record, including Mr. Berrien's latest testimony, together with his testimony prior, together with the facts that are contained in the record, supports the conclusion that -- that this is not only a coerced statement, but is also a statement that is contrary to the facts, could be classified as grossly unreliable, and to put it in simple English, false.

(PC-R2. 332). Dr. Ofshe also testified on cross-examination that Mr. Berrien's testimony at the evidentiary hearing is far more likely to be reliable than his trial testimony (PC-R2. 349-50).

Mr. Melendez presented evidence demonstrating that the testimony of Deborah Ciotti, Janice Dawson, Sandra James, Dwight Wells and John Berrien was unavailable previously to post-conviction counsel and thus was newly discovered. Harun Shabazz, an attorney at Capital Collateral Representative assigned to Mr. Melendez's case, directed and conducted the investigation on the

case (PC-R2. 186). Consistent with CCR policy, Mr. Melendez's case was reinvestigated in 1993 and 1994 when a federal habeas petition **was** filed on his behalf (Id.). One goal of that investigation was to locate John Berrien (Id.). Brook Hunt, a CCR investigator, spoke with John Berrien's family numerous times in an attempt to determine his whereabouts (PC-R2. 186-87). The Berrien family was unable to provide any information the first several times that Mr. Hunt questioned them; however, on one occasion, a Berrien family member suggested that John Berrien **was** possibly incarcerated in New Mexico (PC-R2. 187). Mr. Hunt thereafter located John Berrien in a New Mexico jail, and Mr. Shabazz interviewed him (Id.).

Donna Harris, a former CCR investigator assigned to Mr. Melendez's case in 1988 and 1989, also testified about the efforts to find John Berrien. At that time, Ms. Harris sent public records requests to the following agencies in an attempt to locate Mr. Berrien: Polk County Jail; Florida Department of Law Enforcement; Polk County State Attorney's Office; the Auburndale Police Department; the Polk County Sheriff's Department (PC-R2. 207). Although Ms. Harris received records in response to these requests, they were not helpful in determining Mr. Berrien's present location (PC-R2. 209). Ms. Harris also interviewed Ginny Berrien, Mr. Berrien's wife, and Ruby Collins, his sister-in-law, in unsuccessful efforts to locate him (Id.). Ms. Harris was unable to determine Mr. Berrien's whereabouts at

the time that Mr. Melendez's first Rule 3.850 motion was filed (Id.).

Ms. Harris also attempted to locate Mr. James because of his importance to Mr. Melendez's case. She sent public records requests to the following agencies: Winter Haven Police Department; Polk County Sheriff's Office; Auburndale Police Department; Polk County State Attorney (PC-R2. 210). The records received in response to these requests did not assist Ms. Harris in locating Mr. James (Id.). Ms. Harris learned that Mr. James had been murdered, and when she requested records relating to his death, she discovered that the case was still open and she was therefore unable to obtain any records (PC-R2. 211-12). Ms. Harris was unable to locate any evidence relating to Mr. James' involvement in Mr. Baker's murder at the time Mr. Melendez's first Rule 3.850 motion was filed (PC-R2. 212).

The other witnesses who testified at Mr. Melendez's evidentiary hearing were discovered after Mr. Shabazz received the Vernon James murder file which was unavailable until 1994 (Id.). The file contained information on Janice Dawson and Sandra James; CCR was able to locate both potential witnesses because Ms. Dawson was working in Auburndale and Ms. James was incarcerated at Florida Correctional Institution (Id.). When Ms. James spoke to a CCR investigator, she suggested that Deborah Ciotti might have additional information about her brother; Ms. Ciotti was incarcerated at the same facility and met with the CCR investigator that same afternoon (Id.).

The circuit court denied relief under the standard of Jones v. State, 591 so. 2d 911 (Fla. 1991), and under Brady v. Maryland, 373 U.S. 83 (1963)(PC-R2. 426-28). The court did not address Mr. Melendez's allegations that trial counsel provided ineffective assistance.

SUMMARY OF ARGTJMENT

Evidence previously unavailable to post-conviction counsel establishes that Mr. Melendez is innocent of the offense for which he was convicted and sentenced to death. This evidence entitles Mr. Melendez to a new trial and sentencing. At the evidentiary hearing, Mr. Melendez presented evidence that Vernon James made numerous statements implicating himself in Mr. Baker's death. Mr. James' confessions are corroborated by witnesses who saw Mr. James with money and drugs the morning after the murder and jewelry belonging to Mr. Baker. This evidence raises a reasonable doubt about Mr. Melendez's guilt and probably would result in his acquittal on retrial.

The circuit court denied relief, ruling that the witnesses presented by Mr. Melendez were not credible and that their testimony would not have changed the verdict. The circuit court did not provide a legitimate reason for disbelieving Mr. Melendez's witnesses and the record does not contain evidence in support of this finding, An evaluation of the newly discovered evidence, in the context of the record as a whole, demonstrates that Mr. Melendez has met the standard established by this Court in Jones v. State.

The second aspect of Mr. Melendez's innocence claim is that he was denied an adversarial testing at his trial due to State misconduct and his trial counsel's ineffectiveness. As a result, valuable evidence supporting his innocence claim was not presented to the jury that convicted Mr. Melendez and sentenced him to death.

Finally, the circuit court failed to evaluate the cumulative effect of all the evidence discovered since Mr. Melendez's trial -- that which is newly discovered, that which was withheld by the State, and that which was not presented due to trial counsel's ineffectiveness. Mr. Melendez is entitled to a new trial.

ARGUMENT I

PREVIOUSLY UNAVAILABLE EVIDENCE ESTABLISHES THAT MR. MELENDEZ'S CONVICTION AND DEATH SENTENCE ARE UNRELIABLE AND THAT HE IS THEREFORE ENTITLED TO A NEW TRIAL AND SENTENCING.

Assessment of Mr. Melendez's claims must be conducted in light of the record as a whole. On direct appeal, the weakness of the State's case at trial elicited the concern that this may be a case where "a review of the evidence in the record leaves one with the fear that an execution would perhaps be terminating the life of an innocent person." Melendez v. State, 498 So. 2d 1258, 1262 (Fla. 1986) (Barkett, J., concurring specially). Absolutely no physical evidence connected Mr. Melendez to the murder of Delbert Baker. In light of the weakness of the State's case at trial, the evidence presented below shows that Mr.

Melendez's conviction and death sentence represent a manifest miscarriage of justice and cannot be allowed to stand.

The State's theory at trial was that Mr. Melendez, John Berrien, and George Berrien rode in John Berrien's car to the victim's hairdressing salon in the late afternoon of September 13, 1983. John Berrien dropped off Mr. Melendez and George Berrien and returned for them about two hours later. The State contended that Mr. Melendez and George Berrien robbed and killed the victim, and then were driven home by John Berrien. According to the State's theory, George Berrien slit the victim's throat and Mr. Melendez shot the victim in the head. The next day, according to the State, John Berrien drove George Berrien and Mr. Melendez to the train station, where George Berrien boarded a train for Wilmington, Delaware, At the train station, Mr. Melendez purportedly handed George Berrien some jewelry and a gun which George Berrien was supposed to sell in Delaware.

This theory rested solely on the testimony of John Berrien and David Luna Falcon. John Berrien testified that he drove Mr. Melendez and George Berrien to Auburndale and later took George to the train station where Mr. Melendez handed George jewelry and a gun to sell in Delaware.[3] David Falcon testified that Mr.

[3]The jury never heard about John Berrien's prior inconsistent statements to police nor about his deposition testimony where he said his statements to police were "mostly false."

Melendez made a statement inculpating himself in the murder.[4] The only other evidence which tended to support the State's theory was an Amtrak record indicating that George Berrien had taken a train to Wilmington, Delaware, on September 14, 1983. No physical evidence connected Mr. Melendez to the victim's death or supported the State's theory regarding his participation in the offense. George Berrien was never charged with any offense, although he testified at trial as a defense witness and thus was certainly available to the authorities, and although the State argued at trial that he was "equally guilty" and "equally involved . . . in committing the murder" (R. 786-87).

Other evidence at trial contradicted the State's theory. Franklin Brown, a State witness who worked at the victim's shop and knew John and George (R. 278-79), testified that he worked on the day of the victim's death until 5:10 or 5:15 p.m. (R. 281), and did not see John or George that day (R. 283). Dorothy Rivera, Mr. Melendez's girlfriend, testified that she was with Mr. Melendez on September 13, 1983, from 5:00 p.m. until the next morning (R. 486-87). Ms. Rivera remembered that date because it was her first wedding anniversary and her husband was in Pennsylvania (R. 484). Mr. Melendez had been at Ms. Rivera's

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[4]The jury never heard evidence showing, inter alia, that David Falcon was not a trustworthy undercover agent for the Justice Department as he portrayed himself, but a common criminal and murderer, was not a regular informant for Agent Roper as he portrayed himself, and was being protected by Detective Glisson for his actions in a shooting at the home of a family named Reagan. See Mr. Melendez's Motion to Vacate, filed 1/16/89, pp. 55-56; Supplement to Motion to Vacate, filed 4/21/89, pp. 69-85.

sister's house when Ms. Rivera arrived there at 3:00 p.m. (R. 499). Marie Graham, Ms. Rivera's sister, testified that Mr. Melendez was with her sister on September 13, 1983 (R. 502). Terry Barber, who knew the victim and was interviewed by police at the time of the victim's murder (R. 569), testified that he went to the victim's shop between 5:00 and 6:30 p.m. on September 13, 1983 (R. 571). He saw the victim at about 5:45 or 5:50 p.m. (R. 572). Two other people who Barber thought were Vernon James and Bobo were in a back room of the shop (R. 574-75). Barber left the shop about 6:15 p.m. (R. 577). Barber testified that he had never seen Mr. Melendez before (R. 579). Roger Mims, a jail inmate **and** cellmate of Vernon James (R. 633), testified that James had admitted participating in the victim's murder (R. 634-35), and had said that Mr. Melendez had nothing to do with the murder (R. 635). John Knapp, a police investigator, testified that Vernon James and Bobo were suspects in the victim's death (R. 648). George Berrien testified that he had nothing to do with the victim's death (R. 655), and had never ridden in a car with Mr. Melendez to Auburndale (R. 657).

At the evidentiary hearing, Mr. Melendez's trial counsel, Roger Alcott, testified that John Berrien's testimony was helpful to the State's **case,** that John Berrien's testimony corroborated David Falcon's testimony, and that evidence showing John Berrien's testimony was not believable would have been material to the defense. Mr. Alcott also testified that part of his defense theory was that the murder **was** committed by Vernon James

and that he presented the evidence available to him to support this theory. Mr. Alcott testified that other evidence implicating Vernon James in the murder would have been consistent with the defense theory and would have been presented had it been available.

Not only must the Court consider Mr. Melendez's claims in light of the record as a whole, but also the Court should consider the cumulative effect of the evidence which the jury never heard. As this Court held in State v. Gunsby, 670 So. 2d 920 (Fla. 1996), a combination of Bradv violations, ineffective assistance of counsel and newly discovered evidence may establish prejudice sufficient to require granting relief. There, the Court ordered a new trial based upon the combined effect of Bradv violations, newly discovered evidence, and ineffective assistance of counsel. Therefore, although the facts underlying Mr. Melendez's claims are raised under alternative legal theories -- i.e., newly discovered evidence, Brady, ineffective assistance of counsel -- the cumulative effect of those facts in light of the record as a whole must be nevertheless be assessed.

In the Brady context, the United States Supreme Court has explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995). Thus, the analysis is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 1566 (footnote omitted). In

the ineffective assistance of counsel context, the United States Supreme Court has explained that the same totality of the circumstances approach applies:

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Strickland v. Washington, 466 U.S. 668, 695-96 (1984)(emphasis added).

The Supreme Court had previously described the totality of the circumstances analysis as follows:

> [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-13 (1976) (emphasis added) (footnote omitted).

In the newly discovered evidence context, this Court has held that the analysis requires a judge "to evaluate the weight

of both the newly discovered evidence and the evidence which was introduced at the trial." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). When these principles are applied to Mr. Melendez's claims, his entitlement to relief is clear.

Evidence that Vernon James has confessed to the crime for which Mr. Melendez was convicted and that key State witness John Berrien lied to convict Mr. Melendez creates a reasonable doubt regarding his guilt and certainly undermines confidence in the outcome of the trial. Mr. Melendez is entitled to a new trial.

A. THE EVIDENCE PRESENTED IN THE CIRCUIT COURT WAS NOT PREVIOUSLY AVAILABLE IN POST-CONVICTION

In the circuit court, Mr. Melendez presented unrefuted evidence establishing that the testimony of Janice Dawson, Sandra James, Deborah Ciotti, Dwight Wells and John Berrien **was** not previously available to Mr. Melendez's post-conviction counsel. Post-conviction counsel was not previously able to locate Ms. Dawson, Ms. James, Ms. Ciotti or Mr. Berrien. Before locating Mr. Berrien, Mr. Melendez's post-conviction counsel was unable to talk to Dwight Wells because any such discussion required a release from Mr. Berrien. Before obtaining that release and speaking to Mr. Wells, post-conviction counsel had no reason to suspect Mr. Wells had any information regarding Vernon James. The State did not contest this evidence and did not argue that these witnesses could have been discovered earlier by post-conviction counsel. Rather, the State argued that some of these witnesses were available to trial counsel. The circuit court found that Deborah Ciotti, Sandra James and Dwight Wells were

available to trial counsel. Mr. Melendez argued that if the witnesses were available to trial counsel, then counsel provided ineffective assistance in failing to investigate and present their testimony. Gunsby v. State, 670 So. 2d 920 (Fla. 1996). Trial counsel's ineffectiveness is discussed in Argument III, infra.

B. THE PREVIOUSLY UNAVAILABLE EVIDENCE ESTABLISHES TEAT MR. MELENDEZ IS ENTITLED TO A NEW TRIAL

In the lower court, Mr. Melendez presented four witnesses who testified that Vernon James confessed to participating in Mr. Baker's murder. Mr. Melendez also presented John Berrien, who testified that his trial testimony against Mr. Melendez was false. These witnesses' testimony contradicted the State's theory at Mr. Melendez's trial and supported the defense trial theory. Individually and cumulatively, this testimony entitles Mr. Melendez to a new trial.

In regard to Ms. Ciotti, Ms. Dawson, and Ms. James, the circuit court considered the content of their testimony that Mr. James had confessed his involvement in Mr. Baker's death. The court made the following summation of these confessions:

> After [Ms. Ciottil read about the murder she asked James if he did it and he responded by showing her some money and drugs. He never told her he killed the victim.
>
> * * * *
>
> On many occasions James told [Ms. Dawsonl that he had been involved in the murder. Indeed, he used to brag about it to other people in the neighborhood. But he never said that he murdered the victim nor did he say who had committed the murder.

* * * *

> [Ms. James] claims her brother told her that he set up the robbery of the victim and was present when he was murdered but did not actually commit the murder.

(PC-R2. 426). Because Mr. James did not explicitly state in these confessions that he had killed Mr. Baker, the court found them insufficient to warrant a new trial (Id.). Clearly, the court applied a higher standard than that required by this Court's opinion in Jones and failed to evaluate the cumulative effect of all the evidence. Even if Mr. James did not admit to being the actual killer, his confessions to being present at and involved in the murder are absolutely contrary to the State's theory at Mr. Melendez's trial, exclude Mr. Melendez from any participation, and support the defense theory at trial. Thus, Mr. James' confessions create substantial reasonable doubt which would probably have produced an acquittal.

The court stated that Mr. Wells' testimony did not meet the Jones standard. However, an evaluation of this testimony, in the context of the record as a whole, indicates that it meets the Jones standard. At trial, Mr. Melendez presented Mr. Mims, the cellmate to whom Mr. James confessed, to support the defense theory that Mr. Melendez was innocent. As Mr. Alcott testified at the evidentiary hearing, presenting a corroborating witness to whom Mr. James had also confessed, especially an attorney who would have greater credibility than an inmate, would have strengthened the defense case. This evidence is not merely

cumulative because it reinforces the credibility of a defense witness whom the State tried to impeach.

The circuit court also denied relief because the jury rejected the defense theory at trial that Vernon James committed the offense (PC-R2. 427). However, this evidence is all the more significant because it is consistent with the defense trial theory. New evidence supporting an old fact or theory is still new evidence and cannot simply be dismissed as cumulative. Establishing a fact or theory requires a certain quantum of evidence, and thus new evidence can add weight to an old fact or theory and make it more likely that the fact or theory is true. Thus, a claim cannot be dismissed simply because a similar allegation was made in the past. In Jones v. State, 591 So. 2d 911 (Fla. 1991), the defendant proffered new evidence that one Schofield really committed the murder at issue. The State argued that this evidence was not new because the defendant previously alleged that Schofield was the murderer. This Court rejected that argument and ordered an evidentiary hearing. Similarly, in Scott v. State, 657 So. 2d 1129 (Fla. 1995), the defendant argued that new evidence showed his codefendant was the real killer. The State argued the evidence was not new because the defendant had always said the codefendant was the triggerman. Again, this Court rejected that argument and ordered an evidentiary hearing.

The standard announced by this Court in Jones does not require a defendant to present conclusive evidence of another's guilt; rather, the standard to grant a retrial is that the newly

discovered evidence must raise **a reasonable doubt** about the defendant's guilt. To produce an acquittal, evidence must simply raise a reasonable doubt. It is not necessary that the evidence negate every bit of the State's evidence. Compare Hallman v. State, 371 so. 2d 482 (Fla. 1979), with Jones, supra (receding from Hallman standard). Here, the new evidence of Vernon James' inculpatory statements in conjunction with the evidence at trial that Mr. Melendez had an alibi, that Terry Barber saw Vernon James at the victim's shop near the time of the murder, that Vernon James confessed to Roger Mims, and that George Berrien testified he was not involved in the murder establishes a probability of an acquittal. Clearly, the evidence presented at the evidentiary hearing, when considered individually or cumulatively and compared to the State's weak evidence at trial, meets this standard and entitles Mr. Melendez to a new trial.

In addition, the fact that Mr. James has made several independent confessions, those presented at the evidentiary hearing and that previously presented at Mr. Melendez's trial, makes each of those confessions more reliable and trustworthy. Chambers v. Mississippi, 410 U.S. 284 (1973). In Chambers, the Supreme Court recognized the corroborating effect of multiple confessions, noting that "[t]he sheer number of independent confessions provided additional corroboration for each" 410 U.S. at 300. The defendant in that case sought to introduce three confessions made by another man to three different friends. The issue before the Court was the admissibility of hearsay not

within an exception, but the analysis was similar to that before the circuit court regarding Mr. Melendez's newly discovered evidence: the issue is the reliability of the confessions themselves.

In addition to Mr. James' confessions, Mr. Melendez presented previously unavailable evidence that **a** key State witness has recanted his testimony that secured the State's conviction of Mr. Melendez. Relief should be granted based on a State witness's recantation "[o]nly when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict." Armstrons v. State, 642 So. 2d 730 (Fla. 1994). The circuit court failed to evaluate the effect of Mr. Berrien's recantation on the State's **case** as required by this Court's precedent. The State's case against Mr. Melendez rested solely on the testimony of two witnesses because there was no physical evidence connecting Mr. Melendez to the crime. Mr. Alcott attempted to impeach this witness at trial but the State's misconduct deprived him of the information necessary to do so effectively.[5] Regardless of whether other impeachment evidence was available and failed to persuade the jury, courts have recognized the greater effect of an actual recantation. In Cammarano v. State, 602 So. 2d 1369 (Fla. 5th DCA 1992), the court noted that the defendant had already tried to impeach a State's witness with the testimony of other witnesses and the

[5]Mr. Alcott also failed to use Mr. Berrien's previous inconsistent statements as impeachment, as was raised in Mr. Melendez's first Rule 3.850 motion.

witness's confession to another inmate that he had lied at Cammarano's trial. Nevertheless, the court was willing to consider new evidence that the witness had recanted because of its greater effect: " [Aldmissions or confessions are fraught with credibility problems. They are mere chaff in the wind by comparison to the key witness, himself, now recanting his testimony." Id. at 1371.

In denying relief, the circuit court noted that "attacking [Mr. Berrien's] credibility was a major part of the Melendez defense. His numerous and frequently contradictory statements were brought to the attention of the jury. Yet the jury apparently believed him" (PC-R. 426). First, the circuit court was clearly wrong that the jury had heard about Mr. Berrien's "numerous and frequently contradictory statements." The jury was never informed about those statements or about Mr. Berrien's deposition testimony that most of what he had told police was false. Thus, the circuit court's analysis rests on an incorrect factual premise. Further, the court's conclusion that Mr. Berrien's recantation was merely cumulative to the evidence available to the defense at trial ignores the persuasive effect it would have on a jury and downplays its effect on Mr. Melendez's newly discovered evidence claim. In addition, the jury did not know that the State had to coerce a witness to testify against Mr. Melendez, evidence which lends further support to Mr. Melendez's innocence claim and corroborates Mr. James' confessions.

C. THE CIRCUIT COURT INCORRECTLY FOUND THAT THE TESTIMONY OF FOUR OF MR. MELENDEZ'S WITNESSES WAS NOT CREDIBLE

The circuit court stated that four of Mr. Melendez's five witnesses were incredible (PC-R. 426). The court explicitly stated that Mr. Berrien was "completely unbelievable" (PC-R. 427). However, the court did not explicitly state that either Ms. Ciotti, Ms. Dawson, or Ms. James were incredible. The court did note that Ms. Ciotti was a prostitute and drug addict at the time of Mr. Baker's murder and that Ms. James was a drug addict at the time of Mr. Baker's murder and is currently serving a thirty-year prison sentence. However, the court did not cite any legitimate reasons for finding the testimony of these witnesses incredible and made no mention of Ms. Dawson's credibility.

Although it is within the trial court's discretion to reject a witness's testimony if it finds that witness unworthy of belief, the circuit court in this case did not provide a legitimate basis for its conclusions and the record does not contain sufficient evidence to support this finding. In Parker v. State, 641 So. 2d 369 (Fla. 1994), the circuit court rejected a newly discovered witness who testified that he saw a sheriff's deputy shoot the victim; the court found the testimony "inconsistent, incredible, uncredible, and unworthy of belief." 641 So. 2d at 376. This Court upheld that decision, noting that the witness's testimony was contradicted by facts, such as the victim's clothes and the physical description of the deputies, that were not in dispute.

A. MS. CIOTTI, MS. DAWSON, AND MS. JAMES

The testimony presented by Mr. Melendez is not plagued by similar problems. Ms. Ciotti, Ms. Dawson, and Ms. James were very close to Mr. James and do not know Mr. Melendez; therefore, they had no motive to lie to help him. Their testimony is consistent with evidence presented at Mr. Melendez's trial: Mr. Barber testified that he saw Mr. James and his friend Mr. Landrum with Mr. Baker shortly before the latter's death; Mr. Mims testified that Mr. James confessed to killing Mr. Baker; a detective testified that Mr. James was the original suspect; a detective testified that Mr. Landrum was questioned; and a detective testified that Mr. Landrum's sneakers matched the bloody footprints at the crime scene. In addition, Mr. James' confessions are corroborated by his possession of drugs and money the morning after the crime and his possession of Mr. Baker's jewelry which he later gave to Ms. Dawson. Although Ms. Dawson described Mr. James as a liar and con man, testimony cited by the court in its order, the fact that he had Mr. Baker's jewelry indicates that he was not merely bragging about his involvement in the crime.

B. DWIGHT WELLS

In regard to Mr. Wells, the court first noted that his memory of his discussions with Mr. James was "extremely sketchy":

> During these visits [with Mr. James], Wells claims that James confessed to the murder for which Melendez and Barrien [sic] were charged. Wells' memory of these confessions is extremely sketchy. He made no notes and did not tape any of the confessions. He is

> not sure of the dates when these confessions were given but does remember that they occurred during the time he was representing Barrien [sic]. He doesn't recall if he ever mentioned these confessions to Roger Alcott, Melendez' attorney. He doesn't remember if he contacted the State Attorney to inform him that innocent men, including his client, had been indicted. He thinks he may have mentioned the confessions to his client but is not sure.

(PC-R. 427). The court registered its suspicion that these conversations never occurred because Mr. Wells neither took notes nor taped Mr. James' confessions. However, his neglect to do so seems less suspicious when one remembers that Mr. Wells was not representing Mr. James when he visited him at the jail; he testified that Mr. James trusted him because of their past attorney/client relationship and sought to speak with him as a friend; this was not an attorney/client interview at which one would expect Mr. Wells to take notes.

The court further stated that Mr. Wells' story that he advised his client to accept the State's plea in exchange for testimony against Mr. Melendez, a man he knew to be innocent, was "inconceivable." However, Mr. Wells testified that Mr. Berrien was facing the possibility of the death penalty and the plea arrangement was in his best interests. Mr. Berrien confirmed Mr. Wells' memory; when asked whether he entered a plea to being accessory after the fact, Mr. Berrien replied: "Yes. That's what my lawyer told me the best thing for me to do, to accept that, because he didn't know what would happen down the line" (PC-R. 64).

Finally, the court noted that the physical evidence at the crime scene contradicted the story that Mr. James told Mr. Wells. Mr. Wells summarized Mr. James' confession:

> He told me that he was involved in the murder of Mr. Del. He described to me in some detail what had gone on. Mr. James shared with me, however reluctantly, that he was homosexual and that this had started out as an attempt to go back to Mr. Del's place and have some drugs and have a party. That Mr. Del had come on to him in an overly-aggressive way, and that's what led to the homicide.

(Pc-R. 194-95). Mr. James' confession is not contradicted by the physical evidence as the circuit court concluded.[6] Rather, this version of Mr. Baker's murder is consistent with the trial testimony concerning the manner of death and the crime scene evidence.

Dr. Drake, the medical examiner, testified at the trial that he tested for sexual activity because "the fact that the body was unclothed and to me also that the clothing was missing would -- and the general circumstances and things like that would make you think that there were perhaps some relationship to some homosexual activity" (R. 357). The police who examined the crime scene confirmed that Mr. Baker was dressed only in socks and underwear when he was killed (R. 369). The fact that the autopsy did not disclose any evidence of sexual activity (R. 356) further

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[6]The circuit court judge had not read the trial transcript at the time of the hearing (PC-R2. 297), although he indicated an intent to do so (PC-R2. 304). However, the errors regarding the trial record contained in the circuit court's order indicate that the judge did not review the trial record or the previous post-conviction record.

supports Mr. James' confession that he acted in response to aggressive sexual advances and that he killed Mr. Baker to prevent unwanted sexual activity.

Sergeant Knapp testified at the trial that their investigation revealed that Mr. Baker met men at his beauty school after business hours to have sex (R. 383). In addition, Deborah Ciotti testified at the evidentiary hearing that Mr. James supplied Mr. Baker with drug connections (PC-R. 95) and would recruit young men to have sex with Mr. Baker at the beauty school (PC-R. 91). Ms. James testified at the evidentiary hearing that Mr. Baker and her brother were lovers in a "prostitute relationship" (PC-R. 127) and that she would sometimes drive her brother to the beauty school and he would come out with money (PC-R. 130). Finally, Mr. Barber testified at the trial that he saw Mr. James in the back room of the beauty school after business hours on the night of Mr. Baker's death (R. 575).

The circuit court incorrectly found that the physical evidence contradicted Mr. James' confession when, in fact, the crime scene evidence and testimony about Mr. Baker's drug and sexual activity confirm every aspect of Mr. James' confession to Mr. Wells. Mr. Wells' testimony was credible and it should have been considered as newly discovered evidence for its effect on Mr. Melendez's trial.

C. JOHN BERRIEN

The court found Mr. Berrien "completely unbelievable," noting that he was currently incarcerated in New Mexico and had a "transparent motive" to lie to help Mr. Melendez. However, consideration of the newly discovered evidence in the context of the evidence as a whole, including that presented at Mr. Melendez's trial, demonstrates that Mr. Berrien had **a** compelling motive to lie at the trial but no conceivable motive to lie at the evidentiary hearing. The court also noted that Mr. Berrien was vague about what parts of his testimony he was recanting. However, his hearing testimony clearly and consistently indicates exactly what parts of his trial testimony he recanted. On direct examination, Mr. Berrien testified that the police gave him the following information that they wanted to use against Mr. Melendez: that Mr. Berrien and Mr. Melendez had planned the robbery and that Mr. Berrien expected to get a share of whatever was stolen (PC-R2. 137); the time and date on which he took Mr. Melendez to Mr. Baker's beauty school (PC-R2. 138); and that he saw Mr. Melendez give George Berrien two rings, a watch, and a gun (PC-R2. 139). On cross-examination, the State Attorney reviewed Mr. Berrien's trial testimony to clarify what information was given to Mr. Berrien by the police (PC-R2. 160- . As on direct, Mr. Berrien repeated what parts of his trial testimony were false: that he had seen Mr. Melendez with .38 caliber pistols in the past (PC-R2. 163); that he saw Mr. Melendez carrying a towel when he picked him up at the beauty

school (PC-R2. 167); and that Mr. Melendez gave George Berrien jewelry and .38 caliber pistol at the train station to be sold in Delaware (PC-R2. 171-73). Mr. Berrien repeatedly testified that the police had told him what he should say and that they were the source of the information he offered against Mr. Melendez his trial (PC-R2. 137, 140, 151, 171-72, 174, 183-84). The circuit court's statement that Mr. Berrien's recantation is unclear is simply not supported by the record.

The circuit court also completely disregarded the testimony of Dr. Richard Ofshe, an expert in police interrogation techniques and coercion. This defense expert testified to the substantial evidence, in addition to the recantation, that Mr. Berrien's trial testimony was both coerced and false. The circuit court also did not consider FDLE Agent Roper's testimony that officers discussed the case with Mr. Berrien before taking a tape-recorded statement and that the tape was turned off several times during the statement. This evidence corroborates Mr. Berrien's recantation. Clearly, the circuit court did not consider the newly presented evidence as a whole or in conjunction with the trial record and previous post-conviction record or it could not have concluded that Mr. Berrien was lying when he recanted. His hearing testimony is corroborated by this expert witness as well as the police testimony at trial that confirms that the tape recording was manipulated and that Mr. Berrien was threatened with incarceration.

ARGUMENT II

MR. MELENDEZ WAS DENIED AN ADVERSARIAL TESTING BECAUSE THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE AND PRESENTED FALSE TESTIMONY IN VIOLATION OF MR. MELENDEZ'S CONSTITUTIONAL RIGHTS.

With almost no discussion, the circuit court dismissed Mr. Melendez's Brady claim, concluding that "[t]he major problem with this so-called Brady violation is that in order to sustain it one has to believe John Berrien. I do not believe John Berrien" (PC-R. 428). The court's dismissive analysis of the Bradv claim reveals that it did not consider Dr. Ofshe's analysis corroborating Mr. Berrien's testimony about the threats and other coercive tactics the police used to secure his cooperation in their prosecution of Mr. Melendez, as well as his opinion that Mr. Berrien's statements and testimony were false. Significantly, Dr. Ofshe found support for his conclusions in the transcripts of Mr. Berrien's interviews and did not base his conclusions solely on Mr. Berrien's account of his interactions with the police. The court's order does not mention Dr. Ofshe, but there is no explanation provided for this oversight. Further, the court's order does not mention Agent Roper's testimony, which also corroborates Mr. Berrien's account of his interviews by law enforcement. Mr. Berrien's trial testimony resulted from coercion and intimidation by law enforcement which was not revealed at the time of trial, and Mr. Melendez is entitled to relief.

A. JOHN BERRIEN'S TRIAL TESTIMONY RESULTED FROM COERCION AND INTIMIDATION

The circuit court fundamentally misunderstood Mr. Berrien's interactions with the police. The court correctly noted that Mr. Berrien had three interviews with the police: March 7, 1984, at the Lakeland Police Department; March 15, 1984, at the Auburndale Police Department; and March 17, 1984, at the Polk County Jail. The court then explained its rejection of Mr. Berrien's claim that he **was** threatened and coerced by the police: "While the three statements differ in detail, they are basically the same. It is difficult to understand how Berrien's allegedly coerced statement on March 15th vitiates the statement he made on March 7th. Moreover, the police obtained the March 17th statement at the behest of Berrien himself" (PC-R2. 428).

While Mr. Berrien's testimony at the evidentiary hearing initially dealt with the second interview because he begins by saying "[t]his was in Auburndale" (PC-R. 136), on cross-examination, he provided details about the first interview on March 7, 1984, at the Lakeland Police Department. He stated that he told the police: "I didn't know nothing about no murder" (PC-R. 144). Despite Mr. Berrien's ignorance of the crime, the police succeeded in eliciting a statement that incriminated both Mr. Melendez and himself. Agent Roper testified that before the interview began, police had informed Mr. Berrien of facts about the crime and that they believed Mr. Melendez was involved. Agent Roper also testified that during this interview the tape recorder was turned off and on several times, On cross-

examination, when the State Attorney asked a succession of "do you remember" questions regarding the first police interview, Mr. Berrien was unable to recall any of his interview answers and stated that although he remembered being interrogated at the Lakeland Police Department, he could not remember anything he or the police said (PC-R. 149). In addition, Mr. Berrien's testimony about the first interview does not support the court's conclusion that the threats and coercion were present only at the second interview; when asked whether the police made any threats at the first interview, Mr. Berrien responded: "I was scared from the get-go from seeing them all" (PC-R2. 149).

Dr. Ofshe's testimony further supports Mr. Melendez's argument that Mr. Berrien's statements and testimony were both coerced and false. First, Dr. Ofshe testified that Mr. Berrien was particularly susceptible to police coercion because he was on parole; the police therefore had leverage over him because of the unspoken threat that his parole could be revoked (PC-R2. 318). Dr. Ofshe also noted that the interview was conducted either very late at night or very early in the morning and that there were five police officers present; these factors placed Mr. Berrien at a disadvantage and contributed to his feeling of helplessness. Dr. Ofshe also testified that it was unlikely that Mr. Berrien could distinguish the three interviews in his memory. This is consistent with Mr. Berrien's ability to remember that he was interviewed at the Lakeland Police Department but his inability

to recall what was said or whether the interview was taped (PC-R2. 149).

Agent Roper of the FDLE also corroborates Mr. Berrien's testimony regarding the first interview. Agent Roper admitted that before the police began taping Mr. Berrien's statement, they told him that his car was involved in the murder and that he was a suspect. In addition, the transcript of the tape recording reveals that a substantial discussion occurred before the taping began. For example, Mr. Berrien was asked on the tape about threats that Mr. Melendez had allegedly made against him, but there is no prior mention of threats on the tape. Agent Roper also admitted that the tape was turned on and off during the interview and that discussion occurred between tapings. Despite substantial evidence to the contrary, the court incorrectly concluded that coercion and threats were only employed at the second interview.

Mr. Berrien's memory of the second interview was consistent and unwavering, even on cross-examination:

> Q All right. Now, this is the interview you're talking about where you said Mr. Glisson and Mr. Knapp had a tape recorder that they kept cutting on and off?
>
> A Right.
>
> Q And they were telling you what they wanted you to say?
>
> A Yeah, because they said either we're going to stick you with it or you're going down by yourself or you can end up like Mr. Del.

Q Okay. And you felt scared and frightened?

A Oh, yes, I was.

Q Did they have a sort of script written out as to what they wanted you to say?

A They had it on paper.

Q Had it written down on paper?

A Yes.

Q Did they show it to you to read, or did they tell you what to say?

A They just told me how they wanted me to say it.

(PC-R2. 150-51).

In addition, the court's conclusions about the interviews reveals that Dr. Ofshe's expert opinion on the effects of police coercion were completely ignored. Dr. Ofshe testified that once a serious and credible threat is made, the subject is placed in a coercive situation until that threat is removed. The police threats against Mr. Berrien's life and freedom that were made from the beginning were still in effect while he remained in police custody, vulnerable to prosecution and/or violence at the hands of his interrogators.

Even if the court felt that Mr. Berrien had a "transparent motive for recanting" (PC-R2. 426), Dr. Ofshe's analysis precludes a finding that Mr. Berrien was not coerced to give statements incriminating himself and Mr. Melendez and thereafter forced to testify falsely at the trial. Dr. Ofshe concluded not

only that Mr. Berrien was coerced but also that this resulted in false testimony against Mr. Melendez:

> Throughout his statements, it's -- the story keeps changing and it changes in rather major ways over the series of recorded interviews or recorded interrogations. And most of the content of what he talks about, even though it itself is changing, by the time of his deposition prior to the trial and his affidavit after the trial, he repudiates virtually all the content that he gave over the series of interrogations. But the series of interrogations themselves show so much variability that one would have to conclude, as a whole, that the totality of this is simply unreliable without independent corroboration.

(PC-R. 320-21). Clearly, coercive police tactics resulted in the presentation of false testimony.

B. THE EVIDENCE CONCERNING MR. BERRIEN'S INTERVIEWS THAT WAS WITHHELD FROM MR. MELENDEZ WAS MATERIAL, EXCULPATORY EVIDENCE

As noted earlier, Mr. Melendez's conviction and death sentence rest on the credibility of Mr. Berrien. Thus, any information revealing that his trial testimony was false and the result of police coercion would be material to Mr. Melendez's defense. The jury that convicted Mr. Melendez never heard the evidence discussed in the preceding section establishing that Mr. Berrien's testimony was the result of police misconduct. Because the jury is entrusted with the responsibility of evaluating a witness's credibility, the withholding of information relevant to this issue can be just as violative of the dictates of Brady v. Maryland, 373 U.S. 83 (1963), as the withholding of evidence regarding a defendant's innocence. United States v. Baslev, 473

U.S. 667 (1985); Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991). Impeachment evidence of an important State witness is material evidence which must be disclosed to the defense. Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). The State's withholding of this evidence precluded Mr. Melendez from cross-examining a key State witness and from effectively presenting a defense.

Under United States v. Baslev, 473 U.S. 667, 680 (1985), reversal is required if there exists a "reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." However, it is not the defendant's burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984); Kyles v. Whitley, 115 S. Ct. 1555 (1995). A reasonable probability is one that undermines confidence in the outcome of the trial. Such a probability undeniably exists here.

The undisclosed evidence establishes that Mr. Berrien's testimony was the result of police coercion. Because Mr. Berrien was a key State witness who could have been impeached with this evidence, confidence in the outcome of Mr. Melendez's trial is undermined. The only evidence offered against Mr. Melendez was the testimony of David Luna Falcon and Mr. Berrien. There was absolutely no physical evidence connecting Mr. Melendez to the crime. The State knew that Mr. Falcon was not a credible witness and effectively used Mr. Berrien to corroborate his testimony. Therefore, the impeachment of Mr. Berrien would not only have

affected the persuasiveness of his own testimony, but would have undermined the State's entire case. In addition, in the absence of physical evidence, credibility of the witnesses was the central issue at Mr. Melendez's trial.

Attorneys for both sides admitted that the credibility of their witnesses was a fundamental issue for the jury that would determine their verdict. Mr. Melendez's trial counsel in his opening statement encouraged the jury to evaluate the credibility of the State's case, emphasizing that their key witnesses, Mr. Falcon and Mr. Berrien, both had reasons for testifying against Mr. Melendez (R. 241). Mr. Alcott attempted to impeach Mr. Berrien's credibility by telling the jury that he had received lenient treatment in exchange for his testimony against Mr. Melendez. He then promised the jury that he would show "the incredibility of the State's key witnesses" (R. 243). However, without the evidence withheld by the State, Mr. Alcott's attempts to impeach Mr. Berrien failed.

The State Attorney's closing statement similarly invited the jury to evaluate the witnesses' credibility:

> We [the attorneys] will probably have disagreements as to what witnesses to believe. That's where you come in. . . . You're going to have to decide what witnesses to believe and what not to believe and obviously there are conflicts in the witnesses. Everybody that got on the witness stand in this trial cannot be telling the truth; that's sort of obvious. You're going to have to decide who to believe, who not to believe.

(R. 690-91). The State Attorney then bolstered his key witness's credibility by telling the jury that Mr. Berrien would not tell a lie that implicated himself in the crime:

> John Berrien **was** arrested. He **was** also charged with robbery and first degree murder for his participation in this offense, for taking Melendez and his cousin, George, to the crime scene. John Berrien pled no contest to being an accessory after the fact to the murder and agreed to testify.
>
> You're going to be asked apparently by the defense to disbelieve John Berrien; to come to the conclusion that he is lying. The problem I've got with that is if John Berrien is lying, it would mean he did not drive them to the crime scene. It would mean he was not involved in the crime at all. So, if that's true that he was not involved in it, why would he plead guilty or plead no contest and face going to prison for a crime that he didn't commit? That doesn't seem real logical that the man could be totally innocent of the crime, as Mr. Melendez claims John Berrien had nothing to do with the crime, he never took him anywhere, but yet the guy is risking going to prison by pleading in court to something that the defense wants you to believe he never was involved in, and that doesn't make a great deal of sense.

(R. 704). The State Attorney's argument persuaded the jury to believe Mr. Berrien only because they were deprived of the truth. Mr. Berrien was coerced by the State to lie, and, in fact, he was not risking going to prison as the State Attorney alleged but was facing either probation or house arrest in exchange for his cooperation in the prosecution of an innocent man. If defense counsel had known how the State secured Mr. Berrien's self-incriminating statement, he could have effectively countered the State's bolstering of its witness. Despite his emphasis on the

importance of credibility, Mr. Melendez's trial counsel was unable to effectively impeach the State's witnesses so that his attempt to argue that Mr. James was guilty of the crime was ineffective in the face of unimpeached false testimony incriminating Mr. Melendez.

This evidence was previously unavailable to Mr. Melendez and could not have been obtained with the exercise of due diligence. In Cammarano, 602 So. 2d at 1371, the court recognized that without the cooperation of the recanting witness, any attempts by defense counsel to persuade him to tell the truth would not have brought forth the recantation, no matter how diligently defense counsel questioned him. Clearly, the situation here is identical. At the time of Mr. Melendez's trial, Mr. Berrien was still facing potential prosecution based on his self-incriminating statement. He knew that his deal with the State by which he would receive either house arrest or probation was contingent on his testimony against Mr. Melendez. Therefore, any efforts to convince him to recant his false statements would at that time have been futile. Unfortunately for Mr. Melendez, telling the truth at trial was too great a risk for Mr. Berrien to take.

ARGUMENT III

MR. MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY FAILED TO ADEQUATELY INVESTIGATE AND PREPARE A DEFENSE.

To the extent that the State argues and the lower court found that the evidence presented below was available to trial

counsel, Mr. Melendez received ineffective assistance of counsel. The State has not contested that the evidence was unavailable to post-conviction counsel. When evidence supporting an ineffective assistance of counsel claim was unavailable for an initial Rule 3.850 motion but later becomes available, it is proper to present an ineffective assistance of counsel claim in a second Rule 3.850 motion. Provenzano v. State, 616 So. 2d 428, 430-31 (Fla. 1993) (considering an ineffective assistance of counsel claim presented in a second Rule 3.850 motion because the facts underlying the claim were not previously available, even though a different ineffectiveness claim was raised in first Rule 3.850 motion). See also Breedlove v. Singletary, 595 So. 2d 8, 11 (Fla. 1992)(allowing presentation of ineffectiveness claims in second Rule 3.850 motion because conflict of interest prevented raising claims in first Rule 3.850 motion). Furthermore, it is proper to plead Bradv and ineffective assistance of counsel in the alternative. Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995) (addressing claim raised alternatively as Brady and ineffective assistance of counsel). At the evidentiary hearing, the State brought out that Deborah Ciotti's close relationship with Vernon James was well-known locally, and that Mr. Alcott knew Sandra James and Dwight Wells, Mr. Alcott testified he never spoke to Sandra James about this case. Mr. Wells testified he would have testified at Mr. Melendez's trial if asked. Mr. Alcott testified he would have presented additional evidence of Vernon James' involvement if such evidence were available, particularly the

testimony of Mr. Wells, who would have made a credible witness. If this evidence was available to Mr. Alcott, his failure to present it was deficient performance which undermines confidence in the outcome of Mr. Melendez's trial. Strickland v. Washington. Further, in the lower court, the State argued that trial counsel could have discovered the evidence regarding Mr. Berrien's coerced and false trial testimony. If trial counsel could have discovered this evidence, counsel was ineffective in failing to do so. As Mr. Alcott testified, evidence showing the unreliability of Mr. Berrien's trial testimony would have benefited the defense and he would have presented it.

In State v. Gunsby, 670 So. 2d 920 (Fla. 1996), the defendant presented newly discovered evidence at a Rule 3.850 hearing. The State argued the evidence was not newly discovered because trial counsel could have discovered it through the exercise of due diligence. This Court held:

> In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington.

670 So. 2d at 924. Thus, if the evidence presented in the lower court in Mr. Melendez's case should have been discovered by trial counsel, it is proper to consider that evidence as a basis for an ineffective assistance of counsel claim.

The defense theory at trial was that Mr. Melendez was innocent, that John Berrien and David Falcon were lying, and that another man, namely Vernon James, had killed Mr. Baker. In support of this defense, Mr. Alcott presented Mr. Melendez's alibi witnesses and one witness to whom Mr. James had confessed. However, due to his failure to adequately investigate, Mr. Alcott did not discover additional witnesses to whom Mr. James confessed and did not discover the coercion and intimidation employed to obtain John Berrien's testimony. Such evidence would have corroborated that of the other defense witnesses and discredited the testimony of the State's witnesses. Mr. Alcott's failure to adequately investigate and prepare for trial rendered his performance ineffective. Mr. Melendez is entitled to relief. Strickland v. Washington, 466 U.S. 668 (1984).

Mr. Melendez's trial attorney chose a particular defense strategy -- that Mr. Melendez was innocent and that Mr. James was responsible for the crime -- and then failed to adequately investigate possible sources of information supportive of that defense. Specifically, he did not discuss the Baker case with Dwight Wells who was representing Mr. Melendez's co-defendant John Berrien. Mr. Wells had previously represented Mr. James on at least two occasions and spoke to him about the Baker case before Mr. Melendez's trial (PC-R2. 194). Mr. Wells summarized his meeting with Mr. James:

> He told me that he was involved in the murder of Mr. Del. He described to me in some detail what had gone on. Mr. James shared with me, however reluctantly, that he was

> homosexual and that this had started out really as an attempt to go back to Mr. Del's place and have some drugs and have a party. That Mr. Del had come on to him in an overly-aggressive way, and that's what led to the homicide.

(PC-R2. 194-95) . These conversations were not privileged because Mr. Wells and the Public Defender's Office were not representing Mr. James at this time; he was consulted because Mr. James had developed trust in him based on their prior professional relationship (PC-R2. 194).

Although Mr. Wells knew that "it was extremely important that the people who were trying this case know about [this information]" (PC-R2. 195), he could not remember whether he told anyone of Mr. James' confession. Mr. Wells specifically remembers that he did not share this information with Mr. Alcott; further, he testified that he would have told him of Mr. James' statements if Mr. Alcott had discussed the case with him (PC-R2. 195-96).

Mr. Alcott confirmed the importance of this information to the defense strategy at trial:

> [O]ur position was that Mr. Melendez did not do it . . . . Mr. James may well have participated. So I think we were trying to show that Mr. James was a participant in the offense, not Mr. Melendez. And so anything that would have shown that James was involved would have been something that I would have presented.

(PC-R2. 291). Mr. Alcott explained that this information was consistent with the defense theory at trial but that Mr. Wells' testimony was not merely cumulative because he has greater credibility as a witness than Mr. Mims, a cellmate to whom Mr.

James had also confessed (PC-R2. 297). Clearly, it was Mr. Melendez's trial attorney's failure to interview this obvious source of information that precluded the jury from hearing valuable evidence in support of Mr. Melendez's defense.

The lower court found that Deborah Ciotti and Sandra James were available to trial counsel. Trial counsel testified that evidence showing Vernon James was involved in the murder would have supported the defense and that he would have presented such evidence. However, trial counsel never spoke to Deborah Ciotti or Sandra James about Mr. Baker's murder. This was deficient performance which prejudiced Mr. Melendez, for their testimony would have supported the defense and contradicted the State's case.

The State argued below that trial counsel could have discovered evidence regarding the coercive police tactics which resulted in John Berrien's trial testimony. Trial counsel testified that evidence showing Mr. Berrien's trial testimony was unreliable would have been important to the defense not only to undermine the reliability of Mr. Berrien's account, but also to show that David Falcon's testimony was uncorroborated. However, trial counsel did not talk to Mr. Berrien or cross-examine him regarding his prior inconsistent statements or his deposition testimony that what he told police was "mostly false." This was deficient performance which prejudiced Mr. Melendez, for Mr. Berrien was a key State witness without whom the State could not have obtained a conviction.

The Supreme Court has explained that a court making an ineffectiveness determination must "consider the totality of the evidence before the judge or jury" and that "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696-97.

Here, the verdict is, at best, "only weakly supported by the record" and therefore "is more likely to have been affected by errors than one with overwhelming record support." As discussed previously, attorneys for both sides admitted that the credibility of their witnesses was a fundamental issue for the jury. In the absence of any physical evidence connecting Mr. Melendez to Mr. Baker's murder, witness credibility was the determinative factor in the State's prosecution of Mr. Melendez. Clearly, his conviction and sentence are "only weakly supported" by the State's evidence, and evidence that Mr. Berrien's testimony was false and that Mr. James had made several confessions would have resulted in a different outcome.

The State presented a weak case with absolutely no physical evidence, and the key issue for the jury was determining the credibility of contradictory witnesses. Had the defense been able to invalidate Mr. Berrien's testimony and to corroborate Mr. Mims, the inmate who testified that Mr. James had confessed to

him, the jury would have been more likely to accept the defense and to disbelieve the State's witnesses. Mr. Melendez was prejudiced by his counsel's failure to discover and present this evidence. Confidence in the outcome of the trial is undermined by counsel's ineffectiveness, and Mr. Melendez is entitled to relief.

ARGUMENT IV

THE CIRCUIT COURT FAILED TO CONSIDER THE CUMULATIVE EFFECT OF ALL THE EVIDENCE DISCOVERED SINCE MR. MELENDEZ'S TRIAL.

The circuit court failed to consider the cumulative effect of all the evidence not presented at Mr. Melendez's trial as required by Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995), and this Court's precedent. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996) (directing the circuit court to consider newly discovered evidence in conjunction with evidence introduced in the defendant's first 3.850 motion and the evidence presented at trial).[7] In State v. Gunsby, 670 So. 2d 920 (Fla. 1996), this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violations, ineffective assistance of counsel, and/or newly discovered evidence of innocence. Gunsby is exactly on point here and should have been followed by the circuit court. In Gunsby, this Court found that a new trial

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'That Kyles v. Whitley is not limited to Brady claims is evidenced by its application to sufficiency of the evidence claims, United States v. Burros, 94 F.3d 849 (4th Cir. 1996); United States v. Rivenbark, 81 F.3d 152 (4th Cir. 1996); ineffective assistance of counsel claims, Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996); and newly discovered evidence claims, Battle v. Delo, 64 F.3d 347 (8th Cir. 1995).

was required because the new evidence presented at the evidentiary hearing undermined the credibility of key State witnesses. Id. at 923. This Court also addressed the State's argument that some of the defendant's evidence did not meet the test for newly discovered evidence:

> In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington. The second prong of Strickland poses the more difficult question of whether counsel's deficient performance, standing alone, deprived Gunsby of a fair trial. Nevertheless, when we consider the cumulative effect of the testimony presented at the Rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome.

Id. at 924 (citations omitted). The circuit court not only failed to consider the cumulative effect of Mr. Melendez's new evidence but also ignored this Court's instructions in Gunsby to consider evidence that does not satisfy the newly discovered test for its support of an ineffective assistance of counsel claim. Had the circuit court examined all the evidence Mr. Melendez has presented throughout his capital proceedings, it would have found that the previously unknown evidence, in conjunction with the evidence introduced at Mr. Melendez's trial, undermines

confidence in the outcome and/or would probably have produced an acquittal. See Gunsby; Swafford.

The State's case against Mr. Melendez was extremely weak. His conviction and death sentence rest solely on the testimony of two felons, David Luna Falcon and John Berrien. Mr. Falcon testified that Mr. Melendez had confessed his involvement in Mr. Baker's death. According to Mr. Falcon, Mr. Melendez and a friend planned to rob Mr. Baker because he was known to have a lot of money and jewelry. The other man cut Mr. Baker's throat, and as he was begging to be taken to a hospital, Mr. Melendez shot him using a pillow as a silencer. Defense witnesses testified that Mr. Falcon hated Mr. Melendez and had frequently spoken of his plan to either kill him or get him convicted.

However, the jury never heard evidence showing, inter alia, that David Falcon was not a trustworthy undercover agent for the Justice Department as he portrayed himself, but a common criminal and murderer, was not a regular informant for Agent Roper as he portrayed himself, and was being protected by Detective Glisson for his actions in a shooting at the home of a family named Reagan. See Mr. Melendez's Motion to Vacate, filed 1/16/89, pp. 55-56; Supplement to Motion to Vacate, filed 4/21/89, pp. 69-85.

Because the State knew that Mr. Falcon was unreliable and unworthy of belief, they used John Berrien to corroborate his story against Mr. Melendez. John Berrien testified that he drove his cousin George Berrien and Mr. Melendez to Mr. Baker's beauty school on September 13, 1983. He testified that he dropped them

off in the late afternoon and picked them up about two hours later. The next day, he drove George Berrien and Mr. Melendez to the train station where Mr. Melendez gave George Berrien jewelry and a gun before he boarded a train for Wilmington, Delaware. The only physical evidence supporting this story was an Amtrak record indicating that George Berrien had taken a train to Delaware on September 14, 1983. There was no physical evidence connecting Mr. Melendez to Mr. Baker's murder.

Evidence withheld by the State demonstrates that John Berrien's testimony lacked any credibility or reliability; in addition, John Berrien has recanted his testimony against Mr. Melendez. The jury was never told that John Berrien was threatened by the police and coerced into testifying falsely against Mr. Melendez. The police first elicited a self-incriminating statement from John Berrien by telling him that they had enough evidence to convict him and then threatening him with prosecution if he did not implicate Mr. Melendez. At trial, the State bolstered this witness's credibility by telling the jury that he would not tell a lie that implicated himself in Mr. Baker's murder. Mr. Melendez's trial counsel was aware of the importance of impeaching John Berrien but failed to use available evidence such as Mr. Berrien's prior inconsistent statements and his deposition and lacked the information necessary to do so effectively because the State withheld material, exculpatory evidence regarding the coercive police tactics used on Mr. Berrien.

The defense presented the testimony of George Berrien who contradicted every aspect of John Berrien's testimony against Mr. Melendez. He testified that he had only seen Mr. Melendez once before, at his cousin John's house. The defense also presented two witnesses in support of its theory that Mr. James murdered Mr. Baker. Roger Mims testified that Mr. James confessed to him when they were held in jail together, and Terry Barber, an employee at the beauty school, testified that he saw Mr. James in the back room of the school at about 6:00 p.m. on the night of the murder. Mr. Barber is the last known witness to see Mr. Baker alive; he testified that he had never seen Mr. Melendez at Mr. Baker's beauty school.

In further support of Mr. Melendez's innocence, the defense also presented two alibi witnesses who were with Mr. Melendez at the time of Mr. Baker's death. Dorothy Rivera and her sister Marie Graham testified that Mr. Melendez was with them in Lakeland on September 13, 1983. Mr. Melendez also testified that he had never been to Mr. Baker's beauty school.

In the absence of physical evidence, Mr. Melendez's trial was a contest in which the jury determined the credibility of contradicting witnesses. The new evidence of four witnesses to whom Mr. James confessed would have corroborated the defense witnesses and diminished the State witnesses, resulting in Mr. Melendez's acquittal. These witnesses include Mr. James' close friend Deborah Ciotti and his sister Sandra James, to whom he confessed soon after Mr. Baker's death, and his girlfriend Janice

Dawson, to whom he confessed after being arrested on other charges. In addition, Ms. Ciotti saw Mr. James with drugs and money the morning after Mr. Baker's death, and Mr. James gave Ms. Dawson two rings that he told her had belonged to Mr. Baker. Mr. James also confessed to Mr. Wells, an attorney whose credibility would have persuaded the jury of the truth of these confessions that prove Mr. Melendez's innocence.

Clearly, the presentation of this evidence at Mr. Melendez's trial, along with the other evidence presented by the defense, is sufficient to raise a reasonable doubt and would have resulted in Mr. Melendez's acquittal. The evidence presented at trial strongly suggested that the wrong man was convicted and sentenced to death. Melendez v. State, 498 So. 2d 1258, 1262 (Fla. 1986) ("There are cases, albeit not many, when a review of the evidence in the record leaves one with the fear that an execution would perhaps be terminating the life of an innocent person.") (Barkett, J., concurring specially). The newly discovered evidence and evidence never presented because of State misconduct and trial counsel's ineffectiveness, when viewed cumulatively, confirms that Mr. Melendez is innocent and is entitled to a new trial.

CONCLUSION

Based upon the record and the discussion herein, Mr. Melendez respectfully urges that this Court reverse the lower court's order and grant Mr. Melendez a new trial and sentencing.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May 29, 1997.

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