

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-155**

**DONTAE MORRIS
Appellant,**

vs.

**STATE OF FLORIDA,
Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FL
Lower Tribunal No. 2010-CF-010203**

REPLY BRIEF OF THE APPELLANT

**ADRIANA CRISTINA CORSO
Florida Bar No. 0112427
Assistant CCRC**

**ANN MARIE MIRIALAKIS
Florida Bar No. 0658308
Assistant CCRC**

**CAPITAL COLLATERAL
REGIONAL COUNSEL-MIDDLE
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
813-558-1600
corso@ccmr.state.fl.us
mirialakis@ccmr.state.fl.us
support@ccmr.state.fl.us**

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PRELIMINARY STATEMENT ABOUT THE RECORD

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REPLY TO STATE'S ANSWER

I. THERE IS NEWLY DISCOVERED EVIDENCE THAT ASHLEY PRICE LIED WHEN SHE SAID THAT DONTAE MORRIS CONFESSED TO HER THAT HE COMMITTED THE MURDERS, VIOLATING MR. MORRIS'S RIGHTS UNDER THE 5TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A new trial is warranted because Mr. Morris has presented evidence that was unknown by counsel at the time of trial, that could not have been known through the exercise of due diligence and that would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512 (Fla. 1998). While the State's answer claimed Mr. Morris failed to offer any reason or testimony about why Mr. Baird's testimony could not be obtained prior to trial or how it would be admissible, the postconviction-record reflects differently.

Mr. Morris has maintained, and the postconviction court agreed, that the evidence is admissible as impeachment evidence to challenge the credibility of Ms. Price as the State's star witness. T1675. This evidence is also admissible as a statement against interest. During the evidentiary hearing, it was noted by CCRC-M Counsel Mr. Shakoor that Ms. Price was confronted with this evidence during her postconviction testimony to set the foundation for the admissibility of this impeachment evidence. T1675, 1895. Even the State in its Answer acknowledged, "Ms. Price denied telling Mr. Baird that she was

pressured by police and denied telling Mr. Baird that Mr. Morris never actually confessed to her." A. 57. Thus, Ms. Price put the credibility of these statements directly at issue. Additionally, the State in its answer gives a third path to admissibility: as a prior inconsistent statement. A. 51.

As to the second prong of Jones, Mr. Baird's testimony was not evidence that could have been known by trial counsel by the use of due diligence during trial. See Jones, 709 So. 2d at 522. Mr. Baird made it clear during his evidentiary hearing testimony that he did not view it as possible to reveal any of this information prior to these postconviction proceedings. T1929. This was in large part because of the pressure he and Ms. Price were receiving from the State regarding their corresponding legal issues. T1927. At the time Mr. Baird learned of this information in February of 2013, Ms. Price was in the midst of the legal, financial, and custody issues addressed in the initial brief and did not want to in any way exacerbate or jeopardize her well-being by coming forward with evidence of possible perjury. T1927.

As for their prejudice analysis, the State attempts to tout Ms. Price's established credibility on her apparent "knowledge" of "details that had not been made public" as the reason for this court to discount the prejudicial impact of this newly discovered evidence. A. 52. However, these "details" known by Ms. Price were also details that would have been known by the State or

interviewing TPD officer. Thus, Mr. Baird's testimony directly refutes the entire premise on which the State rests its credibility of Ms. Price. If Ms. Price were pressured to testify by the State, it would have been necessary for the State to feed her specific details regarding the crime in order to make her knowledge seem believable before the jury. This evidence would have therefore properly vetted Ms. Price so jurors could put her testimony into the proper context.

Further, while the State is correct that this Court should award deference to the postconviction court's findings, Ms. Price's lack of credibility is apparent from the record itself. Unlike the financial, legal, and custodial issues of Ms. Price, Mr. Baird has no reason, incentive, or motive to lie in this case for a man he has never met. Mr. Baird was only found and contacted through the course of postconviction counsel's investigation, rather than someone initially coming forward with a story to tell.

Nor is the State correct in asserting, without citation, that assessing the lack of evidence against Mr. Morris in conjunction with Mr. Baird's testimony is an improper analysis. Answer p. 53. As this Court has recognized, "in a newly discovered evidence analysis, a court must conduct a cumulative analysis of all the evidence" – that is, weigh the new evidence, "in combination with the evidence developed in postconviction proceedings," and the evidence presented at trial viewed through the lens of these new revelations—"so that there is a

‘total picture’ of the case and ‘all the circumstances of the case.’ Swafford, 125 So. 3d at 776, 778 (quoting Lightbourne v. State, 742 So. 2d 238, 247 (Fla. 1999)); see also Jones, 709 So. 2d at 521. The State largely relied upon the testimony of Ms. Price to identify Mr. Morris as the perpetrator of the murders. Their other evidence is circumstantial and has been challenged by postconviction counsel. Therefore, because this admissible, newly discovered evidence so “weakens the case against [the defendant]” and “completely changes the character of” the case and unquestionably leads to “reasonable doubt as to [Morris’s] culpability,” Swafford, 125 So. 3d at 778 a new trial is warranted.

II. DONTAE MORRIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE, DEVELOP A DEFENSE AND CHALLENGE THE STATE’S CASE, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

A. Counsel’s Failure To Meaningfully Investigate, Develop A Defense, And Challenge The State’s Case Was Deficient Performance That Prejudiced Mr. Morris.

Trial Counsel’s deficient performance is underscored by postconviction counsel’s uncovering of the following evidence and theories that were not previously discovered, nor presented, by trial counsel. This evidence obtained by

postconviction counsel was uncovered by investigating leads found in trial counsel's files. Id. Counsel's deficiency is clear because it was unreasonable to fail to conduct additional investigations because the evidence already available to trial counsel would have led a reasonable attorney to investigate further. Id.

Additionally, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, 539 U.S. at 527.

1. Counsel failed to investigate and obtain checks fraudulently cashed in Mr. Morris's name while he was incarcerated.

The State's answer relies largely upon the argument that it was Mr. Morris's resistance to certain lines of defense that shroud defense counsel's actions in a protective cloak of reasonableness. A. 56. While true that the Strickland Court stated that when the "defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable[.]" more recently the McCoy Court squarely addressed the proper issue of the role of counsel during trial. The McCoy Court explained that "trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." See McCoy v. Louisiana, 138 S. Ct. 1500 (2018); see also Gonzalez v. U.S., 553 U.S. 242, 248

(2008). "Some decisions, however, are reserved for the client-- notable, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. See Jones v. Barnes, 463 U.S. 745 (1983). Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles. See Gonzalez, 128 S.Ct. at 1170 ("[numerous choices affecting conduct of the trial" do not require client consent, including "the objections to make, the witnesses to call, and the arguments to advance."). Thus, it does not shield counsel from the responsibility of presenting an argument to simply claim that the client was unreceptive to it when what arguments to pursue falls squarely within the role of counsel.

Additionally, as discussed in the initial brief, evidence was presented at the postconviction proceeding that showed Mr. Morris had become amenable to this line of defense prior to trial. Further, Mr. Morris's concern regarding this defense was in attempting to ascertain who the individual was who cashed these checks in his name while he was incarcerated. During the evidentiary hearing, trial counsel conceded that it was unnecessary to prove who cashed the checks in order to present the defense. T1957. As documented in the October 19, 2011 attorney note, Mr. Morris seemed receptive to exploring the defense. PC/140. Mr. Boldt agreed that after this October 19, 2011 attorney note entry, this theory of defense was dropped and not mentioned again until an attorney note dated August 1, 2013.

PC/140. This was around the time period that the relationship between Mr. Hileman and Mr. Morris became strained and this entry should be properly interpreted as counsel's attempt to begin shifting blame to Mr. Morris in anticipation of another lost trial. PC/341, 432.

Contrary to the State's attempt to attenuate the check cashing incidents from the murders the presentation of this argument is imperative. This evidence creates an alternate suspect challenging the state's assumptive argument that because the passenger identified himself as Dontae Morris, this is proof beyond a reasonable doubt that the passenger was in fact Dontae Morris. Again, it is not the *timing* of the checks that is the probative information, but rather it is the fact that on four separate occasions, someone used Mr. Morris's identification card which contained all of his personal information that was given to the officers the night of the murders. See Magil v. Dugger, 824 F.2d 879, (11th Cir. 1987)

Trial counsel's mention of this theory of defense during opening statement contradicts their reliance on the "attenuated" timeframe and the "lack of plausibility." It was mentioned during Opening Statements by trial counsel for a reason, and it seems more likely that because it was not fully and thoroughly investigated, counsel was unable to present it persuasively in its entirety. Deficient performance of counsel arises when counsel argues a defense in opening and presents no evidence to support the defense during trial. Avery v. State, 737 So.2d

1166, 1167 (Fla. 2d DCA 1999); see also Harris v. Reed, 894 F.2d 871, 879 (7th Cir.1990) (explaining that counsel “primed the jury” to hear evidence, failed to present it, and “the jury likely concluded that counsel could not live up [to] the claims made in the opening”).

Nor is trial counsel saved from a finding of deficiency by simply obtaining minimal information to investigate this theory of defense. A “cursory investigation” does not “automatically justif[y] a tactical decision.” Wiggins v. Smith, 539 U.S. 510, 527 (2003). As addressed in the initial brief, the most relevant evidence was not discovered until the postconviction proceedings.

During trial, the State placed undue emphasis on the shooter giving Mr. Morris’s name and information to police when an individual who resembled Mr. Morris and possessed his Florida ID Card only a few years earlier was able to cash checks in broad daylight. This evidence should have been presented because it directly supported the theory of the defense that the State had insufficient evidence identifying Mr. Morris as the perpetrator of the crime. Bringing jurors’ attention to this alternate possibility would have significantly weakened the State’s identification of Mr. Morris and would have changed the outcome of the proceeding had it been presented. T1944. This deficiency prejudiced Mr. Morris, and relief is proper. See Strickland, 466 U.S. at 685.

2. Counsel failed to meaningfully investigate and uncover evidence to challenge Ms. Price’s testimony.

Contrary to the State's assertion that Morris failed to present any evidence to show that the cross-examination of Ms. Price during trial was insufficient, the multitude of evidence admitted during the postconviction evidentiary hearing proves otherwise. Further, trial counsel's "awareness" of some of these issues does not save their deficiency. Their cursory investigation, and subsequent cross examination, of basic, general facts about Ms. Price's custody, legal, and financial issues was insufficient in light of the plethora of evidence available after a thorough investigation. Especially when the facts that were obtained by trial counsel should have put a reasonable attorney on notice that further investigation into these issues was necessary. See Brewer v. Aiken, 935 F.3d 850 (7th Cir. 1991). No tactical motive can be ascribed to an attorney whose omissions are based on ignorance due to the failure to properly investigate or prepare. See Id.; see also Wiggins, 539 U.S. at 526-27.

As one example from the many put forth in the initial brief, trial counsel only knew the basic fact that Ms. Price was facing child custody issues. Trial counsel did not know the extent of those issues and its impact on her financial wellbeing. Therefore, it was necessary for trial counsel to investigate into her child custody issues to be able to properly cross examine her regarding the full context of what she was facing when she testified against Mr. Morris. Additionally, while counsel did ask Ms. Price about the direct financial assistance she received from

the Tampa Police Department, the full financial troubles of Ms. Price at the time of her testimony was not investigated or uncovered and therefore the jury was left unaware of how financially desperate Ms. Price was at the time she gave the police her statement. Instead, the cursory, overbroad questions asked by trial counsel and relied on by the State in its answer were deficient in light of the evidence presented by postconviction counsel.

It is not a question of the direct promise one receives in exchange for her testimony. The subtle exertions of influence over Ms. Price were occurring in more nuanced ways and required more nuanced questioning. While the State did not overtly promise Ms. Price leniency with her felony criminal charges in exchange for her testimony, the circumstances surrounding her continuances and allowing her legal case to remain pending over her head until the completion of her testimony against Mr. Morris still cast significant doubt on her credibility and should have been presented during cross examination. Trial counsel failed to establish that Ms. Price had selfish motives for giving the statement she gave to the police and for persisting with this statement through trial. Their efforts fell short of a reasonable, competent effort to impeach an important State witness. Because counsel failed to obtain all of the necessary evidence prior to determining that this defense should not be pursued, a strategic decision could not have been made because counsel was not equipped with all of the facts in order for them to have

fully considered the issue. This prejudiced Mr. Morris and relief is proper.

3. Counsel failed to call Marcus Ogelsby to testify to contradict the identification of Mr. Morris as the shooter in the dash cam video.

Counsel's was deficient for failing to call the only available witness who could testify to an alternative description of what Mr. Morris was seen wearing the night of the murders. Furthermore, his contact with Mr. Morris was a mere 20 minutes or so before the shooting. Additionally, Mr. Morris was seen in a different automobile than the one the shooter was in at the time of the traffic stop. This deficiency is especially egregious considering that this was the only available eyewitness evidence the defense could use to challenge the State's eyewitness identification evidence of Mr. Morris. This prejudiced him because the State's eyewitness accounts of his description from the night of the shooting went unchallenged before the jury. See Strickland, 466 U.S. at 685.

4. Counsel failed to offer context to evidence admitted by the State during trial.

Ms. Brantley never named the individual in the passenger seat of her car that evening. As the undisputed driver of the vehicle, she is the only living eyewitness to the murders. It was not only credible, but necessary, for defense counsel to draw jurors' attention to the texts messages already admitted into evidence that showed Mr. Morris and Ms. Brantley broke up at some point that evening. Instead, the defense chose not to mention it or put on any evidence at all. This deficiency prejudiced Mr. Morris. Counsel's failure to present this

information left the State's theory unchallenged. Had counsel presented this information, it is likely that the outcome would have been different. See Strickland, 466 U.S. at 685.

B. Counsel was deficient for failing to obtain a working version of the November 10, 2011, jail visit video, which contained incredibly probative mental health evidence.

The State's argument in its answer that Mr. Morris was not prejudiced because Dr. McClain "did not testify that her Spencer hearing testimony would have been different" is without merit. Dr. McClain did in fact testify differently during the evidentiary hearing. In response to a question asking specifically whether her opinion of Mr. Morris's mental health as changed after viewing the November 10, 2011 jail visit video (Hereinafter "11/10/11" video), Dr. McClain testified that her initial impression of his diagnosis has changed from major depression with psychotic features, to schizophrenia. T2887-88

Dr. McClain also explained during the evidentiary hearing that based on the evidence provided to her of Mr. Morris's mental health, that she had formulated the hypothesis of "major depression with psychotic features" as a possible diagnosis for Mr. Morris. T2859. She was not able to see any direct evidence of Mr. Morris's psychosis when she made this diagnosis. T2860. She had also not reviewed the 11/10/11 before making any recommendations regarding Mr. Morris's mental health concerns and possible mitigation explorations to defense counsel.

T2861-62.

Dr. McClain also testified that she would not have been able to formulate her opinion about Mr. Morris suffering from schizophrenia without review of this 11/10/11 video. T2888. Regardless of the general information that Dr. McClain received regarding Mr. Morris's psychosis and relied on by the State in its answer to attempt to cure counsel's deficiency, firsthand observation and knowledge is different. Dr. McClain explained that the video evidence she observed in the 11/10/11 video was different than the evidence provided to her by trial counsel because "the way the video progresses helps to define the type of voices and the content of the voices." T2862. She was also able to observe nonverbal behaviors by Mr. Morris which designate more of a paranoid type of ideation." T2870, 2887. Further, she says there is a struggle Mr. Morris seems to be experiencing regarding the differentiation of the voices that she was not able to previously ascertain. T2885.

After viewing the video, which Dr. McClain described as having "strengthen[ed]" her original observations and opinions regarding the psychotic episodes, and now believes what Mr. Morris was exhibiting at the time to "an actual psychotic disorder such as schizophrenia, as opposed to [her] initial impressions which were major depression with psychotic features." T2862. Thus, had Dr. McClain been provided this jail visit video by competent counsel, her

recommendations to defense counsel would have included the "exploration of [a] potential psychotic disorder such as schizophrenia" and her Spencer hearing testimony would have likely included whatever diagnosis or result stemmed from these explorations that were otherwise not considered. This video would have totally altered not only Dr. McClain's Spencer hearing testimony, but it would have also changed her recommendations to counsel regarding mental health mitigation which will be addressed again below. Trial counsel was deficient for failing to obtain and provide this 11/10/11 video to Dr. McClain and this deficiency had prejudicial impact on both the guilt, and penalty phase of Mr. Morris's trial.

As for the direct observation logs and the trial counsel's deficient failure to use portions of the logs to challenge the statement "I repent for killing," the concerning nature of the statements made by Mr. Morris speak for themselves and do not rely solely upon expert testimony to be properly explained to the jury. Thus, it does not cure the deficiency to hide behind the trial court's ruling on the defense's motion in limine precluding any mental health testimony regarding this statement. Additionally, trial counsel could have submitted the troubling statements to the jury through officer testimony and would have had the opportunity to dispel any possible misconception during closing argument.

Mr. Boldt testified during the evidentiary hearing that he agreed that this Court's order on the motion in limine allowed for offering evidence of other

statements made by Mr. Morris during his direct observation. T2371. His explanation that this is a "back door" around this Court's ruling is nonsensical. Instead, this was actually the only available evidence that could have complied with this Court's ruling and put his statement into the proper perspective: As one made during a psychotic break, not as an affirmative admission to murder. T2384. Thus, the jury could have also known that during this observation hold, Mr. Morris stated that voices are telling him that he has AIDS and that he believed his brother put voodoo on him to die. T2377, 2378. There are also several portions of the log stating that Mr. Morris is either murmuring, mouthing words silently or talking to himself. T2380.

Additionally, as concerning as the statement "young buck child molester" may be, Mr. Boldt also agreed that absolutely no evidence exists of Mr. Morris ever having sexually abused anyone. T2383. On the other hand, the actual most damaging statement, "I repent for killing" was admitted without the context of his truly psychotic state of mind. T2373. In between the two extremes could have been known by the jury that Mr. Morris seemed to be ranting that the officers were going to rape him and kill him and that they were waiting to fall asleep to harm him. Instead, Mr. Morris's statement "I repent for killing" was submitted to the jury as a direct confession without any explanation. This was a prejudicial deficiency on the part of trial counsel.

Finally, it should be noted that this Court acknowledged the trial court error in not allowing a mental health expert to testify to the reliability of the statement, “I repent for killing.”¹ However, since trial counsel had made so little effort to challenge the rest of the State’s case, this Court found the error to be harmless. Morris v. State, 219 So.3d 33, 42 (Fla. 2017). Reviewing this error now, in light of all the evidence that could have been presented to defend Mr. Morris, as well as all the other statements that Mr. Morris made at the time of his observation, the error is significant. The Defense should have had the ability to challenge a false admission of guilt with expert testimony. This is the type of error that calls into question the outcome of Mr. Morris’s trial.

C. The cumulative effects of counsels’ errors amount to overwhelming deficiency and warrant relief.

Trial counsel failed to put forth any evidence during its case in chief. However, a review of the facts contained in the initial brief highlight how imperative it was to have attacked the State’s case with all of the evidence that could have been available to competent counsel. This includes: (i) that another individual had previously used Mr. Morris’s identity to fraudulently cash checks; (ii) the true

¹ This Court found, “Specifically, the testimony Morris sought to offer was relevant to the circumstances surrounding his statement, namely his mental state at the time he made the statement, in an attempt to cast doubt on the credibility of the statement that he made. See, e.g., Palmes v. State, 397 So.2d 648, 653 (Fla. 1981) (defendant’s state of mind is relevant to the question of what weight to give the confession in determining guilt).

extent of the motives, bias, and financial and legal circumstances of the State's star witness, Ashley Price; (iii) a witness to challenge the identification of Mr. Morris based on the clothing worn by the shooter in the video and the automobile he was last seen driving; (iv) and to give context to text message evidence admitted by the State that actually went to show that it was unlikely it was Mr. Morris who was in Ms. Brantley's passenger seat that evening. Had this evidence been properly put forth by trial counsel the outcome of the proceeding would have been different. Instead, trial counsel allowed the State's case to remain virtually unchallenged before the jury.

Simply reviewing the facts of the murder *presented at trial* does not address the issue of prejudice. The State's review of the evidence are all facts that were submitted by the State to the jury *uncontested by trial counsel*, but heavily attacked by postconviction counsel. From the text messages, Ms. Price's testimony, the identification of Mr. Morris based on his knowledge of his personal information, and the "I repent for killing," statement; postconviction counsel has presented substantial, substantive, admitted evidence during the proceedings that severely discredits the State's theory regarding each of the above assertions.

Taken together, failing to present items A. through D. deprived Mr. Morris of a new trial. If all of the above-mentioned evidence would have been present, the jury would have found the State's case insufficient to convict Mr. Morris. See

Strickland, 466 U.S. at 685.

III. TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY AND SENTENCING PHASE OF MR. MORRIS'S TRIAL FOR FAILING TO INVESTIGATE AND PRESENT ADEQUATE MITIGATION, THUS DENYING MR. MORRIS HIS RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

- A. Trial Counsel failed to investigate and present adequate mitigation evidence during Mr. Morris's penalty phase.

Trial counsel was deficient for failing to task any mental health expert or investigator to complete the type of psychosocial evaluation conducted by Dr. Cunningham and presented during the evidentiary hearing. Further, it is not a defense that trial counsel encountered initial resistance from certain family members during trial. Postconviction counsel was only able to provide to Dr. Cunningham these same additional family members, notably, several members of the totally unexplored paternal side of Mr. Morris's family, to interview after extensive efforts to develop trust between Mr. Morris's family members and the postconviction team. This is part of the duties and responsibilities of trial counsel.

Additionally, Dr. McClain testified that there is a difference between being tasked with an ACE, or psychosocial investigation like the one completed by Dr. Cunningham, and the forensic psychological evaluation that she was tasked to complete with Mr. Morris. Dr. McClain also noted that her approach between the two are different. T2858. One evaluates a person's behavior in light of the

environmental, social, inherited, and societal impact one's upbringing as opposed to evaluating behavior for a mental health diagnosis. Dr. McClain explained that it would have been Ms. Springer's role in this case to provide her information that she thinks would be helping in her evaluation. T1137-1138.

Further, mental health evidence should have been presented during the penalty phase before the jury. Counsel's deficiency for failing to put forth any mental health mitigation is not justified based on a fear that the State would then present evidence of anti-social personality disorder (hereinafter "ASPD"). Had Dr. McClain been properly provided the jail visit video by counsel, her belief regarding Mr. Morris suffering from schizophrenia would have changed her recommendation to defense counsel regarding her fear in presenting her mental health testimony. T2924. In fact, Dr. McClain explained that had she been properly provided the 11/10/11 video discussed at length above, she could have testified that ASPD is not an appropriate diagnosis when there is evidence of a rule out mental health disorder, "such as bipolar or schizophrenia that would account for these types of behaviors." T2891, 2909, 2924. Thus, her concern regarding schizophrenia particularly would have assuredly dispelled her fears regarding the State putting on evidence of ASPD because she could have ruled out ASPD behaviors with a proper diagnosis of schizophrenia. T2891.

Instead, because she was not provided all of the available mental health

information by trial counsel, her hypothesis at the time regarding Mr. Morris's mental health was a possible diagnosis of major depression with psychotic features. T2859. This formed the basis of Dr. McClain's recommendation to defense counsel regarding the presentation of mental health mitigation that is heavily relied on by the State to cure trial counsel's deficiency. T2859. The fact that Dr. McClain did not receive the 11/10/11 video heavily impacted the presentation of mitigation during Mr. Morris's penalty phase before the jury. As Dr. McClain explained in her testimony, "with regards to mitigation or potential mitigation that further exploration of the potential psychotic disorder and the onset of that would be very important." T2890.

Finally, while the State and the postconviction court cite Mr. Boldt's credibility regarding his statement that he did not recall Dr. Ingulli recommending follow up neurological testing based on Mr. Morris's test scores, the evidence presented during postconviction proceedings reflects differently. During the evidentiary hearing, after testifying that he did not recall Dr. Ingulli's recommendation, Mr. Boldt had his recollection refreshed by an email sent by Dr. Ingulli, on which he was copied, in which she asked for a neurology consult- T2404-05. Thus, the evidence in fact proves the opposite, that Mr. Boldt's testimony is not at all credible because Dr. Ingulli did recommend a neurology consult which was ignored by trial counsel.

Additionally, the State's citation to Hall v. State, 212 So.3d 1022 (Fla. 2017), that presenting a more favorable expert during the postconviction proceeding does not make counsel deficient, its not applicable here- In this case, there are the same experts, testifying to facts that could have been presented, but were not based on several omissions and deficiency on the part of trial counsel.

In light of these facts, and all of the new evidence that Mr. Morris has presented for the first time on post-conviction review, there is at the very least a “reasonable probability” that “but for counsel’s unprofessional errors,” Mr. Morris would not have been sentenced to death. Strickland, 466 U.S. at 694-95; Walker, 88 So. 3d 128, 142 (Fla. 2012) (“Considering the lack of background evidence produced at trial, [and] the wealth of such evidence produced at the postconviction hearing . . . , our confidence in the outcome of the penalty phase trial is undermined.”)

Therefore, a new penalty phase is warranted.

IV. THE STATE WITHHELD VITAL MENTAL HEALTH EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND AN EVIDENTIARY HEARING IS WARRANTED

Contrary to the State's assertion that the jail visit video suppression was a pre-trial discovery issue, the majority of the facts alleging Mr. Morris's prima facie Brady v. Maryland, 373 U.S. 83 (1963), claim occurred after the conclusion of trial and during the postconviction proceedings. Whether the State suppressed evidence is a question of fact that can only be resolved by an evidentiary hearing. See Way

v. State, 630 So.2d 177, 178 (Fla. 1993). Allen v. State, 854 So. 2d 1255, 1259 (Fla. 2003). Because a material question of fact exists as to whether the State suppressed this 11/10/11 jail visit video, especially because the video no longer exists in the State's files as evidenced by a certificate of diligent search filed during postconviction proceedings, an evidentiary hearing is warranted.

CONCLUSION

Based on the foregoing claims, viewed individually and cumulatively, Mr. Morris's death sentence is unconstitutional. He prays this Court vacate his death sentence and remand for a new trial. In the alternative, because a genuine dispute of fact exists and that the current record is insufficient to provide relief, this Court should reverse the circuit court's order denying Mr. Morris an evidentiary hearing on his Brady claim.

Respectfully submitted,

ADRIANA CORSO
Florida Bar No. 0112427
Assistant CCRC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of October, I electronically filed the foregoing Motion with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following: The Honorable Michelle Sisco, Circuit Judge, 401 N. Jefferson Street, Room #102, Tampa, FL 33602, heckshsl@fljud13.org, Marilyn Beccue, Assistant Attorney General, Office of the Attorney General, Marilyn.Beccue@myfloridalegal.com, capapp@myfloridalegal.com, Scott Harmon, Assistant State Attorney, harmon_s@sao13th.com, Stapleton_a@sao13th.com, 419 North Pierce Street, Tampa, FL 33602, mailprocessingstaff@sao13.com, Circuit Court Reporting, 800 E. Twiggs Street, Room 606R, Tampa, FL 33602, reporters@fljud13.org and by U.S. mail to Donte Morris DOC # 214353, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

Attorneys for the Appellant

/s/ Adriana Corso

Adriana Corso
Florida Bar No. 112427
Assistant CCRC-M
CORSO@CCMR.STATE.FL.
US
support@ccmr.state.fl.us

/s/ Ann Marie Mirialakis

Ann Marie Mirialakis
Florida Bar No. 658308
Assistant CCRC-M
MIRIALAKIS@CCMR.STAT
E.FL.US

/s/ Nicole Engebretsen

Nicole Engebretsen
Florida Bar No. 117696
Assistant CCRC-M
ENGBRETSSEN@CCMR.ST
ATE.FL.US

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.

/s/ Adriana Corso

Adriana Corso
Florida Bar No. 112427
Assistant CCRC-M
CORSO@CCMR.STATE.FL.
US
support@ccmr.state.fl.us

/s/ Ann Marie Mirialakis

Ann Marie Mirialakis
Florida Bar No. 658308
Assistant CCRC-M
MIRIALAKIS@CCMR.STAT
E.FL.US

/s/ Nicole Engebretsen

Nicole Engebretsen
Florida Bar No. 117696
Assistant CCRC-M
ENGBRETSSEN@CCMR.ST
ATE.FL.US