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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

REPLY BRIEF OF APPELLANT

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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. Appellee has filed its answer to Mr. Suggs' initial brief, and this reply follows. References to the Appellee's Answer Brief are made with the letters AB, followed by the page number(s). This reply will address only the most salient points argued by the Appellee. Mr. Suggs relies upon his initial brief in reply to any argument or authority argued by Appellee that is not specifically addressed in this reply.

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.

REPLY TO TIMELINESS AND PROCEDURAL BAR ARGUMENTS IN ISSUES I, II, IV AND V

The state argues that Issues I, II, IV and V are untimely. (AB. 17-18; 24-25; 40-41; 48). The state also argues that Issues I, IV and V are procedurally barred. (AB. 18; 41; 48-49). The one year clock by which a capital defendant may file a motion pursuant to Rule 3.851 cannot start ticking until collateral counsel is in place. In fact, the idea of the one year clock was premised upon the assumption that there would be collateral counsel in place. In the 1993 Court Commentary to Rule 3.851, the Supreme Court Committee on Postconviction Relief in Capital Cases recognized that "to make the process work properly, each death row prisoner should have counsel available to represent him or her in postconviction proceedings."

The Florida Supreme Court recognized that the statutory right to postconviction counsel necessarily encompasses a right to effective assistance by the postconviction attorney assigned to the case. *Spaziano v. State*, 660 So. 2d 1363, 1370 (Fla. 1995) (recognizing that Spaziano was entitled to "adequate counsel and resources."); *Spalding v. Dugger*, 526 So. 2d 72 (Fla. 1988) ("each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings."). *Spalding* was a promise made to death-sentenced individuals like Mr. Suggs that effective representation would be provided. What the Florida Supreme Court did not advise them or Mr. Suggs was that, for the right it had recognized in *Spalding*, there would be no remedy. So death-sentenced individuals like Mr. Suggs relied, to their detriment, on the Florida Supreme Court's promise that effective representation would be provided in both state and federal court, not knowing that the promise was empty.

As to the state's failure to insure Mr. Suggs had collateral counsel as Section 27.7001 et seq. of the Florida Statutes promised: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

Attorney abandonment cannot be counted against the client. Here, Moldoff abandoned Mr. Suggs, insofar as he failed to notify the court that he was no longer actively representing Mr. Suggs, and that Registry counsel needed to be appointed. *See Maple v. Thomas*, 132 S. Ct. 912 (2012). In *Maples*, the Court reasoned:

> (a) As a rule, a federal court may not entertain a state prisoner's habeas claims "when (1) 'a state court [has] declined to address [those] claims because the prisoner has failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.'" The bar to federal review may be lifted, however, if "the prisoner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as a result of the alleged violation of federal law."
>
> Cause for a procedural default exists where something external to the petitioner, something that cannot fairly be attributed to him[,] ... "impeded [his] efforts to comply with the State's procedural rule." A prisoner's postconviction attorney's negligence does not qualify as "cause," because the attorney is the prisoner's agent, and under "well-settled" agency law, the principal bears the risk of his agent's negligent conduct. Thus, a petitioner is bound by his attorney's failure to meet a filing deadline and cannot rely on that failure to establish cause.
>
> **A markedly different situation arises, however, when an attorney abandons his client without notice, and thereby occasions the default. In such cases, the principal-agent relationship is severed and the attorney's acts or omissions "cannot fairly be attributed to [the client]. Nor can the client be faulted for failing to act on his**

own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him.

(emphasis added). (internal citations omitted). *Maples*, 132 S. Ct. at 914-15. Moldoff had a duty to withdraw from the case and obtain state collateral counsel for Mr. Suggs. Having not informed the court that he was no longer representing Mr. Suggs as his state collateral counsel, Moldoff effectively abandoned his client. As long as Moldoff remained counsel of record, the court was led to believe that Moldoff was continuing in his representation of Mr. Suggs. However, unbeknownst to the court, Mr. Suggs was in fact, without a functioning attorney of record in his state proceedings.

The United States Supreme Court has held that: "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). *See Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("Persons facing the most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."). Mr. Suggs has not been afforded a fair opportunity to show that the Eighth Amendment prohibits his execution.

REPLY TO ISSUE I

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

The state 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. (AB. 17-18). The testimony at the 2003 hearing was incredibly brief and 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, Mr. Suggs would have been able to obtain such information, until Laura Johnson was ready to reveal it.

This evidence is from Laura Johnson is not procedurally barred because it is 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*.

Under the second prong of *Jones II*, 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.

The state posits that this newly discovered evidence does not provide a reasonable doubt that Suggs committed this crime when reviewed in connection with the evidence admitted at trial. (AB. 21). However, this reasoning fails to take

into account **all of the evidence**, as required by *Jones II*. 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). Certainly if jurors heard **all of the evidence** that is now known, they would have returned a different verdict.

The state's argument that this evidence is cumulative is without merit. (AB. 22-23). Although Mr. Suggs' trial counsel argued to the jury that Ray Hamilton or Steve Casey could have killed Pauline Casey and cited the Ms. Casey's life insurance policy as motive, trial counsel did not have the benefit of this newly discovered evidence from Laura Johnson that she was raped and impregnated by her step-father, and planned to tell her mother mere days before she was murdered, to strengthen the argument to the jury that Steve Casey killed his wife.

REPLY TO ISSUE II

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

The state confuses the standards for relief in this claim. To be clear, this is a newly discovered evidence claim premised upon *Brady*. 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).

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.

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. (emphasis added). 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.

"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.** (emphasis added).

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.

REPLY TO ISSUE III

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

The state asserts that "the published opinion of a judge, written in a book for sale to the general public, is not newly discovered evidence," and cites to *Schlup v. Delo*, 513 U.S. 298, 324 (1995). (AB. 33, 36). Nowhere in the 26-page *Schlup* decision, is this proposition contained.

Judge Melvin's book, considered with her letter to the governor are 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*. However, they must also be examined pursuant to *Caldwell v. Mississippi*, 472

U.S. 320 (1985). 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 registry counsel. This is his first opportunity to present these claims.

As to the second prong in *Jones II*, the state contends that this claim has no merit because it is only the judge's personal opinions, and then proceeds to once again erroneously quote from the case of *Schlup v. Delo*, 513 U.S. 298, 324. The state contends that *Schlup* "defin[es] newly discovered evidence as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." The state then argues "a memoir is none of those things." (AB. 36). It should be noted that *Schlup* concerns the proper legal standard governing actual innocence claims. The state cannot simply handpick a random quote from a case that has nothing to do with newly discovered evidence of a *Caldwell* violation by the court. The entire paragraph from which the state handpicked this quote is as follows:

> Claims of actual innocence pose less of a threat to scare judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty. Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. *See supra*, at 864. **To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.** Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful. Even under the pre-*Sawyer* regime, "in virtually every case, the allegation of actual innocence has been summarily rejected." The threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing.

Schlup v. Delo, 513 U.S. at 324. (emphasis added). Moreover, *Schlup* concerns federal habeas proceedings and is not the law in Rule 3.851 proceedings. As discussed *supra*, *Swafford*, *Hildwin*, and *Jones* are the law in 3.851 proceedings. The state has long maintained that *Trevino* and *Martinez*, cases involving federal habeas proceedings, are not the law in Florida 3.851 proceedings. If the state now wants *Schlup* to be the law in Florida, then it must also concede that *Trevino* and *Martinez* are the law in Florida, as well.[1]

The state proceeds to quote from cases in which courts failed to recognize "new research studies" or "new opinions" as newly discovered evidence. (AB. 33). These cases can easily be distinguished from Mr. Suggs' case. Judge Melvin's book and her letter to the governor are specifically about this case. While new opinions or research studies can apply to many people or cases, Judge Melvin's book and letter apply directly to Mr. Suggs' case. The state also cites to *Foster v. State*, 132 So.3d 40, 65 (Fla. 2013), which involves a juror seeing photos in a book which differed from those in evidence. (AB. 34). This can also be distinguished from Mr. Suggs' case, as Judge Melvin was the final sentencer, not a juror. She was required to independently weigh the evidence. She was the one who sentenced Suggs to death. This is not a juror issue. 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

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[1] *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

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."[2]

The state further suggests that Suggs is using a 2010 Florida Bar news article referenced by Judge Melvin in her letter to the governor, as newly discovered evidence. Although this article contains important information regarding the realities of the death penalty, nowhere in his motion does Suggs state that his claim is premised upon this information.

Judge Melvin wrote a book discussing her sentencing of Mr. Suggs and 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, and Mr. Suggs is entitled to relief. When she sentenced Mr. Suggs to death, 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.

REPLY TO ISSUE IV

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

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

[2] Laura Melvin, *Public Secrets & Justice – Journal of a Circuit Court Judge* (2013), at 60-61.

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 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 state asserts: "Suggs tries to argue that if the hairs do not match Suggs they have to match someone. This presupposes the fact that there were unidentified hairs located." (AB. 46). 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, and the Walton County Sheriff's Office did not provide the FBI any additional comparison samples. If there were unknown hairs, there would have been no samples with which to compare them. The report from Malone only answered Captain Trusty's question of whether the samples matched Suggs.

The state further claims that "[t]here is no indication that Malone played any significant role in testing items in this case." The letter from the United States

Department of Justice dated September 27, 2013, directly contradicts this statement. (PC-R2. 181-182). It clearly states: "we believe that FBI examiner Michael Malone performed laboratory work for the government in this case." Moreover, the initials "RQ" appeared on the reports from the FBI concerning the above-mentioned evidence. These initials were used by Michael Malone and indicated that he was the principal examiner in the case. (PC-R2. 218-220). Moreover, the state's timeliness argument is without merit because there is no way Mr. Suggs could have known or deduced that "RQ" were the initials for Michael Malone. The FBI specifically used "examiner symbols" instead of the examiner's initials so defense counsel would not be able to identify the agent who examined the evidence. (PC-R2. 218).

REPLY TO 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.

The state misses the point of this claim entirely. To assert in its Answer that "While Zeigler alleged she felt threatened by the actions of the Walton County Sheriff, she still went to court and testified truthfully as to her results," completely minimizes the fear and intimidation she endured. (AB. 53). Either the state failed to read the transcripts of Ms. Zeigler's testimony provided by Mr. Suggs or the state is intentionally attempting to mislead the court as to this issue. Shirley Zeigler 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.

In its analysis of this claim, the state erroneously commingles the *Jones* and *Brady* standards. This evidence is clearly *Brady* and should be evaluated under that standard for relief. This information regarding the FDLE investigation into Walton County 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). 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.

In his 3.851 motion, Mr. Suggs specifically stated that he previously filed a demand pursuant to rule 3.852(i) to the FDLE for documents generated as a result of this investigation into the Walton County Sheriff's Office; that FDLE acknowledged that Mr. Suggs was entitled to these documents; that due to the age of the documents, FDLE has not yet been able to locate them; and that because of this, Mr. Suggs is unable to fully plead this claim and requested leave to amend upon receipt of these documents. Shirley Zeigler knew that FDLE was conducting an 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, 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. The state incorrectly attempts to analyze this claim under *Jones* and claims Suggs is time-barred because he failed to exercise due diligence, and this claim should have been brought within one year of its discovery. (AB. 49-50). This is precisely one of the claims that was discovered while Mr. McClain was attempting to exhaust state claims in federal court, and seeking to be appointed as Mr. Suggs' state registry counsel. The state further claims that references made to *Whitton* in Suggs' Second Amended Motion to Vacate filed on August 31, 2001, demonstrate that he did not use due diligence with regard to this claim. (AB. 49). The reference to *Whitton* in the previous motion to vacate was regarding a claim for access to public records premised upon equal protection, as Suggs, who had private counsel, was claiming he was being treated differently than other similarly situated death-sentenced individuals who were represented by a capital collateral representative.

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 state asserts that "[i]f there was no relief granted in *Whitton*, Suggs' claim that the events of the *Whitton* case would satisfy *Jones* or *Brady* is unfathomable." (AB. 54). Unfortunately, the state fails to see how 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.

CONCLUSION AND RELIEF SOUGHT

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,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished on this day July 28, 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

This is to certify that the foregoing Initial Brief of Appellant has been reproduced in Times New Roman 14-point font, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

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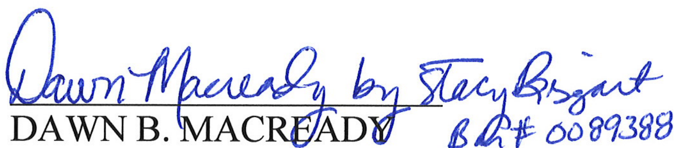

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