IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-1328

Lower Tribunal No.: 82-453-CF10A

OMAR BLANCO vs. STATE OF FLORIDA

Appellant Appellee

On appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida:

Trial Court's denial of any evidentiary hearing on all issues raised under Rule 3.850.

INITIAL BRIEF OF APPELLANT

[This brief is filed on behalf of the Appellant, OMAR BLANCO]

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PRELIMINARY STATEMENT

The Appellant was the defendant in the court below. The Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this Court.

The symbol “TR” will be used to designate the trial record on direct appeal and includes the original guilt phase, the original penalty phase and the original sentencing hearing.

The symbol “DAR” will be used to designate the direct appeal to the Florida Supreme Court of the original trial proceedings.

The symbol “PR1” will be used to designate the first post-conviction record.

The symbol “PPh2” will be used to designate the second penalty phase and second sentencing hearing record and includes the third motion for postconviction relief that was litigated during the same proceeding and included in the same record.

The symbol “ROA” will be used to designate the record on appeal from the summary denial of the fourth post-conviction motion that is the subject of this appeal.

The symbol “ROA Supp” will be used to designate the supplemented record items by agreement of the parties or Order of this Court.

All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The judgment of conviction under attack was rendered by the Seventeenth Judicial Circuit in and for Broward County, Florida, the Honorable Stanton S. Kaplan presiding as Circuit Judge throughout the original guilt phase, original penalty phase and original sentencing hearing, all of which were held in 1982.

A second penalty phase and re-sentencing hearing were held in 1993-1994 presided over by the Honorable Barry E. Goldstein of the Seventeenth Judicial Circuit in and for Broward County, Florida.

On February 2, 1982, the Appellant was indicted by the grand jury and charged with "Murder in the First Degree" in count I and "Burglary-Armed" in count II (TR vol. XII, pp. 1874). On February 3, 1982, the Appellant entered his plea of not guilty to both counts of the Indictment (TR vol. XII, p. 1875).

The original guilt phase of the jury trial commenced on June 1, 1982 (TR vol. II, p. 184). The jury returned a verdict of guilt on both counts on June 11, 1982 (TR vol. XII, pp. 1991-1992). The date that the judgment of conviction was rendered by verdict of the jury was June 11, 1982 (TR vol. XI, pp. 1749-1750). The date that the defendant was adjudicated guilty of murder in the first degree and armed burglary by the Honorable Stanton S. Kaplan was June 11, 1982 (TR vol. XI, pp. 1763-1764).

The original penalty phase commenced on June 15, 1982. The

same day, the jury returned its recommendation of the death penalty by a majority vote of eight to four (TR vol. XI, pp. 1848-1849; and TR vol. XII, p. 2013).

The trial court conducted the original sentencing hearing on June 21, 1982 (TR vol. XI, pp. 1853-1873) and, following the recommendation of the jury, the trial court entered a written sentencing order of the death penalty (TR vol. XII, pp. 2016-2022) on June 21, 1982, and judgment (TR vol. XII, pp. 1993-1994) on June 22, 1982, *nunc pro tunc* June 11, 1982. The date of imposition of the original death sentence rendered in the trial court was June 21, 1982 (TR vol. XI, pp. 1853-1873). The length of the original sentence imposed was count I (first degree murder)--death sentence (TR vol. XI, pp. 1867) and count II (armed burglary)--75 years including a minimum mandatory of 3 years without possibility of parole consecutive to count I (TR vol. XI, pp. 1867-1868).

Appellant timely filed his original direct appeal of the judgments and sentences to the Supreme Court of Florida in Cases Nos. 62,371 & 62,598 on July 16, 1982 (TR vol. XII, p. 2024). This appeal was denied and the defendant's judgments and sentences were affirmed on June 7, 1984.[1]

Appellant’s petition for writ of certiorari in the Supreme Court of the United States (Case No. 84-5659) was denied on

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[1] *Blanco v. State,* 452 So.2d 520 (Fla. 1984); reh. den. 7-26-84.

January 14, 1985.[2]

Appellant filed his first motion for postconviction relief (pursuant to Rule 3.850, Florida Rules of Criminal Procedure) on January 31, 1986 (PR1 vol. IV, pp. 451-533). The trial court denied this motion on May 6, 1986 (PR1 vol. IV, pp. 582-597).[3]

Appellant's first collateral appeal to the Florida Supreme Court was commenced by the filing a notice of appeal on May 21, 1986 (PR1 vol. IV, pp. 602). Appellant also filed a state petition for writ of habeas corpus in the Florida Supreme Court on February 3, 1986. Both were consolidated for appeal. The Florida Supreme Court affirmed the trial court's denial of postconviction relief and denied the writ of habeas corpus on

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[2] See *Blanco v. Florida*, 469 U.S. 1181, 105 S. Ct. 940, 83 L.Ed.2d 953 (1985).

[3] The following issues were raised in support of collateral relief in the trial court:

a. Failure to present mitigation evidence;
b. Court ordered defense counsel to present witnesses over objection;
c. Counsel revealed secrets of client to the court violating duty of loyalty;
d. Portions of the trial conducted outside defendant's presence and without an interpreter;
e. Defendant's incompetency to stand trial never raised;
f. Unreliable penalty phase verdict;
g. Jury incorrectly instructed in penalty phase;
h. Failure to narrow the class of persons eligible for death;
i. Improper use of a supposed prior conviction at penalty phase;
j. State's use of improper argument affected sentencing.

May 7, 1987. [4]

Appellant filed a federal petition for writ of habeas corpus

[4] *Blanco v. Wainwright* and *Blanco v. State,* 507 So.2d 1377 (Fla. 1987), *rehearing denied* July 10, 1987.

under case number 87-6685-Civ. The United States District Court granted the writ requiring that a new (second) penalty phase proceeding be held in the trial court with a new judge assigned on July 11, 1988.[5]

The state appealed to the United States Court of Appeal, Eleventh Circuit, which affirmed the decision of the United States District Court and sent the case back for a second penalty phase and re-sentencing proceeding on September 30, 1991.[6]

Appellant filed his second motion for postconviction relief (pursuant to Rule 3.850, Florida Rules of Criminal Procedure) in the trial court on August 1, 1989 (PPh2 vol. L, pp. 2454-2495) while the appeal in the United States Court of Appeal was still pending.[7]

The Seventeenth Circuit Court, the Honorable Barry E. Goldstein presiding, commenced the second penalty phase jury trial commencing on April 18, 1994 (PPh2 vol. XXXIV, p. 690). This proceeding concluded on May 5, 1994 (PPh2 vol. XLVI, p. 2297). The second penalty phase jury returned its

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5 See *Blanco v. Dugger,* 691 F. Supp. 308 (U.S.D.C. So. Dist. Fla. 1988).

6 *Blanco v. Singletary,* 943 F.2d 1477 (11th Cir. 1991).

7 Apparently, that claim was abandoned because of the result in the 11th Circuit. The state moved to dismiss the claim for mootness January 28, 1993 (2PR vol. LI, pp. 2600-2602).

recommendation of the death penalty, this time by a majority vote of ten to two, on May 5, 1994

(PPh2 vol. XLV, p. 2393). On January 6, 1995, the trial court again sentenced Appellant to death on count I of the Indictment (PPh2 vol. XLIX, p. 2425).

Simultaneous to the second penalty phase proceeding, Appellant filed his third motion for postconviction relief (pursuant to Rule 3.850, Florida Rules of Criminal Procedure) on January 12, 1994 (PPh2 vol. LIII, pp. 2934-2937). This third motion for postconviction relief was heard by the trial court commencing on February 25, 1994 (PPh2 vol. XXXI p. 505). The trial court denied the third motion for postconviction relief on April 27, 1994 (PPh2 vol. LV p. 3396).[8]/[9]

The Appellant appealed the trial court's re-sentencing order in the second penalty phase proceeding by filing his notice on February 2, 1995. The Florida Supreme Court affirmed the trial court's re-sentencing on September 18, 1997.[10]

Appellant filed a petition for writ of certiorari to the United States Supreme Court on April 28, 1998. This was denied on

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[8] The issue raised in support of collateral relief on the third motion for postconviction relief in the trial court was "newly discovered evidence" alleging that someone other than Appellant committed the murder.

[9] Apparently, the defendant did not file a second collateral appeal from the trial court's denial of defendant's third motion for postconviction relief. It was never addressed in the briefs or in the opinion.

[10] *Blanco v. State,* 702 So. 2d 1250 (Fla. 1997), reh. den. 12-17-97.

October 5, 1998.[11]

This is the fourth motion for postconviction relief filed on behalf of the defendant pursuant to Rules 3.850 and 3.851, Florida Rules of Criminal Procedure, in the trial court. The second was apparently dismissed for mootness. On July 1, 2003, the trial court summarily denied the entire petition including twenty-two separate claims without providing any evidentiary hearing.

The Appellant, OMAR BLANCO, is currently a state prisoner incarcerated "on Death Row" at the Union Correctional Institution in Union County, Florida. His prison number is 084582.

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[11] *Omar Blanco v. Florida,* Case No. 97-9118.

STATEMENT OF THE FACTS

Thalia Vezos was a fourteen-year-old [DOB 2-27-67] ninth grade student (TR vol. VI, p. 880, l. 11-19) who witnessed certain aspects of a shooting inside her home in Fort Lauderdale that led to her uncle's death right around 11:00 p.m. on the night of January 14, 1982.

Thalia was in the breakfast room doing her homework after dinner (TR vol. VI, p. 882, l. 21-25). Just before 10:00 p.m. she took a shower (TR vol. VI, pp. 883, 884) and got ready for bed. Thalia did not see her uncle as he was watching another T.V. in the den (TR vol. VI, p. 883, l.16-17). Thalia went to her own bedroom to watch "Hill Street Blues" (TR vol. VI, p. 884, l. 4-5). Thalia testified at trial that at about 11:00 p.m. (TR vol. VI, p. 886, l. 4), she picked up her English book and began reading it while she was in her bed (TR vol. VI, p. 884, l. 18 through p. 885, l. 1).[12]

At 11:05 p.m., Thalia saw a man, whom she had never seen before, standing in the hallway just outside her bedroom door

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[12] This must have occurred much earlier as Thalia's timeline does not add up. If she first noticed the intruder at 11:05 p.m. as she testified at trial (TR vol. VI, p. 886, l. 4-8) and he was in her presence for an additional 8-10 minutes (TR vol. VI, p. 898, l. 13), then the police dispatch transcripts from "Master Tape Red 14 radio transmissions" on January 14, 1981 indicating the 911 call had been received prior to, and the first radio broadcast was made at, 2312 hours which is 11:12 p.m. (Appendix item 1) and the first officers [K. Bull, M. Moniz, Lecense and Gibbons] arrived at 2313 which is 11:13 p.m. (Appendix item 2), this timing by Thalia is inaccurate.

(TR vol. VI, p. 886, l. 7-9). The man was holding a gun to his lips

indicating for her to be quiet. He spoke quietly to her and told her "Shhh." (TR vol. VI, p. 886, l. 19). Thalia described the man in her trial testimony as "…a white man, medium height, with dark hair, shaggy, kind of down to his shoulders." (TR vol. VI, p. 886, l. 16-17).

The man was 12-14 feet away from her when she observed him. Thalia testified that the man got as close as a foot and a half away but she does not remember looking at him at that time (TR vol. VI, p. 887, l. 18-21). He walked up to the bed and stuck his hand out and said "Friend" or "Amigo" (TR vol. VI, p. 892, l. 18-24) and she put her finger in his hand. At that point she felt something covering his hands that was red or maroon in color (TR vol. VI, p. 893, l. 7-15). The state introduced a pair of socks [marked State's Exhibit "M" and later placed into evidence at trial as State's Exhibit 37 "brown bag containing socks" (Appendix item 3)] that Thalia calls "the gloves that he was wearing." (TR vol. VI, p. 893, l. 16-23).[13]

The man proceeded to exit her bedroom and was out of sight for some period of time (TR vol. VI, p. 888, l. 8). He may have gone into her mother's bedroom across the hall (Appendix item 4, pp. 2-4). Thalia got out of bed and the man returned and said

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[13] These were the socks that were found by the defense to be missing from the trial court clerk's evidence box during the evidence review conducted by the defense on the post- conviction proceedings that are the subject of this appeal. A motion was filed (ROA vol.2, pp.364-375) and heard by the trial court (ROA vol.3, pp. 482-507).

“Get into

bed.” (TR vol. VI, p. 887, l. 23 through p. 888, l. 1). In her statement to police on 1-15-81 @12:00 midnight (Appendix item 4), Thalia stated under oath that the man said to her “I’m not here to hurt you. Just be quiet.” or, “I won’t kill you if you get back in bed.” (Appendix item 4, p. 6). At trial some six months after the crime Thalia testified on cross examination that “As far as that goes, I don’t remember saying that, but that night it was in my statement and I’m not positive. I was in shock. I don’t know.” (TR vol. VI, p. 914, l. 18 through p. 915, l. 1).

Thalia heard him speak several times but could not later relate if he spoke in English or Spanish or broken English (TR vol. VI, p. 914, l. 18-20). On her statement under oath to the police an hour and a half after the crime, Thalia testified that the man said “I’m not here to hurt you. Just be quiet.” She had a conversation with him, presumably in English as she stated that at one point the man said something in Spanish that she testified that she did not understand (Appendix item 4, p. 1). Thalia relates, “And he asked me if there was anybody in the house and I said yes my uncle is in the den, and he said well don’t scream for them, and I said please I’d like to be with him, and he said no.” (Appendix item 4, p. 1).

When Thalia next saw the man, he was standing right at her

bedroom door again (TR vol. VI, p. 888, l. 8).[14] Momentarily, she saw her uncle, John Ryan, as he appeared in the hallway (TR vol. VI, p. 888, l. 8). John Ryan immediately attacked the gunman and fought with him trying to take the gun away from the other man (TR vol. VI, p. 888, l. 8-11). On her 1-15-81 sworn statement to police, Thalia testified, "Uncle John tried to get the gun away from him." At this point, Thalia admitted that she had closed her eyes out of fear and really didn't see everything (Appendix item 4, p. 9).

Both men had a grasp on the gun as they fought for possession of it. Their hands simultaneously gripped the gun and each other's hands and likely went up high and then down low when the gun went off striking John Ryan low in the abdomen and through the neck from left to right (Appendix item 29, ME's Report). During this scuffle, John Ryan was shot two or three times. As they continued in wrestling combat, both men had to have been covered in John Ryan's blood. John Ryan fell backwards onto the bed and landed on top of his niece, Thalia Vezos (TR vol. VI, p. 889, l. 19-22). It is unknown if both men were still locked in combat on the bed. In her statement to the police, Thalia says that John Ryan was shot one more time while he was on the bed and another shot was fired at the door or wall (Appendix item 4, p. 9). At trial, Thalia changed her

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[14] This is the exact point where the unsolved latent print was lifted that is of AFIS quality.

testimony to two or three more shots were fired into John Ryan while he was on the bed (TR vol. VI, p. 890, l. 3-6). At the second penalty phase proceeding, Thalia testified that she

buried her head in her pillow and did not see anything, nor was she able to discern how many shots were fired (PPh2 vol. XXXVIII, p. 1302, l.6-24).

Following the death of John Ryan, Thalia Vezos remained in her room for some period of time. The man closed her door and left her bedroom (TR vol. VI, p. 894, l. 13-16). Thalia tried desperately to get out of her window but it could not be opened (TR vol. VI, p. 894, l. 17). At trial she testified that she opened her door and thought the man was still there but she could not really be sure (TR vol. VI, p. 894, l. 18-22). On her 1-15-81 statement to police only an hour after the crime, she testified “So I think I think I went out side, into the living room and the man said get back into your bedroom” (Appendix item 4, p. 9).

Thalia heard what she believed was a few men talking in the living room, possibly in Spanish (Appendix item 4, p. 10). She could not decipher what the men were saying and could not see what they were doing. In fact, she was not sure what she remembered even within hours of the event (Appendix item 4, p. 10)(TR vol. VI, p. 894, l. 17-22).

After about ten minutes went by and when she believed they had already left the home, Thalia unlocked the deadbolt lock (PPh2 vol. XXXVIII, p.1294, l. 23 through p. 1295, l. 10) on the front door and ran outside screaming (TR vol. VI, p. 895, l. 1-4; p. 896, l. 5 through p. 897, l. 13). She ran over to her

neighbors’ house.

This was the home of the Wengatzes. They let her in and Mr. Wengatz called the police at 911 (Appendix item 1, p.1).

In her statement to police on 1-15-81 only an hour after the murder, Thalia described the man as Cuban or Spanish; dark olive complexion; dark hair; over weight; medium height; greasy hair to the back of the head; unsure if he had any hair on the face; could not recall his eyes or the color; dark skin with big pores; she did not notice his teeth; did not think he wore any jewelry; he was about 5'8"; stocky build 175-180 lbs.; pot belly; he wore an olive green, puke green running suit and she did not notice his shoes (Appendix item 4, pp. 2-4). Thalia testified that she could not really recall many details as she was in shock (Appendix item 4, p. 5).

Thalia stayed inside the Wengatz home along with George Abdeni and Lawrence Abdeni, his wife, for over an hour discussing what they had seen with one of the FLPD Detectives. Thalia gave a taped statement under oath at 12:00 midnight on 1-15-81, to Det. Kamm (Appendix item 4).

Then all the people inside the Wengatz home were informed by the police that a suspect had been caught and that he was being brought to the street outside the Vezos home for a show-up identification. Officer Karen Bull had been talking to Thalia Vezos and the other neighbors inside the Wengatz home. She was standing in the doorway of that residence when Omar Blanco was brought to the scene (TR vol. I, p. 46, l. 13-22). They were

50-75 feet away from Blanco as they observed him and discussed the case.

George Abdeni did go outside and, after totally changing his description of the identifying characteristics observed from the suspect, he was able to give the police a positive identification of Omar Blanco as the perpetrator of the crime. George Abdeni gave a taped statement under oath at 12:37 a.m. on 1-15-81, to Detectives G. Ciani and R. Pusins (Appendix item 5). George Abdeni testified,

> Well I was sleeping and heard uh (UI) shots in the background. I got up and uh, I heard a voice like a woman shouting and uh, I waited a while and uh finally I saw sort of a form of a person I thought it was a woman in a gray suit, uh, leaving the house of the person who was inside (UI) who I now understand got killed.
> (Appendix item 5, p. 1).

George Abdeni stated his windows were closed and it was very cold 30-degrees outside so he never went out until after the police cars came. Then George said, “I thought it was woman but later on it turned out to be a man.” (Appendix item 5, p. 2). He saw a woman in pajamas or a nightgown. Then he was able to talk to the police inside of the Wengatz home along with Thalia waiting for the show-up to occur. Then he began to conform his eyewitness testimony to what he figured the police wanted. He stated:

> A. Uh, no, no I just when I saw him [Blanco at the show-up] you know uh then I thought then they [the police] told me it was the same guy I mean I made the comparison and I saw it was the same guy dressed so I knew it was a

man who left.

> Q. OK. Sir, you were asked to identify a white male [Blanco] that was standing outside among a group of people, both in uniform and in plain clothes…Of that group of people outside, did you observe anybody that you recognized as that subject being that left the residence earlier?
>
> A. Well I saw this uniform again, completely gray, and when he turned around **I assumed** that it was that guy.
> (Appendix item 5, p. 2).

Mrs. Lawrence Abdeni could not identify anyone and she did not give a sworn statement to the police at the scene.

Thalia was not emotionally up to making an identification that night so she was not brought out to the show-up of Omar Blanco.[15]

Officer Karen Bull arrived at the crime scene at 11:14 p.m. (TR vol. V, p. 774, l. 9-12). After an inspection of the scene, Officer Bull went next door to talk to the "little girl" (TR vol. V, p. 779, l. 10-22). Thalia gave an initial description of the intruder as a Latin male, between 5'8" to 5'10", 180 to 190 pounds, wearing a gray or light green jogging suit, with dark curly hair (TR vol. V, p. 780, l. 9-11). Officer Bull sent the description to a dispatcher at approximately 11:24 p.m. (TR

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[15] Thalia observed the entire show-up from the Wengatz window and discussed the case with the police, the Wengatz family and Mr. and Mrs. Abdeni. The next afternoon Thalia was able to make the positive identification at FLPD by picking Omar Blanco out of the lineup. Her description of identifying characteristics also changed over that period of time as suggestive events unfolded.

vol. V, p. 780, l. 25).

Based upon the description given by Thalia, Officer Bull broadcast the BOLO at 11:23 p.m. (Appendix item 1, p.2). The dispatched BOLO described the suspect as "…a Spanish male, Latin male, black hair, black curly hair, wearing a green or gray jogging suit, about 5'10", dark complexion, **with a moustache**" (Appendix item 1, p. 2). Moments later the police stopped a suspicious car in the area that had been driving up and down 57th Court. They searched the vehicle and found that it was occupied by two black males carrying a shotgun and a handgun (Appendix item 1, p. 4). Apparently, since the police had failed to find a Latino male in the car, they let these armed dark-skinned males go. This information was not acted upon by FLPD.

During the course of canvassing the neighborhood, Accident Investigator R. Martin was dispatched to the general area of the Vezos home at 9:50 a.m. on 1-15-82, to search for the murder weapon and anyone missing a bicycle. AI Martin located a witness by the name of Nancy Brandt who resided at 2789 NE 37th Drive. This witness stated she saw a black male walking westbound on NE 35th Drive wearing a jogging suit (Appendix item 7). This information was not acted upon by FLPD.

Officer Price, who was in the area, responded to hearing the BOLO at 11:29 p.m. (TR vol. V, p. 814, l. 18-20) by driving through the area within his district especially the area around Fantasy Island (TR vol. V, p. 814, l. 22-25). He testified,

“There’s a lot of different bars around that area and I began circulating that specific area (TR vol. V, p. 815, l. 1-2).

Shortly before midnight [an hour or more after the crime], Officer Price saw Omar Blanco casually riding a bicycle (TR vol. V, p. 817, l. 4) southbound on A1A (TR vol. V, p. 817, l. 6). Since the Appellant was a white Latin male, Officer Price determined that appellant fit the description on the BOLO (TR vol. V, p. 816, l. 11-12). Appellant had a growth of full facial hair, unlike the BOLO.

Officer Price then followed appellant for approximately one-tenth of a mile (TR vol. V, p. 816, l. 24-25) before stopping him at 11:57 p.m. (TR vol. V, p. 818, l. 2-3) near North Beach Hospital (TR vol. V, p. 817, l. 1). Officer Price requested a backup unit (TR vol. V, p. 819, l. 9-10) and Sgt. Steven Roberts, who had been supervising at the crime scene, responded over to where Blanco was being detained (TR vol. V, p. 837, l. 2-19).

Sgt. Roberts described the white lady’s bicycle that he collected into evidence (TR vol. V, p. 838, l. 17-20) and testified at trial “I didn’t actually see him ride the bicycle but he was standing next to the bicycle when Officer Price was talking to him” (TR vol. V, p. 838, l. 21-23). Sgt. Roberts also testified that he transported that bicycle to the Detective Bureau **later** that night (TR vol. V, p. 838, l. 24-25). The police were so focused on the person of Omar Blanco and

transporting him back to the scene for

the show-up that they neglected the bicycle and left it on A-1-A unlocked for several hours.[16]

After Blanco was transported to the Bureau, Officer Roberts then went back to the scene of the stop and collected a white lady's bicycle and transported it to the Bureau (Appendix item 21). The clear chain of custody problem on this evidence was of concern to the State Attorney. In his April 23, 1982, memorandum to the Chief Investigator point number 1 questions:

> "Advise chain of custody re: bike. Whose initials are on it? If there are no initials on it, can Sgt. Roberts identify the bike? [NOTE: Roberts supposedly left it at the hospital, then went back and picked it up]" (Appendix item 16).

Chain of custody on the white lady's bicycle was raised at trial by the Defense by specific objection. The trial court asked counsel to go sidebar off the record for a discussion of this issue. When they came back on the record, the trial judge simply stated "Overruled. Will be received." The bike became State's Exhibit 7 in evidence (TR vol. V, p. 839, l. 2-18).

Officer Price asked Omar Blanco (in English) if he possessed a gun (TR vol. V, p. 819, l. 20-21). Blanco replied, "No Ingles." Officer Price advised dispatch that the Latin male suspect "doesn't speak any English" (Appendix item 1, p. 7).

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[16] Blanco claimed that he was riding his expensive racing bike that was stolen by someone who left the "junker bike" in exchange during the time the police lost chain of custody and that the police thereafter conformed their testimony to the bike that they actually had as proffered evidence.

Officer Price was then

advised by dispatch, "…if he matches the description go ahead and take him back to the scene. (Appendix item 1, p. 7).

Then Officer Price frisked Omar Blanco. He found nothing on Blanco's person except for a necklace with a ring on it and watch on his arm (TR vol. V, p. 820, l. 6-9). There was no firearm (TR vol. V, p. 820, l. 1).

Officer Price and Sgt. Roberts handcuffed Omar Blanco and placed him into the patrol car (TR vol. V, p. 838, l. 5-8). Officer Price transported him, in his vehicle (Appendix item 6, p. 1), to the murder scene at 2701 NE 35th Drive, Ft. Lauderdale (TR vol. V, p. 820, l. 24-25) and Sgt. Roberts returned to the scene as well. Blanco arrived at the street outside the Wengatz home before George Abdeni gave his statement to police which began at 12:30 a.m. (Appendix item 5).

When Blanco arrived at the show-up location, Spanish speaking Officer Perez Cubas was instructed by Sgt. Patterson to interrogate Blanco. Blanco told him his name [Omar Blanco], his date of birth [4-7-50] and his address [3422 Taylor Street, Apt. 1, Hollywood, Florida] (Appendix item 13, p. 1). Officer Perez Cubas continued to converse with Blanco who immediately, consistently and persistently protested his innocence.

Officer Perez Cubas transported him to FLPD where he and Detective Miller continued to converse and question Blanco (Appendix item 13, p. 2). Later on at 3:15 a.m., Miranda rights

were finally given to Blanco who continued to openly speak with the police and protest his innocence (Appendix item 13, p. 2).[17]

ID Tech John M. Matheson arrived at the scene at some time after 11:30 p.m. on 1-14-82 (TR vol. VI, p. 939, l. 2-15). He did a walk-through and wait for EMS to determine that the victim was dead. Then he commenced taking crime scene photos, dusting multiple areas for latent fingerprints and making the lift cards, collecting casings and other crime scene evidence (Appendix item 8).

ID Tech Matheson was at the scene for a couple of hours. He took all of the crime scene photographs but they were taken at various times as indicated by the time on the clock in Thalia Vezos' room shown on the two photographs contained in Appendix 25. Both of these photos were taken by ID Tech Matheson on 1-15-82, but they were not entered into evidence at any trial or court proceeding. The first photo that is closer up indicates that it was taken at 2:53 a.m. The second photo that is more distant indicates 1:50 a.m., although that one is difficult to read (Appendix item 25, p. 1-2).

At trial ID Tech Matheson testified that he took certain photos [state's Exhibits N-1 through N-9] at 1:14 a.m. (TR vol.

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[17] It is unknown why Officer Perez Cubas re-wrote his report on 1-21-82 (Appendix item 14) and again re-wrote his report on 2-20-82 (Appendix item 15).

VI, p. 953, l. 17 through p. 954, l. 14). ID Tech Matheson was still

dealing with crime scene evidence collection at 3:11 a.m. when he was examining the bed linens (TR vol. VI, p. 942, l. 22-25).

During ID Tech Matheson's time at the scene on 1-14-82, an item was supposedly found that was to become the only item of real evidence purportedly tying Blanco to the inside of Thalia Vezos' home at the time of the shooting. Matheson reports:

> "Continuing search of the room and search of the floor revealed a leather pocketbook, a male type pocketbook. A search inside revealed a black pocketbook with identification and private papers to include a driver's license, social security card and a **Mariel boatlift** card of one Omar Blanco." (Appendix item 8, p. 2).

The timing of when this purse with ID was found and the circumstances surrounding it have been lost as they were never documented. ID Tech Matheson's report jumbles it altogether with the processing of the bed linens that he testified was continuing at 3:11 a.m. on 1-15-82 (cited above). ID Tech Matheson claims that he was the one who found the purse (TR vol. VI, p. 992, l. 23-25) and (PPh2 vol. XXXVIII, p. 1337, l.14-24). ID Tech Matheson turned the purse and its contents over to Detective Walley for examination at some point in time and received it back at another point in time (TR vol. VI, p. 961, l. 10 through p. 963, l.14). Compare Detective Walley's report in which he states that he was the one who found the purse

(Appendix item 2, p. 1).[18]

At some point in time on 1-15-82, Detective Ralph Martin and Detective Ciani went to Hollywood to search for two possible suspects (Appendix item 11). It is unknown if these detectives gained entry into the address given by Omar Blanco to Officer Perez Cubas during the show-up. Nor is it known what items they confiscated from his apartment or whether his wallet was obtained at that time.

Det. Michael Walley's report states that while he was examining a bullet hole in the wall he "…also observed a brown leather purse lying on the floor next to the trash can." He picked it up and moved it or did something with it (Appendix item 9, p. 1).[19] For some reason, only one photograph was taken of the purported purse at a distance but that does not show any of the contents (Appendix item 26). Nor does it depict the external characteristics of the evidence clearly. This sole photograph was never entered into evidence at trial but in 1994 it was entered into evidence at the second penalty phase.

ID Tech Matheson also collected a pair of socks found inside

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[18] It should be noted that the police introduced another brown leather purse [on top of the alarm clock] into the crime scene for photographing (Appendix item 25, pp. 1-2) which raises additional questions on integrity of the crime scene evidence.

[19] This evidence, if actually found in the room, was absolutely crucial to the crime scene. It should have been exhaustively photographed, dusted for prints, opened cautiously, repeatedly photographed at every stage, the contents displayed and photographed and thoroughly documented.

the bedroom door (Appendix 19). The State introduced these into evidence at trial and argued that Blanco covered his hands by

wearing these socks during the shooting. These socks were never photographed at the crime scene.[20]

At some time in the early a.m. on 1-15-82, Omar Blanco was transported by Officer Perez Cubas to FLPD. He was given his Miranda rights at 3:15 a.m. according to Officer Perez Cubas (Appendix item 13, p. 2). Blanco was photographed at 2:50 a.m. [according to his watch that is shown in two of the photos] (Appendix item 27, p. 1, 3). These photos were never placed into evidence at any proceeding in the trial court.[21]

Blanco's shoes were thoroughly tested by Crime Lab Analyst Katherine R. Bisset of FDLE for fiber evidence that might link him

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[20] These are the socks that were found missing from the trial court clerk's evidence box during the evidence review in this proceeding and then showed up again once the problem was brought to light.

This purported crime scene process in no way preserves the integrity of this evidence and raises several unanswered evidence questions that can only be resolved through an evidentiary hearing where an adequate record can be established for the reviewing Court.

[21] The photos are instructive in they depict that Blanco was not the man who had been locked into chest-to-chest, hand-to-hand combat with John Ryan who was shot 2 or 3 times, in the abdomen and under the chin. See the report of Dr. K.J. Garvin, Medical Examiner dated 1-15-82 at 9:00 a.m. (Appendix item 29, p. 1). The ME report indicates a shot fired at very close range hit Ryan under the left chin and passed out through his right chin or neck showing powder burn stippling (Appendix item 29, p. 2, 7). If Blanco was the shooter, he would have been covered in blood and blood splatter on his face, hair, chest, hands, clothes, shoes and bicycle. None of these items had any even microscopic trace of John Ryan's blood. Blanco's clothing was collected and placed into evidence (Appendix item 20).

to the scene or the carpeting of the Vezos home (Appendix item 15). The only trace evidence found was debris consistent with him having recently been on the beach. No fibers consistent with the carpet samples were found on the shoes (Appendix item 15, p. 2). The complete report of Sanford regional Crime Lab also indicates negative results on fiber testing (Appendix 22).

No Blanco hairs were found at the crime scene or in the clenched hands of John Ryan. None were found on Ryan's body. No forensic evidence has ever been found to link Blanco with the scene or the murder.[22]

While Blanco was at FLPD, ID Tech Matheson did gunshot residue swabs an "Absorption Analysis Kit" (Appendix item 8, p. 3). The swabbing was performed at about 2:45 a.m. on 1-15-82 (Appendix item 23). These swabs were eventually sent for testing to ATF in Washington, D.C. by forensic chemist William D. Kinard who utilized the "flameless atomic absorption spectrophotometry" procedure (TR vol. VIII, p. 1227, l. 8-9). Mr. Kinnard made a

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[22] In 1982, the science of DNA was not available for forensic use as it has been developed today. Unfortunately, the trial court clerk's office had no rules or regulations concerning maintaining the integrity of the trial evidence over the years in cases of the magnitude of a death penalty murder case. Since all of the trial evidence has been commingled and not separately packaged, there is no way for the Court to avail itself of DNA testing or other current forensic procedures such as luminal testing, etc. John Ryan's bloody clothes were thrown in the evidence box with all of the other evidence piled on top or commingled underneath. The integrity of the evidence has not been maintained.

two page report that he sent to FLPD chief of Police, Leo F. Callahan (Appendix 24).[23] At trial, Mr. Kinnard testified that if the person firing a weapon wears gloves or socks over his hands when he fires the gun, then the gunshot residue will not be found on his hands but rather on the gloves or socks instead (TR vol. VIII, p. 1269, l. 19-24).

On the day following the murder 1-15-82 at 12:30 p.m., Detective Ralph Garner went back out to the crime scene and lifted a latent print from the hall side of the bedroom door (Appendix item 10). This is of crucial importance because the gunman was said to have opened and closed that door during his interaction with Thalia Vezos both before and after the shooting. That print went unsolved in that it did not belong to Omar Blanco, Thalia, John Ryan, Margaret Vezos, or any of the officers on scene.[24]

Also on 1-15-82 at 4:10 p.m., Thalia Vezos identified Omar

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[23] The first page simply states his conclusions with no reviewable test date and states "Levels of barium and antimony indicative of gunshot residue were found on…Omar Blanco." Appendix item 24, p. 1). The second page has handwritten numbers that have no explanation included. This "flameless atomic absorption spectrophotometry" procedure supposedly could read barium and antimony levels that were below the otherwise normally accepted levels in the profession and determine that the person might have fired a weapon within six hours of the swabbing. This test procedure is not considered valid by today's standards in the trade as it has been discredited and is no longer in use by law enforcement.

[24] It is of AFIS quality but the trial court refused to permit BSO to run the print through the AFIS system as requested during the current post-conviction proceedings below.

Blanco in a line-up conducted at FLPD. At that time she gave her second recorded statement that was transcribed (Appendix item 28) and contains a photocopy of the lineup. In that statement Thalia says she is sure that Blanco was the one who killed her uncle.[25] Before the show-up Thalia's identifying characteristics were 5'10" dark complexion with a moustache (Appendix item 1, p. 3). Clearly the lineup depicts a light skin male 5'7" or 5'8" (Appendix item 28, p. 3-4).

Omar Blanco was convicted by a unanimous jury at trial and is currently on death row under a sentence of death.

[25] Her eyewitness ID is clearly tainted by her observing Blanco at the show-up at midnight outside of the window of the Wengatz home where she was along with Det. Kamm. Sixteen hours later when asked to do the eyewitness ID she already knew the man the police arrested and her eyewitness testimony was discredited.

SUMMARY OF ARGUMENT

On 1-14-82, on the night of the murder of John Ryan and during the period of time that the murder was inside the home, he went in and out of Thalia Vezos' bedroom door several times. It is clear from the record that the intruder touched, closed and opened her door. The next day crime scene investigators lifted a latent print from the door in the very area touched by the gunman. It did not match with the comparisons of Omar Blanco, Thalia Vezos, her mother, her grandmother, John Ryan or any of the police officers who had been inside the crime scene prior to the time of the lift. The identity of that print remains unsolved today.

The State has a means of running that print through its computerized AFIS system but it refuses to do that. The process is simple, quick and economic. If it is done, the results would be "newly discovered evidence." Appellant sought an order of the trial court who denied the relief. The evidence is crucial and would probably change the outcome of the case. The Court is asked to remand the case for purposes of running the AFIS comparisons and identifying the print.

Appellant filed his 1st amended motion for postconviction relief in this case but that was actually his fourth such motion filed over the years. The second was withdrawn without consideration. A total of twenty-two claims were raised most of which have never been addressed before by Appellant. The motion

was timely filed and all of the claims are factually/legally sufficient on its face. The trial court erred under the Florida law in summarily denying each and every claim without affording an evidentiary hearing so that Appellant could prove his claims and build a record for the reviewing Court. In doing so, the trial court wasted one and a half years between the *Huff* argument and his final order denying relief. During that period of time a final hearing could have been completed and a record made for review. Appellant asks this Court to remand the case to the trial court for final evidentiary hearing on all permissible claims.

The crime scene investigation was totally deficient in numerous ways discussed under issue III. There is no doubt that evidence was not photographed, there were items introduced into the scene by the police, chain of custody would bar other items and a myriad of other integrity compromising acts and omissions are indicated. The State rushed to judgment. There was ineffective assistance properly raised in several claims and each of the claims are argued as to sufficiency requiring a final hearing in the trial court. That was denied and needs to be corrected.

During evidence review, it was determined and proven that the trial court clerk’s office, at some time between 1982 and today, commingled all of the trial evidence by stuffing it into a big box and not individually packaged. As a consequence the

bloody clothes of decedent were commingled with the bloodless clothes of

Appellant, the men's purse claimed to be owned and carried by Blanco on the night of the murder, pliers, shoes, etc. None of these items can be DNA tested because the integrity of the evidence is permanently lost. In addition, the socks purportedly worn by the gunman to cover his hands were determined to have been absent from the evidence box at the time of the evidence review. Then, just before the hearing on these matters, the clerk located the socks. This item might have been tested for gunshot residue and DNA to prove the innocence of Appellant. That testing ability is now lost forever because of the negligence of the clerk and Appellant's right to due process and equal protection has been violated permanently.

ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO REQUIRE AN UNSOLVED LATENT FINGERPRINT LIFTED AT THE CRIME SCENE TO BE RUN THROUGH THE AFIS SYSTEM, A RELATIVELY EFFICIENT AND ECONOMIC PROCESS, IN ORDER TO DETERMINE WHO WAS HANDLING THE BEDROOM DOOR AT THE EXACT POINT WHERE THE VICTIM ATTACKED THE GUNMAN AND COMMENCED HAND-TO-HAND COMBAT RESULTING IN THE INITIAL SHOTS BEING FIRED?

At the crime scene on 1-14-82, the night of the murder, and on 1-15-82, during the continuing crime scene investigation, FLPD detectives dusted certain areas for latent fingerprints. ID Tech Joseph Marhan made seven lifts from the shell casings (TR vol. VII, p. 1084, l. 18 through p. 1086, l. 21). BSO Chief Latent print Examiner Ellery Richtarcik testified that none of these lifts contained usable latents (TR vol. VII, p. 1089, l. 5-9).

ID Tech Matheson made or attempted several lift cards. None of these latents belonged to the Appellant while several of them belonged to Thalia Vezos (TR vol. VI, p. 990, l. 16 through p. 991, l. 2). He could not locate any usable latents from the purse or any of its contents (TR vol. 965, l. 3-8).

On 1-15-82, armed with information gleaned from the overall ongoing investigation, Detective R. Garner went back into the crime scene to dust several areas that were then believed to have been touched by the culprit (TR vol. VI, p. 1000, l. 3 through p. 1001,

l. 5). He “was able to obtain one partial latent print from the hall side of the bedroom door, where the incident occurred.” (Appendix item 10).

According to the testimony of Thalia Vezos, the man entered into her bedroom via the bedroom door (TR vol. VI, p. 888, l. 7-9). Then he left through that same door (TR vol. VI, p. 888, l. 8) and entered again where the fight occurred with John Ryan. After the shooting, the man left her room and closed her bedroom door touching the hall side of that door at least once (TR vol. VI, p. 894, l. 13-16).

To the police detectives, it was logical and highly probable that the man left his prints on the door. Detective Garner searched, found and lifted this print (TR vol. VI, p. 1000, l. 3 through p. 1001, l. 5). That latent lift was admitted into evidence at trial as State’s Exhibit 36 (TR vol. VI, p. 1006, l. 14-20). Detective Garner compared that latent to the standards of Omar Blanco, John Ryan, Thalia Vezos, her mother and grandmother, and against all of the police officers who were at the crime scene and that latent could not be identified (TR vol. VI, p. 1005, l. 16-23). In the expert’s guesstimate that latent print was placed on the bedroom door within a time period that included the time of the murder and just a few days maximum of the lift (TR vol. VI, p. 1005, l. 24 through p. 1006, l. 13). The result of this comparison is extremely relevant and material to this case.

During the preparation for the evidentiary hearing on this post-conviction motion, Appellant obtained several suspects certified fingerprints [along with Omar Blanco] for comparison and had his own certified latent print examiner [Jim Werring of Hamilton Investigations Limited] compare these standards to the lift card [State's 36] for this particular unsolved latent fingerprint. No matches were obtained. However, it was determined that the latent print lifted and in evidence [as State's 36] at the trial **is of AFIS quality**. The Appellant filed a motion with the trial court on 8-13-01 to raise this issue and asked for an order requiring Broward Sheriff's Office to run the print through AFIS.[26] The trial court denied the request for AFIS review although the State does not contest that the quality of the print is such that is able to be run by the AFIS system.

In this case, the State denies the Appellant the only access to evidence that is available under an exclusive procedure that the State of Florida alone owns and controls thereby preventing the Appellant from discovering evidence essential to his case in that it may be likely to lead to a different result. The trial

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[26] This item is not part of the ROA as it was omitted by the trial court appellate clerk in compiling the record for the Court. It was attached to Appellant's motion to supplement the record as Exhibit "A" that is still pending in this Court. Also attached as exhibits to that motion are the notice of hearing, transcript of the hearing and order of the trial court that is also on appeal herein and a copy of the Appellant's proposed order that was rejected by the trial court.

court erred in denying Appellant access to the AFIS system and testing this evidence in his search for “newly discovered evidence.”

A. Newly Discovered Evidence:

The Florida Supreme Court, in *Jones v. State*, 591 So. 2d 911 (Fla. 1991), reviewed the trial court's summary denial of defendant's second motion for postconviction relief. The Court remanded for an evidentiary hearing on the *newly discovered evidence* claim.

The *newly discovered evidence* arises in several affidavits of nine new witnesses that were attached to Jones' 3.850 motion. These affidavits point to the supposed real murderer, Glen Schofield, who allegedly confessed to a prison cellmate and a CCR investigator.

The Court reviewed the standard previously set for review of *newly discovered evidence* cases and stated:

> "The seminal case on attempting to set aside a conviction because of newly discovered evidence is *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979), in which this Court said: 'The general rule repeatedly employed by this Court to establish the sufficiency of an application for writ of error coram nobis is that the alleged facts must be of such a vital nature that had they been known to the trial court, they *conclusively* would have prevented the entry of the judgment. *Williams v. Yelvington*, 103 Fla. 145, 137 So. 156 (1931); *House v. State*, 130 Fla. 400,

177 So.705 (1937); *Baker v. State*, 150 Fla. 446, 7 So. 2d 792 (1942); *Cayson v. State*, 139 So. 2d 719 (Fla. 1st DCA), *appeal dismissed*, 146 So.2d 749 (Fla. 1962).

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> "In *Preston v. State*, 531 So. 2d 154 (Fla. 1988), we explained that under the H*allman* standard, if the sole prosecution witness recanted his testimony, a petition for coram nobis could be granted. However, if the newly discovered evidence did not refute an element of the State's case but rather only contradicted evidence that had been introduced at trial, the petition must be denied." *Jones*; 591 So. 2d at 915.

In *Jones*, the Supreme Court determined that the *Hallman* standard was too strict requiring a next-to-impossible burden of proof. It held that the *newly discovered evidence* "must be of such a nature that it would *probably* produce an acquittal on retrial." *Jones*; 591 So. 2d at 915. The Court further held that the same standard applies to penalty phase proceedings, this being the same standard applied by the federal courts.

The first step in analyzing the *newly discovered evidence* claim is to examine the proffered evidence to see if it qualifies as *newly discovered* under the *Hallman* definition:

> "That is, 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. *Hallman*, 371 So. 2d at 485.'" *Jones*, 591 So. 2d at 916.

The Court was unable to determine which would, and which would not, be *newly discovered evidence*, whether it could have been ascertained with the exercise of reasonable diligence, and whether it would meet the *reasonable probability* standard.

These

determinations would require an evidentiary hearing by the trial court.

That is precisely the point. The latent lift [State's Exhibit 36 in evidence] itself was known by the State, the defense and the trial court back in 1982. However, the defense could not have run that latent through the AFIS system on its own as no one holds the keys to that information other than the State who continues to bar the door to the evidence. Therefore, it is not the latent print that is the newly discovered evidence but the AFIS run comparisons and leads that it would produce coupled with the identification by a fingerprint examiner that is the evidence. That evidence has never been permitted to be discovered by the Appellant. As a result, it is not known at this time to what extent the result would affect the outcome of the proceedings.

B. Exculpatory Evidence Withheld:

The trial court denied the death-sentenced defendant's motion for post-conviction relief, following an evidentiary hearing, in *Routly v. State*, 590 So. 2d 397 (Fla. 1991). Routly claimed that the state suppressed critical exculpatory and impeachment evidence relating to the accomplice's immunity contract. The Supreme Court reflected that the state is required to disclose favorable evidence to the defense (whether it relates to guilt or punishment) pursuant to *Brady v.*

Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215

(1963), and stated:

> "In order to establish a *Brady* violation, one must prove: (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant did not possess the evidence, nor could he obtain it with any reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different." *Routly*; 590 So.2d at 399.

In this case, the State has not provided the discovery, it is blocking the path to the evidence itself and is preventing Appellant from being able to meet his burden under the *Routly* test. Due process and fundamental fairness would require that the AFIS review be authorized so that the evidence can be revealed to Appellant who will then be in a position to either prove or fail to prove to the trial court at an evidentiary hearing the four prongs of the *Routly* test.

In *Scott v. State*, 657 So. 2d 1129 (Fla. 1995), the Florida Supreme Court reviewed the summary denial of defendant's third motion for postconviction relief concerning an alleged *Brady* violation and remanded the case for evidentiary hearing.

Scott claims that the state committed a *Brady* violation by not disclosing:

> (1) a statement of the co-defendant's cellmate who now claims the co-defendant admitted killing the victim;
>
> (2) a statement by another person who allegedly told

police that the co-defendant was mad at Scott for running out on him; and

(3) a medical examiner photograph suggests that the deathblow came when the co-defendant hit the victim in the head with a wine bottle.

The Court carefully reviewed the affidavits and its own prior decision in *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993) in which it reviewed *Williams v. Griswald*, 743 F. 2d 1533, 1542 (11th Cir.1984). The *Williams* Court held, "It is irrelevant whether the prosecutor or police is responsible for the nondisclosure; it is enough that the State itself fails to disclose."

This is the point in this case as the State claims it cannot get BSO to run its AFIS procedure. The fact is that the Appellant certainly has no access to the BSO AFIS system. The trial court can, and should have, ordered the simple procedure to be performed by the State, that is the prosecutor or the police.

Looking to another Florida Supreme Court decision in *Lightbourne v. Dugger*, 549 So.2d 1364, 1365 (Fla.1989), the *Scott* Court quoted:

> "Accepting the allegations [of the State's failure to disclose] at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing with respect to whether there was a *Brady* violation." *Scott*; 657 So.2d at 1132.

Based upon the above review, the *Scott* Court held that the trial court erred in failing to hold an evidentiary hearing on

the alleged *Brady* claims and remanded for that hearing. In this case,

an evidentiary hearing must be held on the evidence after the AFIS procedure provides the discovery of the evidence.

C. State's Use of Misleading Testimony:

In *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed. 2d 104 (1972), the case arose on a defense motion for new trial based on a *newly discovered evidence* claim. The defendant alleged that the government made a promise of leniency to its key witness in return for his testimony to the grand jury and failed to disclose that to the defense. At the hearing on the motion the prosecutor who tried the case testified that he was unaware of the promise made by the grand jury prosecutor, when he said in closing argument that "[Taliento] received no promises that he would not be indicted." *Giglio*; 92 S.Ct. at 765.

The Supreme Court of the United States held that neither the grand jury prosecutor's lack of authority, nor his failure to inform his superiors or replacement prosecutor is controlling over this issue. The prosecutor's duty to offer all material evidence to the jury was not fulfilled violating due process and requiring that the case be remanded for a new trial.

The high Court stated:

> "In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is

the responsibility of the prosecutor. The

> prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.
>
> ***
>
> "Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Giglio*; 92 S.Ct. at 766.

Under ***Giglio***, the State has a duty to provide access to the AFIS procedure so that Appellant can obtain all material evidence and present his case properly to the trial court at an evidentiary hearing.

If the unsolved latent lift is run through the AFIS system today, with its expanded data base accumulated throughout the years from 1982, it is highly likely that data could be obtained that would lead to an expert identification. We would then know the identity of the man who was opening and closing Thalia Vezos' bedroom door on the night of the murder. This information will shed light on this case that would answer some important questions.

Running a latent through the AFIS system is not time consuming. It is simple and economic. Solving this latent fingerprint could give rise to a newly discovered evidence claim or effect Appellant's mitigation of sentence claims. Given the

seriousness of this case, the requested AFIS review must be done and the trial court must be required to hold an evidentiary hearing.

ISSUE II:	**WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING EACH OF APPELLANT'S CLAIMS [I THROUGH XXII], RAISED IN THE FIRST AMENDED MOTION FOR POSTCONVICTION AND/OR COLLATERAL RELIEF, WITHOUT DETERMINING SUFFICIENCY OF THE PLEADING ON ITS FACE AND WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW?**

The trial court summarily denied each and every one of the twenty-two claims raised by Appellant in his 1st amended motion for post-conviction relief. The trial court erred in that it failed to consider whether any of the issues were legally or factually sufficient, and it failed to demonstrate clearly and objectively from the files and records in the case why each claim ought to be denied without any opportunity for evidentiary hearing.

In *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002) the defendant filed a motion for post-conviction relief, the trial court summarily denied his claims and the Florida Supreme Court per curiam affirmed. This decision expresses the clear statement of the Florida law [*Lawrence*; at 127]:

> This Court has held on numerous occasions that a defendant is entitled to an evidentiary hearing on his motion for post-conviction relief unless (1) the motion, files and records in the case conclusively show that the defendant is not entitled to any relief, or (2) the motion or the particular claim is facially invalid. *See Cook v. State*, 792 So.2d 1197, 1201-1202 (Fla.2001); *Maharaj v. State*, 684 So.2d 726 (Fla.1996). The defendant carries the burden of

> establishing a prima facie case based upon a legally valid claim. This Court has held the following:
>
> A motion for post-conviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.
>
> *Kennedy v. State*, 547 So.2d 912, 913 (Fla.1989) (citations omitted); see also *Freeman v. State*, 761 So.2d 1055, 1061 (Fla.2000).

Although the *Lawrence* opinion directly speaks of ineffective assistance of counsel issues, its principle applies to any post-conviction issues. In *Atwater v. State*, 788 So.2d 223(Fla.2001), the issues raised were also ineffective assistance but the Supreme Court spoke in more generalized terms delineating the identical principal applicable to all postconviction motions [*Atwater*; at 229]:

> We begin our analysis with the general proposition that a defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. *See, e.g., Maharaj v. State*, 684 So. 2d 726 (Fla. 1996);

Andersonv. State, 627 So. 2d 1170 (Fla.1993); *Hoffman v. State*, 571 So. 2d 449 (Fla. 1990); *Holland v. State*, 503 So. 2d 1250 (Fla. 1987); *Lemon v. State*,

> 498 So. 2d 923 (Fla. 1986); Fla. R. Crim. Pro. 3.850. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. *See Kennedy v. State*, 547 So.2d 912(Fla. 1989). However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. (citations omitted). We must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.

Applying these principles, the trial court should have conducted the ***Huff*** hearing under the presumption that Appellant is entitled to a full evidentiary hearing on all of his factual claims. The trial court should have determined whether the motion was timely and legally sufficient on its face. In this case, the trial court failed to properly determine that Appellant's motion, the files and records in the case conclusively show that he was not entitled to relief as a matter of law. The trial court erred in summarily denying all twenty-two claims without any evidentiary hearing. Since there was no evidentiary hearing in the trial court, this Court must accept appellant's factual allegations as pleaded because they are completely consistent with the record. As a result, the case should be remanded for evidentiary hearing.

The trial court failed to attach record portions to its order along with written findings so that the reviewing court could make its determination as to whether the trial court's

decision is valid

under *Atwater* and *Lawrence.*

This is Appellant's fourth post-conviction motion. Notwithstanding, his litigation has spanned twenty-two years and seen several changes in forensic evidence procedures such as DNA testing that was not available in 1982 but would be available today. In addition, gunshot residue testing has evolved and procedures that were novel in 1982 are no longer considered valid. Records in the case are more voluminous and more details of the facts have come to light. Considerations such as eyewitness testimony have become more scientifically testable with "identifying characteristics" and "encoding factors" and the psychology of how and why people make the choices they do and how that factors into their identifications is currently better understood than in 1982. The issues Appellant has raised on this post-conviction motion have not been raised before and they have not been litigated before. Appellant should be given an opportunity to present proof of facts on the issues raised so that the trial court would have a complete record before it prior to making an informed decision and the reviewing courts would have the complete factual record on which to rule. Death cases deserve special attention and attention means to record facts and not mere pleadings alone.

When cases such as this one sit for a year and a half between the *Huff* hearing in the trial court and its final order summarily

denying all of Appellant's claims, that is more than an adequate amount of time to have actually conducted a final evidentiary hearing with witness testimony and real evidence. Had the trial court done that, there would now be an adequate record for the reviewing Court. It is error for the trial court to delay the proceeding for that amount of time and then suggest that it would be a waste of time to conduct an evidentiary hearing on the issues. It is certainly true in this case that the failure of the trial court to hold a timely evidentiary hearing presents a major cause of delay in the post-conviction process.

Whenever the trial court improperly denies relief that is later overturned on appeal, valuable time is lost both to the court process and to the person who must remain on "Death Row" if he is later determined to have been wrongly convicted. It would appear to be a better practice for the trial court to liberally grant evidentiary hearings on a timely basis and give the defendant a fair opportunity to prepare and present proof on his properly pled claims.

Under Florida law, an evidentiary hearing on a post-conviction motion is required provided the motion is legally sufficient and the claims are properly pled alleging a factual basis under the law for the relief sought, or unless the files and records conclusively demonstrate that the defendant is not entitled to relief. If the motion is sufficient on its face to allege a claim [for ineffective

assistance, newly discovered evidence, a *Brady* violation, *Giglio* claim, etc.] as a matter of law and if the files and records do not conclusively refute the claim, the trial court must grant an evidentiary hearing.

In the case at bar, the trial court did not make a finding that Appellant's 1st Amended Motion for Post-Conviction Relief was legally sufficient or insufficient. Nor did the trial court enter any findings on "timeliness" of this motion. The trial court did adopt all of the State's arguments in its response to all of the claims and incorporated the State's response and appendix into its final order summarily denying each and every claim. The trial court made no findings in regard to the legal sufficiency of the pleading as to any of Appellant's claims on its face.

The trial court erred in not applying the proper legal standard to grant a final evidentiary hearing. While it should become increasingly more difficult to find adequate issues to raise on successive post-conviction motions under the theory that there ought to be finality of litigation, valid newly raised issues ought to be determined by evidentiary hearing under the same standard as if raised in the very first post-conviction motion.

In Appellant's case, many unanswerable questions are raised by review of the crime scene investigation. It is essential to the integrity of the death penalty process to adequately and

fairly litigate them to finality once and for all.

ISSUE III:	**WHETHER THE TRIAL COURT ERRED IN ADDRESSING EACH OF APPELLANT'S CLAIMS [I THROUGH XXII], RAISED IN THE FIRST AMENDED MOTION FOR POSTCONVICTION AND/OR COLLATERAL RELIEF, SEPARATELY AND INDIVIDUALLY WITHOUT ANY REGARD TO THE INTERACTIVE OR CUMMULATIVE EFFECT OF SOME OR ALL OF THESE CLAIMS TAKEN TOGETHER AS A WHOLE AND WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW?**

In its "Order re: Huff Hearing" dated 7-1-03, the trial court addressed each of Appellant's claims separately and individually. The trial court gave no regard to the interrelation of the claims.

A. Crime Scene and Related Issues:

The crime scene investigation raised more questions than it provided answers. In his 1st amended motion for post-conviction relief the Appellant attempted to separate out his claims in order to focus on certain key points. However, several of these claims are necessarily interactive just as the crime scene investigation must be viewed in its entirety as a unit. If too many of the parts are bad an engine just won't run right.

In Claim I of Appellant's 1st amended motion for post-conviction relief paragraph 32(b) addresses the latent fingerprint lifted from the bedroom door [fully argued under Issue I]. The evidence concerning identification of that print was prevented by State action in refusing to make any AFIS comparisons. Paragraph

32(c) raises the issue of errant crime scene investigation. These aspects of the claim interact in that the State derived a theory of the crime that simply had no basis in fact or logic.

In its opening statement at trial the State outlined its theory that "The evidence is going to show you, ladies and gentlemen, that Omar Blanco was **in the process of burglarizing** the dwelling at 2701 Northeast 35th Drive, and during the progress of that **burglary** the evidence is going to show you that he shot to death John Ryan." (TR vol. V, p. 766, l. 6-11). In its closing argument, the State again characterized the incident when the prosecutor said "This is a vicious, ruthless, rotten killing, done by a man who was **burglarizing a home**, who entered without permission during the nighttime **in order to steal**-in order to steal. The people who live in that house don't know Omar Blanco." (TR vol. X, p. 1677, l. 25 through p. 1678, l. 4). From its opening through its closing the State raised and argued the following points that it intended to prove and that it claimed to have proven:

(1) There was an intruder (TR vol. V, p. 751, l. 23 through p. 752, l. 1);

(2) The intruder conversed with Thalia Vezos in English for quite some time (TR vol. V, p. 752, l. 2 through p. 753, l. 12)in fact 8-9 minutes (TR vol. X, p. 1679, l. 9-12);

(3) The intruder was in Thalia's bedroom; she was dressed for

bed wearing a night shirt, a pair of sweat pants and a pair of socks (PPh 2, vol. XXXVIII, p. 1288, l. 7-8); the intruder left and came back several times;

(4) John Ryan yelled “What the hell are **you** doing in my house?” and he proceeded to jump the gunman in an attempt to overpower him and get his gun away (TR vol. V, p. 753, l. 18-25) and (TR vol. X, p. 1677, l. 11-13);

(5) John Ryan was shot and murdered (TR vol. V, p. 754, l. 1-4) and “John Ryan is no more.” (TR vol. X, p. 1688, l. 10-11);

(6) After some time elapsed, Thalia unlocked the front door (TR vol. V, p. 754, l. 18-25) and ran out screaming to her next door neighbors’ house (TR vol. V, p. 755, l. 16-20);

(7) Mr. Wengatz called 911 and shortly thereafter the police began to arrive (TR vol. V, p. 755, l. 21-23);

(8) Then another neighbor, George Abdeni, gave a statement that he saw a woman in pajamas walking casually across the front yard (TR vol. V, p. 759, l. 19 through p. 760, l. 13) and (TR vol. X, p.1681, l. 11-18);

(9) Thalia along with Mr. and Mrs. Abdeni, Mr. and Mrs. Wengatz and there daughters, and FLPD Officer Karen Bull (TR vol. X, p. 1682, l. 24-25) and Detective Kamm remained inside the Wengatz home discussing the tragedy until they were informed that the police had caught the culprit and were bringing him to the street in front of the Wengatz home;

(10) George Abdeni identified Omar Blanco as the man he had seen (TR vol. V, p. 762, l. 4-12);

(11) Thalia was too shaken up to go outside and identify Blanco that night (TR vol. V, p. 762, l. 13-14) so she looked on from inside the house;

(12) Later that afternoon, Thalia went to FLPD and picked Blanco out of a lineup (TR vol. V, p. 755, l. 24 through p. 756, l. 4);

(13) A brown leather purse was found inside the crime scene that supposedly had Blanco's wallet and ID inside along with Thalia's inexpensive watch (TR vol. V, p. 762, l. 18 through p. 763, l. 5) and (TR vol. X, p. 1678, l. 14-15) as if the man had entered the residence for the purpose of stealing items.

In review of what was compiled by the crime scene investigators in this case and from the surrounding circumstances, it is not indicative of the average burglar or thief. Normally a lone burglar will enter a residence when there is no one home but rarely will one man enter a home that has two large dogs inside and two separate occupied rooms. In cases where a burglar does enter an occupied residence, he does not have several conversations with an encountered party in the residence. Nor does he cut phone lines. That is an action done by a home invasion type robbery. A burglar does not lock doors behind him as he exits the residence. The Appellant wants the opportunity to develop these facts through

a crime scene reconstruction expert at an evidentiary hearing.

If this was a home invasion type robbery, that type of crime is normally committed by several individuals. A single gunman would be too vulnerable against dogs and several family members that he might encounter inside the residence. It would be far too risky. When persons are encountered they are usually tied up or duct taped and gagged. The intruders will aggressively scream orders at the people, “Get down on the floor! Get down and shut up!” They won’t converse for 8-10 minutes using words like “Friend” and “Nobody’s going to hurt you. Just get back into bed.” An experienced crime scene reconstruction expert, such as the Appellant would bring to the evidentiary hearing in this case, would likely give his opinion that this case as presented would more likely describe an execution-type murder or a drug related scenario with some sort of a set up. In its closing argument, the State argued, “Now, when you shoot somebody seven times, you are not there to crease his pants. You are there to disarm him. You are there to kill him. That is exactly what happened.” (TR vol. X, p. 1676, l. 12-15). That is the likely cause: an execution of John Ryan by someone who knew him and was after him, personally.

This perplexing crime scene raises many questions that were left unanswered by the crime scene investigators. Among them are these:

(1) Why are there several different descriptions?

(2) Why didn’t Thalia remember Blanco’s blue shirt and obvious jewelry (Appendix item 27)?

(3) Why was the front door left unlocked for the intruder to enter but he locks it when he leaves?

(4) Why weren’t any valuables taken, drawers opened or the place ransacked (Appendix item 30)? The home was in perfect condition [other than Thalia’s room caused by the fight].

(5) It is a blessing indeed, but why wasn’t Thalia killed?

(6) Why did the perpetrator continue around the house after the shooting but take nothing?

(7) If the perpetrator carried a leather bag for stashing stolen jewelry or goods, and continued to search for things after the shooting, wouldn’t he have noticed it missing especially if it really did have his ID in it?

(8) Why did John Ryan have $880 in cash on his person (Appendix item 18) at the time? He didn’t just get home. Why did he have it in his pocket? If the intruder was a thief, why did he leave this cash behind?

(9) Why did John Ryan yell out, “What are **you** doing in my house” before he attempted to jump the intruder? Doesn’t this indicate that John Ryan knew the intruder and was shocked that he was in there then?

(10) Why would a person carry a leather purse when riding a bike?

(11) Why weren’t photographs of the den or other parts of the residence taken or processed?

(12) Why, in a murder case, did the crime scene tech only shoot one roll of film?

(13) Why were there missing projectiles?

(14) Why is there no fingerprints of Omar Blanco at the scene?

(15) If Blanco committed the crime with gloves or socks over his hands, then how would they have found gunshot residue on his hands? Wouldn’t there have been gunshot residue on the socks?

(16) Why weren’t the socks photographed at the scene and documented as evidence?

(17) Why is there an unidentified fingerprint in this case that the police were not desirous of identifying?

(18) Why did the one independent eyewitness [George Abdeni] give three different accounts of how the perpetrator fled?

(19) Why did Thalia testify there were several shots fired in the hallway when the evidence shows only one projectile?

(20) Why didn’t Thalia have blood on her clothing if John Ryan was on top of her bleeding as he did?

(21) Why didn’t Omar Blanco have blood on his clothing or

on his person from the struggle?

(22) Why leave damaging evidence so easy to be found [leather purse and needle nose pliers]?

(23) Why didn't the crime scene tech photograph the leather purse up close with the contents as found?

(24) Why did FLPD stop a car in the very neighborhood that had two black males with a sawed off shotgun and a handgun just (Appendix item p. 4) minutes after the crime [at 11:23 p.m.] and let them go without documenting their ID just because the BOLO said Latin male?

(25) Why didn't any crime scene investigator create a "crime scene diagram" that is a standard item in investigations showing dimensions, locations, distances, etc.?

These are some of the very interesting and important questions that the Appellant wants to address at an evidentiary hearing to consider in light of how fast the State rushed to judgment in this case. Blanco was arrested on 1-15-82. This first degree murder with the death penalty trial was over in less than six months [verdict on 6-11-82]. This included a second trial on armed robbery that the State pushed through for the sole reason of being armed with a prior felony aggravator in order to support the death penalty. These questions are raised under Claim I, Claim XVII and Claim XXII. These claims were legally sufficient on their face and deserve to be litigated at an evidentiary hearing so that a record can be made for review by this Court.

B. Ineffective Assistance of Counsel:

Ineffective assistance of counsel issues are raised in Claims II, VII, VIII, XIII, XVI and XXII. The law on the issue of ineffective assistance is well settled.

(1) Requirements of the Constitution of the United States:

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984), the Supreme Court of the United States granted certiorari "to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." *Strickland*; 104 S. Ct. at 2063. In that opinion, the high Court discussed the right to the assistance of counsel and its parameters.[27]

The Sixth Amendment to the Constitution of the United States requires the "assistance of counsel."

In *Strickland*, *supra*, the Court noted that in a long line of cases the Supreme Court has recognized the right to counsel in order that the fundamental right to a fair trial be protected.

The *Strickland* Court held that, "An accused is entitled to

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[27] The issues in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984), related to capital sentencing proceedings. However, the Supreme Court realized the necessity of addressing the test for ineffective assistance of counsel at trial, generally. Once settled, the test would also apply to a capital sentencing proceeding similar to that conducted in Florida where the case arose. *Strickland*; 104 S. Ct. at 2064.

be assisted by an attorney, whether retained or appointed, who plays

the role necessary to ensure that the trial is fair." *Strickland*; 104 S. Ct. at 2063. The Court emphasized that "the right to counsel is the right to the **effective assistance of counsel**." citing from *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S. Ct. 1441, n.14, 25 L.Ed. 2d 763 (1970).

There are two ways in which the defendant's constitutional right to effective assistance of counsel can be violated. The first category consists of those cases in which the acts or omissions of the prosecutor and/or the trial judge cause the resultant ineffective assistance, thus causing fundamental error.

The second category causing the defendant to be deprived of the effective assistance required by the Sixth Amendment, would arise in those cases where defense counsel fails to render adequate legal assistance.

The *Strickland* Court noted that prior to its decision in *Strickland*, *supra*, there had been no judicially announced standard on the meaning of the constitutional requirement of effective assistance of counsel in the second category above [acts or omissions of defense counsel]. It was that chasm which the Supreme Court sought to bridge in its opinion by setting out the two-pronged *Strickland* test, which is discussed below.

(2) The *Strickland* Test and *Baxter* Test:

The *Strickland* Court reviewed the proper standard for defense attorney performance at trial universally held by all

federal appellate courts (prior to the date of the *Strickland* decision) finding the standard to be one of "reasonably effective assistance."[28] *Strickland*; 104 S. Ct. at 2064. The Court reasoned that the burden is on the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Strickland*; 104 S. Ct. at 2064.

In setting forth its two-part test[29], the high Court held:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*; 104 S. Ct. at 2064.

The Court further stated:

> "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel

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[28] See *Trapnell v. United States*, 725 F. 2d, at 151-152.

[29] The two-pronged test of *Strickland* is: (1) The lawyer's performance was deficient, and (2) there is a reasonable probability that the deficient performance affected the outcome of the trial.

> that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland; 104 S. Ct. at 2066.

The Court defined a ***reasonable probability*** to be "a probability sufficient to undermine confidence in the outcome." *Strickland*; 104 S. Ct. at 2068.

In setting out its two-pronged test for ineffective assistance of counsel, the *Strickland* court stated that "…both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*; 104 S. Ct. at 2070.

In *Baxter v. Thomas*, 45 F. 3d 1501 (11th Cir. 1995), the Eleventh Circuit Court of Appeals applied the Strickland test to mitigation evidence standards of preparation in penalty phase proceedings.

(3) Application of *Strickland* and *Baxter* to Florida Cases: Both the main case, which set the test for ineffective assistance of counsel, *Strickland*, *supra,* and the case applying

its reasoning

to mitigation evidence in the penalty phase, *Baxter*, *supra*, have been consistently followed and applied in Florida. See *Von Poyck v. State*, 694 So. 2d 686 (Fla. 1997); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995) [required a new penalty phase proceeding]; *Rose v. State*, 675 So. 2d 567 (Fla. 1996) [trial court's denial of 3.850 as to penalty phase reversed]; *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993) [remanded for new sentencing proceeding].

In Claims II, VII, VIII, XIII, XVI and XXII where ineffective assistance of counsel is alleged, Appellant has pled the claims to a legal sufficiency and a final evidentiary hearing must be held in the trial court.

C. Remaining Claims:

Claim III raises the issue of the discredited and unreliable gunshot residue testing procedure employed in this case [flameless atomic absorption spectrophotometry test] rather than the test most widely accepted in 1982 and today [neutron activation analysis] and addresses the unreliable results where socks are covering the shooter's hands. This claim also addresses the lack of evidence of fibers found on Blanco's shoes that would connect him to having been inside the Vezos' home.

Claim IV and V raise issues of the State manipulating evidence and a conviction. These claims deal with two persons who were tried along with Blanco in the Emerald Hills Country

Club armed

robbery case. That conviction was used as a prior felony aggravator in this case supporting the death penalty. There was an initial conviction that was overturned on appeal. After Blanco was already on death row and the case was remanded for retrial, the State struck a deal with Enrique Gonzalez [who had testified in the first case that Blanco wasn't involved] that the charges against him would be dropped in exchange for him agreeing to be deported back to Cuba. The other codefendant, Fidel Romero, was given a reduced sentence in exchange for testifying against Blanco. In this way, the State could maintain its death sentence. These claims deserved an evidentiary hearing.

Claims VI, VII and VIII raise viable issues that are pled sufficiently to require evidentiary hearing.

Claims IX and X are admittedly novel but raise interesting issues regarding violation of equal protection as to this particular defendant and as opposed to others convicted of first degree murder by not creating a reviewable record on the issue of proportionality. Hearing time was requested to attempt to make proof on this issue.

Claims XII and XIII address the eyewitness identifications of Abdeni and Vezos and are sufficiently pled to require evidentiary hearing.

Claims XIV and XV address important trial rights that were not afforded Appellant and are sufficiently pled to require evidentiary

hearing in light of the facts raised showing blatant untrustworthiness of the identifications.

Claim XVI addresses a particular problem that arose wherein the English speaking attorneys did not adequately convey the State's plea offer of [pre-guidelines] "life" to the Appellant with opportunity for parole after twenty-five years. This important claim needs to be addressed by an evidentiary hearing.

Claim XVII addresses prosecution's use of misleading evidence relating to the lady's bicycle, brown leather purse, Abdeni's contrived show-up identification and changed account of the facts and this claim is sufficiently pled to require evidentiary hearing.

Claim XVIII is a viable claim raising issues that are sufficiently pled to be considered at evidentiary hearing.

Claim XXII addresses the bungled crime scene investigation and multiple problems that must be addressed at evidentiary hearing as they are sufficiently pled under the law.

The State has argued, and will likely continue to argue, that every claim is independent and must be considered by itself, standing alone. They argue the eyewitness identifications are not material. Even if they are tainted, Blanco tested positive for gunshot residue and his ID was inside the house. Then they argue, even if the gunshot residue test is found to be unreliable it is of no consequence because Abdeni identified him at the show-up and Vezos picked him out of a lineup. Then they argue, even if there

were problems with the crime scene documenting evidence or chain of custody of the lady’s bike it is of no import because the gunshot residue was positive and the eyewitness ID’s were made. These circular arguments can go on and on.

All of the claims are interactive. The crime scene investigation is to be considered in its entirety. There are so many inadequacies as to cast grave doubt over the entire crime scene investigation to the point of not believing any of the purported evidence. It is all part of the whole process.

All of the claims need to be considered as to legal sufficiency in the pleading and, once determined to be legally sufficient, the Appellant deserves to have a full, opportunity to try his case through an evidentiary hearing on the issues raised.

ISSUE IV: WHETHER THE TRIAL COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING ON THE CLERK'S MISHANDLING OF TRIAL EVIDENCE SO AS TO TAINT THE VARIOUS ITEMS OF CLOTHING WHICH WOULD FORM AN OBSTACLE TO MODERN SCIENTIFIC TESTING FOR DNA AND GUNSHOT RESIDUE WHICH WOULD TEND TO EXONERATE APPELLANT?

The integrity of the trial evidence has not been maintained over the years that this case has been litigated. Appellant's rights have been disregarded and ultimately lost forever.

The fault entirely rests in the hands of the trial court clerk's office which, at some time between 1982 and today, saw fit to throw all of the evidence into one box, not individually packaged, and commingle it such that all of the evidence is now indelibly tainted. Now and forever more the evidence of this case is cannot be tested as modern forensic methods have developed and will develop in the future that would determine the innocence of the Appellant. Then there was no DNA testing. Today DNA testing has brought to light the innocence of many, many death row residences in Florida and elsewhere. Whatever might be developed over the coming years will be of no avail to this Appellant because of the negligence of the clerk's office in mishandling the trial evidence. This is patently unfair to Omar Blanco and it violates his fundamental right to due process.

Appellant sought to conduct a complete crime scene evidence review in its effort better understand the original crime scene

and

the investigation made by FLPD in 1982. The Broward prosecutor commented that the first complete evidence review on any postconviction matter it is aware of took place in this case in Broward County.

On 10-10-00, an ore tenus motion was made in open court for leave to conduct the evidence review of the clerk's trial evidence and FLPD's archive evidence. The trial court granted Appellant's motion and the attorneys worked together on the wording of the order and setting up the dates, times and places of this procedure. The date set was 12-13-00. A trial court order (Appendix item 31) was entered in early December 2000 permitting the defense to conduct a full evidence review. Unfortunately, the trial court appellate clerk has not included that order in the record for this appeal and the true copy in Appellant's counsel's file was not dated by the in-court clerk.

While conducting the evidence review of all of the items in the possession and domain of the 17th Circuit Felony Clerk's Office, color photographs taken on 7-25-01 (ROA vol. 2, p. 364) of the open box of evidence reveals that the bloody clothes of the murder victim, John Ryan, were thrown loose into the box and commingled with the clothes worn by Omar Blanco (attached as Exhibit "E" to Appellant's motion to correct/supplement the record which was agreed to by the Appellee and is currently pending in this Court). Regular photocopies were included in the record (ROA vol. 2, p.

372) but not the original color photocopy. The current state of the evidence is shown in those two photos as it has existed for an extended period of time in the trial court clerk's possession.

Also during the course of preparation for Appellant's postconviction motion in this case and in response to the public outcry for DNA testing in death row cases, the Broward State's Attorney undertook a law enforcement initiative to conduct DNA testing on all Broward County death row inmates that wished to avail themselves of such testing. Assistant State's Attorney Carolyn V. McCann wrote a letter dated 6-26-01 to counsel explaining the initiative (ROA vol. 2, p. 373).

Counsel along with his investigator and paralegal traveled to Union Correctional Institution ["Death Row"] to personally confer with Appellant and to discuss the viability of entering into an agreement with the State in regard to DNA testing.

Counsel wrote to Ms. McCann on 8-24-01, delineating the problems with the clerk's evidence that Appellant had discovered in his 7-25-01 evidence review (ROA vol. 2, pp. 374-375). The bloody clothes of John Ryan were commingled with Blanco's clothes, the men's purse and the pliers were all commingled. Had Appellant not conducted the evidence review just prior to the law enforcement initiative and blindly accepted the offer to test DNA, the tainted results would have produced devastating results the truth of which would have never come to light, all to the ultimate detriment of

Appellant.

If DNA testing of the various items that were purportedly used or touched by Appellant on the night of the crime would conclusively prove Blanco was not the intruder and not the shooter, that evidence could exonerate him. That forensic ability to get to the truth of the matter has been lost forever by the negligence of the trial court clerk.

If Omar Blanco's shirt, shoes and silver velour jogging suit might have been DNA tested to conclusively prove that Blanco never had any contact with the victim as the victim's DNA appears nowhere on any of those items, that forensic ability has been lost forever as well.

Through the negligence of the clerk's office Blanco has been greatly injured and has been denied due process of law and equal protection of the law in that other death row inmates had their evidence properly preserved until DNA testing was developed and they could avail themselves of the law enforcement initiative.

In addition to these problems with commingled evidence, it was determined that the **"socks"** purportedly worn over the hands of the shooter on the night of the murder were missing and were not in the evidence box at the date of the evidence review on 7-25-01. This was also brought to the trial court's attention by motion (ROA vol.2, pp. 364-375) and a hearing was held on 10-22-01 in the trial court (ROA vol. 3, pp. 482-507) concerning both the problem with

the socks and other items of commingled evidence.

The Chief Evidence Clerk, Dave Tomkins, was subpoenaed for testimony. He stated that he went back to the evidence archives and located the socks supposedly inside the same evidence box that had been thoroughly reviewed by the defense team on 7-25-01 when the socks were not found and not photographed. At that time no socks were found present inside the clerk's evidence box.

The defense team went into the evidence review that day specifically looking for those socks in order to determine how they were packaged and maintained over the years as they were considering having the socks tested for gunshot residue and DNA under the law enforcement initiative (ROA vol. 3, p.2, l.17 through p. 5, l. 4). So counsel knew those socks were not in the evidence box at the time of this evidence review (ROA vol. 3, p. 9, l. 24 through p. 10, l.24).

At the hearing, Appellant's investigator [PI] Pedro Fernandez-Ruiz testified as to his findings during the evidence review and his photographing of the evidence. He found the evidence loose and commingled and photographed it as it was shown to him by the clerk (ROA vol. 3, p. 21, l. 6 through p. 23, l. 9). In regard to the socks, Mr. Fernandez-Ruiz testified that he also was specifically looking for those socks and none were produced from the contents of that box (ROA vol. 3, p. 23, l. 10 through p. 24, l. 3).

The problem for Appellant now is that he knows the

integrity

of the trial evidence was not properly maintained and he does not believe that the socks were actually kept in such a manner as to permit integrity of any scientific forensic testing. As a consequence, Appellant has been irreparably harmed and his due process rights have been purposely and systematically violated requiring serious remedial action by this Court.

CONCLUSION

1. The unsolved latent fingerprint lifted from the bedroom door that is of sufficient quality to be run through BSO's AFIS system so that newly discovered evidence might be obtained that would probably change the outcome of this case, must be ordered. The Court should remand for proper order of the trial court to accomplish that.

2. The trial court erred in summarily denying all claims without evidentiary hearing under the law and this Court should remand the case to the trial court to conduct a final evidentiary hearing on all claims.

3. Several of the claims interact with one another and it was error for the trial court to separate each one and thereby rule against each claim as not being material to the outcome. A final hearing is necessary to determine the probability of changing the outcome of the case and must be ordered by this Court.

4. The evidence integrity has been severely and permanently compromised violating appellant's due process and equal protection rights. This Court must fashion an adequate remedy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Initial Brief was served by hand/mail upon Susan Bailey, Esq., Assistant State's Attorney, at the Broward County Courthouse, 201 SE 6th Street, Room 655, Fort Lauderdale, FL 33301, and by mail upon Leslie T. Campbell, Esq., Assistant Attorney General, at 1515 North Flagler Drive; Suite 900, West Palm Beach, FL 33401, this 6th day of February 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) in that it is Courier New 12-point font, except that headings and subheadings are Courier New 14-point.

IRA W. STILL, III, ESQUIRE