RENE SANTANA,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY
Petitioner,	:	
		INDICTMENT NO. 240-75
v.	:	
STATE OF NEW JERSEY,	:	
Respondent.	:	

BRIEF AND APPENDIX IN SUPPORT OF PETITION FOR POST-CONVICTION RELIEF

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STATEMENT OF THE CASE

1. Procedural History.

The lengthy procedural history of this prosecution is set forth in full at Paragraphs 1 through 5 of the first count of the verified petition for post-conviction relief in this matter. That procedural history is adopted here by reference.

2. Statement of the Facts.[1]

A. Factual overview.

Those facts which bear directly on Petitioner's arguments will be developed in detail, supported by specific transcript references, as appropriate to those arguments. The following broad outline of the evidence, and conflicting state and defense theories, is intended to provide an overview of the case and to set the stage for a discussion of recently uncovered evidence of the apparently deliberate suppression by the state of evidence favorable to Petitioner.

On Monday morning, December 16, 1974, two or three armed men wearing ski masks forced their way into the 191 Roseville Avenue basement apartment of Newark resident Remigio Sanchez in an apparent robbery attempt. One of the would-be robbers was Provenco Acevedo, an individual generally known by

1. In Santana v. Fenton, 570 F.Supp. 752, 753-755 (D.N.J. 1981), the facts of the case were accurately and adequately summarized.

his nickname, "Columbia." Seconds after the robbery attempt began, Columbia was struck in the head and mortally wounded with a baseball bat wielded by Remigio Sanchez. An exchange of gunfire followed between the occupants of the apartment and the remaining robber or robbers. In this exchange, Sanchez was shot. He died exactly one month later, January 16, 1975. The injured robber, Columbia, died the day of the robbery attempt. The second masked man (or men) fled the apartment and escaped. It was the state's trial theory that the second man was Petitioner, Rene Santana. It was further the state's trial theory that a third man, Jose Rodriguez, was also involved in the robbery attempt and had waited outside as the driver of the getaway car.

On July 23, 1975, approximately eight months after the crime, Petitioner and Rodriguez were arrested and charged with the murders of Remigio Sanchez and of co-felon Columbia. In the preceding months, two other individuals had been arrested and charged with the murders, charges that were later withdrawn. One of these individuals was Gilberto Crespo, brother of Carmen Crespo who, in turn, was Columbia's widow. Carmen Crespo testified as a state witness. Another state witness, Carlos Pepin, had also been arrested and charged with the murders. Charges against him were also withdrawn.

At trial, Jose Rodriguez presented virtually no defense. By contrast, Petitioner Santana presented a credible alibi defense. Rodriguez was acquitted of all charges. Peti-

tioner was convicted of all charges.[2] The only salient difference between the evidence as to Jose Rodriguez and that as to Petitioner was the testimony of Roberto Gutierrez, a purported eyewitness who placed Santana at the scene of the crime as a participant. It is upon the testimony and concealed criminal record of Roberto Gutierrez that this petition for post-conviction relief focuses.

B. Principal Figures.

The following thumbnail sketches of the principal trial personna will, it is hoped, assist this Court in following the sometimes convoluted testimony and sometimes complex inter-relationships among the principals, witnesses and victims. This is a task not made easier by the fact that many of the principals employed aliases or nicknames that were freely substituted for proper names by witnesses and counsel during testimony and argument.

1. Remigio Sanchez:

> Alleged numbers banker who was intended victim of robbery. Killed Provenco "Columbia" Acevedo with baseball bat in fighting off robbery. Died 30 days later of gunshot wound received during robbery attempt.

2. Provenco "Columbia" Acevedo:

> One of robbers. Married to Carmen Crespo. Entered basement apartment wearing ski mask and carrying gun. Mortally injured

2. Petitioner's conviction for the death of Columbia Acevedo was vacated on appeal following an intervening decision by the New Jersey Supreme Court that one felon could not be held liable on a felony-murder theory for the death of a co-felon. See State v. Canola, 73 N.J. 206 (1977).

by Remigio Sanchez with baseball bat. Died day of robbery attempt.

3. Jose "Salao" Rodriguez, Jr.:

Co-defendant. State's theory was Rodriguez drove getaway car. Did not testify. Found not guilty by jury on all counts.

4. Rene Santana:

Petitioner in this action. State's theory was Petitioner was one of masked robbers inside Sanchez' apartment. Put forward alibi defense. Did not testify. Convicted on all counts.

5. Maria "Cuqui" Linares:

Common-law wife of acquitted co-defendant Jose Rodriguez. Testified once out of jury's presence on collateral issue.

6. Carmen Crespo:

Widow of deceased robber Provenco "Columbia" Acevedo. State witness. Brother Gilberto Crespo had been arrested and charged with murders in February of 1975. Charges later dropped.

7. Carlos "Amigio" Pepin:

State witness. Was initially arrested and charged as participant in crime. Charges later dropped.

8. Guido Sanchez:

Son of deceased Remigio Sanchez. In apartment at time of robbery. Unavailable at time of trial because of return to Santo Domingo.

9. Leonardo delaRosa Alba:

In apartment at time of attempted robbery. State witness. Unable to identify any of robbers.

10. Melvin LaCosta:

Good friend of deceased Provenco "Columbia" Acevedo and also Carmen Crespo and Carlos Pepin. Came forward with information one week prior to trial at urging of Maria Linares. State witness.

11. Martin Palmer Helmick:

State witness. Testified via video tape deposition.

12. Roberto Gutierrez:

Testified as state rebuttal witness. Friend and upstairs neighbor of murdered Sanchez and of Sanchez' son Guido. Described elder deceased Sanchez as like father to him. Came forward as eyewitness on day jury selection began, 18 months after crimes.

LEGAL ARGUMENT

THE STATE'S DELIBERATE MISREPRESENTATION TO THE COURT AND COUNSEL REGARDING THE DISMISSAL OF PENDING CRIMINAL CHARGES ON BEHALF OF A KEY STATE WITNESS, COUPLED WITH THAT WITNESS' PERJURY IN DENYING THE EXISTENCE OF A CRIMINAL RECORD, DENIED PETITIONER DUE PROCESS AND REQUIRES A NEW TRIAL.

1. Introduction.

Roberto Gutierrez was the state's key witness here. The only significant difference between the case presented against petitioner Rene Santana and his co-defendant, Jose Rodriguez, who was acquitted on all counts, was the testimony of Gutierrez. Although ostensibly a friend of the murder victim, Gutierrez did not appear as a witness until jury selection was in progress, some 18 months after the crime.

After Gutierrez' eleventh-hour appearance, defense counsel made repeated requests for a "rap sheet" or other evidence suggesting that Gutierrez might have a criminal record. The prosecutor made repeated promises that if such a document, or other information regarding a criminal record, existed, it would be produced. The prosecutor represented to the Court and counsel that Gutierrez had not been arrested in Essex County; Gutierrez himself denied under oath any arrest record with the exception of

motor vehicle offenses, primarily drunken driving. Gutierrez testified for the state on Tuesday, May 18, 1976. Despite repeated, persistent, almost obnoxious requests from defense counsel, no rap sheet or other documents evidencing a criminal record were ever produced.

In the summer of 1984 it was learned, for the first time, that at the time of his surprise appearance as a potential state witness, Gutierrez had pending against him in the Newark Municipal Court three criminal complaints, two of which charged indictable offenses.[3] It was further learned in the summer of 1984 that on May 14, 1976, the Friday before he testified and the day the state announced it would use him as a witness, the three charges pending against Gutierrez were dismissed in the Newark Municipal Court and bench warrants that had been outstanding were recalled and withdrawn. The judge who handled the matter, Golden Johnson, Esquire, has stated that although she does not remember the individual cases, she would not have dismissed complaints, especially indictable complaints, or recalled bench warrants, unless the defendant and a prosecutor were present in open court. Unfortunately, any tape-recordings

3. Gutierrez was charged with the following crimes: (1) attempted bribery, a violation of N.J.S.A. 2A:93-6, carrying a maximum penalty of up to 3 years imprisonment and/or a fine of up to $1,000; (2) possession of a dangerous weapon, a violation of N.J.S.A. 2A:151-46, carrying a maximum penalty of up to 7 years imprisonment and/or a fine of up to $100,000; and (3) eluding a police officer, a violation of N.J.S.A. 2A:170-25.8, carrying a maximum penalty of up to 6 months imprisonment and/or a fine of up to $500. [See certified docket sheets of Newark Municipal Court, reproduced at Pa 2A - 4A.]

or other records of those proceedings have long since been destroyed. [See Affidavit of James McCloskey, reproduced at Pa 5A - 7A.]

To an unusual extent, this was a case marked by discovery problems that caused the Court and defense counsel to call into question, repeatedly, the good faith and/or competency of the prosecution. On March 18, 1976, the date on which the trial was to begin, the trial judge granted a motion for a five week adjournment because of the prosecutor's suppression of discoverable material that the judge described as "border[ing] on shameful." [8T92-19.][4] A subsequent discovery violation, which involved a significant change in the story of a key state witness, prompted the trial judge to pointedly ask the prosecutor whether he honestly felt he was "acting as a reasonably prudent and decent attorney here?" [20T125-23, 24.] At another point in pre-trial proceedings, the judge expressed his exasperation with the seeming inability of the prosecutor to comply with discovery orders and, when discovery was supplied, to supply it accurately. The trial judge commented:

> Certain lapses concur [sic] but then I am puzzled why addresses have to be mixed up like that and improper streets given and then the fingerprints and it is the combination of these things that make we wonder.

[15T20-21 to 25.] Finally, a few days prior to the trial, the trial judge denied a motion to dismiss the indictment on the

4. This trial produced 16 volumes of pre-trial matters, 13 volumes of trial testimony, and 4 of post-trial matters. The abbreviations used to designate the record are found at Table I, located at p. 1A of the appendix to this brief.

premise of prosecutorial misconduct in discovery by noting:

> I find no willfulness on the part of the state, but I am satisfied there is repetitive carelessness. I recall three pretrials before getting to a trial date on the matter of discovery.

[29T95-3 to 6.]

After the trial, defense counsel moved to set aside the verdict and dismiss the indictment on the grounds of prosecutorial misconduct. The trial court, after reviewing the repeated instances of violation of the rules of discovery, concluded "There was carelessness" and "There was abounding sloppiness," but nothing that required a new trial or dismissal of the indictment. [31T10-20; 11-2.] The trial judge also stated for the record the fact that he had called the sloppy and careless manner in which the case was prosecuted to the attention of the then-Essex County Prosecutor, Joseph P. Lordi. [31T11-4, 5.]

On May 6, 1976, clearly frustrated by the prosecutor's unwillingness or inability to comply with the rules of discovery, the trial judge engaged in the following exchange with the prosecutor:

> THE COURT: Mr. [Prosecutor], when does it end?
>
> PROSECUTOR: I don't have the answer for you, Judge. I mean, I don't know about this. I don't know how else . . .

[18T50-19 to 25.] The honest answer to the trial judge's

question is that, more than nine years after the fact, it is still not ended.

2. The emergence and importance of Roberto Gutierrez.

Roberto Gutierrez was the sole witness who placed Petitioner at the scene of the crime.[5] Gutierrez was the upstairs neighbor of robbery victim Remigio Sanchez. [28T17-16, 17.] On the morning in question, Gutierrez heard the shots in the apartment below and saw one man leave the apartment and remove what Gutierrez described as a "skin" having "mouth and eyes," an apparent reference to a ski mask. [28T20-13 to 20.] He identified Petitioner as that man. [28T21-13 to 16.]

As noted earlier, despite Gutierrez' claim that he was an eyewitness to events surrounding the shooting of a man the witness described as "like a father" to him [28T37-15, 16], he never came forward as a witness until 18 months after the crime. Indeed, Gutierrez never even checked on what had happened in the apartment below despite having heard the shots and despite testimony that he was very worried about Sanchez. Finally, he testified that he had never told anyone about what he had seen until two weeks before the time he testified. [28T43-13 to 15.] He came to court only at the urging of Felipe Calipan, a son of the deceased Sanchez. [28T43-18 to 25.]

Despite some credibility problems, Gutierrez was steadfast in his identification of Petitioner Santana as the man who emerged from the downstairs apartment removing a ski mask.

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5. A second witness, Martin Palmer Helmick, although proferred as an eyewitness did not live up to his advance billing. His testimony is discussed in detail at pp. 28 - 31 of this brief.

It seems clear beyond responsible counter-argument that Gutierrez' testimony tipped the scale in the state's favor in this case in a way that the testimony of other witnesses, who implicated the acquitted co-defendant and Santana equally, did not.

As noted earlier, despite the fact that 18 months had elapsed between the crime and the time of trial and more than 8 months between the time of Santana's arrest and the trial, the name Roberto Gutierrez had never been connected with the case until May 3, 1976 when the assistant prosecutor opened the morning's session by announcing that he had a new eyewitness by the name of Roberto Gutierrez whom the prosecutor had just learned of that morning. [17T3-2 to 5.] The response of defense counsel was to request two things immediately: First, whether Gutierrez had a criminal record and, second, whether Gutierrez had been shown photographs of Petitioner Santana or had otherwise made an identification. [17T5-1 to 17.][6] Regarding the latter issue, the assistant prosecutor replied that there had been no photo identification since Gutierrez knew Santana. Regarding a criminal record, however, the prosecutor informed the court and counsel as follows:

> The fact of the matter is I will check on his criminal record, if any, and [defense counsel] is entitled to that under discovery, and since I just learned of him a little

6. The fact that Gutierrez knew Santana is further evidence of the skepticism with which his testimony may be viewed. Accepting what he had to say as truth, he not only observed a man who had shot a good friend leaving the apartment, he knew who the man was and still remained silent.

while ago, I will have that done over the lunch hour, as to any record of this man.

[17T5-18 to 24.] Defense counsel again asserted that he was seeking "all investigative materials concerning the background of this case by rules of discovery." [7T6-3 to 8.] Indeed, at that juncture Santana's counsel asked for a one week recess of the trial to allow an opportunity to check out Gutierrez's background including "what his criminal record is." [17T10-2 to 6.] The final word regarding Gutierrez's criminal record on May 3 was the prosecutor's representation to the court that a record check was already in progress, stating, "I have given that to Det. Flaminio now. He's going to check on it." [17T23-5, 6.] Finally, it was agreed on May 3 that Gutierrez would be called only as a rebuttal witness should Santana present an alibi defense. [17T29-23 to 31-20.]

Thereafter, the trial went forward and, on Wednesday, May 12, the state rested. The next day, May 13, co-defendant Rodriguez put on a very brief case and the Santana defense began. Santana's defense continued into the afternoon of May 14, at which time the jury was sent home early since three witnesses had not shown up. [26T70-10 to 20.] On May 14, the prosecutor announced that he intended to call Gutierrez as a rebuttal witness when the trial resumed the following Monday, May 17.[7]

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7. The Friday, May 14 date is critical. On that date, according to records maintained by the Newark Municipal Court, three pending complaints naming Roberto Gutierrez as a defendant were dismissed. At the same time, previously entered bench warrants were recalled and withdrawn. The judge in question has stated that she would not have dismissed indictable complaints or withdrawn bench warrants without a prosecutor being present in court along with the defendant.

In addition to a consistent attempt on the part of defense counsel to learn the nature and extent of any criminal record that Gutierrez might have, defense counsel also sought persistently to interview Gutierrez. Indeed, the Court ordered the prosecutor to make Gutierrez available for such an interview. The first such attempt failed on May 3, 1976 when the prosecutor reported to the Court that he was unsuccessful in catching Gutierrez before he left the courthouse to go back to work. [7T22-3-5.] The prosecutor did promise, however, to have Gutierrez back the following morning, May 4, for an interview by defense counsel. [17T33-1 to 4.] On May 4, however, Gutierrez did not show. The prosecutor explained his witness' failure to show by saying, "I understand Roberto Gutierrez went to work today, he may have misunderstood me, his English is not that good. I have difficulty communicating with him." [8T62-3 to 10.] By May 14, the interview had not still taken place. In response to inquiry from the Court, the prosecutor stated, "I am trying to have him here this afternoon for the convenience of [defense counsel]. I understand again from secondhand the man is down on the docks at the Port Authority." [26T64-20 to24.]

On Monday May 17, Gutierrez finally showed up for his interview by defense counsel. After taking a short recess, defense counsel objected to any testimony from Gutierrez "on the

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The May 14 decision to use Roberto Guttierrez as a rebuttal witness coupled with the May 14 dismissal of all charges against him seems to lead to but a single conclusion, namely that dismissal of the complaints was a quid pro quo for Gutierrez's testimony and that that "deal" was deliberately concealed from the defense.

grounds that the defense is being confronted at this point with a story that it has absolutely no way of checking up on." [27T34-21 to 23.] Specifically, defense counsel noted that during his interview of Gutierrez the latter stated that his roommates were with him on the morning in question and that they had also seen the man with the ski mask flee the Sanchez apartment. [27T34-14 to 17.]

In the course of an ensuing Wade hearing, the Court directly questioned Gutierrez about the existence of any criminal record:

> THE COURT: Have you ever been arrested?
>
> A: Yes.
>
> THE COURT: All right. For what?
>
> A: For something with a car.
>
> THE COURT: And were you convicted, were you found guilty?
>
> A: Yeah, I found guilty, I pay the money.
>
> THE COURT: You paid money?
>
> A: Some for the car, you know, I was drinking the car and driving the car, that's all.
>
> THE COURT: Drunk driving?
>
> A: Before, no more.
>
> THE COURT: You said that's--
>
> A: Five years ago.
>
> THE COURT: You were drinking in the car?
>
> A: Right.

THE COURT: What were you fined?

A: I paid $100 fine.

THE COURT: Were you ever arrested beside that?

A: About two times for the same thing, you know, driving with no license or something like that.

THE COURT: All right. Anything besides that, any other arrests besides that?

A: No.

THE COURT: All right. You may proceed, [defense counsel].

[27T44-19 to 45-22.]

On Tuesday, May 18, Gutierrez testified. Immediately prior to his taking the stand, the following exchange took place among defense counsel, the Court and the prosecutor concerning Gutierrez's criminal history:

DEFENSE COUNSEL: Judge, we haven't gotten the rap sheet on Mr. Gutierrez. I am informed the person who has been accompanying him to court on the times he has been brought to court is somehow involved with the drug program. If this man has some sort of charge pending against him or some other situation where he is anyway involved where he would be in a position to bargain with the State, I think we are entitled to know about it before he testifies. The state has nown of the existence of this witness for two weeks. We don't have a rap sheet. We don't have any record.

THE COURT: Do you have a rap sheet?

PROSECUTOR: I asked Det. Flaminio to check. There are no charges pending in this county. There was no record from the State but I told them to go back downstairs and check to see if there was any way, shape

> or form that may be under a different spelling of the name or something like that there may be a record. As far as I know he has nothing. He indicated yesterday on the record that he has several drunk driving arrests but there is nothing pending in Essex County against him.
>
> . . . .
>
> THE COURT: The state has checked and there is no record. You have Detective Flaminio double checking?
>
> PROSECUTOR: He is doing it now. If he comes back with something, I will ask him to come to sidebar and let the Court know.

[28T15-8 to 16-19.]

The above exchange represents the last time in the course of this trial that Gutierrez's criminal record was mentioned. Summations were delivered that afternoon. The following morning the jury began deliberations and found petitioner guilty of all charges and acquitted his co-defendant, Jose Rodriguez, of all charges.

3. 1984 Developments.

Approximately eight years after the state's representations to the Court and counsel concerning the existence of a criminal record for Roberto Gutierrez, the truth surfaced. It was learned in June of 1984 that Gutierrez, despite his sworn testimony to the contrary and the representations of the assistant prosecutor, did have a criminal record. Not only did he have a criminal record, but there were outstanding indictable complaints in Essex County at the time Gutierrez first appeared. Not only were they outstanding indictable complaints in Essex County, but bench warrants had been issued for his arrest.

Ironically, the charges in question were initially brought by the Essex County Park Police.

As certified court records demonstrate,[8] Gutierrez was arrested on August 28, 1972 for the following offenses: Attempted bribery; eluding a police officer; possession of a dangerous weapon. Following the arrest, Gutierrez appeared in the Newark Municipal Court and was released on his own recognizance. On December 15, 1972 he failed to return to court and bench warrants were issued with $500 bail set for each offense. The charges and the warrants remained open and active until May 14, 1976, the Friday prior to Gutierrez' testimony as a witness for the state in this prosecution. On that day, all charges were dismissed and the bench warrants cancelled. May 14 was also, "coincidentally," the day the state announced its decision to call Gutierrez as a rebuttal witness. [26T64-1 to 3.]

Although the tape-recordings of whatever occurred in Newark Municipal Court on May 14, 1976 have long since been destroyed, the facts speak loudly, plainly and shamefully. In its zeal to convict, the law enforcement agencies involved in this prosecution apparently countenanced perjury and the deliberate concealment from defense counsel of information that might well have undermined the credibility of the state's most important witness. Prior to discussing the remedy appropriate for this misconduct, it might be well to remember the words of

8. Copies of those certified records are appended to the petition and to this brief. [Pa 2A-4A.]

Justice Douglas, dissenting in Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 49 L.Ed.2d 431 (1974):

> The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.

416 U.S. at 648, 649, 40 L.Ed.2d at 440.

4. Appropriate Remedy.

This case involves the apparently deliberate suppression by the state of impeachment material specifically requested by a defendant. In order to accomplish the deception, the witness in question perjured himself when queried directly by the trial judge as to the nature and extent of the witness' criminal record. As we now know, approximately 72 hours prior to that perjured testimony, the witness's criminal record was being cleaned up in a courtroom located scant blocks from the courtroom in which the perjured testimony was offered by the state. Under the circumstances, a new trial is the least of the remedies available to undue this harm.

A. Brady's evolving materiality standards.

"In determining whether prosecutorial non-disclosure violates due process, the good faith or bad faith of the prosecution is irrelevant. Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. at 1197, 10 L.Ed.2d at 218." State v. Carter, 91 N.J. 86, 112 (1982). Thus, while prosecutorial misconduct may well be present here, the nature and extent of such misconduct is unimportant to the Brady aspects of the argument. In this regard, a

majority of the United States Supreme Court quite recently reiterated its earlier holding in United States v. Agurs, 427 U.S. 97, 93 S.Ct. 2392, 49 L.Ed.2d 342 (1976) and summarized the finding that this Court must make:

> [A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.

United States v. Bagley, ___ U.S. ___, 37 CLR 3185 (7/2/85).[9]

In Agurs the Court established a hierarchy of approaches to suppressed Brady material, a hierarchy that varied with the specificity of a defense request and the presence, or not, of perjured testimony. Of the three possible approaches, only two apply to this case since there is no question that defense counsel made repeated and specific requests for any information regarding the criminal record of Roberto Gutierrez. Indeed, the prosecutor acknowledged both the request and the fact that the defense was entitled to such information. [17T5-18 to 24.]

Where, as here, a specific request has been made for Brady material, non-disclosure of such evidence violates due process anytime a "substantial basis for claiming materiality exists." United States v. Agurs, 427 U.S. at 106, 96 S.Ct. at 2399, 49 L.Ed.2d at 351. To underscore the importance of sup-

9. In Part III of the Bagley opinion, Justice Blackmun, joined only by Justice O'Connor, put forth an attempted re-working of the Agurs standards. However, although the Chief Justice and Justices White and Rehnquist joined in Parts I & II of the Bagley opinion, they declined to join Part III. United States v. Bagley, 37 CLR 3190.

plying specifically requested information that is also material, the Agurs court stated:

> When the prosecution receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

United States v. Agurs, 427 U.S. at 106, 96 S.Ct. at 2399, 49 L.Ed.2d at 351. The standard of materiality that applies to this kind of situation is whether "the suppressed evidence might have affected the outcome of the trial." United States v. Agurs, 427 U.S. at 104, 96 S.Ct. at 2398, 49 L.Ed.2d at 350 [emphasis added]; accord, State v. Carter, 91 N.J. at 112.

This case also involves that aspect of the Brady materiality standards having to do with perjured testimony. While is true that perjured testimony was not delivered directly to the jury, there is nothing of analytical value to distinguish a case such as this one from a case where a witness, such as Gutierrez, falsely testifies before a jury that he has not made a deal of any kind with the state in return for his testimony. Here, the false testimony was delivered out of the presence of the jury thus obviating the particular line of questioning in front of the jury. If that testimony was known by the state[10] to be false, then the standard is different:

> [A] conviction obtained by the knowing use perjured testimony is fundamentally unfair, and must be set aside if there is any rea-

10. The broad term "state" is used deliberately. Even if the assistant prosecutor handling the case did not know the testimony was false, the materiality standard applicable to the knowing use of perjured testimony applies to all involved in the investigation and prosecution. See discussion, infra, at pp. 33 - 35. The same knowledge standard applies across-the-board in this discussion.

> sonable likelihood that the false testimony could have affected the judgment of the jury.

United States v. Agurs, 427 U.S. at 103, 96 S.Ct. at 2398, 49 L.Ed.2d at 350. The Agurs court justified this standard on the basis that to use perjured testimony knowingly involves prosecutorial misconduct and "a corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. at 104, 49 L.Ed.2d at 350.

In Carter, the New Jersey Supreme Court adopted the "harmless beyond a reasonable doubt" approach announced by the United States Supreme Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) as the proper line of inquiry in a Brady case. See State v. Carter, 91 N.J. at 113, 114. The doctrine of harmless constitutional error first emerged in 1967 when the United States Supreme Court held that evidence admitted against a defendant during a criminal trial in violation of federal constitutional rights would not lead automatically to a reversal of the conviction. Chapman v. California, supra. In formulating a constitutional harmless error rule, however, the Court specifically recognized that "harmless error rules can work very unfair and mischievous results . . . . " 386 U.S. at 22. Weighing competing interests, the Court selected a standard employed four years earlier in Fahy v. Connecticut, 375 U.S. 85 (1963). The Fahy standard, as adopted in Chapman, is as follows: "'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the convic-

tion,'" Chapman v. California, 386 U.S. at 23, quoting Fahy v. Connecticut, 375 U.S. at 86, 87 [emphasis added].

Regarding the burden of persuasion on the question of harmlessness, the Court, logically, placed the burden on the beneficiary of the error. Chapman v. California, 386 U.S. at 24. Finally, in order to emphasize the importance of federal constitutional rights and to avoid the "unfair and very mischievous results" that can stem from after-the-fact harmless error analysis, the Chapman Court concluded that the proponent of the proposition that the error was harmless had to prove that proposition true beyond any reasonable doubt. The Court summarized the process as follows:

> There is little, if any, difference between our statement in Fahy v. Connecticut about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Chapman v. California, 386 U.S. at 24.

The Chapman standard has never been limited or qualified in any material manner. See, e.g., Kampshoff v. Smith, 698 F.2d 581, 587-589 (2d Cir. 1983). Thus, in the language of Chapman, if there is a "reasonable possibility" that the constitutional error "might have contributed to the conviction," the

error is not harmless. The question is not simply whether there is other legally "sufficient evidence [of guilt] on which the accused could have been convicted without the evidence complained of." Fahy v. Connecticut, 370 U.S. at 85, 86. As recently noted by the Second Circuit:

> Indeed, even if a court considers the evidence overwhelming, it should not automatically assume that a constitutional error is harmless. See Harrington v. California, 395 U.S. 250 (1969); Chapman, 386 U.S. at 23. The test rather is simply whether "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." Schnable v. Florida, 405 U.S. 427, 432 (1972); accord, Chapman, 386 U.S. at 24.

Anderson v. Smith, 751 F.2d 96, 101 (2d Cir. 1984).

In Carter, the Court concluded that the evidence in question, an undisclosed oral report by a polygraph examiner contradicting a key aspect of an important witness' testimony, was material in the sense that the test results "might have affected the outcome of the case." State v. Carter, 91 N.J. at 117. Reversal of the conviction, however, was rejected on the basis that further impeachment of the witness in question would have been "merely cumulative." State v. Carter, 91 N.J. at 118.

In sharp contrast to the situation presented in Carter, and the cases discussed therein, defense counsel in this matter had virtually no impeachment material to work with. Had the truth been known, the jury would have been presented with a witness who was willing to testify only after having received a substantial benefit from the state, namely the dismissal of serious criminal charges. As it was, cross examination of

Gutierrez was essentially limited to the fact that he had not come forward with his information or had otherwise contacted the police at or around the time of the murder. It can hardly be said beyond a reasonable doubt that that circumstance combined with the newly-discovered fact of the dismissal of pending criminal charges might not have affected the outcome of the trial.

As noted earlier, the materiality test that is applied in a case where a specific request for Brady material has been made is whether "the suppressed evidence might have affected the outcome of the trial." United States v. Agurs, 427 U.S. at 103-104, 96 S.Ct. at 2397, 49 L.Ed.2d at 349-50; State v. Carter, 91 N.J. at 112. As re-stated in Bagley, the overall approach is whether the undisclosed evidence "is material in the sense that its suppression undermines confidence in the outcome of the trial." United States v. Bagley, 37 CLR at 3188. Ultimately, the question seems to reduce itself to one of the harmlessness, or not, of constitutional error. See generally United States v. Oxman, 74 F.2d 1298, 1311 (3d Cir. 1984), vacated and remanded for reconsideration in light of Bagley, ___ U.S. ___ (7/2/85).

Only if it can be said beyond a reasonable doubt that significant impeaching evidence regarding Roberto Gutierrez might not have affected or contributed to the jury's verdict here may the conviction be permitted to stand. It is necessary, therefore, to examine the strength of the state's case against Rene Santana. As will be seen, the evidence was far from compelling.

Every one of the state's witnesses was open to significant credibility challenges. Indeed, in reviewing this case on habeas corpus the United States District Court for the District of New Jersey noted that, "several key witnesses [were] open to strong attack on matters of credibility . . . . " Santana v. Fenton, 570 F.Supp. 752, 759 (D.N.J. 1981). A review of the state's principal witnesses' testimony will demonstrate the accuracy of that finding. It must also be emphasized that many of the witnesses who testified adversely to Rene Santana testified equally adversely to co-defendant Rodriguez, who was acquitted. This critical fact serves to buttress the point that Gutierrez was the witness who made the difference between the Santana conviction and the Rodriguez acquittal.

B. State witnesses.

Carmen Crespo

Carmen Crespo was the state's lead-off witness. She was the widow of Provenco "Columbia" Acevedo, the would-be robber who was beaten to death with a baseball bat in the Sanchez apartment. As Columbia's widow, Carmen Crespo would be expected to be hostile to the individuals involved her husband in the events that lead to his death. A logical hostility was, however, only the beginning of Carmen Crespo's credibility problems. In the first place, her brother Gilberto had at one point been arrested and charged with the murders. [19T3-19 to 6-13.] More seriously, as Ms. Crespo admitted, she had repeatedly lied under oath to the police over a period of many months concerning her

knowledge of the robbery attempt's planning or participants. [19T49-1 to 20.] Indeed, her trial testimony was a complete contradiction of everything she had told police from December 1974 through July of 1975. Defense cross examination proceeded on the theory that Carmen Crespo's initial lies to the police and her later change of heart were motivated by her desire to protect the real culprit, her brother Gilberto. [20T16-21 to 17-17; 23-1 to 25.]

As with other witnesses, Crespo implicated both Santana and Rodriguez in the crimes. The jury's acquittal of Rodriguez cannot be read in any other way than the jury's rejection of the testimony of Carmen Crespo.

Carlos Pepin

Carlos Pepin admitted that he had once been charged with the murders and had fled to Puerto Rico to avoid arrest. [20T54-1 to 59-25.] He testified that although he considered himself to be "like a brother" to the deceased Columbia [20T43-8] and that he had known all along that Petitioner and Rodriguez had committed the crimes, he had remained silent and had not told the police anything until he himself was arrested and charged with the crimes in July of 1975. [20T62-1 to 65-24.] Additionally, although one cannot usually draw demeanor inferences from a cold record, from the prosecutor's apology to the jury in the course of summation, one can conclude that Pepin's behavior and ap-

pearance on the witness stand were not exactly everything a prosecutor could hope for, the prosecutor stating:

> Carlos got up there and he is a young kid. He is a street-wise kid. Maybe some of you don't like him because he sat there and played with his beard or goatee, whatever it was, but when you come right down to it, think of what Carlos told you.

[28T107-13 to 18.]

As was the case with Carmen Crespo, Pepin implicated both Santana and Rodriguez.

Leonardo delaRosa

DelaRosa was in the basement apartment during the robbery attempt. [20T88-1 to 19.] He admitted lying to the police when he denied picking up a gun during the robbery and shooting at the robbers. [20T97-2 to 99-25.] His testimony never directly implicated either defendant in the crimes; instead, it simply established the circumstances surrounding the deaths of Acevedo and Sanchez.

DelaRosa also admitted that he had originally thought there were three robbers inside the apartment but changed his story at the urging of Sanchez' son, Guido. [22T7-10 to 18.] Finally, delaRosa admitted lying to defense counsel when they interviewed him and also admitted lying to the Newark Police Department since he considered everyone to be against him. [21T34-7 to 40-25.] That delaRosa was not an important witness was shown by the fact that the prosecutor conceded in his summation that even if the jury disbelieved delaRosa, the case would not be affected. [20T116-2 to 7.]

Melvin LaCosta

LaCosta described himself as a friend of both defendants and stated that he had seen Petitioner Santana with a gun on the night before the robbery. [22T111-7 to 18.] He also testified that he had seen Petitioner with Rodriguez on the day of the murder at a time after LaCosta had heard about Columbia's death. [22T111-6 to 114-25.] LaCosta conceded that he never came forward with any information until the week before the trial, some 18 months after-the-fact. He explained this by saying that no one had ever asked him about it. [22T119-20 to 25.]

Martin Palmer Helmick

Helmick, who was so ill at the time of trial that he had to testify by videotape deposition, stated that he had seen Santana outside the Helmick residence at 532 1/2 Broadway in Newark.[11] [23T57-14; 64-1, 2.]

On a day that he was never able to pin down, Helmick testified that he had seen Santana get out of co-defendant Rodriguez' car and open its trunk. [23T64-7, 8.] Helmick then observed Santana remove what the witness described as a "tobagen" from the rear of the car. He described a "tobagen" as "something the kids wear in the winter time when it is cold." [23T64-9 to 13.] The witness had no idea what direction Santana went in after he had left the car. [23T64-16.] With further reference

11. The crime occurred at 191 Roseville Avenue, Newark, a location far from the Helmick address.

to the "tobagen," Helmick stated that it was all rolled up and that Santana had been carrying it in his left hand. [23T64-11, 19.] He described it further as something kids stretch down over their head. [23T65-2.] When shown S-1 in evidence (the ski mask removed from the deceased Columbia), Helmick stated that the thing he saw Santana carrying was "nothing like that, it was bigger than that and was brown. The eyes I didn't see, here the way the guy had it in his hand." [23T65-17 to 19.] Thus, whatever this "tobagen" was, it is apparent that the witness was unable to identify it as anything resembling a ski mask.

The crime here occurred in the mid-morning hours of December 16, 1974. When asked to fix the time of his observation, Helmick stated, "I do know it was before dinner time." [23T66-22, 23.]

There were additional problems with Helmick's recollection of events. Most serious of these was his inability, despite the prosecutor's repeated coaching, to state that the day he saw Santana was the day of the attempted robbery and murder. He testified, first of all, that he did not learn about the incident or Columbia's death until several days after it occurred. [23T62-9, 10; 23T67-11 to 14.] He also conceded he had seen Santana outside the Helmick apartment on the street, "many times, many times." [23T62-16.] After several confusing exchange between the prosecutor and the witness, during which the witness frankly admitted, "I don't know exactly what day it was," [23T63-1, 2] the prosecutor finally asked, "Okay, what day--what day do you think I am talking about?" [23T63-3, 4.] The witness

responded, "You must be talking about the same day that this thing happened." [23T63-8, 9.] The witness finally said he saw Santana on the day of the robbery. [23T63-19.] However, any fair reading of the exchange of questions and answers leading up to that point would leave serious and fair doubt as to whether the witness had any real idea of what day he was describing.

Subsequent testimony from Helmick made it crystal clear that he was, in fact, relating an observation of Santana that occurred on some day other than the crime. For example, when asked on cross examination whether he remembered what day of the week it was that he had seen Santana, the witness said it seemed to him like it was a Tuesday or a Wednesday or it could have been a Monday. [23T69-11, 12.] He testified further that Santana had been wearing a suit and tie on the day the witness was describing. [23T70-22.] No witness ever described any of the robbers as so attired. Helmick's final word on the day of the week that he had seen Santana was that it "had to be on either a Tuesday or a Wednesday." [23T72-23, 24.] The robbery attempt and murder occurred on a Monday.

The prosecutor's attempt to rehabilitate the witness on re-direct examination was disastrous. When the prosecutor asked the witness whether the day that he saw the man with the "tobagen" outside his apartment was the same day that the robbery took place, all the witness could offer is, "That's the way I understand it now." [23T73-14 to 17.]

It is apparent that Helmick's testimony could not have made the difference between the case against Santana as opposed

to the case against Rodriguez. In the first place, although Helmick knew Columbia [23T59-9], he did not see Columbia with Santana despite the fact that every other state witness allegedly in a position to know had testified that Columbia, Santana and Rodriguez all left together to rob the Sanchez apartment. [See, e.g., testimony of Carmen Crespo at 19T23-4 to 23-25.] Additionally, the one state witness who was in the basement apartment during the robbery attempt, Leonard delaRosa-Alba, never described either of the intruders as wearing a suit and tie. For that matter, Roberto Gutierrez did not describe Santana as having worn a suit and tie on that day. The time frame is also wrong. The robbery occurred in the morning yet Helmick testified that he did not see petitioner on whatever day it was Helmick was describing until "before dinner time." [23T66-22, 23.] Finally, even the day of the week was wrong. It is apparent that Helmick saw Santana outside Helmick's apartment on a day and time unrelated to the crime.

C. Defense witnesses.

Santana put forward a credible alibi defense. Maria Cepeda testified that she, her husband and Santana were friends and that Santana had stayed with them in New York City the Sunday night of the third week in December of 1974. [26T8-19 to 21.] The trio spent the evening wrapping Christmas presents and Santana spent the night. [26T9-5 to 11.] When Maria Cepeda left for work the following morning at seven-thirty, Santana was not yet up. [26T9-11 to 15.]

The common-law husband of Maria Cepeda, Arturo Garcia, corroborated his spouse's testimony by stating that he had been with Petitioner on the particular Sunday in the middle of December. [26T43-16 to 18.] Garcia first saw Petitioner around five o'clock that afternoon when they met at a restaurant. [26T44-24 to 45-1.] They stayed at the restaurant for a long period of time and then went to a second restaurant belonging to Petitioner's sister. After leaving that restaurant, they located Maria Cepeda and the three went home where Petitioner stayed the evening. [26T45-2 to 15.] Garcia and Santana spent the entire following day together in Brooklyn. [26T45-16 to 21.]

The alibi defense continued with testimony from Maria Espenanza, Santana's estranged wife. [27T22-3, 4.] She confirmed that in December of 1974 Santana was living in Corona, Queens at Arturo Garcia's home. [27T22-9, 10.] It was Petitioner's habit and custom to come visit Espenanza and their children each and every Sunday. [27T22-12 to 14.] He came to visit every Sunday in December of 1974. [27T22-15, 16.] As a general rule, Santana arrived in the early afternoon and remained to visit for two or three hours.[12]

It is a fair summary of the defense evidence that Santana presented witnesses who accounted for his whereabouts completely during the critical hours of December 15 and 16 1974. The witnesses supported the overall defense theory that Santana

12. The Sunday afternoon period was important because several witnesses, including Carmen Crespo and Carlos Pepin, had testified that Santana was in Newark that Sunday and that, among other things, the robbery site had been "cased" and the crime planned that afternoon.

was not in New Jersey on either of the two days and, therefore, participated neither in the planning of the robbery nor its attempted execution and attendant deaths.

D. Prosecution knowledge.

The Brady doctrine focuses on information "known to the prosecutor but unknown to the defense." United States v. Agurs, 427 U.S. at 103, 49 L.Ed.2d at 349. Suppose in this case, for example, that the prosecutor trying the matter did not know about the "cleaning up" of Gutierrez, but other prosecutorial and/or law enforcement personnel did. In the first place, as Agurs points out, the disclosure obligation extends not only to information a prosecutor actually knows but also to information the prosecutor "should have known." United States v. Agurs, 427 U.S. at 103, 49 L.Ed.2d at 349. This principle is illustrated in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), where the trial prosecutor was not aware that a promise of lenient treatment had been made to an important government witness by another prosecutor in the same office. The Supreme Court reversed the conviction on that basis, concluding that the failure to reveal the promise of lenient treatment denied the defendant a fair trial. In so ruling, the Court applied agency principles, stating:

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be at-

> tributed for these purposes to the Government.

Giglio v. United States, 405 U.S. at 154, 31 L.Ed.2d at 106.

The American Bar Association's Standards for Criminal Justice deals specifically with this situation:

> The prosecuting attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.

A.B.A. Standards for Criminal Justice, §11-2.1(d)(2d Ed. 1982). In line with this standard, several courts, including the New Jersey Supreme Court, have held that a prosecutor has an obligation to know of evidence in the possession of investigating police officers and, if he does not actually know, the result is no different than if he had known. See, e.g., State v. Spano, 69 N.J. 231, 235 (1976); State v. Carter, 69 N.J. 420, 429 (1976); Hauptmann v. Wilentz, 570 F.Supp. 351, 389 (D.N.J. 1983). The reason for this rule has been explained as follows:

> Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have real knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than

> the State's Attorney, were guilty of the nondisclosure.

Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964). See also Fulford v. Maggio, 692 F.2d 354, 358 n. 2 (5th Cir. 1982)("The State's duty of disclosure is imposed not only upon its prosecutor, but also on the State as a whole, including its investigative agencies"); United States v. Butler, 567 F.2d 885, 889 (9th Cir. 1978).

From the chronology that this case presents, it is clear that someone associated with the prosecution of this matter determined that Gutierrez' potential criminal liability would be eliminated and that knowledge of that fact would not reach defense counsel. Whether the prosecutor handling the matter was also kept in the dark is of no moment to the constitutional arguments here presented.

5. Need for an evidentiary hearing.

To a very large extent, the sequence of events speaks for itself. Gutierrez was arrested in late August of 1972 and charged with three separate offenses, two of which were indictables. Although released on his own recognizance, Gutierrez failed to keep court appearance commitments and, on December 15, 1972 bench warrants were issued on each of the three charges. Bail was set on each charge at $500, a total of $1,500. Matters lay dormant until May 14, 1976, the Friday prior to Gutierrez's testimony in the Santana matter. On that date the state announced its intentions to use Gutierrez as a witness. On that date all pending charges were dismissed and the warrants were

recalled and cancelled. The judge who handled the matter has stated that she would have not dismissed complaints and cancelled warrants absent some kind of official intervention. The timing is such that only one conclusion can be drawn: The charges were dismissed against Gutierrez as a quid pro quo for his testimony in the Santana matter.

Should this Court require testimony, the following witnesses, at a minimum, would seem to be required: the former Assistant Prosecutor, Ralph Fusco, Jr.; Detective Flaminio; Roberto Gutierrez; all police officers and law enforcement personnel involved in this matter in any way whatsoever. Additionally, documentary evidence would have to be explored. Among such sources that might shed light on what occurred is the prosecutor's entire file on the case. Additionally, the Essex County Park Police's files may reveal something concerning the disposition of this matter. Finally, the prosecutor's office may have a file on the Roberto Gutierrez cases. The above list is meant to be suggestive, not exhaustive.

6. Conclusion.

This is not a case where suppressed evidence was merely cumulative of other impeachment material. Rather, it is a case where powerful evidence of a critical witnesses' bias and interest was discovered, almost fortuitously, long after the trial. It is, additionally, evidence that was apparently deliberately concealed from defense counsel, a factor which lends support to the argument that the material was powerful indeed. The appropriate test is whether the evidence, had it been disclosed as

the law requires, "might have affected" the case's outcome. Based on the above, it seems clear that the least that can be said is that the evidence might have affected the outcome. That is all Petitioner need establish in order for this Court to award the relief sought. The petition should be granted.

CONCLUSION

For the reasons expressed above, and to be developed during argument and evidentiary hearings if required, the petition for post-conviction relief should be granted.

Respectfully,

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BY: 
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