IN THE SUPREME COURT OF FLORIDA

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| KRISHNA MAHARAJ,<br><br>Appellant,<br><br>v.<br><br>STATE OF FLORIDA,<br><br>Appellee. | ) | No. 91,854 |

# BRIEF OF APPELLANT, KRISHNA MAHARAJ, ON APPEAL

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## Certificate of Type Style and Font

It is hereby certified that the text of this brief is printed in Abadi MT Conde 14 point font, proportional spaced, in compliance with this Court's rules.

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## BRIEF ON APPEAL

COMES NOW, KRISHNA MAHARAJ, and respectfully files his appeal from the denial of his *Fla. R. Crim. Pro. § 3.850* petition challenging his convictions in this case:

## STATEMENT OF JURISDICTION

This is a capital case in which the death penalty was imposed. This Court has jurisdiction pursuant to *Fla. Const. Art. V, §3(b)(1)*.

## STATEMENT OF THE CASE

Mr. Maharaj was indicted for two counts of first degree murder and related offenses. (Tr. 1-5a)[1] He was charged with the deaths of Derrick and Duane Moo Young in the Dupont Plaza Hotel on October 16, 1986. On October 19, 1987, the jury rendered verdicts of guilty as to two counts of first degree murder, two counts of kidnaping with a firearm, and unlawful possession of a firearm while engaged in a criminal offense. (Tr. 4184-87) The jury recommended life imprisonment for the murder of Derrick Moo Young and the death penalty, by a vote of 7 to 5, for the murder of Duane Moo Young. (Tr. 4498-99) On December 1, 1987, the trial court imposed the death penalty for

[1] The record in this case is cited as follows: The record on direct appeal is cited "(Tr. ___)"; the 1213 page transcript of the 3.850 hearing held below is cited "(3.850 Tr. ___)"; the 6834 pages of clerk's papers from the hearing are cited "(3.850 Clerk Tr. ___)".

the murder of Duane Moo Young, three consecutive terms of life imprisonment, and 15 years imprisonment consecutive on the final count. (Tr. 1783-84)

Before the preparation of the record on appeal, Mr. Maharaj moved for relinquishment of jurisdiction to file a writ of error *coram nobis* based on newly discovered evidence. This Court allowed 90 days for an evidentiary hearing, but counsel was never provided and no hearing was held. Compelling evidence of his innocence therefore had to wait a decade before he could present the evidence at his 3.850 hearing.

On direct appeal, this Court affirmed Mr. Maharaj's convictions and sentences. Maharaj v. State, 597 So. 2d 786, 17 FLW S201 (Fla. 1992) (Maharaj I), cert. denied, 506 U.S. 1072, 113 S. Ct. 1029, 122 L. Ed. 2d 174 (1993). Mr. Maharaj immediately filed for post-conviction relief, long before the statute of limitations. However, it was denied without a hearing. On appeal from the decision, this Court ruled that Judge Glick should have been disqualified from sitting on the case, and ordered a hearing on the substance of the petition. Maharaj v. State, 684 So.2d 726 (Fla. 1996) (Maharaj II). This time, a week-long hearing was held before Judge Jerald Bagley (3.850

Tr.135-1137), who granted relief as to sentence,[2] but refused to vacate Mr. Maharaj's convictions. (3.850 Clerk Tr. 6576) This appeal ensues.

## STATEMENT OF FACTS

Krishna Maharaj, a British citizen, was born in Trinidad on January 26th, 1939. He moved to England in 1960, and lived there until 1985. He became a very successful businessman. In 1985 he began to spend time in Florida, since he had investments in real estate in the Fort Lauderdale area. He hoped to divide his time between England and Florida after he retired. Since his 1987 conviction, the British public has learned of the facts of this case through such documentaries as *Murder in Room 1215*, by Channel 4. The public concern has reached such a pitch that a Queen's Counsel, a Member of Parliament, and a member of the Diplomatic Service were all present at the hearing in the lower court. (3.850 Tr. 222)

The State's case at trial stretched credulity. We now know it was false, and relied heavily for its success on defense counsel's failure to prepare, and the State's suppression of extremely favorable evidence. Mr. Maharaj had once been friends with a Jamaican who had moved to the United States, Derrick Moo Young, but they had fallen out. The State insisted that their

[2] Judge Bagley found that Judge Solomon's *ex parte* request that the State prepare an order sentencing Mr. Maharaj to death before the judicial sentencing hearing had even begun required vacation of the sentence.

declining relationship was accurately described in various articles published in a local tabloid, the *Caribbean Echo*, by one Eslee Carberry. These detailed Mr. Maharaj's supposed frauds on the Moo Youngs and pending criminal charges in England, and their publication was meant to be the motive for Mr. Maharaj's crime. Maharaj I at 788. The jury did not hear that virtually every fact (including the criminal charges) was known to the prosecution to be false, that the Moo Youngs were actually perpetrating the frauds on Mr. Maharaj, and that the extent of Mr. Maharaj's "revenge" was to start a rival newspaper, the *Caribbean Times*, which was committed to rise above such scandal-mongering, and never even mentioned Carberry or the Moo Youngs.

Supposedly, Mr. Maharaj asked Neville Butler, a recent acquaintance, to set up a meeting with the Moo Youngs in Room 1215 of the Dupont Plaza Hotel, whereupon Mr. Maharaj shot both of them in Butler's presence. Concededly, Mr. Maharaj's fingerprints were found in the room. According to Det. John Buhrmaster, Mr. Maharaj denied ever being in the room. This was very damaging since it was clearly false. Yet according to the deposition of another officer, Buhrmaster had previously said that Mr. Maharaj had admitted to being in the room. The jury never heard this because trial counsel forgot to present it.

Indeed, Mr. Maharaj was seen by an independent witness sitting in the

room alone reading a newspaper, shortly after 8 a.m., although the prosecution had evidence that the Moo Youngs were scheduled to arrive at 12:15 p.m., around the time they were murdered. There was no sensible, incriminating reason for Mr. Maharaj being there that early. However, he has consistently insisted that Butler had arranged for him to meet Eddie Dames, a friend of Butler's from the Bahamas, about distributing the *Times* in the islands. He left before 10 a.m. because Dames never showed. Mr. Maharaj had alibi witnesses who placed him in Fort Lauderdale at the time the crime took place. Yet counsel advised him not to testify and failed to speak with most of his alibi witnesses, much less call any of them. The jury never heard this critical evidence.

The State also presented evidence from one Tino Geddes, another Jamaican, who had initially confirmed Mr. Maharaj's alibi, but by the time of trial testified to outlandish stories about Mr. Maharaj buying camouflage uniforms for a ground assault on the Moo Young home. Defense counsel never even bothered to depose Geddes, and could have shown that his stories were fantasies.

At trial, although he was the State's star witness, Butler's story was flimsy. He supposedly arranged for Mr. Maharaj to meet with the unsuspecting Moo Youngs in Dames' room. Dames allegedly knew nothing about the

planned crime, and was off shopping with an associate from the Bahamas, Prince Ellis, at the time of the murder. Ellis has now recanted the testimony he gave for the State, and admitted that Dames was involved in the crime.

As the "eye witness," Butler testified that Mr. Maharaj shot the Moo Youngs using only one glove--*à la* Michael Jackson. Butler then said that the two of them sat in a car at a meter outside the hotel for three hours watching the police, because Mr. Maharaj supposedly wanted to verify that Dames actually existed (although he had previously said that Maharaj and Dames had met in the lobby earlier).

If Butler was to be believed, then Mr. Maharaj was guilty; if not, Mr. Maharaj was acquitted. Yet the State suppressed critical impeachment evidence, and even lied to the judge (and this Court), saying that Butler had passed a polygraph test. In truth, he had failed. Mr. Maharaj passed his. Indeed, the State's case never made any sense, even in 1987. It defies belief that Mr. Maharaj planned to commit a murder in the Dupont Plaza hotel, where he was well known, using a gun that was not silenced, in a room registered to a man he did not know who could come in at any moment.

Mr. Maharaj had nothing to do with this crime. Who did? It is obviously not Mr. Maharaj's burden to prove this. However, the key lies in the suppression of an unparalleled amount of *Brady* material by the State. The

State had materials in its files to prove that Derrick Moo Young, supposedly a "disabled businessman" with no income, was offering various Caribbean governments loans of up to **five billion dollars**. Far from Mr. Maharaj being the only person who had an axe to grind with the Moo Youngs, there were others with a far stronger motive to kill.

The Moo Youngs were laundering drug money. The records reflect that they were trying to skim money--millions of dollars--off the top. The State knew from a phone record that Adam Amer Hosein had been in contact with Eddie Dames at Dupont Plaza that day. Hosein and Dames have been linked to F. Nigel Bowe, a former Bahamian attorney who, in 1985, had been charged with a large drug trafficking scheme involving the Medellin Cartel. The Moo Youngs held a corporation called *Cargil International* that was negotiating to purchase a bank for $600 million in Panama. The address of the Bahamian office of *Cargil* was Nigel Bowe's law office. Hosein, who supposedly had no links to the victims, was actually an officer in another Moo Young corporation, *Amer Enterprises*, that bore his middle name. Prince Ellis now admits that Eddie Dames was a drug dealer in the Bahamas. It would seem clear that Dames, Butler and others framed Mr. Maharaj for this crime.

Normally, cases such as this focus primarily on technical issues that, while very significant, may bear little relationship to the most important issue

of all: Whether the individual is actually guilty of the crime for which the State seeks his death. This is not the case here. However, there is an additional ground that helps to explain the anomaly of his conviction, and that is the horrifying saga of judicial misconduct in his case. Several months before the trial, Judge Howard Gross sent ASA Myra Trinchet as his go-between to solicit a bribe from Mr. Maharaj to fix his case. Mr. Maharaj indignantly refused, and reported the incident to his attorney who, in turn, informed the State. Although Paul Ridge and John Kastrenakes, who prosecuted Mr. Maharaj, worked with Trinchet, they did nothing about it. Meanwhile, his bribery spurned, Judge Gross became increasingly hostile to the defense. Then, in an *FDLE* sting that took place during Mr. Maharaj's trial, Judge Gross was arrested and charged with accepting bribes in other cases.

Defense counsel failed to discuss the obvious link between the arrest and the prior solicitation of Mr. Maharaj, and advised his client to proceed with the trial. Judge Harold Solomon was appointed and he, in turn, had several *ex parte* communications with the State, asking the prosecutors to write his order sentencing Mr. Maharaj to death *before the judge sentencing hearing had even begun*. While this was the basis for the trial court vacating the death sentence, it leaves absolutely no confidence in the fairness of Mr. Maharaj's trial.

Kris Maharaj is an innocent man who has struggled for more than 12 years to clear his name. He must now be allowed a new trial in which to do so.

## SUMMARY OF THE ARGUMENT

In the pages below, Mr. Maharaj details the various issues that tainted his trial which are: I, that the horrifying judicial misconduct in the case mandates reversal; II, that he was provided with *no funds* to present his post-conviction case; III, that the cumulation of a plethora of *Brady* and *Giglio* violations, combined with ineffective assistance of counsel and newly discovered evidence, requires a new trial; IV, that the State did not, and still has not, complied with its obligations under international law; and V, that the misconduct has been such that all charges should be dismissed.

## ISSUES ON APPEAL

There are numerous issues raised on appeal, all substantially interrelated.[3]

### I. THE COMBINED EFFECT OF JUDGE GROSS' SOLICITATION OF A BRIBE FROM MR. MAHARAJ, USING AN ASSISTANT STATE'S ATTORNEY AS A GO-BETWEEN, HIS BIAS AGAINST THE DEFENSE, AND BY HIS ARREST DURING THE TRIAL, SET IN THE SHADOW OF JUDGE SOLOMON ASKING THE STATE *EX PARTE* TO WRITE THE

[3] Mr. Maharaj predicates each argument on the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as other law as may be set forth below.

**SENTENCING ORDER BEFORE THE JUDICIAL SENTENCING HEARING EVEN BEGAN, SHATTERS ALL CONFIDENCE IN THIS CONVICTION**

There has been a truly extraordinary series of events that has taken place, unparalleled in any other case that Mr. Maharaj has been able to locate, in terms of the judges who have been involved in this case. One of the questions when this Court remanded the case[4] was whether defense counsel knew the facts and conveyed them all to his client in such a manner as to make the client's waiver of a mistrial when Judge Gross was arrested "knowing, intelligent and voluntary." However, this is not the only issue.

First, Judge Gross solicited a bribe from Mr. Maharaj, through Myra Trinchet, who was then an Assistant State's Attorney. Defense counsel did not contemplate a recusal motion of either the judge or the State's Attorney. The State did nothing at all. Second, Judge Gross, spurned by Mr. Maharaj, demonstrated his bias in his crescendo of hostility against the defense. Counsel did nothing about it. Third, Judge Gross was arrested in the middle of the trial of this case. Despite Judge Klein's admonition that counsel take time to research the law, counsel--without discussing the implications of the

[4] This Court "[s]pecifically . . . [found] that an evidentiary hearing [was] necessary to resolve whether . . . Maharaj's counsel was ineffective by failing to advise him properly regarding his waiver of various issues. . . ." Maharaj II, 684 So.2d at 728.

earlier issues--advised Mr. Maharaj to "waive" any mistrial immediately. Fourth, Judge Solomon, who took over, had *ex parte* communications with the State, and solicited the State to write an order imposing a death sentence *before the judicial sentencing hearing had even begun*.[5]

It is very important to recognize all the distinct facets of the claim: First, Judge Gross should clearly have been recused for soliciting a bribe, regardless of whether a motion was filed. Two, Judge Gross should have been recused for showing *actual bias* against the defense after his "offer" was rejected. Neither issue was ever even considered by counsel. Three, counsel failed to advise his client in a way that was remotely effective on the "waiver" issue. Four, there is an appearance of impropriety in the rest of the trial given Judge Solomon's apparent bias. And, fifth, the entire Office of the State's Attorney should have been disqualified where one of its members solicited this bribe behind defense counsel's back.

"Courts, like Caesar's wife, must be not only virtuous but above suspicion." U'ren v. Bagley, 118 Ore. 77, 245 P.2d 1074, 1075 (1926). It is

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[5] As if this were not enough, when Mr. Maharaj filed his 3.850 petition, Judge Leonard Glick failed to reveal that he had been a supervising attorney over the prosecutors at trial. Maharaj II, 684 So.2d at 728. On remand, Mr. Maharaj discovered that he, too, had engaged in *ex parte* communications with the State and had the State write the order denying 3.850 relief.

"one of the most important dictates of due process: that proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair." Steinhorst v. State, 636 So.2d 498, 500-01 (Fla. 1994).[6] "A fair trial and a fair tribunal is a basic requirement of due process. . . . Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" In Re Murchison, 349 U.S. 133, 136, 99 L.Ed. 942, 95 S.Ct. 623 (1955). "The protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." United States v Columbia Broadcasting, Inc. 497 F.2d 107, 109 (5th Cir 1974).

Indeed, this Court has been unflinching in its recognition of the importance of judicial propriety. "This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Davis v. Parks, 141 Fla. 516, 519, 194 So. 613, 615

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[6] Every possible safeguard must be in place to ensure that the conviction is a safe one: "[D]eath is a different kind of punishment from any other which may be imposed in this country... From the point of view of the defendant, it is different in both its severity and its finality. From the point of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, **and appear to be**, based on reason rather than caprice or emotion." Beck v. Alabama, 447 U.S. 625, 637-38, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (emphasis supplied).

(1939); Anderson v. State, 287 So.2d 322 (Fla. 1st DCA 1973) ("A judge must not only be impartial, he must leave the impression of impartiality upon all those who attend court."). A "judge's business is that of judging. He neither represents the state nor a citizen. He does not advocate a position and espouses only the cause of justice." Merckle v. State, 529 So.2d 269, 271 (Fla. 1988).

It is in light of these crucial principles that we review the facts of this case. Myra Trinchet was an ASA set to leave for private practice in a few days. At the 3.850 hearing, defense counsel Eric Hendon testified:

> Q. Did there come a time when Ms. Trinchet became associated in some way with the Maharaj case?
> A. What happened, one evening my client, Krishna, called me to the jail. He was quite -- I don't want to say upset, but quite agitated about a conversation he indicated he had had. He had a card bearing the name of Myra Trinchet. He indicated that he had been approached by a lawyer in the Dade County jail and a lawyer asked him to retain her and quoted a price of $50,000 and indicated to him if she were retained, she had a relationship with Judge Gross and he would definitely be allowed to be released on bond. He advised me that this lawyer told him that she knew he was innocent and that she knew he had passed a polygraph and that she knew Judge Gross and Judge Gross knew her and if she were retained, he would definitely be released on bond.

(3.850 Tr. 224) Although Mr. Maharaj showed him the card she had left

(3.850 Tr. 225),[7] Mr. Hendon did nothing[8] more than report the conversation to the prosecutors. (3.850 Tr. 228)[9]

At the 3.850 hearing, Mr. Maharaj presented unrebutted evidence of the prejudice suffered by his rejection of Judge Gross' bribery attempt. Judge Gross became hostile to defense counsel. (3.850 Tr. 235, 350, 351)[10] For example, counsel was "shock[ed]" that when he asked the record to reflect that a member of the victims' family expressed emotion in the court room "the judge on record did everything but accuse me of lying to the court." (3.850 Tr. 237-38) At that point, the rulings seemed to go heavily against his client:

> the judge decided to admit newspaper articles containing the most outrageous allegations I had ever heard, even possible allegations of possible murder charges, and the judge found these items were sufficient to present to the jury.

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[7] Mr. Hendon testified that he told his client that he thought she was a prosecutor, but would look into it. (3.850 Tr. 225) He said the State's Attorney did not confirm this to him (3.850 Tr. 227), and he did not get back with Mr. Maharaj about it.

[8] Hendon merely gave ASA Kastrenakes "the name and told him what had occurred." (3.850 Tr. 225) He did not follow up. (3.850 Tr. 228, 230)

[9] The State took no action other than to talk to defense counsel. (3.850 Tr. 494) However, a memo in the State's Attorneys' file reflects that they did check into it and found that Trinchet worked for them.

[10] Mr. Hendon remarked during cross-examination by the State that Judge Gross would "bark" at him whilst the State were "treated with the general pleasantries." (3.850 Tr. 351) Mr. Hendon noted that Judge Gross "had not displayed that sort of attitude to me prior to that particular time." (Id. at 352) "I didn't want any particular advantage, I just want fairness." (Id. at 351)

(Tr. 3.850 410) However, Mr. Hendon did not discuss with his client the possibility of recusing the judge (3.850 Tr. 231) or the State's Attorney, or even looking into whether there was an investigation of Judge Gross going on. (Id.)

There was. Even as Mr. Maharaj's trial began, *FDLE* Agent Cassal approached Judge Gross through an attorney, Harvey S. Swickle, about fixing the case of Orlando Zirio, supposedly a drug dealer. On October 7th, 1987, Judge Gross spent a long day in Mr. Maharaj's trial, and then went home. That evening, he received a call from Swickle, who planned to consummate the deal:

> Swickle: Ah, what time you going to be in?
> Gross: I'll be in, ah, probable eight fifteen. * * * I'll be there all day. **I've got that murder trial**.

The Florida Bar v. Gross, 610 So.2d 442, 443 (Fla. 1992) (emphasis supplied). The "murder trial" mentioned on tape was Mr. Maharaj's, which was then in full swing.[11]

Judge Gross was arrested as part of a bribery investigation. (3.850 Tr.

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[11] Consider the paradox here: The evidence now shows that Mr. Maharaj was on trial for the murder of the Moo Youngs, two *real* money launderers, and he had been framed by *real* drug dealers from South America. None of this evidence was being presented in the court where Judge Gross was presiding, since it had been suppressed. However, at the same time, Agent Cassall was posing as "an illegitimate South American . . . money launderer. . . ." The Florida Bar v. Swickle, 589 So.2d 901, 902 (Fla. 1991). On behalf of his fake drug dealer, he was bribing Judge Gross with real money ($20,000) in a sting operation.

239) Everyone had to recognize that Mr. Maharaj had been telling the truth. (3.850 Tr. 432) However, counsel again failed his client. Judge Klein, who informed the parties that Judge Gross would not continue, advised Mr. Hendon to research the issue before his client agreed to go forward. (Tr. 2855)[12] Ignoring this advice, Mr. Hendon announced that he had already discussed the matter with his client and they would go forward. (Tr. 2855; see also 3.850 Tr. 433)

He did not even pause to learn what really happened to Judge Gross.[13] He never considered the link with the earlier Trinchet matter, and did not discuss it with his client. (3.850 Tr. 240, 241)[14] He never mentioned the impact of this bribery attempt on the judge's recent biased behavior. (3.850 Tr. 242) Counsel did not even discuss the possibility of revisiting the issues Judge

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[12] Indeed, it was thoroughly unwise for Mr. Hendon to make an immediate decision, since the judge is the ultimate sentencer, and he ought to at least wait to see who it will be. (Tr. 2855) While Mr. Maharaj does not suggest that a lawyer should be in the business of forum shopping, a wise advocate would at least wait until he knew who the ultimate sentencer would be before advising his client.

[13] He relied solely on newspaper reports (3.850 Tr. 239) and did not make any enquiries with law enforcement into the precise nature of the charges against Judge Gross. (3.850 Tr. 240)

[14] When asked whether he "discuss[ed] possible cause and effect with your client" he said: "No, I did not. And again, at that time I didn't really make it in the connection between what I perceived was less than fair treatment and the incident, reported incident involving Ms. Trinchet." (3.850 Tr. 235)

Gross had decided adversely. (3.850 Tr. 244)

Counsel advised his client to proceed, he testified that this was largely because Prince Ellis had contradicted the anticipated testimony of Eddie Dames. (3.850 Tr. 243) He was worried that the prosecution would not call Ellis at a retrial. (3.850 Tr. 354) If this was truly his reasoning, it was folly, for he failed to consider the obvious: From the depositions, the prosecution already knew of this conflict, and therefore had already decided not to call Dames at the first trial. (3.850 Tr. 546-47) Why would they? Yet counsel did not even bother to get Dames under subpoena.[15]

### A. THE LAW MANDATED THE RECUSAL OF JUDGE GROSS LONG BEFORE ANY QUESTION OF A MISTRIAL

The question of waiver by Mr. Maharaj need never be reached, since Judge Gross was under an obligation to recuse himself by operation of law. It was no novel suggestion in this case that "the trial judge should have recused himself from the entire case if he believed himself ineligible to preside . . . *regardless of whether a motion to disqualify was filed*." Maharaj II, 684 So.2d at 798, citing *Canon 3(E), Code of Judicial Conduct* ("a judge *shall* disqualify *himself or herself* in a proceeding in which the judge's impartiality

[15] Indeed, the State argued to the jury that the defense and the prosecution had the same power of subpoena and could secure the attendance of Eddie Dames. (Tr. 3973-74)

might reasonably be questioned") (emphasis supplied).

Indeed, there comes a point where this Court must protect the integrity of the judiciary regardless of the bumblings of lawyers.[16] Ultimately, "justice [must] satisfy the appearance of justice." In Re Murchison, 349 U.S. at 136. As this Court is aware, the trial court vacated Mr. Maharaj's sentence of death because Judge Solomon held *ex parte* contacts with the prosecutors in preparing the sentencing order. In granting relief on this issue, Judge Bagley observed that "there is nothing 'more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.'" (3.850 Clerk Tr. 6599)

How about bribery? As this Court held in Merckle, where the judge had been convicted of accepting a bribe, "a judge violates his oath of office, and compromises his position of trust, [and] his act is far more egregious than that of any other public servant. Merckle's conduct did . . . have an extraordinary and unusual impact on society over and above a bribery conviction of a lesser official." Id., 529 So.2d at 272.

While many recusal issues turn on the "appearance of impropriety," there has been a showing of *actual bias* against Mr. Maharaj by Judge Gross.

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[16] For example, if both sides had bribed the judge, they might both want to waive recusal, and yet this is hardly a result that this Court would allow.

The evidence in this respect was unrebutted. Astoundingly, the State suggests that Judge Gross' bias might not have been personal but could have been against all criminal defendants, because he "could have been thinking about his own precarious position. . . ." (3.850 Tr. 351)

In Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997), speaking through Chief Justice Rehnquist, a *unanimous* Supreme Court recently dealt with a capital case where the petitioner alleged that the trial judge, Thomas Mahoney, took bribes in *other* cases, not Bracy's own. The petitioner sought discovery to prove that the trial judge's criminality could have influenced his own case. First, the Court noted:

> The facts of this case are, happily, not the stuff of typical judicial-disqualification disputes. A judge who accepts bribes from a criminal defendant to fix that defendant's case is "'biased" in the most basic sense of that word, but his bias is directed against the State, not the defendant.

Id., 117 S.Ct. at 1797. However, the Court went on to say that his criminal misconduct could result in a "compensatory bias" against other criminal defendants, to avoid always ruling against the State:

> [D]ifficulties of proof aside, there is no question that, if it could be proved, such compensatory, camouflaging bias on [the judge's] part in petitioners own case would violate the Due Process Clause of the Fourteenth Amendment.

Id. Of course, there is no difficulty of proof here, since the best defense the State can offer is that the judge was being biased against *all* defendants who

had not paid him a bribe.

In truth, Judge Gross was especially biased against Mr. Maharaj, who had refused a bribe. Common sense tells us this. As the Supreme Court of Tennessee has held in a closely analogous case, "[i]f, as petitioner contends, [the Judge] solicited but did not receive a bribe from the petitioner, then the likelihood of bias is even stronger than in *Bracy* where there was no affirmative solicitation." State v. Benson, 973 S.W.2d 202, 206 (Tenn. 1998).[17]

To be sure, it would simplify matters had counsel raised an issue of recusal.[18] However, this Court has been sensitive to the pressures on defense counsel *not* to raise issues concerning the trial judge. While this "Court has recognized the sensitivity and seriousness involved whenever the issue of judicial prejudice is raised," and noted that it "is a delicate question" for the parties to bring up, nevertheless the judicial system cannot wholly rely on lawyers to preserve the integrity of the judiciary:

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[17] In Bracy, the judge "retaliated against one [defendant] in one of the rare cases where [the lawyer] failed to offer [him] a bribe. . . ." Id. 117 S.Ct. at 1797 n.5. The defense lawyer "learned that in order 'to practice in front of Judge Maloney . . . we had to pay." Id.

[18] This Court felt that Judge Glick's failure to recuse himself at the original 3.850 hearing presented "unique circumstances" excusing such a motion. Maharaj II, 684 So.2d at 728. It is worth considering how extraordinary the facts must seem now: In Bracy, the Court identified only three judges convicted of fixing a murder trial for a bribe in United States legal history. Id. at 1796 n.2. Judge Mahoney may have been the first in a capital case.

> No judge under any circumstances is warranted in sitting in the trial of a cause, whose neutrality is shadowed or even questioned. * * * It is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes.

Livingston v. State, 441 So.2d 1083, 1085-86 (Fla. 1984) (quoting Dickenson v. Parks, 104 Fla. 577, 582-84, 140 So. 459, 462 (1932)).

Ultimately, this Court has an obligation to the entire justice system to step in and occasionally apply the rules more stringently against judges who transgress than might be the case when other citizens commit wrongs:

> The American people want desperately to respect their judges. Moreover, the public is entitled to have that demanding desire satisfied by judges who constantly recognize that they must earn, everyday, the public respect that constitutes not only a quid pro quo for their continuing success in judicial office, but a quid pro quo for the continuing existence of the judiciary as the keeper of the flame of justice in a free society.

Merckle, 529 So.2d at 271 (citation omitted).

This is one reason why there is a requirement placed on judges that they should recuse *themselves* when there is reason to doubt their impartiality: "In other words, a judge should examine his heart, know his prejudices, and if they can be fathomed, *he should recuse himself.*" Anderson v. State, 287 So.2d 322, 324 (Fla. App. DCA1 1973) (emphasis supplied). "It is," as the courts have long held, "vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be,

should be convicted." Hunter v. United States, 62 F.2d 217, 220 (5th Cir. 1932); accord Gomila v. United States, 146 F.2d 372, 374 (5th Cir. 1944).[19]

The effect of Judge Gross' actions have already been described in Swickle's disbarment appeal:

> When people are led to believe that justice is dispensed on the basis of corrupt influences, the public cannot have confidence in the integrity or impartiality of the judiciary or the bar. The entire judicial process is undermined as a result.

Swickle, 589 So.2d at 905. Under such circumstances, there can be no issue of harmless error:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgement, his actual motivations are hidden from review, and we must presume that the process was impaired.

Vasquez v. Hillery, 474 U.S. 254, 263, 106 S.Ct. 617, 623, 88 L.Ed.2d 598, 609 (1986). Thus:

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[19] In Benson, the Tennessee Supreme Court dealt with precisely this issue, and held that a judicial system cannot depend on counsel to make such a recusal motion under these circumstances:

> This Court finds that the issue was not waived for purposes of post-conviction relief. The petitioner could not be expected to ask the judge to recuse himself on the ground that he had solicited a bribe from the petitioner. Judicial corruption is not a basis for disqualification about which the judge accused can make a determination.

State v. Benson, 973 S.W.2d at 206.

> evidence of judicial corruption requires reversal regardless of the facts of the particular case. The denial of the petitioner's right to an impartial judge is a constitutional error which affects the integrity of the judicial process. A new trial is the only remedy.

Benson, 973 S.W.2d at 207, citing Vasquez.

This Court cannot allow public confidence to be thus eroded. Particularly when viewed in the light of the other issues discussed below, this Court simply cannot ratify the shocking judicial misconduct in this case.

### B. TRIAL COUNSEL SHOULD HAVE ACTED TO PRESERVE HIS CLIENT'S RIGHTS LONG BEFORE TRIAL

There is no doubt, when counsel learned of the bribery attempt, and then noted the trial judge's crescendo of hostility, counsel should have taken *some* action to preserve his client's rights.[20] This is a wholly distinct issue from the mistrial waiver question, and there has never been any intimation that Mr. Maharaj even knew of the issue.

Counsel surely should have conducted *some* investigation into the judge and Ms. Trinchet to determine whether to file motions recusing the judge and

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[20] It is a grave matter to cast aspersions on judges and, to a certain extent, it places counsel's interests in his on-going relationship with a judge in direct conflict with his client's interest in a fair trial. Cf. Nunn v. State, 778 S.W.2d 707, (Mo. Ct. App. 1989) (where trial counsel's ethical duty conflicts with his representation of his client, "[s]uch a situation produces a conflict of interest and to sweep it under the rug of trial strategy is a mischaracterization."). However, here counsel could certainly have contacted the *FDLE* without jeopardizing anything.

State's Attorney. Had he talked around the courthouse, or done legal research, he would have learned that there might be valid suspicions about Judge Gross. See, e.g., State v. Paterno, 478 So.2d 420 (Fla. App. DCA3 1985) (reversal where Judge Gross illegally reduced bail in life felony cases). Had he, for example, taken the simple step of contacting the *FDLE*, Agent Cassall would no doubt have been able to tape record conversations between Judge Gross and Myra Trinchet before the trial began. Cf. Miller v. State, 728 S.W.2d 133 (Tex. Ct. App. 1987) (ineffective assistance of counsel (IAC) for, *inter alia*, failing to discover no basis for judge's recusal until sentencing); Gilchrist v. State, 534 So.2d 1120 (Ala. Crim. App. 1988) (murder conviction reversed for IAC where counsel failed to recuse prosecutor's office where District Attorney became a witness).[21]

### C. AS TO THE MISTRIAL ISSUE, TRIAL COUNSEL DID NOT INVESTIGATE THE FACTS AND THE LAW, AND FAILED TO COMMUNICATE EITHER TO HIS CLIENT, WHEN THE TRIAL JUDGE WAS ARRESTED IN THE MIDDLE OF THE TRIAL

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[21] In Goines v. State, 708 So.2d 656 (Fla. App. DCA4 1998), the defendant had previously been prosecuted by the person who now sat as trial judge. Just as here, the accused told his lawyer the facts, but the lawyer simply "did not follow up" on the recusal issue even though it would have resulted in "virtually automatic" recusal. Id. at 658. The court noted that the failure to file such a motion could result in a "trial before a judge whose impartiality may reasonably be questioned [and] 'would present grave due process concerns,'" and therefore concluded that "counsel's error rendered the trial fundamentally unfair . . . because of the appearance of judicial bias." Id. at 660-61 (citations omitted).

In any event, the manner in which counsel gave his advice to "waive" the mistrial when the judge was removed by the *FDLE* agents simply cannot stand up to review. Wicoff v. Sate, 321 Ark. 97, 900 S.W.2d 187, 189 (1995) ("strategic decisions must still be supported by reasonable professional judgment"); Rose v. State, 675 So.2d 567, 572 (Fla. 1996) ("Here, there was no investigation of options or meaningful choice"). Neither, given the ill-considered, incomplete and utterly unsound advice given by counsel, can Mr. Maharaj's "decision" be viewed as a "knowing, intelligent and voluntary" act.

### 1. COUNSEL'S ADVICE TO CONTINUE THE TRIAL ABSENT FULLY INVESTIGATING AND CONSIDERING THE ISSUES WAS PATENTLY INEFFECTIVE

Given the trial judge's bribery attempt, his bias and his subsequent arrest, Mr. Hendon's advice that Mr. Maharaj should overlook it all was clearly ineffective. Counsel concedes that he failed to do any investigation into the bribery attempt, he ". . . just sort of dismissed it." (3.850 Tr. 225) Counsel failed to confirm for his client that Myra Trinchet was in fact an assistant in the Office of the State's Attorney. Counsel failed to take any action when Judge Gross became increasingly hostile to the defense. Counsel's only factual research into the reasons for Judge Gross' arrest was to read the newspaper, and even then he failed to make the link between the arrest and the earlier bribery efforts. Counsel failed to do any legal research into the consequences

of Judge Gross' arrest despite Judge Klein's admonition to do so.[22] Counsel's main reason for continuing was the anticipation of pitting Eddie Dames against Prince Ellis, yet counsel took no steps to ensure that Dames would be available as a witness.

Even standing alone, counsel's advice that Mr. Maharaj not seek a mistrial was ineffective. "Sometimes a single error is so substantial that it alone causes the attorney's performance to fall below the Sixth Amendment standard." Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) (counsel's failure to request a mistrial to which he was automatically entitled was sufficient to establish ineffectiveness). In Nero, the court held that it "could hardly imagine anything more prejudicial to Nero than allowing the jury . . . to hear the prosecutor's comments that Nero had been convicted . . . before. . . ." Id. at 994. With all due respect, we all can: The idea that a judge whose bribery attempt had been spurned should be allowed to continue ruling on Mr. Maharaj's case. The statements in Nero were such as "normally are not cured and cannot be cured by an admonition." Id. at 994. The same must be said of the rulings of crooked judges. As in Nero, counsel must be found

[22] In Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988), the court found counsel ineffective where he expressed no interest in the judge's offer of a continuance to find important evidence for his client. "Counsel's failure to investigate . . . cannot be construed as a trial tactic." Id. at 637.

ineffective.

### 2. SINCE COUNSEL FAILED TO APPRAISE HIS CLIENT OF THE OBVIOUS ISSUES THAT SHOULD BE CONSIDERED IN MAKING THIS CRITICAL DECISION, MR. MAHARAJ'S "WAIVER" WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY

To be sure, "a defendant may waive constitutional rights . . . so long as the waiver is knowing, intelligent and voluntary." Blair v. State, 698 So.2d 1210, 1211 (Fla. 1997), citing Boykin v. Alabama 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). However,

> [v]alid waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Because of the far-reaching consequences involved in a waiver of a basic right, "Courts must indulge every reasonable presumption against waiver of a fundamental right. . ."

In re Bryan, 645 F.2d 331, 333 (5th Cir. Unit B, 1981) (citations omitted). Indeed, the lawyer's advice is often critical in this assessment. Cf. Freeman v. Georgia, 599 F.2d 65, 72 (5th Cir. 1979) ("A defendant cannot have waived more than he knew existed").[23] Here, regardless of the wisdom of counsel's

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[23] As trial counsel conceded, when a lawyer gives legal counsel, even the most stubborn client will generally take his advice: "Essentially our clients rely on us to advise them of what we feel they should do. And even with a client as forthright as Mr. Maharaj, as client as strong or strong in getting his positions out as Krishna Maharaj, our clients ultimately say "Well, what do you think I should do?" If I am representing a client who is not an attorney, who has not had a legal education, I understand that my suggestion will probably have a great weight even on what I would consider

own "decision," counsel failed to investigate, let alone discuss, critical facts that would have influenced his client's ultimate choice. The waiver was therefore invalid.

### D. GIVEN JUDGE GROSS' CRIMINAL MISCONDUCT, THE FLAGRANT *EX PARTE* MISCONDUCT BY JUDGE SOLOMON, AND THE STILL MORE IMPROPER *EX PARTE* COMMUNICATIONS BY JUDGE GLICK, IT CANNOT BE SAID THAT MR. MAHARAJ "APPEARS" TO HAVE RECEIVED JUSTICE IN THIS CASE

When Judge Gross was arrested, he was replaced by Judge Solomon. The defense has learned that Judge Solomon allowed the prosecution to write his sentencing order for him. The trial court granted sentencing relief because of the *ex parte* communications, finding that there could be "nothing 'more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.'" (3.850 Clerk Tr. 6599)

However, this was not the end of it. Judge Glick failed to reveal to the defense that he had been a supervising prosecuting attorney in the State's Attorney's Office at the time of Mr. Maharaj's trial, and this Court found such "unique circumstances" required reversal even though no motion to recuse had been filed. See Maharaj II, 684 So. 2d at 726. Upon remand of this case,

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a bull-headed, arrogant type of client. So Mr. Maharaj asked me if I thought it was in his best interest to proceed. I told him in no uncertain terms that yes, absolutely. . ." (3.850 Tr. 359)

the defense obtained evidence from the prosecutor's file that Judge Glick, too, held *ex parte* communications with the prosecution and had them write his order denying any hearing and all relief on the *3.850* petition. Again, the draft of the order is unsigned and is in the State's Attorney's file. (3.850 Clerk Tr. 1280-81)[24]

Our cases emphasize that when it comes to allegations of judicial impropriety the litigant need only "show 'a well grounded fear that he will not receive a fair trial at the hand of the judge.'" Livingston, 441 So.2d at 1086 (citations omitted). "What is important is the party's reasonable belief concerning his or her ability to obtain a fair trial." Id. at 1087. This is particularly the case in a "prosecution for first degree murder in which appellant's life is at stake. . . ." Id. While there never has been and, one hopes, never will be another case like this, surely it cannot be said that the public can have confidence in the outcome, and there is the appearance of propriety in the actions of the judiciary?

## II. MR. MAHARAJ WAS FORCED TO PRESENT HIS CASE TO THE LOWER COURT WITHOUT ANY FUNDS WHATSOEVER IN CLEAR VIOLATION OF THE LAW

Mr. Maharaj should be granted a new trial on the evidence that was

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[24] The defense sought to introduce this at the 3.850 hearing to show the pattern of misconduct in this case (3.850 Tr. 592), but the lower court improperly limited the questioning.

presented in the 3.850 hearing, discussed in *Section III*. The question of funding will then become moot. However, in making a compelling showing in the lower court that his conviction was flawed, Mr. Maharaj fought with both hands manacled firmly behind his back, for he was allowed not one *penny* with which to present his case. It important to demonstrate that the showing he made would have been much stronger still had he been allowed funds.

### A. THE DEFENSE SHOULD HAVE BEEN PROVIDED WITH FUNDS WITH WHICH TO PREPARE AND PRESENT MR. MAHARAJ'S CASE IN POST-CONVICTION

Mr. Maharaj's counsel were allowed *no funding* to present his post-conviction case. The issue of costs came up over and over and over again. (See, e.g., 3.850 Tr. 19-28; 46-49; 965-73) Defense counsel argued that the denial of funds was a "fundamental flaw" in the attempt to present Mr. Maharaj's case adequately. (3.850 Tr. 965)[25]

To be fair, this was not Judge Bagley's fault: His hands were also tied. He was "acutely aware of the issue relating to the funds and the monies that [defense counsel] have requested from the Court in efforts to bring witnesses

[25] Mr. Kuehne had been retained for the limited purposes of the Maharaj II appeal, with limited funds from some of Mr. Maharaj's relatives. Those funds had long since dried up. Mr. Smith had agreed to work *pro bono* on the initial appeal, since it was of limited scope. Counsel for Mr. Maharaj both appeared at the 3.850 hearing *pro bono* although this was over objection since counsel had constantly sought appointment and funding.

forward to have experts look at certain evidence and what have you." (3.850 Tr. 974) The reason Mr. Maharaj could not have the witnesses he needed was "due to the lack of funds or resources they cannot be made available." (3.850 Tr. 978) When Judge Bagley asked Mr. Maharaj whether he would go along with this, Mr. Maharaj was emphatic:

> You cannot, in my humble opinion, you cannot judge this entire evidentiary hearing unless you have the whole truth; and what I believe is essential, as I said to [counsel] yesterday, is, we must have, even if it takes a little more time . . . the crime scene reconstruction. * * * I believe we must have that ITV report and the Channel 4 report. . . . [A]ll the expert witnesses I think are necessary, very necessary.

(3.850 Tr. 976)[26]

This Court is painfully aware of the confusion caused by the closing of Florida's federally-funded Volunteer Lawyers Resource Center (*VLRC*) in March 1996, the lack of funds available to the Office of the Capital Collateral Representative's (*CCR*) in the 1996/7 fiscal year, and the confusion surrounding the establishment of the Justice Administrative Commission, headed by Judge Schaeffer, in the summer of 1997. Initially, Judge Bagley tried to secure funds from Judge Schaeffer, who held out the possibility of

[26] Judge Bagley permitted the defense to file an *ex parte* sealed memorandum stating the ways in which counsel's presentation was ineffective due to lack of funds. (3.850 Tr. 1044-45, Def. Exh. A-11) This memo is available for this Court's *in camera* review.

money if the defense met an impossibly high standard.[27] However, even this chimera disappeared when Judge Schaeffer later declared that Mr. Maharaj was not eligible.[28] Mr. Maharaj applied to the *CCR* to no avail.

This Court has subsequently made it clear that Mr. Maharaj was correct to apply to *CCR.* Orange County v. Williams, 702 So.2d 1245, 1248 (Fla. 1997) ("CCR is responsible for the litigation expenses incurred by volunteer post-conviction counsel."). However, the case was not decided until September 11, 1997, which was the third day of Mr. Maharaj's hearing, and was not known to the parties until too late. Later still, this Court tolled the time limitations for all cases in Mr. Maharaj's position until additional funding could be provided by the Legislature. In re Rules of Criminal Procedure, 719 So.2d

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[27] Judge Bagley said that before getting expert funds "[o]ne of the things that is going to have to be shown is that this witness is going to be essential to *proving conclusively or showing conclusively that the defendant did not commit this crime*. That is the standard she is using." (3.850 Tr. 48-49) (emphasis supplied).

[28] Since the case was not initially a CCR case, Judge Bagley advised that

> Judge Shaffer is not the appropriate person to seek costs from because she only handled matters that are conflicted from CCR. And therefore, what has to happen is that you have to put in a new application for costs with the new CCR system the way it has been set up. . . . I should tell you though that the possibility of getting funds do not look that great.

(3.850 Tr. 85-86) Actually, as Mr. Maharaj argued and the CCR substantiated, he was conflicted with CCR, which had failed in its obligation to provide him *any* representation on his *coram nobis* petition. However, his argument was to no avail.

869 (Fla. 1998).

It is one matter to say that "[v]olunteer collateral counsel . . . have provided a great service for the benefit of the public and the Florida Bar by providing such legal representation *pro bono*." Orange County, 702 So.2d at 1246 n.1. It is quite another thing to require counsel to perform this work without any tools. This was error.

### B. THE DEFENSE CLEARLY MADE A SUFFICIENT SHOWING TO MERIT RECEIVING FUNDS

Mr. Maharaj's total lack of funds provokes three distinct issues, the first two of which--the lack of funds for a proper investigation, and for out-of-state witnesses--should be considered together. This is a monumentally complicated case, with critical witnesses who now live in the Bahamas,[29] Jamaica,[30] other Caribbean islands,[31] Panama,[32] Columbia, and a totally

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[29] At his own cost, one counsel did go briefly to the Bahamas. This provided extremely important leads on telephone calls between the various suspects that needed to be investigated.

[30] Tino Geddes was interviewed in Jamaica by a British journalist and made various highly significant comments that conflicted with his trial testimony. (3.850 Clerk Tr. 5791-800) The defense was precluded from interviewing him by lack of funds.

[31] Eslee Carberry was living in Ciocios (3.850 Tr. 972), where he ended up after being deported from the United States.

[32] In addition to investigating the Moo Youngs' attempt to buy a bank there for hundreds of millions of dollars, and the various other clearly illegitimate dealings, the defense wished to interview Orlando Barsalo (3.850 Tr. 772-73), who was one of the other people involved with *Cargil International*.

inadequate investigation even in the USA.[33] To be denied any resources to investigate, despite repeated and detailed proffers, was utterly unfair. Even when the defense did manage to cobble together some witnesses, there were no funds to present them.[34] These included people who could have provided crucial testimony, such as Capil Maharaj,[35] Dennis Evans,[36] Atta Kujifi,[37] Amer Edoo,[38] Prince Ellis, and Mervyn Dymally. (3.850 Tr. 970-72)

Prince Ellis is a good example of how the lack of funds operated against

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[33] Mervyn Dymally lived tin California and could provide the critical "Adam Hosein letter from Cargil International Bahamas link, that he got that had the address of Nigel Bowe . . . in the big picture that is a very important link . . . the Moo Youngs, Nigel Bowe, Adam Hosein, all through one document. . . . We don't have that document. We only have Mervyn Dymally's testimony on them." (3.850 Tr. 971) Additionally, the defense needed to investigate the circumstances of the Moo Youngs' dealings with a highly dubious "church" institution in California, which was purportedly involved in some of the multi-million dollar gem dealings.

[34] The State would only agree to an affidavit as a substitute for penalty phase witnesses whom it apparently considered less significant.

[35] Capil Maharaj (no relation) could help to prove that the camouflage gear and hunting knives were bought in an Army Surplus store for a friend (now deceased) in Trinidad, and not in order to support Tino Geddes' outlandish story that Kris Maharaj was going to storm the Moo Young compound. Frank Barsotti could have corroborated this.

[36] Mr. Evans could have refuted some of the allegations made in the *Caribbean Echo* articles.

[37] Mr. Kujifi is a lawyer in Trinidad who had been retained by the Moo Youngs in their efforts to extort money from various other high-ranking persons there, and could have helped to refute the *Echo* articles.

[38] Mr. Edoo, an accountant and financier, was the alleged recipient of some Moo Young letters purporting to offer hundreds of millions of dollars to Trinidadian banks, and could have provided important evidence concerning the nature of the scams.

Mr. Maharaj. The defense was not able to depose or call Prince Ellis, who lives in the Bahamas, and has now admitted to British television that his trial testimony was not true, that Eddie Dames was merely fabricating a false alibi, and that Dames is a drug dealer. (3.850 Clerk Tr. 1865-67) Even without these funds, the defense sought to present some of his testimony through the Channel 4 television program, yet the trial court erroneously held that this was not properly certified and refused to allow the funds to secure a proper copy.[39]

Ellis, who had been a major prosecution witness, now believes that Mr. Mahraj is innocent. (3.850 Clerk Tr. 1891) He also admits that Dames told a pack of lies in his deposition. (3.850 Clerk Tr. 1879)[40] It is true that Ellis met with Dames on October 16th, 1986 and spent the late morning and early afternoon shopping with him at Ace Music, but he now admits that he was being used by Dames as a diversionary alibi. (3.850 Clerk Tr. 1861) When they later met up with Butler, far from being surprised by the murder, Dames seemed in control of the discussion with Butler. (3.850 Clerk Tr. 1854-55) He

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[39] When the trial court said he felt the verification (valid under British law) was not sufficient for Florida, the defense unsuccessfully sought funds to bring the original materials over with the reporter (3.850 Tr. 712) Indeed, ultimately, the defense was not even permitted to impeach witnesses with the transcript. (3.850 Tr. 707-12, 970)

[40] When British television came to see Ellis because Dames wanted him to listen to a tape of Dames' interview and agree to say that this is the way it went, Ellis refused: "that's not how it went * * * he was telling a lie to some of the questions [Channel 4] asked him. . ." (3.850 Clerk Tr.1873)

has admitted that “Eddie [Dames] was involved with the meeting and what went on in the room." (3.850 Clerk Tr. 1882) This is absolutely critical because not only is Butler’s testimony proven false,[41] and the entire State case makes no sense: Mr. Maharaj supposedly commits a murder in the room of Eddie Dames, who Ellis now admits is a drug dealer,[42] who is a man unknown to Mr. Maharaj, and who is willingly playing a part in a capital crime.

Ellis also casts doubt in Butler's story that there was only one person there shooting, Mr. Maharaj. As Butler discussed the murder with Dames, with Ellis sitting by, "Neville was saying something to the effect that they just went crazy and bullets were flying all over the place. They just started shooting." (3.850 Clerk Tr. 1851) (emphasis supplied) Over and over again, he emphasized that Butler used the word, "they". (3.850 Clerk Tr. 1883, 1853) Overall, Ellis has recanted his story because of what he never heard, as well, and that included the name “Maharaj.” (3.850 Clerk Tr. 1879) A key State witness now believes that Mr. Maharaj is innocent, yet the lack of funds

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[41] He also provides important new evidence that Butler was directly and heavily involved in the crime: "I got very frightened when I found out that Neville's watch was broken off and his shirt was torn, that told me one thing -- he was in a scuffle. So he had to be close enough for that to happen." (3.850 Clerk Tr. 1874, 1849)

[42] Ellis admits that he was taken on a boat ride by Dames that turned out to be a drug run. (3.850 Clerk Tr. 1865-67) Ellis also now admits that Butler’s conversation with Dames after the murder sounded like a drug dispute of some kind. (3.850 Clerk Tr. 1854)

deprived him of presenting this evidence.

The third part of this claim concerns the lack of funds for expert witnesses to review the evidence. The defense unsuccessfully sought access to the physical evidence not once (3.850 Clerk Tr. 6329) but twice. (Id. at 6370)[43] By the hearing, the defense had not even been able to secure color copies of the line-ups used by the police, critical to a meaningful review of the line-up procedures. (3.850 Tr. 812, 822)[44] In any event, there were no funds to challenge the photographic array or even to track down the two highly questionable identification witnesses, Arlene Rivera and Inez Vargas. (3.850 Tr. 967) Neither could the defense secure a fingerprint expert for the 19 unmatched prints found at the scene. (3.850 Tr. 966) This was extremely important since Mr. Maharaj did not commit this crime, but it is highly probable that Adam Hosein and others were involved. While there was an innocent explanation for the presence of Mr. Maharaj's prints at the scene (he admitted he was there) it would blow the case wide open if the defense could place one

[43] In the end, the defense only got to test some of the ballistics evidence when counsel was able to prevail upon an expert to help at vastly reduced cost. However, without funds to do a complete review, this expert was not able to add anything significant to the case.

[44] Ultimately, the best the trial court would allow was to have the defense take photographs of the photographs of the line-ups and the fingerprints. (3.850 Tr. 944-45) These proved to be inadequate for proper comparison purposes.

or more of the other suspects there.

There were no funds for a crime scene expert (3.850 Tr. 967), also critical to prove that Neville Butler's version of events did not match the physical evidence, or a handwriting expert (3.850 Tr. 968) who would show that Mr. Maharaj did not forge the $243,000 check written to him by Duane Moo Young, and who would detail the authorship of the Moo Young briefcase documents. Finally, perhaps most important, were there no funds for a financial analysis. (3.850 Tr. 969-70) To the extent that Judge Bagley questioned what the documents in the briefcase meant, this would have been answered by such an expert.[45]

Far from recognizing the plight of the unfunded indigent defendant inmate and accommodating him to the extent possible, the State exacerbated the problem in ways difficult to comprehend. For example, the State improperly prevented the defense from getting access to witnesses. Thus, when counsel sought to speak with the polygrapher, the State told the expert not to speak without a prosecutor present, and then refused to travel to Tampa

[45] Long after the hearing, Mr. Maharaj secured the assistance of a volunteer expert, Laura Snook, whose affidavit is attached to this brief as *Exhibit A* and discussed in *Section III*. This merely goes to prove the earlier need for experts.

with counsel to conduct an interview. (3.850 Tr. 476-80)[46] The expert refused to appear without payment and his travel expenses, which undersigned counsel was forced to pay out of his own budget. Then, the moment that the expert appeared in Miami, the State stipulated to his results. (3.850 Tr. 486-87)[47]

Thus, the hearing that was held was not full and fair. If this Court does not to reverse outright, therefore, the Court must order a further hearing allowing the defense adequate resources.

## III. THE ACCUMULATION OF ERROR IN THIS CASE REQUIRES THAT THE INDICTMENT BE DISMISSED OR THAT A NEW TRIAL BE GRANTED

In this section, Mr. Maharaj discusses the truth that the jury did not hear

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[46] The state cannot place conditions--such as mandating the presence of a state agent--on a defense interview. Indeed, it was in the seminal case of Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966), aff'd after remand, 410 F.2d 1016, cert. denied, 396 U.S. 865 (1969), that the Court found error where the prosecutor admitted, "I instructed all the witnesses that they were free to speak to anyone they like. However, it was my advice that they not speak to anyone about the case unless I was present." Id. at 187. The Court said that the advice that a witness should not speak to defense counsel unless the prosecutor were there denied the accused "elemental fairness and due process." Id. at 188.

[47] Mr. Dickson had no independent recollection of the test beyond what was in his report. The state had the gall to argue that defense counsel should have resolved the issue without flying him down (3.850 Tr. 482), when the whole reason that this was not possible was the State's refusal to allow counsel to talk to him in the first place.

in his case.[48] Casting blame for misleading the jury is not very productive--the result is the same, the absence of a fair trial. Neither is it always simple, for it involves the State's suppression of favorable evidence,[49] the State's presentation of false evidence,[50] defense counsel's failure to defend Mr. Maharaj effectively,[51] recanted evidence,[52] newly-discovered evidence[53] and

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[48] Mr. Maharaj does not waive any claim in his 3.850 petition (3.850 Clerk Tr. 5962-6321), and the appendices making up over 6,000 pages of the record, and each factual allegation, and each legal basis for relief, is specifically incorporated into this brief by reference.

[49] See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Farrell v. State, 317 So. 2d 142, 144 (Fla. DCA1 1975) ("It is our opinion that our federal and state constitutions protect a person charged with a crime from acts which might be practiced in the name of justice by police and prosecuting officers to hinder an accused in the effective presentation of his defense. This abuse must not and will not be permitted.").

[50] This Court has said that "where the prosecutor has knowingly used perjured testimony, the judgment must be set aside if 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Aragno v. State, 467 So. 2d 692, 694 (Fla. 1985) (quoting United States v. Agurs, 427 U.S. 97, 102, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342 (1976)); see also Miller v. Pate, 396 U.S. 1,7,87 S. Ct. 2392, 49 L. Ed 2d 960 (1967); Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957); Mooney v. Holohan, 294 U.S. 103, 112, 55 S. Ct. 340, 89 L. Ed. 791 (1935) (a "deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "rudimentary demands of justice."); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 31 L. Ed. 2d 104 (1972).

[51] See, eg, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984)

[52] This Court recently held that a new trial must be granted with respect to recanted evidence "when it appears that, on a new trial, the *witness's* testimony will change to such an extent as to render probable a different verdict. . . ." Spaziano v. State, 660 So. 2d 1363, 1365 (Fla. 1995),

other misconduct.

### A. THE LAW REQUIRES THAT THIS COURT ASSESS THE CUMULATIVE IMPACT OF ALL THE "NEW FACTS" IN THIS CASE WHETHER THEY ARE NEWLY DISCOVERED, SUPPRESSED BY THE PROSECUTION, OR IGNORED DUE TO DEFENSE COUNSEL'S FAILINGS

This case is controlled by the recent Gunsby decision, where this Court held:

> Gunsby is entitled to a new conviction-phase proceeding. *We reach this conclusion based on the combined effect of the errors in this case*, which include the State's erroneous withholding of evidence, the ineffective assistance of counsel in failing to discover evidence, and newly discovered evidence reflecting that this was a drug-related murder rather than a racially motivated crime.

State v. Gunsby, 670 So. 2d 920, 921 (Fla. 1996) (emphasis supplied).[54] In Gunsby, this Court held that the *Brady* violation, standing alone, might not be sufficient to merit relief:

> "No question exists that Brady violations occurred. . . . If this were the only guilt phase issue having merit we would be inclined to agree that the trial judge correctly decided this 'close call.' . . . When we consider this error in combination with the evidence set

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quoting Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994), cert. denied, 115 S. Ct. 1799, 131 L. Ed. 2d 726 (1995).

[53] Spaziano v. State, 660 So. 2d 1363, 1365 (Fla. 1995) (citing Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)).

[54] See also Urquhart v. State, 676 So.2d 64, 66 (Fla. 1996) (citing Gunsby for the proposition that "the cumulative effect of numerous errors or omissions . . . may constitute prejudice"); Bradford v. State, 701 So. 2d 899, 900 (Fla. DCA 4 1997).

> forth in the second issue, however, we cannot agree with the State's position."

Id. at 923. The second issue in Gunsby was either newly discovered evidence or the ineffective assistance of counsel at trial, as it related to four witnesses who testified at the 3.850 hearing. This Court found some merit to the argument that the evidence would not, standing alone, "probably produce an acquittal on retrial." Id. at 924. Additionally this Court noted that the evidence could have been discovered through reasonable diligence by counsel at the time of trial. While this reflected badly on trial counsel, it was again a close question whether counsel's ineffectiveness, standing alone, met the prejudice prong of *Strickland*. However, this Court recognized that it makes no difference to the accused *why* he did not receive a fair trial: The ultimate issue is whether in fact he was denied the kind of proceeding guaranteed by our system of laws.

In this regard, Gunsby applies federal law as it has stood for a quarter of a century. One commentator has noted that 25 years ago the Supreme Court reached the same conclusion: "In Taylor v. Kentucky, [the] Court accepted the notion that several errors, none of which individually rise[s] to constitutional dimensions, may have the cumulative effect of denying a

defendant a fair trial."[55] Indeed, it makes no sense to consider the individual impact of each allegation, set in isolation, under a theory of "divide and conquer," since to do so seems only to attach constitutional significance to the table of contents. For example, in Walker v. Engle, 703 F.2d 959 (6th Cir.), cert. denied, 464 U.S. 951 (1983), the Sixth Circuit granted relief where six pieces of evidence were admitted, each "marginally relevant [or] irrelevant," but none of which individually violated the Constitution. Id. at 968. The overall effect, the Court recognized, was to deny the accused "fundamental fairness." Id.[56]

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[55] Van Cleve, *When is an Error Not an "Error"? Habeas Corpus and Cumulative Error Analysis*, 46 **Baylor L. Rev.** 59, 64 (1994); see Taylor v. Kentucky, 436 U.S. 478, 487 n.15, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) ("the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"). Indeed, the Supreme Court has increasingly adopted an approach that has focused on the totality of the circumstances of a trial under review. See, e.g., Darden v. Wainwright, 477 U.S. 168, 182, 106 S. Ct. 2464, 2472, 91 L. Ed. 2d 144 (1986) (prosecutor's allegedly erroneous statements assessed in terms of "their effect on the trial as a whole"); Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984) (when reviewing counsel's effectiveness, court must look to "all the circumstances" of the trial); Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986) (waiver of constitutional rights assessed in light of the "totality of the circumstances"); California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983) (custodial status of suspect evaluated in light of the "totality of the circumstances").

[56] See also Mak v. Blodgett, 970 F.2d 614, 621-22 (9th Cir. 1992), cert. denied, 113 S. Ct. 1363 (1993); United States v. Sepulveda, 15 F.3d 1161, 1195-96 (1st Cir. 1993) (while "errors, taken in isolation, appear harmless, the accumulation of errors effectively undermines due process

Mr. Maharaj's case cannot be distinguished from Gunsby. We now know that the Moo Youngs were not the innocent victims of Mr. Maharaj, as portrayed by the State, but money launderers, just as the victim's brother in Gunsby turned out to be "a well-known drug dealer in trouble over drug debts rather than a hard-working convenience store owner." Gunsby, 670 So.2d at 923. Indeed, Gunsby is only different from Mr. Maharaj's case in that the errors here are more blatant. For example, while the Brady violation in Gunsby only related to one of two eye-witnesses, and one of three people who supposedly heard Gunsby make admissions to the crime, State v. Gunsby, 670 So.2d at 923, here it implicated every facet of the case. Defense counsel failed to provide his client with reasonable advice on several key issues, again in part because he was misled by the prosecutors. Finally, we have already discussed the unique issue of the trial court's effort to solicit a bribe from the client, and his subsequent arrest during the trial.

In Gunsby, the court felt that none of the issues on their own would warrant a vacation of his conviction. "Nevertheless when we consider the cumulative effect of the testimony presented at the rule 3.850 evidentiary

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and demands a fresh start. * * * Individual errors, insufficient in themselves to necessitate a new trial, may in the aggregate have a more debilitating effect."); Floyd v. Meachum, 907 F.2d 347, 357 (2d Cir. 1990) ("[w]hile each instance of prosecutorial misconduct, standing alone, might not justify reversal, the effect of all of them requires it.").

hearing and the admitted Brady violations on the part of the State, we are compelled to find under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome." Id., 670 So.2d at 924. Here, we have already discussed two issues that would mandate reversal, standing alone. Even if they did not, the State has had two strikes. One more and it is out.[57]

### B. THE "FACTS" AS THE JURY AND THIS COURT HEARD THEM AT THE TIME OF TRIAL ARE VERY DIFFERENT FROM THE TRUE FACTS AS WE KNOW THEM TODAY

It is difficult to know how best to approach this case, since there are so many errors having such a profound impact on the trial. Perhaps the simplest method is to consider some of the facts that this Court found important on the direct appeal, and demonstrate how this Court was itself misled as to virtually every facet of the case.

#### 1. HAD CRITICAL FACTS NOT BEEN SUPPRESSED, THE DEFENSE COULD HAVE EXPLAINED THAT THE TWO MURDERS DID NOT "OCCUR AS A RESULT OF AN ONGOING DISPUTE BETWEEN DERRICK MOO YOUNG AND KRISHNA MAHARAJ," Maharaj I at 787

[57] It must be emphasized that although the following sections may speak to only one specific claim--*Brady*, ineffectiveness or what have you--Mr. Maharaj argues in the alternative with respect to each issue, so that if the State takes the position, for example, that defense counsel was provided discovery, then counsel was ineffective for failing to use it properly.

ASA Paul Ridge twice emphasized in closing argument that only one person--Krishna Maharaj--allegedly had the motive to kill the Moo Youngs.[58] It is a shame to have to speak ill of the dead, but unfortunately there were a large number of people who had a motive to kill them.

### a. The million dollar life insurance policies would have led the defense to probe to learn why the victims would have thought them necessary

We begin the search for the truth where the *William Penn Life Insurance Company* started: With the fact, known to the prosecutors[59] and other state actors,[60] but not to the defense,[61] that the Moo Youngs had recently taken out

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[58] The first time, he said: "The only one person who has walked in this courtroom in the past three weeks had a motive to kill Derrick Moo Young, and that's that man right in front of you, Krishna Maharaj, and why? Because he had a running battle with Derrick Moo Young." (Tr. 3913) The second time he argued: "So when you think about motive, only person who has walked in this courtroom in the past three weeks who had a motive to kill Derrick Moo Young was that man right there and no one else." (Tr. 3922)

[59] Three months before trial, ASA Ridge received *Notice of Objection to Request for Production*, in the case of Nagel & DMY v. William Penn. (3.850 Clerk Tr. 1080-81). It was pure advocacy, rather than testimony, for ASA Ridge to say that he couldn't make the "leap" that the Moo Youngs had taken out life insurance "I don't know if William Penn Life Insurance insures other types of risks, other than lives." (3.850 Tr. p. 566).

[60] Detective Buhrmaster, the chief investigator, was forced to admit that he knew long before the trial. (3.850 Tr. 721) He had given a television interview saying he knew about the life insurance policies within a few days. (3.850 Tr. 719) It does not actually matter what the prosecutors admit to knowing since the knowledge of the officer is imputed to them. Antone v. State, 355 So.2d 777, 778 (Fla. 1978) ("there is no distinction between

life insurance policies to the tune of a million dollars each.

From the insurance policies, the Moo Youngs themselves obviously believed that there were people actively interested in killing them. While this, alone, might not be sufficient evidence that someone other than Mr. Maharaj meant to do it, the evidence was clearly discoverable. Indeed, it would have been most important in terms of understanding the Moo Young family's strong incentive to cover up any possible evidence of wrongdoing, since they stood to gain two million dollars from the policies. If it was proven that the Moo Youngs had insured an illegal interest (their "key man" role in a fraudulent company), they would receive nothing. This would have led defense counsel, first, to review Shaula Nagel's deposition more critically, whereupon he would have learned that she was lying. See, infra, §(c). It would also have led to a large amount of other evidence (as indeed it led the *William Penn* lawyers to discover the materials discussed below).

In the case Hughes v. Bowers, 711 F. Supp. 1574 (N.D. Ga. 1989), the

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corresponding departments of the executive branch of Florida's government for the same purpose"). There is no inequity here in imputing Buhrmaster's knowledge to the State, since the prosecutors were always in routine contact with him, "and when it came close to the time of trial I would say it was more often two or three times a week and then right before trial probably every day." (3.850 Tr. 647)

[61] Defense Counsel Hendon testified at the 3.850 evidentiary hearing that he only became aware of the insurance policy at the sentencing phase of the trial when a former colleague informed him that the Moo Youngs had life insurance. (3.850 Tr. 268)

court considered the failure to disclose evidence of a life insurance policy and found that, standing alone, this required that habeas relief be granted. Even though the defense attacked the credibility of the witness who was interested in the policy concerning his acrimonious relationship with the defendant, the court found that the knowledge of the policies would have added a crucial element to the defense case. See also United States v. Srulowitz, 785 F.2d 382, 387-88 (2nd Cir. 1986) (failure to disclose evidence of other person's purchase of insurance mandates relief). **Strike 3** against the State. Yet this was just the first element of the *Brady* violation.

**b. The Moo Young briefcase contained a plethora of evidence of the illegal activities of the victims that would have provided a strong motive for someone else to kill them**

Far more important than the insurance policies, it is undisputed that the State had the contents of the Moo Young briefcase. While the prosecutors denied ever seeing the actual contents of the briefcase,[62] Det. Buhrmaster

[62] Paul Ridge admitted that he gave instructions to Det. Buhrmaster to make an inventory "to see if there was anything relevant to our investigation." (3.850 Tr. 544) He instructed Buhrmaster to do a thorough investigation of all state and federal agencies concerning any crimes possibly committed by the Moo Youngs (3.850 Tr. 567, 999-1001), including speaking to Atta Kujifi in Trinidad. (3.850 Tr. 567) This speaks volumes in terms of the State's suspicions of the Moo Youngs' shady dealings.

clearly did,[63] and he reviewed the documents carefully:

> Q. In your in-depth investigation into the victims' criminal past did you look in that briefcase for the documents that were in there?
>
> * * *
>
> A. Yes.
>
> * * *
>
> Q. And you looked through all the documents in the briefcase to assess how they might related to criminal activity. Right?
> A. I looked at what was there.
>
> * * *
>
> Q. Did you look carefully at documents?
> THE COURT: Carefully.
> [A.] Yes.

(3.850 Tr. 800-01)

This was not just a matter of suppressing evidence in discovery -- the State actively misled defense counsel, lulling him into a false sense of security. Smith v. Secretary of New Mexico Dept. of Corrections, 50 F.3d 801, 830 (10th Cir. 1995) ("We repeat that the failure to disclose this report, in light of a specific request for it, is 'seldom, if ever, excusable'") (quoting United States v. Agurs, 427 U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976)). Det. Buhrmaster represented to the defense investigator that he did not have the documents.[64] The only thing defense counsel knew about the

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[63] The MPD notes reflect that on October 21, 1986 (just five days after the crime), "I [John Buhrmaster] took custody of the victims one gray 'American Brief Case' (Escort Model w/1 Combination Lock) filled with misc. papers of law suits, etc. refs Vics & Offender." (3.850 Clerk Tr. 2049) Buhrmaster also admitted to *William Penn* that he still had the briefcase with all the documents. (3.850 Clerk Tr. 2448)

[64] At trial, Buhrmaster admitted that he had told the defense investigator that the "contents of the briefcase as well as the appointment

Moo Youngs were that they were "a middle to upper class family that lived adjacent to my client and who my client had known," and that they "were deceased, and they were deceased and they were killed in a room at Dupont Plaza." (3.850 Tr. 282, 283) As to the first issue, counsel was both right and wrong. According to the IRS, they were poor; according to the facts now known, they were involved with unimaginable wealth. The truth would have been critical to counsel's assessment of the case, as counsel testified:

> Well, again, this to me was a very crucial issue. I mean, I have a client charged with double homicide telling me that the victims of a double homicide were possibly major drug dealers. It would have been crucial, as far as I am concerned in terms of my investigation, to have information suggesting that they were less than law abiding citizens. I was unable to find anything to substantiate that. The only information I had was my client telling me that in his heart he believed the victims to be major narcotics traffickers or involved in the international drug trade. I could never get anything to show, again, that they were anything other than law abiding businessmen.

(3.850 Tr. 286) Counsel emphasized that investigation into the backgrounds of the victims can be difficult without cooperation from the State: "So I would have relied on the good faith of the prosecuting officials to advise me if they had any such information." (3.850 Tr. 395; see also id. at 436-40)

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books had been returned to the family." (Tr. 3525-26) He conceded this at the 3.850 hearing (3.850 Tr. 730), and defense investigator Ron Petrillo confirmed that he had seen the papers and passports in photographs of the briefcase, but was told the papers were no longer with the police. (3.850 Tr. 1024-26)

Unfortunately, this reliance was misplaced.

### i. The passports would have initiated counsel's investigation into the Moo Young finances

Defense counsel never saw the passports, but the prosecutors (3.850 Tr. 571) and Det. Buhrmaster did. (3.850 Tr. 740) Det. Buhrmaster actively lied to the defense when he said he did not have these, since he told *William Penn* that he had them all along.[65] The passports and the other documents in the briefcase revealed that in the first nine months of 1986 Derrick and Duane went to Europe (twice, staying upwards of two weeks), the Cayman Islands, Mexico, Panama (a total of six times), Puerto Rico (twice), Trinidad, as well as all over the United States.[66] While traveling, they stayed at very expensive hotels and ate in fancy restaurants. (3.850 Clerk Tr. 2998-3059)

When this was contrasted to the apparent poverty of the family, the defense would have been inspired to dig deeper. First, they would have learned that the Moo Youngs filed income tax returns reporting roughly $20,000 in income,[67] and their private bank account varied from a February low

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[65] Buhrmaster told the *William Penn* investigator that the Moo Youngs' "United States passports are in the hands of the Miami police department. . . ." (3.850 Clerk Tr. 2448, 2184-250)

[66] See 3.850 Clerk Tr. 2184-250, 2867-69, 2871-79, 2883-94, 2898-910, 2914-15, 2998-3057, 4341-94.

[67] In 1984, Derrick and Jeanette Moo Young filed a joint return of $16,988.77; in 1985, of $14,168.48; in 1986, of $21,766.12. (3.850 Clerk

of $6.85 on Valentine's Day 1986 (3.850 Clerk Tr. 3297) to a deficit of $14.65 on April 7. (3.850 Clerk Tr. 3335) As a result of this, the defense would have subpoenaed bank records, credit cards, airline tickets, and so forth, both from institutions and from the Moo Youngs directly, just as did the lawyers for *William Penn*. The extraordinary finances of the Moo Youngs would have prompted some very serious questions. As defense counsel testified:

> "if I would have been able to view the passports and have an idea of what sort of travel had been undertaken by the victims, it would have helped me in terms of my investigation as to searching out possible motives for anyone other than my client to want to see some detriment happen to the victims."

(3.850 Tr. 274)

Indeed, it is clear that the defendant is "entitled to evidence of 'debatable exculpatory value,'" Perdomo v. State, 565 So. 2d 1375, 1377 (Fla. DCA2 1990), in part because such evidence clearly may lead to other, more significant evidence. This would have been true in this case, and the Passports, by themselves, are **Strike 4** against the State.

### ii. The all-important evidence of money-laundering in the briefcase would have opened up a line of investigation where defense counsel had found himself stymied

Perhaps most significant of all the suppressed evidence in the briefcase

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Tr. 2814-15, 2823-24, 2835-37)

were the financial documents. Det. Buhrmaster was in possession of information that could have led defense counsel to the core of this case. The references in the hand-written notes include:

**Ø** A note concerning how "Duane [would be] M[oo] Y[oung] agent for Panama Co with 100m . . . to invest ¼% fee advance $100,000. . . ." (3.850 Clerk Tr. 2215)

**Ù** A memo about the Moo Youngs' effort to induce Dr. Richard Hayes, then Minister of Finance for the Government of Barbados, into paying for a loan, using Dr. E.E. Ward as the go-between. (3.850 Clerk Tr. 2267) This was later turned into the letter that proposed the movement of $100 million to Barbados.

**Ú** A draft of a letter from Derrick Moo Young offering $100 million to someone unknown, from Cargil International. (3.850 Clerk Tr. 2270)

**Û** A draft letter regarding the "difficulty [of) getting U.S. $ funds out of Mexico but [it is] not impossible. To avoid any exchange control problems in Mexico . . . must instruct foreign bank to pay to Cargil 2% commission. . . ." (3.850 Clerk Tr. 2276)

**Ü** A draft memo written by Derrick Moo Young about the requirements to receive a $250 million loan from *Cargil International (Panama)*. (3.850 Clerk Tr. 2274) The Moo Youngs expected to net 6%, or $15 million, from lending this money.

**Ý** A draft of the letter to Amer Edoo concerning a loan of $250 million to Trinidad. (3.850 Clerk Tr. 2276) This includes the signature "S. Scott," which the defense would have learned was an alias for Derrick Moo Young. (Id. at 2296, 2279)

The notes reflect that this dealing was going on in Panama, Paraguay and Trinidad (3.850 Clerk Tr. 2272) as well as Costa Rica. (3.850 Clerk Tr. 2281) What, the defense lawyer would have asked, could these people possibly be doing with $250 million?[68] Ultimately, the defense would have

[68] Space limitations prevent Mr. Maharaj from detailing everything in the notes. However, counsel would have had a good idea what was going on here, since he would have found in the notes a clear forgery of a letter to

been inspired to dig in the same way that the *William Penn* lawyers did, and would have found that this was just the tip of the iceberg. Counsel would then have found a draft of the $1.5 billion loan letter to Minister Hayes in Barbados. (3.850 Clerk Tr. 4339) What were the Moo Youngs doing with access to one and a half **billion** dollars?

Counsel would then have found a June 26, 1986, letter of one Roberto Alvarez of Alpine Inc., Puerto Rico, to Duane Moo Young in Panama about $1 to $2 billion for loans to Trinidad. (3.850 Clerk Tr. 4677) Counsel would have discovered a letter from Ameer Edoo in Trinidad to a Mr. Alvarez, who was representing that he was the secretary of *Cargil International*, one of the Moo Youngs' business fronts. (3.850 Clerk Tr. 5028) Counsel would have come across a May 1986 telex from Derrick Moo Young to Dr. Enrique Van Brown about placing the "other **3 billion**" when the first deal is done. (3.850 Clerk Tr. 4922) Then, of course, counsel would have found the June 6, 1986, letter from Derrick Moo Young, written on behalf of *Cargil International*, to Dr. W.C. Bryant representing that Cargil has **$5 billion** for processing in Yen bonds. (3.850 Clerk Tr. 4947) The Moo Youngs now apparently have access to as

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Duane Moo Young that was drafted by Duane in his own handwriting, purporting to be from someone else, to be typed up later. (3.850 Clerk Tr. 4329; see also 3.850 Clerk Tr. 4330) There would have been no doubt in his mind that the Moo Youngs were involved in something fraudulent, and he would have pursued this until he had a satisfactory explanation.

much money as many small nation states.

What did this mean? On one level, in terms of the discoverability of the evidence, it does not matter.[69] However, it is clear to anybody that the Moo Youngs were up to no good, and that someone else might have a motive to kill the Moo Youngs. Indeed, as a close analysis of the documents reveal, they were apparently in the middle of a deal that would skim millions of dollars off the top of one laundering maneuver.[70]

Gunsby is distinguishable by the fact that Mr. Maharaj's evidence is far more dramatic, but there, as here, "Gunsby contends that new evidence establishes that the murder was, in reality, drug related and was committed by a rival drug clan that was competing with the victim's brother for drug business." Id. at 923. Here, unlike Gunsby,[71] this evidence alone would

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[69] To be discoverable, the evidence does not have to be admissible itself: "The assumed inadmissibility of the overheard remarks is irrelevant to the issue of whether the State should have informed the defense of the evidence. Discovery in a criminal case is not limited to investigative leads or reports that are admissible in evidence. The issue is whether the State had a duty to inform the defense of this potentially exculpatory evidence, thereafter leaving to the defense the problems concerning the extent to which the evidence could be used or expanded upon both before and during trial." Jiminez v. State, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996).

[70] Laura Snook, the expert from Britain, makes it clear in her affidavit that the only realistic interpretation of this evidence is that "the Moo Youngs were involved in potential arrangements to launder illegal money." *Exhibit A, ¶11*. Indeed, they were skimming as much as $10 million off the top in these transfers, *id.* *¶12*, providing a strong motive for their murder.

[71] It is not clear what admissible evidence there was to prove that "the victim's brother . . . was a well-known drug dealer in trouble over drugs

require reversal. **Strike 5**.

### c. Shaula Nagel's deposition was replete with perjured evidence and further misled the defense

Much of the information that later came to light from the insurance policies,[72] the Moo Young briefcase,[73] and subsequent investigation would have come to light had Shaula Nagel, Derrick's daughter, not lied and misled the defense in her deposition. That she committed perjury in her criminal deposition is shown in stark relief by the two civil depositions she gave to *William Penn*, when she was trying to cash in on the life insurance policies, and she was forced to concede facts because her lawyer had complied with civil discovery requirements.

Consider, for example, the Moo Young business dealings. When

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debts." Id. at 923. Here, there was a mass of evidence *in the hands of the prosecution* that would have demonstrated this. Furthermore, the case against Gunsby was far stronger in that there were two eyewitnesses, and three witnesses to confessions made by the accused. Id. at 923. Nonetheless, based on this evidence alone this Court found the *Brady* issue a "close call." Id. Here, the decision is not even close if the Court looks solely to the documents in the briefcase. See also People v. Heller, 126 Misc. 2d 575, 483 N.Y.S.2d 590 (1984) (where "information speaks to a possible motive" it must be disclosed).

[72] Shaula Nagel certainly knew about the insurance policies that were "filled out on August 7, 1986, that was two months before [Derrick and Duane Moo Young] died." (3.850 Clerk Tr. 622)

[73] It is significant that she, too, knew that the materials were in the hands of the police. Her lawyer told *William Penn* that the detectives still had the briefcase with the records in it. (3.850 Clerk Tr. 566) She herself said that there were another two boxes of records beyond this.

defense counsel asked Nagel what "export-import" business her father was in, she started talking about "toilets", and the prosecution prompted her to say "fixtures." (Tr. 227) As far as she knew, she said, the business was with "just Trinidad." (Tr. 227) In 1986, their business was "sporadic." (Tr. 228)

This was false. For example, while Nagel told defense counsel that one Moo Young business, *DMY International*, had just begun and had no assets (Tr. 225), she admitted to *William Penn* that she knew more about *DMY* than anyone else alive. (3.850 Clerk Tr. 5358)[74] The *DMY* documents filed with *William Penn* certified that the company had assets of two million dollars. (3.850 Clerk Tr. 617)[75] Defense counsel would want to know where these were, for there were no such *legal* assets.

The family members also enjoyed extraordinary wealth that, had it been

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[74] She was listed as both a director and vice-president of the company. (3.850 Clerk Tr. 649) Indeed, she had first gone to Panama as part of the Moo Young "businesses" a long time (as much as two years) before her criminal deposition. (3.850 Clerk Tr. 549) Shortly before their deaths, she had gone with Derrick and Duane to the Cayman Islands, where she was a part of meetings concerning the gems. (3.850 Clerk Tr. 745)

[75] This was confirmed by at least four people who were involved: Nagel's brothers Duane (id.), Andrew (id. at 125) and Paul (id. at 129), and her husband Kerry. (Id. at 135) While she told *William Penn* she had not seen the documents concerning the supposed value of *DMY*, she admitted that she had heard about it. (3.850 Clerk Tr. 620)

known, would have precipitated a massive defense investigation.[76] Indeed, the Moo Youngs had got sloppy and allowed $74,970 to appear and disappear suddenly in the *DMY* account in August 1986. (3.850 Clerk Tr. 667) Nagel knew about it, because she had "seen it going through the records." (3.850 Clerk Tr. 668) When Nagel told the defense that the Moo Youngs had recently come to America with little or nothing and lived off her student loans (Tr. 245), and were just working hard on their American dream, she was simply lying.

Nagel also tried to throw the defense off the scene with respect to *Cargil International*. She lied to the defense and said it was a corporation owned by

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[76] The documents to prove it were in Nagel's possession before she turned them over to her civil attorney who provided them in discovery to *William Penn*. Duane, for example, had represented that his assets were $550,000 and, Nagel insisted, "I would believe it would have to be true. . . ." (3.850 Clerk Tr. 621) Nagel knew that Duane had just ordered an extremely expensive new Porsche from Europe that Nagel canceled when he died. (3.850 Clerk Tr. 602-04) There was nothing legal that Duane was doing worth $500,000 to *DMY* (3.850 Clerk Tr. 626) and she did not know what he was really doing: "[T]here are a lot of things that Duane and dad did and financial things they handled that I had nothing to do with, that I wouldn't know about." (3.850 Clerk Tr. 621) Alan Carr, her adoptive brother, was meant to be worth $300,000 to the company, and had just received a new car. (3.850 Clerk Tr. 630-31) Another brother, Andrew Wong, stated that he had assets of half a million dollars, and supposedly had received $72,000 from the company in 1985-86. (3.850 Clerk Tr. 634-35) The company had also bought a car for another brother, Paul Moo Young, whose net worth was stated to be $400,000, and who had supposedly netted $72,000 from the company the year before. (3.850 Clerk Tr. 637-38) Nagel's own husband, Kerry, stated his net worth as $575,000, and said he was making $107,000. (3.850 Clerk Tr. 644)

Jeralco Leyva, based in the United States. (Tr. 248) Obviously, then, there would be no reason for the defense to investigate it. In contrast, she admitted to *William Penn* that is was a Panamanian company and she knew her father was involved in it because he had papers and he had its letterhead stationery. (3.850 Clerk Tr. 676) All of these documents were passed to her attorney. (Id.)[77]

Her lies did not only mislead the defense concerning the Moo Youngs, but also the facts of the crime. For example, Nagel lied in her criminal deposition when she said she only knew that Neville Butler called the house to arrange a business meeting because her mother told her. (Tr. 246-47) The prosecution sat back while Nagel lied under oath that she had never heard the name of Eddie Dames prior to her deposition. (Tr. 247)[78] She also denied any

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[77] She also knew some other leads that would have helped the defense. For example, she knew about the use of false names in business documents that were designed to hide the Moo Youngs' nefarious schemes. The mysterious Shernette Scott was "a friend of the family" who lived in Jamaica, and who had been her father's secretary many years ago. (3.850 Clerk Tr. 677, 680) She recognized "S. Scott" forgeries as Duane's handwriting (id. at 686), and even her mother's. (Id. at 699) There were a number of other "S. Scott" letters written by hands unknown to her. (Id. at 701-02) She eventually had to admit that she, herself, had been involved in one business transaction with this mythical figure. (Id. at 716) Nagel also knew her father had used the false names Frank Williamson (Id. at 689, 691, 713), and Ivor Adams. (Id. at 711)

[78] Compare this to what *William Penn* learned from her, discussed in greater detail below, that Eddie Dames had been calling her father frequently in the days leading up to the crime. See *§(2)(c)*. This was critical, for it totally eviscerated the main prosecution theory that Mr.

knowledge of business dealings between her father and Adam Hosein. (Tr. 237-38) Her answers to *William Penn* lead to a very different conclusion.[79] Nagel also lied when she testified that in March 1986, when she and her father were in London, "Scotland Yard had come to the house and told us things about Kris from before, that he was wanted for fraud and all that stuff and then when we went in March it confirmed what they had told us." (Tr. 230) While this "fact" kept Mr. Maharaj from testifying, the State knew it to be false and yet did not correct her lie. See *§(3)(b)(ii)*.[80]

Perjury is perjury, and it does not matter when the lies occur:

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Maharaj had Neville Butler set up a false meeting, and that Dames was a stooge who knew nothing about it.

[79] She knew about another Moo Young bank account in Panama at Citibank (3.850 Clerk Tr. 369) and discovered from Orlando Barsallo that the name of the account was Amer Enterprises (Id. at 371), which "was a Panamanian company where my dad was a consultant, and it was set up to do business. That would be in South America." (3.850 Clerk Tr. 664) Supposedly, she was a signatory on the account, and got $30-40,000 from it when she went to Panama after her father's death. (3.850 Clerk Tr. 665, 667) Again, as discussed below, *§(9)*, had they known to investigate this company, the defense would have learned it was named after Adam "Amer" Hosein.

[80] Nagel also knew full well that it was her father, not Mr. Maharaj, who had been behind the printing press scam that was attributed to Mr. Maharaj by the prosecution at trial. Nagel admitted that *KDM Distributors* (another front that was designed to rip off Mr. Maharaj's company, *KDM International*) had handled this transaction, which meant he was "cut out" of that transaction. (3.850 Clerk Tr. 577) This was precisely the opposite of what the prosecution presented to the jury in Eslee Carberry's false newspaper stories. See *§II(B)(3)(a)*.

> A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . .

Napue v. Illinois, 360 U.S. at 269-70; accord Giglio v. United States, 405 U.S. at 154; Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984). This litany of lies fatally tainted Mr. Maharaj's defense, for it misled him in critical areas.

In Chicago, there has recently been a series of publicized capital cases where the wrong person has been convicted. There, as here, other evidence that should have been turned over was linked to the knowing presentation of perjury. Angered at this, the Illinois Supreme Court has held:

> In our opinion, where undisclosed *Brady* material undermines the credibility of specific testimony that the State otherwise knew to be false . . . the failure to disclose is "part and parcel of the presentation of false evidence to the jury and therefore 'corrupt[s] * * * the truth-seeking function of the trial process,' and is far more serious than a failure to disclose generally exculpatory material."

People v. Coleman, 183 Ill.2d 366, 394, 701 N.E.2d 1063, 1078, 233 Ill.Dec. 789, 804 (1998) (citations omitted). The same is true here, and alone it is sufficient to mandate reversal **Strike 6**.

### 2. THERE WAS PERVASIVE UNFAIRNESS WITH RESPECT TO "THE PRIMARY WITNESS FOR THE STATE . . . NEVILLE BUTLER," Maharaj I at 787

Once the defense had some idea of who the victims *really* were, it would have been time to turn attention on the State's case. "The primary witness for

the State was Neville Butler," Maharaj I at 787; Maharaj II, at 727 ("Butler was . . . the State's key witness at trial."). Virtually any suppression of evidence regarding Butler would therefore be prejudicial:

> [B]ecause the case against [Appellant] for the . . . crimes depended largely upon [the challenged witness'] testimony, it appears beyond peradventure that there exists a reasonable likelihood that the allegedly false testimony influenced the jury's decision.

Johnson v. Trickey, 882 F.2d 316, 319 (8th Cir. 1989); see also Campbell v. Reed, 594 F.2d 4, 8 (4th Cir. 1979); accord Giglio v. United States, 405 U.S. at 154-55.

**a. The State suppressed evidence and suborned perjury with respect to Butler's polygraph**

Kris Marahaj passed a polygraph, strongly supporting his claim of innocence. We now know that on March 2nd, 1987, Butler failed a polygraph that had been conducted by Dudley H. Dickson. (3,850 Clerk Tr. 152-54) Mr. Dickson opined in a letter to the prosecution that, "[b]ased on the subject's polygraph responses, it is the examiner's opinion he was untruthful and was withholding and falsifying information as indicated above." (Id. at 154)

At trial, the State advised defense counsel orally (3.850 Tr. 247) and by letter (3.850 Tr. 384) that Butler had passed his test. Counsel never received a copy of the report (3.850 Tr. 254) and was not even told the polygrapher's

name. (3.850 Tr. 457; see also 3.850 Tr. 1016-17)[81] During the second deposition of Butler, the prosecutor specifically and falsely said that Butler had passed.[82] The State then misrepresented the facts to the trial judge:

> THE COURT: Who passed the polygraph?
> MR. HENDON: Krishna Maharaj took a polygraph and passed.
> MR. RIDGE: **And Mr. Butler took a polygraph and passed.**

(Tr. 4435-36) (emphasis supplied)[83] Perhaps as horrifying as anything in this case, even on appeal the State lied to this Court:

> Even if the point [about Butler's polygraph test] was preserved, error still did not occur since the record reflects that **Butler first decided to tell the truth and the polygraph was given to determine if his second statement was the truth**. At no time did Butler fail a polygraph and then tell the truth.

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[81] All of this is particularly galling given that the State had written to the defense discussing whether "there would be a polygraph of Mr. Butler and, if the defendant wanted a polygraph of Mr. Butler, the defendant would have to pay for the polygraph." (Tr. 4433; Tr. 604-05)

[82] In Butler's second deposition defense counsel wanted to know "[h]ow are we sure you are telling us the truth now?" The State said:

> MR. RIDGE: Objection. * * * **You want to know how we know he is being truthful? Because he took a polygraph examination.** * * * I think it is worthless to ask a question like that.

(Tr. 908-09) (emphasis supplied) Due to this highly misleading objection, the question was never asked.

[83] The trial court's ruling that no mention could be made of the test was clearly based on this misrepresentation, as the judge ruled that to mention that Butler took "a polygraph is to suggest that he might not have been telling the truth and he did, in fact, take a polygraph and he did, in fact, pass it. . . ." (Tr. 4436) It is very possible that the trial court's ruling would have been different had the State not lied.

*Brief of Appellee (Supplemental Argument) at 1 (Sept. 19, 1990)* (emphasis supplied). This is false: Butler was asked questions, failed the test in part, was asked more questions, and failed in part again.[84]

Ultimately, it does not matter that Kastrenakes denied that he knew this to be perjury; his lead counsel, Ridge, effectively admitted it.[85] Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L.Ed.2d 104 (1972) ("We need not concern ourselves with the differing versions of events described by the two assistants in their affidavits. The heart of the matter is that one [prosecutor] – the first one who dealt with Trliento – now states that he

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[84] The State's argument that he changed his story *before* the polygraph is patently false. It is refuted by the polygraph report itself (3.850 Clerk Tr. 152-54), and it is refuted by ASA Paul Ridge, who was lead counsel (3.850 Tr. 493), and testified that he could not remember any pressure before the polygraph, but "**[a]fter it** I believe the tone would have been a bit more forceful," when he explained to Butler "'[l]isten, there are some aspects of your story we don't believe. That we need to -- you need to expand upon, or clarify, or tell us what really happened.'" (3.850 Tr. 503) (emphasis supplied)

[85] ASA Ridge was forced to concede that this was not a "pass":

> Q. Based on the subject's polygraph responses it is the examiner's opinion he was untruthful and was withholding and falsifying information as indicated above. Would you think that that supports a characterization that someone passed the polygraph test?
>
> * * *
>
> THE WITNESS: No.

(3.850 Tr. 512) It does not reflect well on ASA Kastrenakis that he continues to dissemble. He told British television that Butler "flunked" his polygraph (3.850 Tr. 602; 3.850 Clerk Tr. 1637), yet at the hearing he made out that Butler passed. (3.850 Tr. 602-03)

promised Taliento that he would not be prosecuted if he cooperated").

### i. At the very least, inconsistent statements made by Butler in the course of the polygraph were discoverable

There are at least three elements to this issue.[86] First, even if the question of his polygraph were not admissible, the *inconsistent statements made during the test* are discoverable. For example, at trial Butler said the only time he got out of the car was when Mr. Maharaj sent him over to see Dames, whereupon he supposedly got the car key and sped away. (Tr. XIII at 2841-42) On the test, the examiner also concluded that Butler's story about being in the car the whole time was false:

> [Butler] further stated that **with the exception of getting out of the car to put quarters in the parking meter**, he had remained in the car with Maharaj at all times after the shooting until he had seen Eddie Dames. His responses were also indicative of deception to this statement.

(3.850 Clerk Tr. 154) (emphasis supplied).[87] Here, of course, the defense

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[86] The issue definitively is *not* whether a polygraph test is admissible in evidence *per se*. Rather, the results should have been provided to the defense in discovery, and--while this is not critical to the claim--would also have been admissible at trial. United States v. Miller, 874 F.2d 1255, 1262 (9th Cir. 1989) ("in certain circumstances . . . testimony concerning a polygraph may be introduced for limited purposes."); United States v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989).

[87] The state's examiner also concluded that "[d]uring further discussion he stated he was in the car but they had moved the car from the parking lot to a meter space in front of the Dupont Plaza until Eddie Dames returned. He said this was the only traveling he had done after the shooting

could have made hay of the story, since Butler did not mention it at any other time, and--were it true--he would have had the opportunity to run away from Mr. Maharaj at that time. Instead, when examined by Mr. Hendon during the trial, defense counsel specifically asked:

> Q. During that entire time [three hours] you weren't approached by any meter-maid or police officers or anyone?
> A. No one whatsoever.
> Q. And the car ran for three hours?
> A. Yes, or the full period of time we were sitting there.
> Q. According to you, that time was approximately three hours?
> A. Yes.
> Q. You made no attempt to leave?
> A. No, I did not.

(Tr. 3070)

The examiner also concluded that

> During subsequent testing, he was asked if he remembered personally acquiring the heaters in question. He was also asked if he had purchased the [immersion) heaters. His responses were indicative of deceptions to his denials to both of these questions.

(3.850 Clerk Tr. 154) At trial, on the other hand, he told the jury that he and Mr. Maharaj bought the heaters together. (Tr. 2772) Again, this was a change in story on an important point.

The lead case on this issue is Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992), where the Eleventh Circuit reviewed a Florida conviction. As in this

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until after Eddie Dames returned. His responses were indicative of deception to this statement during subsequent testing." (3.850 Clerk Tr. 154)

case, the witness at issue, Rhodes,was the only eye witness, and had undergone a polygraph exam. Unlike this case, he had apparently passed. However, included in the exam were statements that were inconsistent with his trial testimony, and the Court found "it reasonably probable that the disclosure of the examiner's report would have altered the outcome of a trial. . . ." Id. at 1289.[88] This error alone mandates reversal. **Strike 7**.

**ii. That Butler had failed the polygraph with respect to assertions that he insisted were true at trial was discoverable because it would have prompted the defense to investigate more carefully**

Second, the defense would have had the right to know points where the prosecution had reason to doubt its own witness. Facing similar facts in United States v. Hart, 344 F.Supp. 522 (E.D.N.Y. 1971), the court suggested that it would be unfair to allow the State to use a polygraph to try to get a witness to tell the "truth," and then deny the defense the chance to assess how

[88] There are two additional points to make about Jacobs. First, the case ordered habeas relief with respect to an earlier decision from this Court that is often cited for the principle that polygraphs are not discoverable, but it should be noted that even in Jacobs v. State, 396 So. 2d 713 (Fla. 1981), this Court held that the defense is entitled to statements within the polygraph test "inconsistent with the trial testimony." Id. at 716. Second, the Eleventh Circuit applied a cumulative error test, much like Gunsby, and found that the error could not be harmless in light of other allegations of perjured testimony and an unconstitutional statement. Jacobs, 952 F.2d at 1289.

the State reached its conclusion as to that "truth" once the witness failed the test:

> Having requested that [the witness] submit to polygraph tests, and then rejected the conclusions of the tests, the government should be prepared to show (a) the prior experience with polygraph tests . . . which led the Bureau . . . to have [him] submit to the tests; (b) the basis for the subsequent doubts about the validity of the polygraph tests which led to the disregard of the results. . . .

Id. at 524; see also United States v. Glover, 596 F.2d 857, 867 (9th Cir. 1979) (citing Hart for the proposition that it would be a *Brady* violation if "the government failed to reveal that a polygraph test administered at the prosecution's behest to its principal witness indicated he was lying").

Even if this were not admissible before the jury, and it might well be, if discovery had been forthcoming this was certainly an area that the defense would have explored much more carefully itself. For example, the examiner concluded that

> During the pre-test discussion he stated he had remained in the car with Maharaj after the shooting for approximately two and a half hours. His responses were indicative of deception to this statement.

(3.850 Clerk Tr. 153) This was the story that Butler told at trial. The defense had the right to know that he had failed with respect to that question, to prepare for this weak point in the State's argument.

In Goldberg v. State, 351 So. 2d 332 (Fla. 1977), a witness had failed a

polygraph with respect to another case, and the State therefore had asked that he be submitted as a Court's witness, rather than vouch for his credibility on that point. "[T]he results of a polygraph examination indicated that he was testifying falsely . . . in at least one area serving his own interest to the detriment of the defendant." Id. at 335. This Court held that the failure to turn over this evidence, *from another independent case*, resulted in reversal: "Such details were essential to preparing a defense in a case of this nature, where witness credibility was virtually determinative of the entire issue." Goldberg, 351 So. 2d at 336; see also United States v. Lindell, 881 F.2d 1313, 1326 (5th Cir. 1989) ("[i]mpeachment evidence includes the results of a polygraph test"), cert. denied, 496 U.S. 926, 110 S.Ct. 2621, 110 L. Ed. 2d 642 (1990). Again, this error alone mandates reversal. **Strike 8**.

### iii. In allowing Butler to testify that he came forward to change his story, when the truth was that he was coerced to change it when he failed the test, the prosecution suborned perjury

Third, and by far the most important, is the State's knowing and repeated presentation of perjured testimony. The jury was asked to consider why Butler supposedly changed his mind and "came clean"? Butler said that his conscience pricked him in March, so *he went to the State* and told them the truth. (Tr. 3098) He testified that although he did not remember things during

his January 13th-14th deposition he did remember some of the details or facts later and he *then went to the State* with that new information. (Tr. 3061) These were both acts of outright perjury, since he changed his story when caught lying by the polygrapher. The prosecution stood by while he repeated this lie another five times to the jury:

> **Ø** "I voluntarily agreed to correct the wrongs I had--statements I had made when **I approached the . . . State Attorney** and told him about it." (Tr. 3052) (emphasis supplied).
> **Ù** "Subsequently, as I recalled things and I am sure you have one my deposition, that I kept saying from time to time if I remember things, I will being it up and when **I did get in touch with the State Attorney** to let him know of the lies I had told or the things that I was covering up to protect myself." (Tr. 3061)
> **Ú** "Again, **I did, on my own, get in touch with the State Attorney to correct all the things that I said that was incorrect.** Regardless of what the consequences were, I was prepared to abide by it because I felt I was wrong. I did a few things that were wrong and having come to the State Attorney and told him that I was wrong, I was prepared to abide by whatever the consequences." (Tr. 3069)
> **Û** "**[A]s I told the State Attorney, as I remember things, I would bring it to his attention.** This is what happened." (Tr. 3096)
> **Ü** "[A]fter realizing and coming to my senses, is when **I got in touch with the State Attorney** and explained what I had done and prepared to stand the consequences." (Tr. 3097)

The prosecution did not just stand around listening to these lies go uncorrected, but actively compounded them. At the second deposition, Mr. Ridge told counsel that "Mr. Butler has **come forward** and said the whole purpose of the meeting was not what he told you in prior statement or prior deposition. . . ." (Tr. 834) (emphasis supplied) Astonishingly, Det. Buhrmaster got together with the prosecutors to explain (falsely) the reasons for Butler's

change of heart. A note in Buhrmaster's file reflects:

> CROSS EXAM:
> 1. "Nevells change" -- He never has changed his story about how it happened, he just changed on 02 Mar 87, that he did in fact set up this meeting and what Maharaj was going to do there (exception he committed the murder)
> 2. He was afraid that he was also involvement [*sic*] in the murder.
> 3. It's still unknown what status of N. Butler & what will happen to him pending arrest.

(3.850 Clerk Tr. 2027) Thus, the State knowingly prepared the witness to lie about the facts. The plan was that Butler would say he was afraid he was involved in the murder. They knew it to be false. The lead prosecutor, Paul Ridge, conceded at the 3.850 hearing that Butler changed his story "either because of being confronted with the results of the polygraph examination, or my persuasive argument for him to tell us the truth." (3.850 Tr. 519)

The fact that the prosecution used the polygraph to coerce Butler into changing his testimony was clearly discoverable. In Carter v. Rafferty, 826 F.2d 1299 (3rd Cir. 1987), the Court dealt with precisely this issue. As with Butler, the importance of the testimony of accomplice Alfred Bello, the witness, "to the prosecution's case clearly loom[ed] large and commanding." Id. at 1309. The Court "accepted [Appellant's] theory that the police or prosecution confronted Bello [the witness] with the results of the test to persuade Bello to return or adhere to the 'on the street' testimony of the 1967 trial." Id. at 1307. This would have been critical material, since defense counsel "would have

been in a position to argue that the prosecution had persuaded Bello to return to the 'on the street' version not because it was true, but because that is what the 'lie detector' results demanded." Id. at 1308. Because his testimony was so important, the court granted relief *solely on this issue*, finding that "it must necessarily follow that there is a 'reasonable probability' that the 'result of the [trial] would have been different' had the prosecution properly disclosed [the polygraph report]." Id. at 1309 (citation omitted); see also United States v. Lynn, 856 F.2d 430 (1st Cir. 1988). **Strike 9**.

There is another compelling element to this claim--the Government's highly improper presentation of perjured testimony. It does not matter that a polygraph was taken. The only question is whether Butler told the truth, and we know that he did not.

"Whether the State solicits the false testimony or merely allows it to stand uncorrected when it appears does not diminish the viability of this principle. . . ." United States v. Vincent, 525 F.2d 262, 267 (2d Cir. 1975) (citing Napue v. Illinois, 360 U.S. at 269; Giglio v. United States, 405 U.S. at 153). This is because "[t]he thrust of Giglio and its progeny has been that the jury knows the facts. . . ." Brown v. Wainwright, 785 F.2d 1457, 1465 (11th Cir. 1986) (quoting Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.), cert. denied, 464 U.S. 1003, 104 S. Ct. 510, 78 L. Ed. 2d 699 (1983)).

Here, the fact that the State actually *planned* before trial to elicit the perjury is all the more damning. This Court has said that "where the prosecutor has knowingly used perjured testimony, the judgment must be set aside if 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Aragno v. State, 467 So. 2d 692, 694 (Fla. 1985) (quoting United States v. Agurs, 427 U.S. 97, 102, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342 (1976)). Here, there clearly is, since Butler was the State's star witness. United States v. Rivera Pedin, 861 F.2d 1522, 1530 (11th Cir. 1988) ("the prosecutor's failure to correct a witness' false testimony will warrant a reversal where, as here, the 'estimate of the truthfulness and reliability of the given witness may well be determinative of guilt or innocence'"). Reversal would be required on this issue alone. **Strike 10**.

**b. Defense counsel failed effectively to utilize the first Butler statement that contained endless impeachment evidence and was known by the State to be replete with falsehoods**

Butler gave his original sworn taped statement to the police at 00:50am on October 17, 1986. (3.850 Clerk Tr. 1443-64) The copy received prior to the 3.850 hearing from the State's Attorney file identifies down the left hand column various aspects of the story that the state specifically knew to be

"FALSE." (Id. at 1449, 1451)[89] Even though this may be analyzed as a claim of ineffectiveness[90] it must also be viewed as further evidence that the prosecution suborned perjury through its chief witness.

Endless significant details differed, too many to mention here.[91] For example, counsel made nothing of the fact that Butler said he saw a elderly white maid in the room cleaning up. They had a conversation. (3.850 Clerk Tr. 1458) This was crucial since at trial the maid was meant to be an eye witness who had seen Mr. Maharaj, not Butler, and apparently mistook her identification. In his statement, Butler said "[t]here was yelling and screaming" going on for "about 15, 18 minutes" between Mr. Maharaj and the Moo Youngs.

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[89] There are, indeed, only four matters that the agent believed to be "TRUE" (3.850 Clerk Tr. 1448, 1449, 1451, 1458) and his credulity on this point is remarkable, for these included the ridiculous story that the car was parked outside the hotel for three hours after the crime. There are still other matters that the agent believed to be "UNCLEAR." (Id. at 1449)

[90] Defense counsel insisted that he had the statement and used it for impeachment. (3.850 Tr. 388) However, a review of the record shows that he mentioned the statement only twice and clearly did not have it with him. (Tr. 3096, 3101) This may be attributable to the fact, faced with the most important witness in the trial, he had forgotten to bring the notes he had made for cross-examination. (Tr. 3106)

[91] For example, we have already mentioned the immersion heaters. Common sense tells us that these short heating cords were useless for the purpose that Butler testified at trial--tying up the Moo Youngs. Counsel could have made much of his admission in his statement: "I attempted to [tie up Derrick Moo Young), although it was impossible because of the piece of electrical cord. . . ." (3.850 Clerk Tr. 1452) Yet at trial Butler said that he tied Duane Moo Young to a chair with one of the cords (Tr. 2809) and would have tied up Derrick Moo Young at Mr. Maharaj's orders had Derrick not lunged forward. (Tr. 2810)

(3.850 Clerk Tr. 1452) Given the paper-thin walls in the hotel, this made it all the more unlikely that nobody heard the ruckus.

One aspect of his statement would have been crucial for impeachment. Butler has Mr. Maharaj making two additional forays into the hallway to have conversations with the security staff. For example, "[a]t some point while the young Moo Young was sitting with his hands loosely tied, he -- and Maraj opened the door to see if the Security person was out there, young Moo Young dived at him and there was a struggle over the gun." (3.850 Clerk Tr. 1454) This was contrary to what the independent witnesses said and his testimony at trial. The State was faced with two alternatives--either the impartial witnesses were lying, or Butler was. Instead, in anticipation of the impending impeachment, the notes reflect that the State fabricated a third alternative that strains credulity: In the text, the state has written notes, "D w/fake conversation." (3.850 Clerk Tr. 1454) What sense does this make? Why would the killer pretend to be talking to someone who was not there?

Some time later, according to Butler, after supposedly locking Duane Moo Young in the room upstairs (3.850 Clerk Tr. 1455),[92] Mr. Maharaj again came down and opened the door, "and I remember him, he sticking his head out and saying something to somebody who he identified as the Security,

[92] There was no lock on the door, so the prosecution knew this was a lie.

asking if everything is all right." (3.850 Clerk Tr. 1455) Again, the State has written in the left column, "FAKE SECURITY." The very fact that the State itself recognized that this was all false is compelling evidence that it was perjury, and certainly should have been exposed by counsel.

In Voyles v. Watkins, 489 F.Supp. 901 (N.D. Miss. 1980), for example, counsel was found ineffective almost *solely* because he failed to conduct a thorough examination of the chief witness at trial, and "failed to bring out that [the witness] had made previous contradictory statements. . . ." Id. at 907.[93] Again, then, this omission alone would justify relief. **Strike 11**.

**c. The State had evidence that proved it was false to say that "Butler arranged this meeting . . . using the pretext of a business meeting with . . . Dames and Ellis." Maharaj I, at 787**

If the defense had been able to prove that Eddie Dames had been calling Derrick Moo Young frequently throughout October 1986 to arrange a formal meeting for the Dupont Plaza, what would that do to the prosecution's entire theory of the case? It would pose some imponderable questions: Does this

[93] Accord Nixon v. Newsome, 888 F.2d 112, 115 (11th Cir. 1989) (ineffectiveness found where failure to impeach discrepancies with prior transcript "sacrificed an opportunity to weaken the star witness's inculpatory testimony"); Smith v. Wainwright, 741 F.2d 1248, 1254-55 (11th Cir. 1984) (remand for hearing on failure to use prior statement); LaTulip v. State, 745 So.2d 552 (Fla. App. DCA2 1994) (claim that "trial counsel was ineffective for failing to impeach the credibility of the state's key witness").

not refute the prosecution's theory that Dames knew nothing about the Moo Youngs and the meeting? Does this not put paid to the idea that Butler set up a fake meeting for Mr. Maharaj? Does this not mean, as Prince Ellis now concedes, that Dames was in on the crime and concocted an alibi to cover himself?

For some reason, Det. Buhrmaster talked freely when *William Penn* was litigating over life insurance money, rather than life itself. Buhrmaster told them:

> "Sometime prior to October 15, 1986, a man named Dames . . . had attempted to contact the Moo Youngs to arrange for shipment of equipment he had purchased in the Florida area. . . ."

(3.850 Clerk Tr. 2446) This was arranged "several days before the meeting." (Id.) As noted above, Shaula Nagel told Buhrmaster, but not the defense, that she "remembered the names of Butler and Dames, only because her father had mentioned that he received several messages from a Mr. Dames, who he did not know, and did not bother returning the calls." (Id. at 2453) This was the critical fact that could have made all the difference to the defense.[94]

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[94] There was physical evidence in support of this in the briefcase notes. There is a notation to call a Bahamian number, "1-8096452744 - 45 - ED." (3.850 Clerk Tr. 2282) This reference to Eddie Dames' number appears next to the name of Neville Butler. (Id.) The State made much of other people's phone calls, stressing the significance of the phone calls from Butler to Mr. Maharaj and the Moo Youngs, and from Butler to Dames allegedly on behalf of Mr. Maharaj. (Tr. 3943-56) This made the truth (that

The prosecution also knew that Moo Young had a pre-arranged meeting at the Dupont that appeared in his agenda, set for 12:15 p.m. in Room 1215. (3.850 Clerk Tr. 2290) It is clear from the documents that the Moo Youngs arrived early, and waited for their appointment. On October 16, 1986, Derrick and Duane Moo Young, of *KMY International Inc.*, applied to become members of the Dupont Plaza Corporate Membership Program. They spoke with Patrick Dillon about this (3.850 Clerk Tr. 2187), and met with Tony Falcon. (Id. at 2260) This would have strongly impeached Butler's testimony at trial, where he swore that he and Mr. Maharaj were to meet in the hotel lobby at 9:00 a.m. (Tr. 2780), and that he made a phone call just after 9:30 a.m., learning that Derrick Moo Young was supposedly running late. (Tr 2798) None of this would have made sense had the defense been able to prove that the Moo Youngs were not even expected until after noon.

> It should be reemphasized that Butler was a key witness, and
>
> [t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that defendant's life or liberty may depend.

Napue, 360 U.S. at 269, 79 S.Ct. at 1177.

This supported Mr. Maharaj's defense that he was being set up for the murder of the Moo Youngs, and was meant to be in the room leaving prints all

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Dames had called Derrick Moo Young directly) all the more significant.

over it for a while until he got bored and left. This evidence was patently discoverable. **Strike 12**.

### 3. ESLEE CARBERRY'S HIGHLY PREJUDICIAL SIDESHOWS REGARDING THE *CARIBBEAN ECHO*, Maharaj I at 787, 788, SHOULD CLEARLY HAVE BEEN EXCLUDED

At trial, the prosecution urged the jurors to rely on the newspapers printed by Eslee Carberry, despite the fact that they contained a litany of bad acts attributed to Mr. Maharaj:

> Mr. Hendon told you don't waste your time reading these newspaper articles. Don't waste your time. Well, ladies and gentlemen, the best time that you will spend in that jury room deliberating is reading those articles because each and every one of those articles gives you the motive.

(Tr. 3912) In closing, the prosecution spent pages of transcript going through each of the articles, and emphasizing how they were the most significant evidence in the case. (Tr. 3912-23)

At the 3.850 hearing, the trial court ruled that the claim was procedurally barred because it had been raised on direct appeal. (3.850 Clerk Tr. 6591) However, on direct appeal this Court procedurally defaulted Mr. Maharaj because his trial counsel "failed to object when the articles were presented and admitted into evidence." Maharaj I, 597 So.2d at 790. Had the State not covered up *Brady* material that proved these articles false, and had counsel bothered to investigate, file and litigate a motion to exclude them, all of this

evidence must have been excluded.

**a. Had the prosecution not suppressed evidence, and had the defense meaningfully contested the issue, these articles would have been proven false and excluded**

The fault here must lie in part with the State for suppressing evidence, and in part with the defense for failing to litigate a critical issue. The articles portrayed Mr. Maharaj as a criminal, and the Moo Youngs as the victims of Mr. Maharaj's scams. Had defense counsel had access to the information in the hands of the prosecution, he could have proved each one to be *false*:

- At trial the jury learned from Carberry: "Mr. Moo Young told me that he discovered The Caribbean Times was not a registered paper and that he had, in fact, registered the paper and he was the rightful owner of the paper." (Tr. 2367)

In actual fact, the State had evidence in its possession from the Moo Young briefcase that would have proved that he was doing this to Mr. Maharaj, not *vice-versa*. Unknown to Mr. Maharaj, from the start of *KDM International*,[95] to the *Caribbean Times*,[96] the Moo Youngs were trying to steal money from

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[95] *KDM International Inc.* was set up in 1984 with Mr. Maharaj having control. (3.850 Clerk Tr. 1189) In 1985, Derrick and Duane Moo Young set up *KDM Distributors Inc.* with the two of them as the only officers. The office address was listed as the same--4901 S.W. 193rd Lane--as *KDM International*. (3.850 Clerk Tr. 1188) Gradually thereafter, the Moo Youngs started to siphon off *KDM International* funds into *KDM Distributors*. Shaula Nagel well that this was going on, but lied about it in her deposition.

[96] On July 4, 1986, Mr. Maharaj's *Caribbean Times* was first published. (Tr. 2203) The jury was told by Eslee Carberry that Derrick Moo

him.

**Ù** Mr. Maharaj was "accused of being part of a scam described in the letter as 'irregular, illegal and possibly fraudulent.'" (Tr. 1573)

This involved overpayment made for camera equipment to smuggle funds illegally out of Trinidad. Suppressed evidence held by the prosecution had a document proves that this was a Moo Young scam. In the briefcase there were notes on illicit dealings with the Vuark vertical camera showing that this was a Moo Young scam. (3.850 Clerk Tr. 2252)[97]

**Ú** Carberry testified that Derrick Moo Young told him that a bribe of $160,000 was paid to a Mr. Persad to hush up *The Echo*. (Tr. 2373) Moo Young supposedly gave him a check to substantiate that. (Tr. 2373)

In fact the check--and a copy was in Det. Buhrmaster's hands all along--proves that Moo Young received the payment *from* Persad (3.850 Clerk Tr. 5127) as part of a Moo Young scam.

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Young was the real owner and that Mr. Maharaj was trying to steal from him. As the briefcase contents proved, nothing could be farther from the truth. The Moo Youngs found out about the publication and just seven days later Derrick Moo Young registered the *Caribbean Times International Inc.*, again using an address that was virtually identical to the registered address of the *Times*. (3.850 Clerk Tr. 1200) Then, on August 12, 1986, Derrick Moo Young, posing as "President" of Caribbean Times Int'l Inc., wrote to Barnett Bank saying he was the only principal of the company and wanted to know what bank account has been opened for the business. (3.850 Clerk Tr. 1115) This was another effort to lay his hands on Mr. Maharaj's money.

[97] Further, ASA Ridge told Buhrmaster to "speak with Atta Kujifi (Attorney in Trinidad)." (3.850 Clerk Tr. 2172) There was evidence in the files that in April 1986 the Moo Youngs used Kujifi to try to extort more than $300,000 for this camera.

**Û** Carberry testified that Krishna Maharaj allegedly forged a check from Derrick Moo Young. A complaint had been "filed by Attorney Paul May on behalf of Duane Moo Young, President of KDM International." (Tr. 1622)

The evidence suppressed by the prosecution shows that the Moo Youngs were trying to fabricate evidence to cover up the fact that they had stolen the money from Mr. Maharaj.[98] Defense counsel failed to present evidence that was readily available (and was presented at the penalty phase through his civil attorney, Levi England, Tr. 4287) that Mr. Maharaj was the one who had sued the Moo Youngs, and that Mr. England thought he had a watertight case.

**Ü** At trial, the jury heard that *"Journalism has its Hazards"*. (Tr. 1653) Carberry wrote that Mr. Maharaj had said, "I could have killed you a long time ago, and if you mess with me I will kill you." (Tr. 1653) Mr. Maharaj supposedly said to Carberry, "I could have killed you a long time ago . . . I will kill you." (Tr. 2377)

Defense counsel was simply asleep at this point, since in his deposition Carberry had made it clear that there was no threat to kill him, just his newspaper, a competitor to *Times*. (Tr. 5842)[99]

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[98] In the Moo Young briefcase was a draft of a letter to "Nancy" (a bank officer) trying to suggest that the $200,000 check was forged by Mr. Maharaj. (3.850 Clerk Tr. 2275) Duane Moo Young was fabricating evidence. The check was genuine, written by Duane.

[99] Counsel could also have shown that Carberry was always making up stories about supposed attacks on his person. Carberry lied when he testified in deposition that he had filed a $500,000 lawsuit against George Bell for attacking him. (Tr. 5845) He wrote in his paper that he had filed a ten times smaller ($50,000) damages act against George Bell for a "brutal

Ý The jury read in Carberry's story at trial that "according to Detective Inspector Waldham of the Economic Crime Division, the entire Moo Young - Maharaj entourage is being investigated." (Tr. 1622)

As the prosecution well knew, this was simply false. As a tit-for-tat assault for Mr. Maharaj's legitimate lawsuit for the $400,000 stolen from him, Derrick Moo Young had tried to get Detective Waldman to investigate a bad check for $500 that he had supposedly received from Mr. Maharaj, also lying when he told her that Mr. Maharaj was "'wanted' in London." (3.850 Clerk Tr. 2295) She pointed out that he had waited two years to bring this up, and refused to proceed with an investigation since the statute of limitations had run, and because "it appears that [Derrick Moo Young] is attempting to utilize this agency to get back at [Mr. Maharaj] since their friendship is now dissolved." (3.850 Clerk Tr. 2295) Defense counsel could have proven that there was no debt. Further, the State suppressed the fact that Det. Buhrmaster, who spoke with Waldman (3.850 Clerk Tr. 2159), knew all of this.

Þ At trial, Carberry reported that "numerous persons, including Carl Tull a top Trinidad trades unionist, seem anxious to clarify many financial dealings involving Krishna Maharaj." (Tr. 1622)

The State had in its possession a document showing this to be false, the check from Marita Maharaj to Carl Tull paying him back for *Derrick Moo*

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attack on his person recently as a local club." (3.850 Clerk Tr. 1087) The truth (readily available through Mr. Bell) was that no lawsuit was pursued because it was frivolous.

*Young's* rip-off (3.850 Clerk Tr. 1177) whereupon the Mr. Maharaj sued (rather than killed) the Moo Youngs to recoup the money.

ß In the same article, there was also highly prejudicial and entirely inadmissible evidence about crimes that Mr. Maharaj had supposedly committed in England. Carberry wrote, and the jury read:

> I did however secure a comment from a Scotland Yard spokesperson who claims that: "While we need the man for questioning in connection with alleged criminal activities, it is far too costly for us to implement extradition proceedings so we will therefore bide our time."

(Tr. 1622) In his deposition Carberry refused to reveal his sources. (Tr. 5823), although he did admit that Mr. Maharaj said it was libel. (Id. at 5825) While defense counsel must be faulted for failing to pursue this at all, Det. Buhrmaster already held the key to proving the allegation false. From Interpol, Buhrmaster learned that "Maharaj is no longer wanted by the Metropolitan Police [in England]." (3.850 Clerk Tr. 6835 supp.)

These stories almost uniformly turned the truth precisely on its head. Even without help, counsel could have proven some of these allegations false. On the other hand, the prosecution knew the truth, and knowingly allowed this false evidence to go to the jury, even arguing it. (Tr. 3912)

### i. Defense counsel should have vigorously litigated the admissibility of these articles

To begin with, defense counsel should have vigorously contested the

admission of the articles. As it was, counsel did not file *one* motion prior to this capital trial. By 1984, this Court had already noted that there was habitually a "barrage of pre-trial defense motions . . . implemented in capital cases." Downs v. State, 453 So.2d 1102, 1106 (Fla. 1984). In this case, there was not one.[100]

There is a reasonable probability[101] that if counsel had investigated, and had access to the evidence suppressed by the State, a well-drafted and properly litigated *Williams*[102] motion would have prevailed. First, the evidence was of very limited relevance. To argue, as the State did, that Mr. Maharaj would have killed the Moo Youngs (as opposed to Eslee Carberry) because Carberry was publishing articles that he may have thought derived from the Moo Youngs is rather a stretch.[103] It is no more reasonable to assume that all

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[100] Other motions that obviously should have been litigated are discussed below.

[101] The defense does not have to prove that he categorically *would* have prevailed on the motion: "While a timely objection by [defense] counsel may not have excluded the evidence . . . the lack of any objection clearly prejudiced [the defendant] since the adversarial testimony contemplated by the Sixth Amendment did not occur. Additionally, the failure of . . . trial counsel to object later foreclosed [the defendant] from raising the issue of improper admission of the [evidence] on appeal due to the . . . Supreme Court's determination that the issue was procedurally defaulted by counsel's failure to object." Chathom v. White, 858 F.2d 1479, 1487 (11th Cir. 1988).

[102] Williams v. State, 110 So.2d 654 (Fla. 1959).

[103] When this Court made its decision on direct appeal, because counsel neither filed a motion nor investigated, this Court did not know that

those defamed in the newspaper would commit murder than it is that all homosexuals would commit battery. Sias v. State, 416 So.2d 1213, (Fla. App. DCA3 1982) (Dade County case where the Court rejected the State's theory that evidence of the accused's homosexuality was relevant because "only one who is homosexual would commit a homosexual battery").

Looking both to the facts that trial counsel failed to uncover, and the facts suppressed by the State, we now know that Mr. Maharaj did not commit *any* of the offenses listed in the *Echo* articles. It would be a strange world, of course, if Mr. Maharaj were permitted to be convicted based, in part, upon collateral crimes that he did *not* commit. For this reason, this Court has long recognized that:

> [I]n order for the evidence to be admissible there must be proof of a connection between the defendant and the collateral occurrences. In this respect mere suspicion is insufficient. The proof should be clear and convincing.

State v. Norris, 168 So.2d 541, 543 (Fla. 1964).

Certainly, under this or any other standard, counsel could have argued

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in July 1986 Mr. Maharaj had established a rival newspaper, the *Caribbean Times*, and had admonished that it would publish no stories blackening the names of either the Moo Youngs or Carberry. It was highly unlikely that he would show this restraint but instead decide to murder them. Cf. Escobar v. State, 699 So.2d 988, 996 (Fla. 1997) ("[b]ased on the totality of the present evidence, to infer that appellant resisted arrest in California because [he] was conscious of his guilt of the Estefan murder is simply not a reasonable inference").

the exclusion of the evidence as overly prejudicial:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Steverson v. State, 695 So.2d 687, 688 (Fla. 1997), quoting *Fla. Stat. § 90.403 (1995)*; see also, Denmark v. State, 646 So.2d 754, 757 (Fla. App. DCA2 1994). Certainly here, even if "some of this evidence may have been relevant, we cannot agree that as presented, it was not subtantially outweighed by its unfairly prejudicial impact." Sexton v. State, 697 So.2d 833, 837 (Fla. 1997) (referring to "the litany any of bizarre behavior and abuse" that was presented).[104]

In Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986), the Supreme Court held that counsel's failure to raise a suppression issue could provide grounds for a finding of ineffective assistance of counsel. There can be no reason for not litigating this vigorously, for whatever the defense it will not conflict with efforts to exclude damaging evidence from the trial. See Rice v. Marshall, 816 F.2d 1126, 1132 (6th Cir. 1987) (ineffective assistance of counsel when counsel failed to move to

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[104] Counsel should have prevented the State from "mak[ing] the collateral crime[s] a feature instead of an incident." Steverson, 695 So.2d at 689, quoting Randolph v. State, 463 So.2d 186, 189 (Fla. 1984); accord Banks v. State, 400 So.2d 188, 189 (Fla. App. DCA1 1981).

suppress evidence that defendant was carrying firearm during rape when defendant had previously been acquitted of related weapons charge in connection with same rape); Holsclaw v. Smith, 822 F.2d 1041, 1047 (11th Cir. 1987) (failure to make motion to exclude evidence ineffective); Jemison v. Foltz, 672 F. Supp. 1002, 1007 (E.D.Mich. 1987) (failure to file relevant pretrial motion ineffective). **Strike 13.**

### ii. Even if the articles were admitted, there was no excuse for counsel not proving them false at trial

Even if this failed, counsel should have proven that the articles were false to the jury, thereby casting in doubt the rest of Carberry's highly dubious testimony. Regardless of the issue of motive, it is a time-honored principle that the jury may not be "allowed to consider evidence that has been revealed to be materially inaccurate." Johnson v. Mississippi, 486 U.S. 578, 590, 108 S. Ct. 1981, 1989, 100 L. Ed. 2d 575 (1988); accord Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993), cert. denied, 114 S.Ct. 1107 (1994); Preston v. State, 564 So.2d 120 (Fla. 1990), cert. denied 113 S.Ct. 1619 (1993) (error unlikely to be harmless where evidence "materially inaccurate"); see also Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948).[105]

[105] Again, Gunsby is extremely helpful. There, penalty phase relief was ordered because the "prosecutor conveyed false information to the jury regarding . . . Gunsby's previous felony convictions." Gunsby, 670 So.2d at

**Strike 14**.

**b. But for counsel's failure to prove some, or all, of these allegations false, counsel would not have advised Mr. Maharaj not to testify at the first phase of trial, but to testify at the penalty phase where his innocence was no longer relevant**

The prejudice in counsel's failure to question the veracity of these scandalous articles could not have been more extreme, for it resulted (along with the other prejudice) in the denial of Mr. Maharaj's right to testify.

**i. The right to testify on your own behalf is fundamental and any election not to take the stand must be knowing, intelligent and voluntary**

In Rock v. Arkansas, 483 U.S. 44 (1987), the United States Supreme Court recognized that a criminal defendant has a constitutional due process right to testify in his own behalf. The right to testify in your own words concerning the events with which you are charged is a right even more basic than the right to represent yourself. Id. at 52. The constitutional right to testify is so fundamental that it requires a knowing and intelligent personal waiver by a defendant. United States v. Teague, 908 F.2d 752, 757 (11th Cir. 1990); Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir. 1990); United States v. Long, 857 F.2d 436, 447 n.9 (8th Cir. 1988); United States v. Martinez, 883 F.2d 750, 756 (9th Cir. 1989). The right to testify "is a right that cannot be forfeited by

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922.

counsel, but only by a knowing, voluntary and intelligent waiver by the defendant himself." Nichols v. Butler, 917 F.2d 518, 521 (11th Cir. 1990).

In making this decision, "[i]t is the duty of counsel to present to [the accused] the relevant information on which he may make an intelligent decision [as to whether or not to take the stand]." Poe v. United States, 233 F.Supp. 173, 176 (D.D.C. 1964), aff'd 352 F.2d 639 (D.C.Cir 1965). Turning to the facts of this case, it is clear that the "waiver" was not valid here.

**ii. But for counsel's failure to litigate the falsity of the Carberry articles, there is a reasonable probability that Mr. Maharaj would have taken the stand**

It is clear that Mr. Maharaj would have testified had he been effectively represented by a lawyer who was not being sandbagged by the State. Mr. Maharaj has always protested his innocence. The fact that he did not testify was based solely on the ineffective advice given to him by his counsel. Indeed, he insisted on testifying in the penalty phase, when it became clear how erroneous his lawyer's advice had been, and his evidence focused almost exclusively on his innocence.[106]

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[106] His testimony at the penalty phase focused almost exclusively on his innocence: "As true as Jesus Christ was crucified on Friday, I had nothing to do with the murder. I have –- I'm sorry to hear that he died. . . So I had nothing to do with the murder." (Tr. 4368) "I have been convicted I know for Derrick and Duane Moo Young's death. I had, as I said, absolutely nothing to do with it. I feel very badly that those people were killed but I do not know anything about it, the deaths of Derrick and Duane Moo Young."

Counsel advised Mr. Maharaj not to testify for two main reasons.[107] First, counsel was concerned that his client would face extensive cross-examination on the newspaper articles. (3.850 Tr. 329, 414) Had counsel known that all the allegations were demonstrably false, this concern would have fallen by the wayside. Second, and most important, counsel felt that Mr. Maharaj would be examined on the "criminal record" that was purportedly substantiated by those articles:

> . . . apparently the state had information that the apparent warrant

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(Tr. 4372) "I did all my life what I believe was right and I – here I am accused of two murders, cold-blooded murders that I had nothing to with. . . ." (Tr. 4373) "And what else can I tell this jury? It has been said that I cold-bloodedly killed them. I told Detective Buhrmaster at the time of the murder that I had nothing to do with the murder." (Tr. 4373) "I am hoping that time will tell that I was innocent of these murders. I am hoping that time will tell that I was wrongly charged with these murders and I'm hoping that when the truth comes out it will prove I was not guilty of them." (Tr. 4374) "I am hoping and praying that with the grace of God that I will be vindicated as soon as possible." (Tr. 4374) "I did not kill [Derrick Moo Young] and the people who are responsible for it will eventually be brought to justice. The people who are responsible for hiding the true identity of the murderers will be brought to justice." (Tr. 4375) It is perhaps ironic that, in preparation for the expected resentencing hearing, the State has filed a motion to bar any reference to innocence, or "lingering doubt" (3.850 Clerk Tr. 6794-96), demonstrating that trial counsel should not have waited to present his claim of innocence at the penalty phase.

[107] Counsel also felt that there was no case to answer, so his testimony was not needed. (3.850 Tr. 328) Given the evidence that this Court detailed, Maharaj I, 597 So.2d at 787-89, and counsel's failure to present any defense, he was plainly deluded. See Williams v. State, 507 So.2d 1122, 1123 (Fla. App. DCA5), review denied, 513 So.2d 1063 (Fla. 1987) ("Trial counsel even advised Williams not to testify, which would have meant the state's version of events was uncontradicted.").

> that had been out or issued for my client in England was no longer in effect or had been withdrawn. At the time . . . he would have taken the stand . . . I was unaware that that situation had been resolved. That was one of the allegations in one of the newspaper articles, and matters of that sort were matters that I wanted to shield my client from – from the stand point of him not having to discuss those types of matters in front of the jury. So I advised him that it would have been in his best interest not to take the stand.

(3.850 Tr. 414-15) Counsel was emphatic on this point:

> Q. How important was the -- the information you had received from the state about London warrants or London crimes involving Mr. Maharaj?
> A. That was, as far as I considered, very crucial, very significant. . . . I in no way wanted him exposed to questions relative to that on the stand.

(3.850 Tr. 452-53) As he gave this advice, counsel thought that these were very serious charges, one involving "a very large fraud scheme or scam," and the "[]other one was . . . possible homicide related charges." (3.850 Tr. 453-54)

All of this merely illustrates how deficient counsel's advice actually was: In truth, one charge was for the possession of stolen property (Mr. Maharaj allegedly bought a silver teapot that was later reported as stolen) and the other involved the failure to pay some of the customs duties due on some bananas he had imported. However, while counsel should have known that the charges were not significant, some of the blame for this mistake must be accepted by the State, that was well aware at the time, and failed to reveal, *that both*

*charges had been dismissed.*

This was clearly ineffective assistance of counsel. Blackburn v. Foltz, 828 F.2d 1177, 1182 (6th Cir. 1987), cert. denied, 485 U.S. 970 (1988) (counsel ineffective for advising defendant not to testify on grounds that he could be impeached by three prior convictions where all could have been excluded; "Counsel's failure to move for suppression and his legal advice to Blackburn was based, not on strategy, but on mistaken beliefs and "a startling ignorance of the law.") (quoting Kimmelman, 106 S.Ct. at 2588-89);

Indeed, in Deaton v. Dugger, 635 So.2d 4 (Fla. 1993), this Court dealt with a similar issue:

> the trial judge found that Deaton had waived the right to testify . . . in mitigation, but concluded that, because his counsel failed to adequately investigate mitigation, Deaton's waiver of those rights was not knowing, voluntary and intelligent. The right to testify . . . [is a] fundamental right[] under our state and federal constitutions.

Id. at 8 (citations omitted); see also Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991) (ineffective advice that client could be impeached with a marijuana conviction deprived accused of right to testify).

Likewise in United States v. Moskovits, 844 F.Supp. 202 (E.D. Pa. 1993), counsel advised a Mexican conviction would be used to impeach him, without checking into the validity of the conviction (it was secured without counsel). The Court found that counsel's performance had been deficient, and

determined that once a showing has been made that erroneous advice led the client to forego his right to testify, there is rarely any need to show additional prejudice. "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Id. at 207-08 (quoting Green v. United States, 365 U.S. 301, 304, 81 S.Ct. 653, 655, 5 L.Ed.2d 670 (1961)).[108] Thus "judges properly view with skepticism our ability to conclude with any confidence in the average case that an error keeping a defendant form testifying did not likely affect the outcome of the trial. . . ." Id. at 207. In the ineffectiveness context, it is probably true that "prejudice is sufficiently proven, if not to be presumed from, the resulting denial of the defendant's right to testify." Id. at 208 n.8 (quoting United States v. Butts, 630 F.Supp. 1145, 1149 (D.Me. 1986)). The only difference between Moskovits and this case is that counsel should have known from the start that the charges were inadmissible, since they had not even been reduced to a conviction. Indeed, the case is made all the worse by the State's suppression of the evidence that they had been dismissed. See also Lavigne v. State, 812 P.2d 217, 222 (Alaska 1991) (burden on the prosecution to prove that the

[108] See also Nichols v. Butler, 953 F.2d 1550, 1553 (11th Cir. 1992) ("The testimony of a criminal defendant at his own trial is unique and inherently significant."); United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985) ("Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance.").

denial of the right to testify was "harmless beyond a reasonable doubt"). Again this is an error that, standing alone, would be sufficient to require reversal. **Strike 15**.

**c. When "[t]he State . . . presented Eslee Carberry, the Publisher of The Caribbean Echo," Maharaj I, at 788, the prosecution suppressed highly favorable evidence that would have shown Carberry up as a liar**

Perhaps the most stunning piece of suppressed evidence, in terms of the sheer gall in not turning it over, was a memo written about its witness, Eslee Carberry. This is a memo written to Sgt. Bohan and Sgt. Vivian, stating in part:

> This crooked, notorious thief and con and fraud artist from the island of Grenada came to the USA via Texas then he quickly opened up his paper then rob everyone and landed in Miami in 1982 about August or thereabouts. Then he started again he ripped off any and everybody and business and he moves about. He had a storefront office at 7911 Biscayne Boulevard #5 with a Jamaican name[d] Phyllis Reid. He ripped her off a few thousands, used her name and when he was a haunted man he took off for his native Grenada in July 1984 and obtained a visitors visa whereby he could only come in and go out and not to conduct any business. [B]ut he stayed on and has amass[ed] thousands . . . by sheer fraud schemes.

(3.850 Clerk Tr. 2081)

There can be no doubt that this memorandum was discoverable. It raises several questions, in addition to providing a lead on aspects of

Carberry's dishonest[109] and dissolute[110] character that the defense would have wanted to investigate. For example, if the Government knew that Carberry was illegally in the country, and illegally operating a business here, the obvious question is why he was not deported? United States v. Shaffer, 789 F.2d 682, 689 (9th Cir. 1986) (government's failure to act "implies that a tacit agreement was reached . . . that allowed Durand to avoid any forfeiture liability in exchange for his testimony").

The memo indicates that Carberry was closely associated with Butler,[111] and links Carberry to drugs, stating that in "82 & 83 he [Carberry] lived off drug money in Miami and got so rich and took off to Grenada. Stayed at the St. James Hotel, paid up well for the few m[o]nths he stayed there. . . ." (3.850 Clerk Tr. 2084) Since Butler was clearly in the drug conspiracy, this would have provided a lead to place Carberry there also, providing the defense with ammunition to bring Carberry within the main conspiracy.[112] **Strike 16**.

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[109] For example, the memo lists numerous people who have been ripped off by Carberry. (3.850 Clerk Tr. 2082-84)

[110] For example, in common with many of the State's witnesses, he also had a drinking problem that might have led to part of his confabulation, both in the newspaper and in his testimony. He apparently ran up a bar tab while he was staying at the Plantation Inn that was astronomical and then left without paying his bill. (3.850 Clerk Tr. 2085)

[111] "Neville Butler alias Crossley West who was the sole witness he was the set up person. . . ." (3.850 Clerk Tr. 2086)

[112] There were many other ways in which the prejudice of Carberry's testimony could have been diminished. For example, defense counsel failed to object when Carberry testified to rampant hearsay:

### 4. THE PROSECUTION SUPPRESSED EVIDENCE THAT WOULD HAVE DISPROVED THE CRITICAL FACT "THAT MAHARAJ OWNED A SMITH & WESSON NINE-MILLIMETER PISTOL" SIMILAR TO THE ONE APPARENTLY USED IN THE CRIME, Maharaj I at 789

The State presented evidence that Mr. "Maharaj owned a Smith & Wesson 9 mm pistol" that could have fired the fatal bullets. Maharaj I at 789. In opening, the prosecutor emphasized that the jury would hear about "a nine millimeter pistol which will be very important in the case because it is a murder weapon." (Tr. 2155) To prove that Mr. Maharaj had this gun, the prosecution called officers who had allegedly seen the gun during a traffic stop on July 25-26, 1986.

Mr. Maharaj told his attorney that he had bought such a gun through a neighbor, Lt. Bernard Buzzo of the Miramar Police Department. However, he maintained to his attorney that the gun was taken from him during the traffic

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> He said, [I've got a] big news story for you. I said, "A story?" He then said that the Moo Youngs were killed. I said, "How?" He said, "They were shot." I said, "How do you know that?" He said, "I was there." I said, "Who did it?" He then told me that Mr. Maharaj did it.

(Tr. 2385) Carberry also discussed his conversations with Derrick Moo Young, again without any objection from defense counsel. (Tr. 2359) Clearly counsel cannot simply sit back while this kind of evidence is admitted. Grubbs v. Singletary, 892 F.Supp. 1484, 1490 (M.D. Fla. 1995) (the failure, *inter alia*, "of trial counsel to object to hearsay . . . constitute instances of ineffectiveness of trial counsel")

stop, along with some of his money, by Trooper Smith.[113] Clearly, in order to believe this, the jury would have to hear some evidence. While defense counsel presented none, there was plenty available (although some of it was being suppressed by the State).

**a. The prosecution did not disclose that they knew of the earlier allegations that the officers had stolen some money and the gun**

Astoundingly, again the State had evidence that supported Mr. Maharaj's story here but covered it up. In closing argument, the State told the jury that Lt. Buzzo had facilitated the purchase of the gun around June or July 1986. (Tr. 3927) To the contrary, the prosecutor knew that on July 25th the gun had been taken *from* Mr. Maharaj. In Buhrmaster's file appear some handwritten notes that reflect that he learned this in his investigation:

> Approx. six months [before the crime) -- $150 to ) for protection.
>
> F.H.P. *took gun* Orlando, Fla. $1,000.00 -- $700.00 & gun. K Troop. July # Aug. 86.
>
> * * *
>
> * Subsequent to arrest, Don't you remember. I told you in July that the gun was stolen.

[113] There were several officers involved in the stop, including Smith, Jeri Nuzzo, and Steven Veltri. The defense filed a copy of Officer Jerri Nuzzo's personnel file (3.850 Tr. 1060) that reflects various misconduct that would have been very significant.

(3.850 Clerk Tr. 2040) (emphasis supplied).[114]

This note was obviously of critical importance to the defense and would be enough, without more, to require reversal. See Arango v. State, 497 So. 2d 1161, 1161 (Fla. 1986) (failure to reveal presence of pistol that could have corroborated defense required reversal of conviction in capital case); see also Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993) (suppressed evidence "would have eviscerated the State's theme"). **Strike 17.**

### b. Defense counsel could have corroborated Mr. Maharaj's version himself

Even though the State cheated, had defense counsel done a thorough investigation himself, the defense could have called Manuelos Stavros to corroborate this evidence. Stavros would have testified, as he did at the 3.850 hearing, that Mr. Maharaj had kindly agreed to lend him some money for his trip to the island of Crete. At the end of July, 1986, Mr. Stavros, went to see Mr. Maharaj about the loan of $1,000 and found Mr. Maharaj in an "emotionally upset" state. (3.850 Tr. 187) Mr. Maharaj told Mr. Stavros that some money and "a gun" had been taken from his car in a traffic stop. (3.850 Tr. 185-188)

Again, here, defense counsel simply failed to present any case on behalf of his client. In Davis v. State, 627 So.2d 112 (Fla. DCA1 1993) the Court held:

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[114] The prosecution was aware of this, since there is a note from ASA Ridge to Buhrmaster to "speak with FHP liaison about money and gun." (3.850 Clerk Tr. 2171)

> It is reasonable to conclude that the failure to call a witness possessed of exculpatory evidence and of whom trial counsel should have been aware constitutes deficient performance.

Id. at 113 (claim of IAC for failing to present witness who would have testified that the weapon had been thrown away before the alleged crime).[115] As with so many matters in this case, counsel could not claim any strategic reason for not calling Mr. Stavros, since he never interviewed the man. "[F]ailure to call a witness because of lack of knowledge is not such a reason." Lanier v. State, 709 So.2d 112, 120 (Fla. DCA3 1998); Gill v. State, 632 So. 2d 660, 662 (Fla. DCA2 1994); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989) (trial counsel ineffective for failure to locate potential witnesses who would have testified that defendant possessed a gun in self-defense). The evidence was critical and, standing alone, would merit reversal. **Strike 18.**

### c. The prosecution should have turned over evidence in its possession of all the other guns that could have committed the same crime

If Mr. Maharaj did not have the gun, who did? The prosecution searched the files to prove that Mr. Maharaj had a registered *Smith & Wesson*. He did

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[115] See also Moffett v. Kolb, 930 F.2d 1156 (7th Cir. 1991) (IAC for failure to corroborate theory that the gun was taken from accused before the crime where the "theory was plausible and had a reasonable chance of success"); United States v. Gray, 878 F.2d 702, 713-14 (3rd Cir. 1989) (IAC on failure to call a witness on the gun when who had it was "another indispensable element of [defense] theory").

not. But two other people called Maharaj did. Naresh Maharaj and Vijai Maharaj had both bought *Smith & Wesson* pistols in Dade County. (3.850 Clerk Tr. 2150) Defense counsel could have used this information to great effect. Not only were there many, many *Smith & Wesson* guns in the country that could have been used to commit this crime, but there were two other Trinidadians called Maharaj in Dade County who had weapons consistent with the murder. Again, this was discoverable, not just because it helped show how many others could have committed the crime,[116] but because by its suppression we get a snapshot of the biased manner in which this case was investigated.[117] **Strike 19.**

### d. The prosecution also knew that Butler's story about the gun was false

Butler testified that a barrage of bullets were fired without a silencer in

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[116] Cf. Scott v. State, 657 So.2d 1129, 1130-31 (Fla. 1995) (prosecution in possession of evidence that the murder weapon was potentially in the hands of another person).

[117] Cf. Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986), *cert. denied,* 479 U.S. 962, 107 S.Ct. 458, 93 L. Ed. 2d 404 (1986) ("The withheld evidence also raises serious questions about the manner, quality, and thoroughness of the investigation that led to Bowen's arrest and trial. *A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant*, and we may consider such use in assessing a possible Brady violation") (emphasis supplied); Lindsey v. King,769 F.2d 1034, 1042-43 (5th Cir. 1985) (failure to disclose evidence that might have had effect of the "discrediting, to some degree, of the police methods employed in assembling the case against him").

Room 1215. (Tr. 2814) He said that none of the shots that killed Derrick Moo Young was even muffled. (3.850 Clerk Tr. 1457) Yet Butler had told Det. Buhrmaster that Mr. Maharaj had brought the pillow with him in his brown bag to use with the shooting (3.850 Clerk Tr. 1457), a good lie if he wanted to make Mr. Maharaj into a calculating killer, but his credibility would be sorely damaged if it could be proven false. The prosecution recognized both that the shots must have been muffled and that the pillow story might be helpful. According to the prosecution's file, ASA Ridge specifically told Buhrmaster to "[d]etermine whether the pillow used as a silencer belonged to the Dupont Plaza." (3.850 Clerk Tr. 2171)

The pillow clearly belonged to the hotel, and defense counsel should have known that the crime could not have been committed without some kind of muffling device in the thin-walled rooms of the Dupont Plaza. Ron Petrillo, the defense investigator, stayed in the room next door to the crime scene. He testified at the 3.850 hearing that the soundproofing in the rooms was very bad; so much so that he could hear the conversations of guests in other rooms. (3.850 Tr. 1021)

One of the most critical parts of Butler's initial statement related to the gun description:

> Q. Can you tell me what color the gun was?
> A. It was white.

Q. Meaning shiny color?
A. No, one color, white.

(3.850 Clerk Tr. 1455) Det. Buhrmaster tried to get him to say the gun was shiny, but he could not.

At trial, the officer who had previously owned it described Mr. Maharaj's gun as "shiny," and Butler agreed that it was silver (Tr. 2886) or, according to the State, "shiny." (3.850 Clerk Tr. 6425) This was again a critical point to make about the gun, which defense counsel failed to address in cross examination: Butler's story had changed because under his original tale Mr. Maharaj was exculpated. See People v. Salgado, 263 Ill.App.3d 238, 247, 635 N.E.2d 1367, 1374, 200 Ill.Dec. 784, 791 (1994) ("the impeachment value of directly contradictory testimony made under oath . . . by the State's premier eyewitness can hardly be overestimated").[118] **Strike 20.**

### 5. THE DEFENSE FAILED TO DEMONSTRATE THE ABSURDITY OF TINO GEDDES' TESTIMONY ABOUT THE SUPPOSED HOMICIDAL PRACTICE SESSIONS, Maharaj I at 788

While Tino Geddes was a significant witness against Mr. Maharaj,

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[118] There were many other points that should have been made to discredit the prosecution's theory about the gun. For example, after shooting once, Butler testified, Mr. Maharaj supposedly said, "I've got nine more where this came from." (Tr 2808) This would have been important for the defense to explore, since how many guns are there that fire ten rounds total? Certainly, a Smith & Wesson 9mm does not.

counsel did not even bother to depose him prior to trial.[119] There was a large amount of favorable evidence that counsel could have elicited from Geddes had counsel only known to ask.[120] However, even more significant was counsel's total failure to investigate and challenge the outlandish, false and prejudicial stories that Geddes told about supposed practice forays in purported preparation for the crime.[121] A practiced liar will always be sure to have a grain of truth in the story he tells. Such was the case with Tino Geddes.

One story he told concerned the occasion when Mr. Marahaj "purchased exotic weapons and camouflage uniforms," Maharaj I, at 788, to use in the

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[119] This Court has previously held that "the specific omission of trial counsels' failing to take pre-trial depositions upon oral examination of the State's main witnesses was a substantial and serious deficiency measurably below that of competent counsel." Aldridge v. State, 425 So.2d 1132, 1134 (Fla. 1983).

[120] For example, Geddes admitted to an English newspaper that "Moo Young was a bit of a crook. Not a bit of a crook, an outright crook." (3.850 Clerk Tr. 5792) Geddes admitted that Moo Young, who had been made the sole signatory of *KDM International* simply because Mr. Maharaj did not want to be in front of the corporation, "decided that since he was the sole signatory, he signed a document dissolving the company and transferring all the assets to his name. Even the cars and the house that Marita and Kris were living in were signed over." (Id.) This alone would have gone a long way towards disproving the *Echo* articles.

[121] On direct appeal, this Court rejected the claim that the issues related to collateral prior bad acts allegedly committed in the presence of Tino Geddes should have been excluded both for lack of relevance and notice, holding that defense counsel failed to object. Maharaj I, at 790. Again, this was an issue that trial counsel failed to litigate.

murder of the Moo Youngs. On one level, this was absurd: Was the jury really meant to believe that Mr. Maharaj meant to launch an assault on the Moo Young compound with some mythical force of camouflaged mercenaries? The defense could have proven that Mr. Maharaj had bought the camouflage items, but he had done so to deliver them to an acquaintance in Trinidad for the workers on the man's land.[122]

Then the defense could easily have impeached his story about the "dry run" murder effort at the Dupont Plaza and the gun Geddes bought. First, the prosecution misrepresented this to the defense[123] and then, at trial, Geddes testified:

> I purchased that gun because I had become involved in these escapades which I have already described with Mr. Maharaj, and I was, in fact, fearful for my own safety, and this is why a I purchased this firearm.

(Tr. 3661) He testified that he bought the gun at the time of the supposed DuPont "dry run" incident. (Tr. 3668) This was, according to the prosecution,

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[122] This would have been included in Capil Maharaj's and Frank Barsotti's testimony, but the defense was not permitted the funds to bring him over.

[123] ASA Kastrenakes told counsel that he went to Jamaica to represent "the facts and circumstances surrounding the purchase of the firearm and ammunition by Mr. Geddes and *the reason for the purchase, which was due to threats made upon Mr. Geddes by . . . Krishna Maharaj.*" See *Letter of Paul Ridge to Eric Hendon (9/22/87) (3.850 Clerk Tr.* (emphasis supplied).

on October 5 or 6, 1986.[124] The defense did not make the essential point that he bought the gun on July 19, 1986,[125] which made the whole story a lie.

When the Moo Youngs arrived at the dress rehearsal, Geddes story went, Mr. Maharaj planned to burst through the door connecting Room 408 with Room 406 and kill them. This could have been proven to be utterly and dramatically false since, as there was no door between the two rooms. (3.850 Tr. 1023) Counsel's investigator knew this and yet counsel still did not bring it out. Again, this was ineffective. **Strike 21.**

### 6. DEFENSE COUNSEL SIMPLY FAILED TO PRESENT AVAILABLE EVIDENCE THAT WOULD HAVE NEUTRALIZED THE INCRIMINATING FINGERPRINTS, Maharaj I at 789, AND THE "FALSE DENIAL."

On appeal, the State made much of the fact that Mr. Maharaj's fingerprints were in Room 1215. Maharaj I, at 789. Of course, these would mean very little if Mr. Maharaj had been in the room for his expected meeting with Eddie Dames, as he insisted to his lawyer. It was therefore critical to the prosecution case that Mr. Maharaj supposedly denied to Det. Buhrmaster that he had ever been to the room. (Tr 3450 *et seq.*) The State stressed this in

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[124] The defense secured information from the Dupont Plaza showing that Roopnarine Singh checked in on October 5th, 1986, and left on October 7th.

[125] Geddes purchased a Smith & Wesson with a blue finish (Serial No. 18D8777) from Sy's Gun & Pawn, 19567 NW 2nd Avenue, Miami, Fl. 33169. (Tr. 1684)

opening statement:

> You will hear evidence that he had a conversation with the police. Sure, he wanted to talk about his new case. And what does he tell the police? He tells the police that never had he been inside the DuPont Plaza Hotel on October 16th, and what's more, in his life, he had never been on the 12th floor. Nobody said that he had ever been on the 12th floor.

(Tr. 2173) The jury would know Mr. Maharaj's statement to be false, given all the prints and the maid who had seen someone in the room fitting his description.

**a. The defense could easily have impeached Buhrmaster's false testimony through his colleague, Officer Romero, but failed to do so**

It was Buhrmaster's testimony that Mr. Maharaj denied being in the room that was false. Defense counsel had the tools to prove this, and simply failed to do it. Officer David Romero stated in his deposition that Mr. Maharaj told his colleague Buhrmaster that "**[h]e had been there [in Room 1215] prior to the homicides, that's correct.**" (Tr. 114; 3.850 Tr. 659-60) It was obviously critical that the defense should call Romero to impeach him, yet defense counsel never brought this out at trial.

It is clear the failure of defense counsel to impeach a key government witness may constitute ineffective assistance. In Hadley v. Groose, 97 F.3d 1131 (8th Cir. 1996), counsel was "aware of [Officer] Roger's report before trial" and knew that it would seriously impeach the other officer, Breeden, who

testified. Id. at 1135-36. There was, as here, "no strategic reason for not impeaching Breeden with Roger's report and it would have been effective to call Rogers to impeach Breeden and offer testimony favorable to Hadley." Id. at 1136. This was, the court concluded, clearly ineffective. Likewise, here, defense counsel offered no reason for his failure to impeach Buhrmaster.[126]

**Strike 22.**

### b. The prosecution cover-up of Mr. Maharaj's assertion of his rights, in conjunction with defense counsel's failure to litigate suppression, also fatally prejudiced the defense

The defense could have neutralized Det. Buhrmaster's evidence by suppressing it. Det. Buhrmaster apparently lied when he said that Mr. Maharaj did not assert his rights.

#### i. The State suppressed critical evidence that Mr. Maharaj asserted his rights

In trawling through Det. Buhrmaster's notes, the defense came across

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[126] See also Adams v. Balkcom, 688 F.2d 734, 739-40 (11th Cir. 1982); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989) (IAC for failure to impeach a witness with prior inconsistent testimony given at the trial of another defendant for the same murder); Smith v. Wainright, 741 F.2d 1248 (11th Cir. 1984) (IAC remand for counsel's failure to use prior conflicting statements to impeach prosecution witness); Groseclose v. Bell, 130 F.3d 1161 (6th Cir 1997) (IAC for failure to impeach critical state witness); Moffett v. Kolb, 930 F.2d 1156 (7th Cir. 1991) (IAC for failure to introduce prior inconsistent statements of a state witness); LaTulip v. State, 645 So.2d 552, 553 (Fla. DCA2 1994) (IAC remand for trial counsel's failure to impeach witness).

a smoking gun of the kind that really should have been used at trial:

> Buhrmaster and Amato go to jail at 12:18am with Maharaj. **(D invokes his right to attorney.) FORGET THIS. * BE CAREFUL ABOUT THIS.**

(3.850 Clerk Tr. 2021) At the 3.850 hearing there was no denial from the State that this note was valid, and there can be no debate what the consequences of this would have been. Any statement would indubitably have to be suppressed. See Edwards v. Arizona, 451 U.S. 47, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).[127]

Elsewhere, the notes show that Mr. Maharaj additionally said "That's all I have to say about today's activities," but this was scratched out and replaced with "That's all he was able to tell me about the days activities" (3,850 Clerk Tr. 2034) This was another patent concoction[128] in order to prevent a defense

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[127] Even by the date of the trial in 1987, this rule had been restated so uniformly as to bear no reiteration. See, e.g., Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983) (in Edwards "we held that after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place 'unless the accused himself initiates further communication, exchanges, or conversations with the police'"); Michigan v. Jackson, 475 U.S. 625, 626, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986); Moran v. Burbine, 475 U.S. 412, 412 n. 1, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).

[128] Det. Buhrmaster lied about this at the 3.850 hearing, as was apparently conceded by the State. He denied that Mr. Maharaj ever said anything about "that is all I have to say about today's activity" or anything to that effect. (3.850 Tr. 749, 751) Yet the prosecution took the extraordinary position that the memo was prepared by Paul Ridge as "an outline of his [Buhrmaster's] trial testimony" (3.850 Tr. 750), which means Mr. Maharaj

attorney from alleging that Mr. Maharaj had asserted his right to remain silent.

Obviously, from this, the prosecutor recognized that this was an invocation of rights by the accused. This would clearly have provided an entirely separate basis for a legal challenge. See, e.g., Stewart v. Commonwealth, 245 Va. 222, 232, 427 S.E.2d 394, 401 (Va. 193) (defendant terminated interview with the remark, "Well, I guess at that time then, that's, that's all I have to say about it."); Skyles v. State, 670 So.2d 1084, 1084 (Fla. DCA4 1996) (suspect terminated interview by stating "That's all I have to say . . . 'cause that's all I know.").

**ii. Either counsel was ineffective for not litigating a motion to suppress, or the blame must be placed on the State for suppressing the necessary evidence**

This is yet another instance where it does not matter who we blame, the same person--Mr. Maharaj--suffered. To be sure, counsel admitted not filing a motion to suppress the statement. (3.850 Tr. 327) Counsel never made the decision that there was no legal basis for the motion to suppress, he simply decided to make the legal arguments to the jury! (3.850 Tr. 409) Of course,

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clearly did make the statement, but Mr. Ridge, recognizing its legal significance, did not want it to surface at trial. On the other hand, Buhrmaster denied working with ASA Ridge to "shape your testimony in any way." (3.850 Tr. 750-51)

this is not a professional decision at all,[129] and counsel was ineffective for not challenging the statement. Martin v. State, 501 So. 2d 1313, 1314, 1315 (Fla. DCA1 1986) (counsel should have, *inter alia*, "object[ed] to certain comments made during trial on Martin's right to remain silent" which "would have formed the basis for either a mistrial or reversal had they been objected to by counsel").

On the other hand, defense counsel was emphatic that he would have litigated the issue had he been provided with the "smoking gun":

> A. Yes. And again, this is not only information that he had invoked his rights to remain silent. This is documentation of that. So it definitely would have played a major role in my decision as to whether or not to pursue a motion.

(3.850 Tr. 449) Counsel agreed that such evidence "is a rare thing to have. So I definitely would have followed up on that." (3.850 Tr. 450) This raises the issue of *Brady* (and, by dint of Buhrmaster's patent perjury, *Giglio*) and would

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[129] Of course, counsel could have had his cake and eaten it too. Even if he had lost the pre-trial hearing, the constitution guarantees his right to present the same evidence to the jury. See Clifton v. United States, 371 F.2d 354, 360 (D.C. Cir. 1966) ("If the determination of the District Judge is to submit the confession to the jury, however, he should not indicate that he has made a preliminary decision . . . but he should specifically instruct that they are not to give any weight to the confession unless *they*, as ultimate fact finders, are satisfied beyond a reasonable doubt on all the evidence that it was voluntarily given by the accused"); Donovan v. State, 417 So.2d 674, 676 (Fla. 1982) (issue should be "determined initially by the trial court . . . and ultimately by the jury").

clearly have made all the difference. **Strike 23**.

### 7. DEFENSE COUNSEL FAILED TO FILE OTHER CRITICAL MOTIONS, INCLUDING A CHALLENGE TO THE IDENTIFICATION EVIDENCE

Despite the fact that this was a capital case where a vigorous motions practice is standard procedure, in this case *counsel did not file one written motion*. We have already discussed counsel's failure to challenge his client's statement, his failure to litigate the plethora of bad acts that the State sought to introduce, and his failure to force the State to provide any meaningful discovery. The list could go on forever.[130]

Indeed, another significant issue that counsel simply ignored was the tenuous identification testimony. (3.850 Tr. 1072) Counsel's excuse for this omission was that he planned to argue the fallibility of this evidence to the jury. (3.850 Tr. 333-34, 403) Such a "strategy" makes no sense at all, since nothing is lost by litigating a potentially meritorious issue prior to trial. If it prevails, there is no need to make the jury argument; if it does not, the argument may still be made.

A strong challenge was available. The witnesses gave no descriptions prior to making their identifications (Tr. 2650) except of an Indian person. The

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[130] For example, counsel made *not one* challenge for cause during jury selection (3.850 Tr. 1069-71), reflecting the desultory manner in which he conducted voir dire.

identification took place upwards of five months after the event (Tr. 2648), and the witnesses were very uncertain.[131] The line-up was highly suggestive, comprised of four photographs (3.850 Tr. 806), which included one picture of an Indian (Mr. Maharaj), with all the rest of black persons. (Tr. 2725)[132]

The Supreme Court has emphasized that identification evidence is "proverbially untrustworthy" and that mistaken eyewitness identifications "account[] for more miscarriages of justice than any other single factor," United States v. Wade, 388 U.S. 218, 228-229, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). Thus, unlike this case, "it is always necessary to 'scrutinize any pretrial confrontation . . . ." Id. at 227.[133] As the Fifth Circuit has held:

> Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased

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[131] Arlene Rivero, for example, testified "I want to say positive, but it looked familiar to me, so that is why I ID'd [the picture of Mr. Maharaj]." (Tr. 2722) She was "more positive" with respect to the photograph than Mr. Maharaj in person. (Tr. 2722)

[132] There is, now, a compelling alternative hypothesis that counsel did not discover at trial, discussed in more detail below. Adam Hosein, a Trinidadian of Indian descent who had known Mr. Maharaj in Britain and used to pass himself off at the racetrack as Mr. Maharaj, is a central suspect who left a telephone message for Room 1215. It is highly probable that if anyone looking like Mr. Maharaj rented the room it was Hosein.

[133] See also Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); United States v. Tyler, 714 F.2d 664, 667 (6th Cir. 1983) (court concludes that the danger of misidentification "is inherent in every identification").

chance of misidentification is gratuitous.

Dispensa v. Lynaugh, 847 F.2d 211, 218 (5th Cir. 1988). A court must consider:

> the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors, the court ruling on the admissibility must weigh the corrupting effect of the suggestive identification itself.

Dispensa v. Lynaugh, 847 F.2d at 218-19 (citations omitted). In this case, all of these considerations weigh heavily against the State. The witnesses had no reason to pay attention to the individual, they gave no prior description, they were not certain, and several months had elapsed before the line-up. Against this, the trial court would have weighed the highly suggestive photo line-up that included only one Indian person. See Bankston v. State, 391 So. 2d 1005, 1008 (Miss. 1980) (condemning as unduly suggestive line-up with only one person exhibiting the distinctive features of the accused).

Counsel was ineffective for his handling of this also. See, e.g., Yarborough v. State, 529 So.2d 659, 662 (Miss. 1988); People v. Ledesma, 43 Cal. 3d. 171 (1987). **Strike 24**.

### 8. DEFENSE COUNSEL FAILED TO INVESTIGATE OR PRESENT MR. MAHARAJ'S A POWERFUL DEFENSE OF ALIBI

Thus far we have considered the prejudice that Mr. Maharaj suffered in terms of the failure to impeach the State's case, either due to the suppression of evidence or by counsel's acts and omissions. These errors clearly mandate a new trial. Yet we cannot stop there, for Mr. Maharaj could prove that at the time of the crime he was 40 miles away from the Dupont Plaza.

Counsel testified that he advised Mr. Maharaj that he did not need to present an alibi (3.850 Tr. 331, 428), since he felt that the defense would win without it.[134] This was highly unlikely in a trial tainted by perjury, massive discovery violations and counsel'sl failure to present his client's case.

Counsel's investigation of this critical line of defense was almost non-existent. Ron Petrillo, the investigator, confirmed that Mr. Hendon had not been responsible in securing the alibi witnesses – this work had been done at the behest of the previous lawyer, Bob Trachman. (3.850 Tr. 1036-37) Mr. Petrillo had taken the affidavits of some[135] of the alibi witnesses (3.850 Tr.

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[134] Counsel tried to blame his client for the fact that one alibi witness, Tino Geddes, turned on the defense. However, there was absolutely no excuse, and no reason, for filing an alibi list without bothering to interview the vast majority of the witnesses. (3.850 Tr. 460-61) Neither did counsel have any excuse, once Geddes began to lie, not to impeach his credibility with the other witnesses who firmly adhered to the truth. Indeed, this was even more reason to prove that Mr. Maharaj had not concocted a false alibi.

[135] There were other witnesses who had not been found at the time of trial, including Marianne Cook. At the 3.850 hearing, the defense chose not to present Dr. Cook's testimony, not because she was being untruthful, but because two other unimpeached witnesses had already testified effectively,

1030-32), and believed them to be credible. Mr. Hendon never expressed any interest in them. (3.850 Tr. 1038)[136]

The lower court's attitude to this evidence was hard to comprehend. He seemed to think that if counsel had known about the witnesses and failed to call them, this could not be ineffective. Indeed, he initially ruled that he would only allow one alibi witness to be called. (3.850 Tr. 830) Arthur McKenzie testified without any meaningful impeachment. (3.850 Tr. 832-43) The court then relented and allowed the defense to call Douglas Scott, who likewise testified honestly to the alibi. (3.850 Tr. 845-53)

However, Judge Bagley then excluded the testimony of George Bell because trial counsel had withdrawn him as a witness at trial based on his

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and because she had some choice words to say about police officers. (3.850 Tr. 954-55) Thus, any assessment of her credibility played no part in Mr. Hendon's "decision" not to present an alibi defense. However, trial counsel should have followed the same course as post-conviction counsel, interviewing all the witnesses, and then making a reasoned election as to which ones would prove most credible.

[136] By and large, Mr. Hendon could not bring himself to contradict this. At best, he said he had spoken to "a couple of the witnesses." (3.850 Tr. 331) He said these were Levi England (who was a very reputable civil attorney, but not an alibi witness) and George Bell. (3.850 Tr. 333) Otherwise he reviewed the affidavits that had been secured by his predecessor counsel (3.850 Tr. 331-32) and felt that they were "too convenient" because they covered "every half hour of the entire time surrounding the incident." (3.850 Tr. 332) There is no case where a court has validated counsel's "decision," without checking the witnesses out, to reject a defense because it seems too good.

prior conviction. (3.850 Tr. 861) The court had the law backwards here: Trial counsel's decision was without justification, since the conviction was a withheld adjudication, and Judge Bagley had just ruled that "it is clear to the Court if you had a withhold of adjudication, it would not come in. I mean that is the rule." (3.850 Tr. 859) Thus, the defense had just proven to the court that counsel's "reason" for withdrawing this critical witness was legally unsound.[137]

In Hadley v. Groose, 97 F.3d 1131 (8th Cir. 1996), the court found counsel ineffective because "[d]espite Hadley's claim of innocence and his presentation of potential alibi evidence to counsel, [counsel] made no effort to investigate Hadley's alibi. . . ." Id. at 1135. Even with just one alibi witness, the court held "that her testimony 'would have probably changed the outcome of the trial.'" Id. (citation omitted). The same is true here. See also State v. Garmise, 408 So.2d 732 (Fla. DCA3 1982) (IAC for failure to call a witness in support of self-defense claim). **Strike 25**.

### 9. HAD COUNSEL CONDUCTED A THOROUGH INVESTIGATION AND BEEN PROVIDED WITH PROPER DISCOVERY, COUNSEL COULD HAVE POINTED THE FINGER AT THE REAL KILLERS IN THIS CASE

[137] Indeed, George Bell was one of the most important of the alibi witnesses. He had been a friend of the Moo Youngs before he had met Mr. Maharaj, which would enhance his credibility. He could not only establish the alibi, but that Adam Hosein (who he knew, and who was the spitting image of Mr. Maharaj) knew Nigel Bowe, the Bahamian attorney. (3.850 Tr. 830-32)

One truism that is routinely ignored in criminal trials is that if you did not commit the crime, you cannot be expected to say who did. Here, both counsel and client struggled with who could be setting Mr. Maharaj up. While he did not know, Mr. Maharaj had a strong sense that Adam Hosein had to be in on it somehow. As Eric Hendon testified:

> Q. Were you able to acquire any information about Mr. Hosein?
> A. I was not directly able to acquire any information about Mr. Hosein. Any information that I had came through my client, who was quite suspicious of the involvements with Mr. Adam Hosein.
> Q. Did you obtain a photograph of Mr. Hosein, a picture?
> A. No, I don't believe I did. My client would mention Adam Hosein's name at least once a day. I mean there would not be a day that he would not mention Adam Hosein and his suspicions relative to Adam Hosein.

(3.850 Tr. 311; see also id. at 312)

Mr. Maharaj does not bear the burden of proving his innocence, and does not purport to. However, with adequate discovery and a thorough investigation, he could have presented a strong circumstantial case--strong enough, certainly, to create more than a reasonable doubt of his own guilt.

The State had in its possession information that would have immediately set the defense alarm bells ringing. In Det. Buhrmaster's files there is a note reflecting that Detective Amato talked with Mrs. Adam Hosein on October 17, 1986:

> Info received from Dupont Plaza operator that Mr. Adam Hosein called the Hotel and left a mesg. for Room 1215.

(3.850 Clerk Tr. 2041) This came as a result of a phone message that Hosein had left the previous day for Eddie Dames in Room 1215.

How can the prosecution possibly account for this evidence not being turned over to the defense? Here is someone calling the room sometime around the time of the crime, in question and the defense is never told about it![138] Who is this Adam Hosein?[139] He is a Trinidadian of Indian extraction, just as is Mr. Maharaj. He looks remarkably like Mr. Maharaj. A man looking like Mr. Maharaj was seen in the Dupont Plaza with Eddie Dames. Since even the prosecution insisted that Mr. Maharaj was never with Dames, and since we now know that Hosein was in the hotel at the time, this was most likely him.

The defense would have wanted to look very closely at Adam Amer Hosein. First, contrary to the lies told by Shaula Nagel, they would have made the connection with the Moo Youngs. Hosein had been given power of attorney for one of the Moo Young's Panama corporations, *AMER Enterprises,*

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[138] Det. Amato was clearly interested in the lead, and tried to get in contact with Adam Hosein that same day. (3.850 Clerk Tr. 2041, 2156)

[139] In 1970, Hosein's brothers, Arthur and Nizamodeen Hosein, were arrested for the kidnaping of Mrs. Muriel McKay, who was held for £1 million ransom and then murdered. The Hoseins had planned to kidnap the Anna, wife of media mogul Rupert Murdoch, for ransom but accidentally seized the wife of one of Murdoch's chief assistants, Alexander McKay. (3.850 Clerk Tr. 5933)

*S.A.,*[140] which was actually named after him. Hosein was also involved in *Cargil International*, the other front for laundering money.[141] This would naturally have led the defense to the conclusion that Hosein was a part of the illegal business being conducted by the Moo Youngs, and therefore even more of a prime suspect in their demise. So what was he doing calling Eddie Dames?

Next, in a competent investigation of Hosein, the defense would have learned that he was a close associate of F. Nigel Bowe, the Bahamian attorney. (3.850 Tr. 830-32) This would have brought the focus back round to the Bahamas and (through Prince Ellis), they would have known that Dames was involved with importing drugs. Even back then, the defense could have learned that Nigel Bowe was involved in the Bahamian drug trade as well.[142]

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[140] *AMER Enterprises, S.A.*, was one of the three corporations named as beneficiaries on the one hundred million dollar ($100,000,000.00) fraudulent bankers letter of credit dated September 15, 1986.

[141] The State also had various notes written by Derrick Moo Young about “Adam,” presumably in reference to Adam Hosein. (3.850 Clerk Tr. 2267)

[142] The case was originally filed against him on September 13, 1995. He was not actually arrested until August 10, 1992, but he had not been hiding. He was a well-known lawyer in the Bahamas, and fought a seven year battle against extradition. Part of the evidence against Bowe came from a José "Pepe" Cabrera-Sarmiento who had formerly worked for the Medellin Cartel. He placed Bowe in Cartagena on various occasions, meeting with his drug associates. The government also charged that he had gone to Colombia to see Carlos Lehder. (3.850 Clerk Tr. 774) Lehder had an island in the Bahamas that Bowe had also visited. (*Ellis 1996*

When the defense looked into Bowe they would have found a shocking link to the Moo Youngs. According to Mervyn Dymally, a former congressman from California, the address listed for *Cargil International Corp., S.A.*, in the Bahamas is P.O. Box N-4839, Nassau, Bahamas (3.850 Clerk Tr. 2301-2) , which is the address of F. Nigel Bowe's law office.

To anyone but the most gullible, it would now be clear that there was a link between Dames (in whose room the Moo Youngs were killed), and two of their money laundering partners, Bowe and Hosein. The defense would then have wondered what precise motive these three would have for carrying out a murder. It would not have been long in coming. After consulting a financial expert to unravel the Moo Youngs' money laundering, they would have learned that the Moo Youngs, acting as middle men, were trying to lighten the load of their investors to the tune of several million dollars each time. There obviously had to be a commission paid for cleaning up the money – the Moo Youngs simply added a couple of percentage points as the documents passed through their hands.[143]

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*Statement)*) Since Lehder was convicted in the seventies, this was all known to the government long before Mr. Maharaj's trial. See, generally, United States v. Cabrera-Sarmiento, No. 1:CR-85-701D (S.D. Fla. Miami Division) (before King, C.J.).

[143] This is reflected in the work of Laura Snook. See *Exhibit A, attached*.

Now, at last, the defense would have had a strong theory.[144] This would also have added significance to another fact in the case. Across the hall from the murder, Jaime Vallejo Mejias of Colombia was supposedly in his room at the time of the crime. Mejias was a Columbia in the "Export-Import" business. (Tr. 3495) Although blood was found on the door of his room (Room 1214), the police did not bother to take prints from the "gentleman." (Tr. 3498)

While, again, Mr. Maharaj does not bear the burden of proof in this case, the jury would finally get to hear what is probably the truth. They heard none of it the first time around, and it is simply impossible, viewing all the error in this case, for anyone to suggest that it is harmless beyond a reasonable doubt.

Many of the facts that were suppressed by the State in this case would not, standing alone, have proved much. Some, on the other hand, clearly pointed to another potential suspect.[145] Put together by a diligent defense

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[144] Mr. Maharaj emphasizes that this theory results from an investigation without funding, and there may be other evidence out there of which he is unaware.

[145] See, e.g., Bowen v. Maynard, 799 F.2d 593 (10th Cir. 1986), cert. denied, 479 U.S. 962 (1986) (violation where prosecution failed to disclose that they considered Crowe a suspect when Crowe better fit the description of eyewitnesses, and was suspected by law enforcement); Miller v. Angliker, 848 F.2d 1312 (2nd Cir. 1988), cert. denied, 488 U.S. 890 (1988) (habeas granted where state withheld evidence which indicated that another person had committed the crimes with which defendant was charged); Smith v. Secretary of New Mexico Dept. of Corrections, 50 F.3d 801 (10th Cir. 1995), cert. denied, 116 S.Ct. 272 (1995) (relief granted where material evidence relating to a possible suspect was not disclosed);

team, all of the suppressed facts prove a great deal. This is why the courts have held that "the defendant was entitled to evidence of 'debatable exculpatory value.'" Perdomo v. State, 565 So. 2d 1375, 1377 (Fla. DCA2 1990) (citations omitted). Indeed, it has been more than forty years since the Supreme Court admonished prosecutors that "only the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense." Jenks v. United States, 353 U.S. 657, 668-669, 77 S.Ct. 1007, 1013-1014, 1 L.Ed.2d 1103 (1957).

At the same time, counsel should have been more diligent in searching out evidence that could have helped to prove his client's innocence. After all, what greater obligation can a lawyer have than to ensure that an innocent man does not land up on Death Row?[146] "Here, it was not just the discovery process

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Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997) (conviction for prison killing reversed when prosecution failed to disclose an internal prison memo which indicated that another inmate may have committed the murder); Jefferson v. State, 645 So.2d 313 (Ala.Cr.App. 1994) (suppressed evidence would have tended to show that someone other than defendant committed crime and would have been relevant to impeach credibility of two prosecution witnesses); Jiminez v. State, 918 P.2d 687 (Nev. 1996) (post-conviction relief granted in capital case where prosecution failed to disclose evidence of other possible suspects which was relevant to informant's impeachment and to challenge reliability of police investigation and police performed only cursory investigation of other possible suspects).

[146] Mr. Maharaj does not intend any person affront to his trial counsel by these remarks. After all, even "[c]onscientious counsel is not necessarily

that counsel failed to conduct, but practically the entire investigation of the case." Wade v. Armontrout, 798 F.2d 304, 307 (8th Cir. 1986). While Gunsby is the pole-star that guides the theoretical consideration of these issues, the facts of that case pale in significance when compared to this one. A new trial is the only equitable outcome. This would be **Strike 26.**[147]

### C. THE DEFENSE WAS DENIED THE DISCOVERY NECESSARY TO MAKE A COMPLETE SHOWING AS TO THE TRUTH IN THIS CASE

Even though, without any funds, the defense put on a compelling presentation, there was still a great deal of evidence that was improperly excluded by the trial court, or continued to be denied in discovery. Thus it behooves Mr. Maharaj to complain once more that he did not receive a full and fair hearing below.

#### 1. DENIAL OF DISCOVERY OF PUBLIC RECORDS AND OF THE GRAND JURY TRANSCRIPT

There were various areas in which the defense were denied discovery that almost certainly would have added additional elements to the claims above. For example, the defense motion for the Grand Jury records was

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effective counsel." Curry v. Zant, 371 S.E.2d 647, 649 (1988). He recognizes that in many ways counsel was led down blind alleys by the failure to disclose favorable evidence in this case.

[147] Notably, even were Mr. Maharaj playing more than one opponent, he would only need 27 strikes to retire the entire team.

denied. (3.850 Tr. 92) It is hard to understand how the trial court could have reached this determination. As part of his investigation, Mr. Maharaj obtained the prosecution's outline of the evidence to be presented to the Grand Jury. (3.850 Clerk Tr. 1270-73) Without a doubt, this was based on witness interviews, and reflected what they were going to say.

In many ways, it is inconsistent with what the witnesses later said at the trial. For example, the document says that Butler (not Mr. Maharaj) rented the room,[148] for Dames who had got together with Ellis the day before.[149] The document reflects that when the Moo Youngs arrived, Mr. Maharaj supposedly left Room 1215 for a moment, and "[s]hortly thereafter, KRISHNA MAHARAJ reappeared wearing a glove on his right hand and holding a .9 millimeter semi-automatic pistol. KRISHNA MAHARAJ accused DERRICK MOO YOUNG of stealing $300,000 from him and demanded repayment of the money." (3.850 Clerk Tr. 1271) This was quite inconsistent with the testimony at trial, where the alleged confrontation occurred without this interlude, and where the

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[148] "Eddie Dames informed the police that a gentleman by the name of Neville Butler had rented room #1215 at the Dupont Plaza Hotel." (3.850 Clerk Tr. 1271) This was contrary to the prosecution theory at trial that Mr. Maharaj rented the room.

[149] "Eddie Dames and Prince Ellis informed the police they arrived in Miami on Wednesday, October 15th, at 10:15 a.m., and spent the day engaged with their business activities. . . ." (3.850 Clerk Tr. 1271) This was contrary to their later story that they did not meet up until the 16th.

argument was over $400,000. How did the story change?

During the argument, the story goes, Butler allegedly tried to intervene,[150] another fabrication to place him in a better light, and there is a clear fabrication about Butler being forced from the room at gunpoint.[151] There are also other statements that seem inconsistent, that the defense should have been allowed to explore.[152]

This document reveals, first, that there is still apparently *Brady* material in the Grand Jury record. The trial court should have ordered the release of the transcripts that apparently reflect these statements. See See Dennis v. United States, 384 U.S. 855, 870, 86 S.Ct. 1840, 1849, 16 L.Ed.2d 973 (1966) ("'after the grand jury's functions are ended, disclosure is wholly proper where

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[150] "An argument ensued between DERRICK MOO YOUNG and the defendant. During the argument, Neville Butler tried to intervene, however, the defendant pointed the gun at Neville Butler's face and instructed him not to interfere." (3.850 Clerk Tr. 1272) In his trial testimony, Butler did not say he intervened, or that Mr. Maharaj allegedly pointed a gun at him.

[151] "KRISHNA MAHARAJ came downstairs and forced Neville Butler to follow him out of the apartment at gunpoint. Neville Butler convinced the defendant he should be allowed to leave. Before allowing Neville Butler to leave the defendant instructed him not to say anything to the police or he would be killed." (3.850 Clerk Tr. 1272) This is clearly false and Butler never mentioned anything at trial about being forced out of the apartment at gunpoint.

[152] For example: "The defendant started shooting and struck DERRICK MOO YOUNG several times." (3.850 Clerk Tr. 1272) Depending on what this means (does he mean struck blows?) this would also be inconsistent with the evidence.

the ends of justice require it.'"); Miller v. Wainwright, 798 F.2d 426, 430 (11th Cir. 1986) ("It the grand jury testimony . . . were a third version, unlike either the trial or the deposition, it strikes us that it would probable be useful to a jury in trying to sort out what is true and what is not"); Keen v. State, 639 So.2d 597 (Fla. 1994) ("To obtain grand jury testimony a party must show a particularized need").

Second, the indictment was clearly predicated on perjury.[153] In the seminal case of United States v. Basurto, 497 F.2d 781 (9th Cir. 1974), the court held:

> We hold that the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty *immediately to inform the court and opposing counsel* . . . in order that appropriate action may be taken

Id. at 785-86 (emphasis supplied). In Anderson v. State, 574 So.2d 87 (Fla. 1991), this Court applied the rule of Basurto to a capital prosecution, and

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[153] Some of these were falsehoods that were repeated at trial. For example, in saying that "[a]fter being advised of his Miranda rights the defendant informed the police he had been to the Dupont Plaza Hotel on prior occasions however he had not been there that day and he had never been in the hallway on the 12th floor or inside suite #1215" (3.850 Clerk Tr. 2173) this repeats the lie that Buhrmaster told at trial, refuted by Det. Amato.

determined that reversal was not required where the falsity of any testimony before the Grand Jury favored the accused, and the witness' "later testimony would have strengthened the probability of an indictment. . . ." Id. at 92. Here, in contrast, we *know* that Butler committed perjury before the Grand Jury, and we *know* that he has lied consistently since. The prosecution knew this long before trial, told nobody, and intentionally suppressed it. See also Beasley v. State, 315 So.2d 540, 543 (Fla. App. DCA2 1975) (when the state's witnesses "informed the prosecuting attorney that they had previously lied to the grand jury and to the state's attorney's office" this was not revealed to the defense). This is a separate, substantive claim, but cannot be fully developed without access to the Grand Jury transcript.

This and other[154] failings in the discovery process reflect a proceeding that still has not been full and fair. They are likely to be **Strike 27**.

### 2. THE TRIAL COURT WOULD NOT ADMIT EVIDENCE THAT WAS HIGHLY RELEVANT TO VARIOUS CLAIMS

In ways that are too numerous to detail in these pages, over and over again, the defense was restricted in its right to examine the witnesses.[155] The

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[154] For example, neither would the trial court enforce public records act requests for Buhrmaster's notes (3.850 Tr.722-25; 774-81; 917)

[155] The scope of evidence admissible to impeach the prosecution case at trial is very broad. United States v. Calle, 822 F.2d 1016, 1021 (11th Cir. 1987); Coxwell v. State, 361 So.2d 148 (Fla. 1978). Therefore, the

trial judge simply did not see the critical significance of the evidence, such as the prosecution's own doubts as to the veracity of Eddie Dames (3.850 Tr. 538-43), the links between Butler and Dames (3.850 Tr. 543-46), or between Bowe and Hosein. (3.850 Tr. 831-32), and constantly limited the defense presentation.

Even on the more pedestrian discovery violations, the trial court refused to consider the report that Det. Waldman had dismissed the Moo Youngs' complaints as vindictive (3.850 Tr. 801), and would not permit the defense to ask about the suppressed statement concerning Eslee Carberry. (3.850 Tr. 552) The defense was not permitted to prove the details of the Moo Youngs' efforts to defraud Mr. Maharaj of the Caribbean Times. (3.850 Tr. 556-60) The defense was not even permitted to question the prosecutor about his note that Buhrmaster should "[s]peak with FHP liaison about money and gun." (3.850 Tr. 548)

The defense was limited in its efforts to prove how obvious the discovery violations must have been to the prosecution,[156] or what steps the defense

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scope of the defendant's presentation at a 3.850 Hearing cannot be any more narrow. It is a mistake to believe that evidence is inadmissible there when a witness is called on *direct*, when the evidence is being offered in support of an allegation that trial counsel should have impeached the State's witnesses on cross.

[156] For example, counsel could not ask the prosecutor what significance he would attach to the documents detailing the laundering of

would have taken to investigate the Moo Youngs had the contents of the briefcase been revealed. (3.850 Tr. 1026-29)[157] Again the hearing was not complete below.

## IV. THE STATE OF FLORIDA STILL HAS NOT COMPLIED WITH ITS OBLIGATIONS TO MR. MAHARAJ, A BRITISH CITIZEN, UNDER INTERNATIONAL LAW

Neither Det. John Buhrmaster nor any other state official informed the British Consul that a British citizen had been charged with a capital crime, as required under the Vienna Convention and the Bilateral Consular Convention between the United States and the United Kingdom. Under the Convention, one important consular function would be protected if arresting countries were required to advise each detained foreign national of his right to consular assistance without undue delay. *Vienna Convention on Consular Relations, April 24, 1963 TIAS 6820, 21 U.S.T. 77, Art. 36*.

In Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996), the court noted that the Vienna Convention "requires an arresting government to notify a foreign

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billions of dollars around the Caribbean. (3.850 Tr. 1006-07)

[157] Indeed, when the defense came up with one expert who was willing to testify for no money, the trial court would also not consider the testimony of a highly qualified defense lawyer, Steve Potolsky, as to the manner in which a competent defense lawyer would have handled the investigation. (3.850 Tr. 771-74) Mr. Potolsky's evidence was proffered. (3.850 Clerk Tr. 6601 *et seq*.) The trial court would not say precisely how he felt that Mr. Potolsky's qualifications fell short, and would not provide funds for an expert who might meet his criteria. (3.850 Tr. 969)

national who has been arrested, imprisoned, or taken into custody or detention of his right to contact his consul." Id. at 520. The court further noted that Texas violated the Vienna Convention when it failed to advise the appellant, a Canadian national, of his right to contact his consul. Id.; see also United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979) (noting obligation under Article 36(1) to inform foreign national of right to contact consul).[158]

It is difficult to doubt that Britain's intercession could have tipped the balance so as to ensure that the defense performed properly and that the prosecution acted fairly. Cf. Breard, 118 S.Ct. at 1355 (noting that the petitioner had made no effort to prove prejudice). Mr. Maharaj presented the affidavit of the British assistant consult in the lower court detailing the steps that the consulate would have taken to ensure that his rights were observed at the time of trial. Given the many violations of Mr. Maharaj's rights, this Court cannot conclude that this violation was harmless beyond a reasonable doubt.

In a case involving evidence similar to that offered by Mr. Mararaj the Ninth Circuit overruled a trial court that failed to give proper weight to the

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[158] The Supreme Court recently considered the Convention in the context of a capital prosecution where Paraguay had sued the United States in federal court for a violation of the convention. The Court held that the petitioner had to raise the issue personally in state court before he could seek relief in federal court. Breard v. Greene, 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998).

prejudice proven by that evidence. United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980). Again, this Court must reverse.

## V. THIS COURT SHOULD NOT MERELY REVERSE, BUT SHOULD ORDER THAT THE INDICTMENT BE DISMISSED

There can be no doubt that Mr. Maharaj must be granted a new trial. If and when he comes to a retrial, if he is granted the necessary resources and if undersigned counsel do their job properly, he will be acquitted, as he should be. The question arises, in light of the plethora of shocking misconduct that permeates that case, whether reversal is sufficient in a case where a man has spent over 12 years on Death Row for a crime he did not commit?

The courts have repeatedly held "that a defendant may raise a due process-based outrageous government conduct defense to a criminal indictment." United States v. Bogart, 783 F.2d 1428, 1433 (9th Cir. 1986) (citing cases). The "outrageous government conduct" defense is one species of the due process defense--adopted from the Fifth Amendment--which is analogous to the double jeopardy bar which predicated on "prosecutorial or judicial overreaching. . . ." United States v. Jorn, 400 U.S. 470, 485, 91 S. Ct. 547, 557, 27 L. Ed. 2d 543 (1971); see also United States v. Dinitz, 424 U.S. 600, 611, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976) (retrial barred by "'bad-faith conduct by judge or prosecutor'" which "threatens the '[h]arrassment of an accused by successive prosecutions'"); see also Farrell v. State, 317 So.2d

142, 144 (Fla. App. DCA1 1975) (destruction of favorable evidence requested in discovery requires dismissal; “The abuse must not and will not be permitted”).

It is particularly applicable in a case where there have been so many acts that have been fundamentally illegal and improper:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes the lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of justice the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Bogart, 783 F.2d at 1436 (quoting Olmstead v. United States, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting)). Thus, even in the non-capital context, courts have ordered that all charges should be dismissed against a criminal defendant where such governmental overreaching is present. See, e.g., United States v. Twigg, 588 F.2d 373 (3d Cir. 1978).

This is obviously a very drastic remedy, but the notion underlying these dismissals has been that where "[t]he government agents' overzealous efforts

. . . [which] involved rather extreme and questionable measures . . . [c]oncepts of fundamental fairness preclude us from putting our imprimatur on law enforcement overreaching conduct. . . ." Lard, 734 F.2d at 1297.

There will never be a case where this principle applies more appropriately. This Court should bar a retrial and allow Mr. Maharaj to go home.

## CONCLUSION

WHEREFORE, for the reasons set forth above as well as such others as many appear to this Court, Mr. Maharaj respectfully moves that this Court grant him a new trial.

Respectfully submitted,
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## Certificate of Service

I hereby certify that I have served a copy of the foregoing document upon the State Attorney, 1350 N.W. 12th Avenue, Miami, Fla. 33136-2111, and the Office of the Attorney General, Department of Legal Affairs, Rivergate Plaza Suite 950, 444 Brickell Avenue, Miami, Florida 33131, this 2nd day of March, 1999.