

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

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**TERENCE G. VALENTINE**

**Appellant**

**v.**

**STATE OF FLORIDA**

**Appellee**

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

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**REPLY BRIEF OF APPELLANT**

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## **PRELIMINARY STATEMENT**

Any claims not argued are not waived and Appellant relies on the merits of his Initial Brief.

## **STATEMENT OF THE CASE**

The State chose to recite the facts from this Court's 1993 Opinion where this Court reversed Mr. Valentine's conviction and sentence because of a jury selection error. More significantly, this Court also specifically held that on retrial portions of the taped phone calls that Livia Romero recorded at the request of police were inadmissible. In this Court's Opinion that ultimately affirmed Mr. Valentine's conviction and sentence after his third trial, this Court omitted some of the quoted portions that are present in the State's recitation of facts. Specifically the following passage was cited and relied upon by the State, but was omitted from this Court's 1996 Opinion:

The entire fifteen-minute tape was played for the jury on retrial. Additional evidence included Romero's testimony and that of Porche's neighbor, who testified that on September 9 he saw two men sitting in a faded red and white or red and gray Ford Bronco parked opposite his house between 1 and 3 p.m. Nancy Cioll, a friend of Valentine's and Romero's, testified that about two weeks after the killing, Valentine visited her driving a maroon,

gray and black Ford Bronco. She said he confessed to the shootings, demonstrated how he had shot Romero, and said he had made a mistake leaving Romero alive. Valentine's alibi defense that he was in Costa Rica at the time of the shootings was disbelieved by the jury and he was convicted on all counts. During the penalty phase, Valentine represented himself and called his daughter and two friends to testify on his behalf.

State's Answer Brief p. 2; c.f. *Valentine v. State*, 688 So. 2d 313 (Fla. 1996).

Mr. Valentine urges this Court, when conducting its *Jones* analysis, to review the actual evidence presented (and equally what was *not* presented) to Mr. Valentine's third jury upon which the instant conviction and death sentence rest. Any other misstatements or mischaracterizations of the facts will be discussed in the arguments below.

### **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 State spends the bulk of its Answer Brief, as it did in its written pleadings and arguments below, disputing the facts and circumstances in and surrounding Mr. Spain's affidavit and insisting that there is overwhelming evidence of Mr. Valentine's guilt. All of these arguments underscore Mr. Valentine's position that there remain factual disputes in the record which can only be resolved at an evidentiary hearing. Because Mr. Valentine's allegations were not conclusively refuted by the record below – as evidenced again by the State's treatment of them here – he is entitled to a full and fair determination of the facts at an evidentiary hearing.

By way of example, the State asserts that Mr. Valentine has failed to “allege why his trial counsel could not with due diligence locate and speak with Spain regarding his involvement in this case after either of Valentine's previous trials, as well as why it took postconviction counsel nearly three decades to do so.” (Answer Brief, p. 13). First, the State wholly ignores the fact that Mr. Valentine specifically alleged below that trial counsel Unterberger's testimony, which was elicited by the State at the initial postconviction evidentiary hearing, was that he tried to locate Terry Spain before the third trial but was unsuccessful. In fact, 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.

Second, Valentine specifically alleged below that at the second trial, 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.

Finally, Mr. Valentine, complying with the pleading requirements under 3.851(e)(2)(C) listed the names and addresses of all of the trial lawyers, trial prosecutors, and post-conviction counsel. R: 170-171. Mr. Valentine sufficiently alleged what the testimony would be, and would have presented such testimony at an evidentiary hearing. The State’s unsupported assertion that Valentine failed to adequately allege due diligence, all the while objecting to an evidentiary hearing below, evidences a

misunderstanding of the law and facts and is a clear reason for this Court to remand for an evidentiary hearing as is required under long-established Florida law.

Indeed, this Court has for many years 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).

**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*<sup>1</sup> and *Giglio*<sup>2</sup>.**

As noted above, the State alleges that portions of Spain's affidavit are not new because they could have been discovered through due diligence. While Mr. Valentine disputes that assertion, the State does concede that paragraphs 17 and 18 of the affidavit – that Mr. Spain was secreted in a hotel and paid \$300, effectively for staying in the hotel room and not testifying at Mr. Valentine's first trial - was not known at the time of any of Mr. Valentine's trials. (Answer Brief, p. 12-13).

However, the State then asserts that those statements would be inadmissible at a retrial. The State appears to misapprehend Mr. Valentine's argument. Mr. Valentine argued below that the State's concealing of Terry Spain in a hotel, limiting his movements for that day, paying him \$300, and concealing that information from Mr. Valentine's trial counsel, renders the entire proceedings fundamentally unfair and unconstitutional. Where there is no physical evidence linking the defendant to the crime, and where, as here, the main witness has a motive to lie and fabricate against the

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<sup>1</sup> *Brady v. Maryland*, 83 S.Ct. 1194 (1963)

<sup>2</sup> *Giglio v. United States*, 92 S.Ct. 763 (1972)

defendant, the conduct of the State must be carefully weighed and considered. *See Guzman v. Secretary, Dept. of Corrections*, 663 F.3d 1336 (11<sup>th</sup> 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).

The State sets out the correct standard, “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*. *Jones v. State*, 591 So.2d 911,916 (Fla. 1991).” (Answer Brief, p. 17, emphasis added by the State), but misapplies it to the facts by arguing that because Terry Spain’s affidavit was not presented at trial, this Court shouldn’t consider it. (“[b]ecause Spain’s testimony about the other person he saw was not introduced at his trial, the Court *should not consider it*.” (Answer Brief, p. 16) (emphasis added). This confusing and circular argument misapprehends both the duties of this Court under the *Jones* standard, as well as the facts that were alleged below.

Additionally, the State’s argument is facially illogical. The Terry Spain affidavit is what Mr. Valentine alleged was the “newly discovered evidence” and so it is *that evidence* that this Court must

compare with what was introduced at Mr. Valentine's third and final trial in order to determine whether the evidence would probably produce an acquittal of the conviction or the death sentence. Mr. Valentine does not dispute that his third jury never heard anything about another man, *who was white and firing shots from a gun*, in the same area where the victims, who were shot, were located. The third jury also never heard that this same man was hidden by the State and paid for his non-appearance at the first trial. As a direct result of the State's action, or the ineffective assistance of trial counsel, or likely a combination of both, Mr. Valentine's jury was deprived of this critical information. This goes to the heart of the *Jones* analysis.

The State then spends the next several pages of its Brief challenging the accuracy of Mr. Spain's recollection of events set forth in the affidavit, disputing the facts alleged. The State argues that "although Spain identifies the man as white, his statement is far from conclusive." (Answer Brief, p. 25). It is hard to imagine a more conclusive way to say: "the man was not black", he was "light tan" and his hair was "blondish or brown." R: 206. In any event, this factual dispute is precisely the reason this Court should remand for

an evidentiary hearing, where the State is free to cross-examine Mr. Spain and challenge his recollection of events.

The State further disputes the accuracy of the affidavit by spouting fantastical theories wholly unsupported by the record below. For example, the State asserts:

Furthermore, even if one assumes that this unknown person is white and involved in the crimes, it certainly does not eliminate Valentine as the person who kidnapped and shot her and murdered Porche. Valentine's contention that he cannot be involved in the crimes simply because Spain was shot by an unknown white man 40-50 yards (or 100 yards) away from the location where Spain spotted Livia Romero, is nonsense. Merely because both he and the other individual observed by Romero prior to her being blindfolded, and only known as "John" could not be mistaken for white does not eliminate the possibility that there was a third man involved was.

(Answer Brief, p. 26). The State's argument here offends notions of fundamental fairness and due process. The State is seeking to execute Mr. Valentine, and yet instead of agreeing to an evidentiary hearing below to resolve all of these clearly disputed facts about actual innocence, it is instead - for the first time on appeal - positing new theories of guilt, some thirty years later, in a desperate attempt to save its conviction and death sentence.

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.*

Eyewitness Terry Spain, a neutral observer, 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.

As set forth in Mr. Valentine's Initial Brief, 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.

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 severe credibility problems and a motive to fabricate her testimony and falsely accuse Mr. Valentine. Under a proper *Jones* analysis, 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. This Court should remand for an evidentiary hearing.

**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.**

With respect to Mr. Valentine's *Brady and Giglio* claim, the State misapprehends Mr. Valentine's argument. The State alleges that the information from Spain was "never withheld from Valentine. In fact, this evidence was actually introduced in both his first and second trials through the cross-examination of Detective Fernandez. Moreover, there is no evidence or allegation that the State prevented Valentine from locating Spain and calling him as a witness in the trial that is the subject of his present motion an appeal." (Answer Brief, p. 32). This is inaccurate.

First, the sanitized testimony that came in through Detective Fernandez at the first and second trials is a far cry from the new and detailed allegations set forth in Mr. Spain's 2020 affidavit. Second, Mr. Valentine argued below that if the State was willing to pay Terry Spain \$300 and secret him in a hotel during the first trial, while asserting falsely two months later *on the record* that he couldn't be found, 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.

Finally, the State's argument highlights the need to conduct a full and fair evidentiary hearing, where the trial prosecutors Karen Cox and George Bedell III would be questioned under oath about what they knew about Terry Spain's whereabouts and the substance of his testimony.<sup>3</sup>

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.

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<sup>3</sup> See *Florida Bar v. Karen Cox*, 794 So. 2d 1278 (Fla. 2001)(Imposing a one year suspension of Cox for knowingly allowing a victim to testify under a false name in a criminal trial, thereby precluding the defense from conducting a meaningful background check on the witness, while an Assistant United States Attorney).

## **CONCLUSION**

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

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Reply Brief 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](mailto:Rick.Buchwalter@myfloridalegal.com) & [cappapp@myfloridalegal.com](mailto:cappapp@myfloridalegal.com); on this 25<sup>th</sup> day of March, 2021.

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**CERTIFICATE OF COMPLIANCE**

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

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