IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **CASE NO.: 2010-CF-746-A-O**

v.

DONTE GRANT,

Defendant.
_____/

DEFENDANT'S AMENDED MOTION FOR POST-CONVICTION RELIEF

COMES NOW the defendant, DONTE GRANT, ("Mr. Grant"), by and through the undersigned counsel and pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, and moves this Court to vacate and set aside the verdict and sentence in Case No. 2010-CF-746-A-O. In support thereof, Donte Grant states the following:

Defendant previously filed a Florida Post Conviction Motion in this case and a Supplemental Post Conviction. Defendant obtained a new witness that exonerates the Defendant from any criminal activity, Mr. Bernard Ford. Defendant seeks to amend his Post Conviction and attaches the affidavit of Mr. Ford in Claim Three (3) of this Amended Motion for Post Conviction.

PRELIMINARY STATEMENT

1. In this motion, the Defendant, Donte Grant, will be referred to as "Mr. Grant". The Plaintiff, the State of Florida, will be referred to as the "State". The attorney that represented Mr. Grant, Joseph Morell, will be referred to as "Trial Counsel".

2. The instant motion refers to, and specifically incorporates herein, Defendant's previously filed Motion for Post-Conviction Relief, filed by Benjamin Christopher Haynes on 12/13/2013. (Attached as "Exhibit A").

STATEMENT OF JURISDICTION

3. Defendant appealed to the Fifth District Court of Appeal, which affirmed his judgment of conviction on December 18, 2012. *See Grant v. State*, 103 So.3d 177 (Fla. 5th DCA 2012). On January 11, 2013, the Fifth DCA issued a mandate finalizing the appeal.

SUMMARY OF FACTS

4. In the early morning hours of January 15, 2010, Theodore Capretta was engaged in cleaning the premises at Athena's Roasted Chicken, a restaurant in Maitland, Florida. Athena's was owned by Andreas Afexendiou. At approximately 5:45 a.m., Mr. Capretta unlocked the back door of the restaurant to bring in a bread delivery, as he did on almost every morning he worked at the restaurant. When he did so, two men approached him, at least one of whom had a handgun drawn. These men were wearing "hoodies", *i.e.* hooded sweatshirts, and masks that covered their faces below their noses. Mr. Capretta thought one was wearing Levi's and the other sweatpants. They forced entry into the premises.

5. Upon entry, one of the men hit Mr. Capretta over the head with the handgun and threatened to kill him unless he told them where the money was located. Mr. Capretta told them that the money was in a desk drawer. The two men forced open a desk drawer, took bank bags containing more than $2,000 in cash and rolled coins, and fled the premises. The foregoing events were captured on video by a security system.

Mr. Capretta then phoned the police and the owner of the restaurant, who arrived shortly thereafter. At approximately 6:30 a.m. Mr. Capretta gave the police a written statement in which he identified the perpetrators as Hispanic.

6. The police began a search for the perpetrators. Law enforcement's search included the use of a helicopter, patrol cars and a K-9 officer from the Orange County Sheriff's Office. Their search led them to an area behind a condominium at 801 Park Lake Place in Maitland, Florida, about a mile from the restaurant. The area included a lake and a wooded area. Officer James Smith of the Maitland Police Department accompanied the K-9 officer. Law enforcement found a roll of coins as well as bank bags in the wooded area. Smith subsequently looked into a screened-in covered patio behind the condominium unit, seeing what appeared to him to be a person lying under a bench. The K-9 officer allegedly then began barking and the two defendants emerged from under the bench. Smith reports that the two defendants then stated "We give up." Later, the patio was searched and bundles of cash were found on the floor.

7. Subsequently, Mr. Capretta was driven to the condominiums, where the Defendants were being detained in handcuffs, in order to conduct a show-up identification. En route, the officer told Mr. Capretta that a dog had tracked the persons he was about to see to the location where they were found. The defendants were dressed differently than the men who had attacked Mr. Capretta. Both of the defendants are of African-American descent. Mr. Capretta viewed the defendants while a passenger in the police truck from a distance that was substantially greater than the distance from the witness stand to the courtroom door. He told the officer that he thought the defendants were the men who had attacked him based upon their clothing.

8. The Defendant was charged by Amended Information on March 2, 2010, in the Circuit Court for the Ninth Judicial Circuit in and for Orange County, Florida. The information charged the Defendant with burglary of a structure with an assault with a firearm in violation of Section 810.02(2)(a), Florida Statutes; robbery with a firearm in violation of Section 812.13(2)(a), aggravated battery with a firearm in violation of Section 784.045(1)(a)(2) and trespass in an occupied structure in violation of Section 810.08. Additionally, the Defendant was charged with one count of possession of firearm by a convicted felon. That count was subsequently nolle prossed by the State. Jury trial was held before the Honorable Renee Roche, Circuit Judge on August 31 and September 1, 2011.

9. At no point, either prior to or during trial did Trial Counsel object to or move to suppress either the out of court show-up identification, or the in court identification of Mr. Grant. Nor did Trial Counsel request a special jury instruction on the dangers of reliance upon out of court identifications, cross racial identifications in particular. Neither did Trial Counsel interview or subpoena the alibi witness whose identity was provided by Mr. Grant prior to trial.

10. The Defendant was found guilty as charged on all counts. Judgment was entered on September 2, 2011.

11. On November 2, 2011 the Defendant filed a timely Notice of Appeal. Defendant appealed to the Fifth District Court of Appeal which affirmed, his judgment of conviction on December 18, 2012. *See Grant v. State*, 103 So.3d 177 (Fla. 5th DCA 2012).

12. On January 11, 2013, the Fifth DCA issued a mandate finalizing the appeal.

13. There have been no other appeals of the instant case.

14. This motion is Mr. Grant's first motion for post-conviction relief.

SUMMARY OF THE ARGUMENT

Trial Counsel's representation of Mr. Grant was constitutionally defective in his failure to move to suppress the impermissibly suggestive show up identification of Mr. Grant by Mr. Capretta, as well as his failure to move to suppress the in court identification which was tainted by the show up. Trial Counel's representation was additionally ineffective when he failed to request a special jury instruction on the fallibility of eye-witness identification, which becomes especially crucial in a largely circumstantial evidence case such as the case at bar. Finally, Trial Counsel performed deficiently when he failed to investigate or subpoena an exculpatory alibi witness who was readily available for trial and whose testimony would have led to Mr. Grant's acquittal.

Claim 3 involves newly discovered witness, Mr. Ford.

ARGUMENT

I. TRIAL COUNSEL'S REPRESENTATION OF MR. SCHULTZ WAS INEFFECTIVE AND CONSTITUTIONALLY DEFICIENT

It is axiomatic that both the United States Constitution and the Florida Constitution guarantee each defendant in a criminal prosecution the right to the effective assistance of counsel. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a due process of law in an adversarial system of justice. *United States v. Cronic*, 466 U.S. 648, 658 (1984).

It is well-settled that "ineffective assistance of counsel allegations are…properly raised in a motion for post-conviction relief." *See McClain v. State*, 629 So. 2d 320, 321 (Fla. 1st DCA 1993); *see also Kelley v. State*, 486 So. 2d 578, 585 (Fla. 1986); *State v. Barber*, 301 So. 2d 7 (Fla. 1974).

The United States Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the *Strickland* standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *Id*. at 687.

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, at 690.

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination the court should keep in mind that counsel's function, as elaborated in

professional norms, is to make the adversarial testing process work in the particular case. *Downs v. State*, 453 So.2d 1102, 1108 (Fla. 1984).

A. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ATTEMPT TO SUPPRESS THE SHOW-UP IDENTIFICATION AND SUBSEQUENT IN-COURT IDENTIFICATION

The out of court eye witness identification introduced at trial was empirically weak, tenuous and equivocal, and any nominal probative value was overwhelmingly outweighed by the unduly prejudicial effect upon the jury. By failing to strive to exclude it from consideration at trial, Trial Counsel provided constitutionally defective assistance to Mr. Grant.

Impermissibly suggestive identification techniques are properly subject to suppression. A "show up is inherently suggestive because witnesses are shown only one suspect for identification." *Jackson v. State*, 744 So.2d 545 (5th DCA 1999), *citing Perez v. State*, 648 So.2d 715 (Fla. 1995); *Blanco v. State*, 452 So.2d 520, 524 (Fla. 1984) *cert. denied*, 469 U.S. 1181 (1985); *Anderson v. State*, 946 So.2d 579, 581 (4th DCA 2006). "The test for suppression of an out-of-court identification is twofold: (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court-identification; and (2) if so, considering all of the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification." *Rimmer v. State*, 825 So.2d 304, 316 (Fla. 2002).

While show-ups are not per se invalid, they become so when "the police aggravate the suggestiveness of the confrontation." *State v. Jackson*, 744 So.2d 545, 548 (5th DCA 1999). In evaluating the likelihood of misidentification arising out of a show-up identification there are a number of factors to be considered by a court. These factors include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Perez, 648 So.2d at 719 (quoting *Neil v. Biggers*, 409 U.S. 188 (1972)).

Mr. Capretta's show-up identification of Mr. Grant was tainted by impermissible suggestion, and therefore Trial Counsel was ineffective by failing to attempt to suppress it from consideration by the jury. Mr. Capretta's ability to describe and recollect the physical description of his assailants was impaired and/or limited prior to his participation in the show-up identification orchestrated by law enforcement. During Mr. Capretta's robbery he was struck in the head with a foreign object, the force of which split his head open. The two men were wearing "hoodies", which covered the tops of their heads, as well as masks pulled up to their noses, leaving a very small portion of their faces exposed. Mr. Capretta was able to remember some of the items of clothing that were worn by his assailants, yet neither Mr. Grant nor his co-defendant were wearing those items of clothing at the time of his show-up identification. Prior to his identification, Mr. Capretta gave a written statement describing his assailants as Hispanic, when in fact both Mr. Grant and his co-defendant are African American. (*See*, The Record, page 118, lines 118-124; page 121, line 17). After his assault, when initially speaking to law enforcement, Mr. Capretta tells them that he does not think that he would be able to identify his assailants. (*See*, The Record, page 122, line 24-page 123, line 2.)

The manner in which Mr. Capretta is presented the Defendants for identification was unduly suggestive when viewed in conjunction with his earlier limited ability to describe or identify his assailants.

Question: You spoke with the Detective before you went to the show-up; is that right?
Answer: Yes.
Question: Okay. And you were told that these two subjects you were about to see were the ones that the dog had picked up the scent on?
Answer: Of the two people I was going to see?
Question: Yes.
Answer: Yes.
Question: And then you were driven to the location where the suspects were?
Answer: Yes.

(The Record, page 131, line 14 to page 132 line 1). When Mr. Capretta is given the opportunity to identify his purported assailants at trial, clearly the subjects of the proceedings and sitting adjacent to their lawyers, his identification is equivocal at best:

Question: Let me ask you this. I would ask you to take a moment, look around the courtroom, and tell me whether or not you recognize anyone in the courtroom as being the attackers in this case.
Answer: I see two gentlemen that look like they were the attackers.
Question: Okay.
Answer: But I'm not sure.

(The Record, page 107, lines 15-22.)

The Florida Supreme Court addressed the inherent suggestibility of show-up identifications in *Willacy v. State*, 640 So.2d 1079 (Fla. 1994). That case involved a brutal murder of a woman who was found bound and mutilated at her home. During law enforcement's investigation of the case they developed Mr. Willacy as a suspect. A sixteen year old high school student had seen a man driving the deceased woman's car, but was unable to get a clear look at the driver's face. Law enforcement drove the young witness past the suspect's home, while another detective had arranged to interview the suspect. Based upon this encounter the witness stated that the suspect "looked a lot like (the driver), but I wasn't 100% sure". *Id.* at 1083. Pursuant to a defense motion to suppress, the trial court

suppressed the out of court identification. The District Court upheld the decision of the lower court, reasoning:

> "It is clear from the record that Barton was unable to make an identification based solely upon his independent recall. He was unable to identify Willacy solely on the basis of the September 5 sighting and it was only after the unnecessarily suggestive procedure that Barton concluded that Willacy looked a lot like the driver, but he still was not 100% sure." *Id.* at 1084.

The Fourth District Court of Appeals has also spoken as to the necessity of suppression of an identification based upon improperly suggestive police procedures. In *Davis v. State,* 683 So.2d 572 (4th DCA 1996), two civilians were walking at night when two men in a grey Acura pulled up to them. One of the men got out of the car and demanded money. One of the victims provided the assailant with $429 in a First American Bank envelope. The other wrote down the license plate number as the car drove away. Hours later law enforcement went to the residence of the young lady who had written down the plate number and told her, "I think we caught them, but you need to properly identify them." *Id.* at 574. The two victims were then transported to the location where the Defendant and his codefendant were being held, having been stopped in a grey Acura with the tag number that had been reported by the victims of the robbery. A First American bank envelope was found in the car and money was found in the waistband of the Defendant's shorts. Additionally, a handgun and shotgun were found in the car. The victims identified Mr. Davis as the assailant who had been holding the gun used to rob them. The only description of the assailant given by the victims prior to the show-up was that the gunman was darker than the driver. The Defendant and his codefendant were being detained in handcuffs at the time of the identification, and law enforcement showed each suspect individually, asking "Is this the guy?" *Id.*

Mr. Davis' attorney failed to either object to the admissibility of the identification, or file a motion attempting to suppress it. In reviewing the reliability of the identification, the appellate court cited to *Perez,* supra, pointing out that a "show-up is inherently suggestive because a witness is presented with one suspect for identification. However, a show-up is not invalid if it does not give rise to a substantial likelihood of irreparable misidentification given the totality of the circumstances." The court found a lack of indicia of reliability to justify the out of court identification of Mr. Davis. The court was troubled by the fact that the witnesses were told by law enforcement that they thought they had the right men prior to the identification, that there was a paucity of detail given with regards to the suspects prior to the identification orchestrated by law enforcement, and that the witnesses had failed to describe either of their assailants being cross-eyed, though Mr. Davis was pronouncedly so. The court opined that had Mr. Davis' attorney moved to exclude the show-up identification he would have likely prevailed, and further that had the trial court denied such a motion, such a denial would have required reversal on appeal absent a showing of harmless error. The court goes on to determine that even considering Mr. Davis' presence in the vehicle used in the commission of the crime was unexplained, the presence of the stolen bank envelope in the car and Mr. Davis' possession of a large amount of cash, it cannot state that the inclusion of the unconstitutionally tainted identification was harmless error. The Court grants the Defendant's Motion for Post-Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.850, and directs the lower court to give Mr. Davis a new trial.

The capacity of Mr. Capretta to observe the identity of his masked, hooded assailants in any meaningful manner was, at best, nominal, and ultimately of no value when irretrievably tainted by the egregiousness of the suggestion utilized by law enforcement.

Like the *Willacy* case, law enforcement here drove the victim of the crime to a show-up identification orchestrated by the police. Like the victim in the *Willacy* case, Mr. Capretta was unable to get a clear look at the suspect's face during the crime. Similar to the witness in the *Willacy* case, Mr. Capretta was unable, even after the police show-up to categorically identify Mr. Grant. The suggestiveness of the show-up in the instant case is even more egregious than that in the *Willacy* case in that at the time Mr. Capretta was brought to identify Mr. Grant and his codefendant were detaqinedin handcuffs.

Unlike the officers in the *Willacy* case, here law enforcement compounded the suggestiveness inherent in all show-up identifications by fallaciously informing Mr. Capretta that the canine units had tracked to Mr. Grant and his co-defendant. This representation is similar to the one made by law enforcement in the *Davis* case, which irretrievably poisoned the reliability of the identification. That fact that the representation made by law enforcement is untrue with regards to Mr. Grant, renders the facts of the instant case even more egregious than those set forth in *Davis.* Like the trial counsel in the *Davis* case, Mr. Grant's Trial Counsel was constitutionally ineffective for failing to move to exclude the impermissibly tainted show-up identification in the instant case, as well as the in-court identification that came about thereafter. The facts in the instant case are similar to those in *Davis,* in that the entirety of the State's case outside of the improper identification relies upon his proximity to stolen items. Like *Davis,* it is impossible to determine beyond a reasonable doubt that the improper admission of the illegal identification did not lead to the guilty verdict with regards to Mr. Grant. Because the admission of the out of court identification was not harmless, Mr. Grant should be allowed a new trial.

B. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AN ALIBI WITNESS

Defense counsel was also ineffective because he did not call an available, exculpatory witness that would have cast a reasonable doubt on Mr. Grant's guilt. To make out a facially sufficient ineffective assistance of counsel claim for failure to call exculpatory witnesses the Defendant must (1) identify witnesses who were not called by counsel, (2) describe what testimony would have supported his defense, (3) confirm whether witnesses were available, and (4) explain how counsel's conduct prejudiced the defendant's case. *See Spera v. State,* 971 So. 2d 754, 756 (Fla. 2007). Further, while strategic decisions of trial counsel are generally not challengeable, such determinations are inappropriate prior to an evidentiary hearing on the ineffective assistance of counsel claim. *See Vanauken v. State,* 51 So. 3d 1186 (Fla. 5th DCA 2010).

Under Florida law, failure to call exculpatory witness is clear grounds for an ineffective assistance of counsel claim. In *Shelby v. State*, 75 So. 3d 845 (Fla. 2d DCA 2011), the Defendant filed a 3.850 Motion claiming ineffective assistance of counsel for failure to call available, exculpatory witnesses. The Defendant was charged with aggravated child abuse and trial counsel failed to call family members as witnesses who could have testified that the alleged incident did not happen. *See id*. The Court in *Shelby* held that such a failure by trial counsel was facially sufficient to the point where an evidentiary hearing on the matter was necessary. *See id*. at 846.

Another illustrative case is *Solorzano v. State,* 25 So. 3d 19 (Fla. 2d DCA 2009). In *Solorzano,* the Defendant was granted an evidentiary hearing based on trial counsel's failure to call a witness that would bolster the Defendant's defense. The Defendant was charged

with DUI manslaughter and his defense was that he was not intoxicated at the time of the crash. *See id*. at 24. The Defendant wanted to call the bartender to testify that the Defendant only had a few drinks and was not intoxicated. *See id*. Trial counsel did not call the witness on grounds that he believed the witness' testimony would be cumulative to the Defendant's on the same subject. *See id*. The Court disagreed and found that the Defendant made out a strong enough claim of ineffective assistance of counsel that an evidentiary hearing was needed. *See id*. The Court held that such testimony was not cumulative and instead bolstered the Defendant's theory of the case. *See id*.

If a witness' testimony will cast doubt on the Defendant's guilt, trial counsel is ineffective for failing to call that witness. *See Gutierrez v. State*, 27 So. 3d 192 (Fla. 5th DCA 2010). In *Gutierrez*, the Defendant was charged with Violation of Probation for Driving with License Suspended and Fleeing a Law Enforcement Officer. *See id*. at 193. The Defendant claimed that his brother was the person driving that day and he was working to refurbish a house at the time of the incident. *See id*. The Defendant told trial counsel that his boss could corroborate this theory, but trial counsel failed to call the witness. *See id*. The Defendant is *Gutierrez* was entitled to an evidentiary hearing because such a claim for ineffective assistance was facially sufficient and it would be improper to deny a 3.850 Motion alleging such a claim without a hearing. *See id*.

Turning to Mr. Grant, he requested that defense counsel speak to and secure his brother, Teddy Mitchell for trial testimony that would have established Mr. Grant's alibi. Mr. Mitchell would have testified that Mr. Grant was at his house in Maitland playing video games until approximately ten minutes before his detention and subsequent arrest, rendering it impossible for him to have committed the robbery for which he was convicted. Mr. Mitchell lived in Maitland

at the time of Mr. Grant's trial and was available to testify. Defense counsel did not act on the information. It was unreasonable for defense counsel to fail to investigate Mr. Mitchell's testimony or endeavor to secure his crucial exculpatory testimony for trial. Mr. Grant would have prevailed if defense counsel had presented an alibi defense or witnesses at his trial to contradict the circumstantial evidence put forward by the State of Florida.

C. NEWLY DISCOVERED EVIDENCE: Mr. Ford.

This motion is brought pursuant to Florida Rule of Criminal Procedure 3.850, motion to vacate, set aside or correct sentence. It alleges that the facts on which this motion is predicated were unknown to the Defendant or the Defendant's attorney at the time, namely, that in that Mr. Ford admitted to committing the robbery.

This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence. If the defendant is filing a newly discovered evidence claim based on recanted trial testimony or on a newly discovered witness, the defendant shall include an affidavit from that person as an attachment to his or her motion. For all other newly discovered evidence claims, the defendant shall attach an affidavit from any person whose testimony is necessary to factually support the defendant's claim for relief. If the affidavit is not attached to the motion, the defendant shall provide an explanation why the required affidavit could not be obtained.

The Supreme Court of Florida Court has articulated the following two requirements that must be satisfied in order to set aside a conviction or sentence on the basis of newly discovered evidence: First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of diligence." Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (internal citations omitted).

The *Jones* court has also explained the proper analytical framework for a court to employ in determining whether the second prong of the standard has been satisfied in post-conviction proceedings: To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial."

This requires that the trial initially consider:

> whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. Where, as in this case, some of the newly discovered evidence includes the testimony of individuals who claim to be witnesses to events that occurred at the time of the crime, the trial court may consider both the length of the delay and the reason the witness failed to come forward sooner. *Jones,* 709 So.2d at 521-22 (citations omitted).

Furthermore, with regard to claims of newly discovered evidence involving recanted testimony, a reviewing Court has explained:

> In assessing recanted testimony, we have stressed caution, noting that it may be unreliable and trial judges must "examine all of the circumstances in the case." Accordingly, "[r]ecantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial." That is the purpose of an evidentiary hearing. *Robinson v. State*, 707 So.2d 688, 691 (Fla. 1998) (citations omitted).

It is correct that not all recantations will be considered newly discovered evidence. A recantation will not be considered newly discovered evidence where the recantation offers nothing new or where the recantation is offered by an untrustworthy individual who gave inconsistent statements all along The Court's decision in *Armstrong v. State*, 642 So.2d 730 (Fla. 1994), sets forth the principles to be followed when evaluating recantations.

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." Only 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 will a new trial be granted. *Id.* at 735 (citations omitted) (quoting *Bell v. State*, 90 So.2d 704, 705 (Fla. 1956)).

The Defendant has previously raised the issue of ineffective assistance of counsel to this Court regarding the likelihood that there was some coerced testimony in his case. Mr. Ford. Mr. Ford clearly states he discovered that another person was convicted of the robbery in this matter. Furthermore, the new testimony does not subject the witness to potential charges for perjury; she was a minor at the time of the first trial and did not testify. Moreover, the totality of the evidence produced at trial makes it highly likely that the outcome, the verdict rendered by the jury would have been completely different had the new testimony been available.

WHEREFORE, the Defendant, DONTE GRANT, respectfully requests that this Court enter an Order:

A. Vacating, setting aside or correcting the sentence delivered in this matter;

B. Quashing the judgment delivered in this matter;

C. Scheduling an evidentiary hearing to determine the merits of this Motion for Post-Conviction Relief;

D. Expressly permitting the defendant to reserve the right to amend this Motion; and

E. Awarding any such other and further relief as this Court deems just and proper.

DATED this 2 day of May 2019.

Respectfully submitted,

/s/ *ROBERT SIRIANNI, JR.*
ROBERT SIRIANNI, JR., ESQ.
Florida Bar No. 684716
BROWNSTONE, P.A.
201 N. New York Avenue, STE 200
P.O. Box 2047
Winter Park, Florida 32790-2047
Telephone: (407) 388-1900
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 2 day of May, 2019 to and via ECF filing system:

Office of the State Attorney
415 North Orange Avenue
Orlando, Florida 32801

/s/ *ROBERT SIRIANNI, JR.*
ROBERT SIRIANNI, JR., ESQ.