CASE NO. SC02-2023

LOWER COURT CASE NO. 1986-04473 CFAWS

ROGER LEE CHERRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Cherry's successive motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied several of Mr. Cherry's claims without an evidentiary hearing. The circuit court held a limited evidentiary hearing on Mr. Cherry's newly discovered evidence claim. The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation.

"R. ___." – record on direct appeal to this Court;

"PC-R. ___." – record on appeal from the denial of the summary denial of postconviction relief;

"PC-R2. ___." - record on appeal from denial of postconviction relief after an evidentiary hearing on ineffective assistance of trial counsel;

"PC-T. ___." – transcript of the evidentiary hearing;

"Supp. PC-R. ___." – supplemental record on appeal materials;

"Supp. PC-T. ___." – supplemental transcripts;

"PC–R3. ___." – record on appeal from the denial of postconviction relief after an evidentiary hearing on newly discovered evidence.

All other references will be self-explanatory or otherwise explained herewith.

STANDARD OF REVIEW

The standard of review regarding Mr. Cherry's newly discovered evidence claim was explained by this Court in Blanco v. State: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court.'" 702 So.2d 1250, 1252 (Fla. 1997).

As to the summarily denied claim , Florida Rule of Appellate Procedure 9.140(g) states: "Unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing."

REQUEST FOR ORAL ARGUMENT

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

argument.

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STATEMENT OF THE CASE

Mr. Cherry was indicted on September 6, 1986, with two counts of first degree murder in the deaths of Leonard and Esther Wayne, one count of burglary with assault, and one count of grand theft (R. 1070-71). Mr. Cherry pled not guilty to the charges (R. 1072).

Mr. Cherry's capital jury trial commenced on September 22, 1987. Guilty verdicts were returned on all charges on September 24, 1987. The penalty phase began on September 25, 1987. The jury recommended a death sentence by a vote of seven to five for the first degree murder of Leonard Wayne. Additionally, the jury recommended a sentence of death by a vote of nine to three for the first degree murder of Esther Wayne (R. 1060). A sentencing hearing was held on September 26, 1987, at which time Mr. Cherry was sentenced to death for the two counts of first degree murder (R. 1067).

On direct appeal, this Court vacated the death sentence for the first degree murder of Leonard Wayne and remanded the case to the circuit court for the imposition of a life sentence without the possibility of parole for twenty-five years. Cherry v. State, 544 So. 2d 184 (Fla. 1989). Also, this court vacated the sentences for the noncapital felony counts and remanded for re-sentencing on those counts. Id.

Rehearing was denied on July 7, 1989.

A writ of certiorari was denied by the United States Supreme Court on April 16, 1990. Cherry v. Florida, 110 S.Ct. 1835 (1990).

A motion to vacate sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure was filed on April 12, 1992. On March 12, 1993, the circuit court summarily denied all claims without an evidentiary hearing. Mr. Cherry appealed the order. This Court remanded for an evidentiary hearing on the ineffective assistance of counsel during the penalty phase claim. Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

A limited evidentiary hearing was held on December 16 - 19, 1996, on Mr. Cherry's claim of ineffective assistance of counsel during the penalty phase.

On January 27, 1997 the circuit court entered an order denying relief (PC-R2. 1724-36).

This Court affirmed the circuit court on September 28, 2000. Cherry v. State, 781 So.2d 1040 (Fla. 2000). The United State Supreme Court denied a writ of certiorari on October 1, 2001. Cherry v. Florida, 122 S.Ct. 179 (2001).

While his case was on appeal, Mr. Cherry filed a second Rule 3.850 motion on August 6, 1997, involving claims of newly

discovered evidence and the inadmissibility and inaccuracy of scientific evidence at Mr. Cherry's trial (PC-R3. 1-158).

The circuit court summarily denied the motion on October 16, 2001 (PC-R3. 429-435). On October 25, 2001, a motion for rehearing was filed (PC-R3. 436-45). The circuit court granted the motion and ordered an evidentiary hearing on Mr. Cherry's newly discovered evidence claim (PC-R3. 446-7).

An evidentiary hearing was held on June 10, 2002. On August 12, 2002, the circuit court denied relief (PC-R3. 486-9). Mr. Cherry timely filed a notice of appeal (PC-R3. 490-1).

While Mr. Cherry's successive Rule 3.850 motion was pending, he filed another Rule 3.850 motion on April 17, 2002. Mr. Cherry's claims involved Mr. Cherry's mental retardation and Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). The State filed a response on May 7, 2002.

Huff hearings were held on June 10, 2002, and December 20, 2002. At the December 20, 2002, hearing, the lower court ordered the State to file a motion requesting this Court to relinquish jurisdiction. That motion is pending before this Court for consideration with this initial brief.

The lower court also held Mr. Cherry's retardation claim in abeyance until this Court promulgates a rule regarding the

procedure for proving capital postconviction defendants retarded or not retarded.

STATEMENT OF FACTS

A. INTRODUCTION

At trial, the State's case rested on the premise that the burglary of the Wayne's home and their murders were committed by one person, Roger Cherry.

Mr. Cherry was convicted and sentenced to death for the murders of Leonard and Esther Wayne. During his trial, the State's case focused on Lorraine Neloms. Neloms was Mr. Cherry's girlfriend at the time of the crimes. Neloms was also the niece of James Terry. Terry was the original suspect in the Waynes' murders. Neloms' testimony regarding Mr. Cherry's statements about robbing and beating an elderly couple in conjunction with her statements regarding items stolen from the Waynes' was the strongest evidence linking Mr. Cherry to the crimes.

Additionally, a partial fingerprint found outside of the house, a questionable palm print inside the house and blood drops outside of the house were the only proof that Mr. Cherry had been near the Waynes' house. Bloodstains, other fingerprints, and a hair found in the room where Esther Wayne was murdered did not match the victims or Mr. Cherry.

Newly discovered evidence, obtained shortly before the first evidentiary hearing, consisted of a confession by Terry

to Levester Hill about the Waynes' murders.

Peter Mills, postconviction counsel for Mr. Cherry, attempted to introduce this evidence at the 1996 evidentiary hearing, but the lower court prohibited the evidence from being presented, ruling that it was outside the scope of the limited evidentiary hearing authorized by this Court. Mr. Mills timely filed a successive Rule 3.850 motion to include this new evidence.

At the evidentiary hearing, evidence was presented about Terry's confession. The lower court refused to consider evidence which corroborated Mr. Hill and undermined the testimony of Terry.

B. THE TRIAL RECORD

Trial counsel, David Miller, was appointed to represent Mr. Cherry due to a conflict with the Volusia County Public Defender's Office (R. 1097). At the time of his appointment, Mr. Miller had never tried a capital murder case (PC-R2. 49). In fact, his field of expertise consisted of wrongful death and personal injury law (PC-R2. 50).

On June 22, 1987, Mr. Miller filed a motion for the appointment of a forensic pathologist, serologist, and a microanalyst to test the validity of the State's assertions about the forensic evidence taken from the Waynes' residence

and car (R. 1079). However, the court never ruled as to whether Mr. Miller would be granted those experts.

During the State's opening statement, the jury was told:

> And on this evening when Mrs. Wayne was in bed and Mr. Wayne was watching television, Roger Cherry went to their house, cut the telephone wire so that no one could make a telephone call from that house. And in the course of cutting that telephone wire, cut himself and proceeded to drip blood all the way around the house to the point of entry where several jalousie windows were removed from the screen porch.
>
> And the State's evidence will be during the course of the trial that these windows were recovered, that blood was found on these windows and that fingerprints were found on these windows and those fingerprints matched up to Roger Cherry.
>
> Roger Cherry cut the screen, removed the windows and entered the house. . . . As he entered this bedroom, Mrs. Wayne woke up and there was some sort of struggle or some sort of a confrontation and the bottom line is that Mrs. Wayne, essentially, was beaten to death.

(R. 285-6).

The State's key witness was Lorraine Neloms, Mr. Cherry's girlfriend. Neloms testified that she met Mr. Cherry through her uncle, James Terry, and they became romantically involved (R. 426-7). In June, 1986, Mr. Cherry and Neloms lived together in an apartment on Garfield (R. 427). On June 27, 1986, the evening of the crimes, Neloms testified that Mr. Cherry left their apartment after 11:30 p.m., and told her that he needed money and was going to the Armory (R. 430-1). Approximately an hour later, Mr. Cherry returned and his hand

was cut (R. 432). He had rifles and a wallet (R. 432, 434). Neloms saw that the wallet contained a license with the name "Wayne" on it (R. 435). Neloms told the jury that a short while later, Mr. Cherry left and attempted to use the bank card. He returned shortly thereafter, and told Neloms that the card was stuck in the machine (R. 436). The next day, Mr. Cherry pointed out the abandoned car that he stole from the Waynes' (R. 436-7).

Neloms further testified that Mr. Cherry admitted going into the Waynes' home: "The lady like tried to fight him or something and he hit her and pushed the man and grabbed his chest and he found their car keys and took their car" (R. 437). However, Neloms stated that Mr. Cherry denied killing anyone (R. 438-9).

On cross examination, Neloms admitted that no guns or wallet were ever found at their residence (R. 452). She did not see Mr. Cherry remove them from the residence (R. 451-2). Neloms admitted that she continued to see Mr. Cherry in jail after his arrest (R. 443). And, although she claimed that she was afraid of him, she wrote love letters to him explaining why she turned Mr. Cherry in to the police and her regret at having done so (R. 1148-64). She stopped visiting Mr. Cherry only after the State told her it would hurt their case for her

to continue to see him (R. 443).

As to the physical evidence, the State presented testimony that the point of entry into the Wayne's home was through the opening where the jalousie windows were removed (R. 159, 198). Investigator John Bradley explained that three jalousie window panes were removed and placed twenty to twenty-five feet away from the house, in the bushes (R. 498).

There appeared to be blood on the window panes and the sidewalk near the phone line (R. 501). At the time of his arrest, Mr. Cherry had a severe cut on his right thumb (R. 514-5). The State's theory was that Mr. Cherry cut his thumb while cutting the telephone wire before entering the Waynes' house (R. 285).

The State presented testimony that blood found outside the Waynes' house was consistent with Mr. Cherry's blood type (R. 637-8, 640-1). The blood was found on the jalousie window panes, a paper bag left near the point of entry into the Waynes' house, and a trail of blood near the house leading to where the Waynes parked their car (R. 638, 642). In the Waynes' car, a towel with blood on it was consistent with Mr. Cherry's blood type (R. 647-8). Additionally, Mr. Cherry's fingerprint was found on the jalousie window pane and on a metal plate found in the trunk of the Waynes' car (R. 687).

The State also introduced evidence that the Waynes' bank card and credit card were captured in the automatic teller machine on June 28, 1986, at 1:58 a.m. (R. 474-5, 481).

The State's only piece of physical evidence linking Mr. Cherry to the inside of the house was a palm print, which matched with Mr. Cherry. However, the palm print was explained as being in two different places depending upon which crime scene analyst was questioned. On direct examination, Daniel Radcliffe, crime scene analyst, stated that Terrell Kingery, latent fingerprint analyst, processed the doorframe for prints and developed the prints found (R. 562). On cross examination, Daniel Radcliffe testified:

> Q: You have indicated, also that that print, believe you said, was four and a half feet above the floor?
>
> A: Approximately four feet, yes.
>
> Q: Can you tell the members of the jury which side of the door casing it was on?
>
> **A: As you are looking into the room from the hallway, it would be on the left side of the door.**
>
> Q: Inside, where is it? Can you tell us where it is exactly?
>
> **A: It was on the doorjamb itself and, if I recall, it was kind of in the middle area of the doorjamb.**
>
> Q: Is this the photograph you previously attached?

A: Yes, sir.

Q: Can you point out to me where that was?

A: Yes sir. It would be another approximately eight inches to ten inches about this side of the door.

Q: It was on the right-hand side or the left-hand side of the door, depending on which way you look?

A: If you're inside the bedroom, then it would be on the right-hand side.

(R. 580). However, Radcliffe's testimony conflicts with the deposition of Terrell Kingery in which Kingery states that the palm print was on the bedroom side of the door frame:

Q: There is a picture of the man's legs sticking out of the bedroom. In other words, we're looking from the living room side towards the bedroom and the prints, if I understand, is on the other side of this door frame, is that correct, or do you know? Here, let me find another shot of the door frame from the inside.

A: Now, this is the living room here, though, right?

Q: Yes. Whoever took the picture is standing out in what was the living room area just in front of the TV, really.

A: Then the print should have been –

Q: On the other side of the frame?

A: Yes.

Q: I don't see another shot. These are all autopsy photos, they're not going to do us any good. Well, here's the bottom of it. It looks like that is taken from what appears to be the bedroom side.

A: That is correct.

Q: And there is the chest of drawers. The print would have been –

A: It should have been on the frame outside the portion here, up in this area here. (Indicating).

John Bradley, Chief Crime Scene Analyst, stated that the palm print was taken from the bedroom side of the doorjamb.

Q: Was that a closet door frame?

A: No. The actual door frame facing of the doorway between the bedroom and the hallway and then I understand the print was found on the bedroom side of the facing.

Q: And Radcliffe, I believe, was in charge of that, he would have been responsible for having lifted that. Right?

A: I believe he did yes.

Q: Do you remember whether it was just a latent print or was it a bloody smudge or what?

A: As I recall, I did not see any bloody smudges there, it would have been a latent.

(R. 1582 Deposition of John Bradley p. 37).

Other evidence was presented at trial that suggested someone else had to be present at the scene of the crime. Shoe prints found on the female victim's pajama bottoms did not match Mr. Cherry's shoes (R. 544). Fingerprints were found throughout the house that matched neither of the victims or Mr. Cherry (R. 737). A head hair which was of African American origin was found at the crime scene but did not match

Mr. Cherry (R. 802-3). Testimony from Ms. Neloms revealed that Mr. Cherry had no blood on him when he returned home August 26, 1986 (R. 448).

Priscilla Daniels testified during the defense's case that on the morning of June 28, 1986, she saw a man looking inside the Wayne's abandoned car (R. 752). She testified: "He walked around the car, looked inside the windows and he walked back like he was going to leave, walking the opposite way." (R. 754). She identified the man that she saw as James Terry (R. 755).

Mr. Cherry testified on his own behalf during the guilt phase of the trial (R. 820). He denied being at the Waynes' house the night of the murder (R. 844). Trial counsel called no witnesses to support Mr. Cherry's testimony. While focusing on Jack Baumgartner, Jr., the victims' former son-in-law, as the possible murderer, he call no other witnesses or introduced evidence to support this assertion.

The jury found Mr. Cherry guilty as charged (R. 1029-30).

The following morning, the jury reconvened for the penalty phase. The State presented no evidence.

As to mitigation, Mr. Miller introduced Dr. Barnard's report (R. 1037-38). Dr. Barnard's scope of appointment was

to determine Mr. Cherry's competence to stand trial and his sanity at the time of the incident (R. 1092). Mr. Miller provided no background information which would have included information regarding the atrocious and brutal childhood Mr. Cherry experienced (PC-R2. 192). The only information Dr. Barnard received for his evaluation were police reports (PC-R2. 192). Dr. Barnard met with Mr. Cherry once, on August 11, 1987, for two hours (R. 1092). No further investigation into Mr. Cherry's background was done (PC-R2. 192). Dr. Barnard did no formal psychological testing on Mr. Cherry (PC-R2. 2105). Throughout the time of his assessment, Dr. Barnard spoke and/or met with Mr. Miller twice (PC-R2. 2105-06).

Defense counsel introduced no other evidence at the penalty phase. In his closing argument, trial counsel referred to biblical passages in urging the jury to recommend life (R. 1050-3).

The jury recommended the death sentence by a seven to five vote for the death of Mr. Wayne and a nine to three vote for the death of Mrs. Wayne (R. 1061-2). The trial court immediately sentenced Mr. Cherry to two counts of death (R. 1067).

C. THE DIRECT APPEAL

This Court affirmed Mr. Cherry's convictions and vacated

the sentence of death for Mr. Wayne and the non-capital sentences and remanded for resentencing. Cherry v. State, 544 So. 2d 184, 185 (Fla. 1989).

This Court also found that Mr. Cherry's jury and sentencing judge had improperly doubled the pecuniary gain and the crime was committed during the commission of a burglary aggravators. Id. at 187. However, this Court found that the error was harmless "[i]n the absence of any mitigating factors." Id. at 188.

In finding that the heinous, atrocious and cruel aggravator applied, this Court noted: "there was a shoe print on the back of Mrs. Wayne's pajama bottom with a corresponding bruise on her right buttock. The medical examiner concluded that the injuries received by Mrs. Wayne were severe and must have been inflicted with great force." Id. at 188.

D. THE 1991 - 1993 3.850 PROCEEDINGS

In 1991, the Volunteer Legal Resource Center (VLRC) was assigned to represent Mr. Cherry in his postconviction appeals. During that time, volunteer counsel from Holland and Hart in Denver, Colorado, worked in conjunction with VLRC. Ann Jacobs, a staff attorney with VLRC was assigned to represent Mr. Cherry and prepare his initial Rule 3.850 motion (PC-R3. 634). Mr. Cherry's postconviction counsel filed his

initial Rule 3.850 motion in April, 1992 (PC-R. 46-426). Twenty claims were pleaded in the motion focusing primarily on the ineffective assistance of trial counsel both in the guilt and penalty phases. Guilt phase claims focused on the lack of investigation into other suspects like James Terry, the bias on the part of Lorraine Neloms, and the failure to follow-up on the request for forensic assistance to rebut the State's testimony (PC-R. 242-274).

Mr. Cherry's initial Rule 3.850 motion contained the following:

> 78. Trial counsel failed to show that the state did not follow up on evidence suggesting that someone other than Mr. Cherry killed the Waynes. He also failed to argue that if Mr. Cherry was indeed involved in burglarizing the Waynes' home, he was not alone and he never went into the house. Finally, he failed to present evidence that Mr. Cherry was high on crack cocaine and alcohol that night.
>
> 79. It was no secret that James Terry was a suspect in this case. The same day that the police discovered that the Waynes were dead and that their home had been burglarized, the police learned from Priscilla Daniels that she had seen a man, acting suspiciously, walking around the victims' abandoned car. She saw this man – James Terry – around the car early on the morning after the Waynes were killed, Saturday, June 28, 1986. When she drove by later, there was no one around the car. When she drove by a third time, she saw the police cars around the victims' car and she informed them that the man she had seen around the car was James Terry, whom she knew by sight. She also knew where he lived, and she gave [the] police directions to Terry's house. The police went to Terry's house and questioned him as to his presence at the victims'

car. Terry claimed that he was looking for bottles and cans to collect and that he just happened upon the car. (He used his own car to get there). Terry signed a statement to the police to that effect.

80. While questioning Terry, the police noticed Terry's shoes in his apartment and asked him if those were the shoes he was wearing when he walked around the car. Terry said they were, and the police asked Terry if they could take the shoes in so that they could eliminate him as a suspect. Terry complied. The police took Terry's shoes, photographed the soles, and J.D. Brown, an evidence custodian at the Deland Police Department, luminaled the shoes to determine whether there was any blood on them. It is unclear what, if any, expertise J.D. Brown has in luminaling shoes. (Roger Cherry's shoes were submitted to the FDLE Crime Lab to see if his shoes had blood on them). The results of the blood on Terry's shoes were said to be negative, although there us no report of any kind concerning the results of that luminal test. The photographs taken of the soles of Terry's shoes are also missing. His shoes are no longer available, Terry having thrown them into a garbage dumpster. See Apps. 73 and 80.

81. The police then brought Terry's shoes back to him later that evening and apologized for bothering him. They asked him if he knew anything about the murders, to which he responded that he did not. App. 80.

82. Despite the fact that Terry was seen around the car and that the police were suspicious enough to test his shoes for the presence of blood, the police went no further in investigating Terry's involvement. The police knew that there was a negroid hair recovered from the victims' bedroom, a hair located directly above the body of Esther Wayne. The police, had they checked, would have discovered that Mr. Terry had a long criminal record.

83. Nor did the police bother to obtain Terry's fingerprints, although such prints were readily available in light of Mr. Terry's criminal record. Although 29 latent lift cards were taken from the scene of the crime, the police never bothered to run Mr. Terry's prints. As Terrell Kingery, the State's

fingerprint expert, testified in his deposition, the only fingerprint comparisons were on Roger Cherry, Leonard Wayne and Esther Wayne. App. 53.

84. James Terry is Lorraine Neloms' uncle. In fact, Lorraine Neloms' maiden name was Lorraine Terry.

85. When Mr. Terry was deposed by David Miller, he was extremely defensive. Without any suggestion from Miller that Terry was involved in the crime, Terry immediately volunteered that he had an alibi for that night. In his July 7, 1987 deposition, James Terry testified to the following:

> Q: [Do you still go door to door pushing a lawn mower?]
>
> A: . . . Oh, I see what you're getting at. No . . . I don't have nothing to do with that. As a matter of fact, I got an alibi. I was out of town when it happened. And I didn't go door to door with Roger . . .
>
> Q: Now, they took your shoes away from you, right?
>
> A: And printed them, because they seen the tracks around this car on Boston that Saturday morning. I had went to Apopka that night, that Friday night with Don. They live out by --
>
> Q: Is he your alibi?
>
> A: Don and his wife, and a guy we call Shorty. I think his real name is Milton something. Anyway, I got three people that I was with that night.
>
> Q: Okay. What are their names?
>
> A: I haven't – I'm not really prepared, but I can get them for them to you.
>
> Q: Okay.

A: Don, I know him from working the grass fields with him pulling weeds. Him and his wife live out by Woolworths.

Q: How long were you with them that night?

A: Must have been at least two o'clock. It was late. The bars had closed down in Apopka. Rode all the way to Apopka, I guess, the first part of that night. **Stayed over there until after two. It was way after two when we came back here**.

Q: All right.

A: I don't know when this thing happened.

Q: The night that the Waynes were killed, had you talked to Roger that night?

A: No. Well, earlier, before I left and went to Apopka.

Q: And what time was that?

A: But to my knowledge, this thing must not have happened as it did. It had to have been between eight and nine.

Q: Okay. What time did you – Wait a minute, Mr. Terry. What time did you talk to Roger that night?

A: It was before I left for Apopka ... between eight and nine. I left him and Lorraine in the parking lot. They was talking, all of us talking, laughing.

Q: What parking lot?

A: Drinking beer. ... And they was in the parking lot ... Then Pat and Don came

up and said, Do you want to ride to Apopka? And I said, Yeah. So we jumped in the car, me and Shorty, and went to Apopka. And it was late when we came back. I don't remember whether I seen Lorraine's car there or not. It was late. I just went in and went to sleep.

* * *

I tell you, I stopped hanging around Roger. I'm not saying nothing against him but, you know, I got two kids and I've been in enough trouble.

Q: Is Lorraine related to you?

A: That's my guess.

Q: Okay. Have you talked to Lorraine about this incident?

A: Well, I tell you, after – I'm under oath here. I didn't talk with Lorraine about it, no.

Q: You never talked to the – You never talked to Lorraine after, about it after it occurred?

A: No. She wouldn't talk about it.

Q: Okay.

A: The only thing she told me, she told me she talked with the detective and from what she told him – she didn't tell me, as a matter of fact. I didn't want to know. The less I knew about it the better it is for me. Like I said, they already knew I was around the car looking like I could use my tools to pull the car out that was stuck. That's what I do, I look for some honest work to do. I was walking around the car and some lady came by that seen me around the car and she said, Have

you heard the news? And I hadn't even heard about the murder.

Q: What were you doing around the car?

A: All right. I said it a couple of times, I get up early every morning, most every morning, but every other morning and go through the woods and pick up cans and stuff people, the good things out in the woods that could be reused, recycled. So that's what I was doing. I got up that morning to go get enough cans so that I could buy some gas for my truck so I could go fishing, catch fish and sell them, you know. That's where I hustle. And someone seen me around the car and they called the detective and, to my idea, they called the detective and told them that what they seen was me around the car and about me being with Roger because they figured I had something to do with the murder thing. . . . And I gave them a statement which they got at the city, a statement or whatever, wherever they kept the records. And so they told me about the murders, and I said, What? What murders? I was shocked that this car had something to do with a murder. Then I was even more shocked a few days later when they come to the project and grabbed my cousin [Roger Cherry] up and took him in.

Q: What kind of shoes [did you have], Mr. Terry?

A: [They came] from the Eagle, the dollar store. ... They had clothes and shoes with lines on the bottom.

Q: Lines? What kind of lines?

A: I'm not smart enough to tell you that.

Q: Can you draw them? Could you draw

the lines?

A: Well, they got a cast on them. [Miller shows Terry photos from FDLE of the prints Terry's shoes make.]

Q: Are those your shoes?

A: Yeah. Those are my shoes around the car. . . . Like I say, you know, I have nothing to prove. I didn't know nothing about it. I went in the woods to pick up cans and I seen this car and walked around it. I was wondering what this car was doing out there. I looked just like my sister's car, too, same model, a Ford. Lorraine, she got a car just like that.

Q: Did you put your hands inside the car?

A: No, I didn't touch anything inside the car. No, I didn't touch nothing. I walked around the car and I almost touch the trunk, but I thought about it, that it wasn't my car.

Q: How about the car keys, did you touch them?

A: Well, did I touch the car keys? I didn't see the car keys. ... I almost touched [the car] but I said, No, this car may be hot or something. And I looked through the car to see what was in there, right, but then I stood back and I went back to my car.

Q: [Did the police take your fingerprints?]

A: [No, just his shoes.] Then they said, Well, we know that you didn't have nothing to do with this. And they asked me did I know anything, any information, anything that would help them. And I

didn’t. I couldn’t tell them nothing.

86. It turns out that Mr. Terry lied when he testified about having gone to Apopka that night and not returning until well after 2:00 a.m. Patricia Grimes and Don Elder are the "Don" and "Pat" of whom Terry spoke. But Patricia Grimes has signed a sworn affidavit that Mr. Terry was lying when he testified that he went with Pat and Don to Apopka.

> 1. My name is Patricia Grimes, and I live in DeLand, Florida. I co-owned a business in DeLand back in 1986 with Don Elder. We employed many laborers who worked for us in our business, which was removing the grass that grew in fern nurseries.
>
> 2. Two of the people that we employed were Milton Hudson Jr. (also known as Shorty) and James Terry (also known as Woody). I was recently informed that James Terry had said that he, myself, Don Elder and Shorty traveled from DeLand to Apopka one evening back in June of 1986.
>
> 3. I can absolutely say without any reservations that this never happened. I have never gone anywhere with these two men. They worked for me picking grass, and that is my only contact with them. If James Terry said that he went with me and Don to Apopka that night, he is lying.
>
> 4. I was never contacted by any police agency or anyone else to confirm this preposterous story. If I had been, I would have been happy to have told them what I have said here.

App. 78.

87. Hence, Mr. Terry hastily and eagerly volunteered an alibi for his whereabouts that Friday night and early Saturday morning, and according to Patricia Grimes, Mr. Terry is lying.

88. David Miller should have talked to Patricia Grimes. Had he done so, he would have discovered that Terry was lying. This fact, combined with the fact that Terry lied about his reasons for being

around the Waynes' abandoned car and that he seemed to have other intimate knowledge about the crime, would have led the jury to question whether Mr. Terry committed the crime.

89. Most significant of all is the fact that the footprints seen around the Waynes' abandoned car, which undeniably belonged to James Terry, bear a striking resemblance to the footprint tread on Esther Wayne's pajama bottoms. A photograph of Mrs. Wayne shows what all experts who have examined it except for Terrell Kingery (the State's purported footprint expert) believe is a footprint on her pajama bottoms. Additionally, Dale Nute, an expert in crime scene investigation and a former supervisor and crime lab analyst at the Florida Department of Law Enforcement Crime Lab, examined the sheet on the cot located just inside the point of entry. It is his opinion that there are two partial footprints on that sheet, primarily the toe area, that bear treads similar to the tread seen on the pajama bottoms and seen around the abandoned car. See App.71.

90. Unfortunately, although David Miller attempted to show that the tread on the pajama bottoms was similar to the footprint treads of James Terry seen around the car, Miller inexplicably failed to have the photograph of the footprints around the car admitted into evidence. Although he had the photograph marked for identification as Exhibit F, he inexcusably failed to have it admitted into evidence. Consequently, the jury never had an opportunity to compare the tread on Esther Wayne's pajama bottoms with the photograph of the footprints around the car.

91. Had the jury been able to compare those footprint treads and had the jury had the additional information that Terry's alibi was false, that Terry had intimate knowledge about the Wayne homicides, that Terry had lied to the police about the whole thing, and that Terry had a long criminal record, Miller would have created a reasonable doubt in the jury's mind as to who actually committed the burglary and killed the Waynes.

92. Terry's involvement in all this would also have established a motive for Lorraine Neloms to have lied about Roger Cherry's involvement. Because James Terry is Lorraine's uncle, Miller could have

> argued that blood is thicker than water. The jury would have had a reasonable basis to conclude that Ms. Neloms was protecting her uncle. It would also have explained how Ms. Neloms knew some of the details of the crime. It is also clear from both Ms. Neloms' own affidavit and that of Sandra Henry that Ronnie Chamberlain was pressuring her to go to the police in order to recover "reward money". See Apps. 62 and 24.[1]

Mr. Cherry's Rule 3.850 motion also included information that Lorraine Neloms admitted in 1992, that she was unsure of what Mr. Cherry told her on the night of the crimes (PC-R. 1547).

Mr. Cherry's initial Rule 3.850 motion also included penalty phase claims that dealt with trial counsel's failure to investigate and prepare mitigation evidence when a plethora of compelling background information was available.

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[1]Supposedly inside information about the crime was available to the general public. In a newspaper article dated June 29, 1986 [Orlando Sentinel], police investigator Martha Nibler advised the press that Mrs. Wayne was "found in the bedroom" and "appeared to have been injured." App. 67. Nibler also "speculated that the man, found in the entrance to the bedroom, may have had a heart attack ...." Id.

In another article the next day, the newspaper reported that "Police say the killer broke a window late Friday night and climbed into the locked house. Relatives said the telephone wires had been cut .... Volusia County deputy sheriff's found the Waynes' Ford sedan abandoned a mile from the house on Saturday." [From Orlando Sentinel article dated 6/30/86, page A-1, by Barbara Stewart. App. 671]. Ms. Neloms could have read these accounts prior to coming forward. She herself is unclear exactly where all her information came from App. 62.

The Circuit Court summarily denied the motion without an evidentiary hearing on March 12, 1993 (PC-R. 2205-24).

E. THE APPEAL OF THE SUMMARY DENIAL OF MR. CHERRY'S FIRST 3.850

On appeal, this Court remanded for an evidentiary hearing on the claim of ineffective assistance of counsel during the penalty phase. Cherry v. State, 659 So.2d 1069, 1074 (Fla. 1995).

In regard to Mr. Cherry's guilt phase claims, this Court affirmed the summary denial of an evidentiary hearing on ineffective assistance of counsel at the guilt phase. Id. at 1073. Specifically as to the James Terry allegations, this Court stated:

> Cherry also contends that counsel should have presented evidence that another person, James Terry, may have been the perpetrator of the murders. However, during the trial counsel did question a witness concerning her observations on the morning of the slayings, including her observations of Terry near the scene of the crime.

Id. And as to Mr. Cherry's Brady claim regarding Terry's shoes and the tread pattern matching the pattern on the victim's pajamas, Mr. Cherry was provided with photographs of Terry's shoeprints. Id. at 1073-4.

Mr. Cherry's case was remanded for a limited evidentiary hearing.

F. THE EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE

After this Court remanded for an evidentiary hearing, Mr. Cherry's pro bono attorneys from Holland and Hart moved to withdraw (PC-R2. 14-19). Mr. Cherry's attorneys cited the fact that VLRC was not funded and his pro bono attorneys could no longer ethically represent Mr. Cherry without VLRC's assistance (PC-R2. 15).

On December 19, 1995, Judge Gayle Graziano granted the motion to withdraw and appointed the Office of the Capital Collateral Representative (CCR), to represent Mr. Cherry (PC-R2. 24). Judge Graziano also scheduled the evidentiary hearing for February, 1996.

CCR immediately filed a motion for continuance and to hold the proceedings in abeyance until counsel could be assigned to Mr. Cherry's case (PC-R2. 28-31). In that motion, Michael Minerva, the CCR, informed the circuit court that he could not appoint counsel to represent Mr. Cherry and attached motions and letters that explained the budget and staffing crises occurring at CCR (PC-R2. 30, 32-47). The court granted the continuance until June, 1996 (PC-R2. 48).

On April 2, 1996, CCR filed a Motion to Continue And/Or Motion to Withdraw (PC-R2. 53-4). Michael Minerva again cited serious budget and staffing problems with the office (PC-R2.

53-4). Mr. Minerva also filed with the court a copy of Chief Justice Grimes letter attaching the Shevin report regarding the problems at CCR and suggesting a meeting (PC-R2. 64-88).

At a hearing on May 29, 1996, Mr. Minerva informed the court: “We have not been able to in good faith supply any – assign any counsel to represent Mr. Cherry.” (PC-R2. 1997). The court granted CCR’s motion for continuance and scheduled the evidentiary hearing for August 16, 1996 (PC-R2. 92).

In early August, CCR moved for yet another continuance of the evidentiary hearing due to problems in securing the attendance of witnesses (PC-R2. 112-5). The court rescheduled the hearing for December, 1996.

In December, 1996, an evidentiary hearing was held concerning Mr. Cherry’s ineffective assistance of counsel claim. Mr. Cherry’s hearing can be characterized by the descriptions by several witnesses of the horrific, brutal and violent background Mr. Cherry suffered. For example, Sylvester Hill who met Mr. Cherry in the 60's and grew up with him in DeLand, Florida (PC-T. 161), recalled Mr. Cherry's father "kind of beat him up all the time" and "one time he left and he run away from him, and his father [Tommy Lee Cherry] went and got him and put a chain around his neck and drug him home like he was a dog" and all the while was

"[k]icking and beating him." (PC-T. 162). Roger's mother, Ceola Cherry, "drunk a lot" and his father would beat her, too (PC-T. 162). The father drank moonshine and liquor "every day." (PC-T. 163). Mr. Hill also related the following:

> Q: Did you every (sic) see the end result of any of the punishment that Tommy Lee issued to Roger?
>
> A: Yes, sir.
>
> Q: And what would you see?
>
> A: Well, **he take a gasoline rope out to tie him up. He put it on his wrists and they stay bloody all the time where he had tied him up**.
>
> Q: And what would he do when he was tied up?
>
> A: Tie him up and beat him.
>
> * * *
>
> Q: Would Mr. Cherry beat Roger in public?
>
> A: Yes.
>
> Q: And what would he use?
>
> A: **A water hose, a shovel handle, anything, it didn't matter.**
>
> Q: Where would he hit Roger?
>
> A: Wherever he hit him at, his head, anywhere he hit him.
>
> Q: How hard would you say?
>
> A: **Like he was trying to kill him.**

(PC-T. 163, 164)(emphasis added).

Further, Mr. Hill once saw Roger hit in the face with a hammer so hard "it knocked his teeth out." (PC-T. 165). Mr. Cherry wore clothes given to him by the witness's mother (his father did not provide for Roger) and Roger referred to her as his mother, Roger was called "Chop Chop" and "Monkey Man", and was ridiculed by other children because of the way his daddy beat him all the time (PC-T. 165, 166). Police would rarely respond to the witness's mother's calls when Tommy Lee would come after Roger and beat him (PC-T. 166).

Roger Cherry was often dared to do things and he would, like jump off the roof into a kiddie pool and mess up his neck and land on his head. He also slept under the house a lot to avoid home (PC-T. 167). Roger rarely went to school; his father kept him out to work and do chores. The witness saw Roger crying many times because of the mistreatment (PC-T. 168).

Roger Cherry was not violent. The two of them huffed gasoline by breathing the vapors off a boat engine gas tank. While the witness tried it once, Roger just kept on doing it and would come over to the house all spaced out and weird (PC-T. 169, 170). Roger was not fed at his house, so Mr. Hill's mother would feed him. Mr. Hill was emphatic that Roger Cherry "was beaten"; "[h]e was not punished." (PC-T. 170).

The hearing included several other accounts of the abuse and neglect Mr. Cherry suffered as a child and his desire to escape his father's torment by turning to "huffing" and later, crack.

Mr. Cherry also presented testimony that he suffered from organic brain damage, retardation and other mental illnesses.

Levester Hill, Sylvester's brother, also testified at the evidentiary hearing about mitigation. During his testimony, postconviction counsel attempted to elicit the fact that another individual had confessed to the crimes for which Mr. Cherry was convicted and sentenced to death (PC-R2. 201-03). The lower court excluded the testimony. However, on cross examination, the State elicited the following testimony:

> Q: And you saw Mr. Terry in 1994?
>
> A: Yes.
>
> Q: And he volunteered to you what about this murder?
>
> A: He told me about some shoes, he was explaining to me about some shoes and jalousie windows and a car that his niece was driving, that was supposed to have been Roger's girlfriend.
>
> Q: What else did he tell you?
>
> A: That's all.
>
> Q: He didn't say, I did it, he didn't say that, did he?
>
> A: He said that he was there.

Q: He say Roger committed the murder?

A: No, he didn't tell me that.

Q: He just volunteered this all in this conversation you had where?

A: In his house.

Q: In his house?

A: Yes.

Q: How did that come up?

A: How did it come up? He was smoking crack.

Q: So he just decided to tell you about some murder and burglary that he was involved in?

A: I asked him about it.

Q: How did you ask?

A: I straight off asked him.

Q: Why did you want to know that all of a sudden? Why did you want to know?

A: Curious.

Q: Haven't you got your own problems?

A: Just curious.

Q: And were you smoking crack with him at the time?

A: No.

Q: You weren't?

A: I sold it to him.

Q: So you were not smoking it?

A: Not then.

Q: So while he was sitting there smoking you just decided to bring up the fact about Mr. Cherry's murder?

A: Yes.

Q: What kind of questions did you ask? Hey, James, did you really do that killing?

MR. MILLS: Objection. He asked him a question, let him answer the question.

THE COURT: Mr. Daly, let the witness answer your question.

Q: What questions did you ask him?

A: First he was talking about his niece, she had died and I was asking him about what happened that night, where was he that night.

Q: So, it when from my niece died to, James, what were you doing that night. Is that the way it went?

A: No, not really.

Q: Well, how did you happen to get into this conversation about the murder?

A: I heard about it and I was curious about it so I asked him about it and he started telling me things about it.

(PC-R2. 217-19).

The lower court denied Mr. Cherry's penalty phase ineffective assistance of counsel claim (PC-R2. 1724-36).

G. THE APPEAL OF THE DENIAL OF MR. CHERRY'S INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE CLAIM

This Court denied Mr. Cherry's appeal. Cherry v. State,

781 So. 2d 1040 (Fla. 2001).

H. THE 1997-2002 3.850 PROCEEDINGS

VLRC represented Mr. Cherry during his initial Rule 3.850 proceedings. At the evidentiary hearing in June, 2002, Ann Jacobs testified that she was Mr. Cherry's primary attorney during his initial Rule 3.850 proceedings and in the appeal following the summary denial of Mr. Cherry's 3.850 (PC-R3. 635-6).

Ms. Jacobs explained her theory of Mr. Cherry's case:

> Well, our theory and my theory was that Roger did not commit the murders. And my belief at the time and the lawyers on the case all believed that James Terry was the primary suspect. In our mind we believed that he was the one who committed the murders. We investigated it. We tried to prove it.
>
> We had circumstantial evidence of that, but we could not definitely prove that he did it. We had – there was some circumstantial evidence from the time of the crime. But then there was additional evidence that we uncovered that indicated that Roger was not inside the house and that James Terry may well have been the person who did this.

(PC-R3. 636-7).

Ms. Jacobs also explained that her staff investigated Mr. Cherry's background for mitigation (PC-R3. 635-37). She recalled that several members of the Hill family were interviewed since the Hill family resided near the Cherrys and she believed that they had valuable evidence regarding

mitigation (PC-R3. 646). She testified: "[M]y recollection was they knew Roger when he was a child, they knew about the abuse and that was my understanding of what they knew" (PC-R3. 646). Ms. Jacobs did not recall Levester Hill and the case files did not reflect that anyone from her office interviewed Levester Hill (PC-R3. 637).

Ms. Jacobs also explained that Mr. Cherry's Rule 3.850 motion was summarily denied in 1993 (PC-R3. 638). She began to work on his appeal (PC-R3. 638). Ms. Jacobs testified that after the case was on appeal "we would not have been working on the case. We were focusing on some other cases and also winding down the Resource Center. We had some death warrants, we were litigating those." (PC-R3. 638-9).

As Ms. Jacobs explained, in 1995, she learned that VLRC would not receive any more funding (PC-R3. 638-9). She characterized the time as "chaotic" (PC-R3. 640). Ms. Jacobs left her employ at VLRC in the fall of 1995 and Mr. Cherry's pro bono counsel also withdrew (PC-R3. 638-40).

The lower court appointed CCR to represent Mr. Cherry in December, 1995. It was not until July, 1996 that Mr. Cherry was assigned an attorney (PC-R3. 623). Peter Mills assumed the responsibilities of representing Mr. Cherry at his evidentiary hearing. Since Mr. Mills was newly appointed to

this case, he investigated all the witnesses involved to better prepare for the upcoming evidentiary hearing (PC-R3. 624).

Mr. Mills sent an investigator, Monica Conklin,[2] to interview Levester Hill because he believed that Levester possessed information about Mr. Cherry's background that constituted mitigation (PC-R3. 617-19). At the time that Ms. Conklin interviewed Levester Hill she was not assigned to Mr. Cherry's case and had little knowledge about the facts of the case (PC-R3. 616-17).

In August, 1996, Ms. Conklin traveled to a Department of Corrections facility to interview Levester Hill (PC-R3. 618). While discussing mitigation information, Levester Hill informed Ms. Conklin that he had additional information about the case (PC-R3. 618). He told Ms. Conklin that James Terry confessed his involvement in the Waynes' murder. Furthermore, he stated that Terry made Lorraine Neloms testify in an effort to protect himself (Def. Ex. 1, Affidavit of Levester Hill). Ms. Conklin prepared an affidavit for Levester Hill attesting to this information on August 6, 1996, because she was unsure to which correctional facility Mr. Hill was to be transferred

[2]At the time of the evidentiary hearing Monica Conklin had married and changed her name to Monica Jordan.

and she was unsure if he was about to be released (PC-R3. 618).

At the evidentiary hearing held in December, 1996, Levester Hill testified about the extensive abuse Mr. Cherry suffered while growing up. When Mr. Mills attempted to elicit testimony about Terry's involvement in the Waynes' homicides, the court prohibited the testimony (PC-T. 200-02).

At the 2002 evidentiary hearing, Mr. Mills testified that when he was prohibited from presenting Levester Hill's testimony about Terry, he filed a second Rule 3.850 motion which included the newly discovered (PC-R3. 627-28).

Also included in Mr. Cherry's second Rule 3.850 motion was a claim that the statistical evidence presented to his capital jury was unreliable and inaccurate. The lower court summarily denied Mr. Cherry's claim.

At the evidentiary hearing held on June 10, 2002, Levester Hill testified that James Terry discussed the crimes for which Mr. Cherry was convicted, and in October, 1994, confessed to the burglary and murder of the Waynes':

> Q: Okay, Now did you ever discuss the crime with which Mr. Cherry was convicted with James Terry?
>
> A: Yes.
>
> Q: How many times did you discuss it with him?
>
> A: About three times.

Q: Three times. All right. Let's start with the first time you had conversation with James Terry about this, Mr. Cherry's case. When did the conversation occur?

A: In '87, about '87.

Q: Do you know where the conversation occurred?

A: No. I can't remember at this time.

Q: Now do you remember how that conversation came about?

A: I asked him.

Q: Who asked who?

A: I asked James Terry about –

Q: About?

A: About Roger Cherry.

Q: What did Mr. [Terry] say at that time?

A: He told me that – I asked him about the crime, what happened. And he told me that Roger Cherry didn't do it.

Q: Okay. And did he say anything else to you at that time?

A: No, not at that time.

Q: Did he – did you ask him anything else at that time –

A: No, ma'am.

Q: – about the case? Now, when was the next time that you spoke to Mr. Terry about the crime with which Mr. Cherry was convicted?

A: About '88.

Q: And do you remember where you were when this came up?

A: At Mr. Terry's apartment. He had a little apartment. I think he had just got a settlement then.

Q: This is in 1988?

A: Yes.

* * *

Q: In 1988 when he spoke to you the second time what did he say about the case?

A: He was explaining to me about some shoes he said that he had to get rid of because they had matched some shoe prints that was at the scene of the crime.

Q: Okay. Did he say anything else during that conversation?

A: No, not at that time.

* * *

Q: Now when is the next time that you spoke to James Terry about the case?

A: '94.

Q: Do you remember any more specifically what kind of time frame it was in '94?

A: Might have been in October, about October of '94.

Q: Okay. And how do you remember that it would have been October of '94?

A: Because I had – I wasn't long out of prison at that time.

* * *

Q: Now, how did the conversation come up at that time in October of 1994?

A: I had went to there to sell –

Q: Where did you go?

A: James Terry's place.

Q: How did that come up then?

A: He was doing some drugs, sold him some drugs.

Q: Were you using any drugs?

A: No, not at that time.

Q: What did he – what did he – how did the conversation come up?

A: I asked him about it again.

Q: Okay. And what did he tell you?

A: He was telling – he started telling me about some jalousie windows that –

* * *

A: And he said once he was inside the house that the old lady started hollering and when the man came out he said he was explaining to me that the man fell and tumbled down to the floor holding his chest.

Q: Okay. And did he say anything about Roger Cherry at that time?

A: No, not at that time.

Q: So did Mr. Terry tell you that he was in the house at the time of the crime?

A: Terry was there he said.

(PC-R2. 651-655).

Postconviction counsel attempted to present testimony corroborating Levester Hill's statements, but the lower court refused to consider the evidence (PC-R3. 688). The court only allowed postconviction counsel to proffer the evidence (PC-R3. 673-5). That proffer included the testimony of Dr. Dale Nute, a crime scene analyst who investigated the crime scene evidence and the scene itself at the request of a VLRC attorney in 1992. His proffered testimony called into question the State's assertion that Mr. Cherry was the sole participant in the murders:

> Q: And specifically what evidence did you review regarding the point of entry?
>
> A: I looked at the jalousie windows. There were three panes that had been removed. One of the panes was reported that Mr. Cherry's left thumbprint was found on it and also had blood on it over in the corner, drops. The telephone wire right next to the point of entry had been cut. And Mr. Cherry's right thumb was also cut.
>
> The – I looked at the window, the size of the window, the opening that would be there with three jealousies removed and found that the height of the opening was 14 inches instead of 18 inches as reported in the trial. Under the window there was the wall both in the photographs – in the photographs was clean; in other words, there was no scuffing, which would – bottom of the window was four feet, one inch from the ground.
>
> Therefore, it was my conclusion that it would have been virtually impossible for one person to have pulled himself up and through the window without being aided by somebody else, without scuffing the window.
>
> Q: In terms of other significant evidence

regarding the point of entry, did you make any other determinations that you think were significant?

A: Yes. There was no blood on the window sill. And from earlier looking at the panes being on the outside of the house and having blood on them. And also there was a paper bag outside of the scene that was three-quarters soaked with Mr. Cherry's blood. That would indicate that he definitely was bleeding prior to anyone entering the house. And there was no evidence of his blood coming into the house at the point of entry, which would have been again if he had a freely-bleeding wound, would have been virtually impossible that he would not have left evidence.

On the window sill was fabric mark which was ribbed in design. A ribbed design is characteristic of at least two types of fabric, one of them is corduroy trousers of some sort and the other is a knit glove, which has a ribbed appearance to it. If – were gloves being used to enter through the window, again that would pretty much negate Mr. Cherry being involved, because his hand would have soaked the glove, it would have left – everything he touched would have left a bloody fabric mark. In fact there was no fabric mark – there was no bloody fabric marks in that area.

The other item of evidence at the point of entry was on the inside of the house right under the window was a sleeper sofa. That sofa had a bed sheet on it and on that bed sheet was a shoe track pattern of which was different from any of the shoes identified as belonging to Mr. Cherry or any of the shoes identified elsewhere in the case, except for some shoe tracks which were at the area where the car abandoned. And the track on the bed sheet was similar in pattern to the track.

So that would – conclusion from that would be that the person who entered the house was probably not Mr. Cherry, but someone else.

(PC-R3. 677-80). The lower court refused to consider Dr. Nute's testimony (PC-R3. 688). The court stated: "I have just reviewed both of the previous cases out of the Supreme Court.

Virtually all of the information relayed by this witness has been previously considered at one point or another, even in the original case at 544 Southern Second 184 or in the review of the 3850 at 781 Southern Second 1040. I don't believe that testimony was relevant to this issue and not considered accordingly." (PC-R3. 688).

Likewise, the lower court refused to consider the testimony of Carol Crippen, and Diane Selman. Crippen and Selman's proffered testimony supported Mr. Cherry's assertion that he did lawn work for the Waynes which would give him reason to be at their home (PC-R3. 694, 696).

At the evidentiary hearing, the State presented the testimony of James Terry. Terry denied being involved in the burglary and homicide of the Waynes (PC-R3. 703). Terry admitted that in 1994 he spoke to Levester Hill about the crimes for which Mr. Cherry was convicted, but Terry maintained that he denied being involved in the crimes to Levester Hill (PC-R3. 702-3). Terry also asserted that he had an alibi for the night of the crimes (PC-R3. 703).

Following the evidentiary hearing, the lower court denied relief (PC-R3. 486-9).

SUMMARY OF ARGUMENT

1. The testimony of Levester Hill is newly discovered

evidence. Hallman v. State, 371 So.2d 482, 485 (Fla. 1979), standard modified in Jones v. State, 591 So.2d 911 (Fla. 1991). The circuit court erred in denying Mr. Cherry relief. It is unclear whether or not the circuit court considered how Mr. Hill's testimony would affect Mr. Cherry's sentence of death. The circuit court also failed to conduct a cumulative analysis of evidence presented in Mr. Cherry's initial Rule 3.850 motion through affidavits and reports.

The substance of Mr. Hill's testimony, when considered with all known record evidence and in light of prior claims, would probably have resulted in acquittal of the First Degree Murder charges, either outright or through conviction of a lesser included offense. Certainly, the new evidence would have probably resulted in a life sentence even assuming a conviction was obtainable.

The lower court failed to consider evidence which supported Mr. Cherry's newly discovered evidence claim and Mr. Hill.

2. Mr. Cherry's due process rights were violated by the circuit court's failure to grant an evidentiary hearing on guilt phase claims.

ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED IN DETERMINING THAT MR. CHERRY WAS NOT DILIGENT IN PRESENTING HIS NEWLY DISCOVERED EVIDENCE AND IN DETERMINING THAT MR. CHERRY'S NEWLY DISCOVERED EVIDENCE WOULD NOT PROBABLY HAVE PRODUCED AN ACQUITTAL OR A LESSER SENTENCE AND THE LOWER COURT FAILED TO CONDUCT A CUMULATIVE REVIEW OF EVIDENCE PRESENTED AT BOTH EVIDENTIARY HEARINGS.

A. Diligence

This Court has held:

> First . . . newly discovered . . . evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of due diligence."

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)(quoting Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-1325 (Fla. 1994).

During the June, 2002, evidentiary hearing, Mr. Cherry presented evidence that James Terry confessed to the murders of Leonard and Esther Wayne. Levester Hill's testimony detailed three discussions when Terry implicated himself in the burglary and homicides. In conducting an analysis of Mr. Cherry's newly discovered evidence the circuit court found that Mr. Cherry did not satisfy the diligence prong of the Jones test (PC-R3. 488). The lower court stated:

> Although the last "piece" of the alleged confession was made in 1994, it did not come to defense

> counsel's attention until August 9, 1996, when defense counsel was preparing for the evidentiary hearing to be held in December of 1996, as ordered by the Florida Supreme Court. Defendant has only one (1) year from the date the evidence was discovered or could have been discovered to file a Rule 3.850 Motion. **Therefore, the Court finds that at the very least, this "newly discovered evidence" could have been discovered, by due diligence, in 1994 and brought to the Court's attention within one year from that date. Thus, the Court finds that Defendant has not successfully demonstrated that the "evidence" is newly discovered. Accordingly, this claim is untimely.**

(PC-R3. 487-8)(citations omitted)(emphasis added). The lower court's finding that Mr. Cherry was not diligent in presenting his claim is in error.

Mr. Cherry was diligent. Ms. Jacobs testified at Mr. Cherry's evidentiary hearing that when she initially investigated Mr. Cherry's case in 1991, she thoroughly investigated James Terry and his connection to the crimes for which Mr. Cherry was convicted (PC-R3. 636-7). In fact, Ms. Jacobs believed that Terry was involved in the homicide of the Waynes (PC-R3. 636-7). Ms. Jacobs also had no reason to know that Levester Hill possessed any information about Terry's involvement in the homicides (PC-R3. 646). Ms. Jacobs was familiar with the Hill family, but not Levester Hill (PC-R3. 637).[3] However, Ms. Jacobs believed that the Hill's were

[3]Mr. Hill was incarcerated during the time that Ms. Jacobs investigated Mr. Cherry's case.

important mitigation witnesses who knew Mr. Cherry as he was growing up in DeLand, Florida (PC-R3. 646). Ms. Jacobs did not have any reason to know that Levester Hill possessed exculpatory information for Mr. Cherry implicating Terry in the crimes.

Furthermore, as Ms. Jacobs explained, when the circuit court summarily denied Mr. Cherry's Rule 3.850 motion, on March 12, 1993, she turned her attention Mr. Cherry's appeal, to other cases, and to cases with impending death warrants (PC-R3. 638-8). Thus, the active investigation into Mr. Cherry's case ceased. Considering the budget and workload of VLRC it would have been impossible for Ms. Jacobs to continue to investigate a case when she was unsure what this Court would do in reviewing the lower court's summary denial of Mr. Cherry's claims, particularly when she had no idea that there was anything to further investigate.

Also, after losing funding, VLRC began to wind down in early 1995 (PC-R3. 638-9). During the time of Mr. Cherry's appeal, Ms. Jacobs had no idea and no reason to know that James Terry made any statements inculpating himself in the Wayne homicides.

On August 31, 1995, this Court reversed, in part, the lower court's order summarily denying Mr. Cherry any relief

and remanded for an evidentiary hearing on ineffective assistance of counsel at the penalty phase. Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

CCR was assigned Mr. Cherry's case on December 19, 1995 (PC-R2. 24). Mr. Minerva filed several motions for continuance in which he explained that he could not appoint an attorney for Mr. Cherry (PC-R2. 28-31, 53-4). At a hearing on May 29, 1996, Mr. Minerva informed the court: "We have not been able to in good faith supply any – assign any counsel to represent Mr. Cherry." (PC-R2. 1997). Due to the extinction of VLRC and the problems afflicting CCR, Mr. Cherry was unrepresented from August, 1995, until July, 1996. It is absurd to find that Mr. Cherry was not diligent in learning of Levester Hill's knowledge about Terry and his involvement in the case during a period of time when Mr. Cherry did not even have an attorney representing him.

After being appointed to represent Mr. Cherry, in July, 1996, Mr. Mills immediately began preparing for the evidentiary hearing that was limited to penalty phase issues. He directed investigators to make contact with all the witnesses VLRC found prior to 1992. During this process, Mr. Mills became aware of Levester Hill and that Levester Hill may have relevant information about Mr. Cherry's background. Mr.

Hill was in the Department of Corrections' custody (PC-R3. 617-8). He immediately sent an investigator to interview Mr. Hill and learned of Terry's confession to Levester Hill.

Mr. Mills attempted to present the information to the lower court during Mr. Cherry's hearing, but was prevented from doing so. Thus, Mr. Mills timely filed a second 3.850 motion regarding Levester Hills' knowledge of Terry involvement in the Wayne homicides.

Mr. Mills had no idea that Mr. Hill had any other information besides background history on Mr. Cherry (PC-R3. 624-626). Ms. Conklin met with Mr. Hill to discuss what mitigation testimony he could give at the evidentiary hearing. Only at that meeting did Mr. Hill reveal the confessions Mr. Terry made to him. Mr. Mills became aware of this information when his investigator, Monica Conklin, obtained an affidavit from Mr. Hill and called Mr. Mills with the information on August 6, 1996 (PC-R3. 620).

At the evidentiary hearing held in December 1996, Mr. Mills attempted to elicit this newly discovered evidence from Mr. Hill but was prevented from doing so by the circuit court (PC-R2. 339-342). His only alternative was to file a successive Rule 3.850 motion to meet his diligence requirement. He filed this motion on August 6, 1997 (PC-R3.

1-158).

Postconviction counsel exercised due diligence in finding and submitting the Terry confession. Terry's confession to his involvement in the crimes did not come into existence until the last statements were made by Terry to Levester Hill in 1994. At that time, counsel for Mr. Cherry was preparing for an appeal of the summary denial of all claims in the original Rule 3.850 motion. The following year, Mr. Cherry was unrepresented for almost a year due to the problems afflicting capital postconviction counsel in Florida.

Mr. Cherry was diligent. This Court must reverse the lower court's finding.

B. PROBABILITY OF ACQUITTAL OR LIFE SENTENCE

In Jones v. State, this Court modified the standard for newly discovered evidence claims and held that "in order to provide relief, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. 591 So. 2d 911, 915 (Fla. 1991). Following Jones, this Court indicated that the same standard would apply if the issue were whether a life sentence should have been imposed. Mills v. State, 786 So. 2d 547, 549-50 (Fla. 2001).

As to the analysis of Mr. Cherry's claim, the circuit court found that "after hearing the testimony of all the

witnesses and observing their demeanor, this Court finds that Mr. Hill's testimony is simply not credible, nor worthy of belief. The testimony of Mr. Terry, on the other hand, is more credible on key points." (PC-R3. 488). The circuit court erred in finding Terry more credible than Hill.

1. Credibility

Levester Hill's testimony was credible. The lower court ignored the testimony of the investigator who spoke to Mr. Hill in 1996 and the testimony which the State elicited at the 1996 evidentiary hearing.

In 1996, Mr. Hill was interviewed by Monica Conklin, an investigator with CCR. At the time Ms. Conklin met with Mr. Hill, she was not assigned to Mr. Cherry's case and she did not know much about the facts (PC-R3. 617). In fact, Ms. Conklin believed that the purpose of meeting with Mr. Hill was to find out what he knew about Mr. Cherry's background or for mitigation (PC-R3. 616). When Ms. Conklin met Mr. Hill and learned that he possessed information about Terry that inculpated him in the crimes and exculpated Mr. Cherry she decided to obtain an affidavit (PC-R3. 618). Mr. Hill provided the information contained in the affidavit (Def. Ex. 1), which as the lower court recognized that the affidavit and Mr. Hill's testimony in 2002 were similar, with only slight

inconsistencies (PC-R3. 488). Likewise, Mr. Hill's testimony under oath in 1996 was also similar to his testimony in 2002. The lower court failed to consider Mr. Hill's 1996 testimony.

Furthermore, Mr. Hill had absolutely nothing to gain by testifying about Terry's confession. While Mr. Hill knew Mr. Cherry as they were growing up, he has not spoken to Mr. Cherry since 1982 (PC-R3. 649).

On the other hand, Terry had much to lose when he testified at the 2002 evidentiary hearing. And like at the time Terry testified at his deposition, he was evasive, not responsive and refused to answer questions that were posed to him (PC-R3. 707, 708). Three times during cross examination, the lower court instructed Terry to answer the question (PC-R3. 708, 711, 713). On one occasion the court instructed Terry: "She gets to ask the questions." (PC-R3. 708).

Additionally, Terry did not deny that he discussed Mr. Cherry's case with Mr. Hill. He remembered that he spoke to Mr. Hill in "1994 or 1995", but could not recall if he spoke to him in 1987 or 1988 (PC-R3. 702). Instead, Terry denied being at the Waynes' home on the night of the crime and asserted an alibi (PC-R3. 703).

In fact, Terry's statements in 2002 were inconsistent

with his deposition and the statements he provided to law enforcement at the time of the crimes. Terry testified in 2002 that he did not provide any statements to the police (PC-R3. 97). This is not true. A police report, dated June 28, 1986, reflects that Terry spoke to the police and provided statements about his shoes and denied any knowledge of the crime (PC-R. 1641).

Additionally, Terry testified that he did not throw his shoes away, so he could not have told Mr. Hill that he did (PC-R3. 702). In fact, in his deposition in 1987, Terry testified that he had thrown his shoes away (PC-R3. 708).

In 2002, Terry also explained that he drove to the area where the abandoned car was located, but in his deposition he explained that he walked through the woods to collect cans and came upon the car (PC-R. 705).

As to his alibi, Terry testified that he could not remember any of the individuals' names (PC-R3. 709). Terry testified:

> Q: What is Pat's last name, do you know?
>
> A: I'm not sure. I'm not sure.
>
> Q: Is it Patricia Grimes?
>
> A: It might be. Mother's name is Mabel Weebles. You know them?
>
> Q: What's Don's last name?

A: I don’t even remember. I have bad rememberance (sic). I don’t remember.

Q: Have you spoken to Patricia Grimes lately?

A: Not lately I ain’t because I haven’t did anything. I don’t have no business here. Should be working.

Q: But you do know her.

A: Yeah. Well, Grimes, no.

Q: Patricia Grimes?

A: No. Who is that? I thought you was talking about Pat, the lady – lady I gave you as my alibi. Patricia Grimes I don’t know her. I can’t remember her.

Q: Okay. So you recall having a conversation with Mr. Hill in 1994 about this crime?

A: Yes, ma’am.

Q: Okay. What did you know about the crime that you could have a conversation with him?

A: That I didn’t do – the same thing I just told you all. I was in Lake County. How can I be in two places at one time.

Q: What time did you go to Lake County?

A: And if Roger did that, he knew himself I wasn’t with him.

Q: What time did you go to Lake County?

A: I don’t remember all that. I don’t remember.

Q: What time did you come home?

A: It was pretty early. You can ask Delores Rockmore. She’s one of my witnesses. She was my girlfriend back then.

> Q: So you said it was pretty early. What time would that be?
>
> A: I couldn't say. I ain't going to say. I ain't going to tell a lie.

(PC-R3. 709-10). Terry testified that he recalled the night because the police came to test his shoes "a couple of days later", "[i]t wasn't the same day." (PC-R3. 713-4). In fact the police did interview Terry the day Mr. and Mrs. Wayne were found in their home. Therefore, Terry's alibi, even if true, was not for the night of the crimes.

Terry's testimony in 2002, was riddled with inconsistencies. Terry admitted that he had a bad memory (PC-R3. 709, 710), yet the lower court found him to be credible. The lower court's order is not supported by the record.

The lower court's order is in error because, the court refused to consider evidence that corroborated Mr. Hill and refuted Terry's testimony. Terry was the original suspect in the crimes. He was seen walking suspiciously around the victims' abandoned car the day after the murders (R. 752-760). Shoe tread impressions found around the abandoned car bears close resemblance to the shoe tread impressions found on the female victim's pajamas (PC-R. 1586-1597). In addition, twenty-three prints were found inside and around the Waynes' home. Of those twenty-three, only five were identified;

eighteen were not (R. 700-01). Terry's fingerprints were never compared to the prints found at the crime scene.

At the 2002 evidentiary hearing, Dr. Dale Nute, a former crime scene analyst with the Florida Department of Law Enforcement explained that the State's theory of the case was essentially impossible. Dr. Nute testified that the shoe print found on the sofa under the window which was the point of entry and the shoe print from Mrs. Wayne's pajama bottom were similar to the tread pattern identified as being from Terry's shoes (PC-R3. 679-682), the shoes he discarded shortly after the crimes.

Dr. Nute also explained that there were fabric patterns at the point on entry and near Mrs. Wayne that did not match the clothing that Mr. Cherry was wearing on the night of the crimes (PC-R3. 679). Mr. Cherry's clothes had no blood on them (PC-R3.683).

Dr. Nute explained that the entry into the Wayne's home would be impossible for one person without leaving any marks on the wall (PC-R3. 678). Dr. Nute also believed that had Mr. Cherry cut his hand and considering the amount of blood that was outside of the house, it would have been impossible for Mr. Cherry to attack Mrs. Wayne without leaving any blood (PC-R3. 685-6).

The lower court also refused to consider Patricia Grimes affidavit which completely refutes Terry testimony that he had an alibi for the night of the crimes (PC-R3. 719).

The lower court's refusal to consider the evidence adduced at trial, supplied to the court in Mr. Cherry's first Rule 3.850 proceeding and the proffered testimony was in error.

Post convictions proceedings are required to conform with due process requirements. Roberts v. State, 2002 WL 31719355, 17 (Fla. 2002); citing Teffeteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996). These requirements include the opportunity to call witnesses and introduce evidence. See Johnson v. Singletary, 647 So.2d. 106 (Fla. 1994); Provenzano v. State, 750 So.2d 597 (Fla. 1999). Within this standard is the premise that the evidence submitted be considered in the court's decision-making process. This would include evidence which supports and clarifies the newly discovered evidence at the heart of the hearing. The lower court erred in failing to consider the evidence that supported Mr. Cherry's claim.

A review of the records makes clear that Levester Hill was credible when he testified about Terry's confession.

2. Affect of the Newly Discovered Evidence

Had the jury heard Terry's confession to Levester Hill there is no doubt that the evidence would have probably produced an acquittal of first-degree murder, or at the very least produced a sentence of less than death.

The State's case at trial relied on Neloms testimony about the statements Mr. Cherry made and what she observed the night of the crimes. The jury never knew that the original suspect in the case was Neloms' uncle, Terry. Had the jury known that there was evidence linking Terry to the crime, including that fact that he described to Levester Hill what occurred in the house, the State's case would have been seriously undermined.

Furthermore, the physical evidence corroborated Mr. Hill's testimony: the unidentified African-American hair found near Mrs. Wayne's body which did not match Mr. Cherry; the unidentified fingerprints that did not match Mr. Cherry; the unidentified fabric patterns that did not match the fabric of Mr. Cherry's clothes; the shoe prints on the sofa and the pajamas did not match Mr. Cherry and in fact, matched the tread pattern on Terry's shoes; and the lack of blood evidence inside the house when substantial blood was found outside of the house.

The only evidence placing Mr. Cherry inside the Wayne's

home, the palm print on the bedroom door is confusing because it is unclear who collected the print and where the print was located on the door frame. Thus, it is outweighed by all of the other physical evidence which proves that Mr. Cherry did not enter the Wayne's home or attack Mr. and Mrs. Wayne.

Terry's admissions to Levester Hill individually and in conjunction with the other known evidence undermine the verdict of first degree murder by exculpating Mr. Cherry and impeaching the credibility of Neloms.

Additionally, the newly discovered evidence affects the penalty phase in Mr. Cherry's case. In light of Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987), Mr. Cherry is entitled to relief form his death sentence based upon the impact Terry's confession has on the findings regarding aggravation and mitigation and proportionality concerns.

Mr. Hills' testimony would probably produce a life sentence on retrial. The jury recommended that Mr. Cherry be sentenced to death for the murder of Mrs. Wayne by a vote of nine to three (R. 1061-62). This Court affirmed Mr. Cherry's sentence of death based on the brutality of the beating of Mrs. Wayne. In fact, in approving of the heinous, atrocious and cruel aggravator, this Court stated: "[T]here was a shoe

print on the back of Mrs. Wayne's pajama bottom with a corresponding bruise on her right buttock. The medical examiner concluded that the injuries received by Mrs. Wayne were severe and must have been inflicted with great force. Under these circumstances, the aggravating factor of heinous, atrocious, or cruel is appropriate to the murder of Mrs. Wayne." Cherry v. State, 544 So. 2d 184, 187-188 (Fla. 1989). Clearly, Terry's statements support the imposition of a life sentence for Mr. Cherry, because Terry was the actual attacker. If this is true, the underlying recommendation cannot be reliable and constitutionally sound.

In Enmund v. Florida, 458 U.S. 782 (1982), the United States Supreme Court established that the individualized sentencing that is required by the Eighth Amendment before the death penalty may be imposed must include a consideration of a particular defendant's culpability. The Court explained:

> The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence, which means that we must focus on "relevant facets of character and record of the individual offender."

458 U.S. at 798 (citing Lockett v. Ohio, 438 U.S. 586 (1978), and Woodson v. North Carolina, 428 U.S. 280 (1976)). The

Supreme Court in Enmund concluded that the Eighth Amendment prohibits imposition of the death penalty for a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." See id. at 797. The Supreme Court found that the sentencing court had erred in failing to consider each co-defendant's individual culpability and instead "attributed to Enmund the culpability of those who killed the [victims]." See id.

Similarly, Terry's confession proves that an Enmund analysis must be performed by the jury and sentencing judge. Terry's statements indicate that Mr. Cherry did not actually kill the victims. Mr. Cherry's death sentence is unconstitutional.

Further, in light of Terry’s statements, the heinous, atrocious and cruel aggravating factor cannot be established, yet mitigating factors are established. For example, the defense could have established the mitigating factor that Mr. Cherry was merely an accomplice in the capital felony committed by another person and his participation was relatively minor.

Terry's confessions also obliterate the trial court's

findings of three aggravating factors and no mitigation (R. 1243). Considering the substantial and compelling evidence of mitigation, both statutory and non-statutory, that Mr. Cherry presented at his 1996 evidentiary hearing, the mitigation would far outweigh the aggravators. Hence, a life sentence is required under the law.

The conflicting evidence presented at trial and in postconviction regarding Mr. Cherry and Terry's culpability would surely have shifted in favor of Mr. Cherry, had Terry's confession been available.

The death penalty is disproportionate for the crime of felony murder (the only crime Mr. Cherry could arguably be guilty of if Terry killed Mrs. Wayne) where the defendant was merely a minor participant in the crime and the state's evidence of mental state does not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery, or in this case a burglary, that results in murder is not enough culpability to warrant the death penalty. See Jackson v. State, 575 So. 2d 181, 190-191 (Fla. 1991) (discussing Tison and Enmund). Terry's confession to Mr. Hill indicates Mr. Cherry had **no** participation in the homicides.

Further, the fact that the evidence is insufficient to

establish premeditated murder by Mr. Cherry given Terry's confession should be considered in determining an appropriate sentence. See Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990).

Surely newly discovered evidence of Terry's confession to his full and single participation in Wayne's death justifies that Mr. Cherry receive a life sentence.

C. Cumulative Review

Furthermore, the circuit court failed to conduct a cumulative analysis. A cumulative analysis of the new evidence, along with all prior claims and the complete record is required. Lightbourne v. State, 740 So. 2d 238 (Fla. 1999); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996); State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

In Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violation, ineffective assistance of counsel and/or newly discovered evidence. Specifically, this Court found that a new trial was required because the evidence presented at the evidentiary hearing undermined the credibility of key State witnesses. Id. at 923. Likewise, Mr. Cherry's newly discovered evidence undermines the credibility of Neloms.

The lower court failed to examine evidence admitted at trial and during the first and second Rule 3.850 proceedings,

including the evidence submitted in the appendix to the initial Rule 3.850 motion. Only under a cumulative analysis can the impact of this testimony truly been determined.

Had all this information been examined, the circuit court would have found the evidence would probably produce an acquittal on retrial. Mr. Cherry, on several occasions, attempted to present evidence illustrating the errors not only in the penalty phase, but also guilt phase of his original trial. The first Rule 3.850 motion was supported by several affidavits illustrating the problems with the forensic evidence presented. The Affidavit of Diane Lavett, an expert in serology, delineated the problems not only with the procedure the FDLE followed in examining the blood taken at the scene, but also with the results they obtained (PC-R. 264-270). Dr. Kris Sperry, a forensic pathologist submitted an affidavit explaining the problems with the autopsy performed on the victim, Esther Williams (PC-R.1784-1797). Also, Dale Nute, a crime scene investigator, explained the inconsistencies in the State's theory that Mr. Cherry was the sole participant in this burglary-murder.

Further, James Terry's involvement in the crime and the evidence presented to the court at trial and in the initial Rule 3.850 proceedings also proves that Terry was involved.

The original Rule 3.850 motion included information that Terry's alibi for the night of the crimes was untrue. Patricia Grimes' affidavit explained that Mr. Terry was not with them as he claimed to be in his deposition and at the second evidentiary hearing (PC-R. 1619).

Terry's confession in conjunction with this evidence, illustrates that at the most, Mr. Cherry was a minor participant in burglary. Mr. Cherry is entitled to relief.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. CHERRY AN EVIDENTIARY HEARING ON HIS CLAIM THAT INADMISSIBLE, INACCURATE SCIENTIFIC EVIDENCE PRESENTED TO MR. CHERRY'S JURY VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In Brim v. State, this Court held: "In the absence of an independent validation method, we find that the Frye test is appropriate when using statistics or population genetics to calculate population frequency statistics." 695 So. 2d 268, 271 (Fla. 1997). In Mr. Cherry's case, population frequency statistics were presented to the jury, but they were never subjected to the Frye test.

Brim discusses the statistical analysis that follows DNA testing. The Court's holding applies to any population frequency analysis, however. "A second statistical step is

needed to give significance to a match" with DNA and serological testing. Brim, at 269-70. See also Richard Saferstein, Forensic Science Handbook 401-403 (1982). The need for independent validation of population frequency statistics used to interpret blood typing results is even greater than in DNA testing. The National Research Council, the scientific body relied upon by this Court in Brim, has found that the kind of serology used in Mr. Cherry's case has substantially less discriminatory power than DNA testing. NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 88 (1992)(citing FBI study finding 33% error rate in inclusion of suspects through conventional serology compared to DNA testing).

In Mr. Cherry's case, the state presented evidence regarding Mr. Cherry's blood grouping and typing of six enzymes found in the blood. The state presented this evidence through David Baer, a crime laboratory analyst in the serology section of the Florida Department of Law Enforcement Crime Laboratory. Mr. Baer was offered as an expert in the field of serology.

> Q: Can you estimate the number of times you have previously testified in court?
>
> A: In the State of Florida between ninety and one hundred times.
>
> Q: And on those occasions, were you qualified as an expert in the area of serology?

A: Yes.

MR. MARSHALL: Your Honor, the State would offer Mr. Baer as an expert in the field of serology and ask that he be permitted to give opinion testimony.

THE COURT: Mr. Miller, you may inquire.

MR. MILLER: **We have no inquiry of him, Your Honor, as long as it's confined in the area of his expertise.**

(R. 616)(emphasis added). Despite defense counsel's attempt to limit Mr. Baer's testimony to his field of expertise--serology--the witness also testified about population statistics.

Q: Based on the blood group factor and the enzymes you found present, are you able to or do you have an opinion as to the percent of population that someone with Mr. Cherry's blood characteristics would fall in?

A: I did not figure it out for the liquid blood. I could do it quickly, I have a calculator with me.

Q: You did that for other items, though, that were submitted?

A: Yes. **I generally just do that on stains.**

Q: Okay.

A: Would you like me to do the calculations right now?

Q: Well, can you do it right now?

A: Yeah.

Q: Sure.

A: **That combination of one blood group factor and six enzymes is found in about one point nine**

percent of the population.

(R. 623-4)(emphasis added). Mr. Cherry's counsel failed to question Mr. Baer about his qualifications to testify to population frequency statistics and failed to question the reliability of his testimony. Such a failure on the part of defense counsel, without other errors, constitutes ineffective assistance. Chatom v. White, 858 F.2d 1479 (11th Cir. 1988), cert. denied, 489 U.S. 1054 (1989).

Mr. Baer had no education or training in population frequency analysis (R. 615). "[T]he calculation of population frequency statistics is based on principles of statistics and population genetics." Brim. Clearly, in Brim, the Court recognized that this is a distinct field of expertise. In Murray v. State, 692 So.2d 157 (Fla. 1997), this Court reversed the convictions and sentences and remanded for a new trial in part because the State's serology expert was not qualified to give an opinion about population frequency statistics. Id., 692 So. 2d at 164. Although the trial in Murray ended before Brim was decided, the Court applied the standards set forth in Brim. Thus the requirements that population frequency statistics meet the Frye test and that experts not be permitted to testify to population frequency statistics if that subject is beyond the scope of their expertise applies retroactively. See generally, Murray, supra.

Mr. Baer's calculations would not have passed the Frye standard. Mr. Baer testified:

> Q: When you assigned the percentage which you originally did to its frequency in the population that you did with Mr. Cherry's blood, one point nine percent, is that it, with the six enzymes?
>
> A: Yes, sir.
>
> Q: What was the size of the population that you used, sir?
>
> A: Those figures are based on bloods which we received in the laboratory. I have been tabulating or collecting my own figures for the past several years. The size depends on which enzymes. ABO, it's based on nine hundred and seven samples. For the enzymes, they are based on smaller samples.

(R. 657). Mr. Baer also made "a transposition error when [he] was going from [his] enzyme book into [his] notes" (R. 661). Had a Frye hearing been held, Mr. Baer's population frequency statistics would not have been admissible. See Murray, 692 So.2d at 163 (Fla. 1997); Ramirez v. State, 651 So.2d 1164, 1168 (Fla. 1995)(holding that scientific evidence is a matter of admissibility determined by the trial judge and not a matter of weight determined by the jury).

Just as in Brim, Mr. Cherry is entitled to an evidentiary hearing to "clarify the exact methods used by the State in calculating its population frequency statistics ... ". Brim, at 275; Murray, 692 So.2d at 164. Given such an opportunity Mr. Cherry will present expert testimony establishing that Mr. Baer's statistical analysis was flawed and unreliable. Mr.

Cherry is prepared to establish through expert testimony that Mr. Baer's methodology both as to his identification of specific enzymes and as to his statistical analysis cannot pass the Frye test.

The lower court erred in denying Mr. Cherry an evidentiary hearing.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, ROGER LEE CHERRY, urges this Court to reverse the lower court’s order and grant Mr. Cherry Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Kenneth Nunnelly, Assistant Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida 32118, on April 3, 2003.

CERTIFICATION OF TYPE SIZE AND STYLE

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