IN THE SUPREME COURT OF FLORIDA

CASE NO. 05-2373

JOSE ANTONIO JIMENEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of a postconviction motion without an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

"T." -- transcript of trial;

"1PC-R." -- record on appeal of denial of first Rule 3.851 motion;

"2PC-R." -- record on appeal of denial of this second Rule 3.851 motion.

REQUEST FOR ORAL ARGUMENT

Mr. Jimenez has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Jimenez, through counsel, accordingly urges that the Court permit oral argument.

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INTRODUCTION

Mr. Jimenez was convicted and sentenced to death on a case built entirely upon circumstantial evidence, as the State conceded in its closing argument at trial:

> [D]efense [counsel] will probably say it's circumstantial, but when the Court reads the instructions to you carefully for a circumstantial phrase. The only place you may find that phrase is in the burglary instruction, the phrase circumstantial evidence.
>
> The evidence is the fingerprint. The evidence is his statement. The evidence is Mr. Merriweather remembering this man jumping out from the balcony.
>
> And the evidence is in fact how she died, and more likely than not a right handed man. There is only one conclusion you can draw from all of the evidence, the defendant is guilty of first degree murder. Guilty of burglary as charged.

(T. 891).[1] The defense presented in its case the fact that DNA analysis of evidence conducted by the Metro-Dade Police

[1]A fingerprint found on the inside of the victim's front door was identified by a law enforcement officer as matching Mr. Jimenez's right little finger (T. 671). Of course, Mr. Jimenez lived in the same apartment complex as did the victim.

The statement referred to by the prosecutor was a statement allegedly made by Mr. Jimenez on October 5, 1992, shortly before his arrest that the police were at his residence because they wanted to talk to him about a "stabbing" (T. 774). The State alleged that on October 5th, three days after the homicide, no one but the killer knew the manner of death (T. 881).

The third circumstance was Mr. Merriweather's claim that he saw Mr. Jimenez hang drop from the victim's balcony between 7:45 and 8:00 p.m. on the night of October 2, 1992 (T. 705-06). Yet, other witnesses heard someone in the victim's apartment who precluded their entry at approximately 8:10 p.m. (T. 637, 649).

Department did not link Mr. Jimenez to the murder. Specifically, the victim was not the source of blood found on Mr. Jimenez's pants (T. 824), and Mr. Jimenez's blood was not found on a towel seized from the victim's apartment (T. 828).

In the motion to vacate at issue in this appeal, Mr. Jimenez proffered recently discovered evidence that demonstrated that the State withheld exculpatory evidence from the defense, the State interfered with the defense's efforts to develop and present favorable evidence, the State deliberately manipulated the process to force a change of counsel on the defendant, the State intentionally withheld from the defense its relationship with private investigator Sessler and its possession of Sessler's investigative reports regarding Mr. Jimenez, and that the defense rendered ineffective assistance of counsel.

In order to understand the significance of the information not provided to the jury, consideration must first be given to the information the jury received. The jury did learn that Merriweather spoke to a uniformed police officer shortly after the homicide, and that the officer wrote in his report that Merriweather "advised, prior to this officer's

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In fact, one witness had seen Mr. Jimenez in the parking lot walking away from the apartment complex at 7:55 p.m., some ten or more minutes before she heard the noises emanating from the victim's apartment that caused the neighbors to try to enter through the open door that was then shut in their faces (T. 638).

arrival he observed SI-UNK a white latin male 5'6" - 5'9", 175 - 190 lbs., wearing a t-shirt and blue jeans, jump off the balcony" (2PC-R. 145). In fact, this police officer testified that in his deposition he had reported that Merriweather advised him that the person had jumped from "a second story balcony on to the van then on to the ground" (T. 853). By the time of trial, the officer was uncertain as to whether Merriweather had mentioned the van. This police officer indicated that when he arrived at the scene, there in fact was a white van that was "parked in such a position to give easy access to climb up and down from the balcony" (T. 845).

Merriweather acknowledged in his testimony before the jury that he had stated in his own deposition that, after the person jumped down from the balcony, this person talked to him. "Then I was standing there talking to him and he just walked. The cab pulled up on the other side. He walked and he got in the cab." (T. 724). However, by the time of trial, Merriweather's memory had faded and he did not recall whether or not a cab had picked up the individual. Merriweather explained: "Talking about a year later my mind ain't a robot. I ain't a computer." (T. 726).

Important information regarding the white van and the cab did not reach the jury. Officer Cardona arrived at the

crime scene at 8:27 PM (2PC-R. 194).[2] She was specifically instructed to "to investigate a white van that was in the parking lot to see if they had anything to do with the incident upstairs" (Id.). She found the white van occupied when she checked it out. The occupants included a middle aged woman and two young males, potential witnesses whose names Officer Cardona failed to obtain (2PC-R. 196). Even though the occupants of the van would have been in a position to see someone jump from the second story balcony, they saw nothing.

Further, no evidence was presented at trial regarding law enforcement's efforts to locate the cab driver who responded to the apartment complex that night. The police contacted the cab company and discovered that at approximately 8:20 p.m., on October 2, 1992, the dispatcher received the call for a cab for

[2]Defense counsel advised the trial judge of his desire to call Cardona as a witness, but that she had not responded to the subpoena he had served at the police department (T. 785). This occurred shortly after defense counsel had been precluded from presenting, through the cross-examination of another police officer, Cardona's description of Mr. Jimenez when she saw him at the scene (T. 766-69). The prosecutor objected and explained, "the purpose they want to bring this in is because they want to bring out that the description Officer Cardona gives of the defendant when she sees him is in fact, different from the description given by the female witnesses who saw him" (T. 767). When the State rested and defense counsel advised of his difficulty in producing Cardona as a witness, the judge asked the prosecution team if it could produce Cardona for testimony. One of the prosecutors responded, "I don't know. I can attempt to get hold of her" (T. 786). Cardona was not produced and did not testify.

"Jose" at the apartment complex at 6th Avenue and 137 Street. Shortly thereafter, a cab driver, Anwar Ali, was dispatched to pick up the fare named Jose (2PC-R. 74-75).

As was pled in the Rule 3.851 motion at issue in this appeal, Mr. Ali was located shortly before the motion was filed and provided highly exculpatory information. When Mr. Ali arrived at the apartment complex, he was not able to locate Jose. He did recall being flagged down by a man on 6th Avenue somewhere between 135th and 151st Streets. This man was bleeding from the face and he told Mr. Ali that he had been mugged and only had a couple of dollars. Mr. Ali gave him a ride to an apartment complex at 142th Street and 18th Avenue, and he dropped him off at the front gate (T. 75).

Mr. Ali was repeatedly interviewed by the police in the weeks that followed and shown several photographs of the same guy to see if he was the fare who was bleeding from the face. Mr. Ali kept telling the police that the individual in the photographs did not look familiar. Then, Mr. Ali started receiving subpoenas from the State Attorney's Office. He had to go appear at least three times to be interviewed about the fare bleeding from the face. On occasion, he was forced to wait

before anyone would speak to him.[3] He was again shown more photographs of the same individual whose photographs he had been previously shown. He again advised his questioners that the man in the photograph did not look like the man who had been picked up and was bleeding from his face. Mr. Ali specifically advised the police that the person in the photographs, Mr. Jimenez, was not the fare bleeding from the face who was picked up near Ms. Minas' apartment (2PC-R. 75).

Finally, the State withheld from the defense the fact that private investigator Sessler was providing assistance to the State and had given law enforcement all of his investigative reports concerning Mr. Jimenez (2PC-R. 85).[4] Sessler had been

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[3]Defense counsel was not provided with statements obtained by the State from Mr. Ali. However, defense counsel was aware of a statement that Mr. Ali had made to a public defender investigator in October of 1992. It was on the basis of the public defender's handwritten note that Mr. Jimenez's subsequent attorneys unsuccessfully sought to depose Mr. Ali and unsuccessfully sought to subpoena him to testify at trial (2PC-R. 75-76).

However, Mr. Ali has reported that due to the hardships of responding to the repeated subpoenas issued by the State Attorney's Office, he consulted with Al Gandero, his dispatcher, who was also receiving harassing subpoenas. Mr. Gandero advised Mr. Ali to ignore the subpoenas that told him to go to the office and to wait for one that directed him to go to court. According to Mr. Ali, Mr. Gandero was also ignoring subpoenas in the case. After his talk with Mr. Gandero, Mr. Ali began ignoring the subpoenas that he received. As a result, the jury never heard Mr. Ali's testimony (2PC-R. 76).

[4]During a deposition of Sessler, the defense indicated that it wanted access to Sessler's investigative reports. The State

hired by Manuel Calderon, a member of the Medellin drug cartel, to investigate Mr. Jimenez after Calderon learned that Mr. Jimenez had been with Calderon's girlfriend the night she died of a drug overdose. As a result, Calderon had it in for Mr. Jimenez. The fact that the investigator he hired to get dirt on Mr. Jimenez and the investigative reports that he had paid for were being used by the State while making its case against Mr. Jimenez was significant evidence that the defense could have used to impeach the impartiality of those building the State's case.[5]

STATEMENT OF THE CASE AND FACTS

Mr. Jimenez's current Rule 3.851 motion presented facts alleging that he is innocent of the murder for which he was convicted and sentenced to death (2PC-R. 68-92). Mr. Jimenez's motion alleged that these facts raise substantial doubts regarding the State's case at trial, were previously

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responded that it understood that Sessler was invoking attorney-client privilege as to the reports, even though the State was in full possession of all of the investigative reports (2PC-R. 261). Thus, the State was aware that the privilege had been waived when the reports were disclosed to the State, and yet, it deliberately chose to mislead the defense and not disclose the reports.

[5]In fact, Sessler ultimately billed the State for his assistance. In seeking and obtaining authorization to pay Sessler's bill, the State asserted that Sessler "assisted in the preparation and presentation of the trial" (2PC-R. 286). The defense was never advised that Sessler was working for the State and was to be compensated for his work.

unknown because the State failed to disclose them, and/or because the State presented false or misleading evidence at trial, and/or because trial counsel failed to investigate and present them, and/or because Mr. Jimenez's state-paid counsel in his first postconviction proceedings failed to investigate and present them, and/or because they are newly discovered evidence of innocence (2PC-R. 72-92). Mr. Jimenez here summarizes the State's case at trial and the new facts first presented in the current postconviction motion.

Mr. Jimenez was charged by indictment on October 21, 1992, in Dade County, Florida, with one count of first degree murder and one count of burglary with an assault (R. 1-2). Trial commenced on October 3, 1994, before Judge Rothenberg.

On the evening of October 2, 1992, Phyllis Minas was stabbed to death in her apartment at a North Miami apartment complex where both she and Mr. Jimenez lived. State witness Merriweather, a custodian at the complex, testified that between 7:45 and 8:00 p.m. on that night, he saw a man he later identified as Mr. Jimenez drop from the victim's balcony to the ground (T. 705-06). About 25 or 30 minutes later, Merriweather saw Mr. Jimenez a second time, and Mr. Jimenez told Merriweather he was waiting for a cab (T. 723). At trial, Merriweather did not remember whether he saw Mr. Jimenez get into a cab, but in

his pretrial deposition, he testified that after he and Mr. Jimenez spoke, Mr. Jimenez walked away and got into a cab (T. 723-24). Also at trial, Merriweather denied having told the police that he saw the man he later identified as Mr. Jimenez come out onto the victim's balcony, jump to the next balcony, and then jump onto a white van and to the ground (T. 730-32). Office Corland, who interviewed Merriweather at the scene, testified in his pretrial deposition that Merriweather said he saw a man "jump off a second story balcony on to the van then on to the ground" (2PC-R. 168).[6]

Shortly before Ms. Minas' body was discovered, several neighbors had returned from grocery shopping. As these neighbors--Virginia Taranco, Ms. Taranco's mother and Mary Griminger--were unloading their groceries from a car, they saw Mr. Jimenez in the apartment complex parking lot at approximately 7:55 p.m. (T. 617-18).[7]

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[6]It is important to remember that Merriweather said the man jumped from the second story balcony before 8:00 p.m. (T. 717). He recalled the time because his shift ended at 8:00 p.m., and he was sitting on the walkway waiting for his ride home (T. 704).

[7]Given that in the course of their testimony these women reported hearing "a noise, a thump" from the victim's apartment about 10 minutes later, and it was this noise that caused them to approach the victim's apartment and attempt to push an ajar front door open, it was then that the door was snapped shut from inside (T. 620-22), it is clear that the assailant was inside

The neighbors went upstairs to unload their groceries in Ms. Taranco's apartment, which was next door to Ms. Minas' apartment, at approximately 7:55 PM (T. 619). It took Ms. Taranco about four minutes or so to walk with her elderly mother and Ms. Griminger to her apartment (T. 619). After another six minutes or more, Ms. Taranco was finished unloading her groceries (T. 619).[8] Ms. Griminger left Ms. Taranco's apartment to head upstairs to her third floor apartment (T. 620). When Ms. Griminger was heading up the stairs, Ms. Taranco heard suspicious noises coming from Ms. Minas' apartment. Thinking that maybe Ms. Griminger had fallen, Ms. Taranco then called out for Ms. Griminger, who came back down the stairs.[9] As Ms.

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the apartment at that time, *i.e.* ten minutes after the women had observed Mr. Jimenez downstairs in the parking lot.

[8]According to the State's theory of the case, Mr. Jimenez would had to have come back up to the second floor after the women saw him in the parking lot, after they spent four minutes or so walking Ms. Taranco's elderly mother up the stairs, and entered the victim's apartment while Ms. Griminger was in Ms. Taranco's apartment unloading groceries.

[9]Meanwhile, Ana Brandt, a witness who was not called to testify at Mr. Jimenez's trial, advised a police officer during an interview that she was waiting for Ms. Griminger on the third floor walkway (2PC-R. 112). She was waiting for Ms. Griminger because she wanted to tell her "that 'COWBOY' a nickname they had labeled the subject 'JOSE' with, had just come home." As Ms. Griminger was walking towards Ms. Brant's apartment, she "heard Virginia [Taranco] yell for Mary [Griminger]." At that time, Ms. Griminger went back downstairs to where Ms. Taranco was. According to Ms. Brandt, she had observed "'JOSE' exit the

Griminger was returning to the second floor, Ms. Taranco and another neighbor, Lecrecia Ponce, discovered the door to Ms. Minas' apartment ajar (T. 621-22). As they went to open it, the door was snapped shut (T. 622). In her closing, the prosecutor argued that at that moment, Ms. Minas' assailant was in her apartment (T. 914).[10]

After being unable to gain entry into Ms. Minas' apartment, Ms. Taranco went downstairs to the parking lot to verify that Ms. Minas' car was there (T. 623).[11] Ms. Taranco returned to the hallway outside of Ms. Minas' apartment and sent Ms. Griminger down to the parking lot to see if she could tell if Ms. Minas' car was there (T. 623). When Ms. Griminger returned, Ms. Ponce went down to look for Ms. Minas' car. When she returned, they decided to call the police. By 8:20 p.m.,

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elevator and walk towards his apartment." This was "a couple of minutes (less than 5) prior to Ms. Griminger coming towards her apartment" (2PC-R. 113).

Thus, Ms. Brandt in her statement to the police placed Mr. Jimenez in his apartment on the third floor before the "thump" was heard that caused Ms. Griminger to return to the second floor, and before the victim's front door was snapped shut by the assailant inside. Yet, she was not called as a witness at Mr. Jimenez's trial.

[10]Again, this ten minutes or so after Mr. Jimenez was observed downstairs in the parking lot.

[11]According to the State's theory of the case, it is after the door is snapped shut that the assailant jumps from the second story balcony, while the women are checking the parking lot for Ms. Minas' car.

Ms. Taranco had called for help and the police were dispatched. The first officer arrived at 8:21 p.m. (T. 683). After the police were called, Mr. Jimenez appeared on the second floor. Mr. Jimenez asked Ms. Taranco's mother if he could use the phone to call for a cab (T. 625). Soon after making the call for a cab, Mr. Jimenez exited Ms. Taranco's apartment and, looking over the balcony, reported that the police had arrived (T. 625). He soon headed down in the elevator to wait for his cab, and was not reported seen again that night by the women.

The prosecutor's closing argument summarized the State's main three points as follows:

> [D]efense [counsel] will probably say it's circumstantial, but when the Court reads the instructions to you carefully for a circumstantial phrase. The only place you may find that phrase is in the burglary instruction, the phrase circumstantial evidence.
> The evidence is the fingerprint. The evidence is his statement. The evidence is Mr. Merriweather remembering this man jumping out from the balcony.
>
> And the evidence is in fact how she died, and more likely than not a right handed man. There is only one conclusion you can draw from all of the evidence, the defendant is guilty of first degree murder. Guilty of burglary as charged.

(T. 891). The State argued that Mr. Jimenez had committed felony murder:

> It is first degree premeditated murder. Felony murder. The victim is dead. This death occurred as a consequence and while the defendant was engaged in the commission of one or more of the following felonies,

> and the one we're interested in is burglary. The death occurred as a consequence of and while Jose Jimenez was attempting to commit one or more of the following felonies, burglary.
>
> He's either committing or attempting to, but unfortunately for him she finds him. She stops him. He kills her, and the elderly ladies are outside and he has to get away, and he doesn't have time to get anything. He's got to get away.

(T. 929-30).

The State's arguments relied upon three pieces of evidence. First, a fingerprint found on the inside of the victim's front door was identified by a law enforcement officer as matching Mr. Jimenez's right little finger (T. 671).

Second, the statement referred to by the prosecutor's argument was a statement allegedly made by Mr. Jimenez on October 5, 1992, shortly before his arrest. Mr. Jimenez allegedly said that the police were at his residence because they wanted to talk to him about a "stabbing" (T. 774). The State alleged that on October 5th, three days after the homicide, no one but the killer knew the manner of death (T. 881).[12]

The third circumstance was Mr. Merriweather's claim that he saw Mr. Jimenez drop from the victim's balcony between

[12]In her deposition, Ana Brandt refuted the State's claim on this point. She testified that when Ms. Griminger came upstairs to the third floor later the night of the homicide, she told Ms. Brandt that "Phyllis was murdered" (PC-R. 83). In fact, Ms. Griminger advised Ms. Brandt as to the manner of the murder; she indicated that the victim "was stabbed" (PC-R. 83). However, Ms. Brandt was not called as a witness at Mr. Jimenez's trial.

7:45 and 8:00 p.m. on the night of October 2, 1992 (T. 705-06). Other witnesses heard someone in the victim's apartment who precluded their entry at approximately 8:10 p.m. (T. 637, 649). One witness had seen Mr. Jimenez in the parking lot walking away from the apartment complex at 7:55 p.m., some ten or more minutes before she heard the noises emanating from the victim's apartment that caused the neighbors to try to enter through the open door which was then shut in their faces (T. 638).

The defense present the DNA analysis of evidence conducted by the Metro-Dade Police Department which did not link Mr. Jimenez to the murder. Specifically, the victim was not the source of blood found on Mr. Jimenez's pants (T. 824), and Mr. Jimenez's blood was not found on a towel seized from the victim's apartment (T. 828).

On October 6, 1994, the jury found Mr. Jimenez guilty of both first degree murder and burglary with a deadly weapon with an assault as charged (T. 957). On November 10, 1994, the penalty phase proceeding was conducted before the same jury. The jury returned a death recommendation (R. 487). On December 8, 1994, a sentencing hearing was held before Judge Rothenberg (T. 1119). On December 14, 1994, Judge Rothenberg imposed a sentence of death and entered her sentencing order, finding four aggravating circumstances: 1) a prior conviction for a crime of

violence (Mr. Jimenez pled nolo contendere to "resisting officer with violence to his person" and was sentenced to six months' jail time with credit for time served); 2) the homicide occurred in the course of a burglary; 3) at the time of the homicide the defendant was on community control; and 4) the homicide was heinous, atrocious or cruel (R. 529; T. 1138). Judge Rothenberg found one statutory mitigating circumstance and two non-statutory mitigating circumstances (*Id*.).

On direct appeal, this Court affirmed the judgment and sentence of death. *Jimenez v. State*, 703 So.2d 437 (Fla. 1997), *cert. denied*, 523 U.S. 1123 (1998).[13] The Court recited the following facts:

[13] In his direct appeal, Mr. Jimenez's claims were: 1) the trial court conducted an inadequate hearing regarding an alleged conflict between penalty phase counsel and Mr. Jimenez; 2) Mr. Jimenez was improperly excluded from sidebars where cause challenges were exercised; 3) his right to cross-examine was erroneously restricted; 4) the trial court erroneously failed to obtain a personal waiver of the right to have the jury instructed as to lesser included offenses; 5) there was insufficient evidence to support the guilty verdicts; 6) the prosecutor made impermissible arguments during the penalty phase proceedings; 7) the sentence of death was disproportionate; 8) the sentence order was replete with errors that warranted a resentencing; and 9) capital punishment as administered by Florida was unconstitutional. This Court found no merit to arguments 1, 2, 3, 4, 5, 7, 8, and 9. Argument 6 was found to be unpreserved.

> On October 2, 1992, Jimenez beat and stabbed to death sixty-three-year-old Phyllis Minas in her home. During the attack her neighbors heard her cry, "Oh God! Oh my God!" and tried to enter her apartment through the unlocked front door. Jimenez slammed the door shut, locked the locks on the door, and fled the apartment by exiting onto the bedroom balcony, crossing over to a neighbor's balcony and then dropping to the ground. Rescue workers arrived several minutes after Jimenez inflicted the wounds, and Minas was still alive. After changing his clothes and cleaning himself up, Jimenez spoke to neighbors in the hallway and asked one of them if he could use her telephone to call a cab.
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> Jimenez's fingerprint matched the one lifted from the interior surface of the front door to Minas's apartment, and the police arrested him three days later at his parents' home in Miami Beach.

703 So. 2d at 438. Regarding Mr. Jimenez's argument that the circumstantial evidence did not exclude all reasonable hypotheses of innocence, the Court wrote:

> Jimenez's fingerprints were found on the inside of the front door. This is consistent with the neighbors' testimony that the door was pushed shut when they tried to get in to help Minas. Further, while the neighbors were blocking the front door, Jimenez was seen jumping from the rear balcony next to Minas's, and the sliding glass doors leading to her balcony were open. Finally, Jimenez told Rochelle Baron that the police wanted to talk to him about a stabbing when the police never mentioned a stabbing. They told Jimenez they wanted to talk to him about some burglaries.

Id. at 441.

On August 21, 1998, Judge Rothenberg appointed Louis Casuso to represent Mr. Jimenez in state court capital postconviction litigation pursuant to § 27.711 of the Florida

Statutes (PC-R. 48). Months later, on January 15, 1999, Mr. Casuso wrote Mr. Jimenez and informed him of his appointment as Mr. Jimenez's collateral counsel. Mr. Jimenez asked to meet with Mr. Casuso. Mr. Casuso responded that that would not be a problem and advised Mr. Jimenez that he would soon visit him at Union Correctional Institution. However, months passed, and Mr. Casuso failed to make the trip.[14] Neither Mr. Casuso nor anyone on his behalf ever visited Mr. Jimenez in order to interview him regarding his case. Accordingly, when in August of 1999 Mr. Casuso offered to withdraw as counsel if Mr. Jimenez was dissatisfied, Mr. Jimenez readily accepted the offer. Mr. Casuso filed the motion to withdraw as counsel on November 21, 1999. Mr. Casuso stated:

[14]Under Rule 3.851, Mr. Jimenez had one year from May 18, 1998, to file his motion for postconviction relief. That date came and went without Mr. Jimenez receiving a visit from Mr. Casuso.

> since the undersigned cannot file anything on behalf of Mr. Jimenez, and has found it difficult to find the time as well as the finances to travel to personally see Mr. Jimenez to get his approval on the motion to vacate, undersigned moves that this Honorable court allow him to withdraw his [sic] attorney of record in this case and appoint another lawyer who can visit Mr. Jimenez and who can underwrite the travel expenses necessary to visit the defendant where he is being held.

(PC-R. 25).

On December 1, 1999, the motion to withdraw was initially granted (PC-R. 9). However, on December 7, 1999, the order granting the withdrawal was vacated (PC-R. 9). Thereafter, an off-the-record proceeding was held before Judge Rothenberg on December 20, 1999.[15] The resulting order indicated that during this proceeding, Mr. Casuso appeared before Judge Rothenberg and complained about Mr. Jimenez, who was not present.

Based solely upon Mr. Casuso's *ex parte* complaints regarding his client, Mr. Jimenez, Judge Rothenberg issued an

[15]The state circuit court record does not contain a transcript of a proceeding occurring on December 20th. The Case Progress Notes do reflect action on December 20, 1999 (PC-R. 12). The record does contain the order entered on December 21st (PC-R. 27-28). The order indicated that the cause came before the court "on January 20, 1999." However, that is clearly a typographical error. During this alleged proceeding, the order stated, "this Court [Judge Rothenberg] reviewed the record and [has] been advised as to status by LOUIS CASUSO, attorney for the Defendant." The order does not reflect that anyone else was present for this proceeding between Judge Rothenberg and Louis Casuso.

order on December 21, 1999, in which she made factual determinations against Mr. Jimenez:

> [t]he Defendant has refused to cooperate in the preparation of a Motion for Post-Conviction Relief, in that the Defendant has refused to do so by written communication and has insisted on meeting with his attorney, Mr. Casuso, face-to-face. Mr. Casuso is unable to travel to communicate with the Defendant by any means other than in writing.

(PC-R. 27). The order concluded by directing Mr. Jimenez to "review the proposed Motion" and to communicate with Mr. Casuso in writing by January 31, 2000, or otherwise the proposed Motion was "to be filed on his behalf by MR. CASUSO no later than February 7, 2000" (PC-R. 27-28).[16]

Thereafter, Mr. Jimenez received a copy of the order along with a letter from Mr. Casuso indicating that "[s]ince you have more time than I do, the order provides for you to tell me by January 31st in writing what it is that you need me to raise on [sic] the motion."

On January 31, 2000, Louis Casuso filed a Motion to Vacate in Mr. Jimenez's case. The eight-page motion raising six

[16]Mr. Casuso asserted in his motion and Judge Rothenberg accepted his representation that he was financially unable to travel to death row to visit his client. Certainly, if the Florida registry attorneys provided for under Fla. Stat. §27.711 are not funded to travel to visit the clients on death row, then the State has failed to provide an adequate budget. See *Olive v. Maas*, 811 So.2d 644 (Fla. 2002).

claims for relief included a verification signed by Mr. Jimenez (1PC-R. 29-36).[17]

On February 7, 2000, Mr. Casuso appeared at a status hearing and requested time to review the public records in the custody of the Repository (PC-R. 48).[18] At a February 22, 2000, hearing, Mr. Casuso indicated that he would be filing an amendment based upon a new decision by this Court (Delgado v. State, 776 So.2d 233 (Fla. 2000)) and that he no longer needed time to examine the public records.[19] In response to an inquiry from Judge Rothenberg as to "any reason why you need to review these records," Mr. Casuso explained, "Not really, I mean we

[17]The claims raised were: 1) trial counsel was ineffective when he failed to call a witness who had observed "Mr. Jimenez exit the elevator on the third floor and saw Mr. Jimenez then walk towards the apartment" (PC-R. 31); 2) trial counsel was ineffective in the penalty phase when he failed to investigate and prepare mitigating evidence; 3) trial counsel was ineffective in failing "to object to certain evidence"; 4) the trial was fraught with procedural and substantive errors that rendered the outcome unreliable; 5) penalty phase counsel was burdened with a conflict of interest and thus rendered constitutionally deficient representation; and 6) death by electrocution violates the Eighth Amendment.

[18]A transcript of the February 7th status hearing does not exist because "no notes were taken," according to the court reporter (PC-R. 118). However, the State in its Response to the Motion to Vacate indicated that at the hearing Mr. Casuso was seeking access to the public records that had been sent to the repository.

[19]There is no explanation in the record as to why Mr. Casuso had not made any attempt to review the public records prior to filing the Rule 3.850 motion.

tried the case" (PC-R. 122). Judge Rothenberg then announced that in light of Mr. Casuso's waiver of access to the public records, "it doesn't appear that I am going to have to review the records en camera since based upon the - - because the notes were the index of what has been retained by the State as [work] product." (PC-R. 122).

On March 10, 2000, Mr. Casuso filed a one-page amendment, adding a seventh claim based upon the decision in *Delgado v. State*, 776 So.2d 233 (Fla. 2000). This was an effort to obtain retroactive application of the decision in *Delgado*.

On March 23, 2000, the circuit court ordered the clerk of court to destroy "certain evidence [ ] now in the possession of the Clerk," without notice to Mr. Jimenez (PC-R. 40).

On April 25, 2000, the State filed its Response to the Motion to Vacate (1PC-R. 42). This Response was twenty-eight pages long.

On May 1, 2000, Mr. Casuso failed to show up to argue the Rule 3.850 motion pursuant to *Huff v. State*, 622 So.2d 982 (Fla. 1993) (PC-R. 129). The *Huff* hearing was rescheduled for May 3, 2000. At that time, Mr. Casuso appeared without Mr. Jimenez. In response to an inquiry by the judge regarding Claim I which asserted that trial counsel rendered ineffective assistance of counsel, Mr. Casuso began by noting that the

witness at issue in Claim I had been deposed and that the deposition was "on the record" (PC-R. 136). Mr. Casuso then waived an evidentiary hearing on the ineffectiveness claim saying, "I don't think there is a necessity for an evidentiary hearing on that. Take a look at it and see if she should have been called or not" (PC-R. 136).[20] Beyond that statement, Mr. Casuso had no arguments to make and so advised the Judge Rothenberg.

On June 8, 2000, Judge Rothenberg entered her order denying the Motion to Vacate (1PC-R. 91). As to Claim I, she found the claim to be refuted by the record. As to Claims II, III, and IV, she found the claims insufficiently pled. She held that Claim V had been raised on appeal and was procedurally barred. She found Claim VI moot. As to Claim VII, the *Delgado* claim raised in the one page amended motion, she concluded *Delgado* was not retroactive.

On June 28, 2000, Mr. Casuso filed a notice of appeal. On appeal, Mr. Casuso raised only one argument in his fifteen page initial brief that was filed on November 14, 2000. The argument was that Judge Rothenberg erred in denying relief under

[20]At that point, the State provided the judge with a copy of the deposition of the witness, Anna Brandt (PC-R. 72, 136). Mr. Casuso made no argument at all as to why Anna Brandt should have been called as a witness.

Delgado. This Court found the issue to be without merit. *Jimenez v. State*, 810 So.2d 511 (Fla. 2001). Mr. Jimenez filed a *pro se* motion for rehearing which the Court denied.

While the Rule 3.851 appeal was pending, Mr. Jimenez filed a *pro se* "Petition for Writ of Habeas Corpus, Seeking a Belated Appeal" in the circuit court. Mr. Jimenez claimed that his registry counsel had not provided adequate assistance and requested the appointment of new counsel. The circuit court denied the petition. The State moved to rescind the order because the lower court lacked jurisdiction, and the court rescinded the order. Mr. Jimenez had already appealed the order to this Court. The State moved to dismiss the appeal, and this Court dismissed the appeal.

On June 11, 2002, Mr. Casuso was discharged as Mr. Jimenez's counsel, and the undersigned counsel was appointed as Mr. Jimenez's registry attorney.[21] On December 11, 2002, Mr. Jimenez filed a petition for writ of habeas corpus in this Court. This petition alleged that Mr. Jimenez had been denied his statutory right to effective representation in collateral

[21]Despite being appointed as Mr. Jimenez's registry counsel in June of 2002, the undersigned could not obtain approval of reimbursement of his attorney fees until June 27, 2006 (2PC-R. 578). Because of the uncertainty over what fees and expenses would be reimbursed, counsel was not able to obtain investigative services until 2005 after he learned that the federal court granted his motion for investigative services.

proceedings, that he was denied due process by *ex parte* contact between Judge Rothenberg and Louis Casuso, and that his death sentence violated *Ring v. Arizona*, 122 S. Ct. 2428 (2002). On June 10, 2003, this Court denied the petition in a decision without published opinion. *Jimenez v. Crosby*, 861 So. 2d 429 (Fla. 2003).

On January 20, 2004, Mr. Jimenez filed a petition for federal habeas relief in federal district court. The district court denied the petition, and Mr. Jimenez filed a notice of appeal in the United States Court of Appeals for the Eleventh Circuit. The appeal is pending.

On April 28, 2005, Mr. Jimenez filed his second Rule 3.851 motion (2PC-R. 68-93).[22] Mr. Jimenez appended to that motion extensive non-record materials supporting his allegations (2PC-R. 96-409).

Mr. Jimenez's motion alleged that no evidence was presented at trial from the cab driver who responded to a call for a cab at Ms. Minas' apartment complex on the evening that she was found stabbed. The cab driver and his dispatcher were repeatedly subpoenaed for deposition by the defense. However, they did not appear and could not be found at the time of trial,

[22]As counsel explained at the *Huff* hearing below, Mr. Ali was located in April of 2005, and the motion to vacate was filed immediately thereafter (2PC-R. 548).

and their testimony was not heard by Mr. Jimenez's jury. The cab driver was Anwar Ali. He has now been located and reports that he had been contacted by the police immediately after Ms. Minas' murder. The police contacted the cab company and discovered that at approximately 8:20 p.m., on October 2, 1992, the dispatcher received the call for a cab for "Jose" at the apartment complex at 6th Avenue and 137 Street.[23] Shortly thereafter, Anwar Ali had been dispatched to the apartment complex at 6th Avenue and 137th Street to pick up a fare by the name of Jose. When he arrived, he did not locate Jose. He did recall being flagged down by a man on 6th Avenue somewhere between 135th and 151st Streets. This man was bleeding from the face and he told Mr. Ali that he had been mugged and only had a couple of dollars. Mr. Ali gave him a ride to an apartment complex at 142th Street and 18th Avenue and dropped him off at the front gate (2PC-R. 74-75).

[23]The only police report that was disclosed that mentioned Mr. Ali was the 15 page supplementary report prepared by Detective Ojeda which was attached to the motion to vacate (2PC-R. 100-14). In that report, reference is made to an October 6, 1993, interview of the dispatcher in which the dispatcher reported that "the call had been cancelled which meant that the person who called either called back and cancelled or the driver responded to the area and could not locate the fare thereby cancelling the call" (2PC-R. 109). In the report, it is noted that Detective Diecidue had interviewed the cab driver, but it did not report the content of that interview.

As the Rule 3.851 motion alleged, Mr. Ali has revealed that he was repeatedly interviewed by the police in the ensuing weeks and shown several photographs of the same guy to see if he was the fare who was bleeding from the face. Mr. Ali kept telling the police that the individual in the photographs did not look familiar. Then, Mr. Ali started receiving subpoenas from the State Attorney's Office. He had to go appear at least three times to be interviewed about the fare bleeding from the face. On occasion, he was forced to wait before anyone would speak to him. He was again shown more photographs of the same individual whose photographs he had been previously shown. He again advised his questioners that the man in the photograph did not look like the man who had been picked up and was bleeding from his face. Mr. Ali did not identify Mr. Jimenez as the fare bleeding from the face who was picked up near Ms. Minas' apartment (2PC-R. 75). Mr. Jimenez's Rule 3.851 motion alleged that the State did not disclose its repeated efforts to get Mr. Ali to identify Mr. Jimenez and Mr. Ali's steadfast insistence that he did not recognize the man in the photographs (2PC-R. 75-76). No statements made by Mr. Ali to either the police or to an employee of the State Attorney's Office were disclosed to the defense at the time of trial.[24] The defense was aware that Mr.

[24]During depositions, the defense did learn that the lead

Ali had been contacted by a public defender investigator in October of 1992, while Mr. Jimenez was represented by the public defender's office. The note from that brief and early interview indicated that the police had shown the cab driver a photograph of Jose Jimenez, but that Mr. Ali indicated that he was not the man who was bleeding and who had gotten in his cab. However, no discovery was provided to the defense regarding any interview of Mr. Ali or photograph having been shown him for identification purposes. On the basis of the public defender's handwritten note, Mr. Jimenez's subsequent attorneys sought to depose Mr. Ali and sought to subpoena him to testify at trial. Trial counsel was not given any information from the State regarding law enforcement's interview of Mr. Ali or his dispatcher, Mr. Gandero. Nor was trial counsel advised that the prosecutor had used state attorney subpoenas to repeatedly drag Mr. Ali and Mr. Gandero before the prosecutor in order to obtain statements from them. Nor were any statements made by Mr. Ali and Mr. Gandero to the prosecuting attorney ever disclosed to the defense (2PC-R. 75-76).

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detective's supplemental police report indicated that another detective had interviewed the cab driver. However, if a report was written regarding the interview, the report was lost or misplaced (2PC-R. 85). The police officer conducting the interview of the cab driver indicated the cab driver had come in and "said he recalled being in the general vicinity, but he didn't recall picking up anyone" (Depo. Diecidue at 71-72).

Mr. Jimenez's motion alleged facts showing that Mr. Ali's testimony was previously unavailable to Mr. Jimenez and that State interference contributed to Mr. Ali's unavailability (2PC-R. 76-77). Mr. Ali has reported that due to the hardships[25] created by responding to the repeated subpoenas issued by the State Attorney's Office, he consulted with Al Gandero, his dispatcher, who was also receiving harassing subpoenas. Mr. Gandero advised Mr. Ali to ignore the subpoenas that told him to go to the office and to wait for one that directed him to go to court. According to Mr. Ali, Mr. Gandero was also ignoring subpoenas in the case. After his talk with Mr. Gandero, Mr. Ali began ignoring the subpoenas that he received. He does not recall ever seeing one directing him to attend a proceeding in court. Had he noticed such a subpoena he would have responded to court and testified truthfully (2PC-R. 76).

Mr. Jimenez's Rule 3.851 motion alleged that the State's conduct toward Mr. Ali and Mr. Gandero in fact discouraged them from becoming involved and appearing for depositions. The State knew that these individuals possessed information favorable to the defense and knew Mr. Jimenez could

[25]Responding to the subpoenas required him to miss work for a substantial amount of time. When he missed work, he did not get paid. It was very upsetting to his wife for him to be continually receiving subpoenas.

not have committed the murder.[26] Further, despite the best efforts of the police to get Mr. Ali to identify Mr. Jimenez as the fare he picked up who was bleeding from his face, Mr. Ali did not recognize the photographs that he had been shown. The defense wished to depose Mr. Ali and Mr. Gandero to ascertain exactly what they had to say.[27] The State did not share the favorable information with the defense (2PC-R. 76-77).

Mr. Jimenez's Rule 3.851 motion alleged that the surviving cab company records demonstrate that the call for a cab was received at 8:20 p.m. and that Mr. Gandero then dispatched Mr. Ali (2PC-R. 77). The records do not include the time period before 8:17 PM. They do not reflect Mr. Jimenez's contention that he had initially called for a cab prior to 8:00 PM and was going downstairs to wait for a cab when he passed his neighbors, Virginia Taranco, her mother, and Mary Griminger, at approximately 7:55 PM in the parking lot (T. 617-18).

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[26]The State deliberately thwarted the defense's effort to learn what Mr. Ali had told the police. The police officer, Detective Diecidue, who was identified as having interviewed the cab driver claimed during his deposition to have forgotten to write a report or misplaced it if he had. Detective Diecidue further claimed the cab driver came in and "said he recalled being in the general vicinity, but he didn't recall picking up anyone" (Depo. Diecidue at 71-72).

[27]Mr. Ali has reported that Mr. Gandero is now deceased.

Mr. Jimenez's Rule 3.851 motion alleged that according to a police report written by Detective Ojeda, Anna Brandt, who was not called as witness by trial counsel, was interviewed on October 9, 1992. At that time, she said "she had seen 'JOSE' come off the elevator only a couple of minutes (less than 5) prior to Ms. Griminger coming towards her apartment." The police report explained, "Ms. Brandt stated that she was on the walkway of the apartment complex waiting from [sic] her friend Mary Griminger to come upstairs so that she could tell her that 'COWBOY' a nickname they had labeled the subject 'JOSE' with, had just come home; Ms. Brandt stated that Mary was walking towards her apartment when she (witness) heard Virginia [Taranco] yell for Mary" (2PC-R. 77-78).

As the Rule 3.851 motion alleged, Mr. Jimenez had returned to his apartment because the cab he had called had not yet shown up. He stopped in his apartment briefly, as Ms. Brandt verified in her statement to the police: "he was walking faster than usual and [ ] he went to his apartment staying less than 5 minutes. She said he returned to the elevator and prior to getting on the same he looked over the railing which overlooks the pool area and then he got onto the elevator." Ms. Brandt was not called as a witness at trial.

The Rule 3.851 motion alleged that, contrary to the police testimony at Mr. Jimenez's trial, counsel has learned from interviewing Ms. Taranco that it was obvious from the blood that she saw that night when the police got into Ms. Minas' apartment that Ms. Minas had been stabbed. Everyone knew that Ms. Minas had been stabbed (2PC-R. 79). This is confirmed by Ms. Brandt's deposition in which she indicated that when Ms. Griminger finally made it up to the third floor, she reported to Ms. Brandt that Ms. Minas had been murdered: "she was stabbed." (1PC-R. 83).

The Rule 3.851 motion pled that Ms. Taranco had also advised that Ms. Minas' murder was shortly after Hurricane Andrew. During the preparation for the hurricane and the clean up after, Mr. Jimenez had helped his neighbors out by doing handy work. He boarded up doors and windows, and took down the preparations afterward. Ms. Taranco has advised collateral counsel that he was in and out of her apartment and also assisted Ms. Minas (2CP-R. 80). No evidence was presented to the jury regarding the circumstances at the time of Hurricane Andrew as an explanation for the discovery of his fingerprint on Ms. Minas' door.

At Mr. Jimenez's trial, Ann Marie Cardona, a police officer, did not appeared to testify, although she had testified

in a deposition. Mr. Jimenez's trial counsel indicated on the record an intention to call Officer Cardona, but indicated that she had not responded to a subpoena served at the police department (T. 785).[28] Mr. Jimenez's Rule 3.851 motion alleged that Officer Cardona now confirms the information contained in her deposition as true and correct. She arrived on the scene at 8:27 p.m. as part of the initial response to the 911 call. Before going upstairs to the apartment where Ms. Minas was located, Officer Cardona was directed to interview individuals outside. Located under Ms. Minas' balcony was an occupied white van, and one of the occupants was speaking to one of the tenants in the building (2PC-R. 196). She interviewed them. They reported that during the time they had been sitting in the van they had observed no one (2PC-R. 81). Though Officer Cardona

[28]This occurred shortly after defense counsel had been precluded from presenting, through the cross-examination of another police officer, Cardona's description of Mr. Jimenez when she saw him at the scene (T. 766-69). The prosecutor objected and explained, "the purpose they want to bring this in is because they want to bring out that the description Officer Cardona gives of the defendant when she sees him is in fact, different from the description given by the female witnesses who saw him" (T. 767). When the State rested and defense counsel advised the court of his difficulty in producing Cardona as a witness, the judge asked the prosecution team if it could produce Cardona for testimony. One of the prosecutors responded, "I don't know. I can attempt to get hold of her" (T. 786). Cardona was not produced and did not testify.

spoke to these individuals for approximately two minutes, she did not obtain any names or the vehicle license plate.

When Officer Cardona finished with the occupants of the white van, she went to use the elevator to go to the second floor. Exiting the elevator was Mr. Jimenez whom she recognized from a previous domestic disturbance call. She had no information that he was a known burglar (2PC-R. 81). Officer Cardona also saw Mr. Merriweather who was cleaning the walkway as she headed toward the elevator. At no time did he advise her that he had seen Mr. Jimenez--the man exiting the elevator--dropping to the ground from a second floor balcony. Moreover, she contradicted Merriweather's testimony that there was not a white van parked under the balcony of Ms. Minas' neighboring apartment (2PC-R. 80-81). Her deposition contradicted the statements of other officers that she indicated that Mr. Jimenez was known to her as a burglar, and that it was through her knowledge of Mr. Jimenez that he became a suspect.

Mr. Jimenez's Rule 3.851 motion also alleged that the jury did not learn that Mr. Jimenez had made a wealthy enemy willing to spend considerable money and energy to get Mr. Jimenez (2PC-R. 82-88). Police had determined that Manuel Calderon was a member of the Medellin drug cartel. Calderon had found his live-in girlfriend, Marie Debas, dead from a drug

overdose on October 22, 1990. He hired a number of private investigators to look into the circumstances of her death and ascertain whether Ms. Debas had been seeing another man. He was advised that she had frequently been in the company of Jose Jimenez and that the police had found a fingerprint of Mr. Jimenez in the apartment Calderon shared with Ms. Debas. The assistant medical examiner who had examined Ms. Debas' body concluded that she died of a drug overdose. There was the suggestion from the scene that consensual sexual activity may have been occurring. A private investigator and former Metro-Dade police officer hired by Calderon, Steve Sessler, advised Calderon that Ms. Debas may have died from asphyxiation during consensual sexual activity with Mr. Jimenez.

The Rule 3.851 motion alleged that Calderon's agents tried to get Mr. Jimenez charged with her homicide. The private investigator contacted the Chief Medical Examiner in order to convince him to override the finding of a drug overdose on the basis that property was missing from the apartment. However, Miami Beach police investigating Ms. Debas' death believed that Calderon may have taken items from the apartment after discovering her body or may have reported items missing that he did not own as part of an effort to defraud his insurance company. After the communication with Calderon's agent urging a

finding that Debas was the victim of a homicide, the Chief Medical Examiner overrode the drug overdose finding and ultimately found the death a homicide that resulted from mechanical asphyxiation. Miami Beach police on the other hand became angry with the interference into their investigation that was being mounted by Calderon's people. In October of 1991, the Miami Beach police closed the case refusing to charge Mr. Jimenez with the murder of Debas.

As the Rule 3.851 motion alleged, Calderon's people refused to accept the action of the Miami Beach police. In August of 1992, an investigator acting on Calderon's behalf discovered that Mr. Jimenez was living in North Miami and was on community control. This investigator on Calderon's behalf confronted Assistant State Attorney Gerald Bagley, who had been assigned the Debas case at the time of the discovery of her body. The investigator accused the Miami Beach police of corruption. He advised Bagley that Mr. Jimenez was a confidential informant working for the Miami Beach police and that the police were protecting him from prosecution. Dissatisfied with Bagley's failure to do anything, the investigator and former Metro-Dade police officer set up a surveillance on Mr. Jimenez. His neighbors were interviewed. Gossip was gathered and rumors regarding Mr. Jimenez were spread

(2PC-R. 355-56). Hoping to find a way to make trouble for Mr. Jimenez and his community control status, the private investigator used contacts from his days as a police officer to gather a dossier on Mr. Jimenez.[29]

Ms. Minas was stabbed to death on October 2, 1992, at the North Miami apartment complex where Mr. Jimenez also lived. Mr. Jimenez's Rule 3.851 motion alleged that through his contacts and surveillance, Calderon's private investigator immediately learned of the incident (2PC-R. 84). He contacted North Miami police personnel and advised them that Jose Jimenez, a known burglar, lived in the building. The investigator provided the lead detectives the dossier of Mr. Jimenez's criminal history that he had put together. He advised them of Debas's death and fed them the story that the Miami Beach police were protecting Mr. Jimenez from murder charges. Ultimately, Sessler was paid for his assistance "in the preparation and presentation of the trial" (2PC-R. 286). However, the defense was never advised of Sessler's role.

[29]The last investigative report prepared by Sessler that collateral counsel has discovered was dated October 2, 1992, the date of Ms. Minas' murder (2PC-R. 355). In this report, reference is made to Mr. Jimenez's new address at 13725 NE 6th Ave., Apt. 309, and the fact that if he was on community control, Mr. Jimenez would have to be present at this address.

The Rule 3.851 motion alleged that the police in turn intentionally covered up the source of the information that led them to suspect Mr. Jimenez. The lead detectives fabricated a story that Officer Cardona had advised them that she recognized Jose Jimenez getting off the elevator and that he was a known burglar (2PC-R. 84). In fact, Officer Cardona did recognize Mr. Jimenez when she saw him, but she did not remember his name, nor did she have any knowledge that he had any involvement with any burglaries. Her only contact with Mr. Jimenez had been when she had responded to a domestic disturbance situation at the same apartment complex several months before.

The Rule 3.851 motion alleged that the police fabricated the story because they did not want it known that Calderon, a member of the Medellin drug cartel who was out to get Mr. Jimenez, was the source of the information first leading them to look at Mr. Jimenez (2PC-R. 84). Revealing this connection to Calderon could be used to impeach their work. The private investigators hired by Calderon were being paid thousands of dollars by Calderon to go after Mr. Jimenez. Money was readily available and was willingly spent.

Mr. Jimenez's Rule 3.851 motion alleged that the police intentionally misled the defense of the involvement that Calderon's hired private investigator had in developing their

case. This private investigator, who had been a homicide detective prior to his sudden departure from the Metro-Dade police in 1984, pooled information with the lead detectives in the Minas investigation (2PC-R. 85). He gave the North Miami detectives all of the information that he had gathered regarding Mr. Jimenez. In return, he was advised who the witnesses in the case were. He learned of Merriweather's statement that he had observed an unknown individual with a Mohawk jump off the balcony onto a van and get into a cab. Soon, Merriweather's testimony changed. The Mohawk, the van and the cab were forgotten, and suddenly Merriweather remembered that the individual was known to him and that it was Mr. Jimenez.

The Rule 3.851 motion alleged that the North Miami police met with Calderon's private investigator and received evidence from him, and then they met with Michael Band, the Assistant State Attorney assigned to the Minas case (2PC-R. 85-86). Band's assistance was obtained to remove the Miami Beach police off the Debas case in order to get the North Miami police involved and to get charges in that homicide filed. To accomplish this, it was decided that a jailhouse informant's testimony would be of assistance. One of the North Miami officers had just used a jailhouse informant in another case and was sure that he would cooperate. Soon, Mr. Jimenez was housed

with this informant, Jeffrey Allen. Within a week, Allen was in contact with the North Miami police officer. He remained housed with Mr. Jimenez for two months working on his story that Mr. Jimenez confessed to killing both Ms. Minas and Ms. Debas. By including an alleged confession in the Debas case along with an alleged confession to the Minas case in his statements to the North Miami police, Mr. Allen gave Band leverage to remove the Miami Beach police from the Debas investigation and to turn the Debas case over to the North Miami detectives who were handling the Minas case. In concocting his story, Mr. Allen was acting as an agent of the State. He had numerous conversations with the police as he improved his story. In early March of 1993, Band arranged with the jail for an interview room to confer with Allen. After Band was satisfied with Allen's story, he advised the North Miami police to interview Allen in an official capacity. This interview took place on March 15, 1993. The defense was falsely advised that this was the first substantive communication with Mr. Allen regarding Mr. Jimenez (2PC-R. 86).

Mr. Jimenez's Rule 3.851 motion alleged that Band and the North Miami detectives intentionally misled Mr. Jimenez's defense lawyers indicating that contact with Mr. Allen commenced on March 15th. Use of Mr. Allen as an informant had a specific benefit in the Minas prosecution that Band exploited. Mr. Allen

had been represented in 1992 by the Dade County public defender's office. When he was disclosed as a state's witness against Mr. Jimenez, it created a conflict that forced the public defender's office to withdraw from representation of Mr. Jimenez (2PC-R. 86). The disclosure of Mr. Allen as a witness occurred after Ms. Hartman's withdrawal as counsel for Mr. Jimenez in the Minas case on April 5, 1993, when the money paid her by Mr. Jimenez's parents ran out. Thereupon, the case was set to revert to the experienced team of capital lawyers with the public defender's office. However, the State was able to force the public defenders off the case by advising them that Jeffrey Allen was a witness and the public defender's office possessed a conflict of interest and could not represent Mr. Jimenez in the Minas case. On April 29, 1993, the State filed a formal notice disclosing Jeffrey Allen as a witness (PC-R. 78).

The Rule 3.851 motion alleged that after using Mr. Allen to force the removal of the public defender's office from representing Mr. Jimenez, Band arranged undisclosed polygraph examinations of Mr. Allen because of his doubts about whether Mr. Allen could be used as a credible witness. Mr. Allen performed poorly on the polygraph examinations. The conclusion was reached that he could not be used as a witness in either case. This meant that the State was left with insufficient

evidence to obtain an indictment in the Debas case. At that point, Band turned the North Miami detectives loose to find additional evidence in the Miami Beach case (2PC-R. 87). Mr. Band went to Judge Rothenberg on an ex parte application in the Minas case and obtained authorization to send the North Miami detectives to Los Angeles to interview "material witnesses" at county expense (R. 104-06). However, these witnesses concerned the effort to find evidence to charge Mr. Jimenez with the alleged murder of Debas, not Minas. Using the assistance provided by Calderon's private investigator, the new witnesses in Los Angeles were located and they now provided evidence that advanced Calderon's interest in getting the state to indict Mr. Jimenez in the death of Marie Debas. An indictment in that case was obtained in early 1994. Thereupon, the public defender's office was assigned to represent Mr. Jimenez in that case. Ms. Debra Cohen, who had been appointed as Mr. Jimenez's counsel in the Minas prosecution in April of 1993, withdrew in the Minas case in May of 1994 due to the birth of her baby. Thereupon, Judge Rothenberg assigned the case to the public defenders who had been appointed in January to the Debas case. As before, Mr. Band immediately used Jeffrey Allen to force the withdrawal of the public defender's office from the Minas case (2PC-R. 87-

88).[30] This was after Mr. Allen had failed polygraph examinations.[31]

At trial, the State presented evidence that Mr. Jimenez advised Ms. Baron, his probation officer, that the police wanted to talk to him about a stabbing at a time when no one outside law enforcement knew that Ms. Minas had been stabbed and law enforcement had not told Mr. Jimenez.[32] Mr. Jimenez's Rule 3.851 motion alleged that defense counsel failed to present Ms. Baron's desk calendar showing that she wrote Mr. Jimenez's statement that the police wanted to talk to him about a stabbing in the square marked October 9th, and not the square marked October 5th, the day she claimed he made the statement (2PC-R. 88). Ms. Baron acknowledged in her testimony that she had also talked to Mr. Jimenez on October 9th.

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[30]The public defenders had been handling the Debas case for over three months without the issue of Jeffrey Allen arising. It was only after the re-assignment of the public defenders to the Minas case that Mr. Band asserted that the public defenders had a conflict and needed to withdraw.

[31]At the October, 1994, trial, Mr. Band did not call Mr. Allen as a witness. Obviously, Mr. Jimenez's new counsel replacing the public defenders were advised in advance of trial because Mr. Allen was not deposed in the Minas case.

[32]Mr. Jimenez did plead in his Rule 3.851 motion, that Ms. Brandt had stated in her deposition that she told the night of the murder by a neighbor that Ms. Minas had been stabbed to death (PC-R. 83). Ms. Taranco also indicates that the residence of the apartment complex knew the cause of death that night because it was obvious that Ms. Minas had been stabbed (2PC-R. 79).

Mr. Jimenez's Rule 3.851 motion alleged that the defense also failed to investigate the reliability of the fingerprint identification, the second of three circumstances used by the State to convict Mr. Jimenez (2PC-R. 89-91). Supposedly, Mr. Jimenez's latent fingerprint was identified in the early morning hours of October 3, 1992. According to the State this was the basis for its arrest warrant. Mr. Jimenez had previously told his probation officer that he would be living at his parents' house. Yet, the police made no effort to go to Mr. Jimenez's parents' house until Monday, October 5th, more than 48 hours after they supposedly had probable cause. The Rule 3.851 motion additionally alleged that new evidence was available that demonstrates the scientific unreliability of fingerprint comparison (2PC-R. 91-92).

The Rule 3.851 motion alleged that Mr. Jimenez, a death row inmate, was not provided with the resources to locate Mr. Ali until recently. He was not located and interviewed until during the month of April, 2005. Mr. Jimenez was deprived of the resources to interview the other witnesses as well after public records disclosures were reviewed and significant new favorable information was learned from those records. The attorney provided in 1998, Louis Casuso, refused to obtain the public records until after the first Rule 3.851 motion was filed

in 2000. Then he did not review the records. In this action, he was not acting as Mr. Jimenez's counsel, but as a contractor with the State serving the State's interest. Since Mr. Casuso did not review the public records and did not provide them to Mr. Jimenez, no investigation could be conducted on Mr. Jimenez's behalf into the favorable information appearing therein. After Mr. Jimenez obtain the services of new counsel, the State blocked funding for counsel in state court proceedings and successfully opposed funding for investigative services in federal proceedings. Mr. Jimenez's counsel learned on March 24, 2005, that funding for investigative services had been approved, and immediately commenced the investigation that led to the interviews of the witnesses identified in Mr. Jimenez's Rule 3.851 motion (2PC-R. 91).

On July 27, 2005, a *Huff* hearing was held on Mr. Jimenez's Rule 3.851 motion. At that hearing, his counsel argued for an evidentiary hearing at which Mr. Jimenez would be afforded the opportunity to present the evidence supporting his claims.

On September 6, 2005, at approximately 4:00 PM, Mr. Jimenez's collateral counsel was contacted by Judge Ward's office inquiring about counsel's availability for a hearing regarding Mr. Jimenez's pending motion to vacate on September 9,

2005. Counsel advised Judge Ward's office that he was not available for a hearing on September 9th because he was catching a plane on the morning of September 7th and would be out-of-state until September 11, 2005. Counsel was asked about his availability for a hearing during the week of September 12th. Counsel advised that he had a hearing in Clearwater on Monday, September 12th (State v. Floyd), and a hearing in Tampa on Wednesday, September 14th (State v. Tompkins). Counsel also indicated that he had a pleading due on September 13th (State v. Pittman) that required him to travel to Raiford to meet with his client. The representative for Judge Ward's office then inquired regarding counsel's availability the week of September 19th. Counsel advised that he was available any day that week. The representative for Judge Ward's office indicated that counsel would be called back with a new date for the hearing on Mr. Jimenez's motion to vacate.

Counsel had not received any word from Judge Ward's office when he returned to Florida on September 11, 2005. On September 12th while in Clearwater, counsel called Judge Ward's office, but he reached voice mail. Counsel left a message inquiring when the hearing on Mr. Jimenez's motion to vacate would be scheduled. Counsel had still not heard from Judge Ward's office when on September 23, 2005, he received a service

copy of a Notice to Court in the federal proceedings pending on Mr. Jimenez's federal petition for habeas relief. This notice indicated that "the State trial court denied the successive motion for post conviction relief, as successive, untimely and without merit." This notice gave no indication when this order denying the motion to vacate had been entered.

In the mail delivered to counsel's office on Saturday, September 24, 2005, was an envelope from Judge Ward's office. The envelope had a Pitney Bowes meter stamp reflecting that the stamp had been affixed on September 21, 2005. However, the U.S. postal service stamped the enveloped with the date "09/22/05."

The envelope contained a document entitled "Order Denying Defendant's Motion for Post-Conviction Relief Pursuant to Florida Rules of Criminal Procedure." The order was signed by Judge Ward. The date of the signature was listed as "this 9 day of September 2005 at Miami-Dade County."

On October 5, 2005, Mr. Jimenez filed a motion for rehearing and a motion to disqualify Judge Ward. On November 4, 2005, Mr. Jimenez filed a motion to get the facts. On November 7, 2005, an order denying rehearing was entered, and a separate order denying judicial disqualification was entered. On November 28, 2005, an order denying the motion to get the facts was entered. On December 15, 2005, Mr. Jimenez filed his notice of appeal.

SUMMARY OF ARGUMENT

1. The circuit court erred as a matter of law in denying Mr. Jimenez's Rule 3.851 motion without an evidentiary

hearing. The motion pled facts regarding both the substance of the new facts and Mr. Jimenez's diligence in ascertaining those facts. Taken as true, those facts show that Mr. Jimenez is entitled to relief and are not conclusively refuted by the record. However, the trial court failed to take the facts as true, largely ignoring Mr. Jimenez's allegations in the order summarily denying relief, and applied erroneous legal standards. This Court should order an evidentiary hearing.

2. Mr. Jimenez is factually innocent of the crimes for which he was convicted and sentenced to death. The jury and this Court on direct appeal did not know of significant facts raising substantial doubt regarding the three circumstances which were the basis of the State's case. The jury and this Court also did not know of significant facts showing that Mr. Jimenez was in his apartment when the murder occurred and that the cab driver dispatched to pick up a fare named "Jose" did not identify Mr. Jimenez as the individual bleeding from the face that he recalled being flagged down by. This Court should recognize factual innocence as a claim properly pursued at any time during postconviction proceedings and, under the unique circumstances presented in Mr. Jimenez's case, allow evidentiary development of such a claim.

3. Mr. Jimenez was denied his right to a fair trial because the prosecutor failed to disclose exculpatory, material evidence, because the prosecutor presented false evidence, and because trial counsel unreasonably failed to investigate and present exculpatory evidence. The prosecutor did not disclose the repeated attempts by police to get Mr. Ali to identify Mr. Jimenez, the extent of Calderon's influence on the investigation and charging of Mr. Jimenez, or the State's machinations with Jeffrey Allen. The prosecutor also presented false evidence that Officer Cardona identified Mr. Jimenez as a known burglar. Defense counsel unreasonably failed to call Ms. Brandt as a witness; unreasonably failed to investigate and present evidence that it was common knowledge in the apartment building on the night of the murder that Ms. Minas had been stabbed; unreasonably failed to call Officer Cardona to reiterate her deposition testimony that she did not recognize Mr. Jimenez as a known burglar on the night of the murder, that a white van was parked beside the apartment building, and that Merriweather did not identify Mr. Jimenez as the man he saw drop from the balcony; unreasonably failed to investigate and present evidence showing that there was an explanation for the presence of Mr. Jimenez's fingerprint inside Ms. Minas' door and questioning the reliability of the fingerprint identification; and unreasonably

failed to present evidence showing that Ms. Baron's desk calendar indicated that Mr. Jimenez's statement about a "stabbing" occurred on October 9 rather than October 5.

These omissions must be evaluated cumulatively. Such an analysis clearly establishes that confidence in the outcome of Mr. Jimenez's trial is undermined. In fact, these omissions led to the conviction of an innocent man. Mr. Jimenez is entitled to an evidentiary hearing and a new trial.

4. Mr. Jimenez moved to disqualify the circuit court judge in these proceedings because the judge engaged in *ex parte* communications with the State regarding the order denying relief. The lower court erred in denying the motion to disqualify. This Court should reverse the lower court's order denying relief and remand for new proceedings on Mr. Jimenez's Rule 3.851 motion.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999); *State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001). The lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. *Peede v.*

State, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DENYING MR. JIMENEZ'S RULE 3.851 MOTION WITHOUT AN EVIDENTIARY HEARING.

The law attendant to the granting of an evidentiary hearing in a postconviction proceeding is often stated and well settled: "[u]nder rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000). The rule is the same for a successive postconviction motion, where allegations of previous unavailability of new facts, as well as diligence of the movant, warrant evidentiary development if disputed or if a procedural bar does not "appear[] on the face of the pleadings." *Card v. State*, 652 So. 2d 344, 346 (Fla. 1995). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact."

Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996). In Mr. Jimenez's case, the lower court erroneously failed to grant an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claims based upon the new evidence, and Mr. Jimenez's diligence in attempting to unearth the new evidence.

Claim I of Mr. Jimenez's Rule 3.851 motion pled that Mr. Jimenez was denied due process because the State failed to disclose material, exculpatory evidence, and/or because the State knowingly presented false or misleading evidence, and/or because trial counsel provided ineffective assistance, and/or because newly discovered evidence shows Mr. Jimenez's innocence (2PC-R. 71-72). The claim specifically pled the new facts upon which it was based (2PC-R. 74-90), as well as facts regarding Mr. Jimenez's diligence in learning and presenting these facts (2PC-R. 74, 91). The claim also specifically alleged that the State deceived Mr. Jimenez and his counsel during trial and Mr. Jimenez's initial postconviction proceedings about the possible existence of these facts (2PC-R. 75-77, 91).

Without accepting Mr. Jimenez's allegations as true, the circuit court denied this claim, addressing each allegation of the claim separately (2PC-R. 437-42). The circuit court never gave cumulative consideration to Mr. Jimenez's

allegations, *Kyles v. Whitley*, 514 U.S. 419 (1995); *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999), and the circuit court's analysis of each individual allegation failed to accept Mr. Jimenez's allegations as true and applied incorrect legal analysis.

The circuit court first addressed Mr. Jimenez's subclaim regarding Anwar Ali, the cab driver (2PC-R. 437). The court's first reason for summarily denying this subclaim was, "there is no evidence that the State willfully or knowingly failed to disclose the evidence since Mr. Ali was listed as a witness and any information about the dispatch-call was investigated prior to trial and was available to defense counsel" (2PC-R. 437). Mr. Jimenez's motion alleged that the police and prosecutor had interviewed Mr. Ali numerous times, attempting to get Mr. Ali to identify Mr. Jimenez as the fare Mr. Ali picked up who was bleeding from his face, but that Mr. Ali advised the police that Mr. Jimenez was not the man that he picked up. Mr. Jimenez's motion also alleged that Mr. Ali did not respond to subpoenas at the time of trial and was therefore unavailable, that counsel on Mr. Jimenez's first Rule 3.851 proceedings did not review public records or conduct any investigation, and that Mr. Jimenez only located Mr. Ali after being provided investigative funding by the federal court. The

circuit court not only did not accept these allegations as true, but completely ignored them.

The circuit court ignored the factual allegation that the State deceived the defense, that it never disclosed that Mr. Ali said anything favorable to the defense. The only police report that was disclosed that mentioned Mr. Ali was the 15 page supplementary report prepared by Detective Ojeda which was attached to the motion to vacate (2PC-R. 100-14). In that report, reference is made to an October 6, 1993, interview of the dispatcher in which the dispatcher reported that "the call had been cancelled which meant that the person who called either called back and cancelled or the driver responded to the area and could not locate the fare thereby cancelling the call" (2PC-R. 109). In the report, it is noted that Detective Diecidue had interviewed the cab driver, but it did not report the content of that interview. Detective Diecidue testified during his deposition that he either forgot to write a report or misplaced the report if one was written. Diecidue further claimed the cab driver came in and "said he recalled being in the general vicinity, but he didn't recall picking up anyone" (Depo. Diecidue at 71-72).

"When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it

is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 124 S. Ct. 1256, 1263 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275. Here, that is precisely what occurred.

The circuit court also applied an erroneous legal analysis to this subclaim, requiring Mr. Jimenez to show that the State "willfully or knowingly failed to disclose the evidence" (2PC-R. 437). Under *Brady v. Maryland*, 373 U.S. 83 (1963), a due process violation occurs when:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully *or inadvertently*; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999)(emphasis added). Under *Brady*, "an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Id*. at 288.

The circuit court's second reason for summarily denying the subclaim regarding Mr. Ali was "the evidence does not qualify as exculpatory" because it did not "unequivocally exculpate" Mr. Jimenez or make Mr. Jimenez's involvement in the crime "impossible" (2PC-R. 437). This is an incorrect legal

analysis under United States and Florida Supreme Court precedent. *Banks v. Dretke*, 540 U.S. 668 (2004); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963); *Cardona v. State*, 826 So. 2d 968 (Fla. 2002); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Gorham v. State*, 597 So. 2d 782 (Fla. 1992); *Roman v. State*, 528 So. 2d 1169 (Fla. 1988).

Under *Brady*, evidence is exculpatory if it is "favorable" to the accused or "impeaching" of the State's case. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Establishing materiality-- or prejudice– "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 419 U.S. at 434. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. Under this correct legal analysis, the evidence regarding Mr. Ali was exculpatory and material. Contrary to what the defense was told, Mr. Ali told law enforcement that he did recall picking up a fare, one who was bleeding from the face. However, this fare was not "Jose", the person who called for the cab, and Mr. Ali advised the police

that the pictures of Mr. Jimenez that the police showed Mr. Ali were not the fare he had picked up who was bleeding from his face. The police and prosecutor surely hoped Mr. Ali would support their theory, repeatedly attempting to have Mr. Ali identify Mr. Jimenez as the fare Mr. Ali picked up. The fact that Mr. Ali would not identify Mr. Jimenez undermines the State's theory and impeaches the investigation of the murder. In a weak case such as that against Mr. Jimenez, the State's failure to disclose its interviews with Mr. Ali "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 419 U.S. at 435. Further, the circuit court did not consider this subclaim as any part of a cumulative analysis, as the court conducted no cumulative analysis. *Kyles*; *Lightbourne*.

The circuit court also found the subclaim regarding Mr. Ali "time barred" and not a *Brady* violation because "the information was available to the defense" (2PC-R. 437). The court did not mention, much less accept as true, Mr. Jimenez's allegations that Mr. Ali did not respond to subpoenas for deposition or for trial, that Mr. Jimenez's first postconviction counsel did not review public records or conduct any investigation, and that Mr. Jimenez located Mr. Ali only after the federal court provided the funds for investigative services.

Moreover, the law is now clear that the defense counsel's failure to figure out that the State is withholding favorable evidence in no way impacts the prosecutor's constitutional obligation to disclose that evidence. The United States Supreme Court has held, "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 540 U.S. at 675-76. In *Banks*, the Supreme Court specifically and pointedly rejected the notion that it was the defendant's burden to figure out what had not been disclosed and obtain it from some other source. The fact that Mr. Ali was listed as a witness did not in any way relieve the State of its due process obligation to disclose favorable evidence.[33] In *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004), this Court ordered a new trial when the State withheld favorable evidence concerning a witness who was not only listed by the State, but was in fact called to testify by the State. In *Hoffman v. State*, 800 So. 2d 174, 179 (Fla. 2001), this Court stated that the argument that the defendant is required to figure out exculpatory evidence existed "is flawed in light of

[33]In fact here, the defense was affirmatively misled by the State when no reports of any of Mr. Ali's statements were disclosed, and to the best of Det. Diecidue's memory Mr. Ali did nor recall picking up a fare when he was interviewed (Depo of Diecidue at 71-72).

Strickler and *Kyles*, which squarely place the burden on the State to disclose to the defendant all information in its possession that is exculpatory."

The circuit court denied as "procedurally barred" Mr. Jimenez's subclaim regarding trial counsel's failure to call Anna Brandt as a witness (2PC-R. 437). The court did not address the substance of the testimony available from Ms. Brandt and did not consider this subclaim as any part of a cumulative analysis, as the court conducted no cumulative analysis. *Kyles*; *Lightbourne*. The court relied upon the rejection of this subclaim in Mr. Jimenez's first Rule 3.851 motion (2PC-R. 437-38). In neither proceeding did Mr. Jimenez receive an evidentiary hearing. In fact, during the initial postconviction proceedings, state-provided collateral counsel waived an evidentiary hearing on this claim: "I don't think there is a necessity for an evidentiary hearing on that. Take a look at it and see if she should have been called or not" (1PC-R. 136). Prior collateral counsel did not even provide the circuit court with Ms. Brandt's name or deposition (1PC-R. 72, 136).

The circuit court did not address at all Mr. Jimenez's subclaim that well before the police came to interview Mr. Jimenez, it was common knowledge in the apartment complex that Ms. Minas had been stabbed. This fact shows that one of the

three circumstances which the prosecution claimed showed Mr. Jimenez's guilt and upon which this Court relied in upholding Mr. Jimenez's convictions and death sentence was simply untrue.

The circuit court summarily denied Mr. Jimenez's subclaim that an explanation existed for the presence of Mr. Jimenez's fingerprint inside Ms. Minas' front door (2PC-R. 438). The court first reasoned that "it is unlikely the result would have been different at trial had the evidence been presented" because Hurricane Andrew occurred five weeks before the murder (2PC-R. 438). This is a incorrect legal analysis. Under *Strickland v. Washington*, 466 U.S. 668, 693 (1984), "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, prejudice is established when the omission of evidence "undermines confidence" in the outcome. *Id*.

The circuit court also summarily denied this subclaim because Ms. Taranco was deposed before trial and testified at trial, because the issue could have been raised in Mr. Jimenez's first Rule 3.851 motion and because Mr. Jimenez would have known he had been in the victim's apartment (2PC-R. 438). These conclusions do not accept as true Mr. Jimenez's allegations regarding diligence. For example, without an evidentiary hearing at which trial counsel can be questioned, there are no

facts showing whether or not counsel asked Mr. Jimenez if he had previously been in Ms. Minas' apartment or whether trial counsel conducted any investigation into that issue. Further, the circuit court did not consider this subclaim as part of a cumulative analysis, as the court conducted no cumulative analysis. *Kyles*; *Lightbourne*.

The circuit court summarily denied Mr. Jimenez's subclaim that trial counsel was ineffective in failing to call Officer Cardona as a witness (2PC-R. 439). The court addressed only Mr. Jimenez's allegations regarding the presence or absence of a white van outside the apartment building and regarding the van's occupants' statements that they had not seen anyone in the area (*Id*.). The court concluded trial counsel "was not ineffective" for failing to call Officer Cardona because the occupants' statements were "inadmissible hearsay," the presence of the van when Officer Cardona arrived did not "conclusively prove" that it was there earlier, and trial counsel attempted to impeach Merriweather regarding the presence of the van (*Id*.).

The circuit court's conclusions failed to accept Mr. Jimenez's allegations as true and relied upon an incorrect legal analysis. The point of Mr. Jimenez's claim regarding Officer Cardona's interview of the van's occupants is not what they said but the fact that the van was there, that the occupants were

interviewed, and that the identities were not memorialized so that anyone else could speak with them.[34] *Strickland*'s prejudice standard does not require Mr. Jimenez to "conclusively prove" that the van was present earlier, as the circuit court ruled.

Merriweather significantly changed his description of the man he said he saw drop from the balcony: at the time of the murder, Merriweather described a man with a Mohawk haircut; a few weeks later, he suddenly remembered that the man was Mr. Jimenez. Despite this impeachment, the prosecution, this Court and presumably the jury relied upon Merriweather's testimony as one-third of the evidence establishing Mr. Jimenez's guilt. Despite trial counsel's attempt to impeach Merriweather regarding the presence of the van, upon which the circuit court relied, trial counsel presented no evidence showing that the van was in fact there. In this context, the fact that a white van was present when the police arrived at 8:23 p.m. provided additional impeachment of Merriweather and therefore "could reasonably be taken to put the whole case in such a different

[34]Of course, the fact that Officer Cardona did not obtain the names of the van's occupants or the license plate number of the van could have been used to impeach the competence of the police investigation. *Kyles v. Whitley*, 419 U.S. at 445-49.

light as to undermine confidence in the verdict." *Kyles*, 419 U.S. at 435.[35]

In addressing the subclaim regarding Officer Cardona, the circuit court did not mention, much less accept as true, the other allegations regarding the testimony Officer Cardona could provide. After interviewing the van's occupants, Officer Cardona went to the elevator to go to the second floor. As she got to the elevator, Mr. Jimenez exited the elevator, and Merriweather was outside the elevator cleaning the walkway. Officer Cardona did not recognize Mr. Jimenez as a known burglar, as other officers indicated, and Merriweather did not say anything to Officer Cardona indicating that Mr. Jimenez was the man he had seen dropping from the balcony. Moreover, Officer Cardona's description of Mr. Jimenez and the clothes he was wearing did not match that of Merriweather or the other witnesses. This testimony was impeachment that trial counsel tried to present through other witnesses because he could not locate Officer Cardona at the time of trial.

The circuit court also did not accept as true or discuss Mr. Jimenez's allegations regarding diligence, including the allegations that prior collateral counsel did not review

[35]*Kyles* explained that the *Brady* materiality standard and the *Strickland* prejudice standard are the same. *Id*. at 434.

public records or conduct any investigation. Finally, the circuit court did not consider this subclaim as part of a cumulative analysis, as the court conducted no cumulative analysis. *Kyles*; *Lightbourne*.

The circuit court summarily denied Mr. Jimenez's subclaim regarding Calderon's influence over the investigation and charging of Mr. Jimenez and regarding the State's use of jailhouse informant Jeffrey Allen to force the public defenders to conflict out of representing Mr. Jimenez (2PC-R. 439-40). The court ruled that Mr. Jimenez was aware of these allegations at the time he filed his first Rule 3.851 motion (2PC-R. 440). According to the court, Mr. Jimenez knew about Calderon's private investigator because Calderon was "listed by the State in their discovery and the Defendant's attorneys took his deposition and asked about the investigator" (2PC-R. 440). The court stated that Mr. Jimenez knew about his allegations regarding Allen because "Defendant knew about the existence of Mr. Allen" and "knew the Public Defender was conflicted out" (2PC-R. 440).

The circuit court's decision did not accept Mr. Jimenez's allegations as true and applied an erroneous legal analysis. In particular, Mr. Jimenez alleged that the State did not disclose its extensive reliance upon the information

Calderon's investigator provided nor its manipulations regarding Allen. The State had in its possession all of Sessler's investigative reports that he prepared for Calderon. However, when the defense asked Sessler for the reports during a deposition, he asserted that the reports were privileged even though the privilege was breached when the reports were provided to the State. The prosecutor concurred with the assertion of privilege, knowing that the reports had been turned over to the State in their entirety. The fact that Mr. Jimenez knew of Calderon and Sessler and knew of the investigative reports Sessler prepared does not excuse the State from disclosing exculpatory evidence.

In *Kyles*, the defense knew about the existence of a witness named Beanie but the State did not disclose its interactions with and interviews of Beanie. The Supreme Court held that this nondisclosure violated *Brady*. *Kyles*, 419 U.S. at 429 ("[t]he theory of the defense was that Kyles had been framed by Beanie"); *Id*. at 429-30 (discussing undisclosed evidence regarding Beanie). In *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004), the undisclosed *Brady* material was favorable information provided to the State by a witness on the State's witness list who was in fact deposed by the defense before she was called as a witness by the State at trial. In *Cardona v. State*, 826 So.

2d 968 (Fla. 2002), the prosecutor withheld statements made by a witness who was listed by the State, deposed by the defense and called to testify at trial by the State.

The circuit court also did not accept as true or discuss Mr. Jimenez's allegations regarding diligence, including the allegations that prior collateral counsel did not review public records or conduct any investigation. Moreover, the circuit court did not consider this subclaim as part of a cumulative analysis, as the court conducted no cumulative analysis. *Kyles*; *Lightbourne*.

The circuit court summarily denied Mr. Jimenez's subclaim regarding Baron's desk calendar (2PC-R. 441). The court ruled that Baron's deposition testimony refuted Mr. Jimenez's allegations because she explained the discrepancy between her testimony that she talked to Mr. Jimenez on October 5 and the fact that she wrote Mr. Jimenez's statement under the date for October 9 (*Id*.). The court failed to recognize that Baron's explanation should have been evaluated by the jury. The court also stated that Mr. Jimenez was not prejudiced because "[t]he result of the trial would not have been different" (*Id*.). The court again applied an erroneous legal standard. The prejudice inquiry is whether the omitted evidence "could reasonably be taken to put the whole case in such a different

light as to undermine confidence in the verdict." *Kyles*, 419 U.S. at 435. Further, the circuit court did not consider this subclaim as part of a cumulative analysis, as the court conducted no cumulative analysis. *Kyles*; *Lightbourne*.

The circuit court summarily denied Mr. Jimenez's subclaim regarding trial counsel's failure to question the reliability of fingerprint evidence (2PC-R. 441). The court ruled that Mr. Jimenez "fail[ed] to identify what evidence could have been introduced to attack the reliability of fingerprint evidence" (*Id.*). Although recognizing that Mr. Jimenez attached an order issued by a Pennsylvania federal district court judge regarding the reliability of fingerprint evidence (*see* 2PC-R. 362-407), the court did not understand that the order was a proffer of the evidence which could be presented to question the reliability of fingerprint evidence. The order discussed such evidence in great detail (2PC-R. 363-402). Mr. Jimenez was required to limit his second Rule 3.851 motion to twenty-five (25) pages, which he could not have done had he included all of this evidence in the motion.

The court also ruled that the claim regarding the reliability of fingerprint evidence could have been presented earlier (2PC-R. 441). The court did not accept as true or discuss Mr. Jimenez's allegations regarding diligence, including

the allegations that prior collateral counsel did not review public records or conduct any investigation. Moreover, the circuit court did not consider this subclaim as part of a cumulative analysis, as the court conducted no cumulative analysis. *Kyles*; *Lightbourne*.

The court interpreted Mr. Jimenez's allegations regarding diligence as a claim that Mr. Jimenez had not been provided funding to investigate his claims (2PC-R. 442). The court stated that this argument was "refuted by the record" because "Defendant was provided with post conviction counsel" and because "[t]he record supports that funding was provided to investigate his claims in his first post conviction motion and the current successive motion" (*Id*.). It is not clear what record the court was referring to when it found that "[t]he record supports" that there was funding for "the current successive motion." Despite statutory provisions providing for reimbursement for registry counsel, at the time the court issued its order, Mr. Jimenez's counsel had not been able to get approval for payment for his time, let alone payment for an investigator's time.

Mr. Jimenez's Rule 3.851 motion pled facts regarding the merits of his claims and regarding his diligence which should have been be accepted as true, but were not. These facts

are set forth in the Statement of the Facts, *supra*, and in the discussion contained elsewhere in this brief. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively rebut Mr. Jimenez's claims and that an evidentiary hearing is required.

ARGUMENT II

MR. JIMENEZ IS FACTUALLY INNOCENT OF THE CRIMES FOR WHICH HE WAS CONVICTED AND SENTENCED TO DEATH, AND HIS CONVICTIONS AND DEATH SENTENCE THEREFORE VIOLATE DUE PROCESS.

Mr. Jimenez's Rule 3.851 motion pled that he was "factually innocent" of the crimes for which he was convicted and sentenced to death (*See* 2PC-R. 72, 78, 81). Mr. Jimenez submits that this Court should recognize factual innocence as a claim properly pursued at any time during postconviction proceedings and, under the unique circumstances presented in Mr. Jimenez's case, allow evidentiary development of such a claim.

As detailed in the Statement of the Case and Facts, *supra*, the State's case against Mr. Jimenez, as well as this Court's affirmance of his conviction and death sentence, rested upon three circumstances: (1) Mr. Jimenez telling Baron the police had come to see him on October 5 to talk to him about a "stabbing" when no one allegedly knew Ms. Minas had been stabbed; (2) the presence of Mr. Jimenez's fingerprint inside Ms. Minas' door; and (3) Merriweather's testimony that he saw

Mr. Jimenez drop to the ground from a balcony. Mr. Jimenez's Rule 3.851 motion proffered evidence significantly impeaching these three circumstances: (1) the fact that Ms. Minas had been stabbed was common knowledge in the apartment building on the day of her death and Baron's desk calendar indicated Mr. Jimenez had made the "stabbing" remark on October 9; (2) Mr. Jimenez had been in Ms. Minas' apartment before and after Hurricane Andrew; (3) Merriweather denied seeing a white van next to the building although a police officer saw the van and talked to its occupants, and Merriweather did not tell Officer Cardona that Mr. Jimenez was the man he saw dropping from a balcony. The jury did not know these facts when it convicted Mr. Jimenez and recommended a death sentence. This Court did not know these facts when it affirmed Mr. Jimenez's convictions and sentences.

However, as Mr. Jimenez's Rule 3.851 motion alleged, there is even more evidence of innocence which the jury and this Court did not know. Merriweather testified he saw Mr. Jimenez dropping from the balcony at about 7:45 or 8:00 p.m. According to the State's theory of the offense, Mr. Jimenez allegedly dropped from the balcony after Ms. Minas' neighbors came to her door and blocked that escape route. At 7:55 p.m., the neighbors saw Mr. Jimenez in the parking lot. About ten or more minutes later, at approximately 8:05 or 8:10 p.m., Ms. Griminger left

Ms. Taranco's apartment to go upstairs. As Ms. Griminger was starting upstairs, Ms. Taranco heard noises coming from Ms. Minas' apartment and called out to Ms. Griminger. Ms. Minas' door was ajar, and three neighbors started to open it when it was slammed shut and locked. The neighbors called the police by 8:20 p.m., and the first officers arrived at 8:21 p.m. After the officers arrived, Mr. Jimenez appeared on the second floor and asked to use a phone.

The jury and this Court did not know that Ms. Brandt had seen Mr. Jimenez come off the elevator only a couple of minutes *before* Ms. Griminger started towards here apartment on the third floor, and before Ms. Taranco heard a thump and called for Ms. Griminger to return to the second floor. Ms. Brandt was in fact waiting to tell Ms. Griminger *that Mr. Jimenez was in his apartment*. This occurred *before* the neighbors became concerned about Ms. Minas and went to her door. As Ms. Griminger walked toward Ms. Brandt's apartment, Ms. Brandt heard Ms. Taranco call out for Ms. Griminger. The neighbors then went to Ms. Minas' door, which slammed shut. Thus, according to Ms. Brandt's statement to the police on October 9, 1992, at the time the neighbors were at Ms. Minas' door, Mr. Jimenez was in his apartment.

The jury and this Court did not know anything about Mr. Ali. The State failed to disclose its repeated unsuccessful attempts to get Mr. Ali to identify Mr. Jimenez as the fare Mr. Ali picked up in the evening of October 2. From its repeated efforts to get him to identify Mr. Jimenez's photo, the State believed Mr. Ali was an important witness. However, it did not disclose that Mr. Ali advised the photographs he was shown were not of the fare he picked up who was bleeding. The jury and this Court in the direct appeal did not even know that Mr. Jimenez's contention that he had been trying to get a cab was supported by documentation from the cab company.

The jury and this Court also did not know that Officer Cardona *did not* recognize Mr. Jimenez as a known burglar and *did not* tell other officers that Mr. Jimenez was a known burglar. This is significant impeachment of statements made by police officers regarding why they focused on Mr. Jimenez as a suspect which ties in with Mr. Jimenez's allegations regarding Calderon's influence over the investigation and charging of Mr. Jimenez.

The jury and this Court knew nothing about Calderon's and his investigator's involvement in gathering evidence about Mr. Jimenez. Calderon was pursuing a vendetta against Mr. Jimenez and thus his investigation of Mr. Jimenez was extremely

biased. When prosecutors and police allowed Calderon to provide them evidence, that bias infected the prosecution.

The criminal justice system has so far failed Mr. Jimenez at every step. At trial, the prosecutor failed to disclose exculpatory evidence, and trial counsel unreasonably failed to present available evidence showing Mr. Jimenez's innocence. In his first postconviction proceedings, Mr. Jimenez was represented by state-provided counsel who waived an evidentiary hearing, who failed to review public records, who failed to conduct any investigation, who refused to meet with Mr. Jimenez, and whose only real interest in the case was collecting the available fees. He did not represent Mr. Jimenez in any real sense. In these circumstances, due process should require that Mr. Jimenez be allowed an opportunity to present evidence of innocence.

In the non-capital context not involving a capital defendant's statutory right to effective collateral counsel, this Court held that when a convicted defendant establishes that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner, due process requires that the convicted defendant be authorized to file a belated motion to vacate. *Steele v. Kehoe*, 747 So. 2d 931, 934 (Fla. 1999)("we

[have] made clear that 'postconviction remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States.'"). Accordingly, this Court ordered that Fla. R. Crim. Pro. 3.850 that addresses postconviction motions filed by non-capital defendants be amended to provide that an untimely motion could be filed if "the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion." Fla. R. Crim. Pro. 3.851 was not amended in a corresponding fashion. The circumstances here are in no real sense any different. Mr. Jimenez sought to have Mr. Casuso investigate and present his claims. He wanted the matters presented in this brief looked into and investigated. He wrote Mr. Casuso and asked for him to investigate these and other matters. Mr. Casuso initially promised he would visit Mr. Jimenez and consider what he had to say. Ultimately, Mr. Casuso refused and went to the circuit court to complain that Mr. Jimenez was a difficult client. He abandoned his client; the duty of loyalty was breached. He was not representing Mr. Jimenez, he was going through the motions so he could collect all of the State funds allotted to Mr. Jimenez's case and do as little as possible for Mr. Jimenez.

Recently, in *House v. Bell*, 126 S.Ct. 2064 (2006), the United States Supreme Court again considered the significance of actual innocence claims brought by capital postconviction defendants. The Supreme Court reviewed Mr. House's evidence of innocence[36] in the federal habeas context and found that he had shown that in light of the evidence presented, "any reasonable juror would have [had] reasonable doubt". Id at 2077. In the federal habeas context, meeting the actual innocence burden of proof provided Mr. House with the opportunity to pursue "habeas corpus relief based on constitutional claims that are procedurally barred under state law." Id. at 2068.

On September 17, 2006, the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team published its comprehensive report on Florida's death penalty system. See American Bar Association, **Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report**, September 17, 2006 (hereinafter ABA Report on Florida). One of the report's conclusions was that the State of Florida leads the country in death row exonerations. ABA Report on Florida at 8.

[36]Mr. House was provided an evidentiary hearing and leave to test evidence in order to demonstrate his actual innocence. *House v. Bell*, 126 S.Ct. at 2075. Mr. Jimenez has been denied such an opportunity.

However, despite this troubling statistic, Florida does not recognize actual innocence as a claim for relief. In addition, innocence, or lingering doubt is not a factor for a jury to consider in determining punishment. ABA Report on Florida at 311 ("the Florida Supreme Court has consistently rejected 'residual' or 'lingering doubt' as a non-statutory mitigating circumstance"). And, in Florida, under the current governor, actual innocence or lingering doubt, is not a factor to be considered in the clemency process. Thus, in Florida, actual innocence means nothing after a jury has rendered a guilty verdict. This predicament demonstrates the unreliability and failure of the death penalty scheme in Florida.

This Court should recognize in the circumstances presented here that Mr. Jimenez was deprived of due process as a result of the appointment of Mr. Casuso as his first registry counsel, and this Court should establish an actual innocence exception and allow Mr. Jimenez to fully present his evidence of innocence. Mr. Jimenez's convictions and death sentence are a grievous miscarriage of justice.

ARGUMENT III

MR. JIMENEZ WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR KNOWINGLY PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY

EVIDENCE, AND/OR THE FAVORABLE EVIDENCE CONSTITUTES NEWLY DISCOVERED EVIDENCE OF INNOCENCE WHICH UNDERMINES CONFIDENCE IN THE RELIABILITY OF THE TRIAL CONDUCT WITHOUT THE EVIDENCE PRESENTED.

In order to insure that a constitutionally sufficient adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. *Banks v. Dretke*, 124 S. Ct. 1256 (2004). "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 124 S. Ct. at 1263. Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 1275. This Court has held that the State has a continuing duty in postconviction proceedings to disclose exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963). *Johnson v. Butterworth*, 713 So. 2d 985, 987 (Fla. 1998); *Roberts v. Butterworth*, 668 So. 2d 580 (Fla. 1996).

A *Brady* violation is established when:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Prejudice is established where confidence in the reliability of the

conviction is undermined as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. *Cardona v. State*, 826 So.2d 968 (Fla. 2002); *Hoffman v. State*, 800 So.2d 174 (Fla. 2001); *State v. Hugins*, 788 So.2d 238 (Fla. 2001); *Rogers v. State*, 782 So.2d 373 (Fla. 2001); *State v. Gunsby*, 670 So.2d 920 (Fla. 1996); *Gorham v. State*, 597 So.2d 782 (Fla. 1992); *Roman v. State*, 528 So.2d 1169 (Fla. 1988). "In determining whether prejudice has ensued, this Court must analyze the impeachment value of the undisclosed evidence." *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004). In the *Brady* context, the United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. at 436; *Young v. State*, 739 So.2d 553, 559 (Fla. 1999). In *Lightbourne v. State*, 742 So. 238 (Fla. 1999), this Court explained the analysis to be used when evaluating a successive motion for postconviction relief and reiterated the need for a cumulative analysis:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision**.

> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995)**.

Lightbourne, 742 So. 2d at 247-248(emphasis added)(citations omitted).

A prosecutor's presentation of false misleading evidence to obtain a conviction violates due process. *Alcorta v. Texas*, 355 U.S. 28 (1957)(due process principles of the United States Constitution were violated where a prosecutor "gave the jury the false impression that [witness's] relationship with [defendant's] wife was nothing more than casual friendship"). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." *Garcia v. State*, 622 So.2d 1325, 1331 (Fla. 1993). *See Giglio v. United States*, 405 U.S. 150, 153 (1972)(the "deliberate deception of a court and jurors by the presentation of known

false evidence is incompatible with 'rudimentary demands of justice"); *Gray v. Netherland*, 518 U.S. 152, 165 (1996), quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)(due process "forbade the prosecution to engage in 'a deliberate deception of court and jury'").[37]

In cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." *United States v. Bagley*, 473 U.S. 667, 678 (1985), quoting *United States v. Agurs*, 427 U.S. 97, 102 (1976). Thus, if there is "any reasonable likelihood" that uncorrected false and/or misleading argument *affected* the verdict (as to both guilt-innocence and penalty phase), relief must issue. In other words, where the prosecution violates *Giglio* and knowingly presents either false evidence or false argument in order to secure a conviction, a reversal is ***required*** unless the error is proven harmless beyond a reasonable doubt. *Bagley*, 473 U.S. at 679 n.9.

This Court has explained, "[t]he State as beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a

[37]This Court has stated, "[t]ruth is critical in the operation of our judicial system." *Florida Bar v. Feinberg*, 760 So.2d 933, 939 (Fla. 2000); *Florida Bar v. Cox*, 794 So.2d 1278 (Fla. 2001).

reasonable doubt." *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003). The Court described this standard as a "more defense friendly standard" than the one used in connection with a Brady violation. Id.

Defense counsel also is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). When evidence was not presented at trial due to ineffective assistance of counsel, the evidence must be considered cumulatively with evidence that the jury did not hear because the prosecutor breached his constitutional obligations. *State v. Gunsby*, 670 So.2d 920 (Fla. 1996); *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004).

Though error may arise from individual instances of nondisclosure and/or deficient performance, proper constitutional analysis requires consideration of the cumulative effect of the individual nondisclosures or deficiencies in order to insure that the criminal defendant receives "a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. The proper analysis cannot be conducted when suppression of exculpatory evidence continues or when, despite due diligence, the evidence of the prejudicial effect of the nondisclosure does not surface until

later. The analysis must be conducted when all of the exculpatory evidence which the jury did not know becomes known.

Mr. Jimenez was deprived of his right to a fair trial by the prosecutor's failure to disclose exculpatory evidence, by the prosecutor's presentation of false evidence, and by trial counsel's deficient performance. The prosecutor did not disclose the repeated attempts by police to get Mr. Ali to identify Mr. Jimenez or Mr. Ali's statements that the person in the photo police showed him was not the fare he picked up on the night of the murder who was bleeding from his face. Indeed, to this day, the State has not disclosed this information. The prosecutor did not disclose the extent of Calderon's influence on the investigation and charging of Mr. Jimenez. The prosecutor did not disclose the State's machinations with Jeffrey Allen. The prosecutor failed to correct false statements that Officer Cardona identified Mr. Jimenez as a known burglar, thus focusing the investigation on him.

Defense counsel unreasonably failed to call Ms. Brandt as a witness, despite the fact that her testimony would have shown that Mr. Jimenez could not have been in Ms. Minas' apartment when the neighbors attempted to enter it. Defense counsel unreasonably failed to investigate and present evidence that it was common knowledge in the apartment building on the

night of the murder that Ms. Minas had been stabbed. Defense counsel unreasonably failed to call Officer Cardona to reiterate her deposition testimony that she did not recognize Mr. Jimenez as a known burglar on the night of the murder, that a white van was parked beside the apartment building, that she interviewed the occupants learning nothing noteworthy, and that Merriweather did not identify Mr. Jimenez as the man he saw drop from the balcony, even though Merriweather, Mr. Jimenez and Officer Cardona passed close to each other when the officer went to the elevator. Defense counsel unreasonably failed to investigate and present evidence showing that there was an explanation for the presence of Mr. Jimenez's fingerprint inside Ms. Minas' door and also failed to investigate and present evidence regarding the reliability of the fingerprint identification. Defense counsel unreasonably failed to present evidence showing that Ms. Baron's desk calendar indicated that Mr. Jimenez's statement about a "stabbing" occurred on October 9 rather than October 5.

The State's nondisclosures and trial counsel's deficient performance denied Mr. Jimenez a trial whose verdict is worthy of confidence. The State's repeated efforts to get Mr. Ali to identify Mr. Jimenez and his steadfast insistence that he did not recognize the man in the photographs is and was evidence favorable to Mr. Jimenez that was withheld from the

defense in violation of due process. Moreover, the evidence that the dispatcher received a call from "Jose" at 8:20 PM for a cab was also favorable evidence that was undisclosed to the defense. The State's conduct toward Mr. Ali and Mr. Gandero in fact discouraged them from becoming involved and appearing for depositions. The State knew that these individuals possessed information favorable to the defense and knew Mr. Jimenez could not have committed the murder. Whether the State's failure to disclose violated due process or defense's counsel failure to discover the information was deficient performance, Mr. Jimenez did not receive a constitutionally adequate adversarial testing.

The prosecutor's failure to disclose the extent of Calderon's influence on the investigation and charging of Mr. Jimenez deprived Mr. Jimenez of evidence showing that the police investigation had been co-opted by a third party. The undisclosed connection between the North Miami police and Calderon's private investigator precluded the defense from building a case that favors were being traded in order to produce more evidence against Mr. Jimenez.[38] Mr. Jimenez was deprived of the ability to impeach the State's case at trial because of the decision to withhold evidence that an agent of

[38]In fact, the State paid Sessler for his assistance "in the preparation and presentation of the trial" (2PC-R. 286).

Mr. Calderon was involved in building the case against Mr. Jimenez.[39] Calderon was pursuing a vendetta against Mr. Jimenez, and thus his "investigation" was biased against Mr. Jimenez. When the State allowed Calderon to influence their investigation, the State's investigation became tainted with Calderon's bias. Such evidence would have cast significant doubt on the reliability and competence of the State's investigation and therefore on the State's case. *Kyles*. The reliability of police investigation presupposes that those conducting the investigation do not have an interest in a particular result and are neutral and/or detached. The involvement of Calderon's staff completely defeats that premise.

Likewise, the State's failure to disclose the State's machinations with Jeffrey Allen deprived Mr. Jimenez of significant evidence showing the unreliability, incompetence and dishonesty of the State's investigation. The non-disclosure of favorable and/or exculpatory evidence regarding Jeffrey Allen precluded the defense from knowing the lengths to which the State would go to obtain a conviction. The State planted Jeffrey Allen in order to find evidence to support a weak case.

[39]Documents exist showing that the State Attorney's Office had possession of the information regarding the efforts by Calderon's people and that the prosecutors consciously decided to withhold the information from the defense.

The State's actions constitute impeachment of the tactics and techniques used in this case and impeachment of the credibility of the lead detectives who consciously misled the defense. Even though Jeffrey Allen was not called as a witness, Mr. Jimenez was prejudiced by the State's deliberate and undisclosed deception and by the State's use of Jeffrey Allen to veto defense attorneys that the State feared would provide Mr. Jimenez with a more zealous defense.

The State cannot show that its false evidence that Officer Cardona identified Mr. Jimenez as a known burglar had no effect on the outcome of the trial. The State used this subterfuge to explain its focus on Mr. Jimenez, thus concealing its dealings with Calderon. As with the State's nondisclosures regarding Calderon and Allen, the truth about Officer Cardona would have shown the unreliability and incompetence of the State's investigation.[40]

[40]Officer Cardona testified in deposition that she did not know Mr. Jimenez as a burglar. Defense counsel advised the trial judge of his desire to call Cardona as a witness, but that she had not responded to the subpoena he had served at the police department (T. 785). This occurred shortly after defense counsel had been precluded from presenting through the cross-examination of another police officer, Cardona's description of Mr. Jimenez when she saw him at the scene (T. 766-69). The prosecutor objected and explained, "the purpose they want to bring this in is because they want to bring out that the description Officer Cardona gives of the defendant when she sees him is in fact, different from the description given by the female witnesses who saw him" (T. 767). When the State rested

Ms. Brandt was not called as a witness at trial due to ineffective assistance of trial counsel. However, her statements to the police, coupled with the information from Officer Cardona and Mr. Ali, demonstrate Mr. Jimenez's actual innocence when analyzed in light of the evidence presented at trial. Mr. Jimenez could not have gotten off the elevator prior to Ms. Taranco calling out for Ms. Griminger and have committed the murder. After Ms. Taranco called out for Ms. Griminger, she and Ms. Ponce noticed the door ajar, walked towards it, and started to push it open. Then, it snapped shut and would not open. But according to Ms. Brandt, when Ms. Taranco called out for Ms. Griminger, Mr. Jimenez had already gone into his apartment, and Ms. Brandt was waiting to tell Ms. Griminger that he was back. This evidence contradicted the State's entire theory about the timing of the murder and the identity of the murderer, showing that Mr. Jimenez could not have been inside Ms. Minas' apartment when the neighbors were at Ms. Minas' door. The omission of this evidence deprived Mr. Jimenez a trial whose outcome is worthy of confidence.

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and defense counsel advised of his difficulty in producing Cardona as a witness, the judge asked the prosecution team if it could produce Cardona for testimony. One of the prosecutors responded, "I don't know. I can attempt to get hold of her" (T. 786). Cardona was not produced and did not testify.

Defense counsel's failure to investigate and present evidence that it was common knowledge in the apartment building on the night of the murder that Ms. Minas had been stabbed deprived Mr. Jimenez of evidence canceling out one-third of the State's case. Ms. Taranco has stated that it was obvious from the blood she saw that night inside Ms. Minas' apartment that Ms. Minas had been stabbed and that everyone knew that Ms. Minas had been stabbed. In her deposition, Ms. Brandt testified that when Ms. Griminger finally made it up to the third floor, she reported to Ms. Brandt that Ms. Minas had been murdered: "she was stabbed." However, the jury never knew that it was common knowledge in the apartment complex that Ms. Minas had been stabbed. Defense counsel's failure to present evidence that Ms. Baron wrote Mr. Jimenez's statement about a "stabbing" under the date for October 9 rather than October 5 also deprived Mr. Jimenez of evidence attacking this one-third of the State's case. Of course, defense counsel was handicapped in challenging the State's evidence by the State's failure to disclose instances of false and misleading testimony of the North Miami police detectives that could have been used to impeach the credibility of their testimony that Mr. Jimenez was not told that they wanted to talk to him about a stabbing. Defense counsel was also handicapped by the failure to disclose the

involvement of Calderon's private investigator and his staff of assistants who may have impersonated police while contacting Mr. Jimenez in order to get a statement from him about the stabbing.[41] Either significant exculpatory material was withheld, and/or defense counsel unreasonably failed to investigate and present this exculpatory evidence. Had the exculpatory evidence been disclosed, investigated and developed, the significance of Ms. Baron's testimony could have been completely undermined; one of the three pieces of circumstantial evidence relied upon by the State to convict Mr. Jimenez could have been shot down. All of this evidence raises substantial doubts about the State's case and is significant evidence supporting Mr. Jimenez's innocence. The omitted evidence reveals that one of the circumstances on which the State rested its case was simply not true. Either the State withheld this favorable evidence or trial counsel was ineffective in not presenting this evidence. The failure to present this evidence

[41]According to the state's evidence, the homicide happened on the Friday evening of October 2nd. Mr. Jimenez's fingerprint was identified at 3:00 a.m. on October 3rd. A warrant issued for his arrest in the early afternoon of October 3rd. And then nothing happened. The lead detectives let Mr. Jimenez remain at large until around noon on October 5th when they decided to go pick him up. This story seems at odds with logic. Supposedly, the police had identified a killer who may be in possession of disposable incriminating evidence, and yet they waited 48 hours to go get him.

must be evaluated cumulatively with the evidence withheld by the State in determining whether Mr. Jimenez received a constitutionally adequate adversarial testing.

Defense counsel failed to present Officer Cardona to reiterate her deposition testimony that she did not know Mr. Jimenez as a burglar, and to recount her investigative efforts in reference to the white van. Officer Cardona's description of her observations of Mr. Jimenez that night and the clothes he was wearing would have impeached Merriweather and the other witnesses. Officer Cardona has stated she would have testified consistent with her deposition testimony had she been called at trial. The failure to present her testimony deprived Mr. Jimenez of evidence casting substantial doubt on the State's investigation of Ms. Minas' murder. Additionally, defense counsel's failure to present Officer Cardona's testimony regarding Merriweather's failure to notify her that Mr. Jimenez was the person who dropped from the balcony would have cast substantial doubt on Merriweather's credibility. Officer Cardona's testimony was extremely significant as it impeached both Mr. Merriweather and the other police officers who claimed Mr. Jimenez became a suspect when Officer Cardona reported he was a known burglar.

Defense counsel's failure to investigate and present evidence that Mr. Jimenez's fingerprint could have been placed on Ms. Minas' door during Hurricane Andrew or on other occasions when he assisted Ms. Minas and was in her apartment deprived Mr. Jimenez of evidence countering another one-third of the State's case against him. Had counsel pursued it, evidence was available to establish that the fingerprint may have been placed there on any one of numerous occasions. Defense counsel was handicapped by the failure to disclose Calderon's private investigator's involvement in the investigation and the potential for planting or manipulating evidence. Evidence that Mr. Jimenez had previously been in Ms. Minas' apartment raises quite reasonable doubts about the significance of this one-third of the State's case. This too is significant evidence supporting Mr. Jimenez's actual innocence. The unpresented evidence must be evaluated cumulatively with the other favorable evidence not heard by the jury in determining whether Mr. Jimenez received a constitutionally adequate adversarial testing.

The defense also failed to investigate the reliability of the fingerprint identification. Supposedly, Mr. Jimenez's latent fingerprint was identified in the early morning hours of October 3, 1992. According to the State this was the basis for

its arrest warrant. Mr. Jimenez had previously advised his probation officer he would be living at his parents' house. Yet, the police made no effort to go to Mr. Jimenez's parents' house until Monday, October 5th, more than 48 hours after they supposedly had probable cause.[42] Defense counsel did not investigate whether the fingerprint identification could be impeached or whether the investigators delayed arresting Mr. Jimenez for some other reason.

Mr. Jimenez, a death row inmate, was not provided with the resources to locate and present this evidence until 2005. Mr. Ali was not located and interviewed until during the month of April, 2005. Mr. Jimenez, a death row inmate, was also deprived of the resources to interview the other witnesses after public records disclosures were reviewed and significant new favorable information was learned from those records. Louis Casuso, the collateral counsel provided in 1998, refused to obtain the public records until after the 3.851 was filed in

[42]The 48 hour gap in seeking to arrest Mr. Jimenez at a minimum demonstrates shoddy police investigation. Accepting the story at face value, the police gave Mr. Jimenez 48 hours to hide and destroy evidence linking himself to a murder. If that is true, this fact undermines the quality of the police work and demonstrates the work was shoddy. However, the undisclosed involvement of Calderon's private investigators certainly suggests that either the claimed timing of the fingerprint identification is fabricated or that the police gave Calderon's people the first crack at Mr. Jimenez.

2000. Then he did not review the records. In this action, he was not acting as Mr. Jimenez's counsel, but as a contractor with the State serving the State's interest. Since Mr. Casuso did not review the public records and did not provide them to Mr. Jimenez, no investigation could be conducted on Mr. Jimenez's behalf into the favorable information contained in those records. After Mr. Jimenez obtained new counsel, the State blocked funding for counsel in state court proceedings and successfully opposed funding for investigative services in federal proceedings. Mr. Jimenez's counsel learned on March 24, 2005, that funding for investigative services had been approved, and immediately commenced the investigation that led to the interviews of the witnesses identified in Mr. Jimenez's second Rule 3.851 motion.

Exculpatory and/or favorable evidence was either not disclosed by the State or was unreasonably not discovered by defense counsel. Had the evidence been disclosed, investigated and presented to the jury, the State's case against Mr. Jimenez would have been destroyed. Mr. Jimenez is entitled to an evidentiary hearing and a new trial.

ARGUMENT IV

MR. JIMENEZ WAS DENIED DUE PROCESS DURING HIS POSTCONVICTION PROCEEDINGS WHEN THE CIRCUIT COURT JUDGE ENGAGED IN *EX PARTE* COMMUNICATIONS WITH THE STATE.

During the proceedings in the circuit court, Mr. Jimenez moved the Honorable Diane Ward, Circuit Judge of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, to disqualify herself from presiding over the proceedings. Mr. Jimenez filed a motion pursuant to Rule 2.160 of the Florida Rules of Judicial Administration (2002), sections 38.02 and 38.10, Florida Statutes (2001), because the State and Judge Ward engaged in *ex parte* contact (2PC-R. 449-59). Judge Ward denied the motion (2PC-R. 508). This Court should reverse and remand for new proceedings before a different judge.

After a *Huff* hearing was conducted on July 27, 2005, Judge Ward took Mr. Jimenez's Rule 3.851 motion under advisement. On September 6, 2005, at approximately 4:00 PM, Mr. Jimenez's collateral counsel was contacted by Judge Ward's office inquiring about counsel's availability for a hearing regarding Mr. Jimenez's pending motion to vacate on September 9, 2005. Counsel advised Judge Ward's office that he was not available for a hearing on September 9th because he was catching a plane on the morning of September 7th and would be out-of-state until September 11, 2005. Counsel was asked about his availability for a hearing during the week of September 12th. Counsel advised that he had a hearing in Clearwater on Monday, September 12th (State v. Floyd), and a hearing in Tampa on

Wednesday, September 14th (State v. Tompkins). Counsel also indicated that he had a pleading due on September 13th (State v. Pittman) that required him to travel to Raiford to meet with his client. The representative for Judge Ward's office then inquired regarding counsel's availability the week of September 19th. Counsel advised that he was available any day that week. The representative for Judge Ward's office indicated that counsel would be called back with a new date for the hearing on Mr. Jimenez's motion to vacate.

Counsel had not received any word from Judge Ward's office when he returned to Florida on September 11, 2005. On September 12th while in Clearwater, counsel called Judge Ward's office, but he reached voice mail. Counsel left a message inquiring when the hearing on Mr. Jimenez's motion to vacate would be scheduled. Counsel had still not heard from Judge Ward's office when on September 23, 2005, he received a service copy of a Notice to Court in the federal proceedings pending on Mr. Jimenez's federal petition for habeas relief. This notice indicated that "the State trial court denied the successive motion for post conviction relief, as successive, untimely and without merit." This notice gave no indication when this order denying the motion to vacate had been entered.

Thereafter, counsel spoke with a Miami attorney, Todd Scher, who advised that he had seen Ms. Sandra Jaggard, counsel for the State in Mr. Jimenez's postconviction proceedings, on September 9, 2005, outside Judge Ward's courtroom and was advised by Ms. Jaggard that she was there on State v. Jimenez.

In the mail delivered to counsel's office on Saturday, September 24, 2005, was an envelope from Judge Ward's office. The envelope had a Pitney Bowes meter stamp reflecting that the stamp had been affixed on September 21, 2005. However, the U.S. postal service stamped the enveloped with the date "09/22/05."

The envelope contained a document entitled "Order Denying Defendant's Motion for Post-Conviction Relief Pursuant to Florida Rules of Criminal Procedure." The order was signed by Judge Ward. The date of the signature was listed as "this 9 day of September 2005 at Miami-Dade County."

According to the transcript of the *ex parte* proceedings on September 9th, the State had the opportunity to review the order before it was finalized in order to make suggested changes (2PC-R. 582). Neither Mr. Jimenez nor his counsel was provided an equal opportunity. The State was promised to have a corrected order faxed to it by the end of the day (2PC-R. 582). A copy was not sent to Mr. Jimenez's counsel until twelve days later.

Mr. Jimenez was and is entitled to full and fair Rule 3.851 proceedings, *Holland v. State*, 503 So. 2d 1250 (Fla. 1987); *Easter v. Endell*, 37 F. 3d 1343 (8th Cir. 1994), and this includes equal access to the court in order to be heard on pending matters. *Smith v. State*, 708 So. 2d 253, 255 (Fla. 1998)("We reject the State's argument that Smith's *due process* rights were not violated by the ex parte communications because he had ample opportunity to object to the substance of the proposed order.")(emphasis added).

The Code of Judicial Conduct states: "A judge should [] neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Fla. Bar Code Jud. Conduct, Canon 3 A(4). As Justice Overton once explained for this Court:

> [C]anon [3 A(4)] implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all ex parte communication except when they are expressly authorized by statutes or rules.

In re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394, 395 (Fla. 1987).

The trier of fact cannot have ex parte communications with a party. *Love v. State*, 569 So. 2d 807 (1st DCA 1990); *Rose v.*

State, 601 So. 1181 (Fla. 1992); *Rollins v. Baker*, 683 So. 2d 1138 (5th DCA 1996); *McKenzie v. Risley*, 915 F.2d 1396 (9th Cir. 1990). This prohibition of *ex parte* proceedings applies in the Rule 3.851 process. This Court has specifically denounced *ex parte* communications in the course of 3.850 proceedings:

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.
>
> * * *
>
> We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect of the appearance of the impartiality of the tribunal The impartiality of the trial judge must be beyond question.

Rose v. State, 601 So. 2d at 1183.

In circumstances nearly identical to those found here, the Florida Supreme Court found that a Rule 3.850 litigant's due process rights were violated by *ex parte* contact between the prosecutor and the judge during the pendency of the Rule 3.850 motion. *Smith v. State*, 708 So. 2d at 255. There, as here, Mr. Smith's counsel was advised by the State of *ex parte* communication with the presiding judge in connection with the preparation of an order denying Rule 3.850 relief. Mr. Smith's counsel objected to the *ex parte* contact as soon as he learned of it and moved for judicial disqualification. On appeal, this Court "conclude[d] that the 'impartiality of the tribunal' was

compromised and the ex parte communications were improper." *Smith v. State*, 708 So. 2d at 255. As a result, the matter was remanded for new proceedings before a new judge.

The aforementioned circumstances of this case are of such a nature that they are "sufficient to warrant fear on [Mr. Jimenez's] part that he would not receive a fair hearing by the assigned judge." *Suarez v. Dugger*, 527 So. 2d 191, 192 (Fla. 1988). The proper focus of this inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially." *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983); *Chastine v. Broome*, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). In capital cases, the trial judge "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." *Livingston*, 441 So. 2d at 1086.

A party may present a motion to disqualify at any point in the proceedings as long as there remains some action for the judge to take. If the motion is legally sufficient "the judge shall proceed no further." § 38.10, Fla. Stat. (1995); *see also Lake v. Edwards*, 501 So. 2d 759, 760 (Fla. 5th DCA 1987) (holding that ruling on a motion for new trial is an action

"further" to the filing of a motion to and therefore improper). Rule 2.160 of the Rules of Judicial Administration similarly provides that, "[i]f the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." Fla. R. Jud. Admin. 2.160(f).

Florida courts have repeatedly held that where a movant meets these requirements and demonstrates, on the face of the motion, a basis for relief, a judge who is presented with a motion for disqualification "**shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification**." *Suarez v. Dugger*, 527 So. 2d 191 (Fla. 1988) (emphasis added). *Livingston v. State*, 441 So. 2d 1083 (Fla. 1983); *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978); *Digeronimo v. Reasbeck*, 528 So. 2d 556 (Fla. 4th DCA 1988); *Ryon v. Reasbeck*, 525 So. 2d 1025 (Fla. 4th DCA 1988); *Fruhe v. Reasbeck*, 525 So. 2d 471 (Fla. 4th DCA 1988); *Lake v. Edwards*, 501 So. 2d 759 (Fla. 5th DCA 1987); *Davis v. Nutaro*, 510 So. 2d 304 (Fla. 4th DCA 1986); *ATS Melbourne, Inc. v. Jackson*, 473 So. 2d 280 (Fla. 5th DCA 1985); *Gieseke v. Moriarty*, 471 So. 2d 80 (Fla. 4th DCA 1985); *Management Corp. v. Grossman*, 396 So. 2d 1169 (Fla. 3rd DCA 1981). *See also Chastine v. Broome*, 629 So. 2d 293 (Fla. 4th DCA 1993).

The appearance of impropriety violates state and federal constitutional rights to due process. A fair hearing before an impartial tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel. Mickle v. Rowe*, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. *Suarez* teaches that even the **appearance** of partiality is sufficient to warrant reversal. This appearance of partiality occurred in Mr. Jimenez's case, and this Court should reverse.

CONCLUSION

In light of the foregoing arguments, Mr. Jimenez requests that this matter be remanded to the circuit court for a full and fair evidentiary hearing and for other relief as set forth in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Sandra S. Jaggard, Assistant Attorney General, Office of Attorney General, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, Florida 33131, on November __, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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