

IN THE SUPREME COURT OF FLORIDA

Case No. SC16-576

Lower Court Case No. 1990-CF-338

ERNEST D. SUGGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT, IN AND
FOR WALTON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

ROBERT S. FRIEDMAN
CAPITAL COLLATERAL
REGIONAL COUNSEL - NORTH
175 Salem Court
Tallahassee, FL 32301
(850) 487-0922

DAWN B. MACREADY
Assistant CCRC-North
Florida Bar No. 0542611

STACY BIGGART
Assistant CCRC-North
Florida Bar No. 0089388

COUNSEL FOR APPELLANT

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT.....	1
CITATIONS TO THE RECORD	1
STANDARD OF REVIEW	2
REQUEST FOR ORAL ARGUMENT	2
STATEMENT OF THE CASE AND FACTS.....	3
SUMMARY OF THE ARGUMENT	25
<u>ISSUE I</u>	27
THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SUGGS’ CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING LAURA JOHNSON.	
<u>ISSUE II</u>	36
THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SUGGS’ CLAIM OF <i>BRADY</i> EVIDENCE FROM WYATT HENDERSON.	
<u>ISSUE III</u>	43
THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SUGGS’ CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING JUDGE LAURA MELVIN.	
<u>ISSUE IV</u>	56
THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SUGGS’ CLAIM OF <i>BRADY</i> EVIDENCE REGARDING MICHAEL MALONE.	
<u>ISSUE V</u>	61
THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SUGGS’ CLAIM OF <i>BRADY</i> EVIDENCE OF FDLE’S INVESTIGATION INTO WCSO.	
CONCLUSION.....	67
CERTIFICATE OF SERVICE	68
CERTIFICATE OF FONT.....	68

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	<i>passim</i>
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....	<i>passim</i>
<i>Card v. State</i> , 652 So. 2d 344 (Fla. 1995).....	55
<i>Duckett v. State</i> , 918 So. 2d 224 (Fla. 2005).....	58, 59
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982).....	53
<i>Grossman v. State</i> , 525 So. 2d 833 (Fla. 1988).....	50
<i>High v. Head</i> , 209 F. 3d 1257 (11 th Cir. 2000).....	58
<i>Hildwin v. State</i> , 141 So. 3d 1178 (Fla. 2014).....	30
<i>Huff v. State</i> , 622 So. 2d 982 (Fla. 1993).....	3, 4, 6
<i>Jennings v. State</i> , 782 So. 2d 853 (Fla. 2001).....	59
<i>Jones v. State</i> , 709 So. 2d 512 (Fla. 1998)(<i>Jones II</i>).....	<i>passim</i>
<i>King v. State</i> , 623 So. 2d 486 (Fla. 1993).....	50
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	<i>passim</i>
<i>LeDuc v. State</i> , 365 So. 2d 149 (Fla. 1978).....	48
<i>Lightbourne v. Dugger</i> , 549 So. 2d 1364 (Fla. 1989).....	37
<i>Lightbourne v. State</i> , 742 So. 2d 238 (Fla. 1999).....	31
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978).....	53
<i>Muhammad v. State</i> , 782 So. 2d 343 (Fla. 2001).....	49, 50

Palmer v. State, 397 So. 2d 648 (Fla. 1981).....49

Phillips v. State, 39 So. 3d 296 (Fla. 2010).....50, 51

Ring v. Arizona, 536 U.S. 584 (2002).....4

Roberts v. State, 840 So. 2d 962 (Fla. 2002).....31, 55

Rolling v. State, 944 So. 2d 176 (Fla. 2006).....2

Ross v. State, 386 So. 2d 1191 (Fla. 1980).....46, 47, 48, 51

Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).....55

Sireci v. State, 587 So. 2d 450 (Fla. 1991).....49, 50

Spaziano v. Florida, 468 U.S. 447 (1984).....49

Stano v. State, 460 So. 2d 890 (Fla. 1984).....49

State v. Carr, 336 So. 2d 358 (Fla. 1976).....49

State v. Coney, 845 So. 2d 120 (Fla. 2003).....2

State v. Dixon, 283 So. 2d 1 (Fla. 1973).....47

Strickler v. Greene, 527 U.S. 263 (1999).....*passim*

Suggs v. State, 644 So. 2d 64 (Fla. 1994).....3

Suggs v. Florida, 514 U.S. 1083 (1995).....3

Suggs v. State, 923 So. 2d 419 (Fla. 2005).....5

Suggs v. McNeil, 609 F. 3d 1218 (11th Cir. 2010).....5

Suggs v. Buss, 131 S. Ct. 1809 (2011).....5

Suggs v. State, 152 So. 3d 471 (2014).....6

Swafford v. State, 125 So. 3d 760 (Fla. 2013).....31, 33

Tedder v. State, 322 So. 2d 908 (1975).....*passim*

Thompson v. Calderon, 151 F. 3d 918 (9th Cir. 1998).....59

Thompson v. State, 328 So. 2d 1 (Fla. 1976).....47, 48

Tompkins v. State, 994 So. 2d 1072 (Fla. 2008).....2

Trease v. State, 768 So. 2d 1050 (Fla. 2000).....51

Trevino v. Thaler, 133 S. Ct. 1911 (2013).....6

United States v. Bagley, 473 U.S. 667 (1985).....41, 46

Waterhouse v. State, 82 So. 3d 84 (Fla. 2012).....37

Woodson v. North Carolina, 428 U.S. 280 (1976).....53

Florida Rules of Criminal Procedure

Florida Rule of Criminal Procedure 3.851.....*passim*

Florida Statutes

§921.141, Fla. Stat. (2015).....46, 47, 51

Other Authorities

Laura Melvin, *Public Secrets & Justice—Journal of Circuit Court Judge* (2013).....*passim*

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Suggs' successive motion for postconviction relief based upon newly discovered evidence and *Brady* material. The motion was brought pursuant to Fla. R. Crim. P. 3.851.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "R" refers to the record on direct appeal to this Court; "PC-R" refers to the record on appeal from the denial of Mr. Suggs' first rule 3.851 motion; "PC-R2" refers to the record on appeal from the denial of Mr. Suggs' second rule 3.851 motion. All other references will be self-explanatory.

STANDARD OF REVIEW

Mr. Suggs sought an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851 for all claims requiring a factual determination. “A postconviction court’s decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court; therefore, for all intents and purposes, its ruling constitutes a pure question of law and is subject to de novo review.” *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008); *See also State v. Coney*, 845 So.2d 120, 137 (Fla. 2003). “In reviewing a trial court’s summary denial of postconviction relief, this Court must accept the defendant’s allegations as true to the extent that they are not conclusively refuted by the record.” *Id.*; *See also Rolling v. State*, 944 So.2d 176, 179 (Fla. 2006).

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF THE CASE

Mr. Suggs was indicted on August 22, 1990 by a Walton County grand jury for (1) the first-degree murder of Pauline Denise Casey; (2) robbery; and (3) kidnapping (R.11). He was also charged with possession of a firearm by a felon, but this charge was severed for trial purposes (R.960). Mr. Suggs pleaded not guilty to the charges.

Mr. Suggs was originally represented by the Public Defender's Office, however, he later retained Donald W. Stewart of Anniston, Alabama, and Robert Kimmel of Pensacola, Florida. (R. 950-57).

A courthouse fire prompted Mr. Suggs to waive his right to be tried in Walton County and the trial was moved to Okaloosa County (R. 4926-4931). Subsequently, the court granted a change of venue, due to pretrial publicity, and moved the trial to Milton, FL (R. 5117-18, 5264-70).

Suggs capital trial commenced on May 26, 1992, and on June 8, 1992, he was found guilty on all three counts (R. 1719-20). A penalty phase was thereafter conducted, and despite numerous character witnesses and pleas on Mr. Suggs' behalf, the jury recommended a death sentence by a seven to five vote (R. 1756). On July 15, 1992, the trial court imposed a death sentence. (R. 1844-51).

On direct appeal to the Supreme Court of Florida, Suggs raised eight issues, all of which were rejected, and his convictions and sentences were affirmed. *Suggs v. State*, 644 So. 2d 64 (Fla. 1994). The United States Supreme Court thereafter denied certiorari. *Suggs v. Florida*, 514 U.S. 1083 (1995).

On January 24, 1997, Suggs filed a Motion to Vacate Convictions and Sentences with Special Request for Leave to Amend and for Evidentiary Hearing. An Amended Motion to Vacate was thereafter filed on March 2, 1998.

On October 22, 1999, the postconviction court conducted a hearing pursuant to *Huff v. State*, 622 So.2d 982 (Fla. 1993). The court issued an order denying some

of Suggs' claims, granting an evidentiary hearing on others, and dismissing the rest without prejudice with leave to amend due to insufficient pleadings. (PC-R. 240-256).

On April 13, 2000, the Honorable Thomas Remington, Circuit Court of Okaloosa County, was assigned to preside over Suggs' case due to Judge Melvin's retirement. Shortly thereafter, in June, 2000, Suggs' postconviction attorney Larry Simpson moved to withdraw stating that a conflict of interest had arisen. This motion was granted on June 30, 2000, and the Office of the Capital Collateral Regional Counsel – North was assigned to represent Mr. Suggs. In November, 2000 Mr. Suggs privately retained Hilliard Moldof as his postconviction attorney.

On August 28, 2001, Suggs filed a Second Amended Motion to Vacate Convictions and Sentences, raising twenty-one claims, most of which had been previously raised in the original and first amended motions.

On January 14, 2002, the postconviction court held another *Huff* hearing to determine which issues would require an evidentiary hearing. Based on these arguments, the court issued an order granting an evidentiary hearing on several claims including ineffective assistance of counsel and *Brady* claims. (PC-R. 198-202).

Following the evidentiary hearing on January 23 and 24, 2003, the postconviction court denied all relief on all outstanding claims. (PC-R. 334-347).

Suggs filed an appeal of the denial of his postconviction motion to the Florida Supreme Court on February 16, 2004. (Case No. SC03-1330). As a result of the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), Mr. Suggs also filed a Petition for Writ of Habeas Corpus on February 16, 2004. (Case No. SC04-224).

The Florida Supreme Court issued its mandate on November 17, 2005, affirming the circuit court's denial of postconviction relief under Rule 3.850, and

denying Suggs' petition for habeas corpus relief. (Case Nos. SC03-1330; SC04-224). *Suggs v. State*, 923 So. 2d 419 (Fla. 2005).

On March 30, 2006, the United States District Court for the Northern District of Florida appointed Florida attorney Martin McClain to represent Mr. Suggs in federal court. A Petition for Writ of Habeas Corpus was filed on June 7, 2006. (Case No. 3:06-cv-111-RH). On October 11, 2007, Suggs filed an Amended Petition for Writ of Habeas Corpus. This Amended Petition was denied on March 26, 2009, the court finding that Suggs was not entitled to relief on any of his claims.

On April 16, 2009, Suggs filed a motion to amend his federal habeas petition based on new information he received on March 23, 2009, from another litigant's collateral proceedings. This motion to amend was denied, the court finding that "granting leave to amend would be futile" since his state claims had not yet been exhausted.

On April 26, 2009, Suggs filed a Motion to Authorize Court-Appointed Counsel to Exhaust Claims in the Course of his Federal Habeas Representation. In this pleading, McClain sought permission to exhaust state claims, since Suggs' federal habeas petition had been denied for the failure to do so. This motion was denied by the court on July 3, 2009.

The Court of Appeals for the Eleventh Circuit affirmed the district court's denial of Mr. Suggs' petition for habeas corpus in *Suggs v. McNeil*, 609 F.3d 1218 (11th Cir. 2010), and the petition for writ of certiorari was denied by the United States Supreme Court. *Suggs v. Buss*, 131 S.Ct. 1809 (2011).

It was at this time that McClain became aware that Suggs was without collateral representation in state court. Mr. Moldof, who had previously served as retained collateral counsel, was by agreement of Mr. Moldoff and Mr. Suggs, no longer retained to serve as counsel. In fact Moldof had not represented Suggs since his 3.851 appeal and state habeas petitions were denied in 2006.

On August 27, 2012, McClain filed a motion seeking to be appointed as Suggs' state court registry counsel. On February 15, 2013, the state circuit court ruled that Suggs was not entitled to collateral representation. As *pro bono* counsel, McClain appealed this decision on Suggs' behalf. The Florida Supreme Court affirmed the denial of Suggs' motion, reasoning that since Attorney Moldof, who represented Suggs during his initial postconviction proceedings and appeal, had not filed a motion to withdraw from the case, he was still representing Mr. Suggs. See *Suggs v. State*, 152 So.3d 471 (Fla. 2014).

Meanwhile, on May 21, 2013, the Public Defender for the First Judicial Circuit was appointed to represent Mr. Suggs in his postconviction clemency process.

On May 27, 2014, Suggs filed a Motion for Relief from Judgment Denying a Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to the United States Supreme Court's decision in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). (3:06-cv-111-RH). This motion was denied on October 21, 2014, and a subsequent Motion to Alter or Amend was denied on November 19, 2014.

Finally, on September 11, 2014, Moldof was permitted to withdraw from the case. The Office of Capital Collateral Regional Counsel – North was appointed on October 28, 2014.

Undersigned counsel filed a Successive Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend Pursuant to Rule 3.851 on October 27, 2015. A *Huff* hearing was held on December 15, 2015, and on February 29, 2016, the circuit court entered an order summarily denying Suggs' motion. (PC-R2. 570-599). Suggs timely files this appeal.

STATEMENT OF THE FACTS

Pauline Casey was an employee at the Teddy Bear Bar in Walton County, Florida when she disappeared on August 6, 1990. (R. 2241-46). Her body was found the next day, about four to five miles from the bar, near a dirt road off U.S. 98 in Walton County, Florida. (R. 2332-35, 2341-42, 2995-96).

GUILT PHASE

I. BACKGROUND OF VICTIM, PAULINE CASEY

Pauline Casey was married to Steve Casey. They were both in the U.S. Army and were stationed in Germany. Steve Casey's father became ill and he and Pauline requested a hardship discharge from the army to come home to be with his father. (R. 3668-69).

At the time of the Caseys' discharge from the army, Sandra Hall was the Leave Military Personnel Clerk at Fort Rucker. Her job was to brief soldiers who were being discharged about their benefits. Upon discharge a soldier has a 120 day grace period to convert his or her life insurance to a personal policy. If the soldier dies within the grace period, the beneficiary can claim the life insurance benefits "without them having to pay a dime." (R. 3710-11).

Sandra Hall personally handled the discharge for Pauline Casey and Steve Casey. It was an unusual situation to have two privates that were married come from overseas and present themselves for discharge at the same time. (R. 3710-11). On February 2, 1990, and again on May 4, 1990, she briefed them on their benefits and specifically remembers telling them about their \$50,000 life insurance coverage and grace period. The insurance coverage is reflected on a DD214, which is a discharge and release from active duty form. (R. 3712-14, 3725, 3736).

After their discharge from the army, Steve and Pauline Casey returned to Walton County. Pauline worked as a waitress at the Hilton and also as a barmaid at the Teddy Bear Bar. Steve Casey was out of work and Pauline was the

“breadwinner” in the family. (R. 3669-72).

II. THE TEDDY BEAR BAR

The Teddy Bear Bar was a small bar with a pool table that was located on State Road 30A in Walton County. The bar was owned by Ted Valencia and opened on July 1, 1990. Pauline Casey worked at the bar for seven to ten days prior to her disappearance. She usually worked nights, and was a dependable employee. (R. 2241-42, 2252).

On the day she disappeared, Pauline Casey came into the bar with her husband about noon and Mr. Valencia asked Pauline to work that night. (R. 2246). Mr. Valencia intended to have the locks changed at the bar because another employee quit the day before, so he asked Pauline to give him back her key. Later in the day, the locksmith called and said he could not come out until the following day. Mr. Valencia gave the key back to Pauline at approximately 5:30, as he was leaving the bar. She put it on top of the cash register. (R. 2245-47).

Sandra Mullens was the manager of the Teddy Bear Bar until she quit on the Saturday prior to Pauline’s disappearance. (R. 3035). She gave Pauline her key to the bar on that Saturday. (R. 3037). Mr. Valencia said there were three keys to the door. He “probably” kept a key that fit the door and “Sandy probably gave one to Judy [one of the other barmaids].” (R. 2253, 2255-56). Ms. Mullens testified that Judy Pitkin “never had a side door key.” (R. 3059).

On several occasions, Mr. Valencia talked to Steve Casey about working at the bar. Mr. Valencia specifically recalls talking to Steve Casey about that on August 6, the day that Pauline disappeared. He did not personally give Steve Casey a key to the bar, but is not sure whether someone else did or not. (R. 2272-74).

III. APPELLANT, ERNEST DONALD SUGGS

The Appellant, Ernest Donald Suggs, is from Anniston, Alabama. His mother and father owned a house on the Choctawhatchee Bay in Walton County. Mr. Suggs

was staying at his parents' house and working on the roof and the dock, for which he was paid \$150 cash on July 29, 1990, and another \$100 on July 31, 1990. (R. 3913-19). His parents sent him two fifty dollar checks for his birthday. One check was cashed at the 331 Mini Market on August 6, 1990. (R. 3916- 3945).

Mr. Suggs was convicted of murder and assault with intent to commit murder in Alabama. He was paroled in June of 1989, and was in Florida "hoping to find a job." (R. 3920, 4640).

IV. PRIOR CONTACT BETWEEN MR. SUGGS AND PAULINE CASEY

Prior to the date of Pauline's disappearance, Mr. Suggs had been at the Teddy Bear Bar on several occasions. Sandra Mullens remembered seeing a napkin on the bar with the name "Ernie Suggs" and a phone number, a week or so before. (R. 3061). Pauline appeared to be friendly with Mr. Suggs and tried to get him a job working with John Villereal. Pauline referred to Mr. Suggs as "Her friend from Alabama." (R. 3672-73). On the date of her disappearance, she told one of the bar patrons that she had been at the Hitching Post (another bar) earlier that day and saw Mr. Suggs there. The witnesses were unsure whether Pauline had been in Mr. Suggs' car while over at the Hitching Post. (R. 2816-17).

V. RAY HAMILTON

Ray Hamilton had known Pauline Casey for six years and previously dated her. (R. 2788, 2808). He was on probation. (R. 2820). The Caseys lived in a block house and Hamilton lived in a mobile home on the same piece of property. (R. 2790).

Ray Hamilton was in the Teddy Bear Bar on the night that Pauline disappeared. Hamilton said he arrived at the Teddy Bear Bar about 8:30 or 9:00 p.m. and, while he was there, talked to Steve Casey on the phone about 9:45 p.m. (R. 2788, 2797). Pauline was shooting pool with a white male that he later identified as Mr. Suggs. (R. 2793-94). Hamilton said Mr. Suggs was there for awhile, left and then came back; but, Hamilton had no way to verify that Mr. Suggs returned to the

bar. Hamilton was likewise alone with Pauline that night. (R. 2814).

Hamilton said he left the bar about 9:45 p.m. and Mr. Suggs was still there. (R. 2796-98). Hamilton said he went to get a pizza and took it home to eat. (R. 2798-2800). The next day he gave the investigators a pizza box but no investigation was done to confirm Hamilton's alibi. (R. 3069-72).

VI. PAULINE CASEY GOES MISSING.

Diane Hosmeier went to the Teddy Bear Bar on August 6, 1990, at 11:10 p.m. The "open" sign was in the window and the door was ajar. There was a car parked outside, but nobody was in the bar. The inside was very clean and all chairs in order. There were no physical signs of a struggle. When she went to make change for a beer, there were only coins in the register — no bills. (R. 2220-23, 2227). She called Ted Valencia who instructed her to call the police. (R. 2223). There was a napkin next to the cash register with the name "Ray" and "draft" with the numbers one and two, indicating that Ray had paid for two draft beers. There was nothing in the bar to indicate Mr. Suggs had been there. (R. 2232-33).

Deputies received the initial call to go to the Teddy Bear Bar at 11:25 and arrived at 11:31. (R. 2309). They confirmed there were no signs of a struggle at the bar. (R. 2316-17). Steve Casey arrived at the bar about 12:30 and denied knowledge of his wife's whereabouts. (R. 2681-82).

Through an interview with Ted Valencia, the investigators discovered that Ray Hamilton had been in the bar that night. (R. 2683). A deputy picked Ray Hamilton up and brought him to the bar. (R. 2323). When interviewed, Hamilton gave the investigators a description of an individual and a vehicle that had been at the bar on August 6 and the investigators put out a BOLO. (R. 2684-85).

VII. MR. SUGGS' DETENTION.

Deputy Sheriff Russell Townsend stopped Mr. Suggs driving a vehicle that fit the BOLO on 331 South at Freeport at approximately 4:50 a.m. on the morning of

August 7, 1990. (R. 852-54). Other officers arrived on the scene and Mr. Suggs and his vehicle were transported to the Sheriff's substation. (R. 872-74, 888).

At the Substation, Mr. Suggs signed a Consent to Search his vehicle and a Consent to Search his home. (R. 876-77).

VIII. THE SEARCHES TAKE PLACE.

While Mr. Suggs was being held at the Substation, investigators sprayed WD-40 on a piece of cardboard and backed his vehicle over the cardboard, leaving an impression of a tire track. Photographs were made of these impressions and given to deputies with instructions to check dirt roads going into the woods. (R. 2988-89).

In the meantime, other investigators went to search Mr. Suggs' home and took Mr. Suggs with them. (R. 880). At Mr. Suggs' home, there was money in the bathroom sink that was wet.¹ (R. 880-81). Mr. Suggs told the officers that he had been working on the dock and fell in the mud. (R. 2756). The total amount of money found was \$176 and included fifty-five \$1 bills. (R. 2739, 3627). The money was processed by the FDLE Laboratory, but no blood or other evidence was developed on the money. (R. 3318-19).

IX. PAULINE CASEY'S BODY IS FOUND.

An employee of the Sheriff's Office took one of the photographs of the tire impression made with WD-40 and went west on U.S. 98. He located a tire track that he thought was similar leaving U.S. 98 about a quarter mile east of 331 and traveling north into the woods. (R. 2332-35). This was a two rut road about 4-5 miles from the Teddy Bear Bar. (R. 2341-42).

Investigator Brad Trusty went to the area of the tire tracks and followed the tracks north down the dirt road to a power line, where the track turned around. (R.

¹ There was also evidence introduced at trial that at approximately 4:12 a.m. that morning, Mr. Suggs purchased two sandwiches from a local convenience store and paid for them with four \$1 dollar bills that were wet. (R. 2853, 2855).

2989). The body of Pauline Casey was found in this area, about 20-25 feet from the dirt road. (R. 2995-96). The body was located in bamboo, thick brush, and cockleburs. (R. 2707-08). The brush was impenetrable in places and anywhere from a few inches to 3-4 feet high. (R. 3005). The cause of death was loss of blood caused by a stab wound to the back and two knife wounds to the neck. (R. 3374-76).

After the body was found, Mr. Suggs was formally arrested at this home at 8:56 a.m. on August 7, 1990, while the officers were still conducting the search. (R. 2718, 2997).

X. RAY HAMILTON IDENTIFIES MR. SUGGS.

After Mr. Suggs was initially detained and transported to the Sheriff's Office, the investigators sent a deputy to pick up Ray Hamilton and bring him to the Substation. According to Hamilton, the deputies said, "Ray, we would like you to identify a vehicle for us" and put him in the back seat of the patrol car. (R. 2803-04). Hamilton thought he was being arrested "Because I was the last one seen with her" and "it just ran through my mind that since I knew I was the last one there..." (R. 1367, 1383, 2818).

As they drove into the parking lot of the Substation, Hamilton saw Mr. Suggs' jeep and told the officers there was something white sticking up on the driver's side in the back. Hamilton went over to the jeep and saw a red and white Coleman cooler in the back of the truck. (R. 2804). The officers then showed Hamilton a polaroid picture. According to Hamilton, "They pulled that picture out of the Polaroid while I was standing there. So there was nothing else there." This testimony was verified by the investigator who said that the picture "was still developing at that time." (R. 1397). The investigator asked Hamilton "if he would identify—or, if he could identify the person in the photograph." (R. 1393). Hamilton identified the picture (which was of Mr. Suggs) as the person in the bar. (R. 2807).

Hamilton said he had never seen this person before and only had about one-half hour to see him at the bar. During that period of time, he was talking and looking at Pauline and other people in the bar and also talking on the phone. Hamilton said he was not looking directly at the individual while at the bar. (R. 1384-85).

XI. PHYSICAL EVIDENCE FROM THE JEEP

Mr. Suggs' jeep was processed by the FDLE laboratory. Despite the fact that there was a substantial amount of blood at the scene of Pauline Casey's murder, the laboratory found no blood on or in the jeep. (R. 3010, 3331). Similarly, despite the fact that there was loose "stuffing" in the seats of the vehicle, there were no fibers from the jeep on the victim and no fibers from the victim in the jeep. Also, there were no fibers from the victim's clothing on Mr. Suggs and no fibers from Mr. Suggs' clothing on the victim. (R. 3953-57). Hair examination had a similar result, with none of the victim's hair being found in the jeep or on Mr. Suggs and none of Mr. Suggs' hair being associated with the victim or her clothing. (R. 4458).

The only evidence obtained from the jeep that would tend to link Mr. Suggs to the victim was the victim's fingerprints. Two of the victim's fingerprints were found on the exterior of the passenger's window and one palm print was found on the inside of the passenger's door handle, in an area where the door handle would be grasped to open the door. (R. 3360). It is impossible to know when those prints were placed on the vehicle because fingerprints cannot be aged. (R. 3367).

Vegetation that was caught in the undercarriage of the jeep was submitted to the laboratory, along with vegetation from the crime scene. The vegetation from the jeep did not match that of the crime scene. (State's Exh. #34). Also, paint scrapings collected from branches at the crime scene did not match that of Mr. Suggs' jeep, with the expert finding "The paint on the bushes could not have come from this jeep." (R. 4101).

Laura Russo of the FDLE laboratory also processed the tire tracks that were at the crime scene and compared them to the tires on the jeep. Three of the tires from the jeep have a similar tread design, but the left front tire is different. Also, the right front tire of the jeep is worn differently from the others and Ms. Russo did not observe the wear pattern from the right front tire at the crime scene. There were no “individual” characteristics in the tire tracks at the scene that would associate Mr. Suggs’ jeep with the scene. The tire tracks could have been made by another vehicle. (R. 3283, 3288, 3302, 3305-06).

Dale Nute worked for the FDLE laboratory for fifteen years, specializing in shoe tracks and tire tracks. (R. 4093). While working for the FDLE, he helped train Laura Russo and was retained as a defense expert in this case. (R. 4096, 4155). Nute took Mr. Suggs’ jeep to the crime scene and drove it down the dirt road, something Russo did not do.² (R. 3312). Mr. Suggs’ jeep created an “overlap” of the tire tracks as it traveled down the dirt road. This “overlap” occurs because the frame on Mr. Suggs’ jeep is warped. As the vehicle rolls along, the back tire tracks should cover up the front tire tracks, but because of the warped frame on Mr. Suggs’ jeep, the back tire tracks do not entirely cover up the front tire tracks. Instead, there is approximately one-half of an inch “overlap” created in the tire tracks wherein the front tire track remains visible. (R. 4119-21, 4126, 4131).

Because there was no “overlap” in any of the tire tracks at the scene, (R. 4126, 4131, 4245), it was Nute’s opinion that it is “highly unlikely” that Mr. Suggs’ jeep left the tire tracks at the crime scene. (R. 4134). The tires on Mr. Suggs’ jeep are sold by eight different manufacturers and five different retread companies. They are customarily used as a light truck tire for pickup trucks, vans, and utility vehicle that inspect power lines. (R. 4107-08).

² Russo also did not measure the wheel base of the vehicle to compare the wheel base of the tire tracks at the scene. (R. 3318).

XII. A STAIN ON MR. SUGGS' SHIRT.

When Mr. Suggs was detained at 5:00 a.m. on August 7, 1990, he was wearing a t-shirt, shorts and flip-flops.³ (R. 874). He had been in several different police cars while being transported to the Substation, to his home, and in returning to the Substation. At the Substation, he was held in several different rooms and ate lunch in the deputies' room. (R. 2832-36). In the meantime, he kept on the same clothes that he was initially arrested in. Finally, at 2:01 p.m. on August 7, 1990, the officers took his clothes into custody. (R. 2830). The clothes were not sent to the laboratory until August 15, 1990, and were maintained in the evidence vault (which is not refrigerated) until then. (R. 3083-84, 3106-07).

Charles Ginsberg, an FDLE lab examiner, tested Mr. Suggs' shorts, shoes and watch and found no blood. (R. 3172). Four or five stains on the t-shirt were negative. Ginsberg said he found human blood in one stain on the t-shirt; but could not get an ABO blood type or any of the enzymes that are found in human blood, except the ADA enzyme. According to Ginsberg, he found ADA enzyme type 1 in the stain which is consistent with the victim's ADA enzyme type and is an enzyme found in the blood of 90% of the Caucasian population. (R. 3164-67, 3189). Mr. Suggs' ADA enzyme type is 2-1. (R. 3167). The test requires the examiner to "interpret" the bending patterns of enzymes and make a "scientific judgment" as to whether the enzyme is there. This is done "visually" without a microscope. (R. 3214, 3224, 3230).

Robert Kopeck is a former supervisor in the FDLE laboratory in Sanford. He has extensive training in forensic serology and has testified as an expert in this case. (R. 3972, 3975). According to Kopeck, the test performed by Ginsberg does not test

³ There were no scratches or scrapes on Mr. Suggs' legs despite the thick brush where Pauline Casey's body was found. (R. 2709).

for human blood; but rather is a test for human protein which can be found in muscle, skin, saliva, urine, and other bodily fluids.⁴ (R. 4012-13). Therefore, it is impossible to determine whether this stain is human blood or some other bodily fluid. (R. 4013). It is also impossible to determine, using Ginsberg's tests, whether this is a "mixed stain," i.e. a stain that is a combination of different stains. Because there was no test to determine if this is a "mixed stain," all of the later tests need to be looked at with some "real suspicion." (R. 4023-25).

According to Kopeck, the effect of not properly storing the shirt for 9 days is "everything" because the enzymes in a blood stain begin to "degrade" and are destroyed. (R. 4030). As a result, there is a "red flag" in Ginsberg's results because Ginsberg got a result on the ADA enzyme and all the others were inconclusive or no activity. "This is not what should have happened." (R. 4032). "It is clear in my mind that something is wrong with these results." (R. 4058). The enzymes in a blood stain degrade at different rates. The one that degrades the fastest is ADA and "that's the one that should be gone first." (R. 4032-33). The ABO blood group lasts for years and can even be derived from mummies. The problem with Ginsberg's results is that the blood group and enzymes that should have lasted the longest are gone and the one that should have been the first to go is the only one that shows up. (R. 4033-34).

When a blood stain degrades the proteins in the blood begin to change which means that the protein configurations change, the molecules change, and the types change. (R. 4029). According to Kopeck, as the ADA type 2-1 begins to degrade, one of the "bands" is lost first and it starts to look like a type 1. (R. 4036).

Also, the ADA enzyme is common in beef, rabbits, squirrels, and other animals. (R. 4035). Because Ginsberg did not test the stain to determine if it was a "mixed stain," the ADA enzyme could have come from something as simple as Mr.

⁴ Ginsberg agreed with this testimony. (R. 4320).

Suggs' dripping a hamburger on his t-shirt. (R. 4062). Also, the ADA enzyme in saliva, tears and other body fluids is often not the same as the ADA enzyme found in the blood. In other words, the ADA enzyme can be different in the same individual depending upon what bodily fluid is being tested. (R. 4039). The only bodily fluid from Mr. Suggs that was tested was a blood sample, and no other tests on urine, saliva, etc. were performed.

Ginsberg could not say with 100% accuracy this was not a "mixed stain" and agreed it could have been a mixed stain of saliva and hamburger that hit the shirt. (R. 4322-23). Ginsberg had no explanation for why he did not get any other enzyme activity and testified "I don't know." All of the sample was consumed in the tests and therefore no other tests could be run. (R. 4331-33).

XIV. A STAIN ON THE VICTIM'S JEANS.

Ginsberg also found sperm on the victim's jeans; but all other tests on the sample were inconclusive. (R. 3169-70). Ginsberg did not request a DNA test on the sample because the lab would "probably" not have gotten a DNA type from it. (R. 3227-28). Robert Kopeck testified that a PCR test was available that would cause the DNA material in the sample to "multiply." Once the DNA material was increased, the DNA test could be done and can say almost positively that an individual did or did not contribute the stain. According to Kopeck, DNA testing is "mandated by this type of case." (R. 4009-10, 4042). The tests done by Ginsberg were "destructive-type" testing techniques that used up all the sample and therefore further tests cannot be done. (R. 4009-10).

XIV. THE DIVE TEAM.

Mr. Suggs was arrested on August 7, 1990. (R. 2718). The next day, starting at 3:00 p.m., the Walton County Sheriff's Department called the "Dive Team" to search the Choctawhatchee Bay behind Mr. Suggs' house. (R. 2861-62). Prior to the search taking place, Mr. Suggs' arrest had received substantial publicity and the

Sheriff held a press conference at 11:00 a.m. on August 7, 1990, “on the high side of 98.” The press was being kept advised on the process of the investigation. (R. 3100-03). The investigators admitted that the dive team did not start diving until at least twenty-four hours after the news media account and that news travels fast in a small community. (R. 2700-01).

Mr. Suggs’ house and the location of the dive were easily visible from the bridge causeway. (R. 2711, 2978). Prior to the search beginning, there was no security posted at Mr. Suggs’ home. (R. 2701). Choctawhatchee Bay is a public watercourse and the location of the dive team’s search was accessible from the water by boat or, because the water is shallow, a person could enter the bay from the land as far as a mile away and walk to the location. (R. 2980). Mr. Suggs’ home was easily identifiable and had the name “Suggs” in two different locations that were visible from the Mini Mart. (R. 2700).

Late in the day on August 8, the dive team found a glass in 2 to 2 ½ feet of water behind Mr. Suggs’ house. (R. 2872-2886). The glass was a Pilsner beer glass, similar to beer glasses used at the Teddy Bear Bar, and most other bars. (R. 2248-50, 2290). No fingerprints or other evidence was developed from the glass. (R. 3362-63).

The next day, August 9, 1990, a key was found in approximately four feet of water. (R. 2874-75, 2979). This key fit one of the locks at the Teddy Bear Bar. (R. 2999). No murder weapon was ever found. (R. 2689).

XV. WALLACE BYARS – AN INCOMPETENT WITNESS.

In May of 1990, Wallace Byars was arrested by the Sheriff’s Department for shooting at the Substation with a 30/30 rifle. (R. 3408-09). Byars had been drinking heavily since he was 10-11 years old and suffered blackouts and hallucinations. He had attempted to commit suicide. (R. 3410-11). Byars had six prior felony convictions. (R. 3398). He was facing a “lot of time” for shooting at the Sheriff’s

Office and the guidelines for his offense called for a sentence of between 15 and 17 years. (R. 3408-09).

On June 19, 1990, Byars was examined by Dr. Borlongan, a psychiatrist. Dr. Borlongan said that Byars' "memory was impaired for both recent and remote events, but recent past is much more impaired. . . He has minimal insight into his problem, and his judgment is impaired." Dr. Borlongan's opinion was that Byars was "not competent" and should be sent to the state hospital for "extensive treatment." (R. 1058-61).

On July 11, 1990, Byars was examined by Wanda Ranger, a licensed mental health counselor, who specializes in competency determinations. (R. 1062-63, 3848-50). Ms. Ranger said that Byars' "memory appears to be severely impaired." Ms. Ranger likewise reached the opinion that Byars was "not competent" and should be sent to the state hospital for "intensive treatment." (R. 1062-63).

An order was entered by the court on July 26, 1990, adjudging Byars to be "incompetent" and finding that he "meets the criteria for involuntary hospitalization." (R. 4742). After Byars was declared incompetent and while awaiting transport to the state hospital, Byars gave a statement to the Sheriff's Office that Mr. Suggs told him that he killed Pauline Casey and it was "over a robbery, and – there was another intention there that he was going to rape her." (R. 1270, 1276, 3399, 3407). Byars also claimed that Mr. Suggs said that he stabbed her and "damn near cut her head off" and drug her body off to the side of a dirt road. (R. 3400).

Byars testified that he was not promised anything in exchanged for his testimony and was not given a lesser sentence. (R. 3404-05). However, on March 6, 1991, Byars entered into a plea agreement with the state that called for a three year sentence to be served in the county jail, "if sheriff agrees." (R. 3490). The Sheriff wrote a letter to the judge asking that Byars be allowed to serve a sentence of three years in the county jail and agreeing there would be no probation after incarceration.

The Sheriff wrote the letter knowing that Byars had made a statement. (R. 3751-52, 3754).

While Byars was serving his sentence and waiting to testify in Mr. Suggs' trial, Byars was allowed to leave the jail to handle personal business. At one point, Byars was staying in the Hilton Hotel in Crestview where he got into a "family dispute" and was arrested. (R. 3415-18).

XVI. JAMES TAYLOR –A "PROFESSIONAL JAILHOUSE INFORMANT"

James Taylor has been convicted of twenty felonies. (R. 3574). He is a "professional jailhouse informant" who was in the Walton County Jail in August of 1990. (R. 4780). Taylor was being held in the county jail because he was a witness for the prosecution in an unrelated case. (R. 3576). Taylor worked as an informant for DEA, Customs, FDLE, and the Walton County Sheriff's Office. (R. 3576, 3602). Taylor admitted he was an "informant" for the government and worked drug cases while he was in prison. (R. 3604). Even while he was in the county jail in August of 1990, he was working cases involving the FDLE and the federal government. (R. 3608).

Taylor was on probation for a case that arose in Walton County in 1985. (R. 3578). He was scheduled for a violation of probation proceeding on August 24, 1990. (R. 3434, 3580). Taylor was in the same cell with Byars and Mr. Suggs. (R. 3535). On August 21, 1990, Taylor made a statement to the Walton County Sheriff's Department describing statements Mr. Suggs made to him. (R. 3539). Following his statement to law enforcement officers, Taylor's probation was extended three years. (R. 3580, 3609).

At trial, Taylor testified that Mr. Suggs said that he felt that law enforcement was bluffing about finding a key and a glass in the bay behind his house because the key would have been aluminum or brass and a magnet would not pick it up or the glass. (R. 3537). Mr. Suggs also said that because Pauline Casey was dead there was

no one to testify against him. Mr. Suggs said that because there was no witness and no weapon, he felt he could beat this case. (R. 3538).

Taylor also testified that Mr. Suggs told him that law enforcement did not have a weapon and would not find one and that he threw it in the canal as he was crossing the bridge. (R. 3536-37). These two latter statements were not included in Taylor's original statement to law enforcement officers and, according to Taylor, were made by Mr. Suggs after his August 21, 1990, statement to the police. (R. 3614). However, in his deposition taken May 23, 1991, Taylor testified that all of Mr. Suggs' statements were made to him prior to Taylor making the August 21, 1990, statement. (R. 3588, 3609).

Taylor said he was not promised anything in exchange for his statement and had no deals for his testimony; however, Taylor expected a letter of "substantial assistance" to take to his parole hearing in August of 1992. (R. 3595).

XVII. THE OTHER SUSPECTS.

According to the investigators, as soon as Pauline Casey's body was found, the investigation of the two other prime suspects, Steve Casey and Ray Hamilton, stopped. (R. 2765). The officers candidly testified that seeking evidence that someone else may have had a motive, the opportunity, or might have committed the crime was "not real high on the list of priorities of the department." (R. 2727-28). There were no further attempts made to search Casey or Hamilton, their homes, seize their clothing, check their vehicles for evidence, or to check for unexplained bank deposits or sudden income. (R. 2759, 2761, 3008).

Steve Casey's alibi was that he stayed home that night of the murder and sold his truck; but Casey could not remember whether he sold the truck for \$1,200 or \$1,500 and did not remember who he sold it to. (R. 3682-83).

Casey does not remember discussing insurance benefits with Sandra Hall at the time of his discharge from the army and has no recollection of discussing the

insurance policy and conversion period with her. (R. 3689-90). According to Casey, a few days after the murder, he called the VA to inquire about funeral benefits and was told to call Sandra Hall. She informed him of the grace period (that was about to expire) to convert the insurance policy. According to Casey, he did not even know what a DD214 was. (R. 3691).

Sandra Hall testified that Steve Casey called her and said he needed a certified copy of Pauline Casey's DD214 to file for the insurance benefits because she had been murdered. Steve Casey did not say anything to her about funeral expenses and instead said "he needed a certified true copy of her DD form 214 to file for that life insurance." (R. 3715).

Steve Casey collected \$50,000 in life insurance from the army and bought a Harley Davidson, traded Pauline Casey's car in on a truck for himself, and made a down payment on a lot on the bay. (R. 3692-93). Casey never told law enforcement about the life insurance policy. (R. 3693-94).

Casey produced his telephone records at the trial that reflected a long distance phone call from his home number to Evanston, Wyoming (his mother's home) that ended at 9:32 p.m. the night that Pauline disappeared. There was no one to verify his activities from then until 12:00 midnight when Casey said he saw Ray Hamilton. (R. 3686). He then went to the Teddy Bear Bar and got there about 12:30 a.m. (R. 2681).

By the next morning, Steve Casey knew that Mr. Suggs had been arrested and that he had been working on his parents' home on the bay. (R. 3687). The investigators acknowledged that if someone wanted to try to tie Mr. Suggs to the crime, they could have left a key in the water behind Mr. Suggs' home. (R. 2714). Casey knew that Sandra Mullens gave his wife a key to the bar because there was discussion concerning Steve Casey starting to work at the bar on Monday, the day Pauline disappeared. Casey said, "It wasn't ever decided, as far as I remember, whether I was really gonna work or not. It was still being talked about." (R. 3685-

86). Casey said he didn't remember if the purpose of the key was so he could open the bar. (R.3685-86).

PENALTY PHASE

I. STATE'S CASE

The prosecution recalled James Taylor, the "professional jailhouse informant." Taylor testified that Mr. Suggs also said, "the case in Alabama he was stupid but this case he was not because he didn't leave a damn witness, I almost taken (sic) her damn head off." (R. 4625).

Investigator Sunday testified during the penalty phase that he removed a book titled Deal the First Deadly Blow from Mr. Suggs' house on August 7, 1990. The book was on a shelf with several other books. (R. 4628-29). The investigator turned to page 99 of the book and said he compared⁵ the photographs on that page to the autopsy photographs of Pauline Casey. (R. 4629). The book was located on a shelf in the living room along with a big collection of other books. There was nothing that tied the book to Mr. Suggs. (R. 4631, 4637). The book could have belonged to Mr. Suggs' mother or father. (R. 4632). The book is an instruction book for the military and Mr. Suggs' father is retired Air Force. (R. 4632-33).

The state introduced the minutes of the Alabama Court showing that Mr. Suggs was convicted in Alabama in 1979 of first degree murder and assault with the intent to murder and was paroled in 1989. (R. 4639-40). He was on parole on August 6, 1990. (R. 4641-43).

⁵ During closing argument, the prosecutor argued that the photographs in the book were similar to Pauline Casey's wounds and argued that the existence of the book proved that Mr. Suggs had planned how his next victim would die. (R. 4699).

II. DEFENSE CASE.

Barbara Tucker testified that she has known Mr. Suggs family for thirty-two years and saw Mr. Suggs grow up. (R. 4661-62). Mr. Suggs' father was a successful businessman and formerly the police commissioner of Anniston, Alabama. (R. 4663-64). Mr. Suggs had a good relationship with his parents. (R. 4665). She described Mr. Suggs as a very hard worker, saying "when he works, he works hard." (R. 4664).

Rhonda Carlson testified that she had known Mr. Suggs since 1975 and that her father was Mr. Mayne. (R. 4672). Mr. Suggs worked for her father from 1975 to 1979, when he was arrested in Alabama, and again in 1989 when he was paroled. (R. 4673-74).

Mr. Suggs' mother testified that he was a normal happy child. (R. 4680). He obtained a GED and completed a 3,000 hour course to become certified in gunsmithing. (R. 4681).

SUMMARY OF THE ARGUMENT

Mr. Suggs has recently uncovered newly discovered evidence and *Brady* violations which substantially undermine confidence in the verdict. This Court must permit Mr. Suggs an opportunity to prove his claims.

I. Mr. Suggs is entitled to an evidentiary hearing on the newly discovered evidence from Laura Johnson, the teenage daughter of murder victim Pauline Casey, that she was molested, raped and impregnated by her step-father Stephen Casey prior to the murder, because this evidence demonstrates that Stephen Casey had a substantial motive to murder Pauline Casey.

II. Mr. Suggs is entitled to an evidentiary hearing on his claim of *Brady* evidence from Wyatt Henderson because the trial court incorrectly analyzed this evidence under a *Jones II* standard, rather than the proper *Brady* standard. This evidence, when taken together with all the evidence in this case, demonstrates that the Walton County Sheriff's Office wanted to vindicate their arrest of Mr. Suggs by any means necessary. This exculpatory evidence, suppressed by the State, undermines confidence in the jury's verdict.

III. Mr. Suggs is entitled to an evidentiary hearing on the newly discovered evidence regarding Judge Laura Melvin, because under a *Jones II* analysis, her book and letter to Governor Scott were published and written in 2013 when Mr. Suggs was without collateral counsel. This is his first opportunity to present these claims. This evidence goes directly to Judge Melvin's state of mind when she sentenced Mr. Suggs and reveals she did not have the benefit of all of the newly discovered evidence that has emerged since postconviction. Had Judge Melvin had the benefit of all the evidence, there is a reasonable probability that the result would have been different.

IV. Mr. Suggs is entitled to an evidentiary hearing on his claim of *Brady* evidence regarding Michael Malone because the trial court incorrectly analyzed this evidence

under a *Jones II* standard, rather than the proper *Brady* standard. This exculpatory evidence was destroyed by Michael Malone and Mr. Suggs has lost crucial evidence that would have positively identified Pauline Casey's killer.

V. Mr. Suggs is entitled to an evidentiary hearing on his claim of *Brady* evidence of FDLE's investigation into the Walton County Sheriff's Office, because under the proper *Brady* analysis, this impeaching and possibly exculpatory evidence of misconduct by the Walton County Sheriff's Office, during the same period of time that Mr. Suggs was arrested and prosecuted, that was suppressed by the State, would almost certainly put the entire case in a different light so as to undermine confidence in the jury's verdict.

ISSUE I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SUGGS' CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING LAURA JOHNSON.

The circuit court erred in summarily denying Suggs' claim of newly discovered evidence that Laura Johnson, the teenage daughter of murder victim Pauline Casey, was molested, raped, and impregnated by her step-father, Stephen Casey prior to the murder.

In its Order Denying the Defendant's Successive Motion to Vacate Judgment and Sentence, the circuit court states the following with regard to this claim:

The defendant alleges that such information could not have been discovered earlier because Ms. Laura Johnson only recently disclosed the information. However, the record refutes such a claim. In particular, the record reflects that the nature of her relationship with her step-father was raised during a postconviction evidentiary hearing held in January 2003. At such hearing, Ms. Laura Johnson testified that she had a "sexual relationship" with Mr. Stephen Casey that began approximately two months after he married her mother. Considering such information, any claim based on Mr. Stephen Casey's relationship with Ms. Laura Johnson is untimely.

(PC-R2. 573).

On February 6, 2014, during Mr. Suggs' clemency process, Laura Johnson, the daughter of the victim, Pauline Casey, wrote a letter to Suggs' clemency counsel. (PC-R2. 170-172). In this letter she indicated that she had some new information that she wanted to bring to the attention of the attorneys and the court, and pleaded for the murder investigation to be re-opened:

First of all and I say this boldly and mean it with everything in me. For many years now I truly feel and believe that Mr. Suggs is an innocent

man. ... This has weighed heavy on my heart for a long time. The execution of this innocent man would be a tragedy to me! I hope and pray that this letter and other letters I've wrote (sic) to the parole board and governor gets the attention of the one's that can put a stop to his execution. ... I also believe once that's done that my mother's case should be immediately reopened. ... I have many reasons of why I say these things and why I stand firm in my belief of his innocence, but I can't do this alone.

(PC-R2. 170-171).

It was during this time that Suggs was effectively without collateral representation in state court. Only after CCRC-North was appointed in October 2014, was Suggs able to investigate this new information from Laura Johnson. Consequently, as part of the postconviction investigation conducted by CCRC-North, one of the investigators contacted Laura Johnson. She agreed to meet and subsequently disclosed a very personal and tragic event in her life. While growing up, there were custody issues between her parents. As a result, she lived with her mother, Pauline Casey, and her step-father, Stephen Casey, for a time while she was a teenager. It was during this time that she was raped, molested, and at the age of 13, impregnated by Stephen Casey. The pregnancy ended in a miscarriage. After this occurred, she moved to Alabama to live with her father, and Pauline and Stephen Casey moved to Florida. In July of 1990, Pauline visited her daughter in Alabama. Shortly thereafter, Laura had planned a trip to visit her mother in Florida during the month of August. It was during this trip that she was going to further discuss the sexual abuse by her step-father, Stephen Casey. Tragically, a few days prior to her arrival, her mother was murdered.

The circuit court asserts that this claim is time-barred because Ms. Johnson testified at the 2003 evidentiary hearing about a sexual relationship she had with her

step-father, Steve Casey, while she was only 13 years old. The testimony, however, was limited to the following:

During cross-examination by the State:

- Q: What kind of relationship did you have with Steve Casey?
A: As in from the beginning or all the time?
Q: Yeah.
A: In the beginning we just, you know, stepfather, getting to know him some when I moved down there in 1986. About a month after I moved down there they got married. About two months after they got married we started having sexual relationship.
Q: You moved back to Alabama?
A: No, not until after we moved to California.
Q: Who moved to California?
A: Me, my mother and him.
Q: The last three years what was your relationship with Steve Casey?
A: The last three years before my mother was murdered?
Q: Yes.
A: None.
Q: How did you get along with Steve Casey?
A: We got along fine.

Follow-up by the Court:

- Q: Did you say you and Mr. Casey had a sexual relationship?
A: Yes, sir.
Q: When was that?
A: Probably around December of '86 through February of '87.
Q: You would have been pretty young?
A: Thirteen years old.
Q: What?
A: I was 13 years old.
Q: All right. Thank you.

(PC-R. 72-79). This was the extent of the evidence that came out during the evidentiary hearing. This testimony is far different from Laura Johnson's recent

statements to a CCRC-North investigator that she was molested, raped, and impregnated by her step-father, Steve Casey, when she was only 13 years old, and had planned a trip to discuss this matter with her mother only days before her mother was murdered. Given that this information was of such a sensitive and personal nature, it is not likely that even through due diligence, Suggs would have been able to obtain such information, until Laura Johnson was ready to reveal it.

This evidence from Laura Johnson is, indeed, newly discovered evidence under *Jones v. State*, 709 So.2d 512 (Fla. 1998) (*Jones II*). Therefore, it must be considered under the standard put forth in *Jones II*. “First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by use of diligence.” *Hildwin v. State*, 141 So.3d 1178, 1184 (Fla. 2014), *citing Jones II*, 709 So.2d at 521.

As required in the first prong of the analysis in *Jones II*, this is information that was not known by the trial court, Mr. Suggs, or counsel at the time of trial. Ms. Johnson was still a teenager when her mother was murdered and was not yet prepared to speak of the horrific things she endured as a child at the hands of her step-father, Stephen Casey. It was only years later, that she was able to discuss such painful memories. Neither Mr. Suggs nor his trial attorneys could have known about this by use of due diligence, since it is only recently that Ms. Johnson has chosen to come forward with this information. Since this newly discovered evidence is of such a personal nature, it is highly unlikely that this information could have been uncovered prior to Ms. Johnson coming forward of her own volition, and in order to save an innocent man from execution. The brief mention of a sexual relationship between her and her step-father during the 2003 evidentiary hearing is nowhere near the detailed information that Laura Johnson has only recently revealed.

Under the second prong set forth in *Jones II*, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.” *Hildwin*, 141 So.3d at 1184, *citing Jones II*, 709 So.2d at 521. “Newly discovered evidence satisfies the second prong of the *Jones II* test if it ‘weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability’.” *Hildwin*, 141 So. 3d at 1184, *citing Jones II*, 709 So.2d at 526.

“The postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial.” *Hildwin*, 141 So.3d at 1184, *citing Swafford v. State*, 125 So.3d 760, 775-76 (Fla. 2013). “In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a ‘total picture’ of the case and ‘all the circumstances of the case’.” *Hildwin*, 141 So.3d at 1184, *citing Swafford*, 125 So.2d at 776; *see also Lightbourne v. State*, 742 So.2d 238, 247 (Fla. 1999). “A postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal. *Swafford*, 125 So.3d at 775-76; *Lightbourne*, 742 So.2d 247; *see also Roberts v. State*, 840 So.2d 962, 972 (Fla. 2002) (holding that upon remand, if the trial court determined that the testimony in a newly discovered evidence claim was reliable, the trial court was required to view that new evidence, as well as claims under *Brady v. Maryland*, 373 U.S. 83 (1963), that were previously rejected in a prior postconviction motion, because the evidence was equally accessible to the defense and there was no reasonable probability that the result of the trial would have been different had the evidence been disclosed).

Evidence introduced at trial revealed that when patrons, Diane and Jim Hosmier stopped at the Teddy Bear Lounge, they found it empty, the front door open, the lights on and music playing, no chairs or tables overturned, no sign of a

struggle, keys still on the register, a purse behind the bar, and money in the tip jar. (R. 2172). Only after calling the owner, Ted Valencia, and then realizing the money was missing from the register, did the Hosmiers call police. (R. 2173). As it was described, this scene gave credence to the defense's theory that Pauline Casey had to have been killed by someone that she knew, such as her husband, Stephen Casey. In fact, the defense argued at trial that Stephen Casey was the one who had a motive to commit this murder. He was the sole beneficiary of a \$50,000.00 life insurance policy on Pauline Casey, of which he had a very small window of time to collect after he and Pauline left the military. (R. 3710-11). Pauline was also the breadwinner of the family, working two jobs, while Stephen was out of work. (R. 3669-72).

According to investigators, as soon as Pauline Casey's body was found, the investigation of the two other primary suspects, Stephen Casey and Ray Hamilton, stopped. (R. 2765). There were no attempts made to search Casey or Hamilton or their homes, seize their clothing, check their vehicles for evidence, or to check for unexplained bank deposits or sudden income. (R. 2759; 2761; 3008).

Steve Casey's alibi was that he stayed home the night of the murder and sold his truck; but Casey could not remember whether he sold the truck for \$1,200 or \$1,500 and did not remember who he sold it to. (R. 3682-83). Steve Casey collected \$50,000 in life insurance from the Army and bought a Harley Davidson motorcycle, traded Pauline's car in on a truck for himself, and made a down payment on a lot on the bay. (R. 3692-93). Casey never told law enforcement about the life insurance policy. (R. 3693-94). Casey produced his telephone records that reflected a long distance phone call to his mother's home in Evanston, Wyoming, that ended at 9:32 p.m. the night that Pauline disappeared. There was no one to verify his activities from then until 12:00 midnight when Casey said he saw Ray Hamilton. (R. 3686). Ray Hamilton also testified at trial that he was at the Teddy Bear Lounge the night

of the murder when he received a phone call from Steve Casey saying that he had just sold the truck. (R. 2788-96).

After Suggs' conviction, his trial attorney hired an investigator to look into Steve Casey's purported alibi. (PC-R. 140-43; 256-257). This investigation ultimately revealed that Steve Casey sold his truck the day before his wife's murder for \$300. Therefore, his alibi that he was at home selling his truck that night was an utter fabrication. The importance of this issue became evident during deliberations in the guilt phase, when the jury requested to rehear the testimony of Steve Casey and Ray Hamilton. Ultimately, though, due to logistical issues this was not done. (R. 4536-4550). Had this crucial information been obtained before trial, the verdict may have been one of not guilty, since the jury was clearly focused on the viability of Steve Casey and Ray Hamilton's testimony.

The newly discovered evidence that Steve Casey molested, raped, and impregnated his thirteen year old step-daughter; that he could have been charged with a potential life felony; that she was on her way to visit with her mother and discuss this sexual abuse by Steve Casey; and that Pauline Casey was murdered just days before her daughter was set to arrive in Florida; would by itself certainly weaken the case against Mr. Suggs so as to give rise to a reasonable doubt as to his culpability.

However, under the second prong of *Jones II*, and as required by *Swafford* and *Hildwin*, Laura Johnson's recent statement must be considered cumulatively, with all of the other evidence, including evidence that was previously excluded as procedurally barred or presented in another postconviction proceeding. Therefore, Ms. Johnson's statement must be considered along with all of the other evidence in the case, including the following evidence related to Steve Casey: [1] Steve Casey faced a possibility of life in prison if convicted of raping his 13 year old step-daughter; [2] Steve Casey's alibi for the night of the murder has since proven to be

a lie; [3] Steve Casey was the sole beneficiary of a \$50,000 insurance policy; [4] Steve Casey was out of work; [5] there is nobody to verify Steve Casey's whereabouts from 9:32 pm until midnight, the night of Pauline Casey's murder; [6] the jurors were focused on the testimony of Steve Casey and Ray Hamilton, as they requested to re-hear their testimony; [7] due to logistical issues, they jurors were unable to re-hear this testimony; [8] Steve Casey's house, clothes, and vehicle were never searched for evidence.

In addition to evidence put forth at trial, the court must now also consider evidence that has been ruled procedurally barred, *Brady* evidence previously rejected, and evidence previously presented in a postconviction proceeding. This cumulative analysis of the evidence would not only include the entirety of the evidence pertaining to Steve Casey as discussed above, but would also include: [1] the "sweetheart" deal received by jail informant Wallace Byars in return for his testimony concerning Mr. Suggs alleged statement to him about the murder; [2] the results of Wallace Byars' court ordered evaluation finding him "incompetent" and meeting "the criteria for involuntary hospitalization" a short time prior to his testimony against Mr. Suggs; [3] James Taylor's status as a professional jailhouse informant who received special benefits at the jail in exchange for testifying against other inmates; [4] the favorable resolution to Mr. Taylor's probation violation after his agreement to testify against Mr. Suggs; [5] the letter of substantial assistance written by Assistant State Attorney Clayton Adkinson to the Alabama Board of Pardons and Parole urging them to grant Mr. Taylor's application for parole; [6] testimony by Gerald Shockley during the postconviction evidentiary hearing in this case regarding statements made to him by Mr. Taylor that the testimony by Taylor and Byars at trial was fabricated, and that they were given information about the murder by investigators at the sheriff's office in order to fabricate statements; [7] testimony during the evidentiary hearing by George Broxson that Suggs was a loner

who didn't talk to anybody about his case; [8] testimony by Broxson that Byars confided in him that he had been given information by the sheriff's office about Suggs' case in order to fabricate his testimony, and that he did this in order to obtain a deal to avoid going to prison for shooting up the sheriff department's substation; [9] Mr. Suggs made no admissions to any law enforcement officers or anyone else other than these alleged statements to Byars and Taylor; [10] there is no DNA evidence linking Suggs to the murder; [11] Pauline Casey was stabbed and bled to death and place where she was discovered was extremely bloody, yet no blood evidence was found on Mr. Suggs' body, clothes, shoes, vehicle, house or belongings; [12] the stain on Mr. Suggs' shirt which is alleged to contain an enzyme that Ms. Casey had was disputed at trial in a "battle of the experts" and the evidence is highly speculative and nowhere near as conclusive as DNA evidence; [13] there is no hair evidence linking Mr. Suggs to the murder; [14] the area where the victim was found was a bushy area, yet Mr. Suggs had no scratches on him, despite the fact that he was wearing shorts that night; [15] no fibers from Mr. Suggs' vehicle were found on the victim; [16] the tire tracks left at the scene do not match Mr. Suggs' vehicle; [17] the vegetation on the undercarriage of Mr. Suggs' vehicle did not match the vegetation where the victim's body was found; [18] paint scrapings found in the area where the victim was found did not match Mr. Suggs' vehicle; [19] the fingerprints of Ms. Casey found in and on Mr. Suggs' vehicle could have been placed there at any time, as they had a friendly relationship with one another; [20] the "wet" money was explained to law enforcement and is highly speculative; [21] Mr. Suggs readily consented to the search of his house by law enforcement; [22] the glass and the key found in the bay behind his house were likely planted by someone else and are not evidence of the murder; [23] no murder weapon was ever recovered; [24] the medical examiner's deposition, which put the time of death during a 24 hour period from 9:15 am on August 7, 1990, until the time of the autopsy at 9:15 am on August

8, 1990; [25] Mr. Suggs was in custody as of 5:04 am on August 7, 1990, before the time of death; [26] the letter from Assistant State Attorney Adkinson to the medical examiner indicating that there was a problem with the time of death; [27] the newly discovered *Brady* evidence that Michael Malone of the FBI destroyed evidence favorable to the defense; [28] newly discovered Brady evidence that the FDLE was conducting a criminal investigation into the Walton County Sheriff's Department at the time of the arrest and prosecution of Mr. Suggs; and [29] newly discovered evidence that the trial judge, Laura Melvin, improperly shifted her responsibility as sentence to the appellate courts in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

This newly discovered evidence from Laura Johnson certainly weakens the case against Mr. Suggs, and demonstrates that Steve Casey had a substantial motive -- avoiding a potential sentence of life imprisonment -- in addition to the insurance money he collected, to murder Pauline Casey. Certainly if jurors heard all of the evidence that is now known, and had a complete picture of the case, they would have returned a different verdict. Mr. Suggs is entitled to an evidentiary hearing on this claim.

ISSUE II

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SUGGS' CLAIM OF *BRADY* EVIDENCE FROM WYATT HENDERSON.

In its Order Denying the Defendant's Successive Motion to Vacate Judgment and Sentence, the circuit court stated that Captain Brad Trusty testified at trial as to the parameters of the search in the Choctawhatchee Bay, and that since this information was known at the time of trial, it is not newly discovered evidence. (PC-R2. 574). The court further states that Wyatt Henderson's recent statements about

the search in the bay could have been obtained earlier through diligence. (PC-R2. 574).

In reaching those conclusions, the circuit court erred by conducting a *Jones II* newly discovered evidence analysis rather than a *Brady* analysis of this claim. To be clear, this is a claim premised upon a *Brady* violation. Therefore, a *Brady* analysis must be conducted as to this evidence.

The suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). The three elements of a *Brady* violation include: [1] the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999). Evidence does not need to prove innocence to be exculpatory. It can merely weaken the State's evidence. Impeachment of the adequacy of law enforcement's investigation and its techniques is favorable evidence that can be utilized by the defense. *See Kyles v. Whitley*, 514 U.S. 419 (1995). Moreover, the factual allegations as set forth in this *Brady* claim must be accepted as true, even with regard to due diligence. *See Lightbourne v. Dugger*, 549 So.2d 1364 (Fla. 1989) (holding that defendant was entitled to an evidentiary hearing on allegations of a *Brady* violation).

Furthermore, in contrast to the State's obligations under *Brady*, collateral counsel should not be held to a higher standard of investigation than that of original trial counsel. *See Waterhouse v. State*, 82 So.3d 84, 104 (Fla. 2012) (requiring collateral counsel to verify every detail and contact every witness in a police report – even where the police report indicates that the witness has no useful information – would place an equally onerous burden on collateral counsel, with little chance of

discovering helpful or useful information.). Thus, due diligence does not require perfection.

Pursuant to postconviction counsel's investigation of Mr. Suggs' case, Wyatt Henderson was contacted and interviewed. He was employed with the WCSO from November 1989 until April 1995, and was the lead dive team member for the WCSO Dive Team, in addition to his regular law enforcement duties. In August of 1990, he was the lead dive team member involved in the search of Choctawatchee Bay, behind the Suggs' residence. He was instructed to look for evidence pertaining to the death of Pauline Casey.

On the first day of the search, his report indicates that a drinking glass was found. On the second day, before the search began, Captain Brad Trusty of the WCSO gave the dive team a direct order to search a different area. Captain Trusty indicated that during the interview of Suggs, they noticed a visible waterline on his pants, and because of this waterline, the investigators believed that additional evidence may be found further out in the bay. At no point either before, during or after the search was the area ever secured by law enforcement.

Henderson assumed that this information regarding the waterline on Suggs' pants was included in the investigators' supplemental reports and provided to Suggs' attorneys. Had he been asked about why the search was expanded, he would have testified to the information conveyed to him by Captain Trusty. There is no mention of this waterline on Suggs' pants in any of the police reports, statements, or depositions, nor was it ever mentioned at trial or any time thereafter, until now. Moreover, Suggs was arrested wearing black shorts, not pants. According to Steve Sundays' police report: "Mr. Suggs was wearing a light colored pull over shirt, black shorts with yellow stripe, sandals, and had brownish hair rolled in a ponytail." (PC-R2. 174). Sunday also testified at trial that Suggs had been in shorts at the time he was arrested, and had been described by Ray Hamilton as having been in shorts

earlier in the evening, as well.⁶ (R. 2708-09). No photos were taken of the shorts to indicate that any such visible waterline ever existed.

Investigator Steve Sunday's report also noted the following information regarding the key to the bar:

At approximately 18:29 hours 6:29 080890, I went to Teddy Bear Bar and met with Ted Valencia. I obtained a key (silver in color with round head) which fit the side door to the bar. It will be used to give the divers and other officers a description of the key to look for. I obtained the key at 1835 hours 6:35 080890. On August 9, 1990 at approximately 1100 hours I discovered that a key had been located at the bay behind Mr. Suggs' residence. (PC-R2. 175).

Although Sunday reported having obtained the key for the purpose of showing it to the dive team so they would know what to look for, he never actually showed it to them. Perhaps not so coincidentally, the key was recovered from the bay the following day, after Captain Trusty told them where to find it.

The state's theory at trial was that Suggs murdered Pauline Casey, and then threw a glass and key from the bar in the bay behind his house. Just prior to the search of the bay, the Sheriff held a press conference announcing the arrest of Mr. Suggs for the murder of Pauline Casey. (R. 3100-03). Mr. Suggs' house and the location of the dive are easily visible from the bridge causeway. (R. 2711, 2978). There was no security posted at Mr. Suggs' house prior to or during the three day search. (R. 2701). Choctawhatchee Bay is a public watercourse and the location of the dive team's search is accessible from the water by boat or, because the water is so shallow, a person could enter the bay from the land as far as a mile away and walk

⁶ The testimony at trial regarding Suggs wearing shorts was in relation to the defense theory that if he had indeed murdered Pauline Casey and dumped her body in the bushes, he would have scratches all over his legs since he was wearing shorts that night, but he had no such scratches.

to the location. (R. 2980). Mr. Suggs' residence was easily identifiable and had the name "Suggs" in two different locations that were visible from the Mini Mart. (R. 2700).

The defense argued at trial that the sheriff's office had a bias against Mr. Suggs, and after he was arrested, they had no intention of finding evidence that would point to anyone else. (R. 2698-99). Had counsel known prior to trial that Captain Trusty told the dive team where to find evidence in the bay, they certainly could have used this information to bolster their defense, and to cross-examine Trusty, especially when coupled with the information that Investigator Sunday received a key from the bar's owner just prior to the key being found in the bay behind Suggs' unsecured residence. Investigator Sunday further conceded at trial that "if a person wanted to tie Ernie Suggs to the Teddy Bear Bar they could leave a key out in the water by his house...even if it wasn't connected to the murder." (R. 2714).

The first element of a *Brady* violation requires that the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching. This evidence concerning former Walton County Sheriff's Office Deputy Wyatt Henderson's statement about the search of the bay behind Suggs' house is favorable, because it is both impeaching and exculpatory. It is impeaching because it directly contradicts Captain Trusty's police reports and testimony at trial. At no time did Captain Trusty ever disclose the fact that he saw a waterline on Suggs' pants when he was arrested. In fact, reports showed that Suggs was arrested wearing nylon shorts. There was never any indication that they were wet or had any other distinctive markings on them. Henderson's statement is also exculpatory because it shows that Trusty knew where the key would be found, **before** the divers found it. Divers were initially told to search for a murder weapon. When no murder weapon was found, they were told to look for a key. It is no coincidence that a key was

recovered shortly after divers were told to look for one and where they should be looking for it. At trial, Investigator Steve Sunday conceded that “if a person wanted to tie Ernie Suggs to the Teddy Bear Bar they could leave a key out in the water by his house ... even if it wasn’t connected to the murder.” (R. 2714). There was also evidence from Steve Sunday’s report that investigators were in possession of an actual key from the Teddy Bear Bar that they had obtained from the owner, the night before the key was recovered from the bay. According to his report, the purpose of obtaining this key was to show it to divers so they would know what to look for. A key is a key. It does not make any sense that divers would need to see what a key looked like in order to search for one. Wyatt Henderson confirmed that he was never shown a key to the bar, prior to finding the one in the bay. If Captain Trusty knew where the key would be found, before the divers found it, then this is indeed exculpatory information as it shows that Suggs did not put it there.

The second element of a *Brady* violation states that the evidence must have been suppressed by the State, either willfully or inadvertently. In order to comply with *Brady*, the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including police. *See Strickler v. Greene*, 527 U.S. 263 (1999); *Kyles*, 514 U.S. at 437. Former Deputy Wyatt Henderson and former Captain Brad Trusty were both employed by the Walton County Sheriff’s Office, and both were involved in the investigation into the murder of Pauline Casey. As required by *Brady*, the prosecutor had a duty to learn of any favorable evidence known by these officers who were investigating the case that he was prosecuting.

Finally, the third prong of a *Brady* violation is that prejudice must have ensued. “Evidence is prejudicial or material under *Brady* if there is a reasonable probability that had the evidence been disclosed, the result of the trial would have been different.” *Jones v. State*, 998 So. 2d 573, 579, citing *Bagley*, 473 U.S. 667,

678. “The critical question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Jones*, 998 So. 2d at 580; *see also Strickler*, 527 U.S. at 290; *Kyles*, 514 U.S. at 435. In *Kyles v. Whitley*, the United States Supreme Court held that in determining whether evidence not disclosed by the state was material, in violation of *Brady*, the cumulative effect of all suppressed evidence favorable to the defendant is considered, rather than considering each item of evidence individually.

Accordingly, the court must now consider the cumulative effect of all evidence in this case, including: [1] divers were told to search for a murder weapon in the bay behind Suggs’ house; [2] no murder weapon was found; [3] a key was given to the investigators by the owner of the bar; [4] investigators told bar owner Ted Valencia that this key was needed to show divers what to look for; [5] a key was never shown to divers; [6] the following morning divers were told where to look for the key by Captain Trusty; [7] Captain Trusty directed divers to change the search parameters due to a waterline on Suggs’ pants when he was arrested; [8] there was no waterline on Suggs’ pants when he was arrested; [9] Suggs was wearing nylon shorts when he was arrested; [10] no mention is made of this waterline in any police reports; [11] the key was found in the area Trusty told the divers to search; [12] investigators admitted at trial they had no intention of finding evidence that would point to anyone else; [13] Suggs was already in custody for the murder of Pauline Casey at the time of the search of the bay behind his house; [14] at no time, either prior to or during the search, was the area of the bay behind Suggs’ house secured by law enforcement. The cumulative effect of this evidence alone could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. However, this evidence, when taken together with all the evidence in this case, especially evidence of a criminal investigation into the Walton County Sheriff’s Office by the FDLE during this same time, demonstrates that the Walton

County Sheriff's Office wanted to vindicate their arrest of Suggs by any means necessary.

“The question is not whether the State would have had a case go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same.” *Kyles*, 514 U.S. at 453 (1995). Certainly, in this case, confidence that the jury's verdict would have been the same cannot survive a recap of the suppressed evidence and its significance for the prosecution. *See Id.* at 453. Mr. Suggs is entitled to an evidentiary hearing on this claim.

ISSUE III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SUGGS' CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING JUDGE LAURA MELVIN.

In its Order Denying the Defendant's Successive Motion to Vacate Judgment and Sentence, the circuit court stated the following as to this claim:

[T]he content of such memoir and letter are not of a nature that would probably produce an acquittal on retrial...the personal reflections of a sentencing judge written many years after the defendant's sentencing do not automatically weaken the case against the defendant so as to give rise to a reasonable doubt as to his culpability. Therefore, any claim based on the memoir or letter does not qualify as newly discovered evidence.

(PC-R2. 574-575).

Judge Laura Melvin, who presided over Mr. Suggs' trial, recently published a book entitled *Public Secrets & Justice: A Journal of a Circuit Court Judge*.⁷ In

⁷ Laura Melvin, *Public Secrets & Justice – Journal of a Circuit Court Judge* (2013).

this book, Judge Melvin described the case against Ernest Suggs, the first man she sentenced to death.

In explaining the law in death penalty cases to her readers, she stated the following:

The law in death penalty cases was complex and did not allow the State to kill everyone who kills another. Murders are committed for a variety of reasons, using a gamut of methods, and the Florida legislature developed a weighing process, a score sheet if you will, to be used by judges and juries when evaluating a specific murder for the death penalty. The judge and jury were to weigh aggravating factors (reasons to kill the defendant) against mitigating factors (reasons not to kill him). If the jury found the defendant guilty of 1st degree murder, there was a second trial, known as the penalty phases, and the same jury of 12 returned a recommendation to the Judge on whether the death penalty should be imposed. **If the jury recommended death, the Judge remained the ultimate decision-maker and could sentence the defendant to life in prison without parole.** On the other side of the equation, if the jury recommended life, there was a narrow set of facts and legal requirements under which a judge might override the jury's recommendation and impose the death penalty. (emphasis added).⁸

However, in contrast to that recitation of the law, she recounted the following of her decision-making process in sentencing Suggs to death by electrocution:

When it came down to it, I could not rationalize overruling the jury. Suggs met all the criteria under the law; as the judge, I didn't feel that I had the option of voting my personal morals. As I struggled with my decision I recited from memory the jury instruction I'd read so many times: 'In closing let me remind you that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two

⁸ *Id.* At 57.

centuries we have lived by the Constitution and the Law. No juror has the right to violate the rules we all share.' So I did my job. I had done my homework. I reread the course materials and reviewed the cases. **I didn't know of any error in the trial.** (emphasis added).⁹

On August 16, 2013, Judge Melvin wrote a letter to Governor Rick Scott recommending that Mr. Suggs' death sentence be commuted to life. (PC-R2. 177-179). In this letter, Judge Melvin again insisted that she carefully followed the law, yet believes that life imprisonment is the appropriate sentence in this case. Notably, she also mentioned the seven to five non-unanimous death recommendation given by the jury, as if even the jurors were not convinced of the sentence they had recommended.

On July 15, 1992, I was the trial judge sitting in Walton County when I sentenced Ernest D. Suggs to death in the electric chair, carefully following the law. **I did not impose the death penalty because I thought Suggs deserved it, or that the emotional stress of the victim's family would somehow be made lighter or because I thought it was the moral thing to do, or that society would be even a whit better off by killing Suggs in retribution.** As a Judge, I understood that I did not have the right or authority to impose my personal convictions, and so I did my job, following the written mandates of the statutes as currently written.

As the Governor of Florida, you have power and authority not granted to me or any other Circuit Judge. **Unlike Circuit Judges who are bound by the statutes, you have the Constitutional power as set forth at Article IV, Section 8, to commute Suggs' death sentence to life in prison without parole, a sentence that would better serve all of the citizens of Florida. The vote of his jury – seven to five for death – demonstrates that even for a jury in the most conservative part of the state, Suggs' execution is by no means the unanimous**

⁹ *Id.* At 60.

choice. I urge you to commute Suggs' death sentence to life in prison. (emphasis added).

Although it is rare that a penalty phase judge enters a sentence which is different than the jury's recommendation, the judge presiding over the penalty phase proceeding ultimately determines the sentence, and can override the jury's recommendation if he/she so determines. In Florida, the jury's sentencing recommendation in a capital case is only advisory. **The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[n]otwithstanding the recommendation of a majority of the jury, is to enter a sentence of life imprisonment or death;** in the latter case, specified written findings are required". See Fla. State. § 921.141 (2015) (emphasis added).

In *Tedder v. State*, 322 So.2d 908 (1975), the court held that a jury's recommendation should be given "great weight":

With respect to the trial court's sentence, we agree with appellant that the death penalty was inappropriate and that a life sentence should have been imposed. A jury recommendation under our trifurcated death penalty statute should be given great weight. **In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.** That is not the situation here. (emphasis added).

Tedder v. State, 322 So.2d at 910 (1975).

Additionally, trial courts are required to make an independent judgment about whether the death sentence should be imposed. The court in *Ross v. State*, 386 So.2d 1191 (1980), vacated the sentence and remanded the case to the trial court for reconsideration of its sentence in light of this requirement. The court further cited to previous rulings:

It appears, however, that the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed. This error requires that the sentence be vacated and that the cause be remanded to the trial court for reconsideration of the sentence. Citing this Court's decisions in *Tedder v. State*, 322 So.2d 908 (Fla.1975), and *Thompson v. State*, 328 So.2d 1 (Fla.1976), which held that the trial court should give great weight and serious consideration to a jury's recommendation of life, the trial court reasoned that it was bound by the jury's recommendation of death. As appears from its "Findings of Aggravating and Mitigating Circumstances" **the trial court felt compelled to impose the death penalty in this case because the jury had recommended death to be the appropriate penalty. It expressly stated, "(T)his Court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed."** Ross correctly points out that the third step in Florida's statutory scheme requires the reasoned judgment of the trial judge to be interposed between the emotions of the jurors and a death sentence. Section 921.141(3), Florida Statutes (1975), provides:

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

We interpreted this section in *State v. Dixon*, 283 So.2d 1 (Fla.1973), and said:

The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

283 So.2d at 8. (emphasis added).

Although this Court in *Tedder v. State, supra*, and *Thompson v. State, supra*, stated that the jury recommendation under our trifurcated death penalty statute should be given great weight and serious consideration, this does not mean that if the jury recommends the death penalty, the trial court must impose the death penalty. The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed. The standard for our review of death sentences where the jury has recommended life was enunciated in *Tedder v. State, supra*, as follows:

In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

322 So.2d at 910. In *LeDuc v. State*, 365 So.2d 149 (Fla.1978), this Court considered the standard of review of a death sentence where the jury recommends death and stated:

The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. On the record placed before the jury in this case, a recommended sentence of death was certainly reasonable. Indeed, the only data on which a life recommendation could have been made would have had to be grounded on the nonevidentiary recommendation of the prosecutor and the emotional plea of defense counsel.

Id. at 151. Since it appears that the trial court did not make an independent judgment whether the death sentence should be imposed, we remand to the trial court to reconsider its sentence in light of this opinion.

Ross v. State, 386 So.2d at 1197-98.

The court in *Sireci v. State*, 587 So.2d 450 (1991), also explained the trial court's duty to independently review the evidence:

The law is clear that a trial judge “upon a finding of a voluntary and intelligent waiver, may in his or her discretion either require an advisory jury recommendation, or may proceed to sentence the defendant without such advisory jury recommendation.” *State v. Carr*, 336 So.2d 358, 359 (Fla.1976). *See also Palmes v. State*, 397 So.2d 648, 656 (Fla.), *cert. denied*, 454 U.S. 882 (1981). **Regardless of the jury's recommendation, the trial judge must conduct an independent review of the evidence and make his or her own findings regarding aggravating and mitigating factors.** *Spaziano v. Florida*, 468 U.S. 447, 466 (1984). The trial judge here noted that if he found the jury was influenced by improper considerations, he had “the ability and the duty to lessen the reliance upon the jury's verdict.” Even if the jury may have surmised that the defendant had been previously sentenced to death, we find no abuse of discretion in the trial court's refusal to waive an advisory jury sentencing recommendation. (emphasis added).

...

The decision as to whether a particular mitigating circumstance is established lies with the judge. Reversal is not warranted simply because an appellant draws a different conclusion. *Stano v. State*, 460 So.2d 890, 894 (Fla.1984), *cert. denied*, 471 U.S. 1111 (1985). **Further, it is the trial court's duty to resolve conflicts in the evidence, and that determination should be final if supported by competent, substantial evidence.** *Id.* (emphasis added).

Sireci v. State, 587 So.2d at 451-53.

Subsequently, in *Muhammad v. State*, 782 So.2d 343 (2001), the court clarified it's ruling in *Tedder* as follows:

It is certainly true that we have previously stated that the jury's recommendation should be given “great weight.” *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). **However, this statement was made in the context of a jury's recommendation of a life sentence.** This legal principle also contemplates a full adversarial hearing before

the jury with the presentation of evidence of aggravating and mitigating circumstances. **We have also made clear that “[n]otwithstanding the jury's recommendation, whether it be for life imprisonment or death, the judge is required to make an independent determination, based on the aggravating and mitigating factors.”** *Grossman v. State*, 525 So.2d 833, 840 (Fla.1988); see *King v. State*, 623 So.2d 486, 489 (Fla.1993). (emphasis added).

In this case, although mitigating evidence may have existed, the advisory jury heard only aggravating circumstances because of Muhammad's previously stated intention not to present mitigating evidence. In fact, the trial court noted in its sentencing order that “[n]o factors in mitigation were argued to the jury.” Nonetheless, the trial court afforded the jury's recommendation great weight:

The jury recommended that this Court impose the death penalty upon AKEEM MOHAMMED by a majority of 10 to 2. *This Court must give great weight to the jury's sentencing recommendation.* The ultimate decision as to whether the death penalty should be imposed rests with the trial judge.

(Emphasis supplied.) Therefore, the trial court in this case, unlike the court in *Sireci*, did not “lessen ... reliance upon the jury's verdict.” *Sireci*, 587 So.2d at 452. In fact, it appears that the trial court felt obligated to give the jury's recommendation great weight.

Reversible error occurred in this case due to the trial court's decision to afford “great weight” to the jury's recommendation when that jury did not hear any evidence in mitigation and the defendant had, in fact, requested waiver of the advisory jury without objection by the State. Accordingly, we vacate the sentence of death and remand for resentencing proceedings before the trial court.

Muhammad v. State, 782 So.2d at 362.

In *Phillips v. State*, 39 So.3d 296 (2010), the court held that the trial court did not err in assigning “great weight” to the jury’s recommendation of death because it

adequately and independently considered the evidence as well as the aggravating and mitigating circumstances:

Giving great weight to the jury's recommendation does not mean that the trial judge is bound by the jury's recommendation. *See Ross v. State*, 386 So.2d 1191, 1197 (Fla.1980). **Rather, regardless of the jury's recommendation, the trial judge must conduct an independent analysis of the aggravating and mitigating circumstances.** § 921.141(3), Fla. Stat. (2007); *Ross*, 386 So.2d at 1197. “The relative weight given to each mitigating factor is within the discretion of the sentencing court.” *Trease v. State*, 768 So.2d 1050, 1055 (Fla.2000). **And the trial judge should utilize his experience to balance the facts of the case against the facts in other criminal cases independent of the jury's recommendation.** *Ross*, 386 So.2d at 1197. (emphasis added).

Phillips v. State, 39 So.3d at 305.

Remarkably, in Mr. Suggs' case, Judge Melvin, chose not to override the jury's recommendation, despite not being convinced that it was the appropriate sentence, and instead, shifted her own responsibility as sentencer to the appellate courts:

I took much comfort in the nitpicking appeal process that would follow - knowing it would be years before everybody finished reviewing this job I'd done. I took comfort in feeling I was only a small part of the process, hoping that somehow I would feel less than ultimately responsible, trying to ignore the fact that I had the choice to impose a life sentence and reject the jury's recommendation. I ignored the legal reality that the Supreme Court would not likely reverse a lower court's decision to impose a life sentence.¹⁰ (emphasis added).

¹⁰ Melvin, *supra*, at 60-61.

Judge Melvin recalled her reaction to the news that the Florida Supreme Court had affirmed Suggs' conviction and sentence on direct appeal:

I was sitting as a Juvenile Judge in Pensacola when the Florida Supreme Court issued its ruling on Suggs, the man I had sentenced to death almost four years earlier. **The conviction and sentence was affirmed; there was no error. Not even what they call harmless error. Nothing was wrong, legally wrong, yet the ruling really took the wind out of me. Suggs is now very likely to die because I'd been well trained and did a good job. Had I been sloppy or short tempered, Suggs would live.**¹¹ (emphasis added).

....

I have no question of Suggs's guilt, or that if anyone legally qualifies for the death penalty, it's him. **But will killing Suggs make the world a better place? I don't think so.**¹² (emphasis added).

....

You can't pay someone enough money to live with the decision ... [that] I made in Suggs' case. It's a very lonely place – one where my soul echoes and aches – one where I found no true answers but a place from which my job description required that I act decisively. The State – my boss – told me that killing in retribution is not wrong, as long as I did it right.¹³

In *Caldwell v. Mississippi*, the U.S. Supreme Court held that “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that responsibility for determining appropriateness of a defendant's death rests elsewhere.” *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). At issue in *Caldwell*, was “whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining

¹¹ *Id.* At 127-28.

¹² *Id.* At 128-29.

¹³ *Id.* At 129.

the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case.” *Id.* at 323.

Caldwell’s attorneys asked the jury to show mercy, and to confront the gravity and responsibility of calling for another’s death. *See Id.* at 320. “In response, the prosecutor urged the jury not to view itself as finally determining whether [Caldwell] would die, because a death sentence would be reviewed for correctness by the [State] Supreme Court.” *Id.* The court reasoned:

Bias against the defendant clearly stems from the institutional limits on what an appellate court can do—limits that jurors often might not understand. The “delegation” of sentencing responsibility that the prosecutor here encouraged would thus not simply postpone the defendant’s right to a fair determination of the appropriateness of his death; rather it would deprive him of that right, for **an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed “[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.”** *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). When we held that a defendant has a constitutional right to the consideration of such factors, *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (*plurality opinion*), we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses. As the dissenters below noted:

“The [mercy] plea is made directly to the jury as only they may impose the death sentence. Under our standards of appellate review mercy is irrelevant. There is no appellate mercy. Therefore, the fact that review is mandated is irrelevant to the thought processes required to find that an accused should be denied mercy and sentenced to die.” *Caldwell v. State*, 443 So. 2d 806, 817 (1983) (Lee, J., joined by Patterson, C.J., and Prather and Robertson, JJ., dissenting).

See Caldwell v. Mississippi, 472 U.S. at 330-31.

“[F]or a sentencer to impose a death sentence out of a desire to avoid responsibility for its decision presents the spectre of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns. The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death. This would thus also create the danger of a defendant being executed in the absence of any determination that death was the appropriate punishment.” *Id.* at 332.

Following the jury's seven to five death recommendation in Mr. Suggs' case, Judge Melvin sentenced him to die in the electric chair. Years later, she insists that death is not the appropriate sentence in this case. Erroneously, she believed that she was unable to override the jury's less than unanimous recommendation because she could not find any “legal error”. Having sentenced Suggs to death, despite her belief that a life sentence was and still is the appropriate sentence in this case, she denied Mr. Suggs his right to a fair determination of the appropriateness of his death.

Judge Melvin's book, considered with her letter to the governor are, in fact, newly discovered evidence under *Jones v. State*, 709 So.2d 512 (Fla. 1998) (*Jones II*). Therefore, they must be considered under the standard put forth in *Jones II*.

This newly discovered evidence of Judge Melvin's book and her letter to the governor meet the first prong of *Jones II* since they were only published and written in 2013, when Suggs was without state collateral counsel. This is his first opportunity to present these claims.

Additionally, this information is newly discovered evidence because it goes directly to the judge's state of mind when she sentenced Suggs, and violated *Caldwell* by shifting her own responsibility as sentencer to the appellate courts: “I took much comfort in the nitpicking appeal process that would follow – knowing it

would be years before everybody finished reviewing this job I'd done. I took comfort in feeling I was only a small part of the process, hoping that somehow I would feel less than ultimately responsible.”¹⁴

In *Roberts v. State*, 840 So.2d 962 (Fla. 2002), the newly discovered evidence at issue was testimony from the trial judge as to how the sentencing order was drafted. The court in *Roberts* ultimately granted relief in the form of a new sentencing proceedings based upon the improper drafting of the sentencing order. Similarly, in *Card v. State*, 652 So.2d 344 (Fla. 1995), statements by the sentencing judge as to the procedure used in preparing the sentencing order gave rise to the claim of newly discovered evidence. The Court in *Card* granted relief and directed the trial court to conduct an evidentiary hearing to review Card's sentencing procedure. Here, statements contained in Judge Melvin's book as to what happened during the sentencing of Mr. Suggs give rise to the claim of newly discovered evidence, just as in *Roberts* and *Card*.

Furthermore, *Scott v. Dugger*, 604 So.2d 465 (Fla. 1992), presents a situation closely resembling the one involving Mr. Suggs. In *Scott*, the court held that an equally culpable codefendant's life sentence constituted “newly discovered evidence” for which postconviction relief could be afforded. There, the trial judge recused herself from the 3.850 proceedings because she felt unable to give the State a fair hearing due to her conviction that Scott's sentence must be set aside based upon the subsequent life sentence of the codefendant. In a letter to the governor and other members of the Clemency Board, the trial judge discussed the relative culpability of the codefendants and urged them to grant clemency for Scott. The record in *Scott* clearly demonstrated that Scott and his codefendant, Robinson, had similar criminal records, were about the same age, had comparable low IQ's, and

¹⁴ Melvin, *supra*, at 60-61.

were equally culpable participants in the crime. In its ruling, the Florida Supreme Court, stated that, “[b]ased upon this information, this Court probably would have found Scott’s death sentence inappropriate had Robinson’s life sentence been factored into [the] review on direct appeal.” *Scott*, 604 So.2d at 469. In Mr. Suggs’ case, Judge Melvin, not only wrote a book discussing her sentencing of Mr. Suggs, but wrote a letter to the governor urging clemency for him, believing that death is not appropriate in this case. Judge Melvin’s statements in her book and her letter to the governor are newly discovered evidence, just as the statements by the judge in *Scott* are newly discovered evidence, and Mr. Suggs is entitled to relief. Moreover, during the time of her sentencing, Judge Melvin did not have the benefit of all of the newly discovered evidence that has since emerged through postconviction. Had Judge Melvin had the benefit of **all** of the evidence, there is a reasonable probability that the result would have been different.

ISSUE IV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SUGGS’ CLAIM OF *BRADY* EVIDENCE REGARDING MICHAEL MALONE.

In its Order summarily denying Suggs’ successive 3.851 motion, the circuit court ruled this evidence does not qualify as a *Brady* violation because Suggs cannot establish prejudice since Malone did not testify at trial; there exists no reasonable probability that the outcome would have been different; the absence of any forensic testing results alone does not automatically constitute either exculpatory or impeaching evidence; the State could not have suppressed information that was not known until after Suggs’ trial. (PC-R2. 575-576). The court further held that the 2013 FBI letter was not newly discovered evidence because the existence of the

criticized laboratory analysts was known publicly as early as 1997; and this evidence could have been discovered earlier through diligence. (PC-R2. 576).

During the initial investigation into the death of Pauline Casey, and after Mr. Suggs' arrest, certain evidence that was collected by the Walton County Sheriff's Office and FDLE, was forwarded to the FBI for analysis. (PC-R2. 181-182). Among those items submitted to the FBI for analysis were pubic hair combings from Pauline Casey, and pubic and head hair samples from both Pauline Casey and Ernest Suggs. Results of the FBI examination simply stated: "No hairs like the hairs of the suspect were found in specimen Q6, the pubic hair combings of the victim." Due to the negative results, neither the state, nor defense counsel offered any evidence at trial regarding this information.

Mr. Suggs and his federal CJA attorney, Martin McClain, received notification from the Federal Bureau of Investigation that there was a problem with the FBI's analysis of evidence in Mr. Suggs' case.¹⁵ On September 27, 2013, the FBI wrote a letter to McClain which included the following disclosure:

As you may be aware, in 1996, following allegations of improper practices by certain FBI Laboratory examiners, the United States Department of Justice established a Task Force to ensure that no defendant's right to a fair trial was jeopardized by the questioned performance of a criticized FBI Laboratory examiner. A subsequent Office of Inspector General Report (OIG Report), issued in 1997, specifically identified 13 examiners whose work may have failed to meet professional standards.

Our records show that you are currently counsel of record for, or previously represented, Ernest Donald Suggs. **The work of one or**

¹⁵ At the time McClain and Suggs received this notification, Suggs was without state collateral counsel to investigate and pursue this claim. CCRC-North was subsequently appointed to represent Suggs in state court. *See* Statement of the Case, *supra*.

more of the 13 criticized examiners is believed to have been involved in the criminal prosecution of Ernest Donald Suggs, in the case(s) identified in the attachment. In particular, we believe that FBI Examiner Michael Malone performed laboratory work for the government in this case. In addition to the criticisms set forth in the OIG Report, Examiner Malone’s work and testimony in other cases has been the subject of criticism, of varying degrees, by independent scientists hired by the FBI to review Examiner Malone’s laboratory results and testimony. (emphasis added). (PC-R2. 184-185).

Recently, on September 3, 2015, in the Hillsborough County hearing for Oscar Bolin, a whistleblower from the FBI, agent Fred Whitehurst, took the stand on Bolin’s behalf and not only described a culture of corruption at the FBI, but that the evidence provided by Michael Malone and his accompanying testimony about that evidence should not be considered in any trial because it is “unreliable” and “has no credibility”. (PC-R2. 224). Whitehurst went on to say: “I don’t think that anything that he has put out, anything that’s been in his hands, would be something valid to look at.” (PC-R2. 224). Furthermore, if an independent analyst was going to retest evidence that Michael Malone had his hands in prior to that, there would be no value to it. (PC-R2. 225). Whitehurst based this assertion on the knowledge that Malone had previously altered evidence that was in his custody. (PC-R2. 226).

In its holding in relation to this claim, the circuit erred in its analysis of the evidence under the standard set forth in *Jones II*. This evidence is *Brady* material and, therefore, should only be evaluated under that standard.

Furthermore, the circuit court erred in its holding that this was not *Brady* evidence because “the State could not have suppressed information that was not known until after Suggs’ trial.” (PC-R2. 576). This holding is in stark contrast to well-established caselaw that “the State is under a continuing duty throughout all proceedings to comply with *Brady*.” *Duckett v. State*, 918 So.2d 224, 239 (Fla. 2005); *see also, Strickler v. Greene*, 527 U.S. 263 (2009); *High v. Head*, 209 F.3d

1257, 1264 n.8 (11th Cir. 2000)(“**The State’s duty to disclose exculpatory material is ongoing.**”). “**This duty extends to postconviction proceedings.**” *Duckett*, 918 So.2d at 239; *see also Thompson v. Calderon*, 151 F.3d 918, 935 n.12 (9th Cir. 1998)(“The *Brady* duty is an ongoing one, and continued to bind the prosecution throughout [defendant’s] habeas proceedings.”). (emphasis added).

Brady requires the State to disclose material information within the State's possession or control that tends to negate the guilt of the defendant. To establish a *Brady* violation, a defendant must show: (1) evidence favorable to the accused, because it is either exculpatory or impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that prejudice ensued. *Jennings v. State*, 782 So.2d 853, 856 (Fla.2001).

The evidence concerning FBI analyst Michael Malone is *Brady* material and should be evaluated using that standard. In order to comply with *Brady*, the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police. *See Strickler v. Greene*, 527 U.S. 263 (1999). The FBI was most certainly acting on the state’s behalf in this case, as evidence was sent from the WCSO investigators to the FBI labs for analysis. Despite the report of the Office of Inspector General in 1997, Mr. Suggs was not notified that this investigation affected his case until September 27, 2013, when Mr. McClain received a letter from the United States Department of Justice. (PC-R2. 184-185). Again, this was during the time when Mr. Suggs did not have an attorney acting as state collateral counsel to be able to pursue this claim. It was also during this time that Mr. McClain was attempting to exhaust such state claims in federal court, and petitioning to be appointed as Suggs’ state registry counsel to pursue these claims. CCRC-North was only appointed in October of 2014, therefore, these claims are timely made, as they have been brought within one year of appointment to represent Mr. Suggs.

Prejudice has certainly ensued because evidence can no longer be retested by the defense. By virtue of Malone working on a case, the evidence is no longer viable. His work cannot be trusted, as he is known to falsely testify about his results and manipulate evidence in his control.

The report sent to the Walton County Sheriff's Office from the FBI laboratory lists the following specimens:

- Q6 Pubic hair combings from victim (C-14)
- K2 Head hair sample from victim (C-18)
- K3 Pubic hair sample from victim (C-17)
- K4 Head hair sample from suspect (Ex 11)
- K5 Pubic hair sample from suspect (Ex 10)

The report then gives the results of the examination as:

“No hairs like the hairs of the suspect were found in specimen Q6, the pubic hair combings of the victim.” (PC-R2. 181-182).

This begs the question, who did match the hairs that were found in the public hair combings of the victim? If it was not Mr. Suggs, then it was obviously another person who came into contact with Pauline Casey shortly before she was murdered. The manner in which Malone words his findings certainly does not exclude this scenario. In no way does Malone definitively state that the pubic hair combings from the victim only belonged to the victim. The only samples sent for comparison were from Pauline Casey and Ernest Suggs. Investigators from the Walton County Sheriff's Office, namely Captain Brad Trusty, only asked the FBI to see if there was a match between the samples from Casey and Suggs. Therefore, if there were unknown hairs, there would have been no samples with which to compare them. The report from Malone only answered the question of whether the samples matched Suggs, as requested by Captain Trusty.

Although a sexual battery was not charged in this case, investigators also found and collected semen from the inside of Pauline Casey's jeans. Testing on this semen stain was inconclusive. The most logical conclusion one can reach from the results of the hair analysis were that the hairs found in the pubic hair combings of the victim were those of her killer. They were not a match to Suggs, and therefore, they are exculpatory evidence.

This exculpatory evidence was intentionally destroyed by Michael Malone by virtue of him coming into contact with it, thereby rendering it unreliable. As Whitehurst has previously testified, Malone was known to have altered evidence in cases he handled. Anything he tested would no longer have any value. Because of this willful dereliction of duty, Mr. Suggs has lost the ability to obtain exculpatory information from this evidence. The resulting prejudice is that Mr. Suggs has lost crucial evidence that would have positively identified Pauline Casey's killer. Mr. Suggs is therefore, entitled to an evidentiary hearing on this claim.

ISSUE V

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SUGGS' CLAIM OF *BRADY* EVIDENCE OF FDLE'S INVESTIGATION INTO THE WALTON COUNTY SHERIFF'S OFFICE.

In its Order Denying the Defendant's Successive Motion to Vacate Judgment and Sentence, the circuit court stated the following as to this claim:

[T]he mere existence of an investigation does not automatically constitute newly discovered evidence or qualify as evidence of a nature that would probably produce an acquittal on retrial.

...

To the extent that defendant attempts to use the existence of FDLE's investigation as *Brady* material, such information also does not qualify automatically as exculpatory or impeaching evidence. The existence of

an investigation also would not establish any reasonable probability that the outcome of the proceeding would have been different. Therefore, any claim based on the mere existence of an investigation by FDLE of the Walton County Sheriff's Office is untimely.

(PC-R2. 576-577).

The trial court conducts both a *Jones II* newly discovered evidence analysis and a *Brady* analysis of this evidence. However, the only proper analysis is the one pursuant to *Brady*.

Evidence of misconduct at the Walton County Sheriff's Office was revealed during an evidentiary hearing in the case of Gary Whitton. Mr. Whitton was housed in the Walton County Jail during the same time as Mr. Suggs, and their cases were investigated and prosecuted by the same individuals during the same time period. Shirley Zeigler, now a retired FDLE criminal analyst, was involved in the investigation and trial of Mr. Gary Whitton, and testified at this evidentiary hearing concerning the illegal tactics employed by the Walton County Sheriff's Office. (PC-R2. 255-285).

Ms. Zeigler described how she was threatened by both the Walton County Sheriff, Quinn McMillan, and the State Attorney, Clayton Adkinson, to disobey a defense subpoena and not testify at trial, in order to suppress certain evidence favorable to the defense. When she did ultimately go to Walton County for Mr. Whitton's trial, she had to be accompanied by three armed FDLE agents because of the threats that she had received.

The [call] that really upset me the most I believe was when the sheriff ... called and told me that he wanted me to leave the lab immediately and go home ... he told me that he did not want me to come to court in DeFuniak. He said, 'If I did come to DeFuniak I definitely would not testify'. **I knew that FDLE had investigations going on here in DeFuniak about the sheriff and some of the things that were going**

on in the office and frankly I was very upset. I didn't like the menacing tone that was being used by both the sheriff and the state's attorney in the case. I figured I was just one individual. They had an entire office of deputies and that I could disappear very easily if they wanted. (PC-R2. 269-270). (emphasis added).

Ms. Zeigler went on to recount how the acting director of the FDLE at the time made arrangements for the bureau chief and two other armed agents to accompany her to testify in DeFuniak Springs. Upon her arrival at the courthouse, Ms. Zeigler experienced a brief, yet menacing encounter with Mr. Adkinson, the state attorney, in the hallway outside the courtroom, which she described as follows:

A. ... [Mr. Adkinson] came over and he told me that ... we were going to the sheriff's office so that he could discuss things with me. And he politely grabbed me by the arm by the elbow and started to lift, you know, kind of like you're coming with me type attitude. And about that time the three agents walked over. I don't think he realized that they were with me until they walked over and one of them told him that she is not going anywhere with you unless we accompany you.

Q. Did he change at that point?

A. Yeah, then he got very nice.

Q. Well, when you said he politely grabbed your shoulder was that literal or sarcastic?

A. That was facetiously.

Q. So it was not polite?

A. No, he was being demonstrative about the fact. He wasn't to where everybody in the room wouldn't have stopped and looked at him, but he grabbed ahold of my arm and kind of in a rather forceful manner said we're going to the sheriff's office.

Q. Did that frighten you?

A. Yeah, except I knew I had three agents there with me. **But if I had been there by myself I think I would have been petrified.**

(PC-R2. 273-274). (emphasis added).

Until the day before her testimony at trial, Mrs. Zeigler had no idea there was any contention regarding the serology results. The Pensacola lab had been told not to give her any information. The plan was for her to arrive to testify totally unaware of any contention. One of the lab people in Pensacola gave her a heads up on the day before trial. She then retested everything just to make sure she had it right. The result was that no blood DNA in the lab matched the victim's blood in that case. This was the same result she had originally obtained. During the *Whitton* trial, Lonnie Ginsberg from the FDLE in Pensacola was called to testify for the state that the blood was a match. Coincidentally, Lonnie Ginsberg was the same analyst who testified in Mr. Suggs' trial that the blood on his shirt was "consistent" with Pauline Casey's blood. This was a hotly contested feature of Mr. Suggs' trial, whereby the defense called their own expert who testified that Ginsberg's results were unreliable. (R. 4032-34; 4058).

This evidence is clearly *Brady* and should be evaluated under that standard for relief. This information regarding the FDLE investigation into the Walton County Sheriff's Office is favorable to Mr. Suggs because it is impeaching, and possibly exculpatory. As previously stated, a piece of evidence does not have to prove innocence to be exculpatory. **The impeachment of the adequacy of law enforcement's investigation and its techniques is favorable evidence that can be utilized by the defense.** See *Kyles v. Whitley*, 514 U.S. 419 (1995). (emphasis added).

Evidence of misconduct by the Walton County Sheriff's Office is certainly impeaching information as to both the officer's credibility and their investigation in this case. This evidence obtained from the *Whitton* case illustrates the brazen tactics used by the Walton County Sheriff's Department during this time period, and specifically those tactics used in attempts to suppress exculpatory evidence.

Shirley Zeigler, an FDLE analyst, was **threatened** by the State Attorney, Clayton Adkinson, and the Sheriff of Walton County, Quinn McMillian. She immediately called the acting director of FDLE because she **feared for her life**. He arranged for **three armed agents** to accompany her to court in Walton County, and that is the only reason why she was able to testify truthfully about her results. This is made clear by her testimony that the prosecutor, Clayton Adkinson, upon seeing her in the hallway, approached her, forcefully grabbed her arm, and attempted to take her to the sheriff's office. To his surprise, the three armed agents intervened and indicated that she would not be going anywhere without them.

The *Whitton* evidentiary hearing also revealed information about the existence of an investigation into the Walton County Sheriff's Office by the FDLE. This investigation took place during the investigation and prosecution of the *Whitton* and *Suggs* cases and was related to misconduct that was taking place within the sheriff's office at that time. Shirley Zeigler knew of this investigation into the Walton County Sheriff's Office during the time of the *Whitton* and *Suggs* trials. Recently, former deputy of the Walton County Sheriff's Office, Wyatt Henderson, also confirmed that FDLE was investigating the sheriff's office during that time. This is favorable to Mr. Suggs case because it shows the strong-arm tactics used by not only the prosecutor, but by the sheriff himself, to try to suppress evidence favorable to the defense. At the very least, it is impeaching material.

The second prong of *Brady* is satisfied because this was information that was certainly suppressed by the state. Since the FDLE investigation was ongoing at the

time of the trials of Suggs and Whitton, there was no way for the defense to have known about it. Clayton Adkinson was the prosecutor in both the Suggs and Whitton cases, and certainly did not turn over any information regarding an investigation into the Walton County Sheriff's Office during that time. This information was only revealed during a postconviction evidentiary hearing in Mr. Whitton's case. Furthermore, this is precisely one of the claims that was discovered while Mr. McClain was attempting to exhaust state claims in federal court, and thereafter, seeking to be appointed as Suggs' state registry counsel. This is the first opportunity Suggs has had to present this claim.

The third prong of *Brady* requires that prejudice ensued as a result of the state's suppression of this favorable evidence. "Evidence is prejudicial or material under *Brady* if there is a reasonable probability that had the evidence been disclosed, the result of the trial would have been different." *Jones v. State*, 998 So.2d 573, 579, citing *Bagley*, 473 U.S. 667, 678. "The critical question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Jones*, 998 So.2d at 580.

The existence of a criminal investigation into the Walton County Sheriff's Office for misconduct, during the same period of time that Mr. Suggs was arrested and prosecuted, would almost certainly put the entire case in such a different light as to undermine confidence in the verdict. Throughout Suggs' trial the defense argued that he had been framed for the murder of Pauline Casey. The case against him was entirely circumstantial. Had the jury also heard evidence that the Walton County Sheriff's Office was under investigation for misconduct, -- in addition to other *Brady* evidence concerning Michael Malone, Wyatt Henderson, and the fabricated testimony of Byars and Taylor -- it would most assuredly have put the entire case in a different light, so as to undermine confidence in the verdict. Mr. Suggs is entitled to an evidentiary hearing on this claim.

CONCLUSION

For the reasons set forth in this Initial Brief, Appellant, Ernest D. Suggs, requests that he be granted an evidentiary hearing on his claims, and any other relief deemed appropriate by this Court.

Respectfully submitted,

ROBERT S. FRIEDMAN

Capital Collateral Regional Counsel-North



DAWN B. MACREADY

Assistant CCRC-North

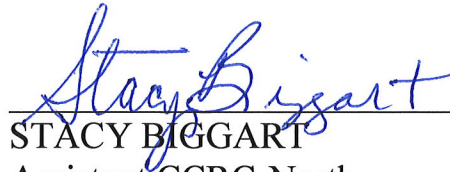
Florida Bar No. 0542611

175 Salem Court

Tallahassee, FL 32301

(850) 487-0922

Dawn.Macready@ccrc-north.org



STACY BIGGART

Assistant CCRC-North

Florida Bar No. 0089388

Stacy.Biggart@ccrc-north.org

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished on this day June 20, 2016, via electronic service to Tineshia Morris, Assistant Attorney General, at tineshia.morris@myfloridalegal.com and capapp@myfloridalegal.com and by U.S. Mail to Appellant, Ernest D. Suggs, DOC# 220267, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

CERTIFICATION OF FONT

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ROBERT S. FRIEDMAN

Capital Collateral Regional Counsel-North



DAWN B. MACREADY
Assistant CCRC-North
Florida Bar No. 0542611
175 Salem Court
Tallahassee, FL 32301
(850) 487-0922
Dawn.Macready@ccrc-north.org



STACY BIGGART
Assistant CCRC-North
Florida Bar No. 0089388
Stacy.Biggart@ccrc-north.org

COUNSEL FOR APPELLANT