

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-1805**

TERENCE G. VALENTINE

Appellant

v.

STATE OF FLORIDA

Appellee

**ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY,
STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

**MARIA DELIBERATO
Florida Bar No. 664251**

**MARIE-LOUISE SAMUELS PARMER
Florida Bar No. 0005584**

**Parmer DeLiberato, P.A.
P.O. Box 18988
Tampa, FL 33679
(717) 503-2730; (813) 732-3321
maria@parmerdeliberato.com
marie@parmerdeliberato.com**

Counsel for Appellant

RECEIVED, 02/15/2021 11:28:27 AM, Clerk, Supreme Court

PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Valentine's successive motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Mr. Valentine has maintained his innocence for more than 30 years; at every one of his trials he has presented affirmative evidence of alibi. In each trial, he presented the testimony of multiple alibi witnesses who unequivocally testified that they saw Mr. Valentine in Costa Rica on September 9, 1988 (the day of the crime) at a party celebrating what is a national holiday in Costa Rica, Children's Day. Mr. Valentine's first trial in January of 1990 resulted in a mistrial after the jury was unable to reach a verdict after more than ten hours of deliberation.¹

The lower court, however, in spite of ongoing genuine questions about Mr. Valentine's culpability and the credibility of his estranged spouse, denied Mr. Valentine the opportunity to present critical new evidence establishing his innocence and misconduct by the State -

¹In the second and third trials, the State presented false and/or improper evidence (as will be set out more fully below), so the jury deliberations were shorter.

an affidavit by crucial eyewitness Terry Spain, who asserted that the man he saw at the crime scene, and who fired a shot at him, was white. (Mr. Valentine is a Costa Rican National with dark skin). Mr. Spain further asserted that law enforcement paid him \$300 and secreted him in a hotel room during Mr. Valentine's first trial. This is significant because the prosecutor claimed not to know where Mr. Spain was, Defense counsel wanted to call him, and thus resulted in a false impression that Mr. Spain was unavailable which lingered through all three trials.

The lower court violated Mr. Valentine's Due Process rights and erred in denying Mr. Valentine an evidentiary hearing, particularly where, as here, Mr. Valentine has asserted his innocence and has been sentenced to death. As this Court is aware, Florida leads the Nation in Death Row exonerations; integrity of process is essential in any death penalty scheme. Had Mr. Valentine been able to present this newly discovered evidence, he would have been able to establish that the evidence would probably produce an acquittal of the crime or of the death penalty on retrial.

CITATIONS

Citations shall be as follows: The record on appeal from Mr. Valentine's trial proceedings shall be referred to as "TR1", "TR2", or "TR3" followed by the appropriate volume and page numbers. The postconviction record on appeal shall be referred to as "PC" followed by the appropriate volume and page numbers. The record on appeal for the successive postconviction motion is comprised of one volume and shall be referred to as "R" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims involved, Mr. Valentine's assertion of actual innocence, and the fact that his life is at stake. Mr. Valentine respectfully requests that this Honorable Court permit oral argument.

TABLE OF CONTENTS

<u>Contents</u>	<u>Page</u>	
PRELIMINARY STATEMENT	i	
CITATIONS	i	
REQUEST FOR ORAL ARGUMENT	iii	
TABLE OF CONTENTS	iv	
TABLE OF AUTHORITIES	vi	
STATEMENT OF THE CASE	1	
STANDARD OF REVIEW	11	
SUMMARY OF ARGUMENT.....	12	
 ARGUMENT		
NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. VALENTINE IS ACTUALLY INNOCENT OF THE CRIME AND THAT THE STATE OF FLORIDA VIOLATED MR. VALENTINE’S FIFTH AND SIXTH AMENDMENT RIGHTS BY SECRETING EYEWITNESS TERRY SPAIN DURING MR. VALENTINE’S 1990 TRIAL AND PAYING HIM \$300 FOR HIS NON-ATTENDANCE. FURTHER, THE LOWER COURT ERRED IN SUMMARILY DENYING THIS CLAIM BECAUSE THE RECORD DOES NOT CONCLUSIVELY SHOW THAT HE IS ENTITLED TO NO RELIEF		12
 A. The January 30, 2020 affidavit of Terry Spain constitutes newly discovered evidence and further supports Mr. Valentine’s longstanding claim that he is innocent of these crimes and establishes that the State purposely concealed Mr. Spain’s whereabouts during Mr. Valentine’s 1990 trial in violation of <i>Brady</i> and <i>Giglio</i>		17

B. Taken together with all of the prior evidence, including Mr. Valentine’s out-of-the-country alibi, the newly discovered *Brady and Giglio* evidence so weakens the State’s case against Mr. Valentine as to give rise to reasonable doubt as to his culpability..... 25

CONCLUSION 28

CERTIFICATE OF SERVICE 29

CERTIFICATE OF COMPLIANCE..... 30

TABLE OF AUTHORITIES

Cases	Page
<i>Asay v. State</i> , 210 So. 3d 1 (Fla. 2016).....	9
<i>Amendments to Fla. Rules of Crim. Pro. 3.851</i> , 797 So. 2d 1213. (Fla. 2001).....	13
<i>Brady v. Maryland</i> , 83 S.Ct. 1194 (1963)	17
<i>Gaskin v. State</i> , 737 So. 2d 509 (Fla. 1999).....	14
<i>Giglio v. United States</i> , 92 S.Ct. 763 (1972)	17
<i>Gore v. State</i> , 24 So. 3d 1 (Fla. 2009)	13
<i>Guzman v. Secretary, Dept. of Corr.</i> , 663 F.3d 1336 (11th Cir. 2001).....	28
<i>Hodges v. State</i> , 885 So. 2d 509 (Fla. 2004)	14
<i>Hurst v. Florida</i> , 136 S.Ct. 616 (2016)	8
<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016)	8
<i>Jones v. State</i> , 591 So. 2d 911 (Fla. 1991).....	18
<i>Jones v. State</i> , 678 So. 2d 309 (Fla. 1996).....	18
<i>Jones v. State</i> , 709 So. 2d 512 (Fla. 1998).....	18
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1994)	18
<i>McLin v. State</i> , 827 So. 2d 948 (Fla. 2002).....	14
<i>Mosley v. State</i> , 209 So. 3d 1248 (Fla. 2016).....	9
<i>Moss v. State</i> , 860 So. 2d 1007 (5th DCA 2003)	14
<i>Nordelo v. State</i> , 93 So. 3d 178 (Fla. 2012)	12,15,16,28
<i>Pardo v. State</i> , 108 So. 3d 558 (Fla. 2012).....	13
<i>Parker v. State</i> , 89 So. 3d 844 (Fla. 2011)	13
<i>Peede v. State</i> , 748 So. 2d 253 (Fla. 1999)	12
<i>Robinson v. State</i> , 707 So. 2d 688 (Fla. 1998)	18

Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) 18

Sochor v. State, 883 So. 2d 766 (Fla. 2004) 11

Stephens v. State, 748 So. 2d 1028 (Fla. 2000)..... 11

Valentine v. State, 616 So. 2d 971(Fla.1993) 2,3

Valentine v. State, 688 So. 2d 313 (Fla. 1996) 6

Valentine v. State, 98 So. 3d 44 (Fla. 2012) 8

Valentine v. State, 296 So. 3d 375 (Fla. 2020) 9

Statutes

Fl. Stat. 787.01 1

Fl. Stat. 810.02 1

Fl. Stat. 812.014 1

Fl. Stat. 782.04 1

Fl. Stat. 777.04 1

STATEMENT OF THE CASE

The State of Florida charged Mr. Valentine by indictment on September 21, 1988 with Count One, Burglary-Armed, F.S. 810.02, a first degree felony; Count Two, Kidnapping, F.S. 787.01 (1)(A)(3), a first degree felony; Count Three, Kidnapping, F.S. 787.01 (1)(A)(3), a first degree felony; Count Four, Grand theft-Second Degree, F.S. 812.014 (2)(B), a second degree felony; Count Five, First Degree Murder, F.S. 782.04, a capital felony; and Count Six, Attempted Murder-First Degree, F.S. 782.04 and F.S. 777.04, a first degree felony.

As noted above, Mr. Valentine has maintained his innocence for more than three decades, and asserted an alibi defense at all three of his trials. After the jury was unable to reach a verdict after more than ten hours of deliberation, Mr. Valentine's first trial in January of 1990 ended in a mistrial.

At his second trial in March of 1990, two critical new pieces of evidence were presented to the jury. First, Detective Jorge Fernandez testified falsely that Mr. Valentine had initially told law enforcement that he was in a Costa Rican jail at the time of the crime. The State used this evidence to discredit Mr. Valentine's alibi at trial that he

was in Costa Rica at a party for Children's Day. However, it later came to light that Detective Fernandez's testimony was false, and he admitted as much in the third trial. TR 3 Vol 12, p.1313-1316. Second, the State was allowed to play a November 7, 1988 recorded phone call between Livia Romero and Mr. Valentine, in its entirety, which contained irrelevant and prejudicial information that Mr. Valentine was a drug dealer, as well as an irrelevant and inflammatory conversation with Mr. Valentine's daughter Giovanna. TR2 Vol. 7, p. 888. As will be discussed below, this Court would later hold those portions of the call to be inadmissible. However, with these two additional pieces of improper information, the jury at Mr. Valentine's second trial deliberated for just a little over an hour before finding Mr. Valentine guilty as charged on all counts. Mr. Valentine chose to represent himself at his penalty phase, and the jury returned a recommendation for the death penalty by a vote of 10-2. TR2 Vol. 10, p.1362.

After reversal by this Court for the trial court's failure to require the State to give racially neutral explanations for peremptory strikes, the State of Florida brought Mr. Valentine to trial for a third time. *Valentine v. State*, 616 So.2d 971 (Fla. 1993). As noted above, this

Court also instructed the trial court to disallow the prejudicial information contained in the November 7, 1988 recorded phone call. *Id.* at 974.

The same prosecutor, Assistant State Attorney Michael Benito, represented the State of Florida at Mr. Valentine's first two trials. Mr. Valentine was represented by Assistant Public Defenders Thomas Meyers² and Linda McKinley at his first two trials. Both trials were before the Honorable William Graybill. However, at the third trial, presided over by the Honorable Diana Allen, Mr. Valentine was prosecuted by Assistant State Attorneys Karen Cox and George Bedell III. Walter Lopez, Jr., and Simson Unterberger represented Mr. Valentine at his third trial.

At that trial, the State played five recorded telephone calls between Livia Romero and Mr. Valentine, but redacted the November 7, 1988 call as instructed by this Court. Again, Mr. Valentine's defense was that he was in Costa Rica on the day of the crime and he presented nine alibi witnesses who testified they saw him at a

² By the time of Mr. Valentine's third trial, Mr. Meyers had left the Public Defender's Office and joined the Office of the State Attorney for the same circuit. TR3 Vol 8, p. 721.

party for Children's Day. Most of the nine witnesses had not testified in the prior two trials, and two of the witnesses testified he stayed at their house on September 6-7, 1988. TR3 Vol. 13, p. 1403. Inexplicably, trial counsel elicited testimony that Mr. Valentine had been previously convicted of the instant crimes and previously had been sentenced to death. TR3 Vol. 12, p. 1321. He further elicited that Valentine had spent time in a Costa Rican prison for drug dealing. TR3 Vol. 13, p. 1469. In addition to the alibi testimony, trial counsel argued that Livia Romero had a motive to falsely identify Mr. Valentine as her attacker. Counsel argued that Romero, who at all relevant times was still legally married to Mr. Valentine, and was never legally married to Ferdinand Porche, stood to gain half of Mr. Valentine's assets if he was incarcerated for these crimes. TR3 Vol. 14, p. 1667-1706. Trial counsel presented evidence that Romero did not even attempt to divorce Mr. Valentine until after his first conviction and sentence of death in 1990 and in fact used his judgment of convictions and sentence as a basis for her divorce. TR3 Vol. 10, p. 973.

After about five hours of deliberations, Mr. Valentine was again convicted on all counts. TR3 Vol. 14, p. 1791. Mr. Valentine waived

his right to a non-unanimous, advisory jury sentence and presented mitigating evidence directly to the judge. The trial court sentenced Mr. Valentine to death on September 30, 1994.

Mr. Valentine timely appealed. Mr. Valentine raised the following claims on direct appeal, arguing that the trial court erred by (1) finding that spousal privilege did not bar Romero's testimony about Porche's murder; (2) denying Valentine's motion to suppress post-arrest statements that Valentine had made to the police; (3) denying Valentine's motion to strike testimony by the state's footprint expert on the ground that the testimony was too speculative; (4) denying Valentine's motion to appoint a jury selection expert; (5) not allowing Valentine to have the concluding argument before the jury even though Valentine had presented alibi witnesses during his defense; (6) giving the jury the standard jury instruction on reasonable doubt; (7) convicting Valentine of attempted first-degree murder because the conviction could rest on attempted felony murder, which is a nonexistent offense; (8) finding the murder to have been cold, calculated, and premeditated; and (9) failing to find several mitigators. This Court denied Mr. Valentine relief, except reversed his conviction for attempted first-degree murder and vacated the

sentence on that count. This Court affirmed the remaining convictions and sentences, including the sentence of death. *Valentine v. State*, 688 So.2d 313 (Fla. 1996), cert. denied, 522 U.S. 830, 118 S.Ct. 95, 139 L. Ed. 2d 51 (1997).

Mr. Valentine timely pursued his rights to collaterally challenge his convictions and sentence of death. Mr. Valentine filed a motion for post-conviction relief, which was amended a number of times. In his final amended motion, Mr. Valentine raised the following claims: (1) his conviction could not be sustained because the alleged name of the victim was “Livia Porche” and the only proof offered showed that the victim's name was “Livia Maria Romero”; (2) the trial court erred by denying his motion to sever all counts in the indictment relating to Ferdinand Porche; (3) the trial court erred in allowing the introduction of inculpatory recorded communications that were deliberately elicited from Valentine after he had been indicted; (4) “fruit of the poisonous tree” should not have been introduced at trial because it resulted from Valentine's illegal arrest; (5) law enforcement failed to advise the Costa Rican consulate of Valentine's arrest and also failed to advise Valentine of his rights to contact the consulate under the Vienna Convention on Consular Relations; (6) he was

denied a fair trial due to prosecutorial misconduct during closing argument which rendered the guilty verdicts fundamentally unfair and unreliable; (7) he was improperly convicted of grand theft because the property that was allegedly stolen was a marital asset acquired during Valentine's marriage to Romero; (8) he was improperly sentenced to death because his vacated conviction for attempted murder was the sole support for the prior violent felony aggravator found by the sentencing court; (9) the trial court erred in failing to file written reasons for its departure from the sentencing guidelines; (10) the prosecutor directed an illegal search of Valentine's jail cell and improperly seized Valentine's personal papers which contained legal strategy; (11) that, as explained in fifteen subclaims, he was denied effective assistance of counsel³; (12) he was denied effective assistance of counsel by penalty phase counsel's failure to investigate and uncover mental health mitigation and by penalty phase counsel's failure to otherwise prepare for the penalty phase of the trial; (13) he was deprived of a fair trial due to cumulative

³ One of the subclaims, which is relevant to the instant successive motion, was a claim that trial counsel was ineffective for failing to locate and present the testimony of Terry Spain.

procedural and substantive error; (14) his right to be free from cruel and unusual punishment will be violated because he may not be competent at the time of his execution. *Valentine v. State*, 98 So. 3d 44, 50, n.2,3 (Fla. 2012).

On appeal from the denial of his post-conviction motion, Valentine raised the following claims: (1) counsel was ineffective for failing to object or otherwise prevent Livia Romero from being referred to or portrayed as divorced from Valentine and married to Ferdinand Porche; (2) counsel was ineffective for failing to adequately investigate and uncover mental health mitigation; and (3) the postconviction court erred in summarily denying three ineffective assistance of counsel claims. This Court denied all of his claims. *Valentine v. State*, 98 So. 3d 44, 51 (Fla. 2012).

Mr. Valentine timely filed a petition for writ of habeas corpus with the federal district court. *Valentine v. Secretary, Dept. of Corr.*, 8:13-cv-30-T-23TBM. That case is stayed pending the resolution and exhaustion of this Successive 3.851 Motion, as well as Mr. Valentine's previous Successive 3.851 Motion which alleged that his sentence was obtained in violation of *Hurst v. Florida*, 136 S.Ct. 616 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Asay v. State*, 210

So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). On June 4, 2020, this Court affirmed the denial of his *Hurst* claim. *Valentine v. State*, 296 So. 3d 375 (Fla. 2020).

On February 17, 2020, while the appeal of his *Hurst* successive was pending in this Court⁴, Mr. Valentine filed the instant Successive 3.851 alleging newly discovered evidence of actual innocence. R, p. 156.

As will be discussed fully below, the new affidavit from Terry Spain establishes several critical facts, including that the man he saw at the crime scene was white and perhaps most notably that during the 1990 trial, he was secreted in a hotel by law enforcement who bought him meals and paid him \$300. R, p. 205-207. This new information raises serious questions about the fundamental fairness of the investigation of this case and the judicial process used to convict and sentence Mr. Valentine to death.

The affidavit establishes that on September 9, 1988, Spain was practicing motocross in a field when he came upon a Chevy Blazer, and next to it on the ground was a woman, naked and hog-tied. R,

⁴ Mr. Valentine also filed a Motion to Relinquish Jurisdiction, which this Court denied on April 16, 2020. SC18-1102.

p. 205. He then saw a man standing by the woods and heard two gun shots. R, p. 206. The man was not black, had blondish or brown hair, and a light tan skin tone. *Id.* He fled in fear from the gunshots, but was able to flag down a nearby trucker to call police. *Id.* Spain was interviewed at the scene by Detective Fernandez, telling Fernandez that he saw “a white male with light colored hair and a medium build.” *Id.* Spain also spoke to law enforcement several times after that and the police went to his house several times. *Id.* He also spoke to an FBI investigator. *Id.* The affidavit further states:

During the trial in January of 1990, the police had me spend the day at a hotel. The police told me that they would come get me if they needed me. They also told me I could not bring my girlfriend to keep me company. The officers fed me and provided room service. The police officers were never in my room. They told me the trial had started and they wanted to make sure I was on stand-by to testify. They also paid me for my time, I think was about \$300 and I was paid in cash. I think it was a Hillsborough County Sheriff Deputy or Detective.

Around 3 or 4 p.m. they told me I could leave because the man’s wife had testified regarding everything they needed to prosecute the man.

R, p. 206.

Mr. Valentine asked for an evidentiary hearing and as required under the Rules, listed the names and addresses of the witnesses he

intended to call. He asserted in his Motion that he was prepared to present the testimony of Mr. Spain, the testimony of the prosecutors, defense counsel at trial and initial post-conviction counsel, regarding their knowledge of Spain's whereabouts and/or their efforts to locate Mr. Spain, and the testimony of Detective McDermott, who would testify as to the inconsistent statements Livia Porche gave surrounding the crime. R, p. 170-171; 238.

The State filed its Response on March 9, 2020. R, p. 208-226. The lower court held a case management conference on August 20, 2020. R, p. 279-302. The lower court denied Valentine's motion on October 13, 2020. R, p. 243-254. Valentine filed a timely motion for rehearing on October 28, 2020 (R, p. 255), which was denied on November 10, 2020. R, p. 259. This appeal follows.

STANDARD OF REVIEW

The standard of review is *de novo*. See *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000). The lower court's rulings are reviewed *de novo* and deference is given to factual findings supported by competent and substantial evidence. See *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

Further, when reviewing a summary denial of a post-conviction claim, this Court has “repeatedly held that ‘where no evidentiary hearing is held below, [the appellate court] must accept the *defendant's factual allegations to the extent they are not refuted by the record.*’ *Peede v. State*, 748 So.2d 253, 257 (Fla.1999) (emphasis added).” *Nordelo v. State*, 93 So. 3d 178, 186 (Fla. 2012).

SUMMARY OF ARGUMENT

The lower court erred in failing to grant Mr. Valentine an evidentiary hearing on his claim of newly discovered evidence. Mr. Valentine’s Motion was legally sufficient and not conclusively refuted by the record. In a case where there was strong alibi evidence and where the State’s main witness had credibility problems and a motive to lie, the newly discovered evidence was of such a nature that it would probably produce an acquittal of the crime or the death penalty. This Court should reverse and remand for an evidentiary hearing.

ARGUMENT

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. VALENTINE IS ACTUALLY INNOCENT OF THE CRIME AND THAT THE STATE OF FLORIDA VIOLATED MR. VALENTINE’S FIFTH AND SIXTH AMENDMENT RIGHTS BY SECRETING EYEWITNESS TERRY SPAIN DURING MR. VALENTINE’S 1990 TRIAL AND PAYING HIM \$300 FOR HIS NON-ATTENDANCE. FURTHER,

THE LOWER COURT ERRED IN SUMMARILY DENYING THIS CLAIM BECAUSE THE RECORD DOES NOT CONCLUSIVELY SHOW THAT HE IS ENTITLED TO NO RELIEF.

The lower court erred in summarily denying Mr. Valentine's claim without an evidentiary hearing. Florida Rule of Criminal Procedure 3.851(f)(5) requires the lower court to hold an evidentiary hearing on "claims listed by the defendant as requiring a factual determination...unless the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Moreover, "[T]his Court is guided by the principle that courts are encouraged to liberally view the allegations to allow evidentiary hearings on timely raised claims that commonly require a hearing." *Amendments to Fla. Rules of Crim. Pro. 3.851*, 797 So.2d 1213, 1219-20 (Fla.2001). An evidentiary hearing on a rule 3.851 motion "should be held 'whenever the movant makes a facially sufficient claim that requires a factual determination.'" *Parker v. State*, 89 So.3d 844, 855 (Fla. 2011) (quoting *Gore v. State*, 24 So.3d 1, 11 (Fla.2009)); see also *Pardo v. State*, 108 So.3d 558, 560 (Fla. 2012). When determining whether summary denial is appropriate, the court must accept all allegations in the motion as true to the extent they are not conclusively rebutted

by the record. *Hodges v. State*, 885 So.2d 338, 355 (Fla. 2004) (citing *Gaskin v. State*, 737 So.2d 509, 516 (Fla. 1999)); see also *Moss v. State*, 860 So. 2d 1007 (Fla. 5th DCA 2003)(where post-conviction motion based on newly discovered evidence is summarily denied, defendant’s factual allegations must be accepted as true to the extent that they are not refuted by the record).

Further, this Court has recognized the need for an evidentiary hearing where there are allegations of newly discovered evidence. “[O]rdinarily an evidentiary hearing is required for the trial court to properly determine, in accordance with *Jones*, whether the newly discovered evidence is of ‘such nature that it would probably produce an acquittal on retrial.’ *Jones*, 591 So.2d at 915. In making this determination, ‘the judge will necessarily have to evaluate the *weight* of both the newly discovered evidence and the evidence which was introduced at the trial,’ so that the appellate court can ‘fully evaluate the quality of the evidence which demonstrably meets the definition of newly discovered evidence.’ *Id.* at 916 (emphasis supplied).” *McLin v. State*, 827 So. 2d 948, 956 (Fla. 2002)(reversing the summary denial of a post-conviction motion involving an affidavit of a recanting eyewitness).

Similarly, in *Nordelo v. State*, 93 So. 3d 178 (Fla. 2012) this Court reversed a summary denial of a newly discovered evidence claim and held that “the facts set forth in the motion and affidavit—that Nordelo did not participate in the crime with Lopez and that Lopez was afraid to come forward with the exculpatory testimony and refused to testify—are the type of facts which, if true, would subject the judgment to a legitimate collateral challenge.” *Id.* at 178. The *Nordelo* Court explained that “such evidence, if presented at trial, would have been important evidence for consideration by the jury....” *Id.* The Court concluded that “[w]hen taken as true for purposes of evaluating the legal sufficiency of the motion, the factual allegations and Lopez's proposed exculpatory testimony present a legally sufficient claim triggering an evidentiary hearing and were not conclusively refuted by the record.” *Id.* at 187. The Court remanded the case back for an evidentiary hearing where the factual allegations in the “affidavit that exculpate Nordelo must be tried and tested in an evidentiary hearing where they are subject to credibility determinations.” *Id.* The Court further directed the lower court to “consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at the

trial, would have probably resulted in an acquittal. In reaching this conclusion, the judge will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.” *Id.* at 187-88 (internal quotations and citations omitted).

The lower court’s order denying relief is internally inconsistent and does not support its finding that the record conclusively shows Mr. Valentine is entitled to no relief. At the outset of the Order, the lower court stated that Mr. Valentine’s “allegations do not constitute newly discovered evidence and are procedurally barred.” R, p. 248. However, the lower court then appeared to concede that at least some of the allegations were new and addressed them on the merits, ultimately concluding that “[i]n light of the very strong evidence of Defendant’s guilt, the Court finds the newly discovered evidence is not of such a nature that it would probably produce an acquittal on retrial.” R, p. 251. The lower court also rejected Mr. Valentine’s alternative argument that the motion was timely due to the ineffective assistance of initial review post-conviction counsel, concluding that “allegations of ineffective assistance of postconviction counsel are not

cognizable and neither *Martinez* nor *Trevino* provides a basis for relief in state court proceedings.” R, p. 251.

Mr. Valentine asserts that the lower court erred in refusing to allow Mr. Valentine the opportunity to present this critical evidence at an evidentiary hearing. This Court should reach the same result as it did in *McLin* and *Nordel* and remand Mr. Valentine’s case to the lower court for an evidentiary hearing.

A. The January 30, 2020 affidavit of Terry Spain constitutes newly discovered evidence and further supports Mr. Valentine’s longstanding claim that he is innocent of these crimes and establishes that the State purposely concealed Mr. Spain’s whereabouts during Mr. Valentine’s 1990 trial in violation of *Brady*⁵ and *Giglio*⁶.

Under Florida and federal law, there are two requirements needed for relief based on newly discovered evidence. First, the asserted facts must have been unknown to the trial court or to counsel at the time of the trial, and it must appear that defendant or his counsel could not have learned of them by the use of diligence. Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. See *Jones v. State*,

⁵ *Brady v. Maryland*, 83 S.Ct. 1194 (1963).

⁶ *Giglio v. United States*, 92 S.Ct. 763 (1972)

709 So. 2d 512 (Fla. 1998). The *Jones* standard is also applicable where the issue is whether a life or death sentence should have been imposed. *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992); *see also Jones v. State*, 591 So. 2d 911, 914-15 (Fla. 1991); *Robinson v. State*, 707 So. 2d 688, 691 n.4 (Fla. 1998); Fla. R. Crim. Pro. 3.851(d)(2)(A). When addressing this claim, courts “must evaluate all the admissible newly discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial.” *Jones v. State*, 709 So. 2d 512, 522 (Fla. 1998) (citing *Kyles v. Whitley*, 514 U.S. 419, 441 (1994)) (*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones II* test if it “weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.” *Jones II*, 709 So. 2d at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996) (*Jones I*)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones I*, 591 So. 2d at 915.

The Due Process Clause of the United States Constitution, along with the Eighth Amendment, provide that when relevant evidence

that would produce an acquittal has not been presented because it could not have been discovered, a capital defendant has a right to a new trial. Mr. Valentine raised one claim of newly discovered evidence, though this Court must consider the totality of the evidence from trial and postconviction below when evaluating this claim.

As noted above, Mr. Valentine has always maintained his innocence for these crimes. There was no physical evidence linking him to the scene. In fact, the physical evidence tends to suggest that he was not the perpetrator as several sets of unidentified fingerprints found by law enforcement at the house and inside the Chevy Blazer where Porche's body was found do not belong to Mr. Valentine. The State's theory at trial was that Livia Romero and Ferdinand Porche were ambushed in their house on Lauren Circle by two men, one of whom had a gun. Porche was shot and beaten at the house, and then both Porche and Romero were placed in the back of the Chevy Blazer and driven to a sand pit in a rural part of Hillsborough County. According to the State's evidence, Porche was then fatally shot while lying inside the back of the Blazer, and Romero was shot twice in the neck but survived. When first responders arrived at the scene, Romero was nude and bound, though she was coherent and able to

speak despite her wounds. Upon questioning, she identified her estranged husband, Terence Valentine, as the perpetrator of these crimes. She would later tell police and testify that there was a second man with him, known to her only as “John,” who was in the passenger seat of the Blazer. Romero described John as a black male. Mr. Valentine is a Costa Rican National with dark skin. As noted above, Mr. Valentine presented an alibi defense at his trial, calling nine witnesses to establish that he was actually in Costa Rica at the time of the crime.

At all three trials, the State conceded that the case came down to whether the jury believed Romero or not, since there was no physical evidence linking Valentine to the crime, nor any direct admissions by him to law enforcement. The State did present a series of recorded phone calls between Valentine and Romero that were recorded by Romero at the behest of law enforcement in the months following the crime⁷, but none of those calls contain any direct admissions or confessions by Mr. Valentine.

⁷Trial counsel vigorously challenged the authenticity, accuracy, and completeness of those calls, and many were played over defense objection.

Eyewitness Terry Spain was the first person to come into contact with Romero on September 9, 1988 after she had been shot at the sand pit where the Blazer was found. Detective Jorge Fernandez interviewed him that same day and Spain told Fernandez that he saw a white male with light colored hair and a medium build standing near the woods while Romero was on the ground and that he heard a gunshot whiz by him. Mr. Valentine, as evidenced by his booking photo taken when the FBI arrested him, has dark skin and very dark hair.

Spain did not testify at any of Mr. Valentine's three trials. At the first trial in January of 1990, defense counsel elicited on cross-examination of Detective Fernandez that Terry Spain had identified a white male present at the sand pit. TR1 Vol. 3, p. 419. At the second trial in March of 1990, defense counsel again elicited on cross-examination of Fernandez testimony that Fernandez had spoken to Terry Spain, who described seeing a white male at the scene, who had fired a shot at him. TR2 Vol. 8, p. 1053-55. Importantly, and curiously, after the testimony of Fernandez, prosecutor Michael Benito explained to the trial court that he allowed the hearsay about Terry Spain to come in without objection "because Mr. Meyers, nor

his investigators could ever find Terry Spain. They could never find him.” TR2 Vol. 8, p. 1064. At Mr. Valentine’s third trial, there was no mention whatsoever of Terry Spain, and so the jury that convicted Mr. Valentine never heard that there was a white man at the sand pit with a gun who clearly did not match the description of either man Romero claims attacked her and Porche.

On May 14, 2001, during Mr. Valentine’s state court collateral challenge, Mr. Valentine, through his initial post-conviction counsel, raised a claim that trial counsel was ineffective for failing to locate and present the testimony of Terry Spain. PC V. 2, p. 350-51. On March 27, 2002, the State conceded that an evidentiary hearing was necessary on that claim. PC V. 4, p. 763; PC V. 5, p. 919. On May 16, 2006, prior to any evidentiary hearing, initial post-conviction counsel withdrew. PC V. 8, p. 1515. On August 10, 2007, Capital Collateral Regional Counsel – Middle Region (“CCRC-M”) attorneys Ali Shakoore, James Viggiano, and Richard Kiley filed their notice of appearance and took over the post-conviction representation of Mr. Valentine. CCRC-M filed an amended post-conviction motion which

included the claim. PC V. 9, p. 1738-39.⁸ In the State's Response, filed September 2, 2008, the State once again conceded the need for an evidentiary hearing on the claim. PC V. 11, p. 2033-37. CCRC-M represented Mr. Valentine at the evidentiary hearing conducted in October of 2008 and July of 2009. CCRC-M did not affirmatively waive the prior claims upon which Mr. Valentine was granted an evidentiary hearing but failed to present the testimony of Terry Spain at the evidentiary hearing without explanation.

In fact, the only evidence related to Terry Spain at the evidentiary hearing was trial counsel Unterberger's testimony, elicited by the State, that he tried to locate Terry Spain before trial but was unsuccessful. The State introduced a letter from Unterberger to his investigator asking him to locate Spain. PC V. 11, p. 2188-90. At the hearing, Unterberger testified that the "evidence was that there were two black men involved in this crime" and opined that there was "some significance for the defense if the first person on the scene said he saw a white person with (sic) approximately a hundred yards from the car." PC Vol. 20, p. 475-476.

⁸ CCRC-M's motion copied the guilt phase claims from the prior motion word for word but amended penalty phase claims.

Mr. Valentine's current post-conviction counsel, appointed by the lower court and the federal District Court after the finding of a conflict between Mr. Valentine and his counsel at CCRC-M, located and interviewed Terry Spain and obtained an affidavit from him on January 30, 2020. The new affidavit from Mr. Spain establishes several critical facts, including that the man he saw was white and perhaps most notably that he was secreted in a hotel by law enforcement during the 1990 trial who bought him meals and paid him \$300. R, p. 205-207.

This new information raises serious questions about the fundamental fairness of the investigation of this case and the judicial process used to convict and sentence Mr. Valentine to death.

As explained above, the affidavit establishes that on September 9, 1988, Spain was practicing motocross in a field when he came upon a Chevy Blazer, and next to it on the ground was a woman, naked and hog-tied. He then saw a man standing by the woods and heard two gun shots. The man was not black, had blondish or brown hair, and a light tan skin tone. He fled in fear from the gunshots, but was able to flag down a nearby trucker to call police. Spain gave a statement to Detective Fernandez on scene that he saw "a white male

with light colored hair and a medium build.” Spain also spoke to law enforcement several times after that and the police went to his house several times. He also spoke to an FBI investigator. The affidavit further states:

During the trial in January of 1990, the police had me spend the day at a hotel. The police told me that they would come get me if they needed me. They also told me I could not bring my girlfriend to keep me company. The officers fed me and provided room service. The police officers were never in my room. They told me the trial had started and they wanted to make sure I was on stand-by to testify. They also paid me for my time, I think was about \$300 and I was paid in cash. I think it was a Hillsborough County Sheriff Deputy or Detective.

Around 3 or 4 p.m. they told me I could leave because the man’s wife had testified regarding everything they needed to prosecute the man.

R, p. 206. As argued below, this new information, coupled with Assistant State Attorney Benito’s on the record assertion that trial counsel “could never find” Terry Spain, is significant and compelling in a case where there was no physical evidence and where the only testifying eyewitness had credibility problems and a motive to fabricate her testimony and falsely accuse Mr. Valentine.

B. Taken together with all of the prior evidence, including Mr. Valentine’s out-of-the-country alibi, the newly discovered *Brady and Giglio* evidence so weakens the State’s case

against Mr. Valentine as to give rise to reasonable doubt as to his culpability.

As noted above, for more than thirty years, Mr. Valentine has maintained his innocence for these crimes. No physical evidence links him to the crime. As trial counsel Unterberger stated at the evidentiary hearing, presenting the live testimony of an eyewitness that directly contradicted Romero's account would have been significant to the defense. Further, if the State was willing to pay Terry Spain \$300 and secret him in a hotel during the first trial, while asserting two months later *on the record* that he couldn't be found, it begs the question of what else Terry Spain may have told the State that did not fit with their theory of Mr. Valentine's guilt. On its own, however, law enforcement's conduct vitiates the integrity of the entire prosecution of Mr. Valentine and violates his Fifth, Sixth and Eighth Amendment rights to a fair trial, the right to call witnesses and the right to a fundamentally fair proceeding.

The State argued to all three of Mr. Valentine's juries that this case came down to the word of Livia Romero versus the word of Mr. Valentine's multiple alibi witnesses. This testimony from Terry Spain surely would have tipped the scales in favor of the defense in such a

close case, and would have created reasonable doubt that Romero was telling the truth about the events of September 9, 1988. Additionally, that the State secreted Terry Spain in a hotel and gave him \$300, and concealed that information from Mr. Valentine's counsel, renders the entire proceedings fundamentally unfair and unconstitutional. After evaluating the totality of the evidence, this new information from Terry Spain would probably produce an acquittal of the crime or the death penalty at re-trial and/or warrants a new trial where the jury can be told not only about Spain's identification of the assailant as a white male, but also how he was secreted by law enforcement.

In denying relief, the lower court agreed with the State's arguments that their case against Mr. Valentine was strong. R, p. 251. While Mr. Valentine strongly disagrees with the State's characterization and the court's ruling, their very argument and the court's adoption of it demonstrates that there are indeed disputed facts, and therefore the record before this Court by definition cannot "conclusively show that the movant is entitled to no relief." The new testimony from Terry Spain supports a "legally sufficient claim triggering an evidentiary hearing and [is] not conclusively refuted by the

record.” *Nordelo v. State*, 93 So.3d at 187. Where there is no physical evidence linking the defendant to the crime, and the main witness has a motive to lie and fabricate against the defendant, the conduct of the State must be carefully weighed and considered. See *Guzman v. Secretary, Dept. of Corrections*, 663 F.3d 1336 (11th Cir. 2011) (reversing death sentence due to *Giglio* error where witnesses testified falsely and witness was paid \$500, although declining to address that sub-issue on habeas). Because this new *Brady* information undercuts the State’s theory at trial and demonstrates that a critical witness was concealed from Mr. Valentine’s trial counsel and jury, and because the State’s case came down to the credibility of a witness who was shown to have made false statements about her marital status and who had a motivation to lie against Mr. Valentine, an acquittal of the crime or the death penalty is “probable” under the *Jones* standard, and the lower court should have granted an evidentiary hearing. As such, this Court should remand for an evidentiary hearing to allow a full and fair factual determination.

CONCLUSION

Mr. Valentine respectfully requests that this Court reverse the lower court’s ruling and remand this case for an evidentiary hearing.

Respectfully submitted,

/s/Maria DeLiberato
MARIA DELIBERATO
Fla. Bar No. 664251

/s/Marie-Louise Samuels-Parmer
MARIE-LOUISE SAMUELS-PARMER
Fla. Bar No. 0005584

Parmer DeLiberato, P.A.
P.O. Box 18988
Tampa, FL 33679
Ph:717 503 2730; 813 732 3321
maria@parmerdeliberato.com
marie@parmerdeliberato.com

COUNSEL FOR MR. VALENTINE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Rick Buchwalter, Rick.Buchwalter@myfloridalegal.com & cappapp@myfloridalegal.com; on this 15th day of February, 2020.

/s/Maria DeLiberato
MARIA DELIBERATO
Fla. Bar No. 664251
Parmer DeLiberato, P.A.
P.O. Box 18988
Tampa, FL 33679
Ph:717 503 2730
maria@parmerdeliberato.com

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief, was generated in Bookman Old Style 14 point font, pursuant to Fla. R. App. P. 9.210(a)(2) and 9.045(b).

/s/Maria DeLiberato

MARIA DELIBERATO

Fla. Bar No. 664251

Parmer DeLiberato, P.A.

P.O. Box 18988

Tampa, FL 33679

Ph:717 503 2730

maria@parmerdeliberato.com