IN THE SUPREME COURT OF FLORIDA

CEASAR H. ROBINSON,	
Petitioner,	
v.	**Case No. 93,210**
STATE OF FLORIDA,	
Respondent.	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL
IN AND FOR THE SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT REGARDING TYPE

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STATEMENT OF THE CASE

In the early morning hours of December 5, 1981, Avil Francis ("Avil") was shot to death while sleeping at a residence in Winter Haven. His wife, Bernadette Francis ("Bernadette"), was shot in the head, but survived the shooting. At a jury trial held on August 2-5, 1982, the Honorable J. Tim Strickland, Circuit Judge presiding, the jury found Ceasar Robinson, Bernadette's ex-husband, was found guilty of the first degree murder of Avil and attempted first degree murder of Bernadette as charged. The state did not seek the death penalty.

On September 8, 1982, Robinson was sentenced to life in prison with a minimum of 25 years and a consecutive prison term of twenty years with a three-year minimum mandatory sentence. (R 11-15) The judgments and sentences were per curiam affirmed without written opinion by the Second District Court of Appeal in 2d DCA no. 82-2333. (R 21) Robinson v. State, 436 So. 2d 112 (Fla. 2d DCA 1983)[table]("Robinson I").

On March 30, 1984, Robinson filed a motion for postconviction relief. (R 22-29) On April 5, 1984 Robinson filed a "motion to

withdraw 3.850 motion," which was granted on April 19, 1984.[1] (R 119) On March 7, 1986, Robinson filed a motion to compel disclosure of exculpatory evidence, which was granted on June 17, 1986. (R 20-33)

Robinson filed a state habeas petition which was treated as a Rule 3.850 motion and denied. On January 25, 1989, the Second District affirmed per curiam without written opinion in 2d DCA no. 88-1019. Robinson v. State, 538 So. 2d 1262 (Fla. 2d DCA 1989)[table]" ("Robinson II").

On October 6, 1989, Robinson filed another motion for post-conviction relief, raising a claim of newly discovered evidence. Robinson alleged, inter alia, that the prosecution threatened a key defense alibi witness, Johnnie Cuyler, who would have testified Robinson was in Monticello, Florida on the morning or night of the offenses. (R 36-117) On February 5, 1990, the trial court summarily denied relief, finding Robinson failed to establish the exception to the two-year limitation in Fla.R.Crim.P. 3.850 for newly discovered evidence. (R 118-121) The motion for rehearing was denied. (R 142-147)

Robinson appealed the adverse order. On April 11, 1990, the Second District affirmed per curiam without written opinion. Robinson v. State, 560 So. 2d 237 (Fla. 2d DCA 1990)[table]. (R

[1]Robinson also filed a petition for writ of habeas corpus in the United States Middle District, which was denied on October 25, 1985 in case no. 84-753-CIV-T-15. (R 153-154)

150)("Robinson III").[2]

On July 25, 1996, Robinson filed a third motion for post-conviction relief, asserting newly discovered evidence. (R 151-161) Robinson claimed the victim and her daughter testified untruthfully at his trial. In support of his motion, he filed an affidavit of a fellow inmate, Wilbert Hollins, who purportedly obtained this information during a conversation with Bernadette Francis in New York in 1989. Robinson claimed he learned of this information a few months prior to filing his 1996 3.850 motion. (R 157) The state responded that Robinson was entitled to an evidentiary hearing, which was granted. (R 163-165)

The Honorable E. Randolph Bentley, Circuit Judge, presided over the evidentiary hearing held on March 21, 1997. The successor judge granted relief by written order filed on May 28, 1997. (R 220-226) The state filed a timely notice of appeal on June 3, 1997. (R 353)

On May 22, 1998, the Second District reversed the order granting relief. The Second District held that trial court abused its discretion in determining that Hollins' testimony would probably produce an acquittal on retrial. State v. Robinson, 711 So. 2d 610 (Fla. 2d DCA 1998)("Robinson IV").

Robinson filed a notice to invoke discretionary jurisdiction

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[2]Robinson unsuccessfully sought habeas relief in the Supreme Court in case no. 76, 176. Robinson v. State, 564 So. 2d 1087 (Fla. 1990)[table]. Undersigned counsel has not ascertained whether such related to the instant case.

dated June 5, 1998. Jurisdictional briefs were filed by the parties. By order dated January 5, 1999, this Court accepted jurisdiction, dispensed with oral argument, and ordered briefing on the merits.

STATEMENT OF THE FACTS

The 1982 Trial

The following facts were adduced at Ceasar Robinson's 1982 jury trial. Robinson met Bernadette in Winter Haven in September 1976 and began his relationship with her by providing transportation. (T 221, 227) Eventually, he moved in her trailer and they were married on May 8, 1977. (T 190, 221) Their relationship, however, was stormy, marred by varied arguments. (T 223) When such arguments erupted, it was Robinson's practice to pack his bags and leave. (T 223) The marriage lasted about a year and a half, ending in divorce. (T 190) They remarried in April 1979 and separated in April 1981. Robinson moved in with another woman by whom he had several children. (T 192) The second marriage ended in divorce on July 7, 1981. (T 190-191)

Bernadette met Avil Francis around May 1981. (T 192) Robinson was unhappy with the divorce and extremely jealous. (T 201, 206) In June 1981, Robinson threatened Bernadette and Avil with a handgun at a trailer where Avil was working. (T 194, 196-197) He unloaded the gun, displaying seven or eight bullets. (T 197) He told them he never pulled a gun without using it. He stated he knew he could get in trouble, but when he gets in trouble, he was going to make sure he did something. (T 197-198) Robinson threatened to come back and get them if they told anyone about the incident. (T 198-199)

Five days later, Robinson took Bernadette to a grove for sex. He choked her and asked if she wanted him or Avil. (T 200-202) She left for New York the next day for her safety. Avil and two of her children went with her. (T 196, 202) She returned to Florida in July and signed divorce papers. (T 203) Bernadette then went back to New York and Avil went to New Jersey. (T 203)

On October 31, 1981, approximately five weeks prior to the fatal shooting, Bernadette married Avil in Brooklyn, New York. (T 191, 203) In late November 1981, she returned to Florida and stayed with Sister Jackson, a member of Bernadette's and Robinson's church, for about a week because someone had broken into Bernadette's house. (T 204-205, 440, 447).

On or about December 2, 1981, Avil returned with the children. They took up temporary residence in the former marital abode of Bernadette and Robinson. They intended to stay only until repairs were made. (T 191, 205, 211-212, 231) Robinson had not lived there since April 1981. (T 215) When he moved out, Bernadette changed the locks on the doors. Robinson had a key to the new locks, but returned it; however, it was not known whether Robinson made a duplicate key. (T 232, 284-285)

Avil lived there approximately two days. (T 206) On the afternoon of December 4, 1981, Bernadette saw Robinson in his truck as she exited the post office in Winter Haven. (T 206-208) She had not seen him since the divorce in July. (T 210) They made eye

contact, although Robinson did not look at her as he drove alongside the vehicle occupied by Bernadette and Avil. (T 210) Robinson turned off and the Francis proceeded to purchase lumber to board up broken windows in the home. (T 205, 211, 236)

That night, Bernadette, Shantel, and Avil went to bed together--with Shantel at Bernadette's feet. (T 212-213) She described it as a twin bed and then as a standard or full bed.[3] (T 236) The doors were locked. (T 214) An outside porch light and lights in her sons' bedroom were on, but not those in the bedroom where Avil, Bernadette, and Shantel slept. (T 214) A small television in the bedroom was on, providing only minimal light. (T 216) During the early mornings hours of Saturday, December 5, 1981, Bernadette awoke with a numb feeling in her hand. (T 216) The lights were now on and the television off. (T 233, 239) She saw Robinson standing by the side of the bed. Robinson said, "you thought you all have gotten away, but I got both of you all." (T 216) Robinson left the house. Bernadette realized she had been shot and Avil killed.[4] Bernadette saw no gun and heard no shots. (T 218-219)

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[3]A crime scene diagram apparently reflected two twin beds were in the room. (T 644)

[4]The bullet entered and exited her arm and reentered her head. A fragment exited her head. The main portion of bullet remained in the back of her head. (T 217-218, 454) Avil was shot three times--in the neck, cheek, and right arm. The arm wound was at close range. The cheek and neck wounds were inflicted from more than a foot and a half away. (T 184, 371-372, 375-376, 380)

Shantel Francis, the five-year-old child of Bernadette and Avil, testified at trial she was laying on her mother's feet in bed at the time of the shootings. (T 260) Avil was also in bed. (T 260) She said Robinson had a big gun. (T 261-262) Shantel advised Robinson "put" on the light in the room and shot her mom once and Avil five times. (T 261, 263-264) She did not count, but knew how many times he shot her mom and Avil, whom she referred to as daddy. (T 263) She said Robinson wore a red shirt, yellow and brown jacket, and blue pants. (T 265) In a subsequent interview she said he had a white suit. (T 492) She knew her cousin had turned on the outside light. She saw it as she was going in the bedroom. She said she could see light through the window. (T 264)

A crime technician later testified all the windows were not boarded up. He did not believe light could come through the boarded up windows in the bedroom. (T 365-366)

Joseph James, age 17, also lived in the house. He was Bernadette's nephew and the last one to bed that night. (T 269) The front door was locked. He turned out the outside porch light with a switch inside the home. (T 217-273) He awoke after the shootings and was told by Bernadette that Robinson shot her. (T 274-275) He did not hear any shots. (T 275) He found the porch light off, the glass cover gone, and the bulb unscrewed. He ran to a neighbor's house for help. (T 276-277)

Deputy Ronald Smith was the first responding officer on the

scene. Bernadette identified her ex-husband as her assailant. (T 314, 316) The screen door outside the wooden front door was cut above and below the handle. (T 331) There was, however, no damage to the wooden door and no sign of forced entry. (T 332) The glass cover to the front porch light lay unbroken on the ground and the light bulb was unscrewed. The light switch inside the house was in the "on" position. (T 333-334) A fingerprint lifted from the light bulb was determined to be Robinson's. (T 335-337, 466) The light bulb was in operating condition. (T 477)

One projectile was recovered from the bed mattress and two more projectiles from Avil's body at the autopsy. (T 344-346,357-359) All projectiles were examined and found to be .38 or .357 caliber of Federal manufacture. (T 429, 431) One of the bullets extracted from Avil and the bullet found in the mattress were definitively determined to have been fired through the same barrel. The third bullet was probably filed through the same barrel. (T 431)

Audrey McGill's testimony revealed that on April 6, 1981, Robinson had purchased a .38 caliber revolver and 12 .38 caliber Federal shells at the Eloise Pawn Shop in Eloise, which is south of Winter Haven. (T 414-421)

About "a week or so" and up to five or six weeks prior to the shootings, Robinson showed his friend Joe Tugerson a snub-nose .38 caliber pistol in a holster. It was underneath the seat of

Robinson's truck. (T 393-395, 402-403, 406) Robinson told Tugerson he caught Bernadette and Avil in bed once and stated he could have killed them if he wanted to do so. (T 397-398)

The night of the shooting, Shantel had heard a truck outside her home. (T 264) Shirley Ethridge, a neighbor, had observed Robinson on prior occasions driving up and down the road in front of Bernadette's home. One night in late November, 1981 around 11 p.m., she saw him parked outside just sitting in his truck. (T 290-291, 294) On December 4, 1981, she observed Bernadette's porch light on at 9:30 p.m. (T 292) At 1:30 a.m., she and her husband were awakened by the dog. They observed the porch light was off. (T 293, 299-300) Her 12-year old son heard a female scream shortly after 1:45 p.m. (T 305, 307)

Another neighbor, Lonnie Mae Jackson (Sister Jackson), saw Robinson at 2 p.m. on the Thursday prior to the shooting on Havendale Boulevard headed toward Florence Villa and Auburndale in his red pickup truck. (T 442-443) She saw him again on Friday, December 4th at around 5 p.m. on Havendale Boulevard. (T 442-443) One of Bernadette's children and her nephew came to Sister Jackson's home in the night at 2:45 a.m., telling her Bernadette had been shot. (T 444)

Investigator Nelson Blount of the Jefferson County Sheriff's Office in Monticello arrested Robinson in Monticello on December 5, 1981 at 1:30 p.m. Blount had driven by Robinson's mother's home in

Monticello between 10:30 a.m. and 11 a.m. that day and saw Robinson's truck parked outside. (T 408-409) In the truck was a box with a receipt in it for a pistol. No firearm was found. (T 410-411, 485) Monticello is 26 miles east of Tallahassee on U.S. 90 and 248 miles from Polk County. (T 407) The investigator drove from Monticello to Winter Haven in rainy conditions in four hours and 40 minutes. (T 407)

At trial, Robinson, then age 64, denied shooting the victims. (T 496) He described his stormy relationship with Bernadette during their two marriages. (T 502-503, 506) He did not contest the divorces and was left with a truck. (T 508) He went to live with Virginia Johnson and his children born of that relationship. Robinson also frequented the home of Edna Mae Edwards and their children. (T 542)

After the last separation and while the divorce was in progress, Robinson said he found Avil in bed with Bernadette at the house. He said he encountered them at the trailer the next day but did not threaten them. (T 510-515) Robinson denied showing Tugerson a gun and denying saying he caught Bernadette and Avil in bed and could have killed them then. (T 523-544) Robinson also testified, "If I told him, I don't remember anything about it." (R 544)

Robinson acknowledged he purchased a gun in April but claimed it disappeared in July. (T 524-525) Robinson did not disclose on

his gun application that he had been twice previously convicted. (T 563-564)

According to Robinson, on November 24th or 25th at 9 p.m., he went to the former marital residence to get his belongings, entered a disturbed window, and changed the outside light bulb. (T 519-521, 547) He maintained that Ms. Ethridge must be mistaken about seeing him one night in front of the house at 11 p.m. in November, that Ms. Jackson was mistaken about seeing him on Thursday in the Florence Villa area and again on Friday about 5 p.m. on Havendale Boulevard in Winter Haven, and that Bernadette was mistaken about seeing him Friday afternoon. (T 545-546) Robinson said he was in Winter Haven from December 1st through December 3rd and returned to Monticello, Florida, near Tallahassee. (T 526-527)

Robinson produced alibi witnesses who claimed to have seen him in the Monticello area from the early morning hours of December 4, 1981 through the early evening hours.[5] Virginia Johnson, mother of children of Robinson, saw him on Thursday, December 3rd at a hospital. He brought her a check from her home in Winter Haven. (T 566-567)

Arlene Taylor, Robinson's mother, age 80, maintained that on

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[5]A continuance was unsuccessfully sought by the defense to obtain another alibi witness, Johnny Cuyler, who purportedly would have testified Robinson was with him until approximately 11:30 p.m. on December 4, 1981. The defense sought to show Robinson could not drive from Monticello after 11:30 p.m. and return to Monticello by 6:30 a.m. on December 5, 1981. The trial court's ruling on the request for a continuance was addressed in Robinson I.

Friday, December 4, 1981, he took her to the store in Monticello, and he was with her for a good part of the day. (T 572) She said her son went to Tallahassee to see Virginia Johnson in the hospital Friday afternoon. (T 572) Robinson was not home after the 11 p.m. news. (T 574) Robinson woke her in the night to let him in--some time before 6-6:30 a.m. on December 5th. (T 574-575)

Joe McCloud, a good friend of Robinson's saw him in late morning hours of December 4th in his mother's yard. (T 579-580) McCloud saw Robinson again around noon the next day at his mother's house. (T 581)

Henry Bailey, a long time acquaintance of Robinson, saw him in the afternoon of December 4th around 5 p.m. at a pool room in a bar in Monticello. (T 584)

Britt Jones said Robinson was across the street from the bar on Friday December 4th between 5-6 p.m. (T 588-589)

Stephen Harris, a life long acquaintance of Robinson, saw him on a Friday afternoon between 4-5 p.m. prior the a public defender speaking with him on a Monday. (T 591-592)

Johnny Blue, "Corn," a long time friend, said Robinson was in Monticello around 10:30 p.m. or 11 p.m on a Friday night in December. (T 594-595)

Adam Scurry, a preacher and long time acquaintance of Robinson, said he observed Robinson hunting one Friday and saw him that Saturday morning on an unknown date he first thought to be in

November. (T 597) He claimed to heard of Robinson's arrest that Saturday night. (T 598)

Herbert Thompson, who knew Robinson for 41 years, said he saw Robinson on Friday, December 4th between 4:30 and 5 p.m. at a service station in Monticello. (T 600-601)

Investigator Dobson testified on rebuttal that Robinson's mother had informed police Robinson left her house the previous Monday and returned during the night or early morning hours of Saturday while she was sleeping. (T 603) She did not know that he came in and didn't hear him until she saw him in the morning. (T 603-604)

The 1997 Evidentiary Hearing

Inmate Wilbert Eugene Hollins, 44 years of age, was currently serving a life sentence for kidnapping and other charges at Avon Park Correctional Institution when he testified at the 1997 evidentiary hearing.[6] (R 175, 185) He had been transferred from New River Correctional Institution the previous year. (R 185)

Hollins claimed to have met the deceased victim Avil in 1974 or 1975 at the Winter Park Mall in Winter Park, Florida. (R 176, 185) Hollins said they became friends and visited each other at their homes. (R 176) Avil, whom he referred to as "Kenny," worked with Adams Fruit Company between Winter Haven and Lakeland. (R 176-

[6]Hollins would not speak with the prosecutor and his investigator who came to Avon Park Correctional Institution, on the premise that all parties were not present. (R 183)

177)

Hollins testified to meeting Bernadette in Florida in the ’70s, and much later in a chance encounter in New York in 1989. Hollins purportedly first met Bernadette, whom he knew as Bernadette James, in 1976 at Hollins’ home in Riviera Beach. He said Bernadette and Avil stopped at his home on their way to Miami. (R 177-178) Hollins testified that from 1977 to 1978, Avil and Bernadette came to his house three or four times, and Hollins would visit Avil in Winter Haven. (R 187) Although Bernadette was not living with Avil, she came over to Francis’ house. (R 188) Francis was married to another woman and had two children at the time. (R 188) Hollins claimed to have seen Bernadette six or seven times. (R 188)

Hollins’ first conviction was in 1984. He was released from custody in May of 1988 upon vacation of his sentence. (R 185) Hollins was rearrested around April of 1989 and released on bond. (R 185) On April 17, 1990, Hollins was placed back in custody on his kidnapping offense and remained in custody thereafter. (R 185).

Hollins asserted that while he was on bond in 1989, he encountered Bernadette Francis in New York. (R 193) He said he came across Bernadette who was sitting on porch steps of a house in the Brownsville neighborhood of Brooklyn, New York. Hollins claimed he was in the process of searching for his mother’s brother

and the latter's wife.[7] While Hollins had not seen Bernadette for almost ten years and didn't know she was living in New York, Hollins said he immediately recognized her. (R 189, 192, 196) She purportedly appeared to recognize him and knew his name. (R 196-197)

According to Hollins, Bernadette informed him of Avil's death and shared the following details. (R 177-178, 181, 198) She and her husband were sleeping in a twin size bed and she woke in the middle of the night, bleeding from being shot. The room was dark. She touched Avil and discovered he, too, had been shot. Bernadette did not see or talk to Ceasar Robinson, but knew he was the person who shot them because she took his life savings and gave it to Francis. (R 178-180, 198-200) When Hollins questioned her about Robinson, she explained she became involved with Robinson, who was 40 years older, for his money. (R 180, 199) Bernadette told her daughter to come to court and lie and say she witnessed the shooting. (R 201) That occasion was the last he saw Bernadette. (R 182)

In another chance encounter, Hollins said he met Robinson at Avon Park Correctional Institution and inquired if Robinson knew Bernadette. (R 181,190) Hollins claimed he heard Robinson's name and remembered Bernadette stating Robinson's name in the 1989 in New York. (R 190) Robinson said he was in Tallahassee at the time

[7]He corrected himself during his testimony, stating the brother was dead and he was looking for the brother's wife. (R 178, 192, 196)

of the shooting. (R 202)

Hollins described Bernadette as a large woman almost six feet tall and 230-250 lbs. He said she wore a wig and glasses and had a stiff finger on one of her hands. (R 182) She and the deceased victim are Jamaican. Hollins said Bernadette and Avil were Jamaican, but Bernadette did not speak like a Jamaican. (R 182) Hollins maintained that Robinson did not describe Bernadette. (R 202)

Bernadette was born in Granada, West Indies. In 1989, her weight was about 233 pounds. She weighed about 245 pounds at the time of the hearing. (R 211-212) Hollins observed her in the courtroom at the hearing and claimed she was Bernadette James, whom he spoke with in Brownsville, New York. (R 216) He said she had a different color wig at the hearing. (R 216) Bernadette said she wore glasses and hair extensions, but never a wig. (R 204, 211, 213) She also contradicted his testimony as to a stiff finger, stating she had no problem with any fingers on her hand. (R 211)

Bernadette observed inmate Hollins in the courtroom and said she never heard of him nor had a conversation with him. (R 206, 208, 210) She testified Hollins did not visit at her former home in Winter Haven. (R 209-210) Nor did she visit Hollins in Riviera Beach. She was unaware of the city’s location. She said she knew Avil about a year before she married him on October 31, 1981. She did not know Avil in 1978 or 1979, as Hollins suggested. (R 206)

Bernadette said Avil lived approximately one day in the house in which he was shot--the same house she formerly shared with Robinson. (R 214-215) After the shooting, she moved to Brooklyn, New York and remarried in 1992. (R 203-204, 206) Bernadette did not live in or near Brownsville, New York and knew no one in that area. (R 207-208) Bernadette never told Hollins that she had her daughter lie about seeing the incident. (R 210) Bernadette confirmed she told the truth at trial. (R 212) She served as a minister in the Temple of Holiness Church of God in Brooklyn since 1990 and as a supervisor of a day care center since 1992. (R 204)

Robinson, 79 years of age, testified briefly to meeting inmate Hollins at Avon Park Correctional Institution in 1996. (R 172) According to Robinson, Hollins stated he learned of Robinson's case from Bernadette Francis. (R 174) Robinson said he made Hollins no promises. (R 174)

The Order Granting Relief

The trial court entered an order granting postconviction relief on May 28, 1997. The trial court found that Hollins' testimony constituted newly discovered evidence and further, such would have probably affected the outcome of this case. The trial court found, inter alia, as follows:

> The state's case was entirely circumstantial absent the testimony of Bernadette Francis and Shantel Francis. At the trial, Ms. Francis testified that the defendant was standing next to her bed, yet she could not identify what the defendant was wearing, nor the type of

weapon he was holding. She further testified that she did not see a gun, nor did she hear any shots fired, yet she told Deputy Dobson that she heard shots and saw the gun.

On the other hand Shantel Francis could positively identify what the defendant was wearing that night, and the number of shots that were fired. Deputy Dobson testified that Shantel Francis was initially unable to recount the events that occurred that night. In one specific instance, Shantel Francis stated that she "did not hear any shots, nor did she know anything about what the shooting occurred."(sic) Yet she was able to provide the police with a detailed interview the following day. We do not know what contact Shantel Francis had between the initial interview and the subsequent interview with her mother.

Hollins' affidavit and testimony were clearly not for any pecuniary gain. At the hearing, no motive for lying or for fabricating the story was shown. He described the meeting with Ms. Francis in detail. While many of the things could have been learned from the defendant, his quality of detail was impressive. Hollins also testified that he is serving two consecutive life sentences. He stated that he would be willing to testify at a new trial.

In any event, the testimony relating to Ms. Francis lacks the necessary indicia of reliability. First, Ms. Francis' statements to police were not consistent with her testimony at trial. Most important, at the evidentiary hearing, Ms. Francis testified that she had never traveled to Miami with Avil Francis. Yet, at trial, Shirley Ethridge testified that the Francis's told her that they were going to a wedding in Miami.

In light of Hollins' testimony as well as the inconsistences of Ms. Francis testimony at trial and at the evidentiary hearing, the Court finds that the newly discovered evidence

> could probably produce an acquittal on retrial. (R 220-225)

The state appealed the adverse order.

On May 22, 1998, the Second District Court of Appeal reversed the order granting relief. State v. Robinson, 711 So. 2d 619 (Fla. 2d DCA 1998). As to the first prong of the newly discovered evidence standard, the district court held that it was clear Hollins' testimony constituted newly discovered evidence. Id. at 622.

As to the second prong of the newly discovered evidence standard, the district court determined that Hollins' testimony was admissible on retrial as impeachment evidence, and the trial court was required to balance the weight of Hollins' impeachment testimony against all of the other evidence stacked against Robinson in making its determination. Id. at 623. The district court held, in relevant part, as follows:

> Upon review of the record, it initially appears that the trial court was within its discretion when it found that the impeachment evidence would counterbalance the testimony of Ms. Francis and Shantel on retrial. However, the trial court's order fails to account for the abundant circumstantial evidence that was presented against Robinson at the 1982 trial. In light of this strong circumstantial evidence, we find it less likely that the jury would reject Ms. Francis's and Shantel's eyewitness accounts on retrial. Moreover, it is important to remember that Hollins' character, as a convicted felon, was itself susceptible to impeachment. See Perry v. State, 395 So.2d 170, 173 (Fla. 1980).

> While we recognize that a motion for new trial based on newly discovered evidence is addressed to the sound discretion of the trial court, see Clark v. State, 379 So.2d 97, 101 (Fla.1979), we are compelled to hold that the trial court has abused its discretion in this case. The circumstantial evidence, coupled with the testimony of Ms. Francis and Shantel, so clearly outweighs the newly discovered, impeachment evidence that no reasonable person would have reached the conclusion that the trial court did. Therefore, the trial court abused its discretion in determining that Hollins' testimony would probably produce an acquittal on retrial. Accordingly, we reverse the order granting postconviction relief and remand for further proceedings consistent with this opinion.

Id., at 623.

SUMMARY OF THE ARGUMENT

The district court properly reversed the order granting relief on Robinson's newly discovered claim under the second prong of the newly discovered evidence standard. The successor trial judge overlooked significant independent evidence of Robinson's guilt adduced at the 1982 trial. In doing so, the trial court failed to balance inmate Hollins' evidentiary testimony against the circumstantial evidence as well as direct evidence.

The independent evidence established Robinson' deadly intent and plan, i.e., that Robinson purchased a .38 caliber handgun and bullets eight months prior to the shootings; he displayed the gun to a witness prior to the shootings and bragged on an opportunity to kill the victims in bed together; and just weeks prior to the shooting, he surveilled their home under the cover of darkness. The circumstantial evidence also showed as motive Robinson's jealousy, emerging during a stormy relationship with his ex-wife. Evidence of the timing and location of the shootings also served to show Robinson's guilt--five months after the second divorce, two days after Avil's fateful return to Winter Haven, in the night time hours following Robinson's observance of the newlyweds, and in the former marital abode of Robinson and Bernadette where the victims slept together.

Strong circumstantial evidence at the scene further evinced Robinson's culpability, i.e., his print on the porch light bulb

which was unscrewed; unforced entry to a locked front door to which Robinson had, at one time, a key; harm inflicted only on two of the occupants--Bernadette and her new husband; no personal items taken; and .38 caliber or .357 caliber projectiles of the same manufacture as bullets purchased by Robinson were recovered from the mattress and Avil's body.

Robinson wrongly charges the district court with reassigning weight of evidence determined below. Fully cognizant of its obligation to honor factual findings, the district court did not disturb such in determining Hollins' testimony constituted impeachment evidence as to Francis and Shantel's eyewitness accounts and was newly discovered. Upon the trial court's failure to weigh Hollins' testimony against the wealth of circumstantial evidence, the district court properly addressed the legal import of Hollins' testimony in relation to the evidence as a whole.

Hollins' account did not refute compelling circumstantial evidence corroborating the testimony of Bernadette and her daughter. Viewing the evidence as a whole, including Robinson's imperfect alibi defense, Hollins' testimony would not probably result in an acquittal by the jury upon retrial. The district court's decision comports, rather than conflicts, with the decisions cited by Robinson.

ARGUMENT

ISSUE: THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO EVALUATE HOLLINS' TESTIMONY AGAINST THE EVIDENCE IN TOTALITY IN GRANTING RELIEF BASED ON NEWLY DISCOVERED EVIDENCE. (restated)

Over sixteen years ago, Robinson's jury was presented abundant circumstantial evidence corroborating surviving victim Bernadette Francis and her daughter's eye witnesses testimony. This evidence implicated Robinson as Bernadette's assailant and Avil's murderer. Inasmuch as the jury was required to examine all the evidence presented at trial, the trial court, before granting relief on the newly discovered evidence claim, was obliged to address the evidence in totality under the second prong of the standard set forth in Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).

The district court in this case properly reversed the order granting relief on Robinson's newly discovered claim because, contrary to Robinson's contention, the successor judge overlooked and failed to weigh compelling circumstantial evidence of Robinson's guilt. By limiting its review, the trial court misapplied the law regarding newly discovered evidence.

Standards of Review

The relevant trial court standards of review of a defendant's claim of newly discovered evidence, are as follows:

> First, to qualify as newly discovered evidence, "the asserted facts must have been unknown by the trial court, by the party, or

> by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Second, to prompt a new trial, "the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial."

Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997)(emphasis in original), quoting, Jones v. State, 591 So.2d at 915, 916.

To reach the conclusion that the evidence would probably produce an acquittal on retrial, the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." Jones v. State, 709 So.2d 512, 521 (Fla. 1998), quoting Jones v. State, 591 So. 2d at 916.

The standard of review of an order on a newly discovered evidence claim is also set forth in Blanco as follows:

> In reviewing a trial court's application of the above law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, "this Court 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."

Blanco, 702 So. 2d at 1252 (footnote omitted) (quoting Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984)).

While underlying factual findings are reviewed for competent

substantial evidence, Steinhorst v. State, 695 So. 2d 1245, 1248 (Fla. 1997), a trial court's legal conclusion that a new trial is warranted is reviewed for an abuse of discretion. In State v. Spaziano, 692 So. 2d 174 (Fla. 1997), this Court stated:

> Many years ago, in Henderson, we wrote:
>
> > A motion for a new trial is addressed to the sound judicial discretion of the trial court, and the presumption is that [it] exercised that discretion properly. And the general rule is that unless it clearly appears that the trial court abused its discretion, the action of the trial court will not be disturbed by the appellate court.
> >
> > Henderson, 135 Fla. at 562, 185 So. at 630 (Brown, J., concurring specially, with Terrell, C.J., and Whitfield and Chapman, JJ., concurring). This Court has continually reaffirmed that view. Jent v. State, 408 So.2d 1024, 1031 (Fla. 1981); Baker v. State, 336 So.2d 364, 370 (Fla. 1976). This rule is neither new nor unusual. It has been repeatedly applied and fully explained in our civil cases. See generally Poole v. Veterans Auto Sales & Leasing Co., 668 So.2d 189, 191 (Fla. 1996); Ford Motor Co. v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981); Castlewood Int'l Corp. v. LaFleur, 322 So.2d 520, 522 (Fla. 1975).

Id. at 177-178, quoting Henderson v. State, 135 Fla. 548, 561, 185 So. 625, 630 (1938)(footnote omitted).

The following statement of the test for review of a judge's discretionary power has been cited with favor by this Court:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by

the trial court.

Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990), quoting Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980)(internal quotation omitted).

This Court in Huff further observed that:

> [t]he discretionary power that is exercised by a trial judge is not, however, without limitation.... The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner.

Id., at 1249, quoting Canakaris, 382 So.2d at 1203 (emphasis supplied by this Court).

Analysis

In the present case, the trial court made factual findings in determining that Hollins' testimony constituted newly discovered evidence. (V 2 R 223) The district court reached the same legal conclusion that Hollins' information was newly discovered, i.e., unknown at the time of trial, and neither Robinson, nor his counsel, could have known of it by use of diligence. State v. Robinson, 711 So. 2d at 622.

Robinson does not argue that factual findings were disturbed by the district court in reaching the same legal conclusion as the trial court on the threshold prong. The thrust of Robinson's

argument is that the Honorable Judge Bentley considered all of the evidence under the second prong of Jones, and therefore, the district court necessarily reweighed the evidence in reaching a contrary result.

In addressing the second prong, the district court determined that inmate Hollins' testimony was admissible as impeachment evidence pursuant to §90.608 Fla. Stat. (1997). Id., 711 So. 2d at 622. In holding that Hollins' testimony did not provide a defense to Robinson, but merely served to refute Bernadette and Shantel's eyewitness accounts of the shootings, the district court did not substitute its judgment on weight of evidence assigned below. Id.

Robinson mistakenly charges the district court with assuming the role of trier of fact in reaching a different legal conclusion on the second prong. The trial court failed to account for abundant circumstantial evidence presented against Robinson at his trial in the first instance. Id. at 623. In reversing, the district court did not contravene the principle set forth in Tibbs v. State, 397 So. 2d 1120, that the weight of the evidence is for the trier of fact. Upon the trial court's failure to weigh Hollins' account against the established circumstantial evidence, the district court properly addressed the legal import of Hollins' testimony in relation to the evidence as a whole.

The Circumstantial Evidence

Because the state maintains the successor judge failed to

evaluate the circumstantial evidence established before the jury and original trial judge, an overview of such is warranted to show the extent and quality of evidence overlooked by the trial court. In addition to the eyewitness accounts of Bernadette and Shantel, the state's circumstantial evidence of Robinson's guilt can be classified in the following categories:

- Robinson's purchase of .38 gun and bullets eight months prior to shootings and the same month he separated from Bernadette
- Robinson's display of gun and inculpatory statements to witness regarding victims prior to shootings
- Robinson's surveillance of former marital abode
- Robinson's observation of newlyweds in daytime hours preceding the shootings, which occurred two days after deceased victim Avil's return to Winter Haven
- Robinson's fingerprint on unscrewed porch bulb of residence where shootings occurred.
- Robinson's prior access to key to front door through which unforced entry was gained despite being locked.
- Projectiles of the same manufacture as bullets purchased by Robinson found in Avil's body
- Other occupants of residence were unharmed and no property taken

At the 1982 trial, the state presented independent evidence establishing that around the time of his separation from Bernadette and eight months prior to the shootings, Robinson purchased a .38 caliber weapon and bullets.[8] Audrey McGill with Eloise Pawn Shop

[8]On appeal, undersigned counsel inadvertently stated that the purchase occurred one month prior to the shootings, but did correctly set forth the purchase date of Robinson's gun on April 6,

testified at trial that on April 6, 1981, Robinson purchased a .38 caliber pistol and 12 .38 caliber Federal shells in Winter Haven. Robinson obtained his deadly firepower with an untruthful statement that he had not been previously convicted. (T 414-421, 563-564)

Evidence was also adduced showing that Robinson, shortly before the shootings, expressed a willingness to inflict mortal harm upon his victims. About one week or so and up to five or six weeks prior to the shootings, Robinson showed Joe Tugerson a snub-nose .38 caliber pistol in a holster underneath the seat of Robinson's truck. Robinson told Tugerson he caught Bernadette and Avil in bed once and he could have killed them if he wanted to do so.[9] (T 393, 395, 402-403, 406)

Tugerson's account of Robinson's display of his .38 revolver and his inculpatory statements a week prior to the crimes served to

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1981, and the date of the shootings of December 5, 1981. (initial brief at pgs. 6, 8, and 28). Unfortunately, the district court reiterated the error as to the time span between the purchase and the shootings. Id., 711 So. 2d at 620. In actuality, the time period was approximately eight months.

Robinson's gun purchase occurred around the time of his separation and prior to Bernadette's meeting Avil. Bernadette testified at trial Robinson moved out in April 1981, she first met Avil around May 1981, and the second marriage with Robinson ended in divorce in July 1981. (T 190-192) While he did not specifically recall, Robinson believed he left Bernadette about May 1981. (T 508)

[9]Robinson testified at trial about his tumultuous relationship with his ex-wife. (T 502-503, 506) He further testified that after the last separation and while the divorce was in progress, he found Avil in bed with Bernadette at the house. (T 510-514) However, he denied showing the gun and denied or didn't recall making the inculpatory statements to Tugerson. (T 544-545)

show: 1) Robinson's gun was not taken in July, as Robinson contended, 2) Tugerson had seen the murder weapon which was missing from Robinson's gun box upon his arrest, and 3) Robinson had foretold his crimes. (T 410-411, 525) Regardless of whether he had actually caught Bernadette and Avil together on a prior occasion, Robinson's recounting of the event to Tugerson, at the same time he displayed his .38 revolver, was strong circumstantial evidence that Robinson's jealousy had taken on deadly dimensions.

The state also presented evidence indicating that Robinson stalked his victims under the cloak of darkness. Shirley Ethridge, a neighbor, saw Robinson on prior occasions driving up and down the road in front of Bernadette's home. In late November, 1981 at 11 p.m., she saw him parked outside the residence just sitting in his truck. (T 290-291, 294) It must be remembered that in early December, Avil and Bernadette were shot in the middle of the night.

Entry into the home was gained without detection by removal of a light bulb upon which Robinson's print was found. (T 335-337, 466) Robinson's recent purchase of deadly fire power, his self-proclaimed capability to inflict mortal harm upon the victims, and his eery surveillance were all indicators that the print on the removed bulb was not placed there innocently.

The timing and location of the shooting also evinced Robinson's decision to implement his deadly intent at a selected time and place--when the two targets were together in bed. The

shootings occurred just a couple of days after Avil had returned to Florida and taken residency in the former abode of Bernadette and Robinson, and just a matter of hours after Robinson drove alongside their vehicle in town on Friday. (T 207-209, 625)

The circumstances of the crimes further pointed to Robinson as Avil's murderer and Bernadette's assailant. The sole purpose of the shooting was to eliminate the victims. The child lying in the bed was unharmed, no other occupants of the residence were harmed, and there was no evidence of theft. At trial, Robinson could not say that another person would desire the deaths of Bernadette or Avil, (T 557) and no other person was shown to have motive to end the victims' lives.

In addition, unforced entry had been gained through a locked front door of the former residence of Robinson. Joseph James testified the front wooden door was locked the night of the shooting. (T 271-272) While there were cuts in front screen door apparently made prior to the night of the shooting, no signs of forced entry to the front wooden door were evident. (T 332) Bernadette's trial testimony indicated that Robinson had, at one time, access to the key to changed locks at the home and, thus, the opportunity to make a duplicate key. (T 232, 284-285) No one outside the immediate family was shown to have had prior access to the key except Robinson. (T 624)

Additional crime scene evidence pointed to Robinson's

culpability. Found in the bed mattress and Avil's body were .38 caliber or .357 caliber projectiles of Federal manufacture, the same manufacture as bullets previously purchased by Robinson. (T 344-346, 357-359, 414-421, 429, 431)

All of the above evidence supported Bernadette and Shantel's eyewitness testimony and served to show Robinson committed the crimes. The trial court simply dismissed this wealth of evidence without balancing such against Hollins' testimony. Robinson argues that the trial court evaluated this independent evidence because the state presented a memorandum addressing such evidence prior to the trial court's ruling. (R 348-352) However, the trial court's recitation of the "essential facts surrounding the murder" in its order is strikingly devoid of central facts shown by the circumstantial evidence. (V 2 R 221-222) Because the court included certain testimony and omitted facts shown by the circumstantial evidence, it cannot be reasonably inferred that the court assessed Hollins' testimony against the independent evidence discussed in the state's memorandum.

Contrary to Robinson's argument, the court's statement in passing that the remaining evidence was "entirely circumstantial" (V 2 R 224) does not show that the trial court considered the independent evidence and weighed it against Hollins' testimony. Although the trial court specifically addressed, inter alia, the victim and her daughter's testimony in relation to Hollins'

testimony, the trial court did not address Hollins' testimony in relation to the circumstantial evidence. (V 2 R 224-225)

Had the trial court examined the independent evidence, the court would have ascertained that such was not refuted by inmate Hollins's testimony. Hollins' account of admissions by Bernadette during a chance encounter in 1989 in New York did not impeach nor negate evidence linking Robinson to the crime scene, such as the fingerprint on the unscrewed porch bulb, projectiles in the mattress and in Avil's body of the same manufacture as bullets purchased by Robinson, and unforced entry through a locked front door of the residence to which Robinson had prior key access.

Nor did Hollins' testimony call into question Tugerson's account of Robinson's display of his gun a week before the shootings and his inculpatory statements about an opportunity to kill the victims. Further, Hollins' account did not operate to diminish testimony showing that Robinson watched the victims' house at night shortly before the shootings, and that mortal harm occurred just a matter of hours after Robinson observed the newlyweds together in Winter Haven. And, Hollins' story did not show that anyone other than Robinson would have the motive to eliminate only two of occupants and take nothing.

The failure of the trial court to address these matters strongly indicates that the trial court did not account for the circumstantial evidence in arriving at its legal conclusion under

the second prong of Jones. Support for the state's position lies in the trial court's conclusion, "[i]n light of Hollins testimony as well as the inconsistencies of Ms. Francis testimony at trial and the evidentiary hearing, the Court finds that the newly discovered evidence could probably produce an acquittal on retrial." Such shows the court conducted a limited review of the evidence. (V 2 R 225) Unlike the order on review in Spaziano, it cannot be concluded from the circuit court's order sub judice that the successor judge fully understood his responsibility to balance all of the trial evidence against the newly asserted evidence. Cf., State v. Spaziano, 692 So. 2d at 178.

The Factual Findings

In Spaziano, this Court held that recanting testimony is exceedingly unreliable and directed trial judges to examine all of the circumstances of the case, including the testimony of witnesses submitted on the issue. Id., 692 So. 2d at 177. The state contends that a report of recanted or repudiated testimony by a victim fourteen years after trial, as in the instant case, is likewise exceedingly unreliable, and the circumstances must be examined in entirety.

While the state is mindful that the trial court accepted Hollins' testimony and rejected that of Bernadette, the state contends that the various findings lacked competent substantial evidence for several reasons. First, the trial court was persuaded

by inmate Hollins' testimony on the premise that it was not offered for pecuniary gain and no motive for lying or fabrication was shown. (V 2 R 224) This determination was, in essence, based on an absence of evidence.

Notwithstanding, the trial court's finding is not supported the competent substantial evidence. There was a motive for Hollins to lie for Robinson. Both were serving life in prison, and Hollins faced no practical consequences in offering perjurious testimony on Robinson's behalf. Even if Hollins received no tangible benefit, his testimony was risk free as a practical matter, and his demonstrated willingness to benefit an aging fellow inmate languishing in lifetime incarceration, as did he, provided a motive.

Secondly, Hollins' account of Bernadette's admissions in a chance encounter in 1989 in New York lacked critical verification by independent evidence. Robinson indicated in his 1996 postconviction motion that he learned of the 1989 information a few months prior to filing the motion. (V 1 R 157) Then, the 3.850 motion and Hollins' testimony lead to the inescapable conclusion that to believe Hollins, one must accept he kept freedom-giving information close to his vest for almost seven years, i.e, 1989-1996.

Even if Hollins did not personally know the person whom Bernadette had purportedly falsely identified at trial, revelation

of the information certainly did not require knowledge of the convicted murderer -- although Hollins said Bernadette told him Robinson's name. (V 2 R 179) It would have sufficed to know the victims, as he claimed he did.[10] (V 2 R 176-177) Yet, no competent substantial evidence was presented to show the reason Hollins failed to come forward sooner than in 1996 when he purportedly met Robinson in another chance encounter. (V 2 R 181-182) Hollins did not claim, nor did Robinson assert and show by any evidence, that Hollins was prevented from timely reporting the freedom-giving information to authorities. The absence of competent evidence explaining Hollins' silence raises a red flag of a conjured event.

Thirdly, the trial court's finding that Bernadette's testimony lacked the necessary indicia of reliability also is not supported by competent substantial evidence. (V 2 R 224) The court was critical of Bernadette's inability to describe the gun or Robinson's clothing while he stood next to her bed on the night of the shooting. (R 224) However, the court overlooked her explanation at trial that she was in shock and was not looking at his clothing. (T 233)

The trial court stated in the order that according to Deputy Dobson, Bernadette said she saw the gun and heard shots. (V 2 R 221) The court was mistaken on this point. Investigator Dobson

[10]Most assuredly, had Hollins timely notified authorities in or around Winter Haven, where he supposedly knew the victims had lived, the collateral flames would have ignited and lapped at Robinson's distant conviction much earlier.

did not testify at trial that Bernadette reported seeing a gun. Moreover, Dobson could not recall Bernadette saying she heard gunshots. (T 490-491) He had previously stated in deposition that "she said she thought she heard two or three gunshots." (T 490) (emphasis added) This does not demonstrate that Bernadette was necessarily untruthful in testifying that she did not hear shots or see a gun.

The first officer on the scene, Deputy Smith, did testify that Bernadette told him Robinson had a hand gun, although she did not know what size or type. (T 310-311, 314) However, the trial court overlooked Deputy Smith's testimony on cross-examination as follows:

> Q. She also said she saw a gun, right?
>
> **A. She didn't use those words that she saw it, to my knowledge. Just said he used a gun.**
>
> A. I believe you testified in direct that she said something about a small gun or a small weapon?
>
> A. It was a hand gun, right, it was a small caliber is what I had come up with by looking at the wounds.
>
> Q. That's what you felt it was as opposed to what she told you it was?
>
> A. She didn't indicate she knew what size it was, **she did not see the gun, I'm sure.**
>
> Q. But did she tell you that the person had a hand gun?
>
> A. **Yes, I believe that was the words. It was a revolver or a hand gun or something, she**

> **wasn't sure**. I used in my report the words, "hand gun."

(T 316) (emphasis supplied)

This explanation suggests Bernadette did not actually confirm that she saw the gun. In making his credibility findings, the successor judge failed to consider it would not be necessarily untruthful for her to report a gun was used, given Bernadette's injuries and the fatal injury to her husband. Put simply, they both had gunshot wounds, and Bernadette made her statements shortly after a bullet had penetrated her head and arm.

Fourthly, there was no competent evidence verifying that Hollins was acquainted with Avil and Bernadette back in the mid '70s, as he claimed. At the hearing, Bernadette testified she had never visited Hollins with Avil nor knew of the city of Riviera Beach. (V 2 R 325) The trial court found that Bernadette's testimony lacked the necessary indicia of reliability, in part, because Bernadette testified she had never traveled to Miami with Avil, and Shirley Ethridge testified at trial that the Francis said they were going to a wedding in Miami. (V 2 R 223-225)

The trial record reflects that when Ms. Ethridge was asked about where the Francis went after checking on the house one day, she stated, "they said something about going to Miami to a wedding." (T 289) This statement does not establish that Bernadette actually went to either Miami or Riviera Beach. Moreover, Bernadette was not confronted at the evidentiary hearing

with the subject statement. In essence, the trial court speculated that Bernadette and Avil actually went to Miami and also speculated that Bernadette visited Hollins based upon the hearsay statement at trial. Conjecture, rather than competent substantial evidence, improperly formed the basis for the factual findings.

Fifthly, as to Shantel's trial testimony, the trial court stated that while Shantel could positively identify Robinson's clothing and the number of shots, Deputy Dobson testified she was initially unable to recount the events that occurred that night. (V 2 R 221, T 487) The trial court overlooked Investigator Dobson's testimony that Shantel had been sleeping at Sister Jackson's and had to be awakened for the initial interview which occurred four or five hours after the shooting. (T 491) While the young child was unable to recount the events to the officer, she told him that Robinson did the shooting. (T 492)

Dobson initially interviewed Bernadette at the intensive care unit at Lakeland General Hospital. (T 486) At the evidentiary hearing, there was no competent evidence presented showing that the child's naming of Robinson, just four or five hours after the shooting, was the product of improper influence by Bernadette, who had been taken to the hospital by ambulance. (T 315, 631)

In sum, the trial court's legal conclusions were flawed because the underlying findings were either erroneous or failed to have the requisite support. Even if this Court determines that the

factual determinations are supported by competent substantial evidence, the state contends that the district court properly evaluated the legal import of Hollins' testimony in relation to the evidence as a whole.

Robinson wrongly charges the district court with reweighing evidence. The district court did not substitute its judgment on Hollins' credibility by simply recognizing that Hollins' testimony was impeaching in nature and his character, as a convicted felon, was susceptible to impeachment. See e.g., Perry v. State, 395 So.2d 170, 173 (Fla. 1980)(defendant was not entitled to new trial on grounds of newly discovered evidence, even though testimony would allegedly prove that purported eyewitness was not present at scene of crime and only testified to reduce her sentence, where evidence was discovered not after trial, but rather, before closing arguments on guilt phase, new witness' character was itself susceptible to impeachment, new evidence was not substantive in nature, and the advisory jury rejected testimony in recommending the death penalty).

Moreover, the trial court did not weigh the circumstantial evidence against Hollins' testimony in the first instance. The district court determined it was less likely that the jury would reject Bernadette and her daughter's eyewitness accounts in light of the strong circumstantial evidence. Id., 711 So. 2d at 623. In so concluding, the district court was not required to reject

Bernadette and Shantel's original trial testimony, the state contends, because the trial court did not place its credibility findings in context with the evidence as a whole.

While the state recognizes that a trial judge is in a superior position to evaluate the demeanor of witnesses, the trial judge granting postconviction relief in Robinson's case did not hear the original trial testimony. The state submits that in this case, the district court was not obliged to accord particular deferential review of the trial court's findings regarding the trial testimony of Bernadette or Shantel where the judge granting relief did not preside over the original trial and improperly conducted a limited review of the evidence.

The Abuse of Discretion

While the state maintains that Hollins' account was newly contrived, not newly discovered, the state foremostly contends that the trial court's legal conclusion under the second prong was an abuse of discretion. No reasonable jurist could conclude that the jury would probably reject Bernadette and Shantel's eyewitness testimony on retrial based on Hollins' testimony, in light of the compelling circumstantial evidence which showed Robinson armed himself, talked about killing the victims, surveilled his victims, awaited their reunion in Winter Haven, vanquished telling light to allow covert entry to the home, unlocked the front wooden door, and after his crimes, rid himself of the gun Tugerson had seen.

The trial court also abused its discretion in failing to consider that Robinson had an imperfect alibi defense. While defense witnesses accounted for his presence in Monticello the day before the shooting, they could not testify to his actual whereabouts at the time of the shootings. Further, alibi testimony was contradicted by Sister Jackson, who espied Robinson in Winter Haven on Friday, December 4th at around 5 p.m. (T 442-443)

In the immediate aftermath of the onslaught, Bernadette named Robinson as her attacker to Joseph James, her nephew, who ran for help. (T 275) As she sat bleeding on her bed, Bernadette also named her ex-husband as her assailant to Deputy Smith. (T 314) The surviving victim's immediate disclosures while under the stress of the event were both spontaneous statements and excited utterances carrying indicia of trustworthiness.[11] As Professor Ehrhardt explains, "the spontaneity of the statement negatives the likelihood of conscious misrepresentation by the declarant and provides the necessary circumstantial guarantee of trustworthiness to justify the introduction of the evidence." Charles W. Ehrhardt, Florida Evidence, §803.1 at 621 (1997 ed.). In granting relief,

[11]See §90.803(1) Fla. Stat. (1981)(a spontaneous statement is defined as "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness") and §90.803(2) Fla. Stat. (1981)(an excited utterance is a "statement or excited utterance relating to a startling event made while the declarant was under the stress of excitement caused by the event.....").

the trial court improperly overlooked the circumstances surrounding Bernadette's reliable utterances.

On appeal from the adverse order, the state asserted that the proper remedy was reversal and reinstatement of the original conviction. Alternatively, the state requested the district court to reverse and remand for the trial court to evaluate all the evidence adduced at trial in relation to Hollins' testimony, including the circumstances of his revelation. Should this Court determine that the district court properly identified the legal error below but the district court's review of the evidence in totality exceeded its proper scope, the state adopts the alternative request for a remand with directions for the trial court to balance all the evidence under the newly discovered evidence standard, including the circumstances of Hollins' account.

This Court's decision in Jones v. State, 709 So.2d at 516, teaches the importance of review of all the evidence, stating therein "[b]ecause all of the evidence presented in Jones' original trial is important to our analysis of the issues Jones raises in the present 3.850 appeal, we set forth the following additional, pertinent facts from the record of the original trial." Id. Unlike Jones, the trial court sub judice did not conduct the required full review.

This Court previously stated that ".... the judge will necessarily have to evaluate the weight of both the newly

discovered evidence and the evidence which was introduced at the trial." Jones v. State, 591 So.2d at 916. Surely this directive requires that the 1982 verdict in this cause not be disturbed absent a complete review of the strengths of the state's case in relation to the "new" evidence. The state submits that the district court properly reached the legal conclusion based on all of the evidence that Hollins' testimony did not warrant a new trial.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court approve the district court decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Kevin Briggs, Assistant Public Defender, P.O. Box 9000)Drawer PD, Bartow, Florida 33831, this 22nd day of March, 1999.

COUNSEL FOR RESPONDENT