IN THE SUPREME COURT OF FLORIDA

CASE NO. 05-2373

JOSE ANTONIO JIMENEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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REPLY TO STATEMENT OF THE CASE AND FACTS

In its Answer Brief, the State engages in word play in order to create a smoke screen to hide behind. For example, the State asserts that at the *Huff* hearing in the lower court,[1] Mr. Jimenez's counsel "admitted that cab driver Anwar Ali had been interviewed by the defense prior to trial, that he had been listed as a defense witness at that time and that Mr. Ali was refusing to respond to subpoenas at the time of trial. (PCR. 543-47)" (AB at 12).[2] The State's generalized characterization of Mr. Jimenez's counsel's argument strips it of the important

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[1]When discussing this *Huff* hearing, the State includes the following sentence: "At the *Huff* hearing, Defendant failed to appear on time" (AB at 12). What possible purpose does this sentence serve? The hearing was scheduled as part of a stacked setting. Stacked settings are standard fare in Miami because traffic delays frequently cause litigants to be detained. Undersigned counsel drove from Ft. Lauderdale to Miami to attend the hearing. He was delayed in traffic. When he arrived, the court was wading through the multitude of cases on the docket to be heard. At some point, Mr. Jimenez's case was called and the *Huff* hearing was conducted. No objection was registered by the State. The matter gave rise to no issue.

So, why is the sentence in the brief? Is its purpose to subliminally suggest that the trial court was entitled to scheduled a hearing at a time that it knew that Mr. Jimenez's counsel could not present? Or that it excuses the State's participation in a hearing being conducted *ex parte*?

[2]This sentence and its use of the word "admitted" is the springboard for the State's later argument that "Defendant did know of the alleged *Brady* material regarding Mr. Ali prior to trial" (AB at 29). The State's smoke screen here is an effort to gloss over the law which this Court recognized in *Cardona v. State*, 826 So. 2d 968 (Fla. 2002). There, the defense had spoken with the witness at issue before trial. Yet, that did not relieve the State of its obligation to disclose statements that the witness made to a state attorney investigator.

features that demonstrate a violation of *Brady v. Maryland*, 373 U.S. 83 (963), and its progeny.[3]

Mr. Jimenez alleged and argued that law enforcement had repeatedly interviewed Mr. Ali and had unsuccessfully tried to get him to identify Mr. Jimenez as the fare he picked up shortly after the murder.[4] Mr. Ali's refusal to identify Mr. Jimenez was information favorable to Mr. Jimenez. Relying on well-established law, Mr. Jimenez argued the State was obligated to disclose the interviews of Mr. Ali or any documents regarding these interviews since they contained favorable evidence (2PC-R. 545). In circuit court, Mr. Jimenez specifically noted that although a Public Defender investigator had briefly interviewed Mr. Ali within ten days after Mr. Jimenez was arrested, the police and prosecutor interviews of Mr. Ali were "subsequent to"

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[3]The State never addresses or acknowledges in the entirety of its Answer Brief Mr. Jimenez's statement in his Initial Brief regarding trial counsel's knowledge of Mr. Ali:

> 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).

(Initial Brief at 5, n. 3).

[4]The State does not and cannot dispute these factual allegations made by Mr. Jimenez in his 3.851 motion on the basis of what Mr. Ali advised Mr. Jimenez's counsel in 2005.

the Public Defender investigator's interview (2PC-R. 545).[5] The information in the handwritten note of the Public Defender investigator was that the police had shown the cab driver a photograph of Jose Jimenez, but that the cab driver advised them that he was not the fare he picked up who was bleeding. When Mr. Jimenez's trial counsel tried to obtain information from the State regarding an interview with the cab driver, he was told that the cab driver had "said he recalled being in the general vicinity, but he didn't recall picking up anyone" (Depo. Diecidue at 71-72). Until Mr. Jimenez's counsel located Mr. Ali in July of 2005, Mr. Jimenez did not know about the State's repeated unsuccessful attempts to have Mr. Ali identify Mr. Jimenez, nor that these contacts with Mr. Ali caused him to not honor any of the defense subpoenas. To this day, the State has not disclosed any documents regarding law enforcement interviews of Mr. Ali.

The State's description of Mr. Jimenez's counsel's arguments regarding Mr. Ali are also misleading as to the fact that the defense listed Mr. Ali as a witness at the time of trial.[6] The State neglects to mention that although the defense listed Mr. Ali as a witness and issued trial and deposition subpoenas for

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[5]Moreover, the Public Defender was conflicted off of the case and did not represent Mr. Jimenez at trial.

[6]Mr. Jimenez alleged that Mr. Ali was listed as a witness solely on the basis of the Public Defender investigator's brief interview of Mr. Ali within ten days of the murder. Trial counsel had no contact with Mr. Ali.

him, Mr. Ali could not be located. The State itself pointed out that the subpoenas for Mr. Ali were served at the cab company, and "[t]he return said he was longer at the address" (2PC-R. 556-57). The fact that the defense tried to subpoena Mr. Ali at the time of trial adds emphasis to the fact that the State has never disclosed its interviews with Mr. Ali even though the State knew that the defense was interested locating Mr. Ali.

ARGUMENT IN REPLY

INTRODUCTION

The State's Answer Brief relies upon procedural arguments, but never addresses substantive questions regarding the validity of Mr. Jimenez's conviction and death sentence or questions regarding the State's failure to honor its own constitutional responsibilities in this case. Although the State has a continuing duty to disclose *Brady* material, *Duckett v. State*, 918 So. 2d 224, 239 (Fla. 2005), the State never addresses the fact that, to this day, it has not disclosed any materials regarding law enforcement's interviews of Anwar Ali, who has revealed that before trial, law enforcement repeatedly, but unsuccessfully, tried to get him to identify Mr. Jimenez as the fare he picked up shortly after the murder. The State also never addresses whether or not Mr. Jimenez has a colorable claim of innocence and whether or not this Court should allow an innocence claim to be presented at any time. From any reasonable perspective, the facts and

arguments presented in Mr. Jimenez's Initial Brief should raise substantial questions about Mr. Jimenez's guilt, but the State appears to be uninterested in whether the government might execute an innocent person.

ARGUMENT I

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

A. *Brady* claim.

The State argues that Mr. Jimenez's claims are procedurally barred and that Mr. Jimenez's motion did not sufficiently plead his diligence (AB at 19-20). A major error permeating the State's assertions is that its failure to recognize the difference between *Brady*, ineffective assistance of counsel, and newly discovered evidence claims, and the analysis to be applied when those claims are asserted in a second 3.851 motion.[7]

Under Rule 3.851(d)(2)(A), Fla. R. Crim. P., a defendant filing a second postconviction motion is required to allege and show that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have

[7]The State error arises from its refusal to recognize a distinction between new evidence of a *Brady* violation and newly discovered evidence of innocence. The latter was recognized as a claim cognizable in a 3.851 motion in *Jones v. State*, 591 So. 2d 911 (Fla. 1991), while the former is a *Brady* claim premised upon evidence that was unknown by the defense at the time of the initial 3.851 motion.

been ascertained by the exercise of due diligence." In *Johnson v. State*, 804 So. 2d 1218, 1221 (Fla. 2001), the defendant filed a second motion under Rule 3.851 alleging *Brady* and newly discovered evidence claims. In addressing the *Brady* allegations, this Court stated: "The time limit for filing postconviction motions in capital cases does not apply where 'the facts on which the claim is predicated were *unknown to the movant* or the movant's attorney and could not have been ascertained by the exercise of due diligence.'" *Id.* at 1221 (emphasis in original).

However, contrary to Rule 3.851 and this Court's precedents, throughout its procedural bar arguments, the State asserts that under Rule 3.851(d)(2), Fla. R. Crim. P., Mr. Jimenez is required "to allege and prove that the claim is . . . based on newly discovered evidence that could not have been discovered through an exercise of due diligence" (Answer Brief at 19; *see also id.* at 20, 21-22, 23).[8] In this formulation, the State interprets "newly discovered evidence" as that phrase is defined in *Jones v. State*, 591 So.2d 911 (Fla. 1991). In *Jones*, this Court defined "newly discovered evidence" as evidence which was "unknown by the trial court, by the party, or by counsel at the time of trial." *Id.* at 916.[9] Relying upon its interpretation of "newly

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[8]The phrase "newly discovered evidence" does not appear in Rule 3.851(d)(2)(A).

[9]The State's interpretation would mean that since the State knew of the *Brady* material at the time, which of course is the

discovered evidence," the State then presents arguments such as the following:

> [T]he [postconviction] motion contained no allegations that any of the evidence was unknown to the trial court, Defendant or his attorney and could not have been discovered through an exercise of due diligence before April 25, 2004.
>
> * * * *
>
> Instead of alleging that the evidence was unknown and unknowable through an exercise of due diligence, Defendant admitted that Mr. Ali had been interviewed by the defense prior to trial and had been listed as a witness in pretrial discovery.
>
> * * * *
>
> [T]he "allegations" address only when Mr. Ali was located and interviewed.
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> * * * *
>
> [T]his Court has affirmed the denial of a claim, finding that the evidence was not newly discovered, when the defendant had information from which he could have located a witness years earlier even though the defense claimed not to have discovered the witness until recently. . . . Since Defendant did not assert when the facts underlying his claims could have been discovered through an exercise of due diligence, the lower court properly found that the claim was not sufficiently alleged in an untimely and successive motion for post conviction relief.
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> * * * *
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> While Defendant seems to believe that alleging that his prior post conviction counsel failed to investigate and present these claims properly satisfies the showing of diligence, it does not. As previously noted, asserting ineffective assistance of counsel in failing to present

basis for a *Brady* claim, no *Brady* claim could be presented more than one year after the conviction became final.

> a claim is "logically inconsistent" with claiming the evidence is newly discovered.
>
> * * * *
>
> Since Defendant has actually been raising these claims for more than a year, the record refutes that the claims are based on newly discovered evidence.

(AB at 20, 20-21, 21, 22, 22-23, 26).

The State's formulation of the diligence standard is just wrong. The standard in Rule 3.851(d)(2)(A) for presenting a successive claim based upon new evidence is not the same as the *Jones* standard for "newly discovered evidence." Rule 3.851(d)(2)(A) applies to all kinds of claims, not simply claims of "newly discovered evidence," and does not require a showing that the evidence was previously unknowable. Rule 3.851(d)(2)(A) does not contain the words "newly discovered evidence."

Mr. Jimenez's motion presented his claim for relief and argued that new evidence demonstrated that the State failed to honor its due process obligation under *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972), and that when considering the prejudice to Mr. Jimenez, cumulative consideration must be given not only to all of the withheld information, but also to evidence that did not reach the jury due to ineffective assistance of counsel. Mr. Jimenez relied upon the decision in *Banks v. Dretke*, 540 U.S. 668, 676 (2004), as establishing that when the State withholds *Brady* information, "it is incumbent on the State to set the record straight." (2PC-R. 72). Under *Banks*, it is

reasonable for a criminal defendant to rely upon the State to honor its due process obligation. As stated in *Banks*, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696. Relying on *Banks*, Mr. Jimenez argued in his motion that it was reasonable for him to expect the State to honor its obligation.[10] The motion alleged that the evidence recently obtained from Mr. Ali was not available to trial counsel: "[Mr. Ali] did not appear [for deposition] and could not be found at the time of trial" (2PC-R. 74). The motion also alleged that the State did not disclose its interviews of Mr. Ali at the time of trial: "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"; "Trial counsel was not given any information from the State regarding law enforcement's interview of Mr. Ali or his dispatcher, Mr. Gandero" (2PC-R. 75-76). Mr. Jimenez further argued that when he learned from Mr. Ali in April of 2005 that the State had withheld favorable evidence he promptly filed his motion. Accordingly,

[10]When trial counsel sought information regarding the police interview referenced in the public defender investigator's note, he was told that any report of the interview had either never been written or was lost. The officer claiming to have interviewed the cab driver testified that his recollection was that the cab driver "said he recalled being in the general vicinity, but he didn't recall picking up anyone" (Diecidue Depo. at 71-72).

these facts demonstrated that he had exercised due diligence.

The State argues that Mr. Jimenez may not rely on *Banks v. Dretke* because it is not new constitutional law (AB at 27). This argument is a *non sequitur*. It is clear that *Banks* is not new law and that the law enunciated in *Banks* has always been binding on the State. But of course that is why it was reasonable for Mr. Jimenez to rely upon the State to fulfill its constitutional obligation and disclose favorable evidence in its possession.[11] It was in the April, 2005, interview of Mr. Ali that Mr. Jimenez learned that the State had withheld favorable information. And yet still as of today, the State has not disclosed the fact that law enforcement interviewed Mr. Ali numerous times, attempting to get Mr. Ali to identify Mr. Jimenez as the fare he picked up who was bleeding from his face, but that Mr. Ali advised law enforcement that Mr. Jimenez was not the man that he picked up.

The State attempts to avoid its responsibilities under *Brady* and *Banks* by arguing that "[t]he language that Defendant relies upon is contained in a discussion of Texas' argument regarding cause after the Court had already found cause" (AB at 28). This is a nonsensical argument.

First, the State makes no effort to address what "cause" is. Within the meaning of *Banks*, "cause" is a legal term of art used

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[11]This is particularly so given testimony provided during Officer Diecidue's deposition that the cab driver said that "he didn't recall picking up anyone."

in the federal habeas context. As explained in *Banks*, when a federal habeas petitioner fails to present his constitutional claim in state court, the federal courts will entertain the merits of the claim only if the petitioner demonstrated "cause and prejudice." As explained in *Banks* "a petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence". *Banks*, 540 U.S. at 691. This is like saying in the 3.851 context that the defendant was diligent if his failure to learn of the *Brady* claim was due to the State's failure to disclose.

Mr. Jimenez's Initial Brief quoted two passages from *Banks*. The first quoted passage states, "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*, 540 U.S. at 675-76. This passage appears at the very beginning of the opinion, in which the Court summarizes its holding. The second quoted passage states, "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696. The Court's statement is a response to the government's argument that the question of cause should be resolved based upon the defendant's conduct rather than upon the government's conduct. *Id.* at 695-

96. The Court is thus restating its holding that the government is required to "set the record straight" when the government conceals exculpatory evidence.

The State also argues that Mr. Jimenez is mistaken in relying upon *Banks* because the Supreme Court found "cause" based upon three factors and, according to the State, Mr. Jimenez is arguing that "he only needs to satisfy part (a) of the reasons the Court found cause" in *Banks* (AB at 28). First, the Supreme Court in *Banks* specifically said it was not deciding whether a habeas petitioner established "cause" by showing only one or two of the three factors were present. Second, the three factors had been articulated in a previous case and were stated in terms that related to the federal habeas context.[12] Moreover, when essential core of the factors are translated from the federal habeas context to the 3.851 context, all three of the factors in *Banks* are present here.

These three factors are: 1) the State withheld favorable evidence; 2) the defense expressed relied upon the State to

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[12]The three factors were articulated by the Supreme Court in *Strickler v. Greene*, 527 U.S. 263, 289 (1999). They were articulated in terms specific to the facts present there and in the federal habeas context. These factors are inherently case-specific and are not a list of requirements comparable to the elements of a *Brady* claim. This is probably why the Supreme Court stated that it "need not decide" whether one or two factors would be sufficient to establish cause. *Banks*, 540 U.S. at 693 n.13. Such case-specific matters require an evidentiary hearing for their resolution.

fulfill its obligation; 3) and the State confirmed that it was aware of the defense' reliance on it to disclose the favorable evidence. The State concedes that the first factor is present. As to the other two factors, the State ignores the fact that trial counsel sought to discover from the State what Mr. Ali had told law enforcement when he was interviewed. In responding to defense counsel's questioning, the police officer claiming to have conducted the interview provided an account of the statement that indicated Mr. Ali said nothing favorable to Mr. Jimenez. The State was aware of this representation and did not disclose that Mr. Ali said anything favorable. Moreover at the beginning of the postconviction process, the State claimed to have turned over to the records repository (through which Mr. Jimenez had access) what was purported to be its entire file. Thus, the representation was made by the State that it had an open file.

Mr. Jimenez alleged in his motion that the State withheld exculpatory evidence at trial, that the State did not disclose the favorable evidence in the public records provided to the records repository, and that the State continues to withhold exculpatory evidence. Nothing was provided in the trial discovery or in the public records, *i.e.* its open file, regarding the repeated interviews of Mr. Ali. Thus, Mr. Jimenez's case is indistinguishable from *Banks*.

In an additional attempt to avoid its responsibilities under

Brady and *Banks*, the State argues that Mr. Jimenez "kn[e]w of the alleged *Brady* material regarding Mr. Ali prior to trial" (AB at 29-30).[13] Mr. Jimenez's specific *Brady* claim regarding Mr. Ali is that the State did not disclose that the police and prosecutor 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. This evidence has not been disclosed to this day. The State does not address this specific claim, but argues that Mr. Jimenez knew of "the alleged *Brady* material" because: the State listed Mr. Ali as a witness; a police report disclosed that the cab company had received a call from a person named Jose and dispatched a cab, but that no one named Jose was picked up; the defense interviewed Mr. Ali before trial. None of these facts addresses the police interviews with Mr. Ali and their unsuccessful attempts to get him to identify Mr. Jimenez. The defense interview of Mr. Ali occurred shortly after Mr. Jimenez's arrest, before the police repeatedly spoke with Mr. Ali, and thus did not reveal the police interviews or attempts to get Mr. Ali to identify Mr. Jimenez. The defense later attempted to subpoena Mr. Ali, who could not be located.

Even in addressing the merits of Mr. Jimenez's claim

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[13]The State ignores the fact that Officer Diecidue claimed he interviewed the cab driver and that the cab driver did not remember picking anyone up.

regarding Mr. Ali, the State does not even mention the fact that the police and prosecutor repeatedly interviewed Mr. Ali and attempted to get him to identify Mr. Jimenez (AB at 30-31). The State argues only that the fact that Mr. Ali picked up someone "in a 16 block area of Miami at some point on the night of a murder" was not exculpatory or material (*Id.*). This is not Mr. Jimenez's *Brady* claim, which the State never addresses.

B. Other Constitutional Error to be Considered Cumulatively and Which Cumulatively Demonstrates Actual Innocence.

The motion alleged that prior postconviction counsel did not fulfill his duties to investigate Mr. Jimenez's claims:

> 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.

(2PC-R. 91). Regarding Mr. Jimenez's allegations that prior postconviction counsel did not fulfull his responsibilities, the State argues, "However, as this Court noted in *Sireci v. State*, 773 So. 2d 34, 40 n.11 (Fla. 2000), allegations of ineffective assistance of counsel are 'logically inconsistent' with allegations of newly discovered evidence" (Answer Brief at 20). As explained above, the State's argument is based upon its reliance upon the *Jones* definition of "newly discovered

evidence," not upon Rule 3.851.

Mr. Jimenez's motion alleged that his current postconviction counsel did not locate Mr. Ali until counsel was provided with funds to conduct investigation:

> After Mr. Jimenez obtain[ed] 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). Mr. Jimenez's motion thoroughly alleged his diligence, and the lower court thus erred in denying an evidentiary hearing on diligence as well as on the substance of Mr. Jimenez's claims.

In support of its argument that "allegations of ineffective assistance of postconviction counsel do not provide a basis for allowing the presentation of the claim in an untimely and successive motion for post conviction relief," the State cites *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002) (AB at 23). However, *Vining* does not discuss allegations that postconviction counsel was ineffective, but simply states the requirements of Rule 3.851. As explained above, Mr. Jimenez has fulfilled those requirements.

The State also cites *Brown v. State*. 894 So. 2d 137, 154 & n.11 (Fla. 2004), in support of this argument (AB at 24). First,

footnote 11 of *Brown* simply states that the Court has not extended the holding of *Williams v. State*, 777 So. 2d 947 (Fla. 2000), beyond its facts. *Brown* does further state, "to the extent that new counsel's motion argued that former [postconviction] counsel's ineffectiveness led to deficiencies in the evidentiary hearing, the argument is meritless." 894 So. 2d at 154, citing *Spencer v. State*, 842 So. 2d 52, 72 (Fla. 2003); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). The circumstances present in Mr. Jimenez's case are clearly distinguishable from those present in *Brown*, *Spencer* and *Lambrix*. In *Brown*, the defendant's second postconviction attorney moved to reopen an evidentiary hearing on the basis that "the new counsel 'may find additional evidence' that might be relevant" and that "Mr. Brown may wish to offer testimony." 894 So. 2d at 153. This Court held that the trial court did not abuse its discretion in denying this motion because Brown had previously waived his right to testify at the evidentiary hearing and because the allegation that new counsel "may find additional evidence" was "facially insufficient to support the motion." *Id.* at 153-54. In *Spencer*, the appellant alleged generally that the rule prohibiting his postconviction counsel from contacting members of his trial jury impeded his ability to investigate postconviction claims and thus deprived him of the adequate assistance of postconviction counsel. 842 So. 2d at 71-72. In *Lambrix*, the

appellant argued that his prior collateral counsel was ineffective in failing to appeal the trial court's denial of the appellant's motion to represent himself. 698 So. 2d at 248.

In contrast to these cases, Mr. Jimenez never waived his right to present evidence and has made specific and substantial factual allegations supporting his claims. The specific factual allegations in Mr. Jimenez's 3.851 motion present circumstances significantly different from *Brown*, *Spencer* and *Lambrix*, as well as the other cases the State cites (AB at 24). Mr. Jimenez has alleged facts which, if true, show his entitlement to relief. Mr. Jimenez is asking only that the Court allow his substantial claims supported by specific factual allegations to be heard and evaluated at an evidentiary hearing.

Further, the State never acknowledges its own complicity in preventing Mr. Jimenez's claims from being presented earlier. For example, the State has never yet disclosed that the police and prosecutor 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. The State did not disclose at trial that it possessed copies of the reports prepared by Calderon's investigator, Sessler, although the State was present when the defense deposed Sessler and asked for copies of his reports. Sessler declined to provide the

reports, claiming privilege, and the State concurred with the privilege claim.[14]

The State argues that *Coleman v. Thompson*, 501 U.S. 722 (1991), supports its position that ineffective assistance of postconviction counsel is not a basis for any kind of relief (AB at 24). According to the State, Mr. Jimenez is arguing that when Casuso became ineffective, he "ceased to be an agent of the defendant and became an agent of the state," an argument rejected in *Coleman*. This is not Mr. Jimenez's argument. Mr. Jimenez's argument is that Casuso always was an agent of the state because the state was obligated to provide Mr. Jimenez with postconviction counsel who provided "effective legal representation in all collateral relief proceedings." *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988). In contrast, in *Coleman*, the State of Virginia "ha[d] no responsibility to ensure that the petitioner was represented by competent counsel." 501 U.S. at 754. Thus, the Supreme Court concluded that the merits of Coleman's claim would not be heard "[b]ecause Coleman had no right to counsel to pursue his appeal in state habeas." *Id.* at 757.

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[14]"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). 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.

Mr. Casuso's failures are not Mr. Jimenez's fault, and in the circumstances presented here, it would be a gross miscarriage of justice to allow Mr. Casuso's failures to prevent Mr. Jimenez's claims from being heard. As is detailed in his Initial Brief, Mr. Jimenez attempted to compel Mr. Casuso to fulfill his duties, but Mr. Jimenez's efforts were rebuffed by Mr. Casuso and by the courts. Mr. Jimenez wanted his case investigated and his claims presented, but he had no way of doing that on his own from death row.

The State disputes Mr. Jimenez's assertion that he lacked the funds to investigate his claims until the federal district court approved the funding for investigative services (AB at 26-27). The State argues, "any lack of funding was due to Defendant [sic] lack of diligence in making motions for costs and setting motions for attorney's fees for hearing" (AB at 27). First, under the relevant statute, Mr. Jimenez was not required to set his motions for attorney fees for hearing. Section 27.711(13), Fla. Stat., provides in pertinent part:

> Prior to the filing of a motion for order approving payment of attorney's fees, costs, or related expenses, the assigned counsel shall deliver a copy of his intended billing, together with supporting affidavits and all other necessary documentation, to the Chief Financial Officer's named contract manager. The contract manager shall have 10 business days from receipt to review the billings, affidavit, and documentation for completeness and compliance with contractual and statutory requirements. If the contract manager objects to any portion of the proposed billing, the objection and reasons therefor shall be

> communicated to the assigned counsel. The assigned counsel may thereafter file his or her motion for order approving payment of attorney's fees, costs, or related expenses together with supporting affidavits and all other necessary documentation. The motion must specify whether the Chief Financial Officer's contract manager objects to any portion of the billing or the sufficiency of documentation and, if so, the reasons therefor. A copy of the motion and attachments shall be served on the Chief Financial Officer's contract manager, who shall have standing to file pleadings and appear before the court to contest any motion for order approving payment.

Mr. Jimenez's present postconviction counsel complied with the procedure set forth in this statute.

Further, the record is contrary to the State's argument that "the record does not reflect that a single motion for costs was even made in state court between the time that Defendant's present counsel was appointed and June 16, 2006" (AB at 26) (footnote omitted). Mr. Jimenez's present postconviction counsel, Martin McClain, was appointed by the circuit court under §27.710, Fla. Stat., on June 12, 2002. Mr. McClain signed a contract with the Department of Financial Services, in compliance with §27.710, Fla. Stat. Mr. McClain filed a habeas corpus petition in Mr. Jimenez's case in this Court on December 11, 2002. After the State's response and Mr. Jimenez's reply, the Court denied the petition on June 10, 2003, and denied rehearing on November 14, 2003.

On January 28, 2004, Mr. McClain submitted a letter to the Department of Financial Services (DFS) detailing the time he had

spent working on Mr. Jimenez's habeas corpus proceeding in this Court and seeking $7,150.00 in attorney fees (*See Jimenez v. State*, Fla. Sup. Ct. Case No. SC06-16, Appendix 1, Attachment A).[15] On February 17, 2004, DFS approved $2500 in fees, but refused to authorize the remainder of the fees (*See Jimenez v. State*, Fla. Sup. Ct. Case No. SC06-16, Appendix 1, Attachment B). On April 5, 2004, counsel filed a motion for reimbursement for $7150.00 in the circuit court (*See Jimenez v. State*, Fla. Sup. Ct. Case No. SC06-16, Appendix 1, Attachment C). DFS never filed a response, and the circuit court never ruled on the motion.

On April 28, 2005, Mr. McClain filed a motion under Rule 3.851, Fla. R. Crim. P., in Mr. Jimenez's case in the circuit court. On May 26, 2004, Mr. McClain filed a second habeas corpus petition in Mr. Jimenez's case in this Court. After the State's response and Mr. Jimenez's reply, the Court denied the petition on March 18, 2005, and denied rehearing on May 26, 2005.

On June 7, 2005, Mr. McClain wrote to DFS seeking approval of his previous request for reimbursement and supplementing that request to include his work on the Rule 3.851 motion filed April 28, 2005, as well as his work on the second habeas corpus

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[15]In *Jimenez v. State*, Fla. Sup. Ct. Case No. SC06-16, Mr. Jimenez requested this Court to order the circuit court to rule on Mr. Jimenez's motions for attorney fees. The documents appended to the petition in that case should be, but are not, in the record on appeal of Mr. Jimenez's present Rule 3.851 appeal. Thus, Mr. Jimenez refers to the appendices to his petition in Case Number SC06-16.

petition filed with this Court. The June 7th letter sought reimbursement for a total amount of $16,800.00 (*See Jimenez v. State*, Fla. Sup. Ct. Case No. SC06-16, Appendix 1, Attachment E). On June 23, 2005, DFS sent Mr. McClain a letter requesting that the bill be resubmitted due to a typographical error (*See Jimenez v. State*, Fla. Sup. Ct. Case No. SC06-16, Appendix 1, Attachment F). On July 7, 2005, Mr. McClain resubmitted his letter seeking reimbursement for $16,800.00 (*See Jimenez v. State*, Fla. Sup. Ct. Case No. SC06-16, Appendix 1, Attachment G).

On July 25, 2005, Mr. McClain received a voice mail message from William J. Thurber of DFS requesting a return call regarding the $16,800.00 bill. Mr. McClain returned the call that afternoon, reached Mr. Thurber's voice mail, and left a message. For over a month, Mr. McClain left several voice mail messages for Mr. Thurber, but did not receive a return call (*See Jimenez v. State*, Fla. Sup. Ct. Case No. SC06-16, Petition at 9-10).

The circuit court hearing Mr. Jimenez's Rule 3.851 motion held a case management conference on July 17, 2005. After an *ex parte* proceeding on September 9, 2005, for which Mr. Jimenez's counsel was not noticed, the circuit court denied the Rule 3.851 motion on September 15, 2005. In that order, the court rejected Mr. Jimenez's complaint that his registry counsel was not being adequately funded, saying, "The record supports that funding was provided to investigate his claims in his first post conviction

motion and the current successive motion" (3PC-R. 442).

On October 3, 2005, Mr. McClain served a second motion for reimbursement of attorney fees (3PC-R. 460-64). As of that date, Mr. Thurber had not returned any of Mr. McClain's phone calls, and Mr. McClain had not received any correspondence from Mr. Thurber regarding Mr. McClain's July 7th letter billing for his representation of Mr. Jimenez. No response was filed to the motion for reimbursement, and the circuit court did not rule on the motion. On December 15, 2005, Mr. Jimenez filed a notice of appeal from the denial of his Rule 3.851 motion.

This summary of the record refutes the State's argument that "the record does not reflect that a single motion for costs was even made in state court between the time that Defendant's present counsel was appointed and June 16, 2006" (AB at 26) (footnote omitted). Counsel diligently pursued reimbursement, but was not provided the resources to investigate possible claims until the federal district court approved investigative costs.

The State argues that the circuit court properly found Mr. Jimenez's allegations regarding Ms. Brandt procedurally barred (AB at 32). The State's argument does not address the facts that Mr. Casuso waived an evidentiary hearing on this claim, did not even tell the court Ms. Brandt's name, and did not provide the court with Ms. Brandt's deposition (1PC-R. 72, 136). The State also does not address the fact that Mr. Casuso did not review any

public records before or after he filed Mr. Jimenez's first 3.851 motion. Mr. Casuso was unaware of a police report written by Det. Ojeda, who interviewed Anna Brandt on October 9, 1992, one week after the murder. At that time, Ms. Brandt 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). Contrary to the trial court's ruling on the first 3.851 motion, this report indicates that Ms. Brandt saw Mr. Jimenez less than five minutes before Ms. Griminger started up to the third floor, which was before someone inside Ms. Minas' apartment slammed her front door in the neighbors' faces. Since no evidentiary hearing was granted, Mr. Jimenez has not been allowed to present this evidence.

The circuit court's ruling on Mr. Jimenez's first Rule 3.851 motion was made without an evidentiary hearing, without hearing from Ms. Brandt, and as a result is highly speculative. For example, the State relies upon the following statement in the order on the first Rule 3.851 motion: "Had M[s]. Brandt

testified, we would have known that after killing Ms. Minus [sic], the Defendant dropped of the balcony, to an elevator to the third floor, went into his apartment where he could have cleaned himself off, change [sic] clothes, hidden the murder weapon, composed himself and then presented himself to the ladies to find out what they may have learned about his deeds before making a hasty exit" (AB at 33, quoting PCR3. 437-38). This is wholly speculation, based upon no facts. Ms. Brandt saw Mr. Jimenez before and after he went into his apartment, where he stayed only briefly. Since no evidentiary hearing has been held, no one has asked Ms. Brandt questions such as whether Mr. Jimenez was carrying a murder weapon when he entered the apartment, whether Mr. Jimenez had blood on his clothes or person before he entered his apartment, or whether Mr. Jimenez was wearing different clothes when he came out of his apartment. Although the State argues that the lack of an evidentiary hearing does not affect the "validity" of the ruling on the first Rule 3.851 motion (AB at 37-38), the speculation in that ruling demonstrates the need for an evidentiary hearing.

Contrary to the ruling on the first Rule 3.851 motion, on which the State relies (AB at 33-36), Ms. Brandt's testimony would be consistent with Mr. Jimenez's innocence and would show that Mr. Jimenez could not have been in Ms. Minas's apartment committing a murder at the same time he was seen in the parking

lot and on the third floor of the apartment building. Indeed, the State's own summary of the evidence its believes supports the circuit court's ruling on the first Rule 3.851 motion demonstrates it was impossible for Mr. Jimenez to have been in Ms. Minas's apartment when the murder was being committed:

> Ms. Brandt did testify during deposition that Ms. Griminger had come to the third floor been called [sic] by Ms. Taranco, left to see Ms. Taranco and while Ms. Griminger was gone the second time, Ms. Brandt saw Defendant exit the elevator on the third floor, go to his apartment briefly and then leave again. (PCR. 78) Ms. Brandt was unable to provide a time when this sequence of events occurred. *Id.* Ms. Brandt stated that she heard voices coming from the second floor before Defendant came up to the third floor on the elevator. (PCR. 81-82, 85)

(AB at 37). An evidentiary hearing is required.

The State argues that the allegation regarding the fact that it was common knowledge that Ms. Minas had been stabbed is procedurally barred because that fact was available earlier in Ms. Brandt's deposition and from Ms. Taranco (AB at 38). The State's argument ignores the facts that Mr. Casuso waived an evidentiary hearing regarding Ms. Brandt and conducted no investigation which might have turned up Ms. Taranco's testimony. Mr. Jimenez cannot be held responsible for Mr. Casuso's failures.

The State's argument that the record refutes the allegation that it was common knowledge that Ms. Minas had been stabbed demonstrates the need for an evidentiary hearing (AB at 38-39). The State summarizes its view of the trial testimony and of Ms.

Brandt's deposition (*Id.*). However, the State's summary does not address the allegations presented in Mr. Jimenez's Rule 3.851 motion. Mr. Jimenez alleged that 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 State's contrary version of the facts demonstrates the need for an evidentiary hearing.

The State's argument regarding Mr. Jimenez's allegations that an innocent explanation exists for the presence of his fingerprint inside Ms. Minas' apartment door again confuses the *Jones* standard with the requirements of Rule 3.851 (AB at 39-40). Mr. Jimenez's claim is that trial counsel was ineffective in failing to investigate any explanation for the presence of Mr. Jimenez's allegation. To meet the requirements of Rule 3.851, Mr. Jimenez further alleged that the failure to present this claim earlier is entirely attributable to Mr. Casuso's failure to provide any semblance of reasonable representation.

In contesting the merits of Mr. Jimenez's claim regarding the fingerprint (AB at 40-41), the State ignores the fact that

the fingerprint was one-third of the State's case against Mr. Jimenez. The State also relies upon the testimony of Mr. Merriweather and Ms. Baron, without acknowledging the serious questions Mr. Jimenez's allegations raise about that testimony. The State's arguments demonstrate the need for a cumulative analysis of all the trial and postconviction evidence, an analysis which the lower court erroneously failed to conduct.

The State's argument regarding Mr. Jimenez's allegation that trial counsel was ineffective in failing to call Officer Cardona again confuses the *Jones* standard with the requirements of Rule 3.851 (AB at 41-42). Mr. Jimenez's claim is that trial counsel was ineffective in failing to call Officer Cardona to testify regarding the presence of a white van outside the apartment building and regarding the fact that she did not recognize Mr. Jimenez as a known burglar. To meet the requirements of Rule 3.851, Mr. Jimenez further alleged that the failure to present this claim earlier is entirely attributable to Mr. Casuso's failure to provide any semblance of reasonable representation.

As to the merits of the issue regarding the van, the State presents the preposterous argument that Officer Cardona's testimony about the van would not have been admissible (AB at 42-43). "All relevant evidence is admissible, except as provided by law." §90.402, Fla. Stat. Evidence is relevant if it tends to prove or disprove a material fact. §90.401, Fla. Stat. Although

Mr. Merriweather denied having seen a van, a police officer who had interviewed Mr. Merriweather 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). The presence of the van was clearly relevant and therefore admissible. Indeed, the State's own argument demonstrates that evidence regarding the presence of the van was admissible, because some such evidence was admitted (AB at 43).

The State misunderstands Mr. Jimenez's allegations that Officer Cardona could have testified that Mr. Merriweather did not tell her Mr. Jimenez was the person he saw drop from the balcony and that she could have testified that she did not recognize Mr. Jimenez as a known burglar (AB at 43-45). Regarding Mr. Merriweather not speaking to Officer Cardona, the State misunderstands Mr. Jimenez's allegation to mean that Officer Cardona would have impeached Mr. Merriweather on the question of whether he spoke to the police (AB at 44). That is not the point of Mr. Jimenez's allegation. Mr. Jimenez alleged that when Officer Cardona finished interviewing the occupants of the white van, she went to the elevator to go to the second floor. Mr. Jimenez was exiting the elevator. At the same time, Officer Cardona also saw Mr. Merriweather cleaning the walkway. Although Mr. Jimenez was exiting the nearby elevator, Mr. Merriweather did not say anything like "I saw that man dropping

from the balcony." Officer Cardona's testimony on this issue was clearly relevant to Mr. Merriweather's trial identification of Mr. Jimenez and thus was admissible.

The State argues that Mr. Jimenez's allegations regarding the State's nondisclosure of the involvement of Mr. Calderon and his investigator, Mr. Sessler, in the investigation is procedurally barred because Mr. Jimenez knew of evidence regarding this issue before his first Rule 3.851 motion was filed (AB at 46-47). The State's argument ignores the fact that Mr. Casuso conducted no investigation of Mr. Jimenez's case and never reviewed any public records. Mr. Casuso's negligence cannot foreclose Mr. Jimenez's attempts to present his claims.

As to the merits, the State argues that evidence regarding Mr. Calderon's and Mr. Sessler's involvement would not have been admissible because this Court has held that a defendant may not attempt to impeach the professionalism of investigators (AB at 47, citing *Rose v. State*, 472 So. 2d 1155, 1157-58 (Fla. 1985)). However, Mr. Jimenez's allegations are not a generalized attack on the police investigators' level of professionalism, but raise specific facts regarding what the police did during the investigation and who they relied upon for information. This is proper impeachment. *Kyles v. Whitley*, 514 U.S. 419, 445-49 (1995). Contrary to the State's argument (AB at 47-48), such impeachment is material. *Id.*

The State argues that presentation at trial of the evidence regarding Calderon and Sessler would have "opened the door to information about Defendant's commission of the Debas murder" (AB at 48 & n.12). However, at the time of the capital trial, Mr. Jimenez had not entered a plea in the Debas case. Further, the evidence would have shown that Mr. Calderon was pursuing a vendetta against Mr. Jimenez because Ms. Debas was Mr. Calderon's girlfriend and would have shown the lengths to which Mr. Calderon went against Mr. Jimenez.

The State argues that Mr. Jimenez's allegation regarding trial counsel's failure to present Ms. Baron's desk calendar is procedurally barred and that Mr. Jimenez "offered no explanation of why this claim could not have been pursued earlier" (AB at 49). The State's argument ignores Mr. Jimenez's allegations that Mr. Casuso conducted no investigation of Mr. Jimenez's case and never reviewed any public records. Mr. Casuso's negligence cannot foreclose Mr. Jimenez's attempts to present his claims.

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.

Although the State asserts that Mr. Jimenez did not raise this claim in the lower court (AB at 55), he most certainly did, repeatedly asserting that he was factually innocent (*See* 2PC-R.

72, 78, 81). However, the State's procedural argument is neither here nor there because Mr. Jimenez is requesting that this Court recognize factual innocence as a claim properly pursued *at any time* during postconviction proceedings.

The State argues that the revisions to Rule 3.850 as explained in *Steele v. Kehoe*, 747 So. 2d 931, 934 (Fla. 1999), *do* apply to capital defendants proceeding under Rule 3.851 and that capital defendants may file a postconviction motion beyond the one-year time limit "if their failure to file a motion on time was due to neglect of counsel" (AB at 55-57). Thus, the State appears at first to agree that Mr. Jimenez may raise claims which were not raised previously due to Mr. Casuso's neglect.

But the State takes back that agreement, arguing that despite the negligence provision added to Rule 3.851, Mr. Jimenez still cannot raise his claims because the negligence amendment to Rule 3.851 does not "authorize the filing of successive motions" (AB at 57). Mr. Jimenez is in exactly the same position he would have been in had Mr. Casuso never filed a Rule 3.851 motion, but the State nevertheless insists that he still cannot raise his claims (AB at 57-58).

The State presents at length its disagreement with Mr. Jimenez's reliance upon *House v. Bell*, 126 S.Ct. 2064 (2006), and with Mr. Jimenez's evidence of actual innocence (AB at 58-61). Suffice it to say that the facts in separate cases differ, and

the facts presented by Mr. Jimenez at least deserve the opportunity to be aired and analyzed at an evidentiary hearing.

The State flatly asserts that Ms. Brandt's deposition "shows that she placed Defendant on the third floor after Ms. Minas was attacked and not during that attack" (AB at 61). The State does not address the facts presented in Mr. Jimenez's Initial Brief showing that the State's is wrong. At the least, the State's disputes regarding the facts require an evidentiary hearing where Ms. Brandt can testify before a court.

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.

The State argues that the motion to disqualify was not timely filed because Mr. Jimenez "knew of the alleged ex parte contact between the State and the Court on September 23, 2005" (AB at 63).[16] The only thing that Mr. Jimenez's counsel learned on September 23, 2005, was that the circuit court had entered an order denying relief, not that ex parte contact had occurred. On that date, counsel received a service copy of a Notice to Court filed in the federal proceedings pending on Mr. Jimenez's case. This notice indicated that the Rule 3.851 motion had been denied,

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[16]The State should be estopped from making this timeliness argument by the fact it was at an *ex parte* proceeding on September 9th and did not advise Mr. Jimenez's counsel.

but did not state when the order denying relief had been entered. Counsel only later learned from another attorney that Ms. Jaggard had appeared in the circuit court on Mr. Jimenez's case on September 9, 2005. The motion to disqualify was timely filed.

The State contends it had no input into the circuit court's order denying Rule 3.851 relief and that its contact with the circuit court concerned only "administrative matters" (AB at 63-65). First, the law is that the factual assertions in the motion to disqualify are accepted as true. At the time the motion was written, the transcript of the hearing did not exist. The issue is whether the allegations in the motion required the trial court to grant the motion.

Moreover, the State's attempt to dispute the factual allegations set forth in the motion fail. The *ex parte* contact involved the content of the order, with the State informing the court that there had been no evidentiary hearing, and the court stating the order would be changed. And in fact, the language of the order was changed.

CONCLUSION

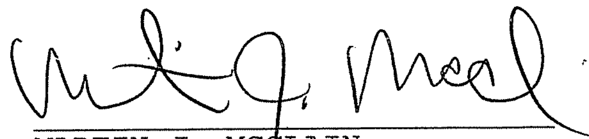
In light of the foregoing arguments and the arguments in his initial brief, Mr. Jimenez requests that this matter be remanded to the circuit court for a full and fair evidentiary hearing and for other relief as set forth in his briefs.

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 September 28, 2007.

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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September 28, 2007

Thomas Hall, Clerk
Florida Supreme Court
500 South Duval Street
Tallahassee, FL 32399

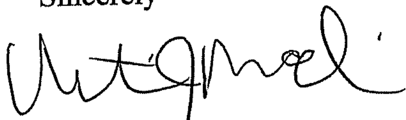
RE: Jimenez v. State, Case No. SC05-2373

Dear Sir:

Enclosed for immediate filing in the case identified above, please find an original and seven copies of Mr. Jimenez's Reply Brief.

If you have any questions, please do not hesitate to contact me.

Sincerely



Martin J. McClain

cc: Sandra Jaggard, Assistant Attorney General