IN THE SUPREME COURT OF FLORIDA

CASE NO.

JUDY A. BUENOANO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

GREGORY C. SMITH
Capital Collateral Counsel
Northern Region
Florida Bar No. 279080

SYLVIA W. SMITH
Assistant CCC - NR
Florida Bar No. 0055816

Post Office Drawer 5498
Tallahassee, FL 32314-5498

COUNSEL FOR APPELLANT

INTRODUCTION

Roger Martz testified that his "x-ray analysis, infrared analysis and mass spectrometry" tests enabled him to determine what was inside the capsules submitted to the FBI by the Pensacola Police Department. But what Martz did in the Buenoano cases is exactly what he has been proven to have done in other cases - tweak scientifically inconclusive test results in favor of the prosecution. However due to state conduct, including that of the circuit court, Ms. Buenoano faces execution in seventeen (17) days without any fair opportunity or reasonable means to fully develop her claims that her Escambia and Orange County convictions and sentence of death were unconstitutionally obtained in reliance upon the false and inadmissible testimony of FBI SA Roger Martz.

Ms. Buenoano has been obstructed by the government in her investigation of claims which undermine the reliability of the judgment of conviction and sentence. Through a pattern of withholding vital information and misleading federal agencies regarding the materiality of that very information, the government has deprived Ms. Buenoano of due process of law and the ability to fully investigate and plead her claims before her scheduled execution. Moreover, with each day the number of documents to be released by the federal government about Martz which collateral counsel may have to obtain and review, grows. The Associated Press reported yesterday that as part of its settlement with Dr. Whitehurst, the government has agreed to the

release of 180,000 pages of FBI lab reports by examiners he criticized. Obviously, lab reports from other cases will not be requested by Ms. Buenoano, but at this time, counsel is not able to determine the exact number of relevant documents which will require review because the federal government's position in the Whitehurst case refers to such a vastly different number of documents. A status hearing in Ms. Buenoano's FOIA lawsuit is scheduled for today at 2:30 p.m.

On March 5, 1998,[1] collateral counsel learned that they could consult with Dr. Frederic Whitehurst under the terms of his settlement with and resignation from the FBI but, he would have to present the full text of any affidavit he supplied to the Director of the FBI at least thirty (30) days prior to disclosure. Arrangements were made for consultations at the earliest possible time which was March 9, just hours before the Circuit Court denied Ms. Buenoano's Rule 3.850 motion.[2] Through diligent efforts, collateral counsel is arranging additional time to consult further with Dr. Whitehurst and other necessary experts as fast as humanly possible.

As collateral counsel argued during the March 6th hearing, this is a case that evolves every day because of changing circumstances which are completely external to Ms. Buenoano and over which neither she nor her attorneys have any control or influence. In light of these circumstances, the circuit court's

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[1]The day after Ms. Buenoano's Rule 3.850 motion was due.

[2]Counsel consulted again with Dr. Whitehurst on March 11.

denial of Ms. Buenoano's request for a stay of execution and leave to amend her Rule 3.850 motion was erroneous and denied Ms. Buenoano due process. A stay of execution and leave to amend should be granted.

When Ms. Buenoano became aware of the connection between the scrutiny and criticism of Martz and the FBI lab and her own cases, she immediately sought these records by making a Freedom of Information Act request. See Argument III. This request apparently stimulated federal interest in the Buenoano cases and prompted federal authorities to inquire of the prosecuting authorities in Escambia and Orange Counties regarding Martz's involvement in the prosecutions. On June 2, 1997, former Escambia County prosecutor P. Michael Patterson advised the State Attorney for the First Judicial Circuit, Curtis Golden, that FOIA requests had been made, that his recollection was that "...Mr. Martz was not called as a witness nor did he testify on behalf of the State of Florida," and nevertheless stated that the FOIA request and the response thereto "...might directly impact upon not only the case that I prosecuted but the other Buenoano prosecutions handled by your office." (PC-R4. 247-48).

Patterson recommended that Golden have someone review the trial record and, purportedly after doing so, Assistant State Attorney John Spencer twice falsely informed FBI Laboratory Task Force Director Lucy Thompson that "Roger Martz was not called as a witness. His chemical analyses of items submitted was not significant in either the prosecution or the verdict." (PC-R4.

250-51). Thus, the federal government was misled into believing that Martz was not a witness in any Buenoano prosecution and certainly not informed that Martz was a "very critical" expert witness in an otherwise "very weak" Orange County prosecution. In so doing, the state government prosecutors effectively deep-sixed any investigation by the federal government and caused the resulting 8 month delay in federal disclosure of information.

Because of the combined effect of these events and the federal government's belated agreement to disclose FBI Laboratory investigation records to Ms. Buenoano, she is now faced with an execution less than three (3) weeks away and the impossible task of attempting to review, digest, refer to experts, and present claims based on over 30,000 pages of federal documents pertaining to the FBI Laboratory and specifically the work of Special FBI Agent Martz.[3] Under these circumstances, Ms. Buenoano has been deprived of due process and her request for stay of execution must be granted to allow Ms. Buenoano an adequate opportunity to plead her claims arising from this mountain of previously withheld information.

This Court should reverse and remand with directions that Ms. Buenoano be permitted to pursue postconviction remedies in Escambia County and amend her 3.850 motion in Orange County. She should be permitted the time necessary to consult with Dr. Whitehurst, to allow other experts to provide complete reports of

[3]All of which have not even been received by collateral counsel to date.

their conclusions to obtain and review the documentation from the DOJ regarding their investigation into the FBI Laboratory and Roger Martz[4] as well as other public records.

[4]And offer opinions based on the documents now available for use by Ms. Buenoano in her 3.850 proceedings according to the Florida Supreme Court's March 6, 1998 order regarding the protective order.

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STATEMENT OF THE CASE AND FACTS

In August, 1984, Ms. Buenoano was indicted for first degree murder regarding the 1971 death of her husband. On November 1, 1985, Ms. Buenoano was found guilty, and the trial court subsequently sentenced her to death. Ms. Buenoano's trial counsel, James Johnston, also served as her appellate counsel. The conviction and sentence were affirmed by the this Court. Buenoano v. State, 527 So.2d 194 (Fla. 1988). A death warrant was signed on November 9, 1989.

On December 21, 1989, a Rule 3.850, Florida Rules of Criminal Procedure, Motion to Vacate Judgment and Sentence was filed in the circuit court; it was summarily denied. On that same date a petition for writ of habeas corpus and request for stay of execution were filed in this Court. This Court entered a stay of execution on January 24, 1990.

Subsequently, after consolidating the petition for writ of habeas corpus with the appeal from the summary denial of the Rule 3.850 motion, this Court denied relief. Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990). On May 17, 1990, another death warrant was signed by the Governor.

On June 5, 1990, Ms. Buenoano filed an emergency motion to vacate her judgment and sentence. Included with the motion was a consolidated request for leave to amend and for a stay of execution. The circuit court denied all relief on June 12, 1990, and denied motion for rehearing on June 15, 1990. The decision

was affirmed by this Court on June 20, 1990. Buenoano v. State, 565 So. 2d 309 (Fla. 1990).

On June 21, 1990, Ms. Buenoano filed an initial 28 U.S.C. Sec. 2254 action in the United States District Court. On June 21 and 22, 1990, the district court held a limited evidentiary hearing, at the conclusion of which judgment was entered denying all relief. This judgment was appealed to the United States Court of Appeals, Eleventh Circuit, and on June 4, 1992, the matter was vacated and remanded to the district court for a full evidentiary hearing. Buenoano v. Sinsletarv, 963 F.2d 1433 (11th Cir. 1992). After conducting an evidentiary hearing, the district court entered judgment denying relief on June 30, 1994. The Eleventh Circuit affirmed the judgment. Buenoano v. Singletary, 74 F.3d 1078 (11th Cir. 1996), reh. denied, 85 F.3d 645 (11th Cir. 1996). Petition for writ of certiorari was thereafter denied. Buenoano v. Sinsletarv, 117 S. Ct. 520 (1996).

Ms. Buenoano and James Buenoano, her son, were charged as co-defendants for the June 25, 1983 attempted first degree murder of John Gentry in Escambia County (R. 3523). James and Judy Buenoano were both represented by James Johnston. In James Buenoano's trial, the State presented evidence that Judy Buenoano had nothing to do with Gentry's death and testimony of a police officer that the physical evidence adduced by the investigators was consistent with the evidence of her innocence. James Buenoano was nevertheless acquitted.

During Ms. Buenoano's trial, the evidence tending to exculpate her was not presented. What was presented was the testimony of Roger Martz. Martz testified that he was a forensic chemist for the FBI. Martz testified that he found a poison in some tablets which Gentry claimed were given to him by Ms. Buenoano. Martz testified that in July, 1983 he received two Vicon C tablets, a multivitamin, sent to him by the Chief of Police in Pensacola, Florida. Martz testified that he took the powder out of the capsules and performed infrared analysis, x-ray analysis, and mass spectometry analysis (R. 2736-38) and that initially, he was unable to make an identification (R. 2738). Martz testified that subsequently he determined that the powder contained in the capsules was negative for vitamins but was positive for paraformaldehyde. According to Martz, paraformaldehyde is an organic polymer that has a variety of uses and is toxic[5] (R. 2770-71). Thus, Martz's testimony provided crucial collateral crimes evidence[6] against Ms. Buenoano in her capital trial.

In its closing argument during the guilt phase of the Escambia County trial, the State seized upon Martz's testimony in order to show Ms. Buenoano had a propensity and intent to commit the charged offense in this circumstantial evidence case:

By Mr. Patterson:

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[5]According to his lab report, "highly" toxic.

[6]See Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

> Mr. Martz testified from the FBI lab in Washington, "yes I received those pills and I tested them." And **lo and behold, what did he find out was in them?** Paraformaldehyde. What is paraformaldehyde. It is a poison ... She tried to kill him with paraformaldehyde first. Did she intend his death? Clearly. Clearly she intended his death.

(R. 2889, 2920). Ms. Buenoano was convicted of attempted first degree murder of John Gentry.

Martz's Escambia County testimony then became pivotal during Ms. Buenoano's First Degree murder trial in Orange County. Martz' testimony provided the basis for uncharged collateral crime evidence to be admitted against Ms. Buenoano.

Ms. Buenoano's trial counsel stipulation of the following was read to the jury during the guilt phase of the Orange County proceedings:

> By Mr. Perry:
>
> It's been stipulated by the State and the defense that the pills that Mr. Gentry testified to were retrieved by Detectives Chamberlain and Steele of the Pensacola Police Department, that those pills were taken into evidence by Officer Gwendolyn Pate, that she then in turn transmitted those pills to the Florida Department of Law Enforcement, where they were analyzed by a chemist by the name of Marion Estees.
>
> Mr. Estees determined, one, that the container of the capsules were Vicon C type capsules, two, that Mr. Estees was unable to determine the contents of the capsules.
>
> Those capsules were subsesuentlv forwarded to the Federal Bureau of Investisation's laboratorv in Washington, D.C., and examined by a chemist by the name of Roser Markz (sic) of the FBI. Mr. Markz (sic) determined that the capsules were Vicon C, and that the substance contained inside of

> those capsules was saraformaldehvde, Class III poison.
>
> It's been further stipulated by the State and the defense that search warrants were executed by the police, Pensacola Police Department, on the home and business of the defendant in July of 1983, in Pensacola, Florida, that as a result of the execution of that search warrant of her home there was no paraformaldehyde found, nor any arsenic.
>
> That as a result of the execution of the search warrant at her business, Fingers and Faces, there was no paraformaldehyde found there, nor was there any arsenic found there.

(R. 1012) (emphasis added).

During the penalty phase portion of the Orange County trial, the prosecutor, Michael Patterson, from the Escambia County case, testified that Ms. Buenoano gave Gentry Vicon C tablets that contained poison (R. 1525). Based on Martz's findings and trial counsel's stipulation, the prosecutor, Belvin Perry, in the Orange County case, queried the jury during his penalty phase closing argument:

> Where was God in her life when she tried to murder John Gentry, and when the sinsle dose Of Poisoning and when the double dose didn't work she tried dynamite? . . . And what mercy did she show John Gentry? When she couldn't poison him, what did she do? Took him out for what they thought would be his last supper when he went out that night, and only God saved that man's life

(R. 1713, 1715) (emphasis added).

The conviction obtained against Ms. Buenoano in Escambia County was used in Orange County to support the State's case for a sentence of death. The trial court relied on the conviction in

sentencing Ms. Buenoano to death (R. 2342-43). In affirming Ms. Buenoano's conviction and sentence, this Court placed great weight on the collateral crime evidence of poisoning. Buenoano v. State, 527 So. 2d 194 (Fla. 1988).

Beginning in January of 1997, having taken responsibility to represent Ms. Buenoano, her then CCR-counsel, Mr. Peter Mills, began directing an investigation of her case by having public records requests made to any and all relevant state agencies. By the end of January, nearly thirty (30) requests had been made. Three (3) agencies: the Office of the State Attorney in and for Orange County, the Orlando Police Department and the Orange County Sheriff, refused to comply with the requests on the basis of Rule 3.852.

On April 9, 1997, collateral counsel requested records pursuant to the Freedom of Information Act (FOIA), the Privacy Act, Brady v. Maryland, 373 U.S. 83 (1963) and Gislio v. United States, 405 U.S. 150 (1972) from the: (1) the Freedom of Information Act Office of the United States Department of Justice, (2) the Criminal Investigations Division of the Office of the Inspector General of the United States DOJ, (3) the FBI Laboratory Task Force, (4) the Freedom of Information Act/Privacy Act Division of the FBI in Washington, D.C. and (5) the Freedom of Information Act/Privacy Act Division of the FBI in Tampa, Florida.

The requests sought access to information about the ongoing investigation of the FBI Lab and Roger Martz by the Department of

Justice including any and all materials discovered or produced during the investigation which regarded Judy A. Buenoano or Roger Martz in any way,

On April 15, 1997, the United States Department of Justice's Office of Inspector General issued a report entitled "THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES -RELATED AND OTHER CASES " [hereinafter OIG Report]; See Attachment 1. The result of a lengthy and detailed investigation into three sections of the FBI Crime Laboratory in Washington, D.C (the Explosives Unit, the Materials Analysis Unit, and the Chemistry-Toxicology Unit) the OIG report issued findings regarding various practices at the FBI Crime Laboratory as well as addressed serious deficiencies noted in various cases in which the FBI Crime Laboratory and its scientists were involved.

As a result of their investigation, the OIG recommended that Martz "should not hold a supervisory position in the Laboratory, and the FBI should assess whether he should continue to serve as a Laboratory examiner" (OIG Report at 4). The OIG report concluded:

> Based on our investigation, we conclude that Roger Martz lacks the credibility and judgment that are essential for a unit chief, particularly one who should be substantively evaluating a range of forensic disciplines. We found Martz lacking in credibility because, in matters we have discussed above, he failed to perform adequate analyses to support his conclusions and did not accurately or persuasively describe his work. We recommend that Martz not hold a supervisory position. The Laboratory should evaluate whether he should continue to serve as an examiner or whether he would better

> serve the FBI in a position outside the Laboratory. If Martz continues to work as an examiner, we sussest that he be supervised by a scientist qualified to review his work substantively and that he be counseled on the importance of testifying directly, clearly and obiectivelv, on the role of protocols in the Laboratory's forensic work, and on the need for adequate case documentation. Finally, we recommend another aualified examiner review any analytical work by Martz that is to be used as a basis for future testimony.

OIG Report at 448 (emphasis added).

On April 11, 1997, Ms. Buenoano filed Petitions seeking Writs of Mandamus against the three Orange County agencies who had refused to disclose records. Later that month, the office representing Ms. Buenoano ceased all operations due to budget shortfalls. That office, CCR, was abolished on June 16, 1997, and in its place three (3) new regional CCRCs were created. By October, all the lead attorneys and most of the second chair attorneys from the former CCR had left, leaving only undersigned who had been promoted to lead attorney just September 4, 1997. Three attorneys who had been assigned to the Buenoano case in the spring of 1997 were among the attorneys who were gone by August. The legal team assigned to the Buenoano case was in a constant state of flux until after the warrant was signed due to the changes in personnel at the CCC-NR.

Meanwhile, on May 2, 1997, a DOJ FBI Task Force attorney, Amy Jabloner contacted Gail Kinsley at the United States

Attorney's Office for the Northern District of Florida via a four (4) page facsimile transmission.[7]

On May 12, 1997, Jabloner contacted Kinsley again and forwarded to the U.S. Attorney's Office the laboratory reports issued by Roger Martz in the Buenoano case for U.S. Attorney P. Michael Patterson's review.

On June 4, 1997, a representative from the U.S. Attorney's Office faxed to Jabloner a copy of a June 2, 1997 letter from U.S. Attorney Patterson to First Judicial Circuit State Attorney Curtis Golden which stated that his recollection was that the defense stipulated to the results of Martz's chemical analysis and he therefore did not testify during Ms. Buenoano's attempted murder trial in Escambia County.

On June 5, 1997, a DOJ FBI Task Force attorney contacted Assistant State Attorney Coffman via a four (4) page facsimile.[8]

On June 12, 1997, DOJ FBI Task Force attorney, Lucy Thompson, wrote First Judicial Circuit Assistant State Attorney John C. Spencer and forwarded to him as requested, a copy of the Office of the Inspector General's report on the FBI Lab, the lab reports for the Buenoano case and a "case information form" to fill out and return.

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[7]This communication as well as the others between state and federal officials mentioned *supra were* only discovered by collateral counsel on February 20, 1998. The contents of this communication remain undisclosed.

[8]The contents of this communication have not been disclosed.

On June 26, 1997, Spencer wrote Thompson representing that Martz did not testify in the Escambia County trial and that his chemical analysis was not significant in either the prosecution or verdict.[9] Spencer also forwarded an "FBI Laboratory Case Review" form to Thompson which stated that the forensic analysis performed by the FBI lab was not material to the verdict.

In a letter dated June 27, 1997, the Freedom of Information Act/Privacy Act Division of the FBI in Washington, D.C. provided 81 pages of material with an explanation that the release of 81 pages contains additional pages that were "inadvertently not copied" in a 1990 release to Ms. Buenoano.[10] (emphasis added). The remaining requested records were withheld.

In October[11] of 1997, Ms. Buenoano's Orange County Petitions for Writ of Mandamus were transferred to Ms. Buenoano's criminal case by order of the circuit court to be treated as motions to compel.

On December 9, 1997, the Governor signed a warrant for Ms. Buenoano's execution which is scheduled to take place March 30,

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[9]A second identical letter was sent dated August 4, 1997.

"Collateral counsel had previously requested FBI files via the Freedom of Information Act. In a response dated March 29, 1990, the FBI forwarded to CCR Investigator Gary A. Hendrix, forty (40) pages of material. The material provided in 1997 included numerous pages of "Lab Worksheet Items" never previously provided. Included in those pages are the test result charts of the tests conducted by Martz.

[11]In the intervening months, CCR ran out of money, was abolished and replaced by three (3) new Regional Offices of the Capital Collateral Counsel, and Ms. Buenoano's former attorney, Mr. Peter Mills, resigned.

1998. Counsel began contacting the Court in the Ninth Judicial Circuit to try to set a hearing on public records issues.

On December 17, 1997, this Court directed that any proceedings in the case be expedited. Thereafter, counsel's efforts to set a hearing were successful. Hearing was set for January 6, 1998.

On December 18, 1997, Task Force attorney Thompson wrote a letter to Ninth Judicial State Attorney Lawson Lamar and forwarded crucial public records.[12] Thereafter in a letter dated December 22, 1997, Thompson forwarded additional records to the state with instructions that the documents were not public and should only be disclosed pursuant to a protective order because the material might contain reference to individuals whose identification was protected or because the information was otherwise sensitive.[13]

Ms. Buenoano's motions to compel were denied on January 6, 1998, and the Court issued an written order denying on January 8, 1998.

Thereafter the State filed its Request for ***In Camera*** Inspection and Judicial Determination of Prosecutorial Obligation stating that "the Office of the State Attorney has knowledge of the existence of additional FBI records believed not to have been previouslv disclosed to Buenoano through anv source, records to

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[12]Submitted to the Court for in camera inspection on January 12, 1998.

[13]A portion of these records were then disclosed to Ms. Buenoano on January 23, 1998.

which it is believed Buenoano will assert entitlement" (PC-R2. 188) (emphasis added). The matter was set for hearing to be conducted January 12, 1998.

Meanwhile, on January 8, 1998, Assistant State Attorney Coffman received a thirteen (13) page facsimile from Jabloner.[14]

On January 12, 1998, Ms. Buenoano filed a rehearing motion (PC-R2. 191-318) and the circuit court conducted a hearing on the State's request for *in* camera inspection (T3. 1-29) . Ms. Buenoano **was** not provided with an inventory of what the State filed under seal for *in camera* inspection or any detailed information about the sources of the material or when it was obtained by the State. At the hearing the State submitted four (4) manila envelopes of documents to the circuit court (T3. 25) (emphasis added).

Later that day, the State submitted "two (2) manila envelopes containins **additional** materials provided to my office by the United States Department of Justice" in connection with Ms. Buenoano's case which it stated had been not been filed under seal during the hearing "through . . . inadvertence." Assistant State Attorney Coffman's cover letter to the circuit court also stated that "for purposes of identification, these materials constitute the entire contents of the transmittal dated December 18, 1997." (PC-R2. 190, 345, 346; see, Motion to Expedite Appeal) (emphasis added).

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[14]The contents of this correspondence have also never been provided.

On January 15, 1998, the circuit court issued a seven (7) page order regarding the State's Request for *In Camera* Inspection (PC-R2. 332-38) and denied Ms. Buenoano's motion for rehearing.

Upon receipt of the circuit court's orders, Ms. Buenoano made a formal Rule 3.852 request on the Office of the State Attorney (PC-R2. 348-54; 380-83). The request specifically invoked Rule 3.852 (n) as an additional basis for the request in light of the fact that it had been shown that the existence of some of the records requested could not have previously been known to Ms. Buenoano. The Office of the State Attorney responded in a letter dated January 21, 1998 (PC-R2. 384-85).

Meanwhile, Ms. Buenoano requested that the attorney for George Trepal (who was challenging his conviction and sentence of death on the basis that unreliable Martz testimony was utilized during his homicide by poisoning trial) and the State Attorney for Polk County disclose whatever material they had in their possession from the FBI Lab Task Force (See, Motion to Expedite Appeal). Stating that because the material is part of Mr. Trepal's active litigation file and because the circuit court has indefinitely extended protective orders as to additional materials which are under seal, Mr. Trepal will not grant Ms. Buenoano's request for access to the material he possesses from the FBI Lab Task Force. Mr. Trepal's denial stated that the documents form the basis of various claims for relief on behalf of Mr. Trepal, including claims arising under both Bradv and

Gislio and that the records could well provide similar claims on behalf of Ms. Buenoano (See, Motion to Expedite Appeal).

On January 20, 1998, the State filed a pleading entitled Supplemental Request for *In* Camera Inspection and Judicial Determination of Prosecutorial Obligation (PC-R2. 357-58). The request stated that the State has additional materials "obtained from the Federal Bureau of Investigations (FBI) containing information which may or may not have been previously disclosed to Buenoano through any source" and these should also be reviewed ***in camera*** by the circuit court.[15]

On January 21, 1998, Ms. Buenoano made a second formal Rule 3.852 request (PC-R2. 679-88), again specifically invoking Rule 3.852 (n) as an additional basis for disclosure in light of the fact that the State had revealed the existence of additional records of which Ms. Buenoano had no previous knowledge.

On January 21, 1998, Ms. Buenoano filed Notice of Appeal of the circuit court's orders of January 8, 1998 (denying Motions to Compel); January 15, 1998 (regarding ***in camera*** inspection); and all other adverse trial court rulings.

On January 22, 1998, Ms. Buenoano filed a Motion to Expedite Appeal Proceedings in this Court.

On January 23, 1998, the circuit court held a hearing on the State's Supplemental Request for ***In*** Camera Inspection and

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[15]These materials, it now appears, were part of the materials enclosed with the DOJ's December 22, 1997 letter to Lawson Lamar and therefore were part of the materials that DOJ requested only be disclosed under a protective order.

Judicial Determination of Prosecutorial Obligation. At that hearing, the State finally provided some information about the FBI materials, but still did not spell out when they received the materials:

> As to the circumstances of the State's possession of these materials, I would like to offer the following explanation:
> My office received three transmittals from Justice, sent on my request, so that a break-in analysis [sic] could be conducted of materials which Justice had identified could be potentially Brady materials which were in their possession.

(T4. 6) (emphasis added). The State's request was denied.

On January 23, 1998, Ms. Buenoano initiated a FOIA lawsuit against the FBI and the Department of Justice.

Also on January 23, 1998, the State filed and served on counsel for Ms. Buenoano the documents at issue in the Supplemental Request for In Camera Inspection (PC-R2. 475-673).

On January 26, 1998, this Court ordered a briefing schedule and set oral argument for Thursday, February 5, 1998.

On February 5, 1998, this Court ordered the parties to attempt agreement regarding terms and conditions for a protective order which would facilitate Ms. Buenoano's need to gain access to and review the sealed documents. No such agreement was forthcoming due to the State's position that it no longer possessed copies of the sealed documents and it's assertion that it would not disclose them in any event. Ms. Buenoano was willing to agree to the conditions with the understanding that she could ask for the protective order to be lifted at such time

as the documents needed to be referred to in her postconviction proceedings.

On February 6, 1998, this Court ordered the State Attorney for the Ninth Judicial Circuit, in and for Orange County, the Orange County Sheriff's Department, and the Orlando Police Department to comply with Ms. Buenoano's prior Chapter 119, Florida Statutes, public records requests within ten (10) days.

By an Amended Order that same day, this Court required the agencies to file a certification of diligent search with the trial court by February 16, 1998.

On February 9, 1998, this Court denied Ms. Buenoano's Motion for Stay of Execution "...without prejudice to re-file said motion in the trial court."

The circuit court held a status hearing on February 12, 1998. Two thousand four hundred and sixteen (2416) documents were delivered to undersigned on February 16, 1998.

On February 20th, collateral counsel received a shipment of twenty (20) previously withheld documents from the DOJ - Criminal Division of the records from the FBI Task Force.

On February 20, 1998, collateral counsel faxed a request to the DOJ for permission to interview Frederic Whitehurst regarding Martz's conduct in the Buenoano cases.

On February 25, 1998, the DOJ denied Ms. Buenoano's request for permission to interview.

On February 26, 1998, Ms. Buenoano filed a Petition for Writ of Mandamus/Prohibition and to Invoke This Court's Extraordinary

Jurisdiction to Issue All Writs Necessary to the Complete Exercise of Its Jurisdiction and Request for Stay of Execution [Petition],

On that same date, this Court requested Assistant State Attorney Coffman and Assistant State Attorney Spencer to file a response.

On February 27, 1998, the State filed its Response in which it flatly conceded it falsely informed federal agencies throughout its prior correspondence; that it informed the federal agencies Martz did not testify without first checking the transcript of the trial; and most importantly admitting that Mr. Martz's testimony was material to the outcome of the Escambia County trial:

> Thank you for faxing the transcript of the testimony of Robert [sic] Martz in the above trial. It would appear that Mr. Martz testified to "similar fact" evidence in the bombing case. Therefore, my letters of August 4, 1997 and June 26, 1997 were in error. It should be noted that neither the prosecutor, Mike Patterson, nor myself had the benefit of having a transcript of the trial to review prior to my earlier response.
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> Whether or not the lab work was "material" to the verdict cannot be determined absolutely. This would be determined by the jury in reaching it's verdict. It must be assumed, however than any evidence received by a jury may have been material to one or more jurors. On the other hand, I did not see anything in the report by the Department of Justice that would directly relate to the admissibility or credibility of Mr. Martz's testimony.

(PC-R4. 186) (emphasis added).

On Friday, February 27, 1998, Dr. Whitehurst reached a settlement with the FBI and, effective that day, took an early retirement from the FBI and established the "Forensic Justice Project" to review thousands of FBI case files to make sure that lab oversights have not resulted in any injustice. Undersigned attempted to determine how this development effected access to Whitehurst, but by March ___, 1998, that information could not be determined.

On Monday morning, March 2, 1998, in a status conference held before United States District Court Judge Daniel T. K. Hurley in Buenoano v. United States Department of Justice and Federal Bureau of Investigation, Case No. 98-6124 (brought pursuant to the Freedom of Information Act), the following was determined: The DOJ Office of the Inspector General, having previously withheld all documents requested by Ms. Buenoano, agreed to produce 7,000 pages by March 6, 1998, another 10,000-12,000 pages **by** March 13, 1998, but was unable to determine when a final batch of several hundred documents would be provided. The FBI was to provide approximately 12,000 pages by March 6, 1998.

Judge Hurley and the Assistant U.S. Attorney in attendance urged undersigned to seek the assistance of the National Association of Criminal Defense Lawyers (NACDL), because the Assistant U.S. Attorney represented that NACDL and Ms. Buenoano were seeking and were to receive the same federal documents. Undersigned contacted NACDL and learned that NACDL is attempting

to index the documents disclosed to date to assist defense attorneys. G. Jack King, Jr., Director of Public Affairs of NACDL, informed undersigned that there are not simply some 30,000 documents which the government has decided to release, but at least 60,000 documents. NACDL has received only approximately 32,000 of these and indicates that the task of indexing the documents is far from complete. Mr. King has however already identified "...a number of documents pertaining to . ..closed capital...cases..." not referred to in the OIG's final report and it is Mr. King's opinion that "...cases involving . ..toxicology (e.g., suspected poisoning cases)" are "[p]articularly suspect and deserving of the most close reexamination and scrutiny..." Finally, Mr. King attests to the fact that "NACDL has volumes of materials generated and/or collected by the OIG calling into question the FBI's general expertise in these areas [including poisoning cases] and that "[m]uch of this material has yet to be reviewed." (PC-R4. 321-25).

Since receipt of Mr. King's original affidavit, Mr. King has provided an additional affidavit, dated March 10, 1998, explaining that NACDL attended a status conference regarding it's ongoing FOIA litigation against the U.S. Department of Justice on March 4, 1998, and, in pertinent part, stated: (a) DOJ has represented that NACDL has "over 75 percent" of the documents it intends to release; (b) DOJ has represented that by "mid-to-late April" NACDL should receive approximately "95 percent" of such documents; (c) that no timetable has been set for the remaining

five (5) percent of responsive documents, many of which are under the control of other federal agencies; (d) that additional litigation may be required to obtain documents claimed exempt by DOJ; and (e) Mr. King's FOIA clerk has identified "numerous documents pertaining to FBI Special Agent Roger Martz," but NACDL has not had time to review all documents received thus far and certainly have no knowledge of the contents of records which will be received in the future. See, attached affidavit dated March 10, 1998, of G. Jack King, Jr., as Attachment 2.

On March 2, 1998, this Court issued an order transferring Ms. Buenoano's Petition to the circuit court, with specific instructions to treat "...the petition and request for stay of execution as a motion pursuant to Florida Rule of Criminal Procedure 3.850, subject to amendment." A hearing upon the original writ and request for stay was ordered to occur by March 9, 1998. Further, Ms. Buenoano was advised that she could not appeal any ruling on the original petition and request for stay until a ruling was obtained on "...any amended rule 3.850 motion."

On March 3, 1998, the government moved for the scheduling of a hearing, pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). At 5:30 p.m. on March 3, 1998, the circuit court issued an order setting hearing for March 6, 1998, and directing Buenoano to file her Amended Rule 3.850 Motion by 5:00 PM, Wednesday, March 4, 1998, and directing the state to file its response by 12:00 PM, Thursday, March 5, 1998 (PC-4R4. 399,400).

Ms. Buenoano filed her motion as directed. The motion was by necessity hastily thrown together and as a result contained obvious errors - such as procedural facts about the wrong case.[16] The state filed its answer as directed.

At the March 6, 1998 hearing, the Court did not entertain the public records claim in the motion, but rather heard only the motions to compel which it had previously set for hearing that day.

During the Huff hearing, collateral counsel fully apprised the Court of the facts undersigned had discovered from NACDL and which were subsequently included in Mr. G. Jack King, Jr.'s affidavit of March 10, 1998. Thus, the circuit court knew many federal records would not be made available to Ms. Buenoano's counsel until mid-to-late April, 1998 (T5. 131,132), quite obviously, some weeks after Ms. Buenoano's scheduled execution in Florida's electric chair.

On March 9, 1998, Ms. Buenoano filed a Supplemental Motion to Vacate hurriedly written after one of her experts returned from a conference and made a report of some of his initial opinions about the case. The State filed a response. In the afternoon of March 9, 1998, the circuit court issued an order denying all relief (PC-R4. 706-729).

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[16]The motion was titled Emergency Motion to Vacate, it probably should have been titled "Amended" motion.

On March 11, 1998, the circuit court issued an order granting in part and denying in part some of Ms. Buenoano's motions to compel (PC-R4. 887-905).

On March 12, 1998, a notice of appeal of that order was filed. This Court ordered briefing and consolidated the cases for oral argument.

Later on the 12th, the circuit court conducted hearings on other pending Motions to Compel. Counsel for Ms. Buenoano appeared telephonically in order to conserve time for preparation of the instant brief in compliance with this Court's briefing schedule. The trial court reserved ruling, indicating that written orders would be forthcoming.

On March 13, 1998, an additional status conference will be held in Buenoano v. U.S. Department of Justice and Federal Bureau of Investisation, Case No. 98-6124.

The circuit court has set the remaining public records issues for hearing March 17, 1998.

ARGUMENT

ARGUMENT I

A STAY OF EXECUTION MUST BE GRANTED TO REMEDY THE CIRCUIT COURT'S DEPRIVATION OF MS. BUENOANO'S DUE PROCESS AND EIGHTH AMENDMENT RIGHTS. DUE PROCESS WAS VIOLATED WHEN THE CIRCUIT COURT FAILED TO GRANT THE RELIEF REQUESTED AND UNREASONABLY FORCED MS. BUENOANO TO FILE AN AMENDED MOTION TO VACATE JUDGEMENT AND SENTENCE BEFORE CRUCIAL PUBLIC RECORDS WERE DISCLOSED BY STATE AND FEDERAL GOVERNMENT AGENCIES AND TO LITIGATE HER POSTCONVICTION CLAIMS WHILE A PROTECTIVE ORDER OF PARTICULARLY CRITICAL INFORMATION REMAINED IN EFFECT.

Postconviction litigation is governed by principles of due process. See Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996); Holland v. State, 503 So. 2d 1250 (Fla. 1987). The circuit court violated due process by forcing Ms. Buenoano to file an amended motion to vacate judgement and conviction before crucial public records were disclosed by state and federal government agencies. The court below erred in denying Ms. Buenoano a full and fair opportunity to investigate, prepare, argue and present her postconviction claims, especially in light of the fact that state action has obstructed her efforts to obtain the records. As a result, counsel was unable to present Ms. Buenoano's case fully and Ms. Buenoano's rights under the United States and Florida Constitutions were violated. Moreover, the circuit court unreasonably directed Ms. Buenoano to file her amended motion to **vacate** by March 4, 1998 on less than 24 hours notice.[17] The

[17]Furthermore, the circuit court ordered the motion filed during the pendency of the appeal of the court's denial of the State's request for a protective order. Thus, the stay order was

circuit court summarily denied the motion. Therefore, Ms. Buenoano appeals the denial of the requests for relief made in her Petition and the denial of her motion to vacate judgment and sentence and requests a stay of execution. The relief sought here is predicated on extraordinary circumstances. This Court should grant a stay of execution.

The relief sought in the Petition transferred by this Court to the circuit court was unreasonably denied and Ms. Buenoano's only remedy is for this Court to issue a stay of execution. Documents which were only disclosed 26 days ago should have been disclosed by the state over 8 months ago and could have been if the state had fully and truthfully complied with the federal government's inquiry. Instead the documents were aqcuired belatedly by the state and then ardently withheld from Ms. Buenoano despite the fact that many were public and others could have been disclosed either under a stipulated, agreed upon protective agreement or under court ordered protection. Huge numbers of additional documents previously withheld by the federal government are now in the process of being disclosed.

By falsehoods and omissions, the State obstructed Ms. Buenoano's rights to pursue her postconviction remedies. Ms. Buenoano has an established legal right to due process of law and Curtis Golden, Lawson Lamar, and their assistants have an indisputable legal duty to not interfere with that right by providing false information to the Department of Justice in its

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in effect when the motion was filed.

investigation of Roger Martz and the FBI Laboratory related to Ms. Buenoano's cases. Art. V, sec. 3(b)(9), Fla. Const.; Fla. R. Crim. P. 3.850; Evitts v. Lucey, 105 S.Ct. 830 (1985); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994); Holland v. State, 503 So. 2d 1250 (Fla. 1987); Teffteller v. Dugger, 676 So. 2d 369 (Fla. 1996); and Huff v. State, 622 So. 2d 982 (Fla. 1993). There is no other adequate remedy at law or equity available to Ms. Buenoano than for this Court to grant a stay of execution.

The prosecution has a continuing duty to disclose to a defendant any evidence favorable to the accused and that duty extends to post-conviction proceedings. Pennsylvania v. Ritchie, 107 s. ct. 989, 1002 (1987); Smith v. Roberts, 115 F.3d 818 (10th Cir. 1997); State v. Hall, 509 So. 2d 1093 (Fla. 1987). Here, the State Attorney's offices in the Ninth Judicial Circuit and First Judicial Circuit of Florida affirmatively violated that duty when they falsely informed/or failed to inform DOJ the extent of FBI analyst Roger Martz's involvment in the Buenoano cases.

Last year the federal government set up a task force to investigate the pivotal role of special FBI agent Roger Martz in specific cases to determine whether he fabricated test results, testified untruthfully or otherwise engaged in misconduct. That Task Force produced a wealth of information in specific cases such as the case of George Trepal. In this case, because the State of Florida falsely informed the FBI Laboratory Task Force that Roger Martz never testified against Judy Buenoano, the

Office of the Inspector General never investigated Martz's conduct in her cases and documents related to the government's investigation were not released until December of 1997.

It was collateral counsel's April 1997 requests to numerous federal agencies including the FBI Laboratory Task Force, made as soon as collateral counsel knew anything about the Martz investigation, that caused the FBI Laboratory Task Force to make inquiries of the Buenoano prosecutors so they could determine whether to investigate Martz's conduct and/or to forward information unearthed in their investigation to the State for disclosure to collateral counsel.[18]

State Attorney Curtis Golden, through Assistant State Attorney John Spencer and former Assistant State Attorney (now U.S. Attorney for North Florida) P. Michael Patterson falsely informed the FBI Laboratory Task Force (PC-R4. 149-55). State Attorney Lawson Lamar and Assistant State Attorney Paula Coffman have conceeded that when requested to provide information to the federal government about Martz's involvement in the Buenoano cases, they failed to do so (PC-R4. 157; 199).

Ms. Buenoano has been unreasonably forced to attempt to overcome the obstruction the State has erected in her case not only under the pressure of a pending execution date but under unreasonable conditions applied by the circuit court, namely

[18]The State did not become involved, as Assistant State Attorney Coffman has represented, in the FBI Laboratory Task Force investigation on its own initiative, however the full extent of the contact between the state and federal government remains unknown.

before she can possibly obtain and review the documents now becoming available by the federal government, A stay should be granted.

Regardless of Mr. Patterson's incorrect recollection that Martz never testified, he nevertheless warned Golden that:

> The Freedom of Information request pertaining to the FBI Laboratory and Mr. Martz, in my view might directly impact upon not only the case that I prosecuted but the other Buenoano prosecutions handled by your office.

(PC-R4. 150).

Mr. Patterson then suggested to Curtis Golden that he appoint an assistant to coordinate the disclosure of the requested information with the FBI Laboratory Task Force. Id. That assistant was John Spencer.

Collateral counsel now has documents revealing that Mr. Spencer, on two occasions, June 26, 1997 and August 4, 1997, falsely informed FBI Laboratory Task Force Director Lucy Thompson that Martz never testified against Judy Buenoano. Spencer's two letters read:

> I have reviewed our file in the above styled cause and talked with Michael Patterson, the prosecutor. Roser Martz was not called as a witness. His chemical analyses of items submitted was not significant in either the prosecution or the verdict.

(PC-R4. 152-3).

These and other damaging documents were never previously disclosed to Ms. Buenoano when the Escambia County State Attorney's Office provided records on August 27, 1997 in response

to a chapter 119 request and yet obviously these records were in existence at the time of that response.

It is clear that neither Orange County nor Escambia County provided the FBI Task Force with the truthful story about the roll Roger Martz played. The Orange County prosecutor himself, Belvin Perry, is on record as follows:

> The testimony of Special Agent Martz is very imwortant to the prosecution of this case. Without his testimony we will not be able to wresent any testimony concerning the attempted murder of John Gentry. This similar fact testimony is very critical, without it, the State will have a very weak case. Therefore, I am requesting that you permit Special Agent Martz to testify in this cause.

(PC-R4. 159-60). It would appear that no such admission has been made to the FBI Laboratory Task Force by Lamar, Coffman or any other Ninth Judicial Circuit Assistant State Attorney. This Court must issue a stay of execution. The delay here in the investigation of Martz's conduct and the federal government's release of investigative information is due to no fault of Ms. Buenoano.

Under Rule 3.850 (b)(l) Ms. Buenoano should be entitled to two years in which to bring claims once the state and federal government agencies have provide all the information in their possession requested by Ms. Buenoano and relevant to her claims because "[t]he facts on which the claim[s] [are] predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.850(b)(1); see also Swafford v. State, 679 So. 2d 736,

739 (Fla. 1996). Any other death sentenced inmate similarly situated to Ms. Buenoano but for the pendency of an active death warrant would be entitled under Rule 3.850 and Rule 3.851 to two (2) years in which to investigate and present such a claim. Id. Certainly this Court has afforded George Trepal with a more fair and adequate opportunity to investigate and present his similar claims. Like Trepal, Ms. Buenoano still does not have all the information available and what she has received was either received after March 4, 1998 or could not be reviewed before March 4, 1998 by either her attorneys or experts.

For these reasons, this situation is exactly one which should not be litigated under the pressure of a pending death warrant but should rather be treated as an initial Rule 3.850 motion would be treated.[19] In fact Rule 3.851(a) (3) specifically provides that "should the governor sign a death warrant before the expiration of the time limitation in subdivision (b)(l), this Court will, upon a defendant's request, grant a stay of execution to allow any postconviction relief motions to proceed in a timely and orderly manner. Fla. R. Crim. P. 3.851(b) (3). Ms. Buenoano has shown that her death warrant was signed before "the expiration of the time limitation in subdivision (b)(1)."

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[19]This Court's comments to Rule 3.851 state:

> This Court agrees that the initial round of postconviction proceedings should proceed in a deliberate but timely manner without the pressure of a pending death warrant.

ARGUMENT II

MS, BUENOANO WAS DENIED A FULL ADVERSARIAL TESTING BECAUSE THE STATE WITHHELD CRITICAL EXCULPATORY EVIDENCE DURING THE GUILT/INNOCENCE AND PENALTY PHASES OF HER TRIAL. MS. BUENOANO'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED AND CONFIDENCE IN THE RELIABILITY OF THE VERDICT IN MS. BUENOANO'S CASE WAS UNDERMINED THE STATE PRESENTED FALSE OR MISLEADING EVIDENCE AND/OR WITHHOLDING OF EXCULPATORY EVIDENCE.

The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); Gislio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972), but also has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173 (1959); Mooney v. Holohan, and to correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103 (1957). Where, as here, the State uses false or misleading evidence, and suppresses material exculpatory and impeachment evidence, due process is violated. Such State misconduct also violates due process when evidence is manipulated by the prosecution. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). All of these occurred in Ms. Buenoano's case.

The State knowingly presented false and misleading testimony in order to secure a conviction. This violated the Eighth and Fourteenth Amendments. Gislio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). The Florida Supreme Court has held that Rule 3.850 relief is required where

new non-record evidence establishes that the State "subvert[ed] the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993).

When a prosecutor presents false and misleading evidence, a reversal is required unless the error is harmless beyond a reasonable doubt. United States v. Baslev, 473 U.S. 667, 679 n.9 (1985). A prosecutor's knowing use of false evidence violates a criminal defendant's right to due process of law. Mooney v. Holohan, 294 U.S. 103 (1935). The Fourteenth Amendment's Due Process Clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Aqurs, 427 U.S. at 103-04 and n.8. The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Gislio, 150 U.S. at 153. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the court has applied a strict standard. , .not just

because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Asurs, 427 U.S. at 104.

In cases involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. United States v. Bagley, 473 U.S. 667, 679 n.9 (1985), quoting United States v. Agurs, 427 U.S. at 102. The most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes from the mouth of a State's witness. The defendant is entitled to a new trial if there is **any reasonable likelihood** that the falsity affected the verdict. This test is the equivalent of whether the State has shown the error harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679 n.9. If there is **"any reasonable likelihood"** that the uncorrected false and/or misleading testimony of the State's witnesses affected the verdicts at guilt-innocence or sentencing, Ms. Buenoano is entitled to relief. Obviously, here, there is much more than just a possibility--as the factual allegations in this motion demonstrate.

When the "inquiry is whether the State authorities knew" of the falsity of a government witness' testimony, "[i]t is of no consequence that the facts pointed to may support only knowledge of the police **because** such knowledge **will be imputed to state prosecutors**." Williams v. Griswald, **743** F.2d 1533, 1542 (11th

Cir. 1984) (citations omitted) (emphasis added). Moreover, "[i]t is of no consequence that the falsehood [bears] upon the witness's credibility rather than directly upon [the] defendant's guilt." Brown v. Wainwrisht, 785 F.2d 1457, 1465 (1986), quoting Williams v. Griswald, and Nasue v. Illinois.

Ms. Buenoano **was** denied a reliable adversarial testing. The jury did not hear exculpatory evidence. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence. Confidence is undermined in the outcome since the jury did not hear the evidence.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. This standard applies whether the breakdown in the process occurs because the prosecutor failed in his duty to disclose or the defense attorney failed in his duty to investigate. Strickland v. Washington, 466 U.S. 668 (1984); Bagley.

The prosecution's suppression of evidence favorable to the accused violates due process. United States v. Bagley. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel request the specific information. A defendant's right to present favorable evidence is violated by such state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Gislio v. United States, 405 U.S. 150 (1972). Here, evidence favorable to the defense, evidence that supported and furthered the defense, was not disclosed to the defense. This must be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). This undisclosed evidence undermines confidence in the outcome of the guilt phase and certainly the penalty phase.

Whether defense counsel failed in his duty or the prosecutor failed in his duty is of no consequence if confidence is undermined in the outcome of the trial as a result of evidence which went either undisclosed or undiscovered. Smith v. Wainwrisht.

Confidence in the outcome of Ms. Buenoano's trial is undermined because here exculpatory evidence did not reach the jury.[20] Either the State unreasonably failed to disclosed its

[20]Workman v. Tate, 957 F.2d 1339, 1346 (6th Cir. 1992) (reasonable probability found where uncalled witnesses would have provided corroboration of defense witnesses and contradicted testimony of police officers); Barkauskas v. Lane, 878 F.2d 1031, 1034 (7th Cir. 1989)(the undisclosed impeachment evidence, in conjunction with that already presented to the jury, may have "pushed the jury over the edge into the region of reasonable

existence, or defense counsel unreasonably failed to discover it. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington. Moreover, the prosecution interfered with counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. As a result, no constitutionally adequate adversarial testing occurred. An evidentiary hearing must be held, and thereafter, Ms. Buenoano's conviction and sentence must be vacated and a new trial and/or new penalty phase ordered.

Any newly discovered evidence must be reviewed not only scrutiny on its own merits, but rather the Court is required to re-evaluate Ms. Buenoano's previous allegations regarding the lack of an adversarial testing so that a collective analysis can be conducted. Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995); Battle v. Delo, 64 F.3d 347 (8th Cir. 1995) (applying the "cumulative effect" test announced in Kyles v. Whitley to a newly discovered evidence claim); State v. Gunsby, 670 So. 2d 920 (Fla. 1996) (holding that the combined effect of Brady violations, ineffective assistance of counsel, and newly discovered evidence

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doubt that would have required it to acquit"); Ouimette v. Moran, 942 F.2d 1, 10 (1st Cir. 1991)(confidence undermined in the outcome because suppressed evidence "might have affected the outcome of the trial"); Chambers v. Armontrout, 907 F.2d 825, 832 (8th Cir. 1990) (in banc) (reasonable probability exists where "jury might have acquitted"). See also Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991); Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991).

requires a new trial); Swafford v. State, 679 So. 2d 736 (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). Kyles v. Whitley is not limited to Brady claims; its cumulative effect analysis has been applied to sufficiency of the evidence claims, United States v. Burgos, 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; State v. Gunsby.

New evidence revealed in the OIG report issued by the Department of Justice on April 15, 1997, establishes that misleading, inaccurate, and perjured testimony was presented by the State during its prosecution of Ms. Buenoano. This newly-discovered information further establishes that unreliable and inadmissible scientific evidence was presented by the State and that the State's witness affirmatively misled defense counsel as to the results of the scientific testing. This information was material, exculpatory evidence that was not disclosed to defense counsel, in violation of Brady v. Maryland, 373 U.S. 83 (1963) and Gislio v. United States, 405 U.S. 150 (1972). This new information affects both the guilt and penalty phases, and requires that relief be afforded at this time.

On April 15, 1997, the United States Department of Justice's Office of Inspector General issued a report entitled "THE FBI

LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES" [hereinafter OIG Report]. The result of a lengthy and detailed investigation into three sections of the FBI Crime Laboratory in Washington, D.C (the Explosives Unit, the Materials Analysis Unit, and the Chemistry-Toxicology Unit) the OIG report issued findings regarding various practices at the FBI Crime Laboratory as well as addressed serious deficiencies noted in various cases in which the FBI Crime Laboratory and its scientists were involved.

One of the sections of the FBI Laboratory investigated by the OIG, the Chemistry-Toxicology Unit (CTU), participated in the testing of the evidence used by the State at Ms. Buenoano's trial, namely, that the tablets in the possession of John Gentry alleged given to Gentry by Ms. Buenoano contained poison. Chemists from the FBI's Crime Laboratory, namely Roger Martz, testimony at Ms. Buenoano's Escambia County trial was admitted in the State's case-in-chief.

As a result of their investigation, the OIG recommended that Martz "should not hold a supervisory position in the Laboratory, and the FBI should assess whether he should continue to serve as a Laboratory examiner" (OIG Report at 4). The OIG report concluded:

> CTU Chief Roger Martz lacks the judgment and credibility to perform in a supervisory role within the Laboratory. If Martz continues to work as an examiner, we suggest that he be supervised by a scientist qualified to review his work substantively and that he be counseled on the appropriate manner for testifying about scientific work. We further

> recommended that another qualified examiner review any analytical work by Martz that is to be used as a basis for future testimony.

(OIG Report at 21).

The State had a duty to disclose this information to defense counsel, and its failure to do so violated Brady v. Maryland, 373 U.S. 83 (1963), and Gislio v. United States, 405 U.S. 150 (1972). This evidence was clearly material and exculpatory to Ms. Buenoano. Bradv; Kyles; Troedel v. Wainwrisht, 667 F. Supp. 1456 (S.D. Fla. 1986), aff'd. sub nom. Troedel v. Dugger, 828 F. 2d 670 (11th Cir. 1987). Martz was a government witness, and furthermore, the FBI was an active co-participant in the investigation. There was no way that prior defense counsel could have been put on notice of the information now uncovered by the OIG as Martz either misled or lied about his testing and his conclusions (as the OIG has found). However, to the extent that the State may argue, contrary to the findings of the federal government and the Department of Justice, that counsel should have known, counsel rendered ineffective assistance of counsel. Again, under Gunsbv, Ms. Buenoano would be entitled to a new trial either based on the Brady violation, the ineffective assistance of counsel allegation, or a combination thereof with the discovery of this new evidence.

On February 9, 1998, this Court directed the State and the Court to disclose to Ms. Buenoano the documents the State had received from the federal government regarding Roger Martz and the FBI Laboratory. Since this Court ordered disclosure of there

has been insufficient time to review the materials, insufficient time for all the necessary experts to be located and obtained to review the materials and the federal government isn't finished processing and releasing the information it says Ms. Buenoano can have about Martz and the FBI laboratory, information which can and will help Ms. Buenoano understand, investigate and present her claims. Because the circuit court ordered Ms. Buenoano to file her amended 3.850 motion on less than 24 hours notice following this Court's March 3rd order, the amended 3.850 motion had to be filed before this Court issued its order permitting Ms. Buenoano to rely on certain critical documents in her postconviction proceedings. Also because the circuit court ordered Ms. Buenoano to file her amended 3.850 motion on less than 24 hours notice, no expert was able to review the materials in time. Other experts cannot provide affidavits in the time which remains before Ms. Buenoano's March 30th execution date due to conditions placed upon them by their former employer, the federal government.

Nevertheless, the circuit court ordered Ms. Buenoano to raise her claims and she attempted to do so.[21] In a motion literally thrown together in a day, Ms. Buenoano raised her Brady claim below on the basis of the newly discovered evidence of the unreliability and inadmissibility of scientific evidence presented against her during her capital trial and sentencing.

[21]Under the circumstances she has not yet been able to complete and file any motion for postconviction relief from her Escambia County conviction.

Ms. Buenoano's Brady claim was a skeleton of what it could be if she were permitted a reasonable amount of time to investigate and prepare the claim.

Ms. Buenoano also raised a Brady claim based on the State's failure to disclose information which could have been relied on to make a Frye challenge to the admissibility of Martz's testimony because the State would not have been able to meet its burden, as the OIG report itself establishes. The government's own investigatory agency has found that Martz had "a lower threshold of scientific proof than is generally accepted in forensic science" and lacked "appropriate scientific rigor in his approach to examinations" See OIG Report. A Frye challenge would have been sustained in favor of Ms. Buenoano, and Martz's testimony would have been excluded as a matter of law. This would have been devastating to the State's circumstantial case.

Had a Frve challenge been unsuccessful and that the information would have been allowed in at trial (a point which Ms. Buenoano in no way concedes), the newly discovered evidence of Brady/Giglio violations have been devastating impeachment evidence that the defense could have used at trial. The State had a duty to disclose this powerful impeachment evidence, yet this information **was** unknown to the defense. Giglio v. United States, 405 U.S. 150 (1972). The impeachment evidence relating to Martz that should have been disclosed would also have included his misconduct in other cases as discussed in the OIG report,

such as the World Trade Center and Judge Vance assassination cases.

Here, Martz testified that his "x-ray analysis, infrared analysis and mass spectrometry" tests enabled him to determine what was inside the capsules submitted to the FBI by the Pensacola Police Department for evaluation. This testimony was false.

According to one of Ms. Buenoano's experts, the tests result charts show that Martz was unable to make such a determination because he relied on bad science, he failed to corroborate his results and engaged in highly suspicious conduct by concluding the existence of paraformaldehyde without any appropriate confirmation by scientifically approved testing procedures. For example, the test result charts show that the x-ray analysis provided no useful results whatsoever. Same with the test result charts for the mass spectrometry. As for the mass spectrometry - according to a review of the charts, it is clear that Dr. Whitehurst's repeated allegations that Martz uses the test inappropriately in other cases are true here. The results of Martz's mass spectrometry in Buenoano were useless and did not provide any probative results because according to a toxicologist retained by Ms. Buenoano to access Martz's lab work, the test should not have been used. Moreover, Martz did not employ the test which would have been appropriate given the nature of paraformadehyde - the liquid chromatographic test.

Counsel for Ms. Buenoano has since learned through consultation with Dr. Frederic Whitehurst additional information[22] which demonstrates that the Martz testimony relied upon at trial by the state was seriously inaccurate, unsubstantiated and unreliable.

After giving the FBI written notice (in a letter dated March 6, 1998) of our intent to interview Dr. Whitehurst, collateral counsel proceeded to interview Dr. Whitehurst on March 11, 1998. Due to Dr. Whitehurst's status as a former employee of the Federal Bureau of Investigation, restrictions are imposed upon the release of certain information. Dr. Whitehurst cannot execute an affidavit in this case until the affidavit goes through a 30 day pre-publication review consistent with his employment agreement. The employment contract requires Dr. Whitehurst to submit the full text of any proposed release of information for FBI approval prior to release. This procedure requires at least thirty days.

Therefore Dr. Whitehurst was able only to provide an oral report. In an effort to inform this court of the gravity of the information learned from Dr. Whitehurst regarding the scientific evidence relied upon in Ms. Buenoano's trial within the legal constricts of Dr. Whitehurst's employment agreement, undersigned counsel states the following:

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[22]Information which counsel could not present below due to the trial court's direction to collateral counsel to file Ms. Buenoano's 3.850 motion on less than 24 hours notice.

Martz conducted his analysis of the evidence in this case according to no established protocol; Martz's report and case file lacks critical data; his analysis is unreliable, and the conclusions he gave at trial are not reliable.

For example, Mr. Martz testified that certain tests were conducted (R. 381), but according to Dr. Whitehurst his report lacks the necessary documentation to support the assertion that he or anyone conducted the tests.

The x-ray analysis, or the x-ray powder defractometry utilized by Martz to determine the presence of paraformaldehyde does not comport with the data in Martz' lab notes. The data (or lack thereof) in Martz' file establishes the fact that the powder is not paraformaldehyde when analyzed under the x-ray powder defractometry.

Furthermore, the gas chromotograph mass spectrometer utilized by Martz in this case merely separated the contents of the powder but in no way positively identified the contents of the powder. The solid probe mass spectrometer utilized by Martz is also problematic in that when the material is put through the solid probe mass spectrometer, it breaks up and therefore one cannot determine what the material is afterwards. Moreover, it is apparent from Martz' lab notes that there was no blank run; that there **was** no standard of paraformaldehyde utilized, and if a filler was used we don't know what was in the filler.

Martz also testified that he was a forensic chemist. Although generally accurate, it **was** misleading. The jury was

never informed as to what substances Mr. Martz was qualified to render opinions about. Martz testified that he could not identify vitamins in the capsules he analyzed (R. 382) however according to Dr. Whitehurst his notes and report indicate that he never compared the substance with a known vitamin standard. Martz's testimony also failed to explain the existence of certain significant elements in the capsules that we now know were present. Martz also testified that the remaining evidence was consumed however information now known reveals that there is no support for this assertion. Martz testified that the substance found in the capsules was toxic (R. 414). However information is now known that shows this opinion is unsubstantiated. Martz testified that there was "no detectable difference " between the standard formal-tablets and the contents of the capsules (R. 415). Expert review of the data available however, proves that this testimony is flatly incorrect. Martz also testified that the substance found in the capsules "was almost pure paraformaldeyde" (R. 415). Information now known establishes that this assertion is not supported by the tests conducted and Martz's report is unreliable.

It is also now known that Martz's report lacks documentation regarding procedures that should have been performed in order to ensure that the instruments used in testing were reliable and not contaminated. Furthermore, Martz failed to analyze significant data contained in his report, failed to consider viable alternatives, failed to properly document data, made findings

upon data about which he lacked sufficient knowledge, and failed to conduct appropriate testing.

Through this pleading, counsel attempts to inform this Court of the gravity of the information now known. However, until Dr. Whitehurst issues an affidavit containing his complete analysis of the shortcomings of the work conducted by Martz in the Buenoano cases, counsel is precluded from submitting a more detailed description of the information which could be available to Ms. Buenoano in her postconviction proceedings.

Counsel for Ms. Buenoano finds herself in an untenable position. Due to the restrictions imposed upon the release of information learned through Dr. Whitehurst, counsel is only able to give a general overview of information learned from Dr. Whitehurst regarding the Martz issue. Because of circumstances completely outside the control of counsel or Ms. Buenoano and the circuit court's unreasonable direction that Ms. Buenoano file her claims before her attorneys receive relevant information from federal agencies, even this preliminary information was not able to be presented below. In order to effectively represent Ms. Buenoano however, counsel must be able to fully present the specifics of critical information to be learned through Dr. Whitehurst and additional experts which must be located and retained.

Counsel has also learned from Dr. Whitehurst that some of the scientific documents provided to Ms. Buenoano under the FOIA request are not of sufficient quality for expert review. A

hearing regarding the FOIA matters is scheduled for March 13 at 2:30 p.m.

Both the state and the circuit court attempt to diminish Martz's impact on Ms. Buenoano's conviction and sentence by stating that "Roger Martz did not testify in this case", his "involvement in this case was merely the fact that he was mentioned in a stipulation that was placed into the record at the trial of this matter." This distinction is not only disingenuous, but misleading. The very fact that Roger Martz was not subjected to any cross-examination, and that his testimony formed a basis for the evidence presented through Dr. Potter highlight and underscore the argument that the newly discovered evidence undermines confidence in the outcome of the proceedings.

Obviously had trial counsel known what is now becoming known about Martz, he would not have agreed to the stipulation.

As to Escambia County, on February 27, 1998, the State flatly conceded it falsely informed federal agencies throughout its prior correspondence; that it informed the **federal agencies** Martz did not testify without first checking the transcript of the trial; and most importantly admitting that Mr. Martz's testimony <u>was material to the outcome of the Escambia County trial:</u>

> Thank you for faxing the transcript of the testimony of Robert [sic] Martz in the above trial. It would appear that Mr. Martz testified to "similar fact" evidence in the bombing case. Therefore, my letters of August 4, 1997 and June 26, 1997 were in error. It should be noted that neither the prosecutor, Mike Patterson, nor myself had

> the benefit of having a transcript of the trial to review prior to my earlier response. Whether or not the lab work was "material" to the verdict cannot be determined absolutely. This would be determined by the jury in reaching it's verdict. It must be assumed, however than any evidence received by a jury may have been material to one or more jurors. On the other hand, I did not see anything in the report by the Department of Justice that would directly relate to the admissibility or credibility of Mr. Martz's testimony.

(PC-R4. 186) (emphasis added).

When inadmissible evidence is presented to the jury, as is the case here, the reviewing court must consider the effect the evidence had on the decision. The harmless error test as enunciated in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), requires that the State establish

> beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

DiGuilio, 491 So. 2d at **1138.** The harmless error test "requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influence the jury verdict." Id. Essentially, "[t]he focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict." Id. at 1139.

In Ms. Buenoano's case, the State cannot demonstrate that the admission of evidence contrary to Hayes/Ramirez/Frye was harmless beyond a reasonable doubt.

With specific respect to the penalty phase, the State's closing argument repeatedly relied upon Mr. Martz's testimony to support aggravating factors. Florida Courts have found reliance on inadmissible evidence in argument to the jury to be prejudicial error that is not harmless beyond a reasonable doubt. See e.g., Phillips v. State, 589 So. 2d 1360, 1361-62 (Fla. 1st DCA 1991).

When considered alone, Ms. Buenoano submits that the evidence disclosed as a result of the FBI Crime Laboratory investigation warrants a new trial and/or penalty phase.

Judy A. Buenoano and James Buenoano were charged as co-defendants for the June 25, 1983 attempted first degree murder of John Gentry in Escambia County (R. 3523). James and Judy Buenoano were both represented by James Johnston. In James Buenoano's trial, the State presented evidence that Judy Buenoano had nothing to do with Gentry's death and testimony of a police officer that the physical evidence adduced by the investigators was consistent with the evidence of her innocence. James Buenoano was nevertheless acquitted.

During Judy Buenoano's trial, the evidence tending to exculpate Judy was not presented. What was presented was the testimony of Roger Martz. Martz testified that he was a forensic chemist for the FBI. Martz testified that he found a poison in

some tablets which Gentry claimed were given to him by Judy Buenoano. Martz testified that in July, 1983 he received two Vicon C tablets, a multivitamin, sent to him by the Chief of Police in Pensacola, Florida. Martz testified that he took the powder out of the capsules and performed infrared analysis, x-ray analysis, and mass spectrometry analysis (R. 2736-38) and that initially, he was unable to make an identification (R. 2738). Martz testified that subsequently he determined that the powder contained in the capsules was negative for vitamins but was positive for paraformaldehyde. According to Martz, paraformaldehyde is an organic polymer that has a variety of uses and is toxic (R. 2770-71). Thus Martz's testimony provided crucial collateral crimes evidence[23] against Ms. Buenoano in her capital trial.

In its closing argument during the guilt phase of the Escambia County trial, the State seized upon Martz's testimony in order to show Ms. Buenoano had a propensity and intent to commit the charged offense in this circumstantial evidence case:

> By Mr. Patterson:
>
> Mr. Martz testified from the FBI lab in Washington, "yes I received those pills and I tested them." And lo and behold, what did he find out was in them? Paraformaldehyde. What is paraformaldehyde. It is a poison . . . She tried to kill him with paraformaldehyde first. Did she intend his death? Clearly. Clearly she intended his death.

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[23] See Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

(R. 2889, 2920). Ms. Buenoano was convicted of attempted first degree murder of John Gentry.

Martz's Escambia County testimony then became pivotal during Ms. Buenoano's First Degree murder trial in Orange County. Martz' testimony provided the basis for uncharged collateral crime evidence to be admitted against Ms. Buenoano.

Ms. Buenoano's trial counsel stipulated to the following during the guilt phase of the Orange County proceedings:

> By Mr. Perry:
>
> It's been stipulated by the State and the defense that the pills that Mr. Gentry testified to were retrieved by Detectives Chamberlin and Steele of the Pensacola Police Department, that those pills were taken into evidence by Officer Gwendolyn Pate, that she then in turn transmitted those pills to the Florida Department of Law Enforcement, where they were analyzed by a chemist by the name of Marion Estees.
>
> Mr. Estees determined, one, that the container of the capsules were Vicon C type capsules, two, that Mr. Estees was unable to determine the contents of the capsules.
>
> Those capsules were subseauentlv forwarded to the Federal Bureau of Investigation's laboratorv in Washington, D.C., and examined bv a chemist by the name of Roger Markz (sic) of the FBI. Mr. Markz (sic) determined that the capsules were Vicon C, and that the substance contained inside of those capsules was paraformaldehvde, Class III poison.
>
> It's been further stipulated by the State and the defense that search warrants were executed by the police, Pensacola Police Department, on the home and business of the defendant in July of 1983, in Pensacola, Florida, that as a result of the execution of that search warrant of her home there was no paraformaldehyde found, nor any arsenic.

> That as a result of the execution of the search warrant at her business, Fingers and Faces, there was no paraformaldehyde found there, nor was there any arsenic found there.

(R. 1012) (emphasis added).

During the penalty phase portion of the Orange County trial, the prosecutor, Michael Patterson, from the Escambia County case, testified that Ms. Buenoano gave Gentry Vicon C tablets that contained poison (R. 1525). Based on Martz's findings and trial counsel's stipulation, the prosecutor, Belvin Perry, in the Orange County case, queried the jury during his penalty phase closing argument:

> Where was God in her life when she tried to murder John Gentry, and when the single dose of woisonins and when the double dose didn't work she tried dynamite? . . . And what mercy did she show John Gentry? When she couldn't poison him, what did she do? Took him out for what they thought would be his last supper when he went out that night, and only God saved that man's life

(R. 1713, 1715) (emphasis added).

The convictions obtained against Ms. Buenoano in Escambia and Santa Rosa County were used in Orange County to support the State's case for a sentence of death. The trial court relied on the convictions in sentencing Ms. Buenoano to death (R. 2342-43). In affirming Ms. Buenoano's conviction and sentence, this Court placed great weight on the collateral crime evidence of poisoning. Buenoano v. State, 527 So. 2d 194 (Fla. 1988).

The Orange County prosecutor himself, Belvin Perry, is on record as follows:

> The testimonv of Special Agent Martz is very imwortant to the prosecution of this case. Without his testimonv we will not be able to wresent anv testimonv concernins the attemwted murder of John Gentrv. This similar fact testimonv is verv critical, without it, the State will have a verv weak case. Therefore, I am requesting that you permit Special Agent Martz to testify in this cause.

(PC-R4. 257-58).

To comprehend the effect on Ms. Buenoano's trial that the previously unknown evidence pled here would have had, this Court must examine the State's case at trial, the evidence proffered by Ms. Buenoano in her prior Rule 3.850 proceedings, and the previously unknown evidence pled here. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996); State v. Gunsbv. By examining all the evidence Ms. Buenoano has presented through direct evidence, cross-examination and proffer throughout her capital proceedings, this Court will find that the previously unknown evidence, in conjunction with the evidence introduced in Ms. Buenaona's first Rule 3.850 motion **and the evidence introduced at trial, would** probably have produced an acquittal, or at the very least, a sentence of less than death. See Swafford.

Ms. Buenoano's execution is scheduled to take place in seventeen days. Due to external impediments, counsel for Ms. Buenoano is unable to fully present all of the reliable evidence which could be presented to attack critical aspects of the cases against her. If able to present this information, counsel could demonstrate that confidence is undermined in the proceedings against Ms. Buenoano.

The circuit court erred when it denied Ms. Buenoano's claim that she was denied a full adversarial testing because of the state's failure to disclose exculpatory evidence. Critical information is now known which seriously undermines the reliability and integrity of FBI SA Roger Martz's scientific analysis and correlating testimony - testimony that the jury and court relied upon.

A Rule 3.850 litigant is entitled to an evidentiary hearing (and a stay of execution) unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985) ; O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Sireci, 502 So. 2d at 1224; Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). See also Groover v. State, 489 So. 2d 15 (Fla. 1986). Ms. Buenoano has presented a claim which warrants an evidentiary hearing. See Roberts v. State, 678 So. 2d 1232 (Fla. 1996); Scott v. State, 657 So. 2d 1129 (Fla. 1995); Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994); Jones v. State, 591 So. 2d 911 (Fla. 1991).

In deciding whether to deny a Rule 3.850 motion without an evidentiary hearing and a stay of execution, the Court must first determine "whether the motion on its face conclusively shows that [the defendant] is entitled to no relief." Squires v. State, 513 So. 2d 138, 139 (Fla. 1987). Ms. Buenoano's motion, like those in Swafford, Roberts, Scott, Johnson, and Jones pleads much more

than sufficient facts to require an evidentiary hearing and a stay of execution. O'Callaghan; Lemon; Sireci.

Precedent is clear. Under Rule 3.850 and the Florida Supreme Court's interpretations of that rule, Ms. Buenoano is entitled to an evidentiary hearing and to a stay of execution. The capital defendant's interest in due process outweighs the state's interest in finality. Id. at 740 (Harding, J., concurring) (concurrence signed by four justices).

Even in "successive motion" cases, involving a petitioner's second or third Rule 3.850 action, the Circuit Court may enter a stay of execution where the files and records do not conclusively refute the allegations contained in a pending Rule 3.850. State v. Crews, 477 So. 2d at 985; see also State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987).

It is certainly altogether reasonable for a capital defendant to request a stay pending the orderly resolution of his claims before the "irremediable act of execution is taken." See generally Shaw v. Martin, 613 F.2d 487, 492 (4th Cir. 1980) cf. Swafford, 679 So. 2d at 740. In Schaeffer, the Supreme Court noted it had previously upheld the grant of a stay where the defendant showed he "might be entitled to relief." 467 So. 2d at 688-89 (emphasis supplied). In State v. Crews, 477 So. 2d 984 (Fla. 1985), the Supreme Court illustrated just how necessary it is for circuit courts to stay executions in order to properly conduct adequate evidentiary hearings. Crews involved a second Rule 3.850 motion by Stephen Booker. Ms. Booker had been denied

relief in his first Rule 3.850 proceeding and the Florida Supreme Court had affirmed that denial. Booker v. State, 441 So. 2d 148 (Fla. 1983). Upon the signing of Ms. Booker's third death warrant, he filed a successor Rule 3.850 motion in the trial court. The trial judge entered a stay of execution and set a date for an evidentiary hearing. The State applied for a writ of prohibition and filed a motion to vacate the stay in the Florida Supreme Court. The Supreme Court denied both. The Court said once more that the question on stay applications is not whether the defendant will ultimately win a new trial or sentencing proceeding; the question is whether it can conclusively be said that the defendant will ultimately lose:

> The trial court did not err in granting defendant an evidentiary hearing on the claim of ineffective assistance of counsel. The movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief. O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984) (citations omitted).
>
> The state has failed to show an abuse of the trial court's discretion in finding that the files and records of the case do not conclusively show that the defendant is entitled to no relief on that ground.

Crews, 477 so. 2d at 984-85. Accord State v. Sireci, 502 So. 2d at 1224. It cannot be said that Ms. Buenoano will conclusively lose. As such, this Court should grant a stay of execution so that a full and fair evidentiary hearing may be had.

Moreover, a stay is required under Rule 3.850 and Rule 3.851 in these circumstances. The factual predicate for Ms. Buenoano's

Brady claim based upon the Martz issue is undisputedly newly discovered. Therefore, under Rule 3.850 (b) (1) Ms. Buenoano is entitled to two years in which to bring this claim because it will allege (and prove) that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.850(b) (1); see also Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996). Any other death sentenced inmate similarly situated to Ms. Buenoano but for the pendency of an active death warrant would be entitled under Rule 3.850 and Rule 3.851 to two (2) years in which to investigate and present such a claim. Id. For these reasons, this situation is exactly one which should not be litigated under the pressure of a pending death warrant but should rather be treated as an initial Rule 3.850 motion would be treated. In fact Rule 3.851(a) (3) specifically provides that "should the governor sign a death warrant before the expiration of the time limitation in subdivision (b)(l), this Court will, upon a defendant's request, grant a stay of execution to allow any postconviction relief motions to proceed in a timely and orderly manner. Fla. R. Crim. P. 3.851(b) (3). Ms. Buenoano has shown that her death warrant was signed before "the expiration of the time limitation in subdivision (b) (1) ."

ARGUMENT III

THE TRIAL COURT ERRED IN **SUMMARILY** DENYING MS. BUENOANO'S REQUEST THAT SHE BE PERMITTED LEAVE TO AMEND ONCE SHE RECEIVES ALL OF THE INFORMATION IN THE POSSESSION OF THE FEDERAL

GOVERNMENT WITH RESPECT TO THE INVESTIGATION INTO THE FBI CRIME LAB, ONCE FULL DISCLOSURE HAS OCCURRED, SHE MUST BE AFFORDED A REASONABLE TIME WITHIN WHICH TO AMEND HER RULE 3.850 MOTION.

At the center of Ms. Buenoano's Argument II is Special FBI Agent Roger Martz. Lead prosecutor Belvin Perry made the following evaluation of Martz's importance to Ms. Buenoano's prosecution when imploring the FBI to accept a trial subpoena:

> The State intends to introduce similar fact evidence involving two other cases... The testimony of Special Agent Martz is very important to the prosecution of this case. Without his testimony we will not be able to present any testimony concerning the attempted murder of John Gentry. This similar fact testimony is very critical, without it, the State will have a very weak case. Therefore, I am requesting that your (sic) permit Special Agent Martz to testify in this cause.

Thus, the prosecuting authority cannot ethically claim that Martz was anything less than "very critical" to the conviction of Ms. Buenoano and, by necessity, essential to the death sentence imposed upon her. The prosecutor concedes in the above letter that actual evidence relating to the alleged murder of James Goodyear is "very weak". The above letter also specifically references Martz's testimony in Pensacola (Escambia County) regarding the purported attempted poisoning of John Gentry as being the "very critical" to the Orange County prosecution.

In Claim II of her Rule 3.850 motion for postconviction relief Ms. Buenoano sufficiently demonstrated that she has not received information in the possession of the federal government material to her case. The trial court summarily denied this

claim on the basis it did not "entitle" Ms. Buenoano to relief (PC-R4. 774). The Court also found that "nothing" alerted the OIG to any errors with regard to Martz' work in the Buenoano cases. Further, the Court found that because the report was issued "before the alleged misconduct of the State agencies," Ms. Buenoano's claims do not provide a basis for relief. As collateral counsel argued at the Huff hearing, the issue may be that either the State misconduct caused the OIG not to investigate the Buenoano cases or the State misconduct caused and eight month delay in the federal government's release of information to the State's attorneys offices and thus to Ms. Buenoano. Collateral counsel explained she cannot be sure that the investigation of the OIG ended when the State says it did, but it hardly matters -- what does matter is by its misrepresentations and omissions, one thing is clear -- Ms. Buenoano has been irreparably prejudiced. The trial court failed to consider the equities and its refusal to level the playing field is unfair.

Beyond the trial court's procedural denial of due process to Ms. Buenoano discussed in Argument I above, Ms. Buenoano alleged "enough facts to show . . . that [s]he might be entitled to relief under rule 3.850.' State v. Schaeffer, 467 So. 2d 698,699 (Fla. 1985). When the defendant presents such facts, a trial court has "a valid basis for exercising jurisdiction" and granting a stay of execution and an evidentiary hearing. Id.; see also State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985); State v.

Sireci, **502 So. 2d 1221, 1224** (Fla. **1987);** O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1986).[24]

It is well established that a Rule 3.850 litigant is entitled to an evidentiary hearing (and stay of execution) unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3,850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 so. 2d 984 (Fla. 1985); O'Callaaghan v. State, 461 So. 2d 1354 (Fla. 1984); Sireci, 502 So. 2d at 1224; Mason v. State, 489 So. 2d 734, 735-37 (Fla.1986). See also Groover v. State, 489 So. 2d 15 (Fla. 1986). Here, the motion, files and records **do not** conclusively show that Ms. Buenoano is entitled to no relief. To the contrary, the motion, files, and records show that Ms. Buenoano is entitled to an evidentiary hearing at a minimum. Under the facts and circumstances **asserted here, Due** Process requires no less.

Additionally, facts not "of record" are at issue in this case; they are referred to in Ms. Buenoano's Rule 3.850 motion. They must be accepted as true. Lishtbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The claims herein presented concerning the capital guilt-innocence or penalty phase proceedings require an evidentiary hearing for proper resolution. This court has not

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[24]Appellant argues these points here because the circuit court's disposition of Claim II included a determination that Ms. Buenoano **was** entitled to no relief on her Bradv claim. The Court did so inpart by erroneously applying in the standard of Jones v. State, 591 so. 2d 911 (Fla. 1991).

hesitated to remand Rule 3.850 cases for required evidentiary hearings. Heinev v. Dugger, 558 So. 2d 398 (Fla. 1990).

In support of her **claim,** Ms. Buenoano informed the trial court that in April of 1997, collateral counsel learned of the scandal at the Federal Bureau of Investigations (FBI) Laboratory and the impending publication by the Department of Justice (DOJ) of an unprecedented report criticizing the FBI Lab and specifically an analyst named Roger Martz. Immediately, collateral counsel, before the report was even published, mailed requests pursuant to the Freedom of Information Act (FOIA), the Privacy Act, Brady v. Maryland, 373 U.S. 83 (1963) and Gislio v. United States, 405 U.S. 150 (1972) to: (1) the Freedom of Information Act Office of the United States Department of Justice, (2) the Criminal Investigations Division of the Office of the Inspector General of the United States DOJ, (3) the FBI Laboratory Task Force, (4) the Freedom of Information Act/Privacy Act Division of the FBI in Washington, D.C. and (5) the Freedom of Information Act/Privacy Act Division of the FBI in Tampa, Florida. The requests sought access to information about the ongoing investigation of the FBI Lab and Roger Martz by the Department of Justice including any and all materials discovered or produced during the investigation which regarded Judy A. Buenoano in any way. See Attachments H-K.

Because the investigation of the FBI Laboratory **was** ongoing, these requests were made to obtain any existing **material** and to "red flag" Ms. Buenoano's case to the FBI Laboratory Task Force

in the hopes FBI Laboratory Task Force's ongoing investigation would make a specific review of the Buenoano case.

Then on April 15, 1997, the Office of the Inspector General of the United States Department of Justice did publicly issue a report. The report was entitled "THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES" [hereinafter Report]. The result of a lengthy and detailed investigation into three sections of the FBI Crime Laboratory in Washington, D.C (the Explosives Unit, the Materials Analysis Unit, and the Chemistry-Toxicology Unit), the Report issued findings regarding various practices at the FBI Crime Laboratory as well as addressed serious deficiencies noted in various cases in which the FBI Crime Laboratory and its scientists were involved. Part of the Report addressed the work of Mr. Roger Martz. Mr. Martz was found to have exploited a lower threshold of scientific proof than is generally accepted in forensic science and to lack appropriate scientific rigor in his approach to examinations. The Report did refer to specific cases, but the Buenoano case was not among those refered to.

In a letter dated April 18, 1997, the Office of the General Counsel for Office of the Inspector General of the Defendant United States DOJ responded that with regards to "any and all drafts of the IG's report as well as any and all materials

relating to the investigation" those documents were to be withheld from Ms. Buenoano.[25]

In a letter dated May 7, 1997, the Director of Facilities and Administrative Services Staff for Justice Management Division of the Defendant DOJ responded that it had referred Plaintiff's request to "the component(s) you have designated **or,** based upon descriptive information you have provided, to the component(s) most likely to have the records" including the FBI, Criminal Division and Office of the Inspector General (Attachment L).

In a letter dated June 17, 1997, the Freedom of Information/Privacy Act Unit for the Office of Enforcement Operations Criminal Division of the Defendant DOJ responded that the April 9, 1997 request was forwarded to "the Task Force investigating the F.B.I. Laboratory for review and direct response to you" (Attachment M).

In a letter dated June 27, 1997, the Freedom of Information Act/Privacy Act Division of the FBI in Washington, D.C. responded to request No. 422055 by providing (1) 81 pages of material; (2) information about where to request a copy of the Report; (3) that the central records indices revealed no records concerning James E. Goodyear or Bobby Joe Morris; and that (4) the release of 81 pages contains additional pages that were "inadvertently not copied" in a 1990 release (Attachment 0).

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[25]Later that year apparently however, collateral counsel is now aware, the OIG switched its position in the Whitehurst case and began disclosing documents. Attachment N, Affidavit of Jack King, NACDL.

The Report contained general findings criticizing the performance and reliability of Roger Martz. Specifically, the Report stated in part that:

> Roger Martz became an examiner in the CTU in 1980 and has been the chief of the CTU since July 1989. Based on our investigation, we criticize certain of Martz's actions both as a supervisor and as an examiner **in particular** cases.
>
> ***
>
> Both as an examiner and as a unit chief, Martz appears not to have recognized the importance of protocols in forensic examinations. After the explosives residue program was transferred to the CTU from the MAU in 1994, Martz as CTU chief failed to integrate the protocols that had been previously used by the two units. This meant, as **was** illustrated in the Shaw case, discussed in Part Three, Section H7, that the analysis of certain evidence could vary depending on the examiner assigned to the case. As noted in Part Three, Section G, in the Oklahoma City case, Martz did not follow the FBI's explosives residue protocol when he failed to examine certain evidence microscopically.
>
> Martz told the OIG that a protocol is a guideline and that examiners should have discretion in determining the procedures to apply in a particular case. Based on his conduct and remarks, Martz does not **seem to** appreciate the importance of following authorized protocols or the need to document the reasons for desartins from them.
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> ***
>
> Based on our investisation, we conclude that Roser Martz lacks the credibility and iudsment that are essential for **a** unit chief, particularly one who should be substantively evaluatins a range of forensic disciplines. We found Martz lackinq in credibility because, in matters we have discussed above, he failed to perform adequate analyses to support his conclusions

> and he did not accurately or persuasively describe his work. We recommend that Martz not hold a supervisory position. The Laboratory should evaluate whether he should continue to serve as an examiner or whether he would better serve the FBI in a position outside the Laboratory. If Martz continues to work as an examiner, we suggest that he be supervised by a scientist qualified to review his work substantively and that he be counseled on the importance of testifving directly, clearly and objectively, on the role of protocols in the Laboratory's forensic work, and on the need for adequate case documentation. Finally, we recommend that another qualified examiner review any analytical work by Martz that is to be used as a basis for future testimony. (Emphasis added).

Counsel subsequently learned that in State v. Trepal, **Case** No. 90-1569 Al (Fla. 10th Cir. Ct.), the FBI had sent materials responsive to similar requests made by Mr. Trepal, to the Polk County State Attorney who then turned them over to counsel for Mr. Trepal. Meanwhile, no word came from the Orange County State Attorney that they had received information from the Department of Justice or the FBI Lab Task Force **and** no additional information came from the federal government.

Having learned through the course of these proceedings the extent of contact between the State and federal governments, to which Ms. Buenoano was not a party, she filed suit in February against the DOJ and FBI. That is how she learned of the state's misleading the federal government and thus interfering with her investigation. On February 20, 1998, collateral counsel for Judy Buenoano discovered that the FBI Laboratory Task Force was mislead by the State of Florida about the scope of Roger Martz's

involvement in the cases against Ms. Buenoano. Only recently did collateral counsel learn that the result of that misinformation was that the FBI Laboratory Task Force did not conduct an investigation of Martz's conduct in the Buenoano cases and did not forward materials to the State's attorneys for disclosure to Ms. Buenoano for over eight months.

In light of the nearly 30,000 pages of material yet to be received from the federal government, and the several hundred additional pages which will not be released until some unspecified time in the future. Ms. Buenoano must be granted leave to amend once all requested federal documents have been received.

Counsel met with Dr. Whitehurst and his attorney on March 9 and 11, 1998 to discuss the scientific evidence in Ms. Buenoano's case. Counsel learned however, that certain scientific documents provided to Ms. Buenoano through FOIA are not adequate for expert review and do not satisfy FOIA requirements. Additionally, it was learned that documentation regarding evidence submitted to Mr. Martz for evaluation were not provided under FOIA as required. Without this information, Ms. Buenoano has been denied an opportunity to fully present critical evidence regarding evidence relied upon at her trial. A hearing on the FOIA issues is scheduled for 2:30 p.m., March 13, 1998 - after the submission deadline of this pleading.

Counsel has also just learned that as part of a settlement agreement with the Justice Department, the federal government

agreed to release 180,000 pages of FBI lab reports by examiners whose work Dr. Whitehurst criticized. Associated Press, The Dallas Morning News (March 12, 1998). See Attachment 3.

On Monday morning, March 2, 1998 in a status conference held before United States District Court Judge Daniel T. K. Hurley in Buenoano v. United States Department of Justice and Federal Bureau of Investisation, Case No. 88-6124 (brought pursuant to the Freedom of Information Act), the following was determined: The DOJ Office of the Inspector General having previously withheld all documents requested by Buenoano is now agreeing to produce 7,000 pages by March 6, 1998, 10,000-12,000 pages by March 13, 1998, but is unable to determine when the final several hundred documents will be provided. The FBI is providing approximately 12,000 pages by March 6, 1998.

Judge Hurley and the Assistant United States Attorney in attendance urged undersigned to seek the assistance of the National Association of Criminal Defense Lawyers (NACDL), because the Assistant United States Attorney represented that the NACDL and Ms. Buenoano were seeking and were to receive the same requested documents. Undersigned has contacted the NACDL and learned that the NACDL is attempting to index the documents disclosed to date to assist defense attorneys. Jack King, Director of Public of Affairs of NACDL, informed undersigned that there are not simply some 30,000 documents which the government has decided to release, but at least 60,000 documents. The NACDL has received only approximately 32,000 and the task of indexing

those documents is far from complete. At this time only a fraction of the documents have been indexed. (PC-R4. 283-85) . Mr. King updated counsel regarding this matter. Mr. King related that counsel for DOJ represented that by "mid to late April" DOJ should have released 95% of their records. See Affidavit of G. Jack King dated March 10, 1998, at Attachment 2.

For all of these reasons, this situation is exactly one which should not be litigated under the pressure of a pending death warrant but should rather be treated as an initial Rule 3.850 motion would be treated. In fact Rule 3.851(a)(3) specifically provides that "should the governor sign a death warrant before the expiration of the time limitation in subdivision (b)(1)," the Court should grant a stay of execution to allow any postconviction relief motions to proceed in a timely and orderly manner. Fla. R. Crim. P. 3.851(b)(3). Ms. Buenoano has shown that her death warrant was signed before "the expiration of the time limitation in subdivision (b)(1)." Furthermore, the record before this Court demonstrates that based on the facts and circumstances presented, no other course of action will guarantee Ms. Buenoano due process and the effective assistance of counsel to which she is entitled in her postconviction proceedings.

Ms. Buenoano requests a stay of the instant proceedings until the government has fully complied with the pending requests for information. In the interests of judicial economy, as well as the sensible allocation of resources and time both on part of

Ms. Buenoano's counsel as well as the State, Ms. Buenoano submits that it would be appropriate to allow the presentation of one comprehensive pleading addressing the impact of the FBI Crime Laboratory situation on Ms. Buenoano's case, rather than piecemeal litigation.

This situation is analogous to the line of cases expressly allowing the amendment of Rule 3.850 motions when additional public records are disclosed by state agencies. See, Ventura v. State, 673 So. 2d 479 (Fla. 1996). In this case, documents withheld by the federal government are material to the issues contained in this motion; moreover, the federal government, namely the FBI, worked in tandem with the state law enforcement agencies in the criminal investigation and prosecution of Ms. Buenoano. The same line of cases should apply to this situation. Ms. Buenoano should have been granted a stay of execution and an evidentiary hearing.

In its order summarily denying this claim the trial court ruled that "only ten of the multitude of documents pertaining to FBI Examiner Roger Martz were under seal and t Buenoano was not prohibited in any way whatsoever from referring to the remainder of documents". (PC-R4. 767).

First, the trial court's statement that "only ten" documents were sealed must be clarified. The ten documents consist of numerous pages. Moreover the number of pages that Ms. Buenoano was precluded from referring to is entirely irrelevant. As this court well knows a single page of information can be critical and

a grounds for relief, It is the content of the material that is important not the quantity. The trial court did not know how MS. Buenoano could have used the contents of this information yet it simply rejected Ms. Buenoano's assertion that the protective order created an obstacle to her raising all her issues. The documents do contain critical information bearing directly upon Ms. Buenoano's claims.[26] Ms. Buenoano should be entitled to present this information at an evidentiary hearing.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING MS. BUENOANO'S CLAIM TEAT ACCESS TO THE FILES **AND RECORDS PERTAINING TO HER CASE IN THE** POSSESSION OF CERTAIN STATE AGENCIES HAS BEEN **WITHHELD IN VIOLATION** OF **CHAPTER 119, FLORIDA STATUTES, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

Ms. Buenoano made clear at the outset that her 3.850 claims were incomplete because state [and federal] agencies had failed to fully disclose requested public records. Ms. Buenoano properly raised all her public records issues in her motion to vacate.[27] Nevertheless, the circuit court engaged in a backwards procedure regarding the public records issues and did so unreasonably as this Court did not order the circuit court to adjudicate any amended 3.850 motion filed by Ms. Buenoano by March 9, 1998. Nevertheless, on March 9, 1998, the trial court

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[26]For example, one of the documents reveals part of the very basis of Ms. Buenoano's Brady/Giglio claim.

[27]And in an abundance of caution filed motions to compel covering the same agencies.

denied Ms. Buenoano's Rule 3.850 motion. The trial court however, held a hearing on pending motions to compel on March 12, 1998 - after it made its conclusions regarding the rule 3.850 motion.

It is axiomatic that resolution of chapter 119 issues should be handled prior to a Huff hearing and prior to any decision regarding the Rule 3.850 motion. In order to be afforded a meaningful Huff hearing, i.e. establishing sufficient evidence for an evidentiary hearing, a defendant should be able to enlist the support of the court in obtaining documents not provided, receive the records and incorporate them into the Rule 3.850 motion for presentation to the court. To force a defendant into a Huff hearing without full resolution of the chapter 119 issues denies the defendant due process of law. To deny a rule 3.850 motion prior to resolution of chapter 119 issues is even more prejudicial.

This Court has recognized a petitioner's right to public records and has not hesitated to remand cases to the trial court for resolution of chapter 119 issues. Ventura v. State, 673 So. 2d 479 (Fla. 1996); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Anderson v. State, 627 So. 2d 1170 (Fla. 1993); Muehleman v. Dugger, 623 So.2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Hoffman v. State, 613 So.2d 405 (Fla. 1992); Engles v. Dugger, 576 So. 2d 696 (Fla. 1991); Jennings v. State, 583 So. 2d 316 (Fla. 1991).

Ms. Buenoano was denied due process and a meaningful opportunity to present her claims and was erroneously denied an evidentiary hearing.

In Claim I of her Rule 3.850 motion, Ms. Buenoano informed the court that effective legal representation had been denied her because public records from various agencies had not been received by Ms. Buenoano's counsel, or if received, were incomplete. Ms. Buenoano informed the court of agencies that were not in compliance.[28] Without compliance and the records, it was impossible for counsel to properly prepare a complete Rule 3.850 motion for Ms. Buenoano.

The circuit court complains that Ms. Buenoano has not given any indication of the specific documents she believes exists that some agencies have not provided completely overlooking that the Court only gave counsel 23-1/2 hours to write and file the motion.

As to the Florida Bar, the Court finds -- without hearing argument of counsel which it set for March 12th despite counsel's request to be heard March 6th -- that it is unable to fathom how

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[28] 1) Orange County State Attorney's Office; 2) Orange County Sheriff's Department; 3) Florida Department of Law Enforcement; 4) Orange County Medical Examiner; 5) Broward County Medical Examiner; 6) Metro-Dade County Medical Examiner; 7) Dr. Leonard Bednarzdyck; 8) Escambia County State Attorney; 9) Pensacola Police Department; 10) Escambia County Sheriff's Department; 11) Santa Rosa County Sheriff's Department; 12) Santa Rosa County State Attorney; 13) Okaloosa County Medical Examiner; 14) Escambia County Medical Examiner; 15) The Florida Bar

the Florida Bar plays any role in Ms. Buenoano's conviction. The Court should not have made this finding without giving counsel an opportunity to be heard.

Counsel for Ms. Buenoano cannot afford the luxury or time of duplicative effort. Unless and until counsel has had a full opportunity to review all of the records and fully develop all of the claims, Ms. Buenoano will be denied her rights under Florida law and the Eighth and Fourteenth Amendments. See Porter v. State, 653 So. 2d 375 (Fla. 1995); Devier v. Thomas, No. 95-8588 and 95-8589 (May 15, 1995). The trial court's denial of Ms. Beunoano's chapter 119 claim and the awkward procedure employed were erroneous.

ARGUMENT V

MS. BUENOANO'S SENTENCE OF DEATH IS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a noncapital case must be set aside as a violation of due process if the trial court relied even in part upon "misinformation of constitutional magnitude," such as prior uncounseled convictions that were unconstitutionally imposed. In Zant v. Stephens, 462 U.S. 879 (1983), the Supreme Court made clear that the rule of Tucker applies with equal force in a capital case. Id. at 887-88 and n.23. Accordingly, Stephens and Tucker require that a death sentence be set aside if the sentencing court relied on a prior

unconstitutional conviction as an aggravating circumstance supporting the imposition of a death sentence. Accord Douglas v. Wainwright, 714 F.2d 1532, 1551 n.30 (11th Cir. 1983).

In Ms. Buenoano's case, materially inaccurate information was presented to and relied upon by the judge and jury who sentenced him to death. Johnson v. Mississippi, 486 U.S. 578 (1988). See also Smith v. Murray, 477 U.S. 527 (1986) (sentence of death constitutionally unreliable when misleading or inaccurate information is presented to the jury); Maggard v. State, 399 so. 2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981). The fundamental error which occurred at Ms. Buenoano's capital proceedings and which resulted in his death sentence must now be evaluated.

The State presented evidence to Ms. Buenoano's sentencing jury of a prior conviction in Escambia County for attempted first degree murder. The prior conviction became the centerpiece of the State's case in the penalty phase. The State called as a witness the prosecutor and the victim (R. 3288-3305).

The underlying conviction upon which Ms. Buenoano's sentence of death rest was obtained in violation of Ms. Buenoano's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. His death sentence, founded upon that unconstitutionally obtained prior conviction, thus also violates his constitutional rights. Johnson v. Mississippi, 486 U.S. 578 (1988); Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993).

The presentation of the unconstitutionally obtained prior conviction deprived Ms. Buenoano of a fair and reliable trial and capital sentencing determination. Rivera v. Dugger, 629 so. 2d 105 (Fla. 1994). This error cannot be harmless, as the jury's consideration of materially inaccurate information substantially influenced the jury's guilty verdict and death recommendation -- certainly, a grave doubt exists as to whether it did. Duest.

Ms. Buenoano has not filed a motion to vacate his conviction in Escambia County but her attorneys are diligently attempting to investigate and develop a motion for filing. The circuit court's order directing the filing of an Amended Motion to Vacate Judgment and Sentence on less than 24 hours notice, as well as both the State and federal government's failure to produce all the documents necessary for her to do so, has prevented Ms. Buenoano from investigating and presenting a rule 3.850 motion.

The State has flatly conceded it falsely informed federal agencies throughout its prior correspondence; that it informed the federal agencies Martz did not testify without first checking the transcript of the trial; and most importantly admitting that Mr. Martz's testimony was material to the outcome of the Escambia County trial:

> Thank you for faxing the transcript of the testimony of Robert [sic] Martz in the above trial. It would appear that Mr. Martz testified to "similar fact" evidence in the bombing case. Therefore, my letters of August 4, 1997 and June 26, 1997 were in error. It should be noted that neither the prosecutor, Mike Patterson, nor myself had the benefit of having a transcript of the trial to review prior to my earlier response.

> whether or not the lab work was "material" to the verdict cannot be determined absolutely. This would be determined by the jury in reaching it's verdict. It must be assumed, however than any evidence received by a jury may have been material to one or more jurors. On the other hand, I did not see anything in the report by the Department of Justice that would directly relate to the admissibility or credibility of Mr. Martz's testimony.

(PC-R4. 186)(emphasis added).

Ms. Buenoano believes that ultimately she will pled facts which, if true, entitle her to relief from her Escambia County conviction. As Ms. Buenoano is about to be executed by the State of Florida, there is substantial doubt that the prior conviction used to support two aggravating circumstances in Florida, is valid. For this reason and all the reasons given throughout this brief, this Court should order a stay of Ms. Buenoano's execution until the court in Escambia County has made a determination, after the evidentiary hearing, regarding the validity of her claims.

ARGUMENT VI

THE TRIAL COURT ERRED IN FINDING THAT MS. BUENOANO'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY WAS NOT VIOLATED WHEN JUROR BATTLE FAILED TO DISCLOSE DURING JURY SELECTION THAT HE HAD BEEN CONVICTED OF INVOLUNTARY MANSLAUGHTER IN PENNSYLVANIA. MS. BUENOANO IS ENTITLED TO A NEW TRIAL.

Ms. Buenoano learned on February 19, 1998 that juror misconduct occurred in her Orange County conviction. Counsel received an anonymous tip that Juror J.B. Battle was a convicted felon and he concealed this information during voir dire. The

anonymous tip stated that Juror Battle was convicted in Pennsylvania in 1978 and sentenced to one (1) to three (3) years imprisonment in a state correctional facility. Counsel was first alerted to this information by Assistant State Attorney Paula Coffman. In a letter dated February 19, 1998, Ms. Coffman informed counsel for Ms. Buenoano that she received a telephone call from the law office of Terry Griffin that one of their clients had information pertaining to Ms. Buenoano's conviction (PC-R3. 752). Counsel later received a phone call that afternoon from an individual who wished to remain anonymous. The caller informed the undersigned that a juror on the Buenoano jury in Orange County had a prior felony conviction but that it was from another state - Pennsylvania. Collateral counsel investigated and discovered that Juror Battle was indicted in 1978 for murder and a Pennsylvania jury convicted Juror Battle of involuntary manslaughter (PC-R4. 595-602). Juror Battle failed to answer truthfully to questioning during voir dire regarding this matter. During voir dire, the prosecutor posed the following question to the entire jury panel:

> By Mr. Perry: Now, have you or any of your family members or close friends ever been personally interested in the outcome of any criminal case, that is, have any interest in the outcome of any criminal case? Anyone here?

(R. 48). Mr. Perry posed this clear and straightforward question twice; Juror Battle failed to respond both times. The record reflects that another juror, Juror Lomen, understood the question and affirmatively responded. Juror Lomen answered: "I own a

clothing store, and on more than one occasion there's been shopliftings, and I have been witness to those and prosecuted those." (R. 49).

After questioning the panel about following criminal or civil **cases** in the news media, Mr. Perry asked the panel this question:

> **MR. PERRY: Have any** of you or your close friends or family members ever been a victim of **a** crime, other than Mr. Lomen?

(R. 51). Mr. Battle again failed to answer a question which pertained directly to his situation.[29] It appears the victim in Mr. Battle's Pennsylvania case **was** his wife or relative.[30] Numerous members of the jury panel answered this question, giving responses ranging from home robbery, stabbing, purse snatching, vehicle theft, petit theft, to rape and murder (R. 51-54). Prospective Juror Miller responded that his nephew was murdered by his girlfriend. Mr. Perry inquired if prospective Juror Miller knew of any motive for the killing, and **Juror** Miller responded that "she was a little insane" (R. 51). Mr. Perry followed up this line of questioning by asking prospective Juror Miller:

> Is there anything about that particular experience that might spill over into this

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[29]At this point in the proceedings, both Mr. Perry and counsel for Ms. Buenoano had used none of their ten peremptory challenges.

[30]The information received concerning Juror Battle's conviction refers to **a** motion filed by Mr. Battles to have alcohol/drug treatment records pertaining to a Stella Battle released (PC-R4. 597).

> case which might cause you not to be a fair and impartial juror for **both** sides.

(R. 51) (emphasis added). Clearly, Mr. Perry was aware that a person's experience with the criminal justice system could create a bias affecting either the prosecution or defense.

Prospective Juror Bridges, answering the same question, stated that a friend of his was shot and killed by the friend's wife about **a** week before Ms. Buenoano's trial began (R. 53). Mr. Perry used one of his peremptory strikes against prospective Juror Bridges (R. 190). Prospective Juror Bass, also responding to this **same** question, answered that one of her best friends shot and killed the friend's husband (R. 54). It appears as if counsel for Ms. Buenoano used one of his peremptory strikes against prospective Juror Bass.[31]

The trial judge went to great pains to explain to the jury the importance of speaking out in selecting a fair and impartial jury (R. 33-35). The trial judge stated to the whole panel:

> Also we want to find out what is on your mind about certain things. Our goal is to select a fair and impartial jury. That means fair to the State as well as to the defense.
>
> We want people who are open-minded, who can reach a decision based on the facts and the law, and not on . . . something that happened to you years ago, something that

[31]The record does not specifically indicate that Ms. Buenoano's counsel struck prospective Juror Bass. However, she does not appear to be one of the prospective jurors challenged for cause and Mr. Perry stated the name of each prospective juror he was striking. Counsel for Ms. Buenoano, on the other hand, called the prospective jurors by number when exercising his peremptory strikes. Therefore, it **was** concluded by process of elimination prospective Juror Bass **was** struck by counsel for Ms. Buenoano.

happened to your family or family members. .

> These questions aren't meant to pry into your private lives, not meant to embarrass you, hold you up to public ridicule, but that are simply meant to get twelve jurors, plus alternates, who are fair and impartial and who can render a verdict based on the evidence and the law, and not on something else.
>
> It would be a travesty of justice to find out if a jury had returned a verdict not based on the facts and evidence but based on something that happened outside of the courtroom. . .
>
> Remember, this is very much like a job interview, and we will try and select people that the State and the defense feels are best able to give both of them a fair and impartial hearing.
>
> Do each of you understand that? Please answer yes or no. (The prospective jurors answered in the affirmative)

(R. 33-36). The trial judge emphasized to the prospective jurors the compelling justification for straightforward, honest answers during voir dire. These instructions failed to convince Juror Battle into disclosing his prior felony conviction. Counsel for MS. Buenoano, at the conclusion of voir dire, gave Juror Battle one last chance to disclose his prior felony conviction by asking the jury panel:

> Is there something that nobody has asked you about that you want to say, that you feel is important to let us know concerning whether you should serve as a juror or not?
>
> Because if there is something you want to say, now is the time to say it. Anything you can think of, no matter how minor it might be?

(R. 175).

To those questions of a personal or sensitive nature, the trial judge told the prospective jurors:

> There are some questions that may cause an embarrassing response, that is, you don't want to answer that question publically (sic).
>
> If that happens, let me know and we will arrange a time when you can answer it more privately outside the presence of the other jurors, or either I will call you forward and you will answer it here outside of the hearing of the other jurors;

(R. 35-36). If Juror Battle was too embarrassed to announce that he was **a** convicted felon, the trial judge gave him the opportunity to disclose this information privately.

The trial court denied any and all relief based on this claim. This was error. The trial court relied on the newly discovered evidence standard annunciated by this Court in Jones v. State, 591 So. 2d 911 (Fla. 1991), to conclude that Ms. Buenoano **was** entitled to no relief. The trial court relied upon an erroneous standard of review in reaching its conclusion.

Jones deals specifically with claims of newly discovered evidence of **innocence.** Jones, 591 so. 2d at 915 (emphasis added), The standard annunciated in Jones and relied upon by the trial court is not the standard of review for juror misconduct **cases.** Jones involved testimonial evidence of innocence which counsel for Jones claimed was newly discovered. This Court analyzed the newly discovered testimonial evidence of innocence under a three-part test. First, this Court looked to whether the asserted facts were unknown by the trial court, by the party, or by counsel at the time of trial. Id. at 916. Second, whether

counsel could have known of the facts at the time of trial by the use of due diligence. Id. Third, whether the newly discovered evidence is of "such nature that it would **probably** produce an acquittal on retrial." Id. at 915 (emphasis in the original).

Jones involved the newly discovered testimonial evidence of innocence provided by nine witnesses. Id. at 914. Jones claimed that based on this newly discovered testimonial evidence of innocence, he was entitled to a new trial. Id. at 913. This Court evaluated the testimonial evidence under the three prongs outlined above and remanded to the trial court to hold a hearing to determine "whether such evidence, had it been introduced at the trial, would have probably resulted in an acquittal." Id. at 916.

The State argued, and the trial court concluded that the claim of newly discovered evidence of jury misconduct failed the Jones test. The trial court, while stating it was relying on Jones, failed to state whether the fact of jury misconduct was previously unknown to the trial court, the prosecutor, or the defense attorney. The trial court then examined whether the information concerning Juror Battle's out-of-state felony conviction could have been discovered through the exercise of due diligence. In effect, the trial court ruled that collateral counsel must do a thorough investigation of every juror as part of its representation of its client. Collateral counsel, under the new standard created by the trial court, would be required to investigate in all fifty states the veracity of each and every

response, or lack thereof, of each juror, to every question propounded during voir dire. The trial court was silent as to whether this newly created obligation applies to other countries as well.

The trial court, even though it decided collateral counsel was not diligent in failing to conduct **a** thorough examination in all fifty states of juror responses and non-responses, continued to evaluate this claim under the last prong of the Jones test. The trial court concluded "that the evidence that Juror Battle had a prior conviction would have **absolutely** no effect (sic) on the outcome of the proceedings, and it most certainly would not produce an acquittal on retrial" (PC-R4. 780) (emphasis added). The trial court's analysis is untenable. The only possible way for any court to determine if Juror Battle's prior felony conviction affected the outcome would be to ask Juror Battle this ultimate question. However, because this ultimate question directly inheres in the verdict is exactly why the Jones test is inappropriate for evaluating claims of newly discovered juror misconduct. The case law is clear that matters which inhere in the verdict can not be unearthed through any means. See § 90.607(2)(b), Fla. Stat. (1997); Wilding v. State, 674 So. 2d 114 (Fla. 1996); Powell v. Allstate Insurance Co., 652 So, 2d. 354, 356-57 (Fla. 1995); Keen v. State, 639 So. 2d 597, 599 (Fla. 1994); Baptist Hospital of Miami, Inc. v. Maler, 579 So. 2d 97, 101 (Fla. 1991).

Contrary to the trial court's analysis of whether a juror's failure to disclose information during voir dire warrants a new trial under the standard annunciated in Jones, Florida courts have utilized a three prong test specific to juror misconduct claims. First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence, Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379 (Fla. 2d DCA 1972), cert. den. 275 So.2d 253 (Fla. 1973); De La Rosa v. Zesueria, 659 So.2d 239 (Fla. 1995); see also, Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984). Despite the State's argument that the cases relied upon by Ms. Buenoano are inapplicable because they are direct appeal cases, both De la Rosa and Skiles were appeals from the granting of new trials. De La Rosa, 659 So. 2d at 240, Skiles, 267 So. 2d at 380. Furthermore, the State argued that the standard of review derived from these direct appeal cases was whether the error was harmless beyond a reasonable doubt. Neither Skiles nor De la Rosa announce any such standard of review. De la Rosa, 659 So. 2d at 240; Skiles, 267 So. 2d at 380. The State further asserted that the direct appeal cases stand for the proposition that there is a burden on the complaining party to show that the juror's concealment of a material fact denies to the party affected the right to make an intelligent judgment as to whether a juror

should be excused. However, De la Rosa does not create such a standard. The first prong is whether the concealment is material to jury service in the case. If this prong of the test is satisfied, it is evident that all parties were affected regarding their right to make an intelligent decision as to whether a juror should be excused. The State directed the trial court to the fact that because Juror Battle concealed information regarding questions propounded by the State, the State was the only one affected. However, this reasoning ignores the fact that the State asks voir dire questions before the defense and few trial judges would allow defense attorneys to repeat questions already asked by the State or the court.

The trial court adopted the State's analysis of the cases cited by Ms. Buenoano and concluded that if anyone was prejudiced by Juror Battle's concealment; it was the State. The State's analysis and the trial court's adoption of same is clearly erroneous. Under the De la Rosa test, this is precisely what is necessary to overcome the first prong of the test; Juror Battle's concealment was material to jury service in Ms. Buenoano's case.

The appropriate inquiry under the first prong of De La Rosa is whether the complaining party can establish that the concealed information is relevant and material to jury service in the case. De La Rosa, 659 So. 2d at 241. The records in Ms. Buenoano's possession pertaining to Juror Battle's Pennsylvania conviction conclusively indicates that Juror Battle: a) was charged with murder; b) his wife or family member was the victim; c) he pled

not guilty; d) a jury convicted him of a lesser included offense; and e) he was sentenced to one (1) to three (3) years in a state facility. Ms. Buenoano was charged with murder; her husband was the victim; she pled not guilty. Plainly, the information Juror Battle concealed from the trial court was extremely **relevant** and material to jury service in Ms. Buenoano's Orange County case. Therefore, the first prong of the test is unquestionably satisfied.

The appropriate inquiry under the second prong of De La Rosa is whether the juror concealed the information during voir dire. See id. In the instant case, Prosecutor Perry specifically asked the panel whether they had ever been personally interested in the outcome of a criminal trial. Obviously, when one is facing murder charges, one is interested in the outcome of that case. Assuming arsuendo that Juror Battle did not understand Mr. Perry's question, the meaning of his question was further clarified by the response of Juror Lomen. Mr. Perry then **asked if** anyone was related to someone who had been the victim of a crime. Again, Juror Battle failed to communicate to the court that his wife or relative was the victim of murder. The record is indisputable that Juror Battle was concealing his prior felony conviction.

The appropriate inquiry under the third prong of De La Rosa is whether the failure to disclose the information was not attributable to the complaining party's lack of diligence. De La Rosa, 659 So. 2d at 241. Ms. Buenoano, as the complaining party,

had no **way** of knowing that Juror Battle was concealing a Pennsylvania felony conviction, precisely because Juror Battle was concealing that information from the court.

Skiles v. Ryder Truck Lines is instructive in this regard. Skiles involved an automobile tort action. The defendant, Ryder Truck Lines, discovered after the trial that one of the juror members failed to truthfully answer two questions.[32] The first question **was** whether any of the juror panel members knew any of the attorneys involved in the litigation. Juror Fernando Mesa knew one of the plaintiff's lawyers but failed to disclose this during voir dire. The second question was whether any of the panel members had been involved in accident **cases.** Juror Mesa replied, "Just a car." Id. Juror Mesa was then asked, "You have never been a member a party to a lawsuit, one way or the other?", to which he replied, "No." Id. However, the defendant in Skiles learned that Juror Mesa had been **a** party to a lawsuit and his lawyer was a partner of the plaintiff Skiles' trial lawyer. Id.

Ryder Truck Lines (Ryder) filed a motion for new trial and the trial court heard argument and testimony regarding the claim that the failure of Juror Mesa to respond truthfully to questions on voir dire required a new trial. Id. Skiles asserted that

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[32]As is the factual setting in the case at bar, the two questions were propounded **by** the plaintiff's lawyer, not by the lawyer for Ryder Truck Lines. Therefore, the defendant, Ryder, is challenging the untruthfulness of answers given during questions solicited by plaintiff. In the case at bar, the Defendant Judy Buenoano, is challenging the untruthfulness of answers solicited by the plaintiff.

before the trial court could grant a new trial, there must be **a** showing or prejudice on the part of the juror in question. Id. at 380. Ryder asserted that three requirements must be met in order to require a new trial: "(1) a **material** (2) **concealment** of some fact by the juror upon his voir dire examination, and (3) the failure to discover this concealment must not be due to the **want of diligence** of the complaining party." Id. (Emphasis in original). The trial court and the appellate court agreed with Ryder as to the appropriate standard of review. Id. In support of this test, the appellate court stated that "the question is not whether an improperly established tribunal **acted** fairly, but it is whether a proper tribunal was established." Id. (quoting Drury v. Franke, 57 S.W. 2d 969, 984).

In Skiles, the trial court inquired of Juror Mesa, under oath, as to whether he was the same person who was involved in litigation against the First National Bank of Tampa as Executor, and whether he was represented by a partner of plaintiff Skiles' trial lawyer.[33] Id. Juror Mesa answered affirmatively to both

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[33]These were the only questions asked of Juror Mesa. Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379, 381 (Fla. 2d DCA 1972), cert. den 275 So.2d 253 (Fla. 1973). The trial court did not inquire ofror Mesa **as** to whether his status as a party in prior litigation or his previous representation by a partner of plaintiff Skiles' attorney affected his verdict in any manner, because the answers to these two questions would inhere in the verdict.

The trial court in the instant case, in denying relief to Ms. Buenoano on this claim, determined that Juror Battle's prior conviction had "absolutely no effect (sic) on the outcome of the proceedings" (PC-R4. 780). In so doing, the trial court delved into matters which inhere in the verdict. Furthermore, the trial court came to this erroneous conclusion with absolutely no factual support (PC-R4. 780).

of these questions. Id. The trial court granted the motion for the new trial on the basis that Juror Mesa's failure to respond truthfully on voir dire "deprived defendant Ryder of the opportunity to examine Mesa concerning these matters and, therefore, deprived him of a possible basis for challenge for cause and certainly deprived him of information that could have given him the opportunity to challenge peremptorily." Id. The appellate court upheld the trial court in stating:

> [T]here is a "miscarriage of justice" when a party is precluded from the opportunity of having a juror excused for cause or of excusing such juror peremptorily by reason of a material concealment by the juror of a fact sought to be elicited on voir dire where the failure to discover the concealment is not through want of diligence by the complainant.

Id. at 382.

De La Rosa involved a medical malpractice action. See De La Rosa, 239 So. 2d at 239. During voir dire, De La Rosa's counsel asked the prospective jurors whether any of them, their family members, or close friends had ever been a party to a lawsuit as a plaintiff or as a defendant. See id. at 240. Four jurors responded explaining their involvement in civil actions. See id. Juror Edmonson did not respond to this question.[34] In a motion for a new trial, De La Rosa asserted that Juror Edmonson's failure to divulge his participation in prior lawsuits constituted material misconduct which entitled De La Rosa to a

[34]Plaintiff's counsel propounded this question to the entire panel and then relied upon the panel members to speak up if they had an affirmative answer.

new trial. Seed . The trial court and this Court agreed De La Rosa was entitled to a new trial based on this claim. See id. at 240-42. Here, as in Skiles and De La Rosa, Ms. Buenoano is entitled to a new trial.

Because "[d]eath is a different kind of punishment from any other that may be imposed," Gardner v. Florida, 430 U.S. 349, 357, 97 S. Ct. 1197, 1205 (1977), the Supreme Court's due process jurisprudence demands that more reliable procedures be used in capital cases. Beck v. Alabama, 408 U.S. 238, 367-368, 100 S. ct. 2382, 2387-2388 (1980). Florida "jurisprudence also embraces the concept that 'death is different' and affords a correspondingly greater degree of scrutiny to capital proceedings." Swafford v. State, 679 So. 2d 736, 740 (Harding, J., concurring) (citing California v. Ramos, 463 U.S. 992, 998-999 (1983) (other citation omitted)). While De La Rosa and Skiles were concerned with monetary damages only, Ms. Buenoano's life is at stake.

"A trial by jury is fundamental to the American scheme of justice and is an essential element of due process." Scruggs v. Williams, 903 F.2d 1430, 1434-1435 (11th Cir. 1990), citing Duncan v. Louisiana, 391 U.S. 145 (1968). The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requires that a juror participating in capital sentencing deliberations must be able to perform "his duties as a juror in accordance with his instructions and his oath." Morsan v. Illinois, 504 U.S. 719, 728 (1992) auoting, Wainwright v. Witt,

469 U.S. 412, 424 (1985), in turn quoting, Adams v. Texas, 448 U.S. 38, 45 (1980) (emphasis added). The capital juror must "consider in good faith the evidence of aggravating and mitigating circumstances as the instructions require him to do." Morgan, 504 U.S. at 729; see also, Ross v. Oklahoma, 487 U.S. 81, 85 (1988). If even one juror is empaneled who cannot comply with what is required in the instructions, Morgan, 504 U.S. at 729, the sentence cannot stand, Mills, 486 U.S. at 377, and "the State is disentitled to execute the sentence." Morgan, 504 U.S. at 729. "Because of the importance of the jury's role in sentencing in capital cases, jurors should be as fully informed as possible about their duties and responsibilities." Jones v. State, 652 So. 2d 346, 354 (Fla. 1995) (Anstead, J., concurring). Juror Battle's failure to truthfully answer the voir dire questions is indicative that he did not take seriously his duties and responsibilities nor could he properly follow the trial court's instructions. Thus Ms. Buenoano's verdict and sentence can not stand.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by facsimile and Federal Express, to all counsel of record on March 13, 1998.

GREGORY C. SMITH
Capital Collateral Counsel
Northern Region
Florida Bar No. 279080

SYLVIA W. SMITH
Assistant CCC - NR
Florida Bar No. 0055816
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(904) 487-4376
Attorney for Appellant

Copies furnished to:

Paula C. Coffman
Office of the State Attorney
P.O. Box 1673
Orlando, FL 32801

Katherine V. Blanco
Candance Sabella
Office of the Attorney General
Westwood Building, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607