IN THE SUPREME COURT OF FLORIDA

CASE NO. 01-2149

JAMES AREN DUCKETT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, STATE OF FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Duckett's motion for post-conviction relief. The circuit court denied Mr. Duckett's claims following an evidentiary hearing. Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on appeal to this Court in the direct appeal.

"PC-R. ___" - Record on appeal from denial of the Motion to Vacate Judgment and Sentence.

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Duckett, an innocent man, remains in jail for a crime he did not commit, and whether he is executed for this crime. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims and the issues raised here. Mr. Duckett through counsel, respectfully urges the Court to permit oral argument.

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STATEMENT OF THE CASE AND FACTS

James Duckett is innocent. Although this may not provide an independent basis for relief from his convictions, it is a fact which cannot be ignored as one reviews the myriad errors which occurred at his trial.

A. COURSE OF PROCEEDINGS

In May of 1988, Mr. Duckett was convicted of first degree murder and one count of sexual battery, crimes which he did not commit. He was sentenced to death by a jury vote of eight to four. The evidence against Mr. Duckett was circumstantial.

On direct appeal, this Court affirmed Mr. Duckett's convictions and sentences. State v. Duckett, 568 So. 2d 891 (Fla. 1990).

Mr. Duckett filed a Motion to Vacate Convictions and Sentence on May 1, 1992 (PC-R. 1859-70). An Amended Motion was filed in November of 1994 (PC-R. 337-470). On May 23, 1995, the court ordered an evidentiary hearing on claims II, A, D, E and F, and claims XI and XIX. Evidentiary hearings were conducted on January 7-8, 1997, October 28-30, 1997, December 17, 1997, October 26-27, 1998, and February 19, 1999.

Following the hearings, both sides submitted post-hearing briefs detailing the arguments and legal conclusions to be submitted to the court. The state's brief was styled in the

form of a proposed order (PC-R. 1551-91). At the court's behest, both parties submitted their brief to the court on disk.

On August 13, 2001, the circuit court entered an order denying Mr. Duckett relief on all claims (PC-R. 1782-1819). The circuit court's order was virtually identical to the post-hearing brief filed by the state, including several errors. Although many of these errors can be described as typographical, the failure to correct some of the errors reflects a complete omission on the part of the circuit court to consider the issues raised in Mr. Duckett's 3.850 motion, much less to adequately weigh and evaluate the strength of the claims. For example, in several claims the court refers to the "tactful" decisions of counsel during the trial (PC-R. 1806-07).[1] Any attorney with even a basic knowledge of post-conviction jurisprudence is familiar with the concept of ineffective assistance of counsel and whether or not counsel's decisions are "tactical". The fact that the judge did not review the state's order closely enough to catch this error and change it prior to signing the order[2] denying relief is a

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[1]Likewise, the state refers to the "tactful" decisions of counsel throughout its memorandum.

[2]In fact, the judge did not actually sign the order but simply entered an order with his signature stamped in printed

strong indicator that the judge did not engage in any meaningful review of the claims in Mr. Duckett's case prior to the entry of the order.

Additionally, both the state's post-hearing memorandum and the court's order denying relief contain a statement of facts taken almost verbatim from the Appellee's initial brief on direct appeal (PC-R. 1782-94). Although this Court affirmed Mr. Duckett's convictions and sentences on direct appeal, it held that the introduction of the testimony of Kimberly Ruetz was in violation of Williams v. State, and should not have been introduced in the trial. Yet the statement of facts in the circuit court's order denying Rule 3.850 relief includes a detailed summary of the testimony of Ms. Ruetz in support of the conviction of Mr. Duckett (PC-R. 1791-92). The circuit court's statement of facts also relies heavily upon the testimony of two other females who testified against Mr. Duckett at trial (PC-R. 1790-91), despite the fact that the circuit court denied Mr. Duckett a hearing regarding this issue, erroneously ruling that this issue had already been

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form. The certificate of service is signed by his judicial assistant. Thus, other than the assumption that the signature stamp would not have been utilized without the judge's authorization, there is no indication that he actually read the order prior to it being entered.

considered on direct appeal.[3] The circuit court's failure to draft a correct statement of the facts relevant to the proceedings in its court again reflects the failure of the court to consider the facts as they related to the issues raised by Mr. Duckett in his Motion to Vacate.[4]

Two and one half months after signing the order denying Mr. Duckett's Rule 3.850 motion, Judge Lockett abruptly announced his decision to retire immediately from the bench (*See* Frank Stanfield, *Judge Lockett To Step Down After 15 Years On Bench*, Lake Sentinel, Oct. 30, 2001).

Following the denial, Mr. Duckett perfected his appeal to this Court.

B. STATEMENT OF THE FACTS

On May 11, 1987, Mr. Duckett was working the night shift as a police officer in the small town of Mascotte, Florida. At around 10:30 p.m. Mr. Duckett was running radar on Highway 50

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[3]The court's ruling was in error because it failed to take into account the fact that trial counsel did not and could not raise his own ineffectiveness with respect to these witnesses when he litigated the Williams rule issue on direct appeal.

[4]Any cumulative analysis done by the circuit court pursuant to Kyles is suspect if the court relied upon facts/evidence which improperly presented at trial. *See* Kyles v. Whitley, 514 U.S. 419 (1995); *see also* Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001)(court has a duty to analyze Brady materials in context with other evidence presented at trial).

across the street from the Circle K convenience store. The Circle K sat on the corner of Highway 50 and Sunset Drive. To the left of the Circle K, and in the same building, was a laundromat, and to the right of the building, on the same side as Sunset Drive, was a dumpster. While sitting there, Mr. Duckett noticed a young white girl and a young Mexican boy standing behind the dumpster (R. 1682). Mascotte had a curfew, and based upon the apparent youth of the two individuals, Mr. Duckett decided to go across the street and speak with them.

Upon arrival, Mr. Duckett parked in front of the store and went into the store to ask the clerk if she knew the name and age of the girl (R. 557, 1683). The clerk told Mr. Duckett the girl's name was Teresa and that she thought she was 10 to 13 years of age (R. 557). The boy with her was Salvador Calisto. Mr. Duckett then went back outside and asked the two to come speak with him (R. 557-58, 1683). They stood in front of Mr. Duckett's police car while he spoke with them (R. 636). Ms. McAbee told him that she was 11 and Mr. Calisto told him that he was 16 (R. 613, 1684). Soon after, Calisto's uncle, Maximino Rubio, drove up to the Circle K. Mr. Duckett recognized Mr. Rubio and went over to talk to him about his nephew (R. 1685-86). Mr. Duckett did not like the situation with Calisto and Ms. McAbee hanging out behind the dumpster at

that time of night and told Mr. Rubio that he needed to speak to his nephew about this(R. 638, 1686). Mr. Rubio and Mr. Calisto gathered their laundry from the laundromat and left (R. 616, 639)

Mr. Duckett asked Ms. McAbee to sit in the police car so he could speak with her further (R. 1684). Mr. Duckett explained to Ms. McAbee that she should not be at the store at that time of night and told her she needed to go home (R. 1687). Mr. Duckett made notes of the interview in his police notebook, noting that Ms. McAbee was wearing a white and tan sweater and that she was eleven years of age (D. Exh. 16). Ms. McAbee then exited the Circle K and left to walk around the dumpster behind the store in the direction of her home (R. 1687). Ms. McAbee's home was less than 400 feet behind the Circle K, on Sunset Drive (R. 513, 896).

Several persons were at the Circle K at this time, each of whom reported that Mr. Duckett got back into his car after Ms. McAbee left and drove off alone down Highway 50 towards Groveland, in the opposite direction of Ms. McAbee (R. 1656). Some of these people testified at trial, and some of them did not. Nonetheless, with one glaring exception which will be discussed *infra*, all agreed that Mr. Duckett left the Circle K

without anyone in his car and headed in the opposite direction as Ms. McAbee and her home.

At about midnight, Dorothy McAbee, mother of Teresa McAbee, decided to report her daughter missing to the police. She had checked at the Circle K earlier and been told that her daughter had left around 10:30-10:45. Mr. Duckett was out on patrol and no one was at the Mascotte Police Station, so Dorothy McAbee went to the Groveland Police Station a few miles down the road (R. 589-90). There, she spoke with an officer and explained that she believed her daughter was missing. Mr. Duckett was called on his police radio and returned to the Mascotte Police station to meet with Ms. McAbee. Mr. Duckett took a statement from her concerning the last time that she had seen her daughter and what her daughter was wearing at this time (R. 535). Ms. McAbee filed a missing persons report and went home (R. 520).

Mr. Duckett went to Ms. McAbee's home about 15-20 minutes later to get a picture of her daughter (R. 520, 1696-97). He returned to the police station where he made a flyer with the photo, which he then took to the Circle K and two other local convenience stores (R. 721-22, 673, 678). He then went to the home of Mr. Calisto and asked if he knew where Ms. McAbee was

(R. 642). Calisto told him he had not seen her since he left the Circle K.

Around 1:00 a.m., Mr. Duckett called his police chief, Michael Brady, and told him about the report and asked if there was anything further they should do (PC-R. 224, 227; R. 741, 1697). Mr. Duckett erroneously believed the girl was probably hanging out with some friends and had failed to tell her mother, but he continued to look for her (PC-R. 225). He also resumed his regular duties, including handing out some tickets to speeding motorists on Highway 50 prior to the end of his shift (R. 708-9, 711-12). At the end of his shift, Mr. Duckett again reported to Chief Brady, and then went home to sleep.

Shortly thereafter, Jim Clark decided to go fishing in the small lake located in the orange groves on Sunset Drive, approximately 3200 feet behind the Circle K (R. 897). Entrance to the orange grove was via a dirt road that came off of Sunset Drive, curved back by a lake and a pumphouse, and then continued back onto Sunset. As Mr. Clark stood by the pumphouse located on the lake, he noticed what he believed to be a body in the edge of the lake (R. 733). The exact time of this discovery is not clear, as documents and testimony indicate different times. At trial Mr. Clark did not give a

time for the discovery of the body, but noted that he dropped his children off at school between 7:15 and 7:30 a.m. then went to three other fishing holes before going to the pumphouse and observing the body (R. 728).

Mr. Clark found Chief Brady and took him back to the lake, where Chief Brady confirmed that the body was that of Ms. McAbee (PC-R. 231; R.758, 775). The Chief then informed the Lake County Sheriff's Office (LCSO) of the discovery. It was initially unclear which agency had jurisdiction of the case, but was subsequently determined that the LCSO would be in charge of the investigation. Chief Brady called Mr. Duckett at his home and informed him of the discovery. Mr. Duckett asked the Chief if he should come in but the Chief told him no. Thus, Mr. Duckett did not arrive at the scene until later that day.

Based on nothing more than a personal hunch, investigator Chuck Johnson decided on May 11 that James Duckett was somehow involved in the homicide ("the feeling was there"), and any chance of investigating other suspects ceased. Despite knowing this, Mr. Duckett voluntarily met with LCSO officers and gave a statement (R. 1279). Mr. Duckett was subsequently indicted for the murder of Ms. McAbee.

In October of 1987, five months after the crime, the person who would become the key witness for the state, Grace Gwendolyn Gurley, came to light. At that time Ms. Gurley was an inmate in the Leesburg Jail awaiting disposition on a charge of violation of probation. After seeing an account of Mr. Duckett's arrest on television, she mentioned to one of the officers that she was from that area and knew Mr. Duckett. (D. Exh. 4, pp. 7-8). She did not tell the jail officer that she had observed anything relevant to the disappearance of Teresa McAbee on the night of May 11, 1987 (D. Exh. 4, p. 8). Ms. Gurley was visited by persons from the LCSO right after she spoke to the officer in the jail (*Id.*). From this point on, the officers and prosecutors visited Ms. Gurley several times at the jail to speak about the case and even removed her from the jail on various occasions to visit with family and her boyfriend or to just get a meal. (*Id.* at 9, 10, 12, 15-19, 37-38).[5] By the time of Mr. Duckett's trial in May of 1988,

[5]Jail records, memos in prosecutor Steve Hurm's personal file and statements of other witnesses confirm that Ms. Gurley was visited on several occasions by persons from the LCSO and that she was also removed from the jail on several occasions by these same persons. (*See* Arg. I; PC-R. 1321, 1338, 1341). This critical *Brady* information was never disclosed to the defense prior to trial (PC-R. 1276).

the work had paid off. The state now had a witness who could place Ms. McAbee in Mr. Duckett's car.

Ms. Gurley's testimony was the lynchpin of the prosecution's case. Not only was she the sole witness to place Ms. McAbee in Mr. Duckett's car, but she testified he drove off alone and then circled back around, picking up his passenger on the side of the Circle K by the dumpster. The only inference the jury could draw from this, and the proposition the state argued throughout the trial, was that Mr. Duckett snuck back to pick up Ms. McAbee so that he could sexually assault and kill her.[6] Of course, the testimony was false.

Ms. Gurley has now admitted in several statements, including a sworn deposition, that the testimony she gave at Mr. Duckett's trial was not true. In a statement given to attorney Jack Edmund after trial, Ms. Gurley explained that she agreed to lie at trial because the prosecution team told her that she would not do as much time if she cooperated with them (*Id.* at 19)[7]. To insure that her story rang true, they

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[6]Because Ms. Gurley was pregnant, the parties agreed to let her testify in a video deposition, without the scrutiny of a live jury.

[7]Ms. Gurley's Department of Corrections file indicates that she was sentenced to two years on three counts of grand theft auto with credit for 104 days on November 24, 1987, that

took her to the Circle K, showed her where to say she was standing and showed her what road she allegedly traveled that night (*Id.* at 19). Rocky Harris told her where to say Mr. Duckett's car was parked and exactly what to say about what she had allegedly seen that night (*Id.* at 14, 20-21, 37). There was no question in Ms. Gurley's mind that the prosecution team knew she was lying because a) they told her what she needed to say and b) she specifically told them that the whole story about what she had allegedly seen was a lie (*Id.* at 35, 39). Ms. Gurley was told she had to stick with this story at trial or risk further prosecution (*Id.* at 26, 35).[8]

Almost immediately after this sworn statement, Ms. Gurley was visited by representatives of the Lake County State Attorney's Office, Ric Ridgeway and Ken Raym (D. Exh. 6). Ms. Gurley was not asked by Mr. Ridgeway to provide any details

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she was not eligible for parole consideration and was to serve the maximum sentence, and that her sentence of incarceration was to expire on August 11, 1989 (D. Exh. 38). In fact, Ms. Gurley was released from prison on April 14, 1988, one year and four months before the expiration of her sentence and one week before her video deposition in Mr. Duckett's case (*Id.*; D. Exh. 39).

[8]Ms. Gurley obviously still believed this threat in August of 1989 because she asked Mr. Edmund if she was going to get "recharged" for speaking with him (D. Exh. 4, p. 25).

concerning what she allegedly saw on May 11, 1987, nor what events led up to her testimony. Mr. Ridgeway simply asked Ms. Gurley whether she had told the truth at trial and in her earlier statement to Rocky Harris (*Id.* at 2). Ms. Gurley answered yes to these questions (*Id.*). Ms. Gurley subsequently admitted that this statement to Mr. Ridgeway and her testimony at trial were the result of conversations with her interviewers both at the jail and during trips out of the jail into town(D. Exh. 3, 4).

In October of 1991, Ms. Gurley was contacted by representatives of Mr. Duckett to discuss the truthfulness of her trial testimony. In an interview with CCR investigator Grace Villazon, Ms. Gurley reiterated the facts that she had told Mr. Edmund during her 1989 deposition. Specifically, she noted that she was taken out of the jail on several occasions by investigators with the state, that she was taken to the Circle K and coached concerning what she allegedly heard and where she was standing on the night in question, that she in fact lied when she testified that she saw Mr. Duckett drive off with the victim, and finally, that she did so because she was told that the state would prosecute her as an adult if she did not help and that the state would help get her out of prison if she did cooperate. (PC-R. 1347-48). Ms. Gurley

confirmed these facts with Ms. Villazon in a subsequent interview in October or November of 1991 (*Id.* at 1350), and in a third interview with Ms. Villazon when undersigned counsel was present (*Id.* at 1351). In this third interview, Ms. Gurley confirmed that she had been told to go in the bathroom if she was not sure of an answer and that someone from the state would be there to help her, and that she did do this during her testimony (*Id.*)[9]. Ms. Gurley was willing to sign an

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[9]Ms. Gurley did in fact take a bathroom break in the middle of her testimony and returned with a solid answer concerning her view of the car at the time the deceased went around the corner of the store:

Q. Now, when you saw the police car parked by the dumpster, where by the dumpster was the car parked? In front of it? Behind it? The side of it?
A. It was like beside it and probably a little bit in front of it. Just a little, if it was... it was right beside it.
Q. And when you observed that, you say that you were down by the trees or bushes on the other side of the store?
A. No, sir.
Q. Where were you then?
A. I was by the sidewalk of the store.

Witness to the Court: Excuse me. Could I take a break for a second to go to the bathroom.

* * *

Q. I believe where we left off you indicated you saw the police car pull up by the dumpster, is that right?
A. Yes, sir.
Q. Could you see the police car from where you were at that time?
A. Yes, sir.
Q. Maybe I am a little confused, but I think...I

affidavit at this time admitting that she had in fact lied at trial, and even made a slight change in this affidavit to insure that it was perfectly accurate. (*Id.* at 1354; D. Exh. 40).

In 1997, Ms. Gurley again admitted to investigators working on Mr. Duckett's case that she had lied at trial and that she was going to tell the truth now (PC-R. 1314, 1322-23, 1649), that she had been told to go in the bathroom if she got into trouble on her questions (PC-R. 1315), that when she did go in the bathroom someone was there to answer her questions (*Id.*) and that the attorney representing the state in post-conviction told her she could be charged with perjury if she changed her trial testimony (*Id.* at 1315-16).[10]

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thought you testified earlier today that you couldn't see the car, but you could tell it was a police car, because you could see the blue lights on the roof?

A. I seen the car.

(D. Ex. 2, p. 29-30).

[10]In fact, when Mr. Duckett's investigators went to serve Ms. Gurley with a subpoena for the post-conviction hearings, she stated that she would not go to jail for doing the right thing (PC-R. 1315-16). Additionally, she told them that State Attorney Don Scaglione had advised her on how to file a complaint against undersigned counsel if she so desired, despite the fact that she had not voiced any desire to do so or requested this information from the state.

There is a wealth of evidence that corroborates Ms. Gurley's recantation, as opposed to her trial testimony. At the time of Mr. Duckett's trial no witnesses corroborated Ms. Gurley's version of events. Neither Jessie Gaitan nor Vickie Davis, the persons with Ms. Gurley on the evening of May 11, 1987, testified at trial. In fact, in separate statements to the sheriff's office, neither Mr. Gaitan nor Ms. Davis claim to have seen a police officer drive out of the Circle K parking lot with or without a passenger. And though both of these individuals gave differing accounts of the events on May 11 from Gwen Gurley's account, neither was interviewed by defense counsel nor called as a witness for the defense.[11]

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[11]Attorney Nathaniel White, who represented Mr. Duckett during the video deposition of Ms. Gurley, testified that he is reasonably certain he never even saw the statements of Mr. Gaitan or Ms. Davis prior to questioning Ms. Gurley (PC-R. 1260). Mr. White stated he would have questioned Ms. Gurley about these inconsistencies had he been aware of the statements (*Id.* at 1261).

Attorney White was not counsel of record for Mr. Duckett, nor did he have any other involvement with the case than the deposition of Ms. Gurley. He simply shared office space with Mr. Duckett's attorney, Jack Edmund, and agreed to handle the deposition of Ms. Gurley when Mr. Edmund requested his help (*Id.* at 1258-59). Arguably, the mere fact that trial counsel delegated the questioning of Ms. Gurley – a witness he admits was probably the most critical witness in the entire case (PC-R. 975) – to an attorney who was neither counsel of record nor involved in the case (*Id.* at 979), denied Mr. Duckett his right to constitutionally adequate representation. But there can be no dispute that trial counsel's failure to provide Mr. White with these statements of contradictory witnesses prior to Mr. White's questioning of this key witness constituted

Mr. Gaitan's statement consisted of a series of leading questions based upon Gwen Gurley's account of the evening. Though Mr. Gaitan's statement differed from Ms. Gurley's on numerous critical points, the conclusion of the investigators was that "he pretty well confirms step by step what the girls say." (D. Exh. 9, p. 6 - Taped statement of Jessie Gaitan, Oct. 29, 1987). The truth is that Mr. Gaitan did not confirm Ms. Gurley's version and would have provided valuable impeachment evidence to the jury. Jesse Gaitan denies that he ever saw a police officer at the Circle K, that he hid in the bushes to avoid a police officer, that he ever saw a police car drive past on Talbot Street with or without a small person in the passenger seat, or that he ever saw a police officer at anytime that night (*Id.*; PC-R. 1402). Additionally, he makes no mention of ever being questioned by a police officer about his age or getting a lecture on the curfew and states that he did not go down to the store with Gwen Gurley on a second trip (*Id.*). Contrary to the conclusion of the investigators who interviewed Mr. Gaitan pre-trial, his statement provides no support for the story Ms. Gurley told at trial.

Ms. Davis' statement to the investigators was also fraught with inconsistencies, both internal and with Ms.

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deficient performance.

Gurley's testimony. It is noted at the outset that Ms. Davis and Ms. Gurley spoke before the sworn statement to insure that "all the details were worked out." (D. Exh. 8, p. 1 - Taped statement of Vickie Davis, Oct. 28, 1987)[12]. Apparently all the details were not worked out in advance and it was necessary for the tape recorder to be turned off twice during the interview for some discussion to take place (D. Exh. 8, p. 2). Even with all these safeguards, Ms. Davis makes "errors" in her statement. Fortunately for the state, the investigators knew the "facts"[13] and were able to help Ms. Davis out when she got confused. Though Ms. Davis originally stated she saw a police car at 1:30 a.m. going up a hill on a street whose name she did not know, she eventually "remembered" that the street was Thomas Street and that the time was "about eleven [t]en-thirty -- eleven, or twelve." (*Id.* at 8). Even with this "assistance", Ms. Davis denied in her original statement that the police officer ever spoke to her about the curfew (as alleged by Ms. Gurley) or that she ever saw the police officer leave the store (*Id.* at 8-9).

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[12]Sheriff's Officer: Ah... because there were some memory lapses on both parts we put you two together and all the details were worked out as to what you and Gwen did the night of the 11th of May, 1987(D. Ex. 8, p. 1).

[13]These were of course not the true facts but only the "facts" necessary to convict Mr. Duckett.

Had trial counsel interviewed Ms. Davis, he might have uncovered the reasons for these inconsistencies. Vickie Davis testified in the evidentiary hearing that Ms. Gurley asked her to lie in her statement to assist Ms. Gurley in gaining an early release from jail (PC-R. 1326)[14]. The officers allowed the two to speak at length before taking the sworn statements so they could get their stories right. When Ms. Davis forgot the details of her story the tape was turned off so that she and Ms. Gurley could figure out what she should say and so that she could confirm with the officers specifically what they wanted her to say (*Id.* at 1329-30)[15]. The truth is that Ms. Davis and Ms. Gurley and Mr. Gaitan went to make a phone

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[14]Ms. Davis testified that the officers were present when Ms. Gurley told Ms. Davis to go along with her story to help her get out of jail (PC-R. 1327), so there can be no dispute that the officers were aware that Ms. Davis was not being truthful in her statement.

[15]For example, during Ms. Davis' taped statement in 1987, the recorder was turned off after the following question:

Sheriff's Officer: All right. While you were at the store did you see any police cars or ah....policemen in uniform.

TAPE OFF

Vickie Davis: Do I answer now?
Sheriff's Officer: Yeah, go ahead.
Vickie Davis: No, I didn't..

(D. Exh. 8, p.2). Ms. Davis testified in 1997 that the recorder was turned off on this occasion to make sure that she understood that she was to say they had been to the store two times and that she did not see Mr. Duckett until the second visit (PC-R. 1330).

call at the store that evening but when they saw Mr. Duckett out front, they left. At no time did Ms. Gurley ever leave Ms. Davis for the rest of the evening and at no time did they return to Circle K. Ms. Davis lied in 1987 at the suggestion of Gwen Gurley and with the acquiescence of the state (*Id.* at 1331).

Raine Payne, a friend of Ms. Gurley's in 1987, testified at the evidentiary hearing that Ms. Gurley confirmed to her that she had lied at trial because she wanted to get out of jail before her baby was born (PC-R. 1341)[16]. This conversation is fully consistent with Ms. Gurley's recantation and with Ms. Davis' explanation of the coercion by the state authorities in the case which led to the false testimony at Mr. Duckett's trial. Ms. Gurley also told Ms. Payne that she was given a script by the officers that told her what she was supposed to say (*Id.* at 1342)[17]. Ms. Payne concluded that she had spoken with Ms. Gurley about a month before the evidentiary hearing and that Ms. Gurley had informed her she

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[16]Ms. Gurley's daughter was born May 18, 1988, approximately one month after she was released from jail (*See* D. Exh. 39, Probation file of Gwen Gurley)

[17]Ms. Payne further testified that she was confident the script mentioned by Ms. Gurley was not a transcript of Ms. Gurley's statement because Ms. Gurley was familiar with a statement and did not call it that (PC-R. 1342).

was going to repeat her trial testimony in the evidentiary hearing because if she told the truth she would go to jail (*Id.*). Ms. Payne's testimony is wholly consistent with Ms. Gurley's recantation. This consistency, coupled with Ms. Payne's lack of motive to lie in these proceedings, provides this statement with the indicia of reliability that is not found in Ms. Gurley's trial testimony. Unfortunately for Mr. Duckett, the jury did not hear any of this evidence, and as a result he was found guilty of a murder he did not commit.

STANDARD OF REVIEW

Specific findings of historical fact in the circuit court's resolution of Brady and ineffective assistant of counsel claims following an evidentiary hearing are reviewed deferentially on appeal. That means as to those findings this Court will accept them as long as there is "competent and substantial evidence" to support the circuit court's finding of historical fact. However, the legal determinations are reviewed de novo. In Stephens v. State, 748 So.2d 1028, 1034 (Fla. 1999), this Court explained that under the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), "both the performance and prejudice prongs are mixed question of law and fact." As a result, "alleged ineffective assistance of counsel claim[s are] mixed question[s] of law

and fact, subject to plenary review." Stephens, 748 So.2d at 1034.

This is equally true of the standard of review of a Brady claim. In United States v. Bagley, 473 U.S. 667, 682 (1985), the Supreme Court adopted the Strickland prejudice prong standard as the standard to review the materiality prong of a Brady claim. *See* Duest v. Singletary, 967 F. 2d 472, 478 (11th Cir. 1992), *vacated on other grounds*, 113 S. Ct. 1940, *adhered to on remand*, 997 F.2d 1326 (1993)("This issue presents a mixed question of law, reviewable de novo."). Rogers v. State, 782 So.2d 373 (Fla. 2001)("[t]he standard requires an independent review of the legal question of prejudice").

SUMMARY OF ARGUMENT

1. Mr. Duckett is entitled to a new trial at which the wealth of exculpatory evidence not heard by his original jury can be presented and considered. This exculpatory evidence, not heard by Mr. Duckett's original jury, more than undermines confidence in the outcome. It clearly establishes the trial resulted in verdict unworthy of confidence because a wealth of evidence supporting Mr. Duckett's claim of innocence was not heard.

2. The failure of Mr. Duckett's counsel to investigate and present to the jury the substantial available mitigating evidence in this case, and the concession by counsel that whoever committed this crime should get a death sentence, violated Mr. Duckett effective assistance of counsel at the penalty phase.

3. The rules prohibiting counsel from contacting jurors precluded Mr. Duckett from adequately investigating his case and from presenting evidence to the circuit court of jury misconduct. 4. The prosecutor injected improper, inflammatory and impermissible matters into the trial in an attempt to gain a guilty verdict and death sentence. Defense counsel failed to counter these arguments, denying Mr. Duckett a fair trial.

5. Mr. Duckett's mental state was relevant to both phases of the proceedings in this case and the failure to obtain expert assistance denied Mr. Duckett a fair trial and sentencing.

6. The instructions on the aggravating factors submitted in this case were unconstitutionally vague and the aggravators were not supported by facts in the record.

7. The jury instructions in this case improperly indicated to the jurors that they were not responsible for the imposition of the sentence in the case.

8. The burden in this case was improperly shifted to Mr. Duckett to prove that the mitigation outweighed the aggravation.

9. Mr. Duckett was unable to participate in critical stages of his trial when counsel failed to assure his presence at all proceedings.

10. The death penalty in Florida is disproportionately applied in violation of the Eighth Amendment.

ARGUMENT I

MR. DUCKETT WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT PHASE OF MR. DUCKETT'S TRIAL. THE STATE EITHER FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING AND FALSE TESTIMONY AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE.

The United States Supreme Court has explained:

> ... a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to ensure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the

prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F. 2d 1442 (11th Cir. 1986).

Here, Mr. Duckett was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that would have shown that Mr. Duckett did not commit the murder. Whether the prosecutor failed to disclose this significant and material evidence or whether the defense counsel failed to do his job, no one disputes the jury did not hear the evidence in question. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence. As a result of these errors, an innocent man sits on death row. Confidence is undermined in the outcome since the jury did not

hear the evidence. Rogers v. State, 782 So. 2d 373 (Fla. 2001); Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993).

A. DUE PROCESS WAS VIOLATED WHEN THE STATE'S KEY WITNESS LIED AND THE JURY NEVER HEARD CRITICAL IMPEACHMENT EVIDENCE.

The state's key witness at trial, Gwen Gurley, lied. Her testimony, that Mr. Duckett came back to the Circle K and picked up the victim, is simply not true. The impact of this false testimony on Mr. Duckett's defense was devastating. Ms. Gurley was the only witness to connect Mr. Duckett with the victim after he left the Circle K. Ms. Gurley testified that she saw Mr. Duckett drive off with a small person in his car (R. 2176) shortly after speaking with the victim. This was the only testimony at trial that contradicted Mr. Duckett's version of events of the night of May 11. Gwen Gurley was the case -- she was the state's star witness.

The state's theory was that James Duckett left the Circle K store, drove around the block and picked up Teresa McAbee. This unlikely sequence of events was necessary because every other witness at the Circle K states that Mr. Duckett drove off alone after speaking with the victim. The clerk from the Circle K, Shirley Williams, testified that James Duckett was driving off alone when she arrived at the Circle K between

10:30 and 10:40 p.m. (R. 1656)[18]. By testifying that she saw James Duckett drive off with a young person in his car, Gwen Gurley provided the missing link.

The only problem with Ms. Gurley's version of events is that it was not true. This critical piece of evidence was nothing more than a story arrived at between Ms. Gurley and a representative from the LCSO. Since her trial testimony in 1988, Ms. Gurley has recanted that version of events in at least six separate interviews to different people. One of these interviews was in fact a sworn statement with a court reporter present.

Mr. Duckett subpoenaed Ms. Gurley to the evidentiary hearing to allow her to once and for all tell the true facts surrounding her testimony in 1988. But newly enacted perjury laws prohibited the circuit court from learning the truth. In 1997, the Florida Legislature added Fl. Stat. §837.021,

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[18]A customer at the Circle K, Kim Vargas, gave both a written and oral sworn statement to sheriff's officers on May 20, 1987, that she was at the Circle K on May 11, 1987, when James Duckett spoke with Ms. McAbee (D. Exh. 17, 18). In these statements, Ms. Vargas stated that she saw Mr. Duckett talking to Ms. McAbee in his car, then saw Ms. McAbee exit the car and walk around the building towards the dumpster alone (D. Exh. 17 at 1-2, D. Exh. 18 at 4-5). Ms. Vargas testified at the evidentiary hearing that she was living in California at the time of trial, that she was called back to Florida to testify by the state, but that she ultimately did not have to testify when she got to court (PC-R. 1120-21). Ms. Vargas never spoke with anyone from the defense team.

Perjury by Contradictory Statements, which provides in relevant part: "Whoever, in one or more official proceedings that relate to the prosecution of a capital felony, willfully makes two or more material statements under oath which contradict each other, commits a felony of the second degree...." Fl. Stat. § 837.021 (2)[19]. The statute adds that it is not necessary to prove which, if any, of the contradictory statements are not true. *Id.* at (3)(c). Unlike the previous law, the prosecution need only prove that a witness has changed her testimony about a material element, not that she is in fact lying in her testimony. Thus, a witness who plans to take the stand and *truthfully* testify in a subsequent capital proceeding when she has previously provided contradictory (false) testimony in a prior proceeding, is now at risk of a charge of perjury.[20]

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[19]This statute was proposed and passed as response to witnesses in capital cases admitting that they had previously lied to assist the state in gaining a capital conviction. Presumably, the legislature felt that these capital defendants should not have a second bite at the apple (despite the fact that the first bite was poisoned by false testimony).

[20]Additionally, the penalty for violation of the perjury statute in capital case has increased from a third degree felony to a second degree felony. *Compare* Fl. Stat. § 837.02 (1996) (making of a false statement in a official proceeding is a third degree felony) *with* Fl. Stat. § 837.02(1997) and § 837.021 (1997) (making of a false or contradictory statement under oath in a proceeding that relates to a capital felony is a second degree felony).

This new law left Ms. Gurley with little choice but to invoke her Fifth Amendment rights and remain silent. She could not tell the court the truth without risking her own liberty.[21] This Court must look to the recantation she provided under oath, prior to the change in the perjury laws, to learn the truth in this case.

Ms. Gurley originally recanted her trial testimony in a taped statement with investigator Ron Hill in June of 1989 (D. Exh. 3). In that statement, she noted that she had not testified truthfully when she stated that she saw Mr. Duckett drive off with Ms. McAbee, that she was taken out of the jail on several occasions by sheriff's investigator Rocky Harris, that she was promised favorable treatment if she testified against Mr. Duckett and that in fact she got out of prison several months before her scheduled release date (*Id.*).

In August of 1989, Ms. Gurley confirmed this recantation in detail in a statement under oath to trial attorney Jack Edmund and Mr. Hill (D. Exh. 4). With the exception of one interview with state investigators post-trial - an interview that contained no details about the actual events of May 11, 1987, or her trial testimony in May of 1988 – Ms. Gurley has

[21]The circuit court encouraged the state attorney to grant Ms. Gurley so that should could testify without fear of arrest, but the state refused to do so.

confirmed this recantation in every statement she has made post-trial. Mr. Duckett sits in a prison for a crime he did not commit because Gwen Gurley lied at his trial.

Clearly the success of the defense at trial depended upon a strong attack on Ms. Gurley's credibility. However, available impeachment evidence was not provided to the jury, either because the state failed to disclose it or defense counsel failed to discover it. Witnesses were available who could have testified that Gwen Gurley had a poor reputation in the community for veracity. Prior to Mr. Duckett's trial, Gwen Gurley had made a false allegation of sexual harassment against Mascotte Police Officer Gray Birman (D. Exh. 44). Upon further investigation, Ms. Gurley admitted that these allegations were false and that she had lied to assist her mother's boyfriend who was in trouble with the police. In other words, on a prior occasion, Ms. Gurley had fabricated testimony in an attempt to gain something for herself. Yet the jury never heard this critical testimony.

Even without this valuable impeachment evidence, trial counsel could have easily shown the jury that Ms. Gurley's trial testimony was not truthful. Her own statements, which changed substantially each time she spoke, provided a powerful tool against the truthfulness of her trial testimony. In her

initial statement Ms. Gurley said that she saw the victim get in the police car and then saw them drive off (D. Exh. 20, pp. 21-22). She backed off of this in her second statement, and said she only heard Mr. Duckett call to the victim, heard a door slam, and then saw Mr. Duckett drive off with a small girl in the car (D. Exh. 21, p. 2-3). By the time she testified Ms. Gurley was only able to say that she saw a small person in the car, but that she could not tell more about the small person (D. Exh. 2, p. 17)[22]. In her initial taped statement, Ms. Gurley only discusses one visit to the Circle K (D. Exh. 20), but in her second taped statement she references two separate visits (D. Exh. 21;PC-R. 1425). Ms. Gurley also places Ms. McAbee standing in two very different spots in her first and second statements.

Ms. Gurley states in her initial statement that Mr. Duckett drove off down the road Ms. McAbee lived on, and then returned to the dumpster to pick up Ms. McAbee (D. Exh. 20, p.

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[22]Although by the time Ms. Gurley got to trial she was only willing to testify that she saw a small child in the police car, the state, when arguing the admissibility of the Williams rule evidence, relied upon her first statement to the police. They argued that the Williams rule evidence corroborated the testimony of Ms. Gurley "who saw the defendant put the little girl in the car and called her over to the car and put her in, and drive off toward the crime scene." (R. 1379). This is clearly an inaccurate and misleading representation of Ms. Gurley's trial testimony.

6).[23] Ms. Gurley had changed this testimony by her second statement where she said she saw Mr. Duckett initially drive off toward Mascotte.

Ms. Gurley's various statements and testimony also contain several lies beyond the facts surrounding the events on May 11, 1987. In response to why she did not mention this story earlier to authorities, Ms. Gurley testified that she really did not hear much about the case because she left the state in May 1987 (*Id.* at 54-55)[24]. Probation records indicate that Ms. Gurley was in the state and met with probation officers in Lake County throughout May and June and early July of 1987 (D. Exh. 39). Statements by Ms. Gurley that she was unaware of the details of the case because she left the state soon after the homicide are clearly untrue.

Not only do Ms. Gurley's pretrial statements change each time she speaks and contain internal inconsistencies, the

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[23]Every other witness who testified at trial or gave a statement concerning the direction Mr. Duckett drove when he left the Circle K states that he headed towards Mascotte (PC-R. 1422).

[24]Evidence with which to impeach Ms. Gurley on this point was readily available, but not utilized by defense counsel. In Ms. Gurley's initial statement on October 28, 1987, she told authorities that she learned about Ms. McAbee's death on May 12, 1987, the day after Ms. McAbee was last seen (D. Exh. 20). This is completely contrary to Ms. Gurley's trial testimony, yet defense counsel did not inquire about the discrepancy.

alleged facts of her statements and trial testimony do not fit the other evidence that was offered at trial. For example, Ms. Gurley stated in her October 28, 1987, statement that she was standing in front of the Circle K and Mr. Duckett asked Ms. McAbee her age and Ms. McAbee answered 12 or 13(D. Exh. 20, p. 6; PC-R. 1419, 1424). Every other witness who testified at the trial said that Mr. Duckett drove up to the Circle K, went in and asked Ms. McAbee's age and then went out and went back to the dumpster to speak with Ms. McAbee and then continued this conversation in his squad car[25]. Ms. Gurley also stated that she was in the store and that Mr. Duckett was outside, when all other witnesses who testified stated that Mr. Duckett was in the store. (PC-R.1420).

Perhaps the most glaring inconsistency between Ms. Gurley's story and the testimony of every other witness who was at the Circle K on the evening of May 11, 1987, is the fact that not one other person puts her or Jesse Gaitan or Vickie Davis at the Circle K when Mr. Duckett was present (PC-R. 1407-08). Several of the witnesses were asked to list the people at the Circle K and none included Ms. Gurley or her

[25]Ms. McAbee was not 12 or 13, but was 11 years of age.

friends (PC-R. 1408-09).[26] Not one of the eight people who were at the Circle K during the time in question and gave statements or testified at trial mention seeing Mr. Gurley, Mr. Gaitan or Ms. Davis (*Id.*). Not one of the boys who were at the Circle K confirm Ms. Gurley's statement that she spoke with them on the night of May 11, 1987 (*Id.*).

Salvador Calisto was interviewed again after Ms. Gurley gave her initial statement and was not asked about whether she was present. This failure to ask the question is either sloppy investigation on behalf of the sheriff's office or indicates that the officers knew Ms. Gurley's statement was untrue (PC-R. 1407, 1411). Shirley Williams, who testified at trial, stated point blank that she did not see Ms. Gurley, Mr. Gaitan or Ms. Davis during the time period in question. It is highly unlikely that these witnesses would remember every other person who was present at the Circle K that night, but that not one of them would recall seeing Ms. Gurley if in fact she was actually there.

Mr. Duckett also gave detailed statements concerning the events on the evening of May 11, 1987, and testified at trial. He describes every aspect of the scene including every witness

[26]These witnesses include Salvador Calisto, Armando Villareal, Kim Vargas, Shirley Williams.

with whom he spoke, but not once does he mention seeing Ms. Gurley, Mr. Gaitan or Ms. Davis. Assuming arguendo that Ms. Gurley's trial testimony was true -- that she heard Mr. Duckett call to Ms. McAbee and saw Ms. McAbee walk toward the car and that Ms. Gurley then hid in the bushes -- Mr. Duckett would have no reason to suspect that Ms. Gurley would later be a witness against him. He would have no reason to leave only her and her friends off of the list of people with whom he came into contact on the night of May 11, 1987.

Though this impeachment evidence was available, defense counsel failed to investigate and provide it to the jury, sacrificing an opportunity to weaken the star witness's testimony. This was constitutionally ineffective assistance of counsel. Nixon v. Newsome, 888 F.2d 112, 115-17 (11th Cir. 1989). This abundance of impeaching evidence combined with undisclosed evidence may have "pushed the jury over the edge into the region of reasonable doubt." Barkauskas v. Lane, 878 F.2d 1031, 1034 (7th Cir. 1989). Relief is mandated.

Gwen Gurley's testimony was critical. At the very least Ms. Gurley has lied about these events on three separate occasions. At the most, she was coached by the state and lied to the jury and the trial court. Either scenario raises substantial doubts about the credibility of this key witness

and requires a new trial for Mr. Duckett. The standard for reversal of convictions and sentences obtained through the use of false or misleading testimony is clear: reversal is required if the false testimony could in any reasonable likelihood have affected the outcome. United States v. Bagley, 473 U.S. 667 (1985). There can be no doubt that Gwen Gurley's testimony affected the outcome of Mr. Duckett's case.

In Strickler v. Greene, 119 S.Ct. 1936, 1948 (1999), the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *See* State v. Huggins, 788 So.2d 238 (Fla. 2001); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001). If the prosecutor intentionally or knowing presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, United States v. Bagley, 473 U.S. 667 (1985); but also has a duty to alert the defense when a State’s witness gives false

testimony, Napue v. Illinois, 360 U.S. 264 (1959); and, to refrain from knowing deception of either the court or the jury. Mooney v. Holohan. A prosecutor must not knowingly rely on false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957). Where, as here, the State uses false or misleading testimony to deliberately deceive the jury, due process is violated.

Contrary to the finding of the circuit court, it is Ms. Gurley's trial testimony which is inconsistent, incredible and unreliable, not her recantation. Not one shred of evidence exists to corroborate the statements she made pretrial and at trial. On the other hand, a wealth of "independent corroborating evidence" of Ms. Gurley's recantation exists. *See* Spaziano v. State, 692 So. 2d 174, 176 (Fla. 1997).

Even if the Court applies the stricter Jones v. State standard, Mr. Duckett will prevail.[27] The circuit court appeared to find that the recantation was newly discovered evidence (*see* PC-R. 1802), but that Mr. Duckett could not prevail because, "had Grace Gurley not testified at the original trial, the results would have been the same..." (PC-R. 1804). But the question in Jones is not whether the

[27]Jones v. State, 709 So.2d 512 (Fla. 1998).

prosecution could have prevailed without the testimony of the witness, but whether a new trial is warranted if the previously unknown evidence would probably have produced an acquittal had the evidence been known by the jury. Jones; *see also* Kyles v. Whitley, 514 U.S. at 449 n. 19. Where the evidence of innocence would probably have produced a different result, a new trial is required.

B. DUE PROCESS WAS VIOLATED WHEN THE JURY DID NOT LEARN OF THE UNRELIABILITY OF THE STATE'S FORENSIC EVIDENCE.

1. The Hair

a. The Prosecution Engaged in Improper Expert Shopping

The state knew that to obtain a conviction against Mr. Duckett, they would need physical evidence to tie him to the victim. Thus the hair evidence found on the victim was critical. Unfortunately for the state, their own expert from the FDLE, Deborah Steger, could not make a match between Mr. Duckett's hair and the unknown pubic hair[28]. Knowing that a "match" on the hair evidence was critical to obtaining a conviction, the state made the unprecedented decision in this case to expert shop and find an expert who could give them the finding they needed. Although Ms. Steger requested more hair samples from Mr. Duckett to allow her to attempt further

[28]A second unknown hair found on the victim which did not match Mr. Duckett's hair has now disappeared. The hair is identified in LCSO files as #98, FDLE #4-SUB002A, FBI #Q9. The petri dish purporting to contain this potentially exculpatory hair evidence is now empty. Until this hair went missing, it was in the custody of the same agencies that were charged with maintaining the custody of the Q hair that allegedly was consistent with Mr. Duckett's hair. No one from the state had accounted for this missing hair and the disappearance of the hair is not reflected in the chain of custody documents. The circuit court failed to even address the fact that the second unknown hair is missing from evidence in its order denying relief.

testing, the state decided to pull the evidence from her and send it elsewhere.

First, they sent it to Lifecodes lab to determine if a DNA match could be made (*See* D. Exh. 53, 59). Lifecodes purportedly viewed the questioned pubic hair and decided that insufficient root system existed to allow for DNA testing (D. Exh. 66). There is no evidence that Lifecodes ever assessed the quality of the second question hair for DNA testing. Lifecodes then returned the questioned pubic hair to the LCSO (D. Exh. 59).[29]

The state then decided to send the hair to the Federal Bureau of Investigators laboratory to see if they could match the hairs. Both LCSO Captain Jimmy Horner and Investigator Rocky Harris testified that Lake County had never shopped for an expert in previous cases and that this was a unique situation (PC-R. 1670, 1692). Traditionally, the sheriff's office simply sent evidence to the FDLE for testing. The only time it was sent to the FBI was if it was some type of special

[29]Two years after the hair evidence was allegedly returned by Lifecodes, the agency discovered several pieces of evidence that had been mislaid and not returned. This inability to properly store the evidence calls into question the chain of custody of all of the hairs while they were in the control of Lifecodes (D. Exh. 66*)*.Counsel testified that he was unaware that Lifecodes had misplaced some of the hair evidence (PC-R. 1737).

evidence that the FBI had special expertise in testing (*Id.* at 1668). That was not the case here, but the hair evidence was still sent to the FBI.

Not only was it against the LCSO practice to send evidence to the FBI after it had been tested by the FDLE, but it was also against the policy of the FBI to do this. The FBI has a policy that prohibits the retesting of evidence that another agency has tested except in certain rare situations (PC-R. 1771; *see also* R. 1028). Those rare situations only occur when the first agency that examines the hair is unable to do a test because of the lack of facilities, equipment or expertise. According to its own policy manual, the FBI does not take evidence that has been previously tested by another agency and perform the same tests again (PC-R. 1771, 1772). This policy exists so the FBI can avoid any appearance of impropriety or expert shopping (*Id.* at 1774).

To insure that its policy is followed, the FBI insists that certain steps are taken before it accepts evidence. The initiating agency sends a letter explaining what particular evidence they need tested and any relevant facts of the case (*Id.* at 1770). If the evidence has been previously tested by another agency, the initiating agency states this in the initiating letter. Likewise, if the evidence has never been

previously tested, the initiating agency traditionally also states this. If the agency does learn that the evidence has been previously tested, the supervisor of the lab must make a determination whether the FBI will become involved (*Id.* at 1771-72).

This policy was not followed in Mr. Duckett's case. The initiating letter sent by the LCSO stated that the unknown hairs had previously been tested by the Florida Department of Law Enforcement (D. Exh. 73). Yet the FBI supervisor did not make a review of the case nor address the issue of the previous testing. FBI Agent Michael Malone simply took the hair evidence and performed similar tests that the FDLE had performed, yet with different results.

Malone testified at trial that he was not initially aware the pubic hair had been previously tested by another agency when he performed his examination (R. 1028). This is simply not true. Malone testified in the evidentiary hearing that he receives a copy of the initiating letter when he is assigned a case (PC-R. 1773). This makes sense as it is the initiating letter which explains the facts of the case and what evidence needs to be tested. As noted above, the initiating letter in this case clearly stated that the evidence had been previously

tested (D. Exh. 73)[30]. According to Malone's own testimony at the evidentiary hearing, his statement to the jury that he did not know the hair had been previously tested cannot be true[31].

[30]Lake County Sheriff's Investigator Rocky Harris testified that he spoke with Malone about the hair examination. When asked whether he informed Malone about the FDLE examination prior to Malone's testing, he replied, "I would imagine so." (PC-R. 1694).

[31]According to his own testimony, Malone knew that FBI policy required him to check with his superiors prior to testing evidence that had been previously tested (PC-R. 1771), something that did not occur in this case. If Malone admitted that he had been aware of the prior testing, he would have to admit that he knowingly violated FBI policy. Thus, a lie was necessary to cover his tracks. Additionally, according to FBI policy, retesting of the evidence would not have been appropriate in this case. The only way to insure that Malone could run his tests and make the conclusions that were needed by the state was for Malone to just ignore the statement concerning the previous tests.

b. The Chain of Custody of the Hair was Compromised

Because of the expert shopping in this case, the chain of custody was destroyed. Two questioned hairs were found on the victim at the autopsy. These hairs were assigned numbers by the investigating agency and were transported to the LCSO, Tech Services, for storage. Shortly thereafter, the hairs were transferred to the FDLE for examination. Known hair standards were taken from James Duckett on June 15, 1987 (D. Exh. 62), so that the FDLE could compare the unknown hairs with Mr. Duckett's known hairs. When the FDLE concluded their testing, they returned all hairs to Tech Services on June 25, 1987 (D. Exh. 55).

Tech Services next transferred the known hair samples of James Duckett and the unknown hairs to Lifecodes for DNA testing on June 29, 1987 (D. Exh. 57, 58, 59, 60). Lifecodes allegedly returned all known and unknown hairs to Lake County on October 14, 1987 (D. Exh. 53, 60). But two years after the trial, on June 19, 1989, Lifecodes sent through a package to Lake County that contained certain hair standards that had been mislaid by the agency for two years (PC-R. 1726)[32]. These

[32]Officers from both the LCSO and from the State Attorney's Office testified that they did not tour Lifecodes nor research the agency prior to transporting the hairs in an effort to determine whether Lifecodes facility and internal procedures provided adequate custody of the evidence. The

samples were discovered only when Lifecodes was reorganizing its evidence room (D. Exh. 66). In an August 17, 1989, letter from Lifecodes to the State Attorney's Office concerning the mislaid hairs, Lifecodes notes that they had originally told the State Attorney's Office that these hair standards were consumed in the testing (*Id.*). Dr. Michael Baird, director of Lifecodes, testified in the hearing that this was in fact an inaccurate statement (PC-R. 1727). Dr. Baird could not explain why the original statement noted that the hairs had been consumed (*Id.* at 1728).

Additionally, Lifecodes misnumbered some of the evidence that was in their custody and submitted an incorrect report stating that evidence that had been tested had not been analyzed and incorrectly noting the evidence number for evidence that had allegedly been tested (D. Exh. 66). The "Results" page contained in the Lifecodes files that notes the conclusions of the examiner made during the testing contains the same errors as the report (*Id.*). The report was revised by Lifecodes, apparently after someone from Lake County discovered the errors, but there was no explanation of how

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fact that two pieces of evidence were mislaid for two years shows that they did not have adequate facilities and/or procedures.

this error could have occurred, no explanation of why the "results" page contained errors, and no corrected "results" page was ever submitted by the examiner. The apparent conclusion from Lifecodes with respect to the question hair is that there was an insufficient standard to detect DNA.[33]

The LCSO then took new hair pulls from Mr. Duckett, alleging that the June 1987 standards had been used up by FDLE in the testing (R. 938). This is not true and in fact, when undersigned counsel viewed the evidence of this case in post-conviction in the custody of Tech Services, the June 1987 hair standards were still available and intact. Nonetheless, in November of 1987 new hair standards were pulled from Mr. Duckett and on November 16, 1987, these known hairs and the unknown hairs were sent to the FBI lab for testing (D. Exh. 61).

The problems with the chain of custody are myriad. First, each agency assigns a new number to known and unknown hairs when they come into their custody. As seen with the misnumbering that occurred at Lifecodes, the renumbering of

[33]It is not clear from the files what was consumed in Lifecodes testing. A handwritten note on the Tech Services handwritten inventory lists says "???? used by Lifecodes" (D. Exh. 52).

evidence each time it changes hands can lead to mislabeling and errors.[34]

Second, the laboratory at Lifecodes was untested by Lake County authorities at the time of Mr. Duckett's trial. They had never used the agency before this trial and did not find it necessary to tour the agency prior to sending the evidence to them to insure that they had adequate storage facilities (PC-R. 1670-71)[35]. The problems with Lifecodes chain of custody records became obvious in this case after the conclusion of Mr. Duckett's trial. Although the agency originally reported

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[34]It is impossible to tell from the Evidence Inventories contained in the State Attorney files which item is the unknown pubic hair. For example, on Mr. Aleno's handwritten inventory, item #54 is purportedly the Q hair found in the victim's panties (D. Exh. 52). Item # 98 states that it is the petri dish containing the hair and fibers removed from the victim (*Id.*). And a handwritten note on the front of the inventory says that the pubic hair is in #105 (*Id.*). A typed written evidence list from the State Attorney's file contains a handwritten note that circles item #131 and states "probably #54 unknown hair from panties" (D. Exh. 51).

Additionally, Malone testified that the state's exhibit OOOOO for i.d,., Exh. 77, is the slide with the unknown pubic hair (R. 1000). But earlier he testified that state's exhibit LLLLL for i.d., Exh. 63, was the unknown pubic hair (R. 999). Malone further testified that the state's exhibit ZZ contains the "unknown hairs and .... the known hair samples of Mr. Duckett" (R. 1000). It is simply not possible to use the inventory lists, evidence lists, testimony or chain of custody forms and determine with any accuracy which item actually contains the Q hairs.

[35]Tech. Services Supervisor Nelson testified that "you would hope that they have something in place that would take care of it, but I couldn't vouch for it" (PC-R. 1702).

that all hair evidence had been returned to LCSO or destroyed in the testing, it later discovered that certain evidence had been mislaid. There is no way to know what other inaccuracies occurred in Lifecodes reporting. From what is known, it appears that Lifecodes did not have sufficient controls in place to insure the chain of custody of the evidence remained intact.[36]

Finally, in April of 1997, the DOJ issued its report detailing the deficiencies of the FBI Laboratories (D. Exh. 69). The report detailed several problems within the laboratories, including, but not limited to, the fact that before November 1992, there was no formal quality assurance plan for the Laboratory and that as of the date of the report, the Laboratory had not been accredited (*Id.*). The FBI conducts tours through its laboratories, both open and behind the glass where the evidence is tested (PC-R. 1774). During these tours, persons not associated with the agency are allowed into the testing areas. When the testing was done on the evidence in

[36]Since Mr. Duckett's trial, at least one court has found that Lifecodes did not perform scientifically accepted tests in a case when it neither followed its own testing method nor obtained a reliable result. *See* People of the State of New York v. Keene, 591 N.Y.S. 2d 733, 741 (1992).

this case in 1987, the FBI crime lab was still not accredited (PC-R. 1775).[37]

c. The Jury Was Never Informed About A Second Unknown Hair Nor That It Did Not Match Mr. Duckett.

A second unknown hair was found on the victim which was not consistent with the victim's known hair nor with the known hair of Mr. Duckett. This hair was examined by both the FBI and the FDLE, with the same result that the hair was inconsistent with Mr. Duckett (D. Exh. 63). Inexplicably, no expert was asked about examination of this second unknown hair at trial and the jury was never informed of its existence, nor of the fact that it was not consistent with Mr. Duckett's known hair. This potentially exculpatory evidence was critical in this solely circumstantial case.

[37]In fact, the FBI Crime Lab did not receive its accreditation until October of 1998, over ten years after Mr. Duckett's trial (PC-R. 1775).

d. Michael Malone Is Not Credible As A Witness.

In April of 1997, the U.S. DOJ issued a report on misconduct in the FBI laboratories (D. Exh. 69). The report investigated Malone's testimony in a 1985 hearing relating to former U.S. District Judge Alcee Hastings. Malone testified in the 1985 hearings in the Hastings case that he had performed a particular test and testified to the results of that test. The DOJ investigation disclosed that not only had Malone not performed the test in question, but that his testimony was in "[d]irect contradiction to laboratory findings supported by data" and that he "present[ed] apparently and potentially exculpatory information as incriminating" (*Id*. at 383). The report concluded that Malone had "falsely testified that he had himself performed the tensile test and that he testified outside his expertise and inaccurately concerning the test results" (*Id.* at 385; *see also* PC-R. 1783)[38]. The DOJ found that Malone's false testimony was inexcusable and criticized the FBI for failing to properly address the problem (D. Exh. 69, p. 17).

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[38]In response to the FBI's contention that it was inappropriate to characterize Malone's testimony as false, the DOJ responded: "We here use the term 'false' as it is employed in other legal contexts; that is, to describe something that is untrue or not in accord with the facts" (D. Exh. 69, p. 385).

The evidence concerning Malone's credibility as a witness went unrebutted by the state. Instead, the state presented the testimony of FBI deputy director Randall S. Murch. Murch testified concerning the assignment of cases within the FBI and the reassignment of Malone from the FBI laboratory to the field. The state never inquired about Malone's reputation for truthfulness as a witness.[39]

This is not the only time Malone's veracity as a witness has been questioned. Recently, the FBI advised Hillsborough County, Florida, prosecutors that several cases involving Malone should be reviewed for potential problems relating to flawed FBI laboratory work or inaccurate testimony[40] (*See* Lyda Longa, *FBI Lab Jeopardizes Local Cases*, Tampa Trib., Sept. 20,

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[39]In response to a question from the defense, Murch admitted that the DOJ had found that Malone testified falsely in the Alcee Hastings matter (PC-R. 1758). The state's redirect on this issue simply asked about Malone's proficiency as a hair examiner, not about his reputation for truth (*Id.* at 1759). Counsel respectfully submits that it is irrelevant if Malone is proficient in his job if he lies about the results.

[40]Mr. Duckett reasserts that any letter or directive from the DOJ or any other agency to the state in this case concerning possible problems with Malone's testing techniques or testimony in this case should be disclosed to the defense pursuant to Brady v. Maryland. The failure of the state to inform Mr. Duckett of the other Florida cases referenced above constitutes a violation of Brady and should be sanctioned by this Court. *See* Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996); Johnson v. Butterworth, 713 So. 2d 985, 986(Fla. 1998)(the state's obligation under Brady continues throughout the post-conviction process).

2000, at 1). Malone was involved in at least fifteen Hillsborough County cases flagged by the FBI for review (*Id.*). In the three cases that have been reviewed by prosecutors, the defendants have been notified that there may be errors in their trials. Malone testified in the case of Brett Bogle that three hairs found on Bogle's clothing belonged to the victim (Richard A. Serrano, *Florida Death Row Inmate's Life Hinges On A Single Hair*, L.A. Times, August 17, 2000, at A26). Mr. Bogle was convicted and sentenced to death. An independent scientist hired by the FBI to reexamine the evidence in September of 1999 found that one of the three hairs in fact belonged to the defendant. The scientist also found that "Malone's work was not adequately documented and that his testimony was inconsistent with his laboratory reports"(*Id.*).

In another case not yet reviewed by the Hillsborough prosecutors, the case of Michael Mordenti, the FBI task force notified the prosecutor that Malone's testimony in the case "regarded inconclusive lab results." (Longa, *supra*). Mordenti was sentenced to death in 1991. The FBI task force found that one lab test conducted by Malone indicated that hairs found on the victim's body did not match hairs from the defendant(*Id.*). The FBI urged local prosecutors to place priority on reviewing this murder case and Malone's testimony in the case(*Id.*).

A more glaring example of Malone's incompetence occurred in the case of Jay William Buckley. Mr. Buckley was charged with the capital murder of a 33 year old woman in upstate New York. As in Mr. Duckett's case, when an examiner from the New York State Crime Laboratory was unable to conclude that any of the hair evidence belonged to the defendant the prosecution called in the FBI. Providing critical testimony for the prosecution, Malone testified that a hair he believed belonged to the victim was found on a white blanket in the van belonging to Mr. Buckley's accomplice. The New York State examiner had found what she termed "unaccountable dissimilarities" between the victim's hair and the hair on the white blanket. In truth, the evidence had been mislabeled and the hair that Mr. Malone had testified was the victim's was found on a blanket that had never even been near the crime scene. Mr. Buckley was acquitted. *See* Laurie Cohen, *Mystery of the Blond Fibers*, Wall St. J., April 16, 1997, at A1.

e. Malone's Trial Testimony Was Misleading, At Best.

Malone's testimony at trial was highly misleading. He testified that he had examined 10,000 different individual known hairs in his seventeen year career and hundreds of thousands of unknown hairs (R. 981). He then testified that he spends an average of three hours examining each unknown hair

(R. 986). When asked by defense counsel to explain how he put 600,000 hours into seventeen years, he immediately began to qualify his answer (R. 986-987). He testified that in those seventeen years of hair examination he has had only two cases in which he could not distinguish between hairs from two different people (R. 992)[41]. On first blush, this statement provides powerful ratification for the "science" of hair examination. The statement implies that the chances of an accidental match are slim, maybe two out of the hundreds of thousands of unknown hairs Malone allegedly had examined at the time of trial (R. 981), or maybe even two out of the 5,110,153,261 people[42] in the world in 1988. A close examination of the statement shows something far different.

Malone testified in post-conviction that hair examination relies solely upon the visual examination of the hair under the microscope (PC-R. 1776, 1780). It is not possible to catalogue the characteristics of a particular hair so that it may later be compared with another hair (*Id.* at 1777)[43]. The

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[41]Shortly after the trial, this figure changed to three. *See* Sheridan Lyons, *Hairs Link Twin To Killing, Court Told Trial Under Way In Girl's Death*, BALT. SUN, April 3, 1993, at 2B.

[42]*See* http://www.census.gov/ipc/www/worldpop.html.

[43]Malone also testified that there is no computer data base in which different hairs are entered (PC-R. 1775). It

only way to compare two hairs is to examine them side by side under a microscope (*Id.*). An examiner can compare hair A with hair B on one day and make a determination that they do not share characteristics. On the following day the examiner can compare hair C with hair D and make the same determination. But without placing hair A under the microscope with hair C, the examiner cannot make any conclusions about the similarities between hair A and hair C (*Id.* at 1778). Because this "science" relies solely upon the examiner's visual examination at the time of viewing the evidence, there is no way to determine whether a hair viewed yesterday or two weeks ago or three years ago matches the hair he is viewing today. The fact that Malone has been unable to distinguish two unknown hairs even once in his career, much less three times, is shocking when you consider the way a hair examination is conducted.

Malone's testimony concerning the number of characteristics he was able to find that were consistent with the unknown hair in Mr. Duckett's case, 20, is also suspect. In fact, in many of the reported decisions concerning his hair

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would be virtually impossible to create such a database because hair examination relies so heavily upon the eye of the examiner and because each person uses different classifications when they examine hairs (*Id.* at 1780-81).

analysis in various cases, he has found exactly 20 different characteristics. Jackson v. State, 511 So. 2d 1047, 1049 (Fla. 1987) (Malone identified 20 individual characteristics present in unknown hair and defendant's hair samples; vacated because evidence insufficient to support finding of guilt); State v. Sawyer, 561 So. 2d 278, 283 (Fla. 2d DCA 1990) (the unknown hair matched the defendant's hair in 20 observable characteristics; hair evidence was inadmissible where probative value of single hair did not outweigh risk of prejudice); Pitts v. State of Arkansas, 617 S.W. 2d 849, 851 (Ark. 1981) (defendant's hair had exactly same 20 characteristics as unknown hair); State v. Asherman, 478 A. 2d 227, (Conn. 1984) (Malone was able to identify 20 characteristics between hair fragment found on defendant's key ring and known hair of victim). *See also* Sheridan Lyons, *Hairs Link Twin To Killing, Court Told Trial Under Way In Girl's Death*, BALT. SUN, April 3, 1993, at 2B (Malone testified twins' samples matched those from crime scene in about 20 characteristics). Malone conceded during the evidentiary hearing that these classifications were just classifications that he used personally and may differ from those relied upon by other hair examiners (PC-R. 1781). This lack of an industry wide protocol, coupled with Malone's consistently finding

exactly 20 matching characteristics, casts further doubt on the validity of his testimony and this science in general.

f. Hair Evidence Is Unreliable And Cannot Sustain A Conviction.

Florida courts have consistently held that a conviction should not should not stand when it is based solely on hair comparison testimony. Because hair testimony does not result in identifications of absolute certainty, reliance upon it to support a conviction would likely result in the conviction of innocent people. In Jackson v. State, 511 So. 2d 1047 (Fla. 1987), this Court evaluated a case that was based partially on the hair comparison testimony of Michael Malone. Malone testified that two hairs found on the victim's pajama top were indistinguishable from the defendant's hair (*Id.* at 1048). In addition to the hair evidence, there were two other items of crucial evidence relied upon by the state to gain a conviction, a bite mark on the victim consistent with the defendant and a statement by the defendant that the victim had been bit (*Id.* at 1049). In overturning Jackson's conviction and death sentence, this Court found that hair evidence cannot result in identifications of absolute certainty (*Id.*). Because of the inconclusive nature of hair analysis and the circumstantial nature of all other evidence in the case, the

court found that the conviction could not be sustained (*Id.* at 1050).

In a similar case, again where agent Malone was the state's expert, the Second District Court of Appeal found that a conviction relying almost solely on hair evidence could not stand. Hortsman v. State, 530 So. 2d 368 (Fla. 2d DCA 1988). Malone testified that hairs found in the victim's mouth and on her body were indistinguishable from the defendant's, and that a pubic hair found on the victim's sock was indistinguishable from the defendant's (*Id.* at 369). The court found that hair evidence is not 100% reliable and that certainty with hair examination is not possible (*Id.* at 370). Although the state argued that Malone had testified that the chances were almost nonexistent that the hairs on the victim originated from anyone other than the defendant, the court did not share Malone's conviction in the infallibility of hair comparison (*Id.*).

In the case of serial killer Bobby Joe Long, this Court again had the opportunity to consider whether a conviction based partially upon hair evidence should be upheld. Long v. State, 689 So. 2d 1055 (1997). Bobby Joe Long was convicted and sentenced to death for the killing of an eighteen year old woman in Pasco County (*Id.* at 1057). At trial, the state

submitted evidence that Long had abducted and released the victim, that two hairs found on the defendant were consistent with the victim, that a carpet fiber found at the scene of the crime matched the carpet in the defendant's car and that the defendant had made vague statements that he had killed others (*Id.* at 1058). The state's hair and fiber expert was Malone. This Court reversed the conviction and death sentence, finding that while the evidence certainly created a suspicion that the defendant committed the crime, it did not prove so beyond a reasonable doubt, especially "given that hair analysis and comparison is not an absolutely certain and reliable method of identification" (*Id.*). ***See also*** Cox v. State, 555 So. 2d 352, 353 (Fla. 1990) (circumstantial evidence consisting of hair found in the victim's car that was consistent with the defendant, some O type blood and a boot print were not sufficient to support a first degree murder conviction); Scott v. State, 581 So. 2d 887, 893 (Fla. 1991) (an circumstantial case which included evidence that hair sweepings from the defendant's car were indistinguishable from hairs retrieved from the victim's cap was insufficient to sustain a conviction

for capital murder).[44] **2. The Tire Tracks**

Neither the jury nor the judge heard critical evidence relating to the tire casts taken at the scene. Both Chief Mike Brady and Officer Troy Smith were present at the crime scene the day the body was discovered and noted where various vehicles were parked. After they learned that someone from the sheriff's office had taken plaster casts of tire prints at the crime scene, they returned to the scene to specifically attempt to find evidence of the location of the tire prints. This occurred in the evening after the crime scene perimeter had been taken down and the investigating officers had left. These officers thoroughly investigated the area around the pumphouse and the dirt road that ran through the area and the only evidence of plaster casts being taken was in the area

[44]Trial counsel's should have moved for exclusion of the hair testimony pretrial. Section 90.403, Fla. Stat. (1988), provides that "[r]elevant evidence is inadmissible when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or needless presentation of evidence." Hair evidence is notable suspect. In this case, two experts examining the same evidence came to different conclusions. The probative value of this possibly unreliable evidence was far outweighed by the danger of unfair prejudice and would have been excluded had trial counsel properly objected.

where all of the cars, including Mascotte police cars, had been parked earlier that day (PC-R. 1194-95).[45]

Also, the evidence at trial was that these tire tracks were consistent with Goodyear Eagle M & S tires, a tire allegedly not commonly sold in the state. Had counsel for the defense investigated he would have discovered that the Jeep Cherokee, a vehicle which is common in central Florida, comes equipped with these tires from the factory.

Additionally, defense counsel failed to impeach the state's witness concerning the Eagle M & S tires. Though Richard Eikert testified at trial that the Eagle M & S tires were delivered to his store accidentally, in an earlier statement he admitted that he had in fact ordered these tires for Mascotte Police, a fact which is corroborated by Michael Brady.[46]

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[45]Forensic consultant Dale Nute, testified in the evidentiary hearing that there were tire tracks indicated in the crime scene video that had not been mentioned in any testimony and tire tracks that appeared to turn around at the scene (PC-R. 1244-45). Had counsel retained the services of a forensic consultant, the state's theory concerning the tires could and would have been successfully countered.

[46]This evidence should be evaluated in conjunction with the evidence presented at trial that 1) there was a light rain the night of the homicide, 2) the crime scene was muddy, 3) Mr. Duckett's police car did not have mud on the tires and had not been recently washed 4) Mr. Duckett did not have mud on his shoes at 1:00 a.m. (Shirley Williams testified in the evidentiary hearing that she had just mopped her floors when

Mr. Duckett came into the Circle K at 1:00 a.m. and that he did not track any mud on the floor - PC-R. 1126), and 5) the small amount of dirt that was found on the car that was tested by an expert in soil analysis at the University of Florida was found to be not consistent with mud or dirt from the crime scene. Without the alleged tire track evidence, the prosecution had no evidence that Mr. Duckett's car was ever near the crime scene.

3. The Fingerprints

The state's case was that the victim's fingerprints were on the hood of the police car where she was sexually assaulted. Defense counsel failed to present an expert to counter this information. Fingerprint expert Mervin Smith was available to counter the state's erroneous arguments concerning the fingerprints (PC-R. 1065-66)[47]. A crime scene analyst could have also provided information that would have allowed counsel to effectively negate the state's arguments. Available information existed that would have shown that had the victim been in the position the state claimed when she was assaulted, there would have been some evidence of the skin of her buttocks touching the car. The jury viewed the prints as they were placed on the car, and therefore knew that there was no evidence of any such print. An expert would have testified that it is clear from the victim's palm prints that she was sweating and it would be highly unlikely that her buttocks would leave no print on the hood if they did in fact come in

[47]Trial counsel contacted Mr. Smith in 1988 and asked if he could determine whether one print was put on a car prior to another. When Mr. Smith stated that he could not make that determination, trial counsel halted the exam (October 28, 1997, p. 104). But Mervin Smith could and would have offered expert testimony countering many of the critical points about the fingerprint evidence. *See infra*. Trial counsel's failure to fully investigate this issue and present this evidence to the jury constituted deficient performance.

contact with the hood (PC-R. 1220-21). An expert could also have noted that Mr. Duckett's palm print was such that he would have been standing with his back to the fender of the car when the print was made. An expert could also have explained the various reasons that a print can appear very lightly when dusted and explained to the jury that the print of Mr. Duckett was just as likely an old print made weeks before the homicide.[48]

Counsel also failed to present critical evidence concerning Mr. Duckett’s police vehicle that would have precluded the scenario the state proposed during the trial. The state’s theory required the victim to remain on the car for at least some period of time. Yet, the Mascotte police

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[48]When evaluating this and all other issues, the Court should not throw common sense out of the window. Mr. Duckett was a police officer trained to examine crime scenes. If Ms. McAbee had truly been sexually assaulted on the hood of the car by Mr. Duckett, as the prosecution argued, Mr. Duckett would have been on notice that her fingerprints would likely appear on his car. The fact that Mr. Duckett did not wash the car at the end of his shift, even though that was the policy of the Mascotte police office and thus would not have raised eyebrows, is powerful evidence that Mr. Duckett did not assault Ms. McAbee on the hood of his car.

Further, if Mr. Duckett had committed this crime, he knew when he was being questioned by the sheriff’s office that he would have to account for Ms. McAbee’s fingerprints on the hood of his car. Yet he did not lie and say he had seen her jump on the hood of his car at the Circle K, even though that is very likely what occurred and that would have been a plausible story that did not inculpate Mr. Duckett.

officer who drove the car after Mr. Duckett testified in the evidentiary hearing that the hood of the car heated up in a very short period of time so that you could not lean on it for more than a brief time or you would risk being burned. He testified that he could not even write tickets on the hood of the car because of the excessive heat (PC-R. 1115-16). This officer called Mr. Duckett's attorney on the end of the first day of trial and gave him this information (*Id.* at 1116), yet Mr. Duckett's attorney unreasonably failed to present this critical evidence to the jury.[49]

4. The Pencil

In an attempt to bolster their theory that the victim did not return home prior to the murder, the state introduced a pencil allegedly found at the crime scene after the body was discovered. The testimony at trial was unclear as to the date when the pencil was found,[50] but existing police reports indicate that it was discovered on May 21, 10 days after the body was discovered. A video tape made of the "discovery" shows that one half of the pencil was found in a tire track.

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[49]This officer neither worked with Mr. Duckett nor knew Mr. Duckett (PC-R. 1114).

[50]Deputy Randy Aleno testified that the pencil was found about a week after the body was discovered (R. 895). Gary Nelson testified that the pencil was located on the 15th or the 21st of May (R. 1068).

In light of evidence presented at trial that a grid search was conducted (R. 920) on the scene and that the tire prints were photographed (R. 1059-60), this tape provides valuable impeachment. Also, Michael Brady could have testified that the crime scene perimeter was disbanded the evening after the victim was found and many people visited the scene in the following week (PC-R. 1195). Either because the state failed to disclose or the defense counsel failed to discover this evidence, the jury was not made aware of the true circumstances surrounding the discovery of the pencil.

The pencil introduced into evidence as being the pencil found at the crime scene looked virtually new. No attempt was made to demonstrate the effects of weather on a pencil that has remained outside for ten days. Trial counsel failed to retain a crime scene expert who could have conducted testing to determine the effects of weather on a pencil. Dale Nute, a forensic crime scene analyst and former analyst with the FDLE, testified at the evidentiary hearing concerning tests that he has performed on pencils similar to the one bought by Ms. McAbee on the night she disappeared[51]. Mr. Nute left sixteen

[51]Mr. Nute worked for the FDLE for over fifteen years as a microanalyst, a person who examines the materials that are transferred during the commission of a crime (PC-R. 1209). He also was involved in the training of the fingerprint analysts and shoe and tire print analysts (*Id.*). He was qualified as

pencils outside for periods ranging from two to four days to determine how the weather would affect these pencils (PC-R. 1252). Mr. Nute then examined the pencils under an ultraviolet light and determined that it was possible to detect if a pencil had been out in the sun for as little as two or three days (*Id.* at 1251). Mr. Nute was available to assist defense counsel during 1988, yet neither he nor any other crime scene expert was consulted by trial counsel on this critical issue. As a result, Mr. Duckett was denied a reliable adversarial testing.

C. DUE PROCESS WAS VIOLATED WHEN THE JURY CONSIDERED IMPROPERLY ADMITTED WILLIAMS[52] RULE TESTIMONY AND NEVER HEARD CRITICAL IMPEACHMENT EVIDENCE.[53]

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a forensic expert over two hundred times while at the FDLE (*Id.* at 1210). Following his work with the FDLE, he opened a private forensic consulting firm where he continued to provide expert assistance as a crime scene analyst (*Id.* at 1208). Mr. Nute provided testimony at the evidentiary hearing concerning ways the defense could have countered the state's argument with respect to the pencil, the fingerprints, the sequence of events on the night of the crime, the crime scene video, the crime scene itself and the tire tracks. Despite the availability of this or another expert in this field who could have provided substantial assistance to the defense team to counter key points of the state's case, trial counsel failed to consult with or retain such an expert. No strategic or tactical reason existed for this failure.

[52]Williams v. State, 110 So. 2d 654 (Fla. 1959).

[53]The circuit court's denial of an evidentiary hearing on this issue prohibited him from effectively presenting his case and from a full and fair hearing on a critical issue.

The coup de grace of the state's case was the testimony of the three Williams rule witnesses. During argument concerning the Williams rule evidence, the trial court noted that the Williams rule evidence did not lead to the conclusion of first degree murder (R. 1386). This comment indicates that the trial court believed the evidence was only relevant, if at all, to the charge of sexual battery. Defense counsel argued that it became apparent early on that the purpose of the sexual battery charge was to attempt to introduce the Williams rule evidence. Yet, defense counsel, knowing this, stipulated to consolidation of the charges of sexual battery and first degree murder (R. 2325). There can be no tactical or strategic reason for this. Counsel's actions paved the way for this highly prejudicial testimony. There is much more than a reasonable probability that, but for counsel's actions, the results of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984).

After the trial court had ruled that the Williams rule evidence was to be admitted, it became imperative that the defense impeach these witnesses. Had defense counsel called Peggy Locke as a witness, she would have pointed out that Linda Upshaw was drunk on the night of the alleged incident. She also would have testified that at no time did Ms. Upshaw

mention any alleged sexual advances by Mr. Duckett. Mr. Duckett actually approached Ms. Locke and told her that the witness was upset and needed a ride home. Mr. Duckett appeared to Ms. Locke to be nothing more than a concerned police officer attempting to assist Ms. Upshaw. Again either the state failed to disclose or defense counsel failed to discover this impeachment evidence and Mr. Duckett was denied an adversarial testing.

In his ruling to admit the evidence of these witnesses, the trial court stressed that Mr. Duckett "used his badge of authority" to lure these young women into his car (R. 1402-03). The court found that the evidence was relevant to the issues of identity and common scheme or plan because each incident happened when the defendant was in uniform and on duty. Ms. Upshaw testified that the alleged incident with Mr. Duckett occurred on a Friday night, May 1, 1987. Though defense counsel attempted to ascertain through various witnesses that Mr. Duckett did not work on that evening (R. 1543, 1678), he failed to introduce concrete evidence in the form of Mr. Duckett’s time sheet that Mr. Duckett did not work on Friday, May 1, 1987 (D. Exh. 1). Defense counsel testified that he had no tactical nor strategical reason for failing to utilize this time sheet to 1) argue against the admissibility

of this witness's testimony and/or 2) impeach this witness (PC-R. 978). Defense counsel's failure to present this critical evidence to the Court and the jury constituted deficient performance.

D. DUE PROCESS WAS VIOLATED WHEN CRITICAL EVIDENCE WHICH WOULD HAVE RAISED A REASONABLE DOUBT WAS NOT HEARD BY THE JURY.

From the moment Officer Chuck Johnson met James Duckett on May 11 and decided he was somehow involved in the homicide ("the feeling was there"), any chance of investigating other suspects ceased. Had defense counsel deposed Mascotte Police Chief Mike Brady prior to trial, he would have discovered that it was common practice for this sheriff to pick a suspect and build a case around him. Though Shirley Williams was a witness for both defense and prosecution, she also was never deposed. A thorough interview with Ms. Williams would have uncovered the fact that Salvador Calisto, one of the three Mexican boys last seen with Teresa, returned to the Circle K after midnight, was in an extremely agitated state, and made a call to someone on the pay phone out front (PC-R. 1127).

On June 2, 1987, an all points bulletin was sent from St. Tammany Parish Sheriff's Office to "All Florida" (D. Exh. 10). This bulletin asked the receiving offices to advise if any department had a homicide on May 20, 1987, or in the days

before where suspects are three Mexican males possibly driving a 70's model bluish/green Chevy (*Id.*). The bulletin adds that the homicide possibly occurred in a state park, beach, or lake area (*Id.*). A copy of this bulletin was received by sheriff's investigator Rocky Harris pretrial (PC-R. 1629) and was in the files from the sheriff's office received by CCR pursuant to a public records request. Defense counsel testified that this evidence was never disclosed to him prior to trial (PC-R. 1009). He further testified that this evidence was important because it corroborated the statement of Richard Reynolds and because it would have provided further leads for investigation (*Id.*).

Also, though it is common police practice to search the house of the victim in a homicide, this was never done in this case (PC-R. 1630). This was a home where several people who were not blood relatives of the victim lived (PC-R. 1159, 1629). It was not uncommon for different men to hang around the house (PC-R. 1159). The boyfriend of the victim's mother, Tony Tula, was never fingerprinted, gave no hair samples and was never interviewed by the police (*See id.*). Had defense counsel spoken with Wayne Butler, the victim's uncle, he would have discovered that the victim did not like many of these men and often stayed with her aunt and her uncle to avoid these

men (*Id.* at 1160). Mr. Butler testified at the evidentiary hearing that there was one man who particularly scared the victim, a man known as "Peoples" (*Id.* at 1159). She hated this man because he would grab her and try to pull her on the couch every time she walked by, and often tried to touch her in a sexual manner (*Id.*). "Peoples" disappeared from the area soon after the murder and was never investigated as a suspect. “Peoples” was also never fingerprinted, gave no hair samples and was never interviewed by the police.[54]

Wayne Butler also testified that he was notified of the victim's death by her Aunt Shirley somewhere between 7:15 a.m. and 7:30 a.m. on the morning of May 12 (*Id.* at 1160). Though Shirley testified at trial that she was down in the area of the pumphouse early that morning and did not see the body (R. 1797), in a conversation with Wayne Butler before 7:30 a.m. she said the victim was probably in the lake behind Polly's Bar in Mascotte (PC-R. 1160). Yet, according to police

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[54]Trial counsel testified at the evidentiary hearing that he had suspicions that Ms. McAbee’s home needed to be investigated. Counsel testified that he was not aware that the Department of Health and Rehabilitative Services had investigated problems at the McAbee home concerning Ms. McAbee and her brothers in 1984 and 1985 (D. Exh. 12), but that this would have directed his investigation to the house of the victim and that it would have had an effect on his trial strategy (PC-R. 1014-15).

reports, the victim's body was not discovered until after 9:00 a.m. and the next of kin was not notified until 11:10 a.m.[55]

The jury also never heard evidence of two other prime suspects in this murder, Charles and Louie Partain. The Partains were friends of the victim's mother and were both seen in the victim's yard between 8:00 and 8:30 a.m. the day the body was discovered (PC-R. 1179, 1629). Despite the fact they were at the victim’s house and were known acquaintances of the victim, neither of them were even interviewed[56]. Mane Davis, a relative of the Partains, states that both the Partains appeared nervous after this incident and Louie Partain mysteriously left the state a few days after the incident (PC-R. 1182). The Partain family refused to disclose where he went, even to other family members. The Partains also drove a blue/green car similar to the one Richard Reynolds

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[55]The LCSO Investigative Report states that Jim Clark first observed the body at 9:40 a.m., but then states that Chief Brady informed LCSO of the body by radio at 0903 hours. At trial Mr. Clark does not give a time for the discovery of the body, but notes that he dropped his children off at school between 7:15 and 7:30 a.m. then went to three other fishing holes before going to the pumphouse and observing the body (R. 728). Clearly the body was not "discovered" prior to 7:30 a.m.

[56]Rocky Harris testified that he reduced all statements in the case to writing (PC-R. 1638). No statement from either Charles or Louis Partain has ever been disclosed to the defense in the case, either pre-trial or post-trial.

observed the victim getting into the night of her disappearance, but after the body was discovered, the Partains never drove this car around town again (*Id.* at 1181). The Partains were no strangers to local law enforcement and had in fact been convicted of various crimes in the past. Had defense counsel investigated, he would have discovered numerous witnesses to corroborate Mane Davis, witnesses who could testify about the violent reputation of these brothers (*See Id.* at 1161, 1171). Neither of these men were ever investigated by the Sheriff's Office in relation to this homicide.

For reasons beyond his control, James Duckett was chosen as the suspect, and other more likely suspects were allowed to walk away. Rather than find the real perpetrator, the state chose to proceed with a circumstantial evidence case against Mr. Duckett. In addition to the dearth of evidence linking Mr. Duckett to the killing, there was much undone or undocumented, or documented and withheld investigation regarding several key suspects. The failure of the state to turn over evidence concerning other suspects is a violation of Brady v. Maryland and precluded the defense from adequately preparing the case. To the extent defense counsel failed to adequately investigate these other suspects, counsel’s performance was

constitutionally deficient. In any event, the decisionmakers in the case did not hear critical exculpatory that other, more likely suspects existed.

E. DUE PROCESS WAS VIOLATED WHEN THE JURY NEVER HEARD CRITICAL EVIDENCE CORROBORATING MR. DUCKETT'S VERSION OF EVENTS.

The defense case was that James Duckett left the Circle K alone after telling the victim to go home. Kim Vargas was a customer in the Circle K and saw Mr. Duckett speaking with the victim on the evening of May 11, 1987, at about 10:30 p.m. (D. Exh. 18, p. 3, 9). She then saw Mr. Duckett leave in his car and saw Teresa McAbee walk around the corner of the store towards the dumpster in the direction of her home (D. Exh. 17 , pp. 1-2, D. Exh. 18, pp. 4-5). Ms. Vargas was subpoenaed to trial by the prosecution and drove from her home in California to Lake County but was not called as a witness (PC-R. 1120-21). Though this evidence clearly corroborated the defense theory of the case, the jury never heard from Ms. Vargas. It does not matter whether this was as a result of misconduct on behalf of the prosecutor or deficient performance on behalf of the defense attorney. The end result is the same – the jury did not hear critical evidence in support of Mr. Duckett’s case.

Further evidence that Mr. Duckett was telling the truth in his many statements and was not the perpetrator of this crime was available from Richard Reynolds. Mr. Reynolds was a patron of the laundromat on the evening of May 11 and observed Mr. Duckett speaking with the victim (D. Exh. 28). After Mr. Duckett left the Circle K, Mr. Reynolds observed the victim getting into a blue-hatchback car with a male with black hair and driving off down Sunset Avenue (PC-R. 1135). Though the state learned of Mr. Reynolds on May 15, 1987 and interviewed him at this time, counsel for Mr. Duckett was not given his name and location until five days before trial. Mr. Reynolds was interviewed by an investigator for the defense, William Arbashaw, but changed his statement when he arrived at the courthouse (PC-R. 1009)[57].

Had defense counsel located Mr. Reynolds earlier and spoken to him about this evening, he would have learned that around 10:30 p.m. Mr. Reynolds observed the police officer speaking with a little girl who had earlier been talking to some Mexican boys. After this, the officer left and turned

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[57]Mr. Arbashaw died after the trial and before the evidentiary hearing and thus was unable to testify (PC-R. 1009). Trial counsel testified that Mr. Reynolds arrived at the court- house in 1988 with a broken arm and a professed lack of memory of the statements made to Mr. Arbashaw (*Id.*; *see also* D. Exh. 28).

onto Highway 50 and soon after, the little girl drove off with a man in a little blue car (PC-R. 1133-35).

The state's theory was that the victim did not go to her home after speaking with James Duckett at the Circle K. To counteract this, the defense attempted to show that the victim had on a different shirt when Mr. Duckett spoke with her than the one she was wearing when her body was discovered in the lake. The defense argued that the victim had on a green and blue shirt at the Circle K but additional evidence which would have bolstered the defendant's claim was not disclosed to the jury or judge. Mr. Duckett's police notebook, which was in the possession of the state at the time of trial, contains a handwritten entry from Mr. Duckett’s earlier interview with Ms. McAbee indicating she had on a blue/green knit shirt at that time(D. Exh. 16). Counsel testified that he did not see this notebook pretrial (PC-R. 1024). He testified that this notebook corroborated Mr. Duckett’s trial testimony and that he would have presented this to the jury if he had been aware of it (*Id.* at 1027-28).

According to the evidence presented by the state at trial no one saw Mr. Duckett between the time he left the Circle K and the time he met Dorothy McAbee at the Mascotte Police Department. The state's theory necessarily requires that Mr.

Duckett was missing for this period of time in order for this crime to be committed. Shirley Williams, a clerk at the Circle K store, testified in the evidentiary hearing that in fact Mr. Duckett came back into the Circle K between 11:05-11:15 p.m. to retrieve his coffee cup (PC-R. 1125). This is approximately 15 minutes after he was seen at the Circle K and is consistent with his testimony at trial. Another entry in Mr. Duckett's notebook indicates that he checked the Jiffy Store at 10:58 p.m. (D. Exh. 16). This corroborates Mr. Duckett's testimony that he did the well-being check and also supports the theory that he would not have sufficient time to abduct the victim, rape and strangle her and return to his duties[58]. Had the trial court and jury heard this critical evidence, they would have had no choice but to conclude that James Duckett could not have committed this crime.[59]

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[58]Forensic consultant Dale Nute testified that a time line based upon the known evidence would have shown that Mr. Duckett did not have sufficient time to do the crime of which he was accused (PC-R. 1230-35). He prepared this time line using statements of witnesses and information from police reports. Had counsel consulted with him prior to trial, he would have prepared a comprehensive time line that would have conclusively shown there simply was insufficient time for the crime to occur as the state argued. This is powerful evidence that was never presented to the decisionmakers due to the ineffective performance of counsel.

[59]Ms. Williams testified at trial but was not deposed by trial counsel prior to testifying. Although she did tell an investigator working on Mr. Duckett's case that Mr. Duckett

The state's theory of the case was that the victim was sexually assaulted at the lake, strangled, and then thrown into the water while still alive. This sequence of events was critical to the conviction of Mr. Duckett, and also provided the evidence to allow the state to argue the aggravating factor of "heinous, atrocious and cruel." Yet a pathologist could have explained to the jury that the conclusion that Ms. McAbee was still alive when she went into the water was not supported by the record.

Medical examiner Jonathon Arden reviewed the relevant evidence in the case and testified at the evidentiary hearing concerning the cause of death (PC-R. 1087). Dr. Arden testified that there was insufficient evidence to conclude that the cause of death in this case was drowning, and that there was compelling evidence that the sole cause of death was in fact manual strangulation (*Id.* at 1099). Dr. Arden further testified that it is inappropriate to list two different injuries as being the cause of death (*Id.* at 1097).[60] Finally,

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had returned to the store around 11:00 (PC-R. 1128), she was not asked about this during her testimony. Due to the failure of counsel to properly prepare the case and interview this witness, critical evidence that supports what Mr. Duckett has contended all along -- someone else committed the murder -- was not presented to the decisionmakers.

[60]Contrary to the circuit court's finding, Dr. Arden's findings differed significantly from Dr. Shutze and would have

Dr. Arden concluded that the most likely sequence of events based upon the evidence in the case was that Ms. McAbee was strangled, died from this injury and then was thrown in the water after her death (*Id.* at 1103)[61]. Had the jury heard this critical evidence, they could have concluded that the victim was killed elsewhere, such as her own home, and transported to the lake after her death. Trial counsel testified that he had no strategic reason for failing to consult with and present evidence from a forensic pathologist (PC-R. 1007, 1013). This evidence was consistent with his theory that Ms. McAbee was killed elsewhere and then thrown in the lake after her death, and thus was critical evidence to present to the jury (*Id.* at 1013).

The state throughout the trial asserted that Mr. Duckett was a liar and to "prove" this stated that he had lied to the Mascotte Police Department and to the Sheriff's Office when he said he attended Polk County Community College. The truth is this was not a lie on behalf of Mr. Duckett but a clerical

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provided support for the defense theory that Ms. McAbee was killed at home.

[61]In response to a question from the Court concerning the possibility that the victim was strangled but still alive when thrown in the water, Dr. Arden testified that unless death occurred within minutes after strangulation one would expect to see swollen tissue in the neck, a condition that was not present in this case (October 27, 1997, p. 151).

error on behalf of the college. When the Sheriff's Office requested confirmation of Mr. Duckett's attendance at Polk County Community College they were erroneously told that there was no record of Mr. Duckett's attendance. The state jumped on this error and flouted it throughout the trial as evidence of Mr. Duckett's dishonest nature. Defense counsel, who had a copy of Mr. Duckett's report card from the college in his possession, unreasonably failed to introduce this into evidence (*See* D. Exh. 19). Defense counsel testified that he had no strategic or tactical reason for failing to introduce this report card (PC-R. 1035)[62].This error is compounded by the fact that Mr. Duckett testified on his own behalf and his credibility was at issue.

Repeated references were made throughout trial to Mr. Duckett's willingness or unwillingness to take a polygraph exam (R. 1289, 1313, 1320, 1564-65, 1754), both by defense counsel and by the state. Evidence of a witness' willingness to take a polygraph examination constitutes improper bolstering and is inadmissible. United States v. Hilton, 772

[62]Several of Mr. Duckett's friends and relatives, including those who testified in the penalty phase, were aware that he had attended Polk County Community College and could have testified to that to the jury. Counsel's failure to adequately investigate and interview these witnesses and present this information to the jury left the jury with an inaccurate picture of Mr. Duckett.

F.2d 783, 785 (11th Cir. 1985); United States v. Brown, 720 F.2d 1059, 1072 (9th Cir. 1983). Counsel's failure to know the law and his improper attempt to bolster Mr. Duckett's credibility opened the door for the state to counter that Mr. Duckett refused to take a polygraph. Though counsel did object when the state asked Mr. Duckett where the results of the exam were (R. 1320), the damage was done. The jury was left with the inference that Mr. Duckett had refused to take the polygraph in the final moments. Not only was this untrue; it was also extremely prejudicial. Due to counsel's deficient performance, Mr. Duckett was deprived of the presumption of innocence to which the accused in a criminal trial is constitutionally entitled.

F. A NEW TRIAL IS WARRANTED

3. Confidence is undermined in the outcome.

Evidence favorable to the defense of which the jury was unaware warrants a new trial when it creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Garcia v. State, 622 So. 2d at 1330-31. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding

would have been different." Bagley, 473 U.S. at 680. This is true whether the evidence was unpresented because of the prosecution's failure to disclose or because of trial counsel's deficient performance. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. at 434; Strickler v. Greene, 119 S.Ct. at 1952. The question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So.2d at 553. If it did and it did not disclose this information, a new trial is warranted where confidence is undermined in the outcome of the trial.

In Kyles v. Whitley, the Supreme Court explained:

> The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item.

Kyles, 514 U.S. at 437.

The Court demonstrated how the analysis should be conducted by doing it in Kyles:

> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that

> Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

Kyles, 514 U.S. at 449 n. 19 (citations omitted).

2. Cumulative Analysis Is Required.

In analyzing the prejudicial impact of the Brady evidence, Strickland evidence, and Jones evidence, the evidence must be evaluated cumulatively in deciding whether a new trial is warranted. This Court made it clear in Jones, and reaffirmed in Lightbourne[63], that the cumulative analysis is in fact legally required where a Brady claim, an ineffective assistance claim, and/or a Jones v. State claim are presented in a 3.850 motion. In State v. Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effects of Brady violations, ineffective assistance of counsel, and/or Jones evidence of innocence. State v. Gunsby, 670 So.2d 920, 923-24 (Fla. 1996); *see also* Young v. State, 739 So.2d 553 (Fla. 1999); Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001). If considering the claims cumulatively results in a loss of confidence in the reliability of the outcome, relief is warranted. Young v. State; Kyles v. Whitley. The errors in Mr. Duckett's trial,

[63]Lightbourne v. State, 742 So. 2d 238 (Fla. 1999).

both individually and cumulatively, require that his convictions and sentence be vacated.

ARGUMENT II

MR. DUCKETT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY AND SENTENCING PHASE OF THE CAPITAL PROCEEDINGS.

In Strickland v. Washington, the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

The courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). Likewise, the courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). An attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Thus, an attorney is

obligated to make timely and proper objections to inadmissible admissible evidence which is prejudicial to his client's interest. Kimmelman v. Morrison, 477 U.S. 365 (1986).

Mr. Duckett's counsel failed with regard to his duties. He failed to fully investigate and develop crucial evidence in mitigation. No tactical motive can be ascribed to an attorney whose "tactful" omissions are based on lack of knowledge, *see* Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. *See* Kimmelman. Mr. Duckett's conviction and sentence of death are the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

Aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988). Yet, the prosecution argued in closing to the jury that they should consider the heinous and atrocious use of a badge and police car when they were determining whether James Duckett should live or die (R. 2059). The trial court also improperly relied upon Mr. Duckett's position as a uniformed police officer in sentencing him to death (R. 2241). The prosecutor's introduction and use

of, and the sentencer's reliance on, wholly improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment. Defense counsel's failure to know the law and to object to this line of argument was prejudicial deficient performance. Harrison.

Mr. Duckett's defense counsel was not prepared for the penalty phase. The jury returned a verdict at 10:55 a.m. on May 10 (R. 2008). Penalty phase began at 1:00 p.m. (R. 2012) on the same date. During this break, the charge conference was held in judge's chambers (R. 2013). Defense counsel had less than three hours to re-group and prepare for this critical stage which would determine whether James Duckett lived or died.

Defense counsel testified in the evidentiary hearing that he believed there was no mitigation that could result in a life sentence in this case (PC-R. 700). He felt that a conviction in this case would essentially result in a mandatory death sentence, and that the penalty phase was nothing but an exercise in futility (*Id.* at 698-99). Based upon this belief, defense counsel presented only 4 witnesses at penalty phase, including Mr. Duckett. Mr. Duckett's testimony consisted of a plea for his life. The other three witnesses spoke briefly about Mr. Duckett's background. A very

incomplete picture of Mr. Duckett was painted to the jury. Ample evidence was available which defense counsel failed to investigate. As a result Mr. Duckett was sentenced to die by a judge and jury who knew very little about his background and the substantial mitigation which existed to warrant a life sentence.

Defense counsel's failure to investigate and present further evidence was constitutionally deficient performance. The unreasonable belief that nothing can change the outcome of a sentencing hearing cannot support a tactical decision not to investigate a case and present evidence to the jury. Many cases with far worse facts have resulted in life sentences. Even in this case, where counsel presented minimal evidence in support of a life sentence, four jurors refused to vote for death. Counsel's decision was constitutionally unreasonable. A wealth of available evidence existed that would have resulted in a life sentence.

Thirteen witnesses testified live at the evidentiary hearing (*see generally* PC-R. Vols. XXII and XXIII). Additional witnesses testified via affidavit after the circuit court ruled that he did not wish to hear all of the witnesses

live (PC-R. 721).[64] This substantial and compelling mitigating evidence was easily available and accessible to trial counsel, but was not investigated and prepared for presentation to either the jury or the judge. As a result, Mr. Duckett was sentenced to death by a judge and jury who heard little of the mitigation which was essential to an individualized capital sentencing determination.

Note only did defense counsel not present evidence, he inexplicably failed to argue in closing any of the mitigation that was in fact presented. Instead he used this opportunity to berate the jury for how little time they spent on their deliberations at the end of the guilt phase (R. 2060). It is clear that this portion of the argument only served to insult the jury as after they retired they sent a note out objecting to these statements made by defense counsel (R. 2084). Counsel then requested that the jurors once again discuss the guilt phase testimony to see if it would convince them to recommend life (R. 2060-62). This argument was in essence a request to the jury to consider lingering doubt in their deliberations, a consideration that this Court has repeatedly said is not proper in a penalty phase. King v. State, 514 So. 2d 354, 358

[64]Because of page limitations, Appellant is unable to detail the evidence presented by these witnesses in this brief and relies upon the record below for support of this claim.

(Fla. 1987). There can be no tactical or strategic motive for this failure.

Defense counsel also failed to obtain and present psychological testing. A clinical psychologist who evaluated Mr. Duckett in post-conviction provided compelling and persuasive testimony concerning his psychological background (PC-R. 912-960). The testimony supports the conclusion that Mr. Duckett's psychological makeup and history are not consistent with a sex offender. Additionally, the testimony showed that Mr. Duckett scored lowest on the antisocial, aggressive and sadistic personality portions of the psychological tests (*Id.* at 939-40). Contrary to the finding of the circuit court, counsel testified he had no reason for failing to present this type of evidence or consult with a mental health professional.

There was no tactical or strategic reason for not presenting complete mental health mitigation. Brewer v. Aiken. Additional mitigation to support a judicial override of the 8-4 death recommendation could have been presented at the judge sentencing proceedings. However, counsel failed to investigate for additional mitigation. This is a case of prejudicially deficient performance. The fact that some testimony was obtained does not establish effective assistance where further

investigation into additional mitigation was warranted. Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991). Counsel was ineffective. Loyd v. Smith, 899 F.2d 1416 (5th Cir. 1990).

These omissions on behalf of defense counsel are exacerbated by the fact that during the guilt phase closing argument counsel stated that whoever committed this crime should go to the electric chair (R. 1932). The next day Mr. Duckett was convicted (R. 2009). The only issue to be determined during the penalty phase, whether or not Mr. Duckett should die, was conceded by defense counsel. Just in case the jury had forgotten about this, the state noted it again in closing (R. 2059). Counsel's concession of the only issue to be decided at penalty phase was patently ineffective and no adversarial testing occurred. *See* Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983).

ARGUMENT III

THE RULES PROHIBITING MR. DUCKETT'S COLLATERAL COUNSEL FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DEPRIVES MR. DUCKETT OF ADEQUATE COUNSEL IN THE POST-CONVICTION PROCESS.

Newly discovered evidence concerning the jury deliberations at guilt/innocence raises substantial doubts

about the propriety of Mr. Duckett's convictions. During deliberations, the jury was unable to come to a unanimous verdict as required by law. The hold-out was a young female juror who was clearly upset by the deliberations. When this juror finally left the jury room in a highly emotional state, she was followed by the foreman. Soon thereafter the two returned to the jury room and the hold-out juror, still in an agitated state, changed her vote and voted to convict (*see* January 7, 1997, p. 32). Due to the unconstitutional restrictions on contacting jurors in Florida, Mr. Duckett is unable to ascertain what pressures were exerted to convince this juror to change her vote.

In post-conviction proceedings, Mr. Duckett’s collateral counsel requested permission to interview the jurors in the case concerning this misconduct (August 30, 1995, p. 16-20; October 28, 1998, p. 151-152). The court presumably relied upon Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, which prohibits counsel from contacting jurors directly, and ruled that counsel could not interview the jurors (August 30, 1995, at 20; October 28, 1998, at 152).

Mr. Duckett asserts that the court’s ruling was in error. Undersigned counsel is a member of the Florida Bar and thus precluded from contacting jurors in order to investigate for

constitutional error at Mr. Duckett's trial. Had Mr. Duckett not been incarcerated, he could have contacted the jurors. Had Mr. Duckett not been indigent, he could have hired individuals who were not members of the Florida Bar to contact the jurors.

There can be no doubt that juror interviews do on occasion give rise to claims warranting new trials. Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla. 1995); Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991). However, Mr. Duckett was denied access to the tools necessary to uncover the evidence. Rule 4-3.5(d)(4) is a barrier to the proper investigation and presentation of legitimate claims for post-conviction relief. Bounds v. Smith, 97 S.Ct. 1491 (1977). Its application here deprived Mr. Duckett due process and equal protection of the law.

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial in which that juror participated. This prohibition restricts Mr. Duckett's ability to allege and litigate constitutional claims which may very well ensure he is not executed based on an unconstitutional verdict of guilt and/or sentence of death.

Florida has created a rule that denies due process to defendants such as Mr. Duckett. "A trial by jury is fundamental to the American scheme of justice and is an essential element of due process." Scruggs v. Williams, 903 F. 2d 1430, 1434-35 (11th Cir. 1990)(citing Duncan v. Louisiana, 391 U.S. 145 (1968). Implicit in the right to a jury trial is the right to an impartial and competent jury. Tanner v. United States, 483 U.S. 107, 126 (1987). However, a defendant who tries to prove members of his jury were incompetent to serve has a difficult task. It has been a "near-universal and firmly established common-law rule in the United States" that juror testimony is incompetent to impeach a jury verdict. Tanner, 483 U.S. at 117.

An important exception to the general rule of incompetence allows juror testimony in situations in which an "extraneous influence" was alleged to have affected the jury. Tanner, 483 U.S. at 117 (citing Mattox v. United States, 146 U.S. 140, 149 (1892)). The competency of a juror's testimony hinges on whether it may be characterized as extraneous information or evidence of outside influence. Shillcutt v. Gagnon, 827 F. 2d 1155, 1157 (7th Cir. 1987).

Such extraneous information that may be testified to by jurors includes evidence that jurors heard and read

prejudicial information not in evidence, Mattox v. United States, 146 U.S. 140 (1892); that the jury was influenced by a bailiff's comments about the defendant, Parker v. Gladden, 385 U.S. 363, 365 (1966); or that a juror had been offered a bribe, Remmer v. United States, 347 U.S. 227, 228-30 (1954).

In order for a defendant to win relief, the extraneous information that infects the jury deliberations must amount to a deprivation of due process. Jeffries v. Blodgett, 5 F. 3d 1180, 1190 (9th Cir. 1993); Harley v. Lockart, 990 f. 2d 1070, 1073 (8th Cir. 1993); Shillcutt v. Gagnon, 827 F. 2d 1155, 1159 (7th Cir. 1987). Furthermore, prejudice that pervaded the jury room, yet is not attributable to extrinsic influences, may nonetheless be so egregious that "there is substantial probability that the [juror's comment] made a difference in the outcome of the trial," thus allowing the admission of juror testimony to prove the abuse. Shillcutt, 827 F. 2d at 1159.

Because error can occur in the jury room that amounts to a denial of due process, defendants must be given the opportunity to discover that error. Florida, however, bars defendants from their best source of information of what took place in the jury room -- the jurors themselves. Patrick Jeffries never would have known of the impermissible extrinsic

evidence considered by his jury, and never would have been granted habeas relief, if Washington had a rule similar to Florida's prohibiting contact with jurors. *See* Jeffries v. Blodgett, 5 F. 3d at 1189. Mr. Duckett cannot allege what, if any, impermissible extrinsic factors, Tanner; Jeffries; or intrinsic prejudices, Shillcutt; affected his jury's deliberations because Florida has erected a bar to his discovery of such due process violations. Florida's rule prohibiting contact with jurors is therefore, in itself, a denial of due process.

The Florida rule likewise impinges upon Mr. Duckett's right to free association and free speech. This rule is a prior restraint. Mr. Duckett's counsel sought to interview jurors in order to prepare his postconviction pleadings. Any legitimate interest the state has in preventing interference with the administration of justice ends when the trial ends, at least with regard to jurors. *See* Wood v. Georgia, 370 U.S. 375 (1978). There is no "clear and present danger" that talking to Mr. Duckett's jurors years after his trial would interfere with the administration of justice. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). The Florida rule is overbroad. Whatever interests it seeks to

protect are outweighed by the rule's chilling effect on speech.

The prohibition violates equal protection in that a defendant who is not in custody can freely approach jurors to determine if juror misconduct occurred when an incarcerated defendant is precluded from doing so. In addition, death-sentenced inmates in other states are not precluded from juror misconduct and have been granted relief after proving such error existed. *See, e.g.*, Jeffries v. Blodgett, 5 f. 3d 1180 (9th Cir. 1993). Florida's rule thus denies Florida inmates equal protection.

Florida's rule prohibiting Mr. Duckett's counsel from contacting his jurors violates Mr. Duckett's First, Fifth, Sixth, Eighth and Fourteenth Amendment rights. This Court should grant relief. Mr. Duckett requests reasonable time to amend his Motion to Vacate and present evidence to this Court after this unconstitutional prohibition has been lifted.

ARGUMENT IV

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS, ARGUMENTS, AND CONDUCT RENDERED MR. DUCKETT'S CONVICTION AND RESULTING DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE.

Throughout Mr. Duckett's capital trial, the prosecutors injected all manner of impermissible, improper, and

inflammatory matters into the proceedings. The prosecutors' arguments, questioning and statements were fundamentally unfair, misleading, false, and improper and deprived Mr. Duckett of due process(R. 1884; 1903; 1974; 1972; 1960; 1965; 1968; 1945; 1968-69; 1899; 1901; 1963; 1308, 1320, 1754; 956; 957; 1941-43; 2059

The prosecutor’s actions at trial also rendered the proceedings fundamentally unfair. Despite a ruling by the trial court that the state’s fingerprint expert, a woman the size of Ms. McAbee, could not sit on the car to demonstrate how the prints got on the car, the state asked her to sit on the car (*see* R. 899-901, 1186, 1194-95). During closing argument the prosecutor carried around a photograph of the deceased in death. The prosecutor displayed the photograph of the deceased to her mother, who became hysterical and ran to the locked door of the courtroom. The jury was exposed to the sight of the victim's hysterical mother attempting to get out of the locked courtroom.

The prosecutor distorted Mr. Duckett's trial and sentencing with frequent improper commentary and actions, thus destroying any chance of a fair trial.[65] The remarks were of

[65]Trial counsel rendered ineffective assistance when he failed to object to many of the improprieties and failing to present effective argument.

the type that this Court and federal courts have found "so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy." Garron v. State, 528 So. 2d 353, 358 (Fla. 1988); *see also* Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994).

Each of these instances of prosecutorial misconduct standing alone is sufficient to warrant reversal of Mr. Duckett's convictions and sentences. Taken together, these numerous instances of misconduct clearly render the trial unconstitutional and require reversal. *See* Davis.

ARGUMENT V

FAILURE TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO A MENTAL HEALTH CONSULTANT DENIED MR. DUCKETT A FAIR TRIAL AND SENTENCING PROCEEDING IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). Florida law made Mr. Duckett's mental condition relevant to guilt/innocence and sentencing in many ways: (a) specific intent to comment first degree murder; (b)

statutory mitigating factors; (c) aggravating factors; and (d) myriad non-statutory mitigating factors. Mr. Duckett was entitled to professionally competent mental health assistance on these issues.

Trial counsel never obtained the services of an appointed expert to evaluate Mr. Duckett's mental health as it pertained to the commission of this crime or statutory or non-statutory mitigating factors. Counsel testified in the evidentiary hearing that he dropped the ball on this issue.

Had a qualified mental health expert evaluated Mr. Duckett on the relevant issues, and been provided with information about Mr. Duckett's background and state of mind at the time of the offense, ample mitigation would have been forthcoming; expert accounts founded upon relevant information relating to the defendant's background were critical matters for the jury to hear (*see* Argument II). The failure to obtain this expert assistance denied Mr. Duckett's his Fifth, Sixth, Eighth and Fourteenth Amendment rights. Mr. Duckett was sentenced to death in violation of his due process and equal protection rights. *See* Ake.

ARGUMENT VI

THE TWO AGGRAVATING FACTORS WERE CONSTITUTIONALLY VAGUE AND IMPROPERLY ARGUED AND APPLIED.

At the penalty phase of Mr. Duckett's trial, the jury was instructed to consider two aggravating circumstances: heinous, atrocious and cruel, and in the course of a felony(R. 2063).

The sentencing jury was not provided constitutionally adequate instructions limiting and guiding the application of aggravating circumstances and was urged to consider nonstatutory aggravating factors. Since the State cannot establish that these errors were harmless beyond a reasonable doubt, Mr. Duckett is entitled to resentencing. Stringer v. Black, 503 U.S. 222 (1992).

In Stringer, the Supreme Court stressed that "if a State uses aggravating factors in deciding who shall be eligible for or receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." 503 U.S. at 236. Use of an aggravating factor "of vague or imprecise content" has a substantial impact upon capital sentencers who weigh aggravating and mitigating factors. *Id.*

Mr. Duckett was denied his Eighth Amendment rights. His jury was permitted to consider "invalid" aggravation because the two aggravating factors submitted to the jury were inadequately defined. Additionally, the jury was urged to consider nonstatutory aggravation. The principle recognized in

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), was violated by the jury instructions here.

The instruction provided Mr. Duckett's jury on the heinous, atrocious or cruel aggravator did not satisfy the Eighth Amendment. Mr. Duckett's jury was given an instruction even more vague than the one at issue in Maynard v. Cartwright, 486 U.S. 356 (1988). Additionally, the state did not prove that this factor was supported by the facts in the case beyond a reasonable doubt. The evidence was not sufficient to support a finding of intentional infliction of torture or wanton disregard for the victim[66]. The state's argument that the Mr. Duckett strangled the deceased and threw her in the lake does not support a finding of heinous, atrocious or cruel[67]. Because the jury in Mr. Duckett's case received no instructions which provided the necessary limiting constructions placed on this factor, the jury improperly found the existence of this aggravating factor.

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[66]To the extent that the state relied upon the alleged sexual battery to support this aggravating factor, that was impermissible doubling of aggravating factors and one of the two aggravators must be struck.

[67]Trial counsel's failure to obtain the services of a pathologist, who could have effectively countered any argument by the state that the victim was still alive when she was thrown in the lake, constituted constitutionally deficient performance of counsel. *See* Argument I, *infra.*

This Court has held that the "committed during a felony" aggravating factor cannot support a death sentence by itself. Rembert v. State, 445 So. 2d 337 (Fla. 1984). Yet, Mr. Duckett's jury was not so instructed[68]. This error undermined the reliability of the jury's sentencing determination and prevented the jury from fully assessing mitigation and its weight relative to the aggravating factors. These errors skewed the weighing process in a case where mitigation is present in the record[69]. Mr. Duckett is entitled to relief.

ARGUMENT VII

MR. DUCKETT'S SENTENCING JURY WAS MISLED BY ARGUMENT AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING. COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS ISSUE.

A capital sentencing jury must be properly instructed as to their role in the sentencing process. Caldwell v. Mississippi, 472 U.S. 320 (1985). Caldwell involved prosecutorial/judicial diminution of a capital jury's sense of

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[68]Additionally, this aggravating factor was not supported by the facts of this case. Defense counsel was constitutionally ineffective for failing to retain the services of a pathologist to successfully counter the argument that the state had proved a sexual assault beyond a reasonable doubt.

[69]This improper instruction must be viewed in light of the fact that the vote for death was by the narrow margin of eight to four.

responsibility which was far surpassed by the jury-diminishing statements made during Mr. Duckett's trial. Caldwell involves the essential Eighth Amendment requirement that a death sentence be individualized and that such a sentence be reliable. Caldwell, 472 U.S. at 340-41.

Throughout the proceedings, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase (R. 75, 87, 89, 90, 92, 94, 95, 98, 100, 117, 127, 132, 134, 201, 202, 206, 211, 212, 245, 247, 264, 265, 268-69, 335, 360, 361, 363, 365, 377, 399, 432, 441, 442, 443).

During the guilt phase, the trial court became concerned about the jury being informed it was not responsible for sentencing (R. 1598-99), and felt it necessary to construct a special jury instruction for the guilt phase (R. 1859-61; 1987), but the instruction did nothing to correct the misinformation the jury had received during voir dire. *See also* R. 2028; 910.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. Its decision is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). Thus, intimations and instructions that a capital

sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she sees fit irrespective of the sentencing jury's decision, is inaccurate and is a misstatement of Florida law. Moreover, the principle recognized in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), was violated by the jury instructions here.

Moreover, trial counsel was ineffective for not objecting to the prosecutorial comments and court's instruction. Longstanding Florida case law established the basis for such an objection. *See* Pait v. State, 112 So. 2d 380, 383-84 (Fla. 1959)(holding that misinforming the jury of its role in a capital case constituted reversible error); Breedlove v. State, 413 So. 2d 1 (Fla. 1982). Mr. Duckett was deprived of the effective assistance of counsel. Accordingly, Mr. Duckett was denied his Sixth, Eighth and Fourteenth Amendment rights.

ARGUMENT VIII

PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO MR. DUCKETT TO PROVE THAT DEATH WAS INAPPROPRIATE. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .

> [S]uch a sentence could be given *if the state showed the aggravating circumstances outweighed the mitigating circumstances.*

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Duckett's capital proceedings. To the contrary, both the court and the prosecutor shifted to Mr. Duckett the burden of proving whether he should live or die (R. 2028-29, 2055, 2056, 2062, 2063).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 481 U.S. 393 (1987), and Maynard v. Cartwright, 486 U.S. 356 (1988).

Counsel's failure to object to the clearly erroneous instructions was deficient under the principles of Harrison v. Jones, 880 F.2d 1277 (11th Cir. 1989) and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). But for counsel's deficient

performance, there is a reasonable probability that the jury would have recommended life under State v. Dixon.

ARGUMENT IX

MR. DUCKETT'S ABSENCE FROM CRITICAL STAGES OF THE PROCEEDINGS VIOLATED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Mr. Duckett was not present at many critical stages in his trial, including a discussion of hair analysis experts in chambers(R. 690); charge conferences in chambers (R. 1836; 2013); and, several critical bench conferences(R. 772 - discussion of the hair analysis and various experts; 795 - defense counsel stipulates to testimony of state witness; 810-12 - discussion of which photos from autopsy defense objects to; 818 - photos from autopsy; 874 defense question about not objecting to trial court; 957 -objection to when Mr. Duckett was advised he was a suspect; 968 - counsel again discuss the hair analysis; trial court admonishes counsel about arguing; 1171 - discussion about taking jury to car to demonstrate how prints placed; 1193 - argument concerning live demonstration of placement of prints on car; 1276 -Williams rule witness; 1305 - state vouches for witness; 1321 -scheduling; 1460 - discussion about anonymous call received by defense counsel that Williams rule witness has been in mental institution; counsel says he has not been able to bring in witnesses to establish this; 1593 - counsel informs trial court Mr. Duckett will testify; 1596 - defense counsel tells court he

will not call Rick Reynolds; 1671 - discussion about speaking to client; 1710 - defense counsel again discusses not calling Rick Reynolds; 1808 - discussion about state witnesses; 1809 - more discussion about Rick Reynolds; 1960 - defense counsel discloses strategy concerning why defense experts were not called; 2051 - court admonishes state; and, 2088 - discussion of failure of jury verdict form to accurately state vote. Although these conferences concerned critical decisions about witnesses, evidence, and Mr. Duckett's fate, he was not present and did not participate.

Trial counsel testified in the evidentiary hearing that he did not recall if he came back to the table after bench conferences where Mr. Duckett was not present and discussed what had just happened (October 28, 1997, p. 86). He stated that he had no memory of whether he discussed the meetings with the prosecution and the judge concerning the statements of Richard Reynolds and his recanting (*Id.* at 85), and that he did not recall asking Mr. Duckett if he acquiesced in the instructions that were to be made to the jury (*Id.* at 87). Mr. Duckett submits that telling the defendant what has occurred in a bench conference after the fact is not sufficient and violates the defendants right to be present at all critical stages, but that there is no evidence that even that minimal

compliance with a defendant’s constitutional right to be present in his own trial took place in this case.

A criminal defendant's Sixth and Fourteenth Amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. United States, 146 U.S. 370 (1892).

Mr. Duckett was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death on separate, distinct, and "critical" occasions. Florida courts require that any waiver be knowing, intelligent and voluntary. Amazon v. State, 487 So. 2d 8 (Fla. 1986). The failure of trial counsel to object to these absences constitutes ineffective assistance. Kimmelman v. Morrison, 477 U.S. 365, (1986). Since the error was fundamental and extremely prejudicial this failure was deficient performance.

ARGUMENT X

THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

For the same reason that the previous death penalty scheme was declared unconstitutional, the present scheme in Florida is unconstitutional in that it is impermissibly vague and promotes arbitrary and capricious prosecution and utilization, in violation of the Eighth and Fourteenth Amendment of the United States Constitution. United States v. Kaiser, 545 U.S. 467 (5th Cir. 1977).

The current scheme outlines eleven circumstances where the death penalty may be imposed. However, no guidelines are provided to the differing jurisdictions' state attorneys on how to apply or interpret them. What constitutes a crime eligible for death penalty in one county may not be considered as an eligible death penalty crime in the adjacent county. Each state attorney in each county or circuit determines those cases that are death penalty eligible, instead of having a narrowly defined criteria to meet the requirements of the Constitution.

Additionally, the death penalty has been discriminately imposed against those accused of killing Caucasians and females. The probability of execution is overwhelmingly greater in cases where, as in this case, the victim is

Caucasian and female. Mr. Duckett's death sentence was imposed pursuant to this pattern of racial and sexual discrimination.

CONCLUSION[70]

On the basis of the arguments presented herein, Mr. Duckett urges that this Honorable Court reverse the circuit court, set aside his unconstitutional convictions and death sentence, and order his immediate release if the state fails to retry him within a reasonable period of time.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Initial Brief of Appellant has been furnished by Federal Express, overnight delivery, to Kenneth Nunnelley, Office of the Attorney General, 444 Seabreeze Blvd, Floor 5, Daytona Beach, Florida 32118-3958, on June 4, 2002.

CERTIFICATE OF COMPLIANCE AS TO TYPE SIZE AND STYLE

I HEREBY CERTIFY that this Amended Initial Brief of Appellant complies with the font requirements of Fl. R. App. P. 9.210(a)(2) typed in Courier New, 12 point type, not proportionately spaced, this date, June 4, 2002.

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[70]Because of the page limitations on the brief, Mr. Duckett has omitted arguments that were advanced in the lower court. Mr. Duckett does not waive any arguments presented below and specifically incorporates those arguments into the brief by specific reference.

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