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STATEMENT OF TYPE USED

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PRELIMINARY STATEMENT

Throughout this brief, undersigned counsel will cite to the transcripts of Petitioner's jury trial by using the designation [T:]. Pages in the remainder of the record on appeal will be indicated by using volume numbers followed by the page number, for example [V2:333].

STATEMENT OF THE CASE

In the Circuit Court for Polk County, a grand jury, on January 8, 1982, returned an indictment charging Petitioner, Ceasar H. Robinson, with first degree murder, count one, and attempted first degree murder, count two. [V1:3-4] Petitioner allegedly committed these offenses on December 5, 1981. [V1:3] Following jury verdicts of guilty of the charged offenses, the trial court sentenced Petitioner to life and twenty years imprisonment for counts one and two, respectively. [V1:11-15]

On July 25, 1996, Petitioner filed a motion for post-conviction relief. [V1:151-61] In this motion, Petitioner maintained that he was entitled to a new trial based on newly discovered evidence. [V1:155-77] The trial court, the Honorable E. Randolph Bentley presiding, conducted an evidentiary hearing on this motion on March 21, 1997. [V2:168-218] The trial court granted the motion and entered a lengthy written order. [V2:220-226] The state filed a notice of appeal. [V3:353] On May 22, 1998, the Second District Court of Appeal reversed the trial court order granting a new trial. State v. Robinson, 711 So. 2d 619 (Fla. 2d DCA 1998). Petitioner filed a notice to invoke this court's discretionary jurisdiction. On January 5, 1999, this court accepted jurisdiction.

STATEMENT OF THE FACTS

I. Facts Presented at Hearing on Post-Conviction Motion

In 1996 Petitioner met Wilbert Hollins at Avon Park Correctional Institution. [V2:172,175,181-82,190] Petitioner had never met Mr. Hollins previously. [V2:173,176] Because he recognized Petitioner's name, Mr. Hollins indicated to Petitioner that he had met Bernadette Francis, one of the victims in Petitioner's case. [V2:174,190] Mr. Hollins recognized Petitioner's name because it was unusual. [V2:190]

Mr. Hollins also knew Abel Francis, the other victim who died. [V2:176] Mr. Hollins met Mr. Francis in 1974 or 1975 when Mr. Hollins helped Mr. Francis with his car. [V2:176] Mr. Hollins testified he immediately became friends with Mr. Francis because Mr. Hollins did not accept any money in exchange for his assistance. [V2:176] Mr. Hollins often visited Mr. Francis at his home in Winter Haven, and Mr Francis would stop by Mr. Hollins' residence in Riviera Beach in South Florida. [V2:176] During one of these visits in Riviera Beach, Mr. Hollins met Ms. Francis, who at that time had the last name of James. [V2:177,178,186-87] Mr. Francis and Ms. Francis were on their way to Miami. [V2:187] Mr. Hollins saw Ms. Francis about six or seven times. [V2:188]

In 1989 Mr. Hollins met by chance Ms. Francis in Brooklyn, New York. [V2:177-78,181] Mr. Hollins was walking down the street looking for someone when he saw Ms. Francis in front of a residence. [V2:177-78,192-97] Ms. Francis indicated that Mr. Francis

had been shot and killed and that she had also been shot. [V2:178,197-98] After Mr. Hollins asked what had happened, Ms. Francis indicated she had awoken in a dark room and discovered she and Mr. Francis had been shot. [V2:179,198-99] Ms. Francis said she did not see who shot her, but she nonetheless claimed that Petitioner was the perpetrator, naming him by name. [V2:179,180-81,198-99] In addition, Ms. Francis told Mr. Hollins that her daughter had lied in court about the shooting. [V2:201] Ms. Francis told Mr. Hollins that Petitioner was her ex-husband, that she got involved with him just for his money, and that she took all his savings and gave it to Mr. Francis. [V2:179-80,199] Petitioner was born in 1917 and was much older than Ms. Francis. [V1:3,V2:180]

Mr. Hollins had not seen Ms. Francis since the meeting in New York. [V2:182] Mr. Hollins described Ms. Francis as a big woman who wore a wig and glasses. [V2:182] Mr. Hollins said Ms. Francis was a Jamaican, but she did not talk like a Jamaican. [V2:182] One of her fingers was "stiff." [V2:182] Mr. Hollins testified he was willing to testify at a new trial if one were granted in Petitioner's case. [V2:182-83] He denied that he was promised anything for his testimony. [V2:183] Petitioner testified he did not promise Mr. Hollins anything in exchange for his assertions. [V2:174] Mr. Hollins was serving a life sentence. [V2:185]

Ms. Francis testified that she did live in Brooklyn, New York. [V2:204] She was born in Granada, West Indies, and did speak with an accent. [V2:204,213] Ms. Francis testified she first met Mr. Francis about a year or two before their marriage in October 31,

1981. [V2:206,214] She said she did not know Mr. Hollins and had never heard his name. [V2:206-09] She did not recall a conversation with Mr. Hollins in Brooklyn. [V2:208,210] According to Ms. Francis, she did not wear wigs, but she did wear hair extensions. [V2:211,213] Her weight was 245 pounds, and she did wear glasses. [V2:211] She claimed she told the truth at Petitioner's jury trial. [V2:212] Ms. Francis denied that she had traveled to any places in Florida with Mr. Francis. [V2:213-14]

II. Facts from Petitioner's Jury Trial

Bernadette Francis married Appellant on May 8, 1977. [T190,221] The marriage lasted less than two years, but Ms. Francis and Petitioner married for a second time in April of 1979. [T190,226] On July 7, 1981, Ms. Francis and Petitioner again divorced. [T190] Although she admitted Petitioner asked for the second divorce, Ms. Francis claimed Petitioner did not want it. [T206,230] Petitioner testified he did not contest the divorce. [T508]

On October 31, 1981, Ms. Francis married Avil Francis in Brooklyn, New York. [T191,203] She had met Mr. Francis in May of 1981. [T192] Near the end of June on a Monday, Mr. Francis was working on Ms. Francis' residence when Petitioner arrived. [T196,199] Ms. Francis had already separated from Petitioner. [T192-93] According to Ms. Francis, Petitioner pulled out a handgun and pointed it at her and Mr. Francis. [T196-97,228-29]

Petitioner unloaded the gun, showing the weapon's bullets. Ms. Francis claimed Petitioner stated, "This is against my reputation. I have never pulled a gun without using it. . .I know I can get in trouble for this; but when I get in trouble I'm going to make sure I do something." [T197] Petitioner allegedly threatened to "get" them if they told anyone about the threat. [T198-99]

The next Friday, Petitioner arrived at Ms. Francis' residence. [T200] Ms. Francis went with him in his truck. [T200] Ms. Francis alleged Petitioner, while they were inside the truck, choked her. [T200-01] Petitioner stopped when several cars approached. [T201] Petitioner continued driving and asked Ms. Francis whether she wanted him or Mr. Francis. [T201] Ms. Francis testified that Petitioner was extremely jealous. [T201] Ms. Francis did not report the incident to the police. [T202,231]

The next day, Mr. and Mrs. Francis traveled to New York. [T193,202-03] Ms. Francis testified she went there because she feared Petitioner. [T196] Nonetheless, she later spoke to him on the phone regarding the divorce, and Petitioner acted in friendly manner. [T231] In late November of 1981, Ms. Francis returned to Florida. [T204] She lived with Lonnie Mae Jackson until Mr. Francis and her children arrived around December 2nd. [T205] On December 4th (a Friday), Mr. and Ms. Francis went to the post office. [T207] Ms. Francis observed Petitioner in his truck, stopped at a stop sign. [T207] As Mr. and Ms. Francis drove away, Petitioner drove very close to their vehicle. [T208]

That evening Mr. and Ms. Francis went to bed between 9:30 and 10:30 p.m. [T212] Six children also lived in the home. [T212] Shantel, who was five years old at the time of the trial below, slept in the same bed with Mr. and Ms. Francis. [T212,259] The residence had two doors, a front and a back. [T213] The doors were normally kept locked at night. [T213-14,241] The screen door to the front door was also normally locked at night. [T214] The lights to the house were off. [T216]

Ms. Francis awoke to feel a numbness in her hand and blood on her hand. [T216] A bullet had entered her arm and exited, hitting her temple. [T217-18,453-54] She claimed that Petitioner was standing at the side of the bed. [T218,219,234-35,239-40] To the contrary, she said in a deposition that he was not close to the bed. [T240-41] Ms. Francis said the light to the bedroom was now on. [T234] The television was turned off. [T239] She could not give a description of what Petitioner was wearing nor did she see a weapon. [T233,235] Ms. Francis testified she recognized Petitioner's voice. [T219] According to Ms. Francis, Petitioner stated, "You thought you all have gotten away, but I got both of you all." [T216] Petitioner then left. [T216,219] Ms. Francis told law enforcement that Petitioner exited toward the back door, which was boarded-up. [T338,478,490] Ms. Francis tried to shake Mr. Francis awake, but he did not respond. [T217,218] She testified Shantel was awake. [T235]

Shantel Francis testified she was in a bed with Mr. and Ms. Francis when the shooting occurred. [T260,263] She claimed that

she saw Petitioner commit the shooting. [T261] Shantel described the gun as "a big gun." [T261] According to Shantel, Petitioner was standing by the door when the shooting occurred. [T250] She said Petitioner shot Mr. Francis five times and her mother once. [T261] Shantel testified Petitioner put the light on to her sister's room prior to the shooting. [T264] Shantel said Petitioner was wearing blue pants, a red shirt, and a brown and yellow jacket. [T265] Despite the detail of her court testimony, Shantel was unable to inform law enforcement what had occurred when she was twice questioned after the shooting. [T486-87] She indicated she did not know what happened although she indicated Petitioner committed the shooting. [T489,492] During the second questioning, Shantel claimed Petitioner wore a white suit. [T492]

Joseph James was in the residence when the shooting occurred. [T269] Shantel awakened him during the night. [T273-74] James went into the bedroom where he saw that Mr. and Ms. Francis had been shot. [T274] Ms. Francis told James that Petitioner had committed the shooting. [T275] James went for help. [T220,445] Lonnie Mae Jackson arrived. [T220,445]

James testified that he turned off the television in the "boy's room" because he was the last to go to bed that evening. [T270-71] He also made sure that the front door was locked and turned on the front door light. [T271,272-73] During her trial testimony, Ms. Francis said the outside light near the front door was on when she went to bed; however, she contradicted this assertion in a deposition, saying the light was off. [T238] Ms.

Francis had changed the locks on the doors to the residence. [T232] She testified that she provided Petitioner with a key to the new locks in June. [T284,285] Petitioner returned this key a couple of days later. [T285] Petitioner testified he never obtained a key to the new locks. [T517-18] Ms. Francis had been convicted of a crime involving dishonesty. [T241-42]

Officer Ronald Smith arrived at the residence at about 3:17 a.m. [T309-10,309,315] Ms. Francis told him that a "Cecil Robinson" had shot her and her husband about fifteen minutes previously. [T311,314,315-16] Law enforcement did not discover any evidence to indicate that the front door was forced open. [T332,476] The back door was boarded-up. [T338,478] The glass cover to the outside light was lying on the ground near the front door. [T333] The cover was not damaged. [T333] The light bulb was loose in the socket. [T334] The light was still turned on, however. [T334,478] A fingerprint from the light matched Petitioner's fingerprints; however, the state could not establish when the print was made. [T337-38,460-62,466,469] Petitioner said he had changed the light bulb at the residence in November when he went into the house to obtain some items that belonged to him. [T519-22,547-48] Ms. Francis testified the bulb had not been changed since she moved back into the residence. [T215] Petitioner last lived in the house in April, 1981. [T215,232] Ms. Francis said she did not see Petitioner change the bulb while he lived there. [T215]

Shirley and Oscar Ethridge lived next door to the residence. [T287,297-98] Ms. Ethridge testified Mr. and Ms. Francis, on one occasion, vacated the residence, saying they were going to Miami to a wedding. [T289] According to Ms. Ethridge, Petitioner would sometimes drive by the house. [T290,294] On one night in late November at about 11:00 p.m., Petitioner parked his car outside the residence. [T290-91]

Mr. and Ms. Ethridge testified the outside light to the Francis residence was on at about 9:30 p.m. on December 4th. [T292,299] At about 10:00 p.m., a vehicle pulled in front of Ethridge's residence. [T292,299] Three men got out of the car and raised the vehicle's hood. [T292,299] A truck came by shortly thereafter, and the car left with the truck. [T292-93] At about 1:30 a.m., the Ethridges were awoken by their dog barking. [T293,299] They noticed that the outside light to the home was off. [T293,295,300] A man was walking a dog in front of the residence. [T293,295,299]

Carl Ethridge, Mr. and Ms. Ethridge's son, testified he heard the dog barking and later a scream. [T308,306] Carl Ethridge said the dog barked at about 1:45 a.m.. [T304,307]

Dr. Wilton Reavis, Jr., a forensic pathologist, performed an autopsy on Mr. Francis on December 5, 1981. [T370] Dr. Reavis concluded that the cause of Mr. Francis' death was three gunshot wounds. [T371,378] Dr. Reavis could not determine the order of the shots. [T374,379] One of these wounds was to his upper right arm. [T371] Dr. Reavis testified this gunshot was fired at close range.

[T372] A second gunshot wound was to Mr. Francis' left cheek and brain. [T374-75] The shot causing this wound was not fired at close range. [T375] The bullet causing the wound was retrieved. [T375-76] A third wound was to the deceased's neck and skull. [T376-77] This wound did not occur at close range. [T377] The bullet causing this wound was also recovered. [T377] The two recovered bullets were both .38 caliber. [T429] In addition, a bullet fragment retrieved from the mattress where Mr. and Ms. Francis slept was a .38 caliber. [T344-45,347,351,431]

Joseph Tugerson knew both Petitioner and Mr. and Ms. Francis. [T389,390] Tugerson met Petitioner at a gas station prior to the shooting. [T393-94,401] He testified that this meeting could have occurred as much as five or six weeks prior to the shooting. [T402] According to Tugerson, Petitioner produced a .38 handgun from beneath the seat of his vehicle. [T394,402-03] Petitioner testified that he had bought this gun after another gun had been stolen from him. [T395] Tugerson testified that Petitioner had stated he had caught Ms Francis and Mr. Francis in bed. [T397,404] According to Tugerson, Petitioner said, "I could have killed them then if I had wanted to." [T398] Tugerson testified Petitioner did not seem angry when he made the statement. [T404] Petitioner denied that he showed a gun to Tugerson. [T523,544] Petitioner did admit that he had purchased a gun in April, 1981, but he testified that this gun was stolen in July, 1981. [T524-25,551-52]

On the morning of December 5th (a Saturday), law enforcement arrested Petitioner in Monticello. [T408-09] Monticello is 248

miles from Polk County. [T407] A law enforcement officer drove from Polk County to Monticello in four hours and forty minutes. [T407] At the time of his arrest, Petitioner was at his mother's home, his truck parked in front. [T408,409-10] Law enforcement first observed the truck between 10:30 and 11:00 a.m. [T414] Inside the vehicle was a receipt for a .38 caliber revolver. [T482,484]

Petitioner testified he first met Mr. Francis at a church. [T510] Ms. Francis had suggested that Petitioner and she go to this particular church. [T510] This meeting occurred prior to Petitioner being separated from Ms. Francis. [T510] Petitioner denied ever having committed any physical abuse against Ms. Francis during their two marriages. [T516]

Just prior to their second divorce, Petitioner saw Ms. Francis in bed with Mr. Francis. [T510,511] Petitioner left the room without incident. [T512] Following him, Ms. Francis told Petitioner that she had rented the room to Mr. Francis because she needed money. [T512-13] The next day, Petitioner met Mr. Francis who apologized for being with Ms. Francis prior to her divorce becoming final. [T515] That day Petitioner assisted Mr. Francis by picking up wood for repairs that Mr. Francis was doing. [T515-16] Petitioner denied pulling a gun out or threatening anyone. [T516,552] He said he was not jealous of Mr. Francis. [T543] Petitioner also denied choking Ms. Francis. [T552-53]

On December 3rd, Petitioner was in Winter Haven in order to pick up a check. [T526] He left for Monticello at 2:00 p.m.,

arriving there at 7:15 p.m. [T526-27] Petitioner normally drives slowly. [T527] His truck is an older model. [T527-28] Petitioner saw Adam Scurry in Monticello. [T528] At about 7:30 p.m., Petitioner drove to Tallahassee to visit a friend Virginia Johnson who was in the hospital. [T528,566] During the trial below, Johnson confirmed that Petitioner did visit her. [T566-67] She testified that he brought her check to her. [T567] From Tallahassee, Petitioner went to Midway. [T529] Petitioner returned to his mother's residence at about 11:00 p.m. [T529]

The next morning, James Bellamy visited Petitioner. [T530] Petitioner then went into town and returned at about 11:00 a.m. [T530-31] Petitioner went with his mother into town. [T531-32] At about 4:00 p.m., Petitioner returned home with his mother. [T533] Petitioner left for Tallahassee, returning about 6:30 p.m. [T533-34] When he returned, Petitioner bought gas from a friend Herbert Thompson. [T534] That evening, Petitioner saw several friends. [T534-35] Petitioner went to Allen's Place and shot pool until about 11:30 p.m. [T535-36] Leaving Allen's Place, Petitioner drove to a friend's house to pick up a friend. [T536] Petitioner then returned home at about 12:30. [T537]

Arlene Taylor, Petitioner's mother, testified she saw Petitioner at her home on December 3rd and 4th. [T571] On December 4th, she and Petitioner went to Monticello to buy groceries. [T572] Later that evening after 11:30 p.m., she saw Petitioner when he returned to her residence. [T573-74] She testified Petitioner woke

her up because he did not have a key. [T574] The next morning Petitioner was still inside the home. [T575]

Richard Dobson, an investigator, questioned Taylor concerning Petitioner's whereabouts on the night of December 4th. [T603] According to Dobson, Taylor said Petitioner left her house on the previous Monday and did not return until late Friday night or early Saturday morning. [T603] Dobson's written report stated, "According to Mrs. Taylor, Ceasar left her house the preceding Monday and returned the night before he was arrested." [T605]

Joe McCloud testified that he saw Petitioner on the morning of December 4th at about 11:00 a.m. [T580] Petitioner was at his mother's residence. [T580] McCloud saw Petitioner the following day at about noon. [T581] Henry Bailey worked at Allen's Place. [T583] Bailey testified he saw Petitioner at the bar at about 5:00 p.m. on December 4th. [T584,586] Britt Jones testified he spoke to Petitioner while he was across the street from the bar. [T588-89]

Stephen Harris remembered seeing Petitioner in Monticello on a Friday afternoon. [T591,592] That following Monday Petitioner was arrested. [T591-92] Johnny Blue also saw Petitioner on a Friday night around 10:30 p.m. [T593-94] Blue testified the Friday was during the middle of December. [T594-95] Adam Scurry said he saw Petitioner on a Friday afternoon and a Saturday morning. [T596-99] Herbert Thompson testified Petitioner bought gas from him at about 4:30 p.m. on a Friday, December 4th. [T600-01]

Petitioner testified he last saw Ms. Francis on July 7, 1981. [T518-19] He denied going to Winter Haven on the night of

December 4th or the following morning. [T537] He denied committing the shooting. [T540]

SUMMARY OF THE ARGUMENT

Mr. Wilbert Hollins testified the key prosecutorial witness told him that she and her daughter had been untruthful in their testimony, which was the only direct evidence against Petitioner. The trial judge did not grant Petitioner a new trial after hearing only Hollins' testimony. Prior to reaching his ruling, the judge also reviewed the transcripts of the jury trial and memorandums submitted by the defense and prosecution. The judge, after this review, wrote a lengthy order supporting the conclusion that a new trial was required. The Second District Court of Appeal reversed this order holding that the trial court had overlooked circumstantial evidence of guilt, evidence that was presented to the trial court by means of the prosecution's memorandum. Because nothing suggests that the trial court did not consider this circumstantial evidence, the district court's more precise holding is that the trial court did not give the appropriate weight to this evidence. The district court, therefore, reweighed the evidence that was before the trial court. This reweighing is contrary to the established appellate principle that only the trier of fact and not the appellate court can weigh evidence.

ARGUMENT

ISSUE

DID THE TRIAL COURT COMMIT A PALPABLE ABUSE OF DISCRETION IN GRANTING PETITIONER A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE?

Petitioner filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850, maintaining that newly discovered evidence required a new trial on his convictions of first degree murder and attempted first degree murder. [V1:151-61] The newly discovered evidence consisted of the testimony of Mr. Hollins. During an evidentiary hearing on the motion, Mr. Hollins testified that he had met Bernadette Francis, one of the victims, over seven years after the date of the alleged offenses. Ms. Francis told Mr. Hollins--in contrast to her trial testimony--she never saw the attacker who shot her and her husband. [V2:179,198-99] Ms. Francis admitted to Hollins that the room where the shooting occurred was dark. [V2:179] In addition, Ms. Francis confessed to Mr. Hollins that Shantel, her daughter, had perjured herself when the young girl testified Petitioner had committed the shooting. [V2:201] Ms. Francis told Mr. Hollins that she had gotten involved with Petitioner, who was much older than she, because of his money, which she gave to Mr. Francis. [V2:179-80,199]

The Honorable E. Randolph Bentley heard the above testimony and the testimony of Petitioner and Ms. Francis. Judge Bentley also reviewed the transcripts of Petitioner's jury trial.

Following this review, Judge Bentley entered a lengthy written order granting the motion for post-conviction relief. [V2:168-341] The order contains findings of fact, conclusions of law, and supporting portions of the jury trial transcript. Judge Bentley concluded that the newly discovered evidence would probably affect the result of the case. [V2:224] Judge Bentley noted that the state's case was circumstantial except for the testimony of Ms. Francis and Shantel. [V2:224] Judge Bentley cited facts questioning the reliability of this direct testimony. [V2:224-25] The judge pointed out inconsistent statements regarding the shooting made by both Ms. Francis and Shantel. [V2:224-25] Finally, Judge Bentley pointed out that Ms. Francis had apparently lied about her travels in Florida with Mr. Francis. [V2:225] On the other hand, Judge Bentley found Mr. Hollins' testimony credible and lacking in a motive for fabrication.

Despite Judge Bentley's careful review and detailed ruling, the Second District Court of Appeal held that "no reasonable person would have reached the conclusion that the trial court did." State v. Robinson, 711 So. 2d 619, 623 (Fla. 2d DCA 1998). The district court supported this holding by stating that the trial court ignored circumstantial evidence of guilt. Id. The district court reached this conclusion even though the record indicates Judge Bentley considered inculpatory circumstantial evidence in ruling upon the post-conviction motion. Judge Bentley did request, at the end of the evidentiary hearing, written arguments from both parties. [V2:216-217] These written arguments were to be written

after a review of the trial transcripts; accordingly, the state's written memorandum argues the circumstantial evidence of guilt that was presented during the trial. [V2:216-217,348-52] Nothing suggests that the trial court ignored this memorandum after specifically requesting its submission from the state.

Given that the trial court considered all of the evidence relevant to a ruling on the post-conviction motion, the district court's statement that Judge Bentley did not properly consider all of the inculpatory evidence is tantamount to saying Judge Bentley did not give the proper weight to this evidence. The district court, by necessity then, reweighed the evidence in reaching a result contrary to the trial court.

In Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), this court distinguished between the weight of the evidence and the legal sufficiency of the evidence. Legal sufficiency, this court stated, "is a test of adequacy" and "is 'evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded.'" Id. at 1123 (quoting Black's Law Dictionary 1285 (5th ed. 1979)). On the other hand, this court stated that the weight of the evidence "is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other." Id. (emphasis added). The latter is the exclusive concern of the trier of fact. Id. This court stressed its holding by calling this rule "a guiding principle of appellate review." Id. at 1125.

In the present case, the district court violated this important principle of appellate view by reweighing the evidence presented in the trial court. The trier of fact in this case is the trial judge, not the appellate court. Under Tibbs, the weight accorded to evidence is within the province of the trier of fact, in this case Judge Bentley. See also, Herzog v. Herzog, 346 So. 2d 56 (Fla. 1977) ("It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it."); Demps v. State, 462 So. 2d 1074 (Fla. 1984) (This court states that it will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court," quoting Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

The basis for the rule permitting only the trier of fact to weigh evidence is sound. The appellate court has only a paper record before it. On the other hand, the trial court is in a position to judge the demeanor and, consequently, the credibility of witnesses. In stressing that deference to be given to a trial court's construction of the evidence, the court in Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985), stated "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." Similarly, this court has stated, "We give trial courts this responsibility because the trial judge is there and has

a superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective." State v. Spaziano, 692 So. 2d 174, 177 (Fla. 1997).

This case is similar to Gonzalez v. State, 449 So. 2d 882 (Fla. 3d DCA 1984). In Gonzalez the state filed a cross-appeal arguing the trial court erred in granting a new trial on a robbery charge based on the weight of the evidence. Id. at 888. The court in Gonzalez noted at the outset that it was not permitted to reweigh the conflicting evidence that was presented to the trial court. Id. The court found that the presence of circumstantial evidence of guilt but stated "the trial court was empowered to reweigh the conflicting evidence and decide that the circumstantial evidence . . . was insubstantial, and did not preponderate over appellant's own testimony." Id. at 889.

The holding in Gonzalez should apply to the present case. Although circumstantial evidence of guilt is present, the trial court is entitled to discount this evidence in favor of credible newly discovered testimony from Mr. Hollins. The trial court had the opportunity to observe the demeanor and intonations of both Mr. Hollins and Ms. Francis as they testified. This opportunity was not afforded to the district court of appeal, which was limited to transcripts of what was said.

The burden on the state to show trial court error in this case is great. A presumption exists that the trial court's granting of a new trial is correct. Ryan v. Atlantic Fertilizer & Chemical

Co., 515 So. 2d 324 (Fla. 3d DCA 1987).¹ A trial court ruling granting a new trial will only be overturned only if there is a "palpable" or "gross" abuse of discretion. Id. at 327. See also, Currie v. Palm Beach County, 578 So. 2d 760 (Fla. 4th DCA 1991) (Abuse of discretion must be "clear.").

A palpable abuse of discretion did not occur in the present case. The newly discovered evidence seriously undermines the only direct evidence of guilt, the testimony of Ms. Francis and Shantel. The trial court had the responsibility and was in the best position to weigh the credibility of the newly discovered evidence and other exculpatory evidence versus the direct testimony and circumstantial evidence of guilt. The trial court fulfilled this responsibility and provided sound reasoning for its ruling granting a new trial. Only by assuming the role of trier of fact did the second district reverse the trial court's decision. This court should correct this violation of a fundamental appellate principle by overturning the district court's decision.

¹The standard for review of an order granting a new trial in a criminal case is the same standard applied in a civil case. See, Gonzalez v. State, 449 So. 2d 882.

CONCLUSION

Based on the above arguments and authorities, Petitioner respectfully requests that this court overturn the decision of the Second District Court of Appeal and affirm the trial court order granting Petitioner a new trial.

APPENDIX

PAGE NO.

A1-A10

1. Second District Court of Appeal's decision rendered on May 22, 1998.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Patricia A. McCarthy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of October, 2000.

Respectfully submitted,

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