IN THE SUPREME COURT OF FLORIDA

CEASAR ROBINSON,	:	
Petitioner,	:	
vs.	:	Case No. 93,210
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

SUPPLEMENTAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

KEVIN BRIGGS
Assistant Public Defender
FLORIDA BAR NUMBER 0520357

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

This supplemental brief is filed pursuant to this court's order in this case on September 15, 1999.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts as presented in the initial brief.

SUMMARY OF THE ARGUMENT

The state advocates for a rule that would prevent the granting of a new trial based on newly-discovered impeachment evidence regardless of how compelling this evidence might be. This harsh position does not serve justice in cases such as the present one where the trial court finds the newly-discovered evidence to be credible and of a weight likely to produce an acquittal on retrial.

ARGUMENT

ISSUE

CAN IMPEACHMENT EVIDENCE ALONE BE THE BASIS FOR A NEW TRIAL?

During the post-conviction hearing below, Wilbert Hollins gave testimony indicating that the alleged eye-witnesses to the shooting had lied during their testimony that led to Petitioner's conviction of first degree murder. Bernadette Francis, Hollins said, told him that she never saw Petitioner at the time of the shooting and that her young daughter had lied by naming Petitioner as the perpetrator. [V2:179,180-81,198-99,201] Hollins' testimony was impeachment evidence that the trial judge found credible and compelling. The state seeks to circumvent this important evidence by advocating for a rule that establishes as a matter of law that impeachment evidence alone is not sufficient grounds for a new trial. This position is extreme and unnecessary. The existing requirement that the newly discovered evidence be of a weight that will probably produce an acquittal at a retrial adequately addresses the merits of the impeachment evidence. Consequently, this court should not establish a rule that would as a matter of law foreclose relief even in those cases where the impeachment evidence is so compelling that justice demands a new trial.

One part of the standard to determine whether a new trial should be granted on the basis of newly discovered evidence is whether the evidence probably will produce an acquittal on retrial. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). Undersigned

counsel is unaware of any Florida cases that create a different standard for impeachment evidence. In Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994), this court pointed out that the "cumulative impeachment evidence" in that case "would not probably produce an acquittal on retrial." Thus this court has at least implicitly adopted the existing standard of review for impeachment evidence. See also, Ashley v. State, 479 So. 2d 837, 839 (Fla. 1st DCA 1985) (Court holds that test for the "materiality" of impeachment evidence or direct testimony is the same.).

In jurisdictions outside of Florida, courts vary in their treatment of impeachment evidence as grounds for a new trial. Some cases do find that a new trial is not warranted solely on the basis of newly discovered impeachment evidence. See generally, Mesarosh v. U.S. 352 U.S. 1 (1956) (Court in dicta states that impeachment evidence does not constitute a basis for a new trial.). However, the holding in most of these cases is ostensibly based more on practice and the particular facts of each case rather than a rule establishing as a matter of law that impeachment evidence alone cannot serve as a basis for a new trial. In United States v. Taglia, 922 F. 2d 413 (7th Cir. 1991), the court noted this distinction and declined to adopted a per se rule regarding impeachment evidence:

> [W]e cannot see the sense of such a distinction. If the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order

> to prevent an innocent person from being convicted. The "interest in justice,". . .would require no less. . .

The court in United States v. Krasny, 607 F. 2d 840 (9th Cir. 1979), also used the probability standard in assessing whether recantation testimony could provide a basis for a new trial, expressly stating that a per se rule is not required for recantation testimony or other testimony where "the bulk of a key witness' testimony is otherwise shown to be false." See also, United States v. Atkinson, 429 F. Supp. 880, 885 (E.D.N.C. 1977) (Court holds that, in some circumstances, impeaching evidence is sufficiently important in the ascertainment of truth and in the interests of justice that a new trial should be ordered.).

Avoidance of a per se rule prohibiting a new trial based on impeachment evidence is consistent with decisions granting a new trial in cases where the state withheld impeachment evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Bagley, 473 U.S. 667 (1985). See, Marrow v. State, 483 So. 2d 17 (Fla. 2d DCA 1985) (The state's failure to reveal exculpatory evidence that a witness had a tentative offer of leniency for his testimony required new trial where witness and his wife were only witnesses to a conversation leading to conspiracy charge.); Auchmuty v. State, 594 So. 2d 859 (Fla. 4th DCA 1995) (Preventing impeachment of a key state witness about potential bias because of a pending prosecution is not harmless error). The court in Bagley stated, "Impeachment evidence, . . .as well as exculpatory evidence, falls within the Brady rule." United States v.

Bagley, 473 U.S. at 676. This treatment of impeachment evidence in a discovery violation context underscores the evidentiary value of this evidence in some cases. This court should not treat impeachment evidence that is newly discovered substantially different from impeachment evidence that was withheld by the state. In both situations, justice can be served only by allowing the trier-of-fact to weigh this evidence in those case where an acquittal on retrial is probable.

In Napue v. Illinois, 360 U.S. 264, 269 (1959), the court stressed the evidentiary value of impeachment evidence:

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Petitioner's liberty does indeed hinge on the truthfulness of Francis and her young daughter. The circumstantial evidence of guilt in the present case is not compelling. On the other hand, Hollins' testimony is compelling because no direct evidence of guilt supports Petitioner's convictions if the trier-of-fact finds Hollins' testimony credible. Hollins' testimony was not cumulative. During the jury trial, no witness provided impeachment evidence revealing the alleged eye witnesses' untrue claims. The trial judge did find Hollins' testimony to be credible based on a thoughtful review of Hollins' testimony, Francis' testimony, and the record of the jury trial. The judge's discretion to make this factual determination should not now be overturned by a stringent

rule that thwarts the interest of justice in even the most compelling cases.

CONCLUSION

Based on the above arguments and authorities, Petitioner respectfully requests that this court overturn the district court's decision denying him a new trial.

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,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

KEVIN BRIGGS
Assistant Public Defender
Florida Bar Number 0520357
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/kb