IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1330

ERNEST D. SUGGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal involves a Rule 3.850 motion on which an evidentiary hearing was granted on some issues, and summarily denied on others. References in the brief shall be as follows:

(R. ___) -- Record on Direct appeal;

(PC-R. ___) -- Record in this instant appeal;

Only the first two volumes of the five-volume record on appeal are numbered sequentially. Thus, the post-conviction evidentiary hearing will be identified as PC.Ev. _____. The rest of the record on appeal will be identified by the date of each hearing.

References to the exhibits introduced during the evidentiary hearing and other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Suggs requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

STATEMENT OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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STATEMENT OF THE CASE AND OF THE FACTS

On August 22, 1990, Ernest Suggs was indicted by the grand jury in Walton County, Florida, and charged with first-degree murder and kidnapping of Pauline Casey, a barmaid. He also was charged with robbery and possession of a firearm by a convicted felon, with the latter charge being severed for trial purposes (R-960). Mr. Suggs originally was represented by John Mooneyham of the Public Defender's Office. After a period of time, Earl D. Loveless, assistant public defender, took primary responsibility for the case. Subsequently, Mr. Suggs retained Donald W. Stewart of Anniston, Alabama, and Robert Kimmel of Pensacola, Florida.

Before trial, a fire broke out at the courthouse in Defuniak Springs (R-4926-27). Mr. Suggs waived his right to be tried in Walton Count and the case proceeded to trial in Okaloosa County (R-4931, 4992). Because of pre-trial publicity, an impartial jury could not be selected, and the court granted Mr. Suggs' motion for change of venue, moving the case to Milton, Florida (R-5118, 5264, 5270).

Jury trial began in Santa Rosa County on May 26, 1992 (R-1894). The jury found Mr. Suggs guilty of first-degree murder, kidnapping, and robbery (R-1719). The jury sentenced Mr. Suggs to death by a vote of seven to five (R-1756). On

July 15, 1992, the trial court sentenced Mr. Suggs to death.

On direct appeal, this Court affirmed Mr. Suggs' convictions and sentence. Suggs v. State, 644 So.2d 64 (Fla. 1994). The United States Supreme Court denied certiorari on April 24, 1995. Suggs v. Florida, 115 S. Ct. 1794 (1995).

Because Mr. Suggs' conviction and sentences became final after January 1, 1994, he was required to file his post-conviction motion within one (1) year, pursuant to newly-enacted Rule 3.851, Fla. R. Crim. P. This Court granted Mr. Suggs an extension of time in which to file his Rule 3.850 motion.

In March, 1998, an Amended Motion to Vacate was filed, raising 15 claims. A hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) was held on October 22, 1999. On March 13, 2000, Circuit Court Judge Laura Melvin granted an evidentiary hearing in part and denied in part Mr. Suggs' claims. The trial court dismissed several claims without prejudice to file amended pleadings and short brief summaries of facts. The State conceded an evidentiary hearing on grounds of ineffective assistance of counsel (PC-R. at 155-174).

At the time of her order, Judge Melvin notified the parties that she would retire on May 15, 2000 and the case

would be re-assigned to Judge Lewis R. Lindsay. On March 14, 2000, an order of reassignment was issued by Chief Judge John Kuder, indicating that Judge Lindsay would preside over the case.

Judge Lindsay, however, had been a State witness in Mr. Suggs' trial and testified against him. Judge Lindsay's testimony was a focal point of the trial and was an issue raised by Mr. Suggs on direct appeal. Counsel for Mr. Suggs filed a notice to the court and a motion to disqualify on March 21, 2000, indicating that Judge Lindsay should be disqualified from presiding over Mr. Suggs' case. On March 28, 2000, Judge Lindsay recused himself from Mr. Suggs' case.

On April 13, 2000, Chief Judge John Kuder assigned the Honorable Thomas Remington, Circuit Court of Okaloosa County, to preside over Mr. Suggs' case.

In June 2000, Larry Simpson, counsel for Mr. Suggs, moved to withdraw from the case because of a conflict of interest. On June 30, 2000, the court granted Mr. Simpson's motion to withdraw. The Office of the Capital Collateral Regional Counsel - North was appointed to represent Mr. Suggs.

In November, 2000, CCRC counsel for Mr. Suggs was replaced by Hilliard Moldof, who was retained by Mr. Suggs. At that time, Mr. Moldof notified the trial court of the

voluminous records and the outstanding public records in the case. The trial court granted Mr. Moldof the time to obtain the public records and file an amended motion in state court.

Mr. Suggs' Second Amended Motion to Vacate was filed on September 1, 2001 (PC-R. 1-154). The State filed its response (PC-R. at 155-174). An evidentiary hearing was held on January 23-24, 2003. On June 11, 2003, the trial court denied all of Mr. Suggs' claims (PC-R. 334-347).

A timely notice of appeal was filed (PC-R. at 348). This appeal follows and is timely.

SUMMARY OF ARGUMENTS

1. Mr. Suggs was deprived of his rights to due process when the State failed to disclose a wealth of exculpatory evidence in its possession. Confidence in the reliability of the outcome of the proceedings is undermined by the non-disclosure. Further, the State knowingly presented false or misleading evidence to obtain a conviction and sentence. The trial court erred in its analysis and failed to consider the cumulative effect of the prejudice suffered as a result of the State's misdeeds. Mr. Suggs' convictions and sentence of death must be vacated and a new trial and sentencing order.

2. Mr. Suggs was deprived of the effective assistance of

counsel at the guilt phase of his capital trial when counsel unreasonably failed to discover and object to exculpatory evidence.

3. Mr. Suggs was deprived of the effective assistance of

counsel at the penalty phase of his capital trial when counsel unreasonably failed to present evidence of compelling and substantial mitigation.

4. A confession by another to the crime constituted newly-

discovered evidence and had this evidence reached the jury, the outcome would have produced an acquittal.

5. Mr. Suggs was absent from critical stages of his prosecution. Failure to object was ineffective assistance of counsel.

6. Mr. Suggs' trial counsel suffered from a conflict of interest that violated his rights. Counsel's failure to object resulted in effective assistance of counsel.

7. Trial counsel was ineffective for repeatedly waiving Mr. Suggs' rights, without his consent.

8. Mr. Suggs' rights were repeatedly violated when his search and seizure rights were violated.

9. Mr. Suggs is innocent of the death penalty.

10. Mr. Suggs failure to interview jurors violates his rights and his access to the courts.

11. Florida's death penalty statute is unconstitutional.

12. Florida's death penalty is cruel and unusual punishment.

13. Mr. Suggs is insane to be executed.

14. The cumulative errors in Mr. Suggs' guilt and penalty phase entitle him to a new trial and penalty phase.

ARGUMENT I

THE HEARING COURT ERRED IN DENYING MR. SUGGS'S CLAIM THAT HE WAS DEPRIVED OF HIS DUE PROCESS RIGHTS WHEN THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY AND/OR PRESENTED FALSE OR MISLEADING EVIDENCE

A. Introduction

To insure a constitutionally adequate adversarial testing and a fair trial occurs, the prosecutor has certain obligations. Due process requires a prosecutor in a criminal prosecution to refrain from presenting false and/or misleading evidence. Strickler v. Greene, 527 U.S. 263, 281 (1999)(the State's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"). If a State witness misrepresents a material fact, the prosecutor is obligated to correct the witness' misstatement. Giglio v. United States, 405 U.S. 150, 153 (1972), Napue v. Illinois, 360 U.S. 264 (1959). "Truth is critical in the operation of our judicial system. . ." Florida Bar v. Feinberg, 760 So.2d 933 (Fla. 2000).

The prosecutor as the State's representative is obligated to learn of any favorable evidence known by individuals acting on the government's behalf and to disclose any exculpatory evidence in the State's possession to the defense. Strickler, 527 U.S. at 280. This Court has not hesitated to order new

trials in capital cases where confidence was undermined the reliability of the conviction as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. Cardona v. State, 826 So. 2d (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Hugins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

In Mr. Suggs' case, the prosecution presented false and/or misleading evidence at his capital trial and this misleading and false evidence was used to obtain a conviction. This failure was not harmless beyond a reasonable doubt. The prosecutor failed to disclose exculpatory evidence that was known to the State. This failure undermines confidence in the reliability of the verdict convicting Mr. Suggs of first-degree murder.

B. The Presentation of False and/or Misleading Evidence

1. The Legal Standard

In Giglio v. United States, 405 U.S. 150, 153 (1972), the United States Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of

justice." The Supreme Court recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). The Court concluded that the Fourteenth Amendment "forbade the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution has a duty to alert the court, the defense, and the jury when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959). The prosecutor must refrain from the knowing deception of either the court or the jury during a criminal trial. Mooney v. Holohan. A prosecutor is constitutionally prohibited from knowingly relying upon false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957).

In cases "involving knowing use of false evidence the

defendant's conviction must be set aside if the falsity could in **any reasonable likelihood** have affected the jury's verdict." United States v. Bagley, 473 U.S. 667, 678 (1985), quoting United States v. Agurs, 427 U.S. 97, 102 (1976) (emphasis added). If there is "any reasonable likelihood" that uncorrected false and/or misleading argument affected the jury's determination, a new trial is warranted. As the Court explained in Bagley, this standard is equivalent to the harmless beyond a reasonable doubt test. Where the prosecution violates Giglio and knowingly presents either false evidence or false argument in order to secure a conviction, a reversal is required unless the error is proven harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679 n.9. See United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995).

2. At Mr. Suggs' Trial, Uncorrected False and/or Misleading Testimony

The State presented false and misleading evidence against Mr. Suggs in an effort to obtain a conviction. This false and misleading evidence was the testimony of Wallace Byars and James Taylor, two known jailhouse informants.

The trial court held that there is "no credible evidence

that either Taylor or Byars were agents for the State." (PC-R. at 338). But this view is unsupported by the record and the testimony from the evidentiary hearing.

After Mr. Suggs was arrested on August 7, 1990, he was incarcerated in the Walton County Jail and placed in an isolation cell. At the time of his first appearance, Mr. Suggs specifically invoked his right to counsel and expressed his desire to have counsel present during any interview: "[d]efendant demands that his attorney be present during any questioning about any potential or pending criminal matter" (R. 1). About a week later, Mr. Suggs was moved from his isolation cell to Cell 211 where inmate James Taylor was housed. A short time later, Wallace Byars, another inmate, was moved to cell 211 (R. 3406).

On August 21, 1990, Taylor and Byars made statements to law enforcement claiming that Mr. Suggs made incriminating admissions to them while housed together in cell 211 (R. 3539). The statements made by Taylor and Byars were tape recorded by law enforcement and delivered to the State Attorney's Office for transcription. Before Mr. Suggs was moved into a cell with Taylor and Byars, both men were known informants. The only reason Taylor was housed in Walton County was to testify for the state and federal governments in

another trial (R-3539, 3576). Taylor's jobs included working as an informant for the Florida Department of Law Enforcement, the Drug Enforcement Agency, U.S. Customs, and the States of Alabama and Georgia (R-3602).

Taylor was given special privileges that no other inmates were allowed to have (PC. Ev. at 44), according to inmate George Broxson, who spent time in the same cell as Taylor (PC.Ev. At 44-47). "He got what he wanted from [jailer] Crenshaw," Mr. Broxson testified (PC.Ev. at 45).

According to Mr. Broxson, inmates were not allowed to have voice-activated tape recorders, but Taylor had one and used it at the jail. (PC.Ev. at 47). Taylor was a known informant.

> I know for a fact that he was an informant because he was housed – okay in cell – the way this incarceration system is set up inside Walton County Jail, cell 211, you have a three-man cell and two one-man cells that are all the way in the back of that pod. Those are locked inside of another pod there, you know. Anyway one's a three-man cell and there are two one-man cells. Taylor lived in a one-man cell.
>
> Another inmate was in another one-man cell. Suggs, I and some other person -- I don't know who he was -- was in the three-man cell. The reason I know Taylor was doing something in there with the tape player that he wasn't supposed to be doing, telling on people, because I go over and speak to him and he reaches under the bed, pulls the tape player out because it's a voice activated tape player and rewinds the tape because I spoke and the tape player kicked on and made a recording.

(PC.Ev. at 48-49). Mr. Broxson testified that he knew Ernie Suggs “wouldn’t talk to anyone,” (PC.Ev. at 55).

The State also created an alias for Mr. Taylor “Robert Locksley” in an effort to keep his identity from the defense. Mr. Taylor used this alias in the jail from July 8, 1990, through October 7, 1990. Walton County Sheriff's Department knew Taylor’s real name and knew that he was not "Locksley," based on Taylor’s prior services provided to Walton County law enforcement. The Walton County Sheriff's Department assigned the alias to Taylor so as to conceal his identity from Mr. Suggs. Jail visitation records reveal that law enforcement was aware of Taylor's true name because Locksley's visitors were "James and Geneva Taylor" who were listed as Taylor's "Mother and Father." (PC-R. at 355-357).

As for Wallace Byars, Mr. Broxson testified that he made it “plain” that he was going to testify against Mr. Suggs so as not to go to prison (PC.Ev. at 49-50).[1]

Mr. Broxson’s story was confirmed by James Taylor who spoke with Gerald Shockley, a 25-year-old veteran FBI agent who in 1995-1996 was in private practice and worked for Mr.

---

[1] Byars was in jail for aggravated battery on a police officer and was facing a minimum of 15-17 years in the Department of Corrections (R-3409). After giving statements to sheriff's deputies, Byars pled to a three-year sentence to be served in the county jail (R-3409).

Suggs' post-conviction attorney. Mr. Shockley testified at the evidentiary hearing that he interviewed James Taylor at the Houston County Jail in Dothan, Alabama on January 16, 1996, and "he supported what Broxson had said." Mr. Shockley also testified that:

> the information that Taylor had testified to and that Wallace Byars had testified to was perjured testimony, that they had fabricated that information stating that Ernie Suggs had admitted to them that he was responsible for the killing of Pauline Casey, when the truth of the matter is that Ernie Suggs had not told him anything like that. That they had fabricated that, that they wanted preferential treatment from the Sheriff's Office and that's the reason they made that story up. That he received enough information from the Sheriff's office to be able to give investigators a statement as to what Ernie Suggs allegedly said.

(PC.Ev. at 103).

Despite law enforcement's knowledge that Taylor and Byars were witnesses in the case and had alleged incriminating evidence against Mr. Suggs, the State Attorney filed false and misleading answers to the defense demand for discovery. On September 18, 1990, the State Attorney filed a response to Defense Demand for Discovery, where the names of Byars and Taylor were omitted, the existence of confidential informants was denied, and it was affirmatively stated that Mr. Suggs had made **no** statements in connection with the case. Additional discovery responses also omitted these critical disclosures.

It was not until January 17, 1991 that the State acknowledged the existence of Taylor and Byars and filed a discovery response indicating that they were witnesses. In the interim, both Taylor and Byars remained in the cell with Mr. Suggs and alleged that Mr. Suggs made additional incriminating statements (R-3586). Many of the statements that Taylor and Byars claimed were made by Mr. Suggs were subsequent to August 21, 1990. On cross examination, Taylor was asked:

> Q: In fact, hasn't your version of what [Petitioner] told you with regard to Mrs. Casey expanded since [August 21, 1990] . . . .?
>
> A: Yes, sir, because we have been in the same cell six or seven months after that.

(R-3586).

It was obvious that Byars and Taylor were working as agents of the state for the purpose of obtaining prejudicial information about Mr. Suggs. Both defense attorneys, Donald Stewart and Robert Kimmel, had no knowledge that Taylor and Byars were agents of the State. “We didn’t know about it. Nobody told us,” Mr. Stewart testified (PC.Ev. at 138-139; 218-224).

In its order, the hearing court erroneously concluded that no evidence was presented to support this claim, (PC-R. at 336). But this claim was substantiated by the unrebutted

testimony of Gerald Shockley and Mr. Broxson.

This Court must grant Mr. Suggs relief based on the State's misconduct. Relief is required if there is any "reasonable likelihood" that the State's use of this false or misleading testimony may have affected the jury's verdict. Bagley. In a case such as this, with a 7-5 jury vote for death, the error cannot be found to be harmless beyond a reasonable doubt.[2]

Much of the State's case depended on the jury believing Taylor and Byars. At trial, the defense tried to impeach Byars for receiving special treatment. For example, while serving a three-year sentence in the county jail, Byars was repeatedly released from the jail on his own recognizance. On one occasion, Byars stayed at the Hilton Hotel in Crestview where he got into a fight and was arrested (R-3415-18).

Byars was such an important witness at trial that the State announced its intent to call County Judge Lewis Lindsey to testify that Byars was released from the Walton County Jail as a result of Judge Lindsey's instructions, **not** because of preferential treatment by law enforcement or the prosecutor (R-2120). Defense counsel cross-examined Byars on the issue

[2] When this error is considered cumulatively with the Brady error and the ineffective assistance of counsel, confidence in the jury's verdict is unquestioningly undermined.

of preferential treatment. Judge Lindsey was allowed to testify, bolstering the credibility of the witness and it left the jury with the impression that Byars was a credible witness, improperly implying Byars' statements about Mr. Suggs were true.

Had the State corrected the false and/or misleading testimony of these witnesses, it would have supported the defense that Mr. Suggs was innocent; that Byars and Taylor were lying about statements allegedly made by Mr. Suggs; that the State placed these two witness in the jail cell for the express purpose of obtaining false and incriminating statements against Mr. Suggs, and that these two men had been placed in a cell with Mr. Suggs to manufacture a story to help them both with their pending criminal charges; both Byars and Taylor were willing to lie in order to help State convict Mr. Suggs and that it was well known in the jail that inmates could help themselves by providing the State with evidence about Mr. Suggs' case. The State's misconduct is anything but harmless beyond a reasonable doubt.

"The State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless error beyond a reasonable doubt." Guzman v. State, 28 Fla. L. Weekly S829 (Fla. 2003).

Otherwise, a new trial is required. At the evidentiary hearing, the State presented **no** evidence to show that its duplicity in hiding information about Taylor and Byars could not have reasonably affected the jury. Mr. Suggs is entitled to a new trial based on the constitutional error established at the evidentiary hearing.

C. The Undisclosed Exculpatory Evidence

1. The Legal Standard

To insure a constitutionally sufficient adversarial testing, and a fair trial occur, certain obligations are imposed upon the prosecuting attorney. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Strickler v. Greene, 527 U.S. at 281. Exculpatory and material evidence is evidence of a favorable character for the defense that creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). This standard is met and reversal is required

once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995).

The question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So.2d 553 (Fla. 1999). If it did and it did not disclose this information, a new trial is warranted where confidence is undermined in the outcome of the trial. In making this determination "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So. 2d at 385. This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446.

2. The Undisclosed Contact Between Clayton Adkinson and Dr. Kielman

At the evidentiary hearing, Mr. Suggs presented a document from the State Attorney's file disclosed pursuant to a public records request. The document was a typewritten memo to Medical Examiner Dr. Kielman, which indicated Mr. Adkinson's concerns about the stated time of death. The note said:

> Dr. Kielman:
>
> My area of concern is in regards to your question and answer beginning on page three, line 22, through line 11 on page four.
>
> This lady was last seen alive approximately 10 p.m. on August 6th. The body was found at approximately 9 a.m. on August 7th. The autopsy was performed, according to your report, on August 8th at 9:15 a.m. The person we have in custody was picked up at 5:04 a.m. on August 7th. Four hours prior to Mrs. Casey's body being found.
>
> You can see my concern if I am limited to 24 hour period as described in your deposition. I will contact you Monday and Tuesday to discuss this further. If you have any questions and need to contact me, I will be in and out of the office all day today.
>
> Clayton Adkinson

(Def. Exh. 5)(PC-R. at 366).

At the evidentiary hearing, Mr. Adkinson testified that he was concerned with the time of death established by the medical examiner because Mr. Suggs was taken into custody at least four hours **before** the time of death established by him

(PC. Ev. at 116). Mr. Adkinson testified that he sent the memo to Dr. Kielman asking for clarification of the time.

Mr. Adkinson testified that **he did not turn this note over to the defense**, nor did he inform the defense of the concern he had about the time disparity in Dr. Kielman's testimony and Mr. Suggs' arrest (PC.Ev. at 118).

In its order, the hearing court erroneously held that the memo was "in fact disclosed to the defense." (PC-R. at 337). The hearing court failed to address the discrepancy in testimony between Mr. Adkinson, who said he did not turn the note over, and the defense attorney, who claimed he had possession of a note (PC.Ev. At 187).[3]

Nevertheless, Mr. Adkinson's admission that he never passed this impeaching information on to the defense demonstrates the State's intent to influence the testimony of the medical examiner and hide evidence that was favorable to Mr. Suggs. This information was Brady and should have been turned over to the defense. After this note was written, no

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[3] The prosecutor's note to the medical examiner was not found in any of the trial attorney files obtained by post-conviction counsel.

If defense counsel had the note before trial, it was ineffective assistance for Mr. Kimmel for failing to question Dr. Kielman about the time of death and whether he changed his opinion after the concerns raised by the prosecutor.

questions were ever asked of Dr. Kielman about the discrepancy in his establishing the time of death, which was critical to the case.

At Mr. Suggs' trial, Dr. Kielman was never asked one question by the State nor by the defense about the time of death. (R. at 3371-3395). If the defense had the note, then it failed to cross examine Dr. Kielman at all.

The non-disclosure was a violation of the State's constitutional obligation to inform Mr. Suggs of favorable evidence. There is no question that the undisclosed evidence was material to Mr. Suggs' case. This was crucial evidence for Mr. Suggs' case because it confirmed his version of events and his activities on the night of the crime.

Mr. Suggs' counsel were either affirmatively misled by the false and/or misleading testimony given by the medical examiner, of if the prosecutor's memo been disclosed, effective defense counsel could have cross-examined the medical examiner about the time of death. Instead, the defense ineffectively failed to even pose one question to Dr. Kielman on cross examination. With such a close jury vote of 7-5 for death, any impeaching evidence could have meant the difference between life an death.

3. Cumulative Analysis of All the Undisclosed Exculpatory Evidence

In the Brady context, the United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. at 436; Young v. State, 739 So.2d at 559.[4] In Lightbourne v. State, 742 So. 238 (Fla. 1999), this Court, in explaining the analysis to be used when evaluating a successive motion for post-conviction relief, reiterated the need for a cumulative analysis:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision**.
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. **This**

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[4] This Court also has held that cumulative consideration must be given to evidence that trial counsel unreasonably failed to discover and present at the capital trial. State v. Gunsby, 670 So.2d 920 (Fla. 1996). Thus, this argument must be evaluated cumulatively with Arguments II and III.

> **cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995).**

Lightbourne, 742 So. 2d at 247-248(emphasis added)(citations omitted).

A cumulative analysis of all of the withheld evidence undermines confidence in the outcome of the trial and requires that this Court grant a new trial to Mr. Suggs. Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Hugins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

The effects of the State's misconduct detailed are not limited to Mr. Suggs' guilt phase. This Court also must consider the effects the misconduct had on sentencing, particularly in the context of the 7-5 vote for death. Garcia, Young. The undisclosed exculpatory evidence causes confidence to be undermined in the reliability of the resulting death sentence.

ARGUMENT II

THE HEARING COURT ERRED IN DENYING MR. SUGGS' CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF

HIS CAPITAL TRIAL.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court explained that under the Sixth Amendment:

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

466 U.S. 668, 685 (1984). To insure a constitutionally adequate adversarial testing and a fair trial occur defense counsel must provide the accuse with effective assistance. Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where defense counsel renders deficient performance, a new trial is required if confidence is undermined in the outcome. Therefore, Strickland requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.[5]

At the evidentiary hearing, Mr. Suggs presented evidence about those instances of ineffectiveness permitted by the Court.

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[5] Various types of state interference with counsel's performance may also violate the Sixth Amendment and give rise to a presumption of prejudice. Strickland v. Washington, 466 U.S. at 686, 692 . See United States v. Cronic, 466 U.S. 648, 659-660 (1984).

1. The Massiah Violation

Following Mr. Suggs' arrest on August 7, 1990, he was incarcerated in an isolation cell at the Walton County Jail. At the time of his first appearance, he invoked his right to counsel and said he wanted to have counsel present during any interview: "[d]efendant demands that his attorney be present during any questioning about any potential or pending criminal matter" (R-1). About a week later, Mr. Suggs was moved from his isolation cell to cell 211 where inmate James Taylor was housed. Shortly thereafter, Wallace Byars, another inmate, was moved to cell 211 (R-3406). On August 21, 1990, Taylor and Byars made statements to police claiming that Mr. Suggs made incriminating admissions to them while housed together in cell 211 (R-3539). The statements made by Taylor and Byars were tape recorded by law enforcement and delivered to the prosecution for transcription.

Before Mr. Suggs was moved into a cell with Taylor and Byars, both Taylor and Byars were known informants. The only reason Taylor was being housed in Walton County was to testify for the state and federal governments in another trial (R-3539, 3576). Taylor worked as an informant for the Florida Department of Law Enforcement, the Drug Enforcement Agency, U.S. Customs, and the States of Alabama and Georgia (R-3602).

Taylor worked for prosecutors on several cases where Walton County was a party (R-3576). The administrator of the Walton County Jail and other Sheriff's Department officials knew Taylor's informant history and made the decision to put Taylor and Mr. Suggs into the same cell (R-3577). The Sheriff's Department had used Taylor as an informant on numerous occasions.

In addition to working as a professional informant, Taylor enjoyed many perks not normally bestowed upon inmates. Taylor was permitted to keep in his cell a regular razor blade, cologne, private metal lock box, necklace, watch, fingernail clippers, and a ring (R-3585). He also was allowed to keep a voice-activated tape recorder, which he kept under his mattress and secretly record inmates as they came into his cell. (PC. Ev. at 47).

While Taylor was acting as a state agent when placed in cell 211, he was booked into the jail under the alias "Robert Locksley," while waiting to testify on behalf of the government in another case. Documents produced in public records show that Taylor used this alias in the jail from at least July 8, 1990, through October 7, 1990. Walton County Sheriff's Department knew Taylor's real name and knew that he was not "Locksley," based on Taylor's prior services provided

to Walton County Law Enforcement. The Walton County Sheriff's Department assigned the alias to Taylor so as to conceal his identity from Mr. Suggs and others. Jail visitation records reveal that law enforcement was aware of Taylor's true name because Locksley's routine visitors were "James and Geneva Taylor" who were listed as Taylor's "Mother and Father" (PC-R. at 355-358).

Likewise, the evidence conclusively demonstrated that Byars, too, was acting as an agent of the state while in cell 211. Byars was in jail for a charge that would net him a minimum of 15-17 years in the Department of Corrections (R-3409). After giving statements to police, Byars pled to a three-year sentence to be served in the county jail (R-3409). Days after relating what he claimed was a confession from Mr. Suggs, Byars was sent to Chattahoochee (R-3402). The state withheld information that would chronicle exactly what sort of relationship existed between the state and Mr. Byars. However, although he was in jail for shooting at and assaulting law enforcement officers, Byars claimed the deputies "all befriended me during the time I have been there" (R-3455).

Additionally, Byars gave conflicting testimony as to whether he was provided with details of Pauline Casey's

murder with which to confront Mr. Suggs. Although he denied being given police reports or newspaper accounts, (R-3407), when asked, "And you learned about a key and glass that had some connection with this from the newspaper?"; Byars responded, "I showed [Mr. Suggs] this in the paper" (R-3405-08).

Before being placed in Mr. Suggs' cell, these informants met with law enforcement and were placed in the cell by police for purposes of obtaining incriminating statements from Mr. Suggs. Taylor and Byars were provided newspapers containing details of the crime for which Mr. Suggs was charged.

Based on the testimony from George Broxson, the Walton County Sheriff's Department falsified jail logs and placed informants in cells, especially cell 211, with defendants charged with serious crimes for the purpose of obtaining incriminating statements (PC. Ev. 37-60).

Even if Taylor and Byars were not agents of the State when first housed with Mr. Suggs, by August 21, 1990, they were cooperating with police in an effort to secure incriminating statements from him (R-3402, 3539). Both informants were left in the cell with Mr. Suggs in order to obtain further incriminating statements.

Despite the knowledge of law enforcement that Taylor and

Byars were witnesses in the case and had alleged incriminating evidence against the defendant, the State Attorney filed false and misleading answers to Mr. Suggs' demand for discovery. On September 18, 1990, the prosecutor filed a response to the defense Demand for Discovery where the names of Byars and Taylor were omitted, the existence of confidential informants was denied, and it was affirmatively stated that Mr. Suggs made no statements in connection with the case. Additional discovery responses also omitted these critical disclosures.

It was not until January 17, 1991, five months after Mr. Suggs invoked his right to counsel, that the State acknowledged the existence of jail-house snitches Taylor and Byars and filed a discovery response indicating that they were witnesses. In the interim, both Taylor and Byars remained in the cell with Mr. Suggs and alleged that he made additional incriminating statements (R-3586). Indeed, many of the statements that Taylor and Byars claimed were made by Mr. Suggs were subsequent to August 21, 1990. On cross examination, Taylor was asked:

> Q: In fact, hasn't your version of what [Mr. Suggs] told you with regard to Mrs. Casey expanded since [August 21, 1990] . . . .?
>
> A: Yes, sir, because we have been in the same cell six or seven months after that.

(R-3586).

Byars and Taylor were state agents and worked to obtain prejudicial information on Mr. Suggs. The hearing court completely ignored the record and the testimony from the evidentiary hearing when it said that "trial counsel was not ineffective for failing to file a motion based on Massiah where no evidence to support the motion existed." (PC-R. at 338). The evidence of the Massiah violation was overwhelming.

In Massiah v. United States, 377 U.S. 201 (1964), the use of undercover police informants to obtain incriminating information from a criminal defendant, out on bond and awaiting trial, was a violation of the Fifth and Sixth Amendments. In United States v. Henry, 447 U.S. 264 (1980), the Supreme Court applied Massiah and noted that an informant who was an agent of the state could not speak to the defendant without counsel.

The State is precluded from using jailhouse informants as state agents to obtain incriminating information from a represented defendant. Massiah, 377 U.S. at 205. When an informant is "acting in concert with the state, actively stimulating or instigating conversation specifically designed to elicit incriminating information" a defendant's Fifth and Sixth Amendment rights are violated. Lightbourne v. State, 438 So.2d 380, 386 (Fla. 1983).

Mr. Suggs' trial counsel failed to investigate, challenge and effectively cross examine Taylor and Byers about their role in the jail and their role in obtaining incriminating statements from Mr. Suggs. Trial counsel failed to file motions pursuant to Massiah, because as Donald Stewart testified:

> I know they were informants, but you're talking about that they were placed in the jail specifically to get information by the Sheriff there. Now nobody told us that. That was never disclosed to me that the Sheriff's Department used this – I understand he had some trouble after we left, but we didn't know anything about that. We weren't aware of that....but nobody told us that the Sheriff put them in there and did it on a regular basis and he had a habit of doing that, and all that kind of stuff. I mean I didn't know that. Nobody told me that.

(PC.Ev. at 138-139).

Mr. Stewart did not say who was supposed to tell him about the State's Massiah violation. Robert Kimmel testified that "We never sought to take a random sampling of all the inmates at the jail to depose them." (PC.Ev. at 224). What Mr. Kimmel failed to acknowledge was that he did not need to depose **all** the inmates at the jail, only those who were in the same cell block as Mr. Suggs and who may have known that Mr. Suggs did not make statements. Jail records indicate that approximately 14 men were in cells 210 and 211 at the same time as Mr. Suggs (PC-R. at 356).

Mr. Kimmel added that he was concerned about money, but his concern did not rise to the level of asking the court to have Mr. Suggs declared indigent for the purpose of costs.

> We were private counsel. I was living in Pensacola, co-counsel is in Anniston. We cannot travel 80 miles or 150 miles to take depositions on fishing expeditions of all the inmates at the jail.

(PC. Ev. at 224).

Mr. Kimmel testified that he failed to hire an investigator who could have talked to inmates at the jail or anyone else. He also failed to file a Massiah claim on behalf of Mr. Suggs (PC. Ev. at 225). Counsel's performance was deficient. The inclusion of Taylor and Byars on the State witness list should have given defense counsel ample reason to investigate the jailhouse snitches. Doing so was critical, considering the importance Byars and Taylor played in incriminating Mr. Suggs. No other statements or confessions of Mr. Suggs was presented at trial. This was ineffective assistance of counsel. Trial counsel's deficient performance prejudiced Mr. Suggs.

The hearing court ignored the evidence of trial counsel's failure to investigate this claim and its unreasonable behavior in representing Mr. Suggs. Mr. Suggs is entitled to relief.

2. **The Richardson violation**

This Court held that trial counsel waived Mr. Suggs' right to a Richardson[6] hearing. Suggs v. State, 644 So.2d 64, 67 (Fla. 1994). Mr. Suggs was never advised that his trial counsel was waiving his right to a Richardson hearing, and he did not affirmatively waive that right. This was ineffective assistance of counsel.

The testimony of jailhouse informant, Wally Byars, was a crucial aspect of this case. Mr. Suggs' trial counsel tried to impeach Byars for receiving special treatment. While serving a three-year sentence in the county jail, Byars was repeatedly released from the jail. On one occasion, he stayed at the Hilton Hotel in Crestview, where he got in a fight and was arrested (R-3415-18).

At trial, the State announced its intent to call County Judge Lewis Lindsey to testify that Byars was released from the Walton County Jail as a result of Judge Lindsey's instructions, not because of preferential treatment by police or the prosecutor (R-2120). Judge Lindsey was not on the State's witness list. Counsel for Mr. Suggs objected, arguing a discovery violation had occurred and they requested a Richardson hearing (R-2121).

The failure to list Judge Lindsey was clearly a discovery

[6]Richardson v. State, 246 So. 2d 771 (Fla. 1971).

violation. See, Fla. R. Crim. P. 3.220 (b)(1)(A). The trial court expressly found that a discovery violation had occurred because "if the State were to call Judge Lindsey as a witness, `clearly Suggs would be entitled to a Richardson hearing.'" Suggs v. State, 644 So.2d 64, 67 (Fla. 1994). Nonetheless, the trial court failed to conduct a Richardson hearing and permitted Judge Lindsey to testify (R-3500 et seq.) because defense counsel inexplicably waived Mr. Suggs' right to a Richardson hearing. Suggs, 644 So.2d at 67.[7]

At the evidentiary hearing, trial counsel testified that they objected to Judge Lindsay testifying and objected to the fact that his testimony would leave a strong impression on the jury, but neglected to request a Richardson hearing (PC. Ev. at 134). He said, "...we did the best we could under the circumstances." (PC. Ev. at 135). Such an omission was not reasonable and was ineffective assistance of counsel.

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[7] On direct appeal, this Court found that there was a discovery violation, and the trial court erred in failing to conduct a Richardson hearing. This Court held, however, that trial counsel "waived his request for such a hearing by stating that a Richardson hearing would not cure the damage of admitting Judge Lindsey's testimony....Moreover, Suggs' counsel had ample opportunity to renew his request for a Richardson hearing, **but failed to do so**. On these facts, we determine that Suggs waived his Richardson hearing request, and we deny this claim" Suggs v. State, 644 So. 2d 64, 68 (Fla. 1994)(emphasis added).

Reasonably competent counsel would have vigorously argued the discovery violation and prevented Judge Lindsey from testifying. Trial counsel had cross-examined Byars on the issue of preferential treatment. Allowing Judge Lindsey to bolster the testimony of Byars stripped Mr. Suggs' cross-examination of its intended goal and left the jury with the impression that Byars was a credible witness, improperly implying Byars' statements about Mr. Suggs were true.

3. Trial counsel's failure to object or move for a mistrial during the medical examiner's testimony

During the testimony of the medical examiner, the details offered by the prosecution of the autopsy were so gruesome that two of the jurors became physically ill (R-3385-3392). Two nurses were called into the courthouse: Nurse Wise- "they were just upset by what was going on in the court[room]" (R-3388); Nurse Pascal-"[i]t looks like a situation that they were excited at what was happening (R-3388-89); and Juror Lee: "I think that I'll be okay . . . [i]f I can just calm down a little bit" (R-3391) (emphasis added).

Despite the fact that two jurors were horrified by the medical examiner's testimony to the point of becoming sick, trial counsel failed to move for a mistrial or to request those jurors be replaced by alternate jurors. In fact, Mr. Suggs' trial counsel failed to put anything at all on the

record:

Court: Does anybody want to put anything on the record?

Kimmel: No, ma'am.

(R-3392).

At the evidentiary hearing, attorney Kimmel testified that he had a “kinship” with the sickened jurors. “If two jurors are revulsed (sic) by photographs that revulsed (sic) me, I’ve got a kinship with that jury. I don’t necessarily strike them.” (PC. Ev. at 247). “I have kinship with them because I’m a human being looking at a dead person.....so I can relate to that juror’s pain and emotional trauma they’re going through. That doesn’t mean to me that they’re an unfit juror for Mr. Suggs.” (PC.Ev. at 247). Yet, it is unclear what strategic advantage Mr. Suggs gained by having his own trial attorney sickened with the jurors.

In denying relief on this claim, the trial court held that Mr. Kimmel’s decision not to replace the jurors was “a tactical decision” (PC-R. at 340).

The hearing court and trial counsel’s response was patently unreasonable. Two of the jurors were overwhelmed by the medical examiner's testimony. No objection was made by trial counsel to the horrendous, gruesome and graphic nature of the medical examiner's testimony. Since the cause of the

victim's death was not an issue in this case, the medical examiner's testimony should have been limited to avoid the prejudicial impact of the testimony, but no attempt was made by defense counsel to curtail this witness. Trial counsel's response was clearly unreasonable. Strickland

4. Trial counsel's failure to address how the victim's fingerprints could have been placed in Mr. Suggs' automobile.

Two fingerprints and a palm print found on Mr. Suggs' automobile that were identified as the victim's incriminated Mr. Suggs. Two of the victim's fingerprints were found on the exterior of the passenger's window and one palm print was found on the inside of the passenger's door handle, in an area where the door handle would be grasped to open the door (R-3360). It is impossible to know when those prints were placed on the vehicle because fingerprints have no age (R-3367). Evidence was available that would have proven that the prints could have been left there earlier in the day.

The evidence showed that Mr. Suggs and the victim were at the Hitching Post, another bar, early on the afternoon in question. Ray Hamilton, a key State witness, testified:

> Defense: Did Pauline describe to you having visited a little bit with [Mr. Suggs] at the Hitching Post?
>
> Witness: No. She said he was at the Hitching Post while she was there.

Defense: But that they were both at the Hitching Post at the same time.

Witness: Yes.

Defense: And did she ever say, "I did not walk out to his car with him and sit in the passenger seat, smoke a cigarette, or visit," or whatever?

Witness: She never said nothing to me.

(R-2816) (emphasis added). Despite the fact that Mr. Suggs and the victim were together at the Hitching Post earlier that same day, defense counsel failed to call other witnesses who could have corroborated this fact. If defense counsel had done so, the jury would have had a reasonable explanation of how Pauline Casey's fingerprints were found on Mr. Suggs' car.

The trial court erroneously held that no evidence was offered to "establish an alternative explanation for the victim's fingerprints" (PC-R. at 340).

When Ted Valencia, owner of the Teddy Bear Bar, was asked whether Mr. Suggs was friends with Pauline Casey, he said: "[y]es. She played pool with him that day if I'm not mistaken and invited him down there" (R-512). Likewise, James Casey, Pauline Casey's father-in-law, was deposed and testified that other people told Ray Hamilton that Mr. Suggs was "there at the Hitching Post" and that Mr. Suggs was Pauline Casey's "friend from Alabama" (R-500). James Casey testified that his son "referred to [Mr. Suggs] as a friend" (R-501). Additional

witnesses were available who could have been called by the defense to establish the link between Mr. Suggs and Pauline Casey that were not hostile. But trial counsel failed to hire an investigator to look into this aspect of Mr. Suggs' case. Defense attorneys Kimmel and Stewart's testimony conflicted as to why no investigation was done.

Kimmel testified that Donald Stewart traveled

> all over, ...he almost got attacked in one of the bars because they found he was the defense attorney, trying to investigate this. He actually endangered himself trying to get that kind of information. We had nothing to tell us that we could prove those fingerprints were in the car for any legitimate reason.

(PC. Ev. at 202).

Mr. Stewart never testified that he was attacked. Nor was there an explanation for why post-conviction counsel was able to speak with these witnesses without repercussions or "actually endangering" themselves.

Trial counsel failed to question John T. Miller, Curtis Wright, Toby Wright and John W. Villareal, each of whom had given statements to police that would have bolstered the argument that Mr. Suggs and the victim were friends who had been shooting pool together at the Hitching Post.

It was crucial that defense counsel establish that Mr. Suggs and the victim were friends who were together on the

afternoon in question in order to give another explanation how the victim's fingerprints could have gotten on Mr. Suggs' car. Defense counsel was ineffective for failing to call witnesses or otherwise present evidence to establish these facts.

Mr. Kimmel described himself as an experienced trial counsel

who had defended 400 cases, and among the two defense attorneys,

he claimed to be an expert on Florida law (PC. Ev. at 217). Yet, he testified that he did not have the money to hire an investigator on Mr. Suggs' case, and failed to ask the judge to declare Mr. Suggs indigent for costs. Though avenues were available, Mr. Kimmel failed to hire an investigator who could have looked into areas of Mr. Suggs' case. "We did not hire a investigator in this case." (PC.Ev. at 250). Mr. Kimmel testified that he relied on himself and Mr. Stewart to investigate the case, and ran into difficulties, like hostile witnesses, because of it. (PC. Ev. at 251). Yet, Mr. Stewart contradicted his testimony and post-conviction counsel had no trouble locating and finding witnesses favorable to Mr. Suggs.

5. Trial counsel's failure to investigate the fabricated testimony of Steve Casey and Ray Hamilton

Steve Casey, the husband of Pauline Casey, was called as a defense witness. At trial, Mr. Casey testified that on

August 6, 1990, the day his wife was murdered, he was at home trying to sell his 1969 Chevy pick-up truck. Mr. Casey testified that he sold the truck for $1,200.00 to an older gentleman from Panama City, but he could not remember his name (R. 3679).

State witness Ray Hamilton testified at trial that on the night of August 6, 1990, he was at the Teddy Bear Bar when he received a telephone call from Steve Casey, who told him that he had sold the pick-up truck (R. 2788-2796).

Both men's stories were lies. Evidence available in 1990 suggests that Steve Casey sold his truck the day **before** his wife's murder for $300. His alibi that he was at home selling his truck that night was a fabrication, as was Ray Hamilton's corroboration.

Trial counsel learned of Mr. Casey's lie only **after** the jury returned the guilty verdict. Mr. Stewart said he went to "every length that I know of that we possibly could have done to find out if Mr. Casey had actually sold that car on Sunday night, which later learned after the trial of this case," (PC. Ev. at 141).

It was only **after the trial**, Mr. Stewart testified, that he found the woman whose father bought the car from Mr. Casey and rejected his abili. It was only **after the trial** that he

hired an investigator to look into Mr. Casey's story as to when he sold the car. In Defense Exhibit 7, (PC-R. at 368), Mr. Stewart identified a letter to Mr. Suggs' attorney Larry Simpson dated April 16, 1993, in which Mr. Stewart said he hired an investigator **after the guilty verdict.** Mr. Stewart testified:

> ...We did everything we could do as lawyers to investigate the case. I don't generally hire investigators myself, I look up evidence myself, and we went everywhere we could in the public records to try to find out who this transfer was made. We went to Tallahassee, we went to the local courthouse, we went everywhere we could, but as a practical matter, if you're saying did we hire an investigator to find out about this ahead of time, we did not.

(PC. Ev. at 143).

There was no indication the investigator after trial had any difficulty locating information to rebut Steve Casey's alibi. This information was readily available to trial counsel **before trial** if only they had hired an investigator to look for it. Mr. Kimmel, however, testified that it was Mr. Stewart's decision to hire an investigator after the verdict was in. "It was not a mutual decision and I was not involved in that decision." (PC. Ev. at 257). Mr. Kimmel conceded, however, that an investigator was hired **after** the verdict that uncovered information that could have been used at trial (PC. Ev. at 258). This would have been particularly important

since the jury was focused on the viability of Steve Casey's testimony and relied on this false testimony in reaching its 7-5 verdict.

6. **Trial counsel's failure to properly respond to the jury's request to have the testimony of the other two suspects read.**

During its deliberations, the jury specifically requested that the testimony of Steve Casey and Ray Hamilton be reread to them (R-4536). The testimony of these witnesses was critical to the defense as the other suspects developed by trial counsel were Steve Casey and Ray Hamilton.

When the prosecutor asked whether the court intended to reread the testimony of Casey and Hamilton, the court initially responded "I don't know of any alternative that I have, given the request" (R-4537). The prosecutor argued that the court should require the jury to "rely on what they heard from the testimony and not re-present part of the testimony" (R-4537). Defense counsel at first argued that the jury "be allowed to have it" (R-4538). It was then discovered that the court reporter's notes of Casey and Hamilton's testimony were in Defuniak Springs, a three-hour round trip (R-4539). Once that information was discovered, the trial court changed its position that it "had no alternative" and instead, focused solely on the inconvenience of the jury and the court: "they

are in the courthouse in Defuniak . . . [a]nd I almost want to ask them if they feel that it is worth the two-hour trip" (R-4541).[8]

The trial court called the jurors in and advised them the trip would take three hours: "[w]e can make arrangements to bring them here but it will take approximately three hours to do that" (R-4547). Once the court advised the jurors that it was "their" decision as to whether they wanted to wait for the court reporter's notes, they canceled their request for the notes to be read: "[p]lease disregard request for transcripts . . . ." (R-4549). Without explanation, defense counsel conceded that the jury could deliberate without the requested information:

> Defense: There is a rule that deals with this [3.410] . . . and it makes it plain that it's . . . discretionary, "may give," but it makes it plain that you may order such testimony read to the jury.
>
> Court: Read to them.
>
> Defense: Yes.
>
> * * *
>
> Court: Okay. And neither the State or the defense requests any further instructions[?]

[8] The court focused on what the jury wanted to do instead of Mr. Suggs who was on trial for first-degree murder and facing the death penalty: "[n]ow, when I get through with this explanation to the jury, if they haven't said anything yet, do either the State or the defense have any problem with my asking for feedback from them?" (R-4544).

Defense: No, ma'am.

(R-4550) (emphasis added).

At the evidentiary hearing, Mr. Kimmel, a veteran of 400 trials, testified that he did not intend to waive the issue and believed that they perfected their record. Mr. Kimmel conceded: “I could add the words I object, I suppose that’s correct. We made the request on the record. I think that perfected it.” (PC. Ev. at 249).

But Mr. Kimmel, an expert on Florida law, was wrong. The defense acquiesced to the trial court giving the jury the option, instead of arguing that the jury should hear this testimony. Competent counsel would have sought a delay in the trial to obtain the requested testimony or move for a mistrial. It is a denial of due process and a denial of the Petitioner's Sixth Amendment right to a trial by jury to fail to obtain the court reporter's notes for review. Instead, trial counsel permitted the court to advise the jurors that it would take three hours to retrieve the notes and that they would be sequestered overnight. The jury opted to deliberate without the benefit of the requested testimony and returned a verdict of guilty. This is particularly significant in light of later revelations that both witnesses’ testimony was false. Trial counsel was ineffective for failing to preserve the

error.

7. Trial counsel's failure to object to blatant golden rule argument

During closing argument, the prosecutor attempted to explain to the jury why Steve Casey (the victim's husband) could not remember the crucial events during the time period surrounding his wife's death.[9] In an obvious ploy to curry sympathy for Steve Casey and to vouch for Casey's credibility, the prosecutor portrayed Steve Casey's plight to the jury using extreme emotionalism. The prosecutor argued:

> Yes, Steve Casey, he talks about Steve Casey not remembering certain events or times or dates around the date of his wife's death. You know, I don't know how many of you have ever lost a close family member and had to bury one. You know, it's not an easy time. This kind of case is perhaps, perhaps the most difficult, when all of a sudden, you know, you're talking to your wife one minute on the telephone and then a couple of hours later you find out that she's missing and then some eight or nine hours later you find out that she's been brutally murdered. I don't know that I would recall everything that happened around that time. I suggest to you that that's another explanation for his not recalling all the events that happened right around that time (R-4502-4503) (emphasis added).

At the evidentiary hearing, Mr. Kimmel, an expert on

[9]At this point, the defense did not know that Steve Casey had perjured himself during trial.

Florida law, conceded that these statements were objectionable (PC. Ev. at 259), but yet failed to object to them. See State v. Wheeler, 468 So. 2d 987 (Fla. 1985); DeFreitas v. State, 701 So. 2d 593 (Fla. 4th DCA 1997).

By failing to object, Mr. Suggs' trial counsel prejudiced his ability to receive a fair and impartial trial because the jurors were told to place themselves in the shoes of the victim's husband. The failure to object to this argument was further exacerbated because Steve Casey was the only other suspect the defense could point to in the case, and his perjured testimony contributed to Mr. Suggs' conviction.

8. Repeated statements that the victim was a missing witness and could not testify, while asking the jury to speculate on the substance of her testimony.

During closing argument, the prosecutor repeatedly referred to the fact that the victim could not testify. This "missing witness" argument is highly improper and the error was compounded because the prosecutor told the jury what the victim's testimony would be, if she could have testified. The prosecutor attempted to invoke sympathy for the victim and play upon the emotions of the jury:

> You know, and let's not forget that, you know, the one person that's not here, the person that is killed in this case, Pauline Casey. You know, we're trying Ernest Donald Suggs for the murder and for the kidnapping and robbery. But we have a

> victim in this case too, although she can't come in this courtroom and give you her version of what happened. But she left enough, she left enough behind for us to build a case on, those items she left in the bar, how she left the bar, the blood on the shirt, the fingerprints in the jeep. While she can't talk to us today, she did leave enough to name her murderer (R-4379-80) (emphasis added).

This tactic was continued by the prosecutor with a specific reference to the "missing witness:"

> [A]s to the only witness that could actually say she was taken out of the bar it was her. But she can't talk, she cannot talk verbally to us today. But she has talked to you, she has talked to all of us through that key, that glass, that blood, those tire tracks and that fingerprint in that jeep. She's talked to you, she has pointed to the person that murdered her, in her own way (R-4407) (emphasis added).

During rebuttal closing argument, the prosecutor continued with this theme: "there were two young people involved in this case: [o]ne, the [Petitioner], and then, of course, the one that's not in the courtroom with us today" (R-4491) (emphasis added).[10]

These arguments are similar to those condemned in Garron v. State, 528 So.2d 353 (Fla. 1988), where the prosecutor's

[10] Adding to the prosecutor's improper comments, the prosecutor inflamed the jury by insisting that the jury view the crime scene photographs that had previously sickened two jurors and conjure up images of ants and animals attacking the victim's body, all without objection (R-4500).

closing argument in the penalty phase contained "egregious, inflammatory, and unfairly prejudicial" remarks that mandated reversal despite curative instructions. The Garron arguments included the following:

> If [the victim] were here, she would probably argue the defendant should be punished for what he did . . . I would hope at this point, that the jurors will listen to the screams and to her desires for punishment for the defendant. (footnotes omitted).

Garron, 528 So.2d at 359.

Once again, Mr. Kimmel failed to object, but noted at the evidentiary hearing that the argument was objectionable (PC. Ev. at 259). Trial counsel said he did not object because of the “collegial” atmosphere defense counsel tried to foster with the State. As Mr. Kimmel said,

> ...there is a collegiality up here that – and I don’t know where you practice – but we treat each other professionally and you get things done and get information without having to bring court reporters in for every uttered word.

(PC. Ev. at 243).

Contrary to Mr. Kimmel’s assertion that “it wouldn’t have mattered,” in Mr. Suggs’ case, it certainly mattered in Mr. Garron’s case where he was granted a new trial. It appeared that Mr. Kimmel’s concerns with being “collegial” with the State outweighed his obligation to zealously represent his

client. Just as it had when Mr. Kimmel failed to hire an investigator, failed to investigate the jail house informants, impeach the medical examiner on the time of death and find out before trial that Steve Casey and Ray Hamilton had perjured themselves. Mr. Kimmel, a self-proclaimed expert in Florida law, knew he should have objected to the State's improper arguments, yet he did nothing. Mr. Kimmel knew he should have objected to the prejudicial and inflammatory testimony that sickened the jury, yet as an expert attorney, he did nothing in favor of fostering a "kinship" with a prejudicial jury. Even an expert in Florida law can be ineffective under Garron.

9. Repeated comments on Mr. Suggs' Fifth Amendment rights, including repeated statements to the jury that there had been "no explanation" by Mr. Suggs for certain evidence.

The prosecutor repeatedly argued to the jury that Mr. Suggs had offered "no explanation" for the evidence presented by the state; repeatedly called the jury's attention to the fact that the State's evidence was the "only evidence" on certain points; and argued that Mr. Suggs had not offered evidence on crucial areas of the case. The prosecutor's arguments take on added significance in light of the fact that Mr. Suggs did not take the stand to testify.

The prosecutor argued: "[n]o evidence of Ray Hamilton or

Steve Casey committing this crime" (R-4386);[11] [j]ailhouse informant's testimony is the "only evidence" that victim was in Petitioner's jeep (R-4389); "[n]o evidence of any working on that dock" (R-4390); the prosecutor suggested that Petitioner testified and then implied that the "testimony" was "not true" (R-4390); "[n]o explanation why [Mr. Suggs] would have fifty-five one-dollar bills in his pocket" (R-4394); "[n]o evidence" that Mr. Suggs dropped hamburger juice on his shirt; "[n]o other explanation for that ADA enzyme 1. None" (R-4400-01); "[t]hey didn't give you one bit [of evidence] that she was in that jeep" (R-4406); "[n]o explanation of why she was there" (R-4507); "[w]e don't know what he [Mr. Suggs] did during that six-day period" (R-4493); "[w]here is the evidence that [Mr. Suggs] cashed a check and got fifty one-dollar bills?" (R-4499); "[t]here's no explanation for a key in the bay" (R-4509).

The prosecutor's actions were direct comments on Mr. Suggs' failure to testify and failure to produce evidence. This was improper. See, Whittaker v. State, 770 So. 2d 737 (Fla. 4th DCA 2000)(The general rule is that comments by a prosecutor that a defendant has failed to call a witness are

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[11] This was before the defense discovered that Steve Casey and Ray Hamilton perjured themselves.

improper because they may lead the jury to believe that the defendant has the burden or proving his innocence). See also, State v. Rodriquez, 753 So. 2d 29 (Fla. 2000)(the prosecution may not comment on the defense failure to call witnesses as a means to shift burden of proof).

At the evidentiary hearing, Mr. Kimmel testified that he did not object to these blatant arguments because **"I didn't think it was reversible error at the time,"** (PC. Ev. at 262), but added that nothing prevented him from going to sidebar and objecting to the prosecutor's improper argument (PC. Ev. at 262). He added: **"I'm not sure that that was something I might not do differently on a retrial. I certainly never claimed I was perfect."** (PC. Ev. at 263). However, even imperfect counsel are required to know the law on improper closing arguments, comments on silence and golden rule arguments. Ignorance of the law is no defense. Brewer v. Aiken, 935 F. 2d 850 (7th Cir. 1991).

Mr. Suggs' trial counsel failed to object to these improper and prejudicial comments made by the prosecutor. By not objecting, Mr. Suggs' trial counsel prejudiced his ability to receive a fair and impartial trial because the jury was left with the impression that Mr. Suggs must prove his innocence and present evidence and/or testimony.

10. Repeated arguments to the jury that the defense attorneys were putting up a “smoke screen” and were creating a “diversion,” depriving Mr. Suggs of his Sixth Amendment rights.

The prosecutor tried to denigrate the defense counsel by arguing that they were trying to put something over on the jury. The prosecutor argued that the trial attorneys were putting up a "smoke screen" or trying to "create a diversion" so the jury would ignore the evidence. Again, trial counsel failed to object to these improper arguments. This Court found that the prosecutor’s arguments and tactics were not objected to at trial and not preserved for appeal. Suggs v. State, 644 So. 2d 64, 69 (Fla. 1994).

The prosecutor argued: "[d]efense counsel, not only in this case **but in most cases**, creates a diversion . . . creates a smoke screen . . . to make you forget" the testimony (R-4380-81); "[t]hey tried to . . . create another diversion . . . to get you to think about something else" (R-4381-82); "another attempt to divert you or get you confused" (R-4382); they "create a smoke screen so they can fog this thing up enough for you to turn the Defendant loose" (R-4406); prosecution called Judge Lindsey "to establish the pattern that the defendant was trying to do, you know, insinuations

they were trying to make" [12] (R-4410-11).

At the evidentiary hearing, trial counsel testified that he did not object to these improper statements by the prosecutor, even though he found the statements to be “an offensive accusation that always rubs me the wrong way” (PC. Ev. at 265)(emphasis added). Trial counsel said he did not object because he believed that the prosecution was hurting itself in front of the jury by making these remarks and that it was helping the defense. He added, however, that **“in hindsight, after the argument was done should I have approached the bench and made that motion, if I could do it today, I might do that.”** He agreed that nothing prevented him from remaining silent during the prosecutor’s remarks and still perfecting the appellate record at the bench and away from the jury (PC. Ev. at 266). Mr. Kimmel failed to recognize that the State was attacking his credibility with the jury by stating that the defense, **like it does in all cases**, tried to hide facts from the jury. In the interest of preserving his good relationship with the prosecution, Mr. Suggs’ rights were ignored and the jury was allowed to

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[12]See, Argument II, Number 2, The Richardson Violation, Supra.

The State violated Richardson by using Judge Lindsey to bolster the State’s case, not just bolster Byars’ testimony.

consider improper argument.

11. Repeated attacks on the defense experts while calling them “hired guns” and “Monday morning quarterbacks.”

The prosecutor improperly engaged in personal attacks on the two defense experts in tire track evidence and serology. The prosecutor mischaracterized their testimony, and resorted to shouting at the witness. The prosecutor interrupted the witness (R-3980,3982); accused the witness of "rambling" (R-4055); mischaracterized the testimony (R-4208-09, 4244); asked the witness to comment on the credibility of other witnesses (R-4076-77,4208); and shouted at the witness (R-3834).

During closing argument, the prosecutor called the experts names such as "hired guns" and "Monday morning quarterbacks" (R-4404-5). The prosecutor tried to inflame the jury about the amount of money these experts were being paid ("thousands of dollars"), when in fact, the experts were being compensated by the county because the defendant was declared indigent for purposes of costs (R-1563,4408).[13] The prosecutor then capped off his closing argument with "[t]he Monday morning quarterbacks, the hired guns, could not tell you anything other than perhaps it should have been done

[13]It is unknown why Mr. Kimmel did not hire an investigator or any mental health expert when Mr. Suggs had been declared indigent for costs for the tire mark experts.

differently" (R-4412).

At no time did trial counsel object. But at the evidentiary hearing, Mr. Kimmel conceded that he should have approached the bench to make his objection because nothing prevented him from doing so and still perfecting the appellate error (PC.Ev. at 266). As a result of “collegiality,” Mr. Suggs’ issues were not preserved for appeal. Failure to do so was ineffective assistance of counsel.

12. Trial counsel’s failure to insist on a mistrial when the prosecutor told the jury that Mr. Suggs had been in jail

During the prosecutor's opening statement, he told the jury

that Mr. Suggs had been in an Alabama prison with James Taylor (Taylor"), a key State witness:

> The defendant is taken to the Walton County Jail. There will be two witnesses that will testify that they were in jail at the time the Defendant was brought in, Wally Byars and James Taylor. They are both convicted felons. . . . James Taylor will tell you that he's from Alabama. He's been in prison up there. He and the Defendant -- he knew the Defendant. They knew some people, the same people and got to talking about that.

(R-2166) (emphasis added). The defense objected and moved for a mistrial (R-2168-69). The trial court found that "a reasonable person might infer that the Defendant was in prison

with Mr. Taylor," but nevertheless denied the motion for mistrial (R-2198,99).

Both sides agreed that a cautionary instruction would only serve to "highlight" the error and both counsel agreed that no instruction would be given (R-2199,2200-03). Nevertheless, the trial court, obviously troubled by the prejudice of such a statement, repeatedly brought the issue up later in the trial and insisted that counsel take some action to cure the error. As a matter of law, nothing could cure the prejudicial impact of such a statement. Mr. Suggs' trial counsel agreed that the prosecutor could read a statement to the jury that he did not intend to imply that Mr. Suggs met Mr. Taylor in prison in Alabama (R-2349-52,2639-51,2675-77):

> To avoid any possible misunderstanding that may have been created yesterday, I would like to make a brief statement: I did not intend to imply that Mr. Taylor met [Petitioner] in prison in Alabama.

(R-2677).

Mr. Kimmel was ineffective for agreeing to a curative instruction that both parties had agreed would only highlight the error. They further erred in allowing the prosecutor, rather than the judge, instruct the jury. Competent counsel would have insisted that a mistrial be declared. See Czubak v. State, 570 So.2d 925, 928 (Fla. 1990); Ward v. State, 559 So.2d 450 (Fla. 1st DCA 1990); and McGuire v. State, 584 So.2d

89 (Fla. 5th DCA 1991).

Any hint that Mr. Suggs had committed other crimes was highly prejudicial in this circumstantial case and was reversible error. The trial court had already taken measures to avoid the obvious prejudice that would occur, if the jury knew of Mr. Suggs' prior conviction, which was a highlight of every newspaper story and media report on the case. Indeed, that was the primary reason why venue was changed and a previous trial aborted. Even in the new venue, numerous jurors knew of Mr. Suggs' prior conviction. During jury selection, the trial court reiterated the concern: "I have a major concern with regard to them tainting the [jury] pool, even one person having knowledge of Mr. Suggs' prior conviction and announcing that to the rest of them" (R-1898). Nevertheless, one of the jurors was seen reading the newspaper in the courtroom and defense counsel should have moved to strike the entire jury venire, but he did not.

Further exacerbating the problem was the fact that Mr. Suggs was required to wear a leg weight during the entire trial. A large police presence was in the courtroom, including two uniformed and armed guards who sat directly behind Mr. Suggs throughout the trial. They got up and stood directly behind him each time he was required to stand. Mr.

Suggs also was observed in the hallway by the jury where he was in handcuffs with an armed guard. This gave the jury the highly prejudicial impression of Mr. Suggs' current and future dangerousness, to his substantial prejudice.

Shackling a defendant before the jury was expressly disapproved in Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified on other grounds, 833 F.2d 250 (11th Cir.), cert. denied, 485 U.S. 1014 (1987):

> The Supreme Court has characterized shackling as an "inherently prejudicial practice." Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 1345, 89 L.Ed. 525, 534 (1986). "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, L.Ed.2d 353 (1970).

823 F.2d at 1450-51.

When shackling occurs it must be subjected to "close judicial scrutiny," Estelle v. Williams, 425 U.S. 501, 503-04 (1976), to determine if there was an essential state interest furthered and whether less restrictive, less prejudicial methods of restraint were considered. Holbrook, 475 U.S. at 568.

To the extent that Mr. Suggs' attorneys failed to object

or appeal, Mr. Suggs received ineffective assistance of counsel. Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Mr. Suggs' due process rights were violated. He is entitled to a new trial.

13. Trial counsel's errors, both individually and cumulatively, were so egregious as to prevent a reliable adversarial testing of Mr. Suggs' guilt.

Because of counsels' deficient performance, the State was able to obtain a conviction by repeated misconduct. The State used a surprise witness, Judge Lindsay, and hearsay evidence to bolster the credibility of a state informant and the state's case. The State presented such gruesome evidence that two jurors became physically ill. And, the prosecutor was permitted to undermine confidence in the jury's verdict by repeatedly inflaming and misleading the jury during closing argument, all without defense objection.

Even though Mr. Suggs had been declared indigent for costs for the tire mark expert, Mr. Kimmel failed to provide reasonable assistance or even request funds for an investigator to develop evidence that could explain how the victim placed her fingerprints on his car earlier that day; when they failed to attack the credibility of the State's informants and another suspect by impeaching them with prior inconsistent statements or introducing evidence of prior

crimes; and when they allowed the State to repeatedly commit reversible errors without objection. Trial counsel not only failed to put the State to its burden of proof, but allowed, in the interests of collegiality, the burden to be shifted to Mr. Suggs. He also failed to preserve Mr. Suggs' right just in case the jury did not share the "kinship" with defense counsel as he believed they did.

The State's evidentiary case was weak and circumstantial. If the State had been prevented from repeatedly abusing the Mr. Suggs' constitutional rights to remain silent, present witnesses and due process, and if the defense counsel had impeached the credibility of the state witnesses, presented evidence in his behalf and raised proper objections, there is much more than just a reasonable probability that the outcome of the trial would have been different. Counsel's excuses were not reasonable under the law. Mr. Kimmel and Mr. Stewart's efforts to foster a "collegial" atmosphere with the State at the expense of Mr. Suggs was not only deficient performance but a breach of their ethical duty to zealously represent their client.

When considered cumulatively with other instances of deficient performance and suppression by the State of exculpatory evidence, it is clear that Mr. Suggs was denied an

adequate adversarial testing. State v. Gunsby. The outcome cannot be reliable. A new trial should be ordered.

ARGUMENT III

THE HEARING COURT ERRED IN DENYING MR. SUGGS' CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

Introduction

An ineffective assistance of counsel claim is comprised of two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland, at 687. "[T]o establish ineffectiveness, a 'defendant must show that counsel's performance fell below an objective standard of reasonableness.'" Williams, at 1511, quoting Strickland at 688.

In Williams, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase of a capital case until a week before trial, "failed to conduct an investigation that would have uncovered extensive records," "failed to seek prison records," and "failed to

return phone calls of a certified public accountant." 120 S.Ct. at 1514. In her concurring opinion, Justice O'Connor explained that "trial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation," and as a result, this was a "failure to conduct the requisite, diligent investigation." 120 S.Ct. at 1524.

More recently, in Wiggins v. Smith, 123 S. Ct. 2527 (2003), the Supreme Court discussed counsel's decision to limit the scope of the investigation into potential mitigating evidence and the reasonableness of counsel's investigation. The Court said:

> [A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Wiggins, 123 S. Ct. at 2538.

This Court has recognized that trial counsel has a duty to conduct an adequate and reasonable investigation of available mitigation and evidence that negates aggravation. Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Rose v. State, 675 So. 2d 567 (Fla. 1996). This did not occur in Mr. Suggs' case.

Deficient Performance

Mr. Suggs had two trial attorneys and each failed to conduct an adequate investigation for the penalty phase. Donald Stewart of Anniston, Alabama, was the lead attorney who was retained by the Suggs' family. He sought the help of Florida attorney, Robert Kimmel and both worked as co-counsel (PC. Ev. at 122-123).

Mr. Stewart testified that he did not hire a neuropsychologist or mental health expert to evaluate his client (PC. Ev. at 124), but he believed that he put on some mitigation in the penalty phase (PC. Ev. at 125).

Mr. Stewart testified that he had a personal relationship with the Suggs' family, which contributed to his lack of investigating mitigation.

> I've known Jack Suggs since I started practicing law in Anniston in 1965, and I knew his children when they were growing up; his wife, Loretta, so I knew a good bit about the background of this individual at the time I took him on as a client in this case....and that had something to do with the way I handled that particular part of the penalty phase of the trial.

(PC. Ev. at 130).

Mr. Stewart said he did not consult with any mental health expert nor was he aware of any concerns that Mr. Suggs may have had organic brain damage or other issues typically raised in a penalty phase. Mr. Stewart said "...if I had known or had some indication that that (organic brain damage)

was present in Mr. Suggs, I would have done something about it" including calling a mental health expert (PC. Ev. at 131-132). But because he "knew the family," he did not see any outward signs of any mental illness or other mental health problems. He did not investigate this possibility despite indications these problems existed.

Mr. Stewart testified that he knew that Mr. Suggs had difficulty in school, had gone to military academy and had some behavior problems as he was growing up, but "I didn't know, necessarily...at the time that we were involved in the penalty phase if that would help him" (PC. Ev. at 133). Mr. Stewart didn't know if it would help because he did not know the reasons for Mr. Suggs' problems or behavior.

Mr. Stewart also failed to conduct an investigation into the circumstances of Mr. Suggs' life and testified that this was his first penalty phase (PC. Ev. at 153). Apparently, Mr. Stewart believed since he "knew the family," he did not need to investigate Mr. Suggs' background at all.

Mr. Kimmel, on the other hand, was an experienced criminal lawyer who had already tried two capital murder cases. He was a board-certified criminal trial attorney at the time of Mr. Suggs' case (PC. Ev. at 213-214). Mr. Suggs' case was his third capital murder case that went to penalty

phase. Mr. Kimmel said he was the experienced capital lawyer familiar with Florida law and who had represented capital defendants (Pc. Ev. at 185). His job was to educate Donald Stewart on Florida law as it related to capital sentencing (PC. Ev. at 216-217). He was the "expert" on Florida law (PC. Ev. at 217). Yet, despite that statement, Mr. Kimmel said that he did not focus on the penalty phase.

> We were focusing on guilt or innocence. If we find getting found not guilty or guilty of a lesser, there's no sentencing phase. That was our focus. That was our primary focus all the way through and we tried very hard to keep him from being convicted of first-degree murder.

(PC. Ev. at 277-278).

Mr. Kimmel testified that it was Donald Stewart's responsibility to deal with the family and obtain any background records to be used in penalty phase. When he was asked if Mr. Suggs' school or medical records were obtained, Mr. Kimmel said no, but added that it was Donald Stewart's responsibility to deal with that part of the case.

> I fully believe that none of these records were available or Donald Stewart would have gotten them. He's the witness you should have asked because this relates to the family and you've already heard Donald explain his ties to the family. **I couldn't and wouldn't have gotten those.**

(PC. Ev. at 275)(emphasis added).

Mr. Kimmell testified that he did not obtain school

records, medical records or any other background materials on Mr. Suggs because he assumed the other attorney did it. Even though a psychologist who evaluated Mr. Suggs for the public defender years earlier had requested background materials on Mr. Suggs, including medical records of head injuries, Mr. Kimmel said he did not provide them to the psychologist. Mr. Kimmel said he failed to learn if there existed medical records or any psychological or psychiatric records from Mr. Suggs' previous incarceration (PC. Ev. at 279). Mr. Kimmel said that the psychologist, Dr. James Larson, was someone who had been retained by the public defender, who was Mr. Suggs' previous attorney.

> The difference is that when Donald Stewart got involved he knew the family and knew the history and knew that we didn't want a psychologist knowing just how bad Ernie had been because it was going – if you present that to the jury, you can't present pieces of the puzzle without them getting all of it.

(PC. Ev. at 280).

The jury never saw the big picture of what Mr. Suggs' life was like. The theory that Mr. Suggs came from a good family and therefore could not have any mental health mitigation is not a reasonable trial strategy under the law. Under Strickland, Williams v. Taylor, 120 S.Ct. 1495 (2000), and Wiggins v. Smith, 123 S. Ct. 2527 (2003), this is improper.

Counsel knew that Dr. Lawson was a confidential expert retained by the Public Defender's Office to evaluate Mr. Suggs before trial. Dr. Larson found Mr. Suggs competent to proceed to trial, but told defense counsel that there may be non-statutory mitigating factors that may include neuropsychological impairment and "chaotic childhood factors" that Mr. Suggs was unwilling or unable to discuss. For those reasons, Dr. Larson sought additional records and information from trial counsel, including school records; an opportunity to interview Mr. Suggs' parents; medical records of any accidents he may have had, especially those with head injuries or brief periods of unconsciousness; medical records from his incarceration and psychological and/or psychiatric records from Mr. Suggs' previous incarcerations.[14]

Despite his request for additional information, Dr. Larson never received those materials. Neither he nor any other mental health expert was ever called to do additional

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[14]While Dr. Larson was a confidential defense expert and his report was confidential, it is unclear how the State received a copy of the report. At the evidentiary hearing, Mr. Kimmel testified that he did not give it to the State and had no idea how the State obtained a copy of it (PC. Ev. at 275-275). Mr. Adkinson told the Court on the record that he "got the record out of the court file this morning." (Pc. Ev. at 163). It is unclear what court file Mr. Adkinson was referring to because the Larson report is not part of the record on appeal. To this day, it is still unclear how the State obtained a confidential mental health report of Mr. Suggs.

evaluations of Mr. Suggs. No psychological experts were called on Mr. Suggs' behalf at penalty phase.

In a proffer at the hearing, Mr. Kimmel testified that his purported reason for not sending Mr. Suggs back to Dr. Larson or to another psychologist for an evaluation was because Mr. Suggs allegedly admitted his involvement in the crime to an investigator with the Public Defender's office, and Mr. Kimmel was concerned that if the psychologist was called to testify, it would hurt Mr. Suggs' case (PC. Ev. at 292-293). At no time did Mr. Kimmel say that Mr. Suggs confessed to him. In fact, lead attorney Donald Stewart testified to the contrary. He said, "Our job was to try to get our client off at that point in time and concede the fact that he was going to be found guilty, because he told us he didn't do it." (PC. Ev. at 149).

Mr. Kimmel testified that the defense failed to investigate or present any mental health mitigation. He did not encourage his client to cooperate with a mental health expert. And even though Mr. Suggs did not cooperate fully with Dr. Larson, the defense decided not to pursue other mental health mitigation at all or obtain the services of any other mental health expert (PC. Ev. at 285), presumably because Mr. Stewart "knew the family" and therefore must have known

everything about Mr. Suggs without investigating it. Under Williams v. Taylor, 120 S. Ct. 1495 (2000), and Wiggins v. Smith, 123 S. Ct. 2527 (2003), this is deficient performance.

1. Failure to offer proof of Mr. Suggs' incarceration record as mitigation

The trial court only found and weighed three mitigating factors. Nonetheless, defense counsel knew that Mr. Suggs had been incarcerated in the State of Alabama for a period of approximately ten years. Defense counsel also knew that during his incarceration, Mr. Suggs was a model prisoner who caused no problems for other inmates or prison personnel. Defense counsel also knew that only after he had served six years in an Alabama prison, he was eligible for work release because of his model behavior in prison and was released after serving 10 years. During his time in the Alabama prison system, Mr. Suggs also was granted several passes outside of the prison to visit with his family. These passes ranged from eight hours to five days.

Despite knowing this information, trial counsel Kimmel said he did not present any evidence of Mr. Suggs' good behavior while he was incarcerated in Alabama, even though the jury had already learned that information in penalty phase from the State.

In June 1981, Alabama prison officials noted that Mr.

Suggs “maintained a clear record since he arrived at Draper (Correctional Center) with no reports of escape behavior. Currently, he does not appear to be a security risk...” Mr. Suggs was paroled from prison on June 19, 1989.

A good prison record is relevant mitigation and sentencing consideration. Skipper v. South Carolina, 476 U.S. 1 (1986). Excluding the jury from considering evidence that a defendant “should be spared the death penalty because he would pose no due danger to his jailers or fellow prisons and could lead a useful life behind bars if sentenced to life imprisonment” would violate Eddings v. Oklahoma, 455 U.S. 104 (1982).

A defendant’s potential for rehabilitation is a significant factor in mitigation. Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). Such evidence is “clearly mitigating in the sense that it might serve as a basis for a sentence less than death.” Id. See also, Lowe v. State, 650 So. 2d 969 (Fla. 1994)(Kogan, J., concurring in part, dissenting in part)(nothing “the general policy that death should not be imposed where the evidence supporting a potential for rehabilitation is strong”).

Mr. Suggs was an exemplary inmate while in Alabama. Trial counsel presented **no** witnesses or records to document

this outstanding record. These records were readily available to trial counsel if only counsel had only sought them out. Trial counsel's failure to obtain the readily available prison records and failure to present to the jury that Mr. Suggs was a model prisoner was ineffective assistance of counsel. In light of the 7-5 jury recommendation for death, failing to argue this mitigating factor was unreasonable.

2. <u>Failure to Object to Jury Instructions That Were Unconstitutional as a Matter of Law.</u>

Especially Wicked, Evil, Atrocious, or Cruel

During the penalty phase of Mr. Suggs' trial, the court addressed the jury as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> * * *
>
> (6) The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.
>
> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

(R-4721-22). Trial counsel failed to object to this erroneous instruction:

> Court: Are there any objections to the instructions as read?
>
> Kimmel: None from us your honor.

(R-4726).

On June 9, 1992, the jury recommended that Mr. Suggs receive a sentence of death by a vote of 7 to 5 (R-4728). On June 29, 1992, the United States Supreme Court held that Florida's "especially wicked, evil, atrocious, or cruel" aggravator was invalid. Espinosa v. Florida, 505 U.S. 1079 (1992). The issue of whether the aggravator was invalid had already been attacked before Mr. Suggs' trial. See Espinosa v. State, 589 So.2d 887 (Fla. 1991). By failing to object, Mr. Suggs' trial counsel allowed the jury to be instructed on an aggravating circumstance that was unconstitutional as a matter of law. The same instruction had been challenged by other defendants and there is no tactical reason for permitting the jury to find an aggravating circumstance that is unconstitutional as a matter of law. Moreover, Mr. Suggs was not sentenced until July 15, 1992, **two weeks after** the United States Supreme Court decided Espinosa. Mr. Kimmel, as an expert on Florida law, should have, at a minimum, requested a new sentencing hearing with the unconstitutional aggravator stricken.

At the evidentiary hearing, Mr. Stewart testified that he did not object to the Espinosa instruction (PC. Ev. at 128). Mr. Kimmel, however, testified that he **did not know** at the

time that the case on appeal in the federal courts, but he did know that it had gone to the Florida Supreme Court and had been denied. When asked what he thought happened to it, he said, " I didn't think about it." (PC. Ev. at 236-237).

The trial court, in denying Mr. Suggs relief on this claim, said that counsel is not ineffective "for failing to anticipate a change in the law," (PC-R. at 345), but that comments misses the point and is wrong.

While Mr. Kimmel testified that he did not think about Espinosa, he characterized the opinion as "a tidal wave, it was an earthquake" as to its impact on Florida law (PC. Ev. at 236). He added, however, that he only learned of the Espinosa opnion after Mr. Suggs was already sentenced to death and did not notify the court before sentencing. "I did not bring Espinosa to the attention of Judge Melvin before sentencing, that is correct." (PC.Ev. at 239).

He did not bring the opinion to the judge's attention because he was **unaware** of the current law, just as he was unaware of the Garron case, the golden rule argument or Mr. Suggs' mental health evidence. Ignorance of the law is no defense. Brewer v. Aiken, 935 F. 2d 850 (7th Cir. 1991).

Cold, Calculated and Premeditated

The trial court also instructed the jury on the

aggravating circumstance of "[t]he crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" (R-4722). This instruction tracked Section 921.141(5)(i), Fla. Stat. (1991), and did not explain the operative terms of the statute; i.e. "cold," "calculated," "premeditated," "pretense," "moral justification," and/or "legal justification." The law requires the court to sufficiently define the circumstances giving rise to this aggravating factor in order to prevent arbitrary application of the law and denial of due process as provided by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution. See Espinosa.

Mr. Suggs' trial counsel did not object to the jury instruction on this aggravator (R-4726) (PC. Ev. at 239). Mr. Kimmel testified that Mr. Suggs' previous attorney had raised motions as to those instructions and "we certainly never waived any of those motions," but also did not object themselves (PC. Ev. at 239).

Prejudice

Mitigation not presented

Mr. Suggs suffers from a deficit in intellectual

functioning. He processes information like a 14-year-old child. "He can't use the brains he's got in an organized way that exercises sound reasoning judgment" (PC. Ev. at 34) (Expert testimony of neuropsychologist, Dr. Barry Crown). Mr. Suggs also suffers from depression, has a flat affect and prefers a simple, repetitive and dependent life. "He certainly prefers to deny psychological problems and deficits." (PC. Ev. at 27).

Mr. Suggs suffers from significant neuropsycholoigcal deficits and impairments, particularly in the functioning areas of language based on critical thinking and in auditory selective attention. This indicates organic brain damage (PC. Ev. at 28).

These problems found in Mr. Suggs have been present in Mr. Suggs for many years. They were documented in school and medical records not sought by trial counsel. These problems were not acquired at a late age and are not based on having too much to drink or staying up late. "It's an underlying organic condition, meaning that the engine just doesn't work. All the cylinders aren't functioning" (PC. Ev. at 36).

> It's very likely that it has its basis or beginnings in the perinatal period and that may have been aggravated later by other accidental consequences. For example, in the educational records I read that Mr. Suggs failed the fourth grade. That's an important point in terms of

> education. Also an important point in terms of functioning because it's in the fourth grade that we make that shift from group efforts and group activities to the beginnings of language based critical thinking. It's language based critical thinking that Mr. Suggs falls down on. And it's in the fifth grade or with the beginnings of the fourth grade that language based critical thinking becomes important in the educational curriculum.
>
> In the primary grades things are more concrete. The shift takes place when we leave the primary grades, first, second, third and move into the fourth grade that there's a shift to more abstract thinking. It supports the notion that Mr. Suggs' problems have an early origin rather than a late origin, although there may be a late aggravator.

(PC. Ev. at 30).

The neuropsychological tests conducted by Dr. Crown were available in 1990 and qualified experts were present in Florida who cold have conducted these tests at the time of trial (PC. Ev. at 28-29).

When considering that Mr. Suggs' death recommendation was determined by one juror's vote, in a 7-5 recommendation, this mitigation could have tipped the scales toward life.

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of

showing a reasonable probability. See Kyles v. Whitley, 115 S. Ct. 1555 (1995) (discussing identity between Strickland prejudice standard and Brady materiality standard). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

Mr. Suggs presented unrebutted mitigation that was available and could have been presented had trial counsel investigated. The compelling mitigation presented "might well have influenced the jury's appraisal of [Mr. Suggs'] moral culpability." Williams v. Taylor, 120 S.Ct. 1495, 1515 (2000). "[C]ounsel's error[s] had a pervasive effect, altering the entire evidentiary picture at [the penalty phase]. Coss v. Lackwanna County District Attorney, 204 F. 3d 453, 463 (3rd Cir. 2000).

Because of the lack of investigation, the sentencer had virtually nothing to weigh against the aggravation, but still voted 7-5 in favor of death. As the Supreme Court observed, "[m]itigating evidence....may alter the jury's election of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S. Ct. at 1516. Mr. Suggs has established prejudice. He is

entitled to relief.

ARGUMENT IV

THE HEARING COURT ERRED IN DENYING MR. SUGGS' CLAIM THAT HE WAS ENTITLED TO RELIEF BASED ON NEWLY-DISCOVERED EVIDENCE.

In Jones v. State, 591 So.2d 911 (Fla. 1991), where neither the prosecutor nor the defense attorney violated their constitutional obligations in relationship to evidence the existence of which was unknown at trial, a new trial may be warranted if the previously unknown evidence would probably have produced an acquittal had the evidence been known by the jury. Where such evidence of innocence would probably have produced a different result, a new trial is required. Impeachment evidence may qualify under Jones as evidence of innocence. See, State v. Mills, 788 So.2d 249 (Fla. 2001). In deciding whether a new trial is warranted, the evidence that qualifies under Jones as a basis for granting a new trial, must be considered cumulatively with evidence that the jury did not hear because either the prosecutor or the defense attorney breached their constitutional obligations. State v. Gunsby, 670 So.2d 920 (Fla. 1996).

New evidence shows that Alex Wells confessed to killing Pauline Casey while he was incarcerated at the Walton County Jail. Wells confessed to George Broxson, another inmate, who

was at the Walton County Jail at the same time. Mr. Wells allegedly told Mr. Broxson that he killed a woman that “Mr. Suggs is on death row for (PC. Ev. at 42). Mr. Wells allegedly told Mr. Broxson “that he killed her (Pauline Casey) and he had a picture of her.” (PC. Ev. at 43). Mr. Broxon testified that he saw the picture of the woman in Mr. Wells’ Bible (PC. Ev. at 43).

In statements that he made to Mr. Broxson, Mr. Wells has confirmed that it was his plan to retrieve Casey's body for burial the day after she was killed; however, as he was returning with a person he described as his "partner" to pick up Casey's body, Wells saw the Sheriff's Department and left the area. The "partner" who Wells described in his statements is most likely his half-brother, Mark Riebe. Riebe has given numerous statements to law enforcement confirming that he has been present and assisted Wells in moving dead bodies from one location to another. Riebe has taken police to two different grave sites located in Walton County, Florida. Although no body was found in either of those two gravesites, police developed evidence that a body was buried in each location.

Wells has been convicted of the kidnapping and murder of Donna Callahan ("Callahan") under circumstances identical to those in this case. Police did not begin to investigate Wells

as the person responsible for Callahan's death until 1993, after Mr. Suggs was convicted in this case. It was not until 1995 that law enforcement completed the investigation of the Callahan case and charged Wells with her kidnapping and murder. Wells eventually entered a plea to the kidnapping and murder and was sentenced in July, 1996. As part of the plea agreement, Wells agreed to take police to the gravesite where Callahan was buried and her body was recovered. It was not until after Mr. Suggs' sentencing that the investigation of the Callahan case became a public record and accessible to Mr. Suggs This evidence is "newly discovered" as contemplated by the rule.[15]

The Newly Discovered Evidence, if Introduced at Mr. Suggs' Trial, Would Have Probably Produced an Acquittal.

The Callahan and Casey facts are so similar that Mr. Suggs was initially named as a suspect in the Callahan case,

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[15] In his amended post-conviction motion, Mr. Suggs sought public records from the Panama City Beach Police Department on William Wells, the man who has admitted killing Pauline Casey. On February 12, 2001, the Panama City Beach Police Department refused to honor the public records request because it considers the information to be part of an "active criminal investigation." In April, 2001, the Panama City Beach Police Department indicated that the investigation into Pamela Ray was being conducted by the Florida Department of Law Enforcement. As of the filing of this Initial Brief, Mr. Suggs still has not received those records.

before it was determined that Mr. Suggs could not have committed Callahan's murder. Another crime committed by Wells, the JoAnn Kemp case, is also strikingly similar to that of Pauline Casey and confirms Wells' use of a knife to kidnap a female. Another crime committed by Wells, the Ruth Bills robbery, also bears a striking resemblance to the instant case.

On August 6, 1990, Pauline Casey was taken from the Teddy Bear Bar where she was working alone. The Teddy Bear Bar is located off U.S. 98 in south Walton County, Florida. The kidnapping was reported at 11:20 p.m. and there were no signs of a struggle. Casey's car was parked out in front of the bar and her purse was left in the bar, untouched. It was as if Casey had simply disappeared. Her body was found the next morning in a wooded area and death was caused by multiple stab wounds.

Donna Callahan was the victim of a similar kidnapping and murder that place on U.S. 98 in Santa Rosa County. Callahan's case is a blueprint for the Casey murder.

Callahan was kidnapped on August 6, exactly one year before Casey, on August 6, 1989, from a Jr. Food Store located on U.S. 98 in Santa Rosa County, Florida. Callahan was working alone and the kidnapping took place at approximately

11:00 p.m. There was no sign of a struggle and it appeared that Callahan had simply disappeared. Callahan's car was left parked out in front of the store and her purse was left in the store, untouched. Wells admitted to numerous individuals that he kidnapped and killed Callahan. In his statements, he admitted to kidnapping Callahan at gunpoint and explained that the reason that he did not rob the store was because another car drove up as he was getting ready to reenter the store for that purpose. Although he abducted Callahan at gunpoint, Wells strangled Callahan to death.

In addition to the similarity of the Callahan and Casey murders, in 1991, Wells was charged with false imprisonment and aggravated assault in the attempted kidnapping of JoAnn Kemp ("Kemp"). Wells went to Kemp's home located in Walton County, Florida, on the pretense that there was an automobile accident down the road from her home. Wells gained entry into the home ostensibly to use the telephone; however, once inside, Wells produced a knife, threatened the victim with the knife, and forced her outside to his truck. There was no sign of a struggle inside Kemp’s home. Her car was parked outside her home, and her purse was undisturbed. It appeared that Kemp simply disappeared. Kemp was able to get away before Wells could force her into his vehicle. Kemp later reported

the incident to law enforcement.

Wells was convicted of the Kemp attempted abduction and later admitted that he intended to kidnap and kill Kemp. These facts make clear that the Kemp case "probably" would have turned out exactly like the Callahan and Casey cases and demonstrates that Wells has used a knife to abduct other female victims, such as Pauline Casey.

On November 25, 1989, Wells also robbed Ruth Bills, a female clerk at a convenience store on U.S. 98 in Mary Esther, Florida. The only reason she was not also kidnapped and killed is because Wells' accomplice interrupted him before he kidnapped Bills. In the Ruth Bills case, Wells was convicted of robbery and sentenced to thirty years in prison.

As late as March 22, 2000, Wells and his brother, Mark Riebe, were being investigated in the death of Pamela June Ray, an Atlanta woman who disappeared from a beach parking lot in 1992, under circumstances identical to that of Pauline Casey and Donna Callahan. Ms. Ray, 36, vanished from the grounds of a motel on August 12, 1992, leaving her car in the parking lot. Inside the car, she left her keys, her purse and her two young children. There was no sign of a struggle.

At the evidentiary hearing, Mr. Broxson testified that Wells told him that he killed "four or five" others (PC. Ev.

at 44). Mr. Broxon was scheduled to testify against Mr. Wells if his case went to trial (PC. Ev. at 62). He added, however, that he did not tell anyone at the county jail of Mr. Wells' confession because he did not want to be "labeled a rat" (PC.Ev. at 60).

To avoid the death penalty, Wells plead to two life sentences because his brother was going to testify against him (PC. Ev. at 83). He said his brother, Mark Riebe, murdered Donna Callahan (PC.Ev. at 83-84). It was clear that killings similar to the Casey murder continued **after** Mr. Suggs had been arrested and convicted.[16]

At the evidentiary hearing, the State called Mr. Wells to deny that he killed Pauline Casey and denied confessing to George Broxson (PC. Ev. at 82-85). He admitted, however, that he has a pending habeas corpus petition and any confession would hamper his efforts to overturn his convictions (PC. Ev. at 85).

The new evidence of innocence in conjunction with the Brady violation and the evidence of ineffective assistance of counsel, all presented at the evidentiary hearing, established

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[16] These facts underscore the importance of the State's failure to disclose the note the medical examiner, which initially found that Mr. Suggs was in custody at the time the victim was murdered.

that the jury probably would have acquitted Mr. Suggs had it known of all of this evidence. Evidence that the trial testimony was false completely undercuts the credibility of the testimony and warrants a new trial.

In analyzing the prejudicial impact of the Brady evidence, Strickland evidence, and Jones evidence, the evidence must be evaluated cumulatively in deciding whether a new trial is warranted. This Court established its position in Jones v. State, 709 So.2d 512 (Fla. 1998), and reaffirmed it in Lightbourne. Cumulative analysis is legally required where a Brady claim, an ineffective assistance claim, and/or a Jones v. State claim are presented. In State v. Gunsby, a new trial was ordered in post-conviction because of the cumulative effects of Brady violations, ineffective assistance of counsel, and/or Jones evidence of innocence using the following analysis:

> First, he argues that the State's erroneous withholding of exculpatory evidence entitles him to a new trial. Second, he asserts that he is entitled to a new trial because new evidence reflects that the State's key witnesses at trial gave false testimony in order to implicate him in a murder he did not commit and to hide the true identity of the murderer.
>
> * * *
>
> Nevertheless, when we consider the cumulative

> effect of the testimony presented at the 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome. Cf. Cherry v. State, 659 So.2d 1069 (Fla. 1995)(cumulative effect of numerous errors in counsel's performance may constitute prejudice); Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995)(same). Consequently, we find that we must reverse the trial judge's order denying Gunsby's motion to vacate his conviction.

Gunsby, 670 So.2d at 923-24 (emphasis added). Like Mr. Gunsby, Mr. Suggs is entitled to a new trial.

ARGUMENT V

MR. SUGGS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS ABSENT FROM CRITICAL STAGES OF HIS TRIAL.

Mr. Suggs was absent from critical stages of his trial and he did not waive his right to be present during those stages. Mr. Suggs was denied a hearing on this issue.

During jury selection, Mr. Suggs was not in the same room when the State and defense were striking potential jurors. During jury voir dire the prosecutor and defense sought to "expedite" the jury selection process by striking select potential jurors based on various factors. See (R-1914 et. seq.). In the process, the trial court elected to question

those select jurors in a separate room.

> Court: I understand that the jury room, which is a much larger room than the one we're sitting in, is available. I think we will just bring the jurors in there to do individual voir dire . . . .

(R-1914).

The defense and prosecution then decided to "stipulate" that the juror questionnaire, which each juror filled out before coming to the courthouse, was accurate as well as sufficient to rely upon in deciding whether to strike the juror or not.

> State: Is there any of them . . . that we could agree on at this point that we perhaps would be spinning our wheels to try to rehabilitate?
>
> Court: We would be at about 75 [jurors] if we did that.
>
> * * *
>
> Defense: I don't have any problem doing that or using the questionnaire if we stipulate it's sufficient cause and rehabilitation would be impossible.

(R-1915-16) (emphasis added). Thereafter, without Mr. Suggs' present, the prosecutor and defense counsel struck jurors Catherine Malczynski (R-1916), Charles Wayne Baxley, and Hollis Mathews (R-1917) based solely upon the limited information contained within the juror questionnaires:

> Court: Both of you are willing to take the limited information on the questionnaire and

neither of you seek an opportunity to get further details?

* * *

Defense: Correct.

(R-1919).

It was only at this point that the court asked defense counsel if they wanted Mr. Suggs present for further strikes:

Court: I asked [defense counsel] if you wanted [Mr. Suggs] present and you said you did not.

Defense: I've thought about that, Judge. I think we need to have him present for this.

* * *

Court: Please have one of the bailiffs bring him in.

(R-1919-20). Thereafter, the court asked Mr. Suggs if he wished to ask his defense counsel about what transpired while he was absent. See (R-1920). It is clear, however, that the judge never inquired of Mr. Suggs prior to excluding him from jury selection and whether he knowingly, intelligently and voluntarily waived his presence during this critical stage of the trial.

A criminal defendant “has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982). A criminal defendant's right to

be present during jury selection has been specifically addressed in Coney v. State, 653 So.2d 1009, 1013 (Fla. 1995), where this Court held that when a defendant purportedly "waives" his right to be present, the trial court "must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary." In Coney, this Court held that a criminal defendant must be present at "the site" where any action is being taken during the pendency of his trial. This rule is prospective and did not apply to cases in the pipeline. Although Mr. Suggs' case was a "pipeline" case at the time the Coney decision was rendered, the fact that Mr. Suggs had the right to be present was well known and should have been insisted upon by defense counsel.

This Court has redefined presence as: "[a] defendant is present for purposes of this rule if the defendant is physically in attendance, and has a meaningful opportunity to be heard through counsel on the issues being discussed." See Boyett v. State, 688 So. 2d 308 (Fla. 1997). Here, Mr. Suggs was not in the same room where defense counsel and the State were discussing "their" stipulation for striking potential jurors and their subsequent striking of several jurors during Mr. Suggs' absence and therefore was not "present."

Trial counsel effectively waived Mr. Suggs' right to be

present, without his knowledge or consent. This failure prejudiced Mr. Suggs' right to a fair trial and denied him the right to be meaningfully involved in the defense of his case.

Mr. Suggs also was absent when defense counsel inexplicably stipulated to dismissal of jurors for cause, based solely upon a written juror questionnaire. Defense counsel did not even question these jurors. Jury selection is a critical stage of the prosecution and Mr. Suggs was entitled to be present when the jurors were questioned. Mr. Suggs should have been present when his counsel waived his right to question the jurors and stipulated that the jurors could be stricken for cause. Challenging jurors is a critical stage of trial. Salcedo v. State, 497 So.2d 1294, 1295 (Fla. 1st DCA 1986). Mr. Suggs never made a knowing and intelligent voluntary wavier of his right to be present. Savino v. State, 555 So.2d 1237 (Fla. 4th DCA 1989) (holding defendant's absence during witness testimony was not harmless error, and absence during period when court answered jury question was similarly not harmless), citing Turner v. State, 530 So.2d 45 (Fla. 1987), cert. denied, -- U.S.--, 109 S. Ct. 1175, 103 L.Ed. 237 (1989); and Fla. R. Crim. P. 3.180.

Mr. Suggs was denied his right to be present during crucial stages of his trial. His attorneys failed to ensure

his presence, which was ineffective assistance of counsel. Mr. Suggs is entitled to a new trial.

ARGUMENT VI

MR. SUGGS' RIGHT TO CONFLICT-FREE COUNSEL WAS VIOLATED BY THE DUAL REPRESENTATION OF MR. SUGGS AND A STATE WITNESS. THIS CONFLICT WAS THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Suggs and one of the State's key witnesses were both represented by the Public Defender's Office during several critical stages of the prosecution of this case. Indeed, Mr. Suggs and Wallace Byars were both represented by the **same lawyer** from the Public Defender's Office, when it was alleged by Byars that Mr. Suggs made incriminating statements to him. That lawyer filed a notice that Mr. Suggs was invoking his right to remain silent and did not want to be questioned without the presence of his attorney. Several days later, however, that same lawyer's other client was placed in the cell with Mr. Suggs and began cooperating with law enforcement. Thereafter, the same lawyer continued Mr. Suggs's representation even after Byars had given statements to law enforcement that allegedly incriminated Mr. Suggs.[17] Mr. Suggs' representation by the Public Defender's Office

[17]This is also the same public defender's office that allegedly took a confession from Mr. Suggs that he vehemently denies making.

continued through numerous critical depositions, hearings, and examinations. For example, during penalty phase, Mr. Suggs told the court-appointed psychologist that he would not complete the neuropsychological testing because his lawyer was working for the State, a fact that now is abundantly clear.

This conflict of interest was created by the State and concealed from the court and Mr. Suggs. Both Mr. Byars and James Taylor made statement to law enforcement on August 21, 1990, but the State did not reveal their existence to the defense until five months later in January, 1991. In September, 1990, the State filed false discovery responses, denying the existence of informants or statements of the defendant. In the interim, these informants remained in Mr. Suggs' cell and later testified to additional statements made by him subsequent to August 21, 1990.

The Public Defender's Office either knew or should have known that their client, Byars, was cooperating with police to obtain incriminating evidence on Mr. Suggs, but did not advise him or otherwise take steps to protect his right to counsel. Even after Byars' existence as a state witness was revealed by the State, the Public Defender continued to represent both Mr. Suggs and Byars during critical stages of Mr. Suggs' case.

A conflict of interest adversely affecting a lawyer's

performance violates the Sixth Amendment Right to conflict-free counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980); Glasser v. United States, 315 U.S. 60 (1942); Foster v. State, 387 So.2d 344 (Fla. 1980). Because a conflict of interest existed, the failure to act on behalf of Mr. Suggs during the period of dual representation resulted in ineffective assistance of counsel. Without an objection by trial counsel to the representation, prejudice will be presumed if a defendant demonstrates counsel "actively represented conflicting interests" and "an actual conflict of interest adversely affected his lawyer's performance." Strickland v. Washington, 446 US 668, 692 (1984).

In setting aside a judgment of first-degree murder and a resultant death sentence based upon the fact that a defendant and his cell mate were both represented by the Public Defender, this Court said:

> We can think of few instances where a conflict is more prejudicial than when one client is being called to testify against another.

Guzman v. State, 644 So.2d 996, 999 (Fla. 1994). Accord,)Foster v. State, 387 So.2d 344, 345 (Fla. 1980(“Even in the absence of an objection or motion below, however, where actual conflict of interest or prejudice to Appellant is shown, the court’s action in making the joint appointment and

allowing the joint representation to continue is reversible error.”). The conflict of interest in this case was prejudicial and undermined confidence in the adversarial testing process. Mr. Suggs was denied an evidentiary hearing on this argument. Mr. Suggs is entitled to relief.

ARGUMENT VII

TRIAL COUNSEL REPEATEDLY WAIVED MR. SUGGS’ RIGHTS, IN VIOLATION OF HIS RIGHTS. THIS WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Suggs’ rights were repeatedly waived by trial counsel without his knowledge or consent. This occurred before and during the trial. For example, during the trial, defense counsel waived Mr. Suggs’ rights to a Richardson hearing. Suggs, 644 So.2d at 67 (emphasis added). Mr. Suggs was never advised that his counsel was waiving his right to a Richardson hearing and he never knowingly and intelligently waived that right. The trial court never inquired whether Mr. Suggs wanted to waive his right to such a hearing. Another example occurred during jury selection, when defense counsel waived his presence during the jury selection process and, in Mr. Suggs’ absence, inexplicably waived his right to question prospective jurors concerning their views on the death penalty. Mr. Suggs was never advised that his counsel was waiving his right to be present at this critical stage of the

proceedings. No inquiry was made by the trial court and no waiver is reflected in the record. Another example occurred before trial, when the Public Defender waived Mr. Suggs' right to conflict-free representation as guaranteed by the Sixth Amendment to the Constitution and represented both Mr. Suggs and Wallace Byars, a key witnesses against him. Mr. Suggs was never advised of the conflict and never waived his right to conflict-free representation. The Public Defender then waived Mr. Suggs' rights under the Fourth Amendment to challenge the search warrants that were issued for the search of Mr. Suggs' residence, while assuring him that the motion filed by the Public Defender would take care of it. Mr. Suggs was never advised that his counsel was waiving his right to suppress the evidence derived from a search warrant that was invalid on its face and Mr. Suggs never waived such a right on the record. To the contrary, Mr. Suggs tried to preserve the issue, and even filed his own addendum to the motion to suppress, so this issue would be addressed. Another example is when trial counsel obtained a confidential expert and then waived the Mr. Suggs' right to confidentiality, without his knowledge or consent, by giving the report to the prosecutor. The prosecutor tried to introduce the report at trial as State's evidence.

By failing to object and move for a mistrial, trial counsel waived Mr. Suggs' right to appeal the prejudicial and reversible errors that occurred during the trial, resulting in a guilty verdict and death recommendation.

Florida law requires that "any waiver of a suspect's constitutional rights must be `voluntary, knowing, and intelligent . . . .'" State v. Franko, 681 So.2d 834, 835 (Fla. 1st DCA 1996), citing Traylor v. State, 596 So.2d 957, 966 (Fla. 1992); and Fields v. State, 402 So.2d 46 (Fla. 1st DCA 1981). The trial court must conduct a colloquy that focuses on a defendant's waiver of a right. Id. Thus, a criminal defendant's trial counsel cannot waive a defendant's right by remaining silent when he should object. See Hannah v. State, 644 So.2d 141, 143 (Fla. 2nd DCA 1994). Likewise, a criminal defendant's trial counsel's affirmative actions cannot be used to infer a waiver of the defendant's rights without the trial court conducting a full colloquy. See State v. Upton, 658 So.2d 86, 87 (Fla. 1995). Accord Hibbert v. State, 675 So.2d 1016 (Fla. 4th DCA 1996).

Trial counsel's waiver of Mr. Suggs' rights was ineffective assistance of counsel and denied Mr. Suggs a fair trial and due process of law. He is entitled to relief.

ARGUMENT VIII

MR. SUGGS' RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WERE VIOLATED.

Law enforcement agents procured search warrants to search Mr. Suggs' home and vehicle and that the search warrants permitted the agents to conduct a general search for "certain evidence and contraband." As a matter of law, the search warrants violated the "particularity" requirement of the Fourth Amendment and permitted an illegal general search for evidence. The evidence obtained during the searches should have been suppressed. Green v. State, 688 So.2d 301 (Fla. 1996).

To the extent that the basis for this argument should have been discovered by trial counsel, but was not, trial counsel was ineffective in failing to investigate the case and present argument. Mr. Suggs filed his own pro se motion to amend the motion to suppress filed by the Public Defender, that specifically alleged:

> On the search warrants nothing is "particularly described" only "evidence and contraband" making them "Blanket Search Warrants" and no contraband is described on the warrants affidavit. (R-791).

Inexplicably, in open court, the Public Defender had Mr. Suggs withdraw his pro se motion because the Public Defender's

"motion would take care of it" (R-849). Thereafter, the Public Defender never raised the lack of particularity in the warrants or otherwise challenged their facial invalidity.

Additionally, trial counsel had a conflict of interest that prevented him from rendering effective assistance of counsel during this stage of the proceedings. See Argument VII, supra.

ARGUMENT IX

MR. SUGGS IS INNOCENT OF THE DEATH PENALTY

Where a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief for constitutional errors that resulted in a sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992). This Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993); Jones v. State, 591 So.2d 911 (Fla. 1991). This Court has recognized that innocence of the death penalty constitutes a claim. Scott v. Dugger, 604 So.2d 465 (Fla. 1992).

Innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law. In this case, the trial court relied upon the following aggravating

circumstances to support the sentence:

- **S** A capital felony was committed by the Defendant while under sentence of imprisonment.
- **S** The Defendant was previously convicted of another capital felony and a felony involving the use or threat of violence to the person.
- **S** The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping.
- **S** The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.
- **S** The capital felony was committed for pecuniary gain.
- **S** The capital felony was especially heinous, atrocious or cruel.
- **S** The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Conversely, the court relied on the following mitigating circumstances:

- **S** The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- **S** The Defendant's Family Background.
- **S** The Defendant's Employment Background.

The jury instructions on aggravating circumstances were erroneous, vague, and failed to adequately channel the sentencing discretion of the jury or genuinely narrow the class of persons eligible for the death penalty. In fact, two

of the aggravating factors cited by the trial judge are unconstitutional as a matter of law. The heinous, atrocious and cruel aggravating factor was held unconstitutional by Espinosa v. Florida, 505 U.S. 1079 (1992). Likewise, this Court determined that the cold, calculated and premeditated aggravating factor did not pass constitutional muster. Jackson v. State, 648 So.2d 85 (Fla. 1994). Based on these decisions, insufficient legal aggravating circumstances exist to support Mr. Suggs' death sentence.

Moreover, Mr. Suggs' death sentence is disproportionate. In

Florida, a death sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. See Tillman v. State, 591 So.2d 167 (Fla. 1991). This proportionality review is not limited by the aggravating and mitigating circumstances, rather it encompasses the "totality of the circumstances." Tillman, 591 So.2d at 169, citing Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990)[citations omitted]. Mr. Suggs is entitled to relief.

ARGUMENT X

MR. SUGGS' ABILITY TO INTERVIEW JURORS DENIED HIM RIGHTS TO DUE PROCESS OF LAW

A lawyer shall not initiate communications or cause

another to initiate communication with any juror regarding the trial in which that juror participated. See, Florida Rule of Professional Conduct 4-3.5(d)(4). This prohibition restricts Mr. Suggs' ability to allege and litigate constitutional claims that would show that his conviction and sentence of death violate the United States Constitution. This rule denies Mr. Suggs due process.

Overt acts of misconduct by members of the jury violate a defendant's right to a fair and impartial jury and equal protection of the law, as guaranteed by the United States and Florida Constitutions. Powell v. AllState Insurance Co., 652 So. 2d 354 (Fla. 1995). Mr. Suggs should be entitled to interview jurors to discover if overt acts of misconduct impinging upon the defendant's constitutional rights took place in the jury room. Also, he should be allowed to discover how the medical examiner's testimony, in which two jurors got physically ill, impacted on the jury's verdict. This rule prohibiting Mr. Suggs' counsel from contacting his jurors violates his rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It also denies him access to the courts of this state in violation of Article I, § 21 of the Florida Constitution and the federal courts in violation of the due

process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT XI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Florida's capital sentencing scheme denies Mr. Suggs his right to due process of law and constitutes cruel and unusual punishment on its face and as applied in this case. The death penalty may not be imposed under sentencing procedures that create a substantial risk of arbitrary and capricious application. Furman v. Georgia, 408 U.S. 238 (1972).

Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. Florida's statute fails to adequately channel the jury's discretion as required by Supreme Court precedent. Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

Florida's death penalty statute fails to meet these constitutional guarantees and therefore violates the Eighth

Amendment. Mr. Suggs is entitled to relief.

ARGUMENT XII

FLORIDA'S DEATH PENALTY PERMITS CRUEL AND UNUSUAL PUNISHMENT

Florida's death penalty statute denies Mr. Suggs his right to due process of law and constitutes cruel and unusual punishment on its face and as applied to this case. Execution by electrocution and/or lethal injection constitutes cruel and unusual punishment under the constitutions of both Florida and the United States. Mr. Suggs hereby preserves arguments as to the constitutionality of the death penalty, given this Court's precedents.

ARGUMENT XIII

MR. SUGGS IS INSANE TO BE EXECUTED

Mr. Suggs is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane.

Mr. Suggs acknowledges that this claim is not ripe for consideration. However, it must be raised to preserve the claim for review in future proceedings and in federal court should that be necessary. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998).

ARGUMENT XIV

THE HEARING COURT ERRED IN FAILING TO CONDUCT A CUMULATIVE ERROR ANALYSIS

Although the facts underlying Mr. Suggs' claims are raised under alternative legal theories -- i.e., Brady, Giglio, ineffective assistance of counsel, newly discovered evidence -- the cumulative effect of those facts in light of the record as a whole must be nevertheless be assessed. Not only must this Court consider Mr. Suggs' claims in light of the record as a whole, but this Court must also consider the cumulative effect of the evidence which Mr. Suggs' jury never heard. The hearing court, however, failed to conduct a cumulative error analysis.

Materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995); Young v. State, 739 So.2d 553, 559 (Fla. 1999). The analysis is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 1566 (footnote omitted).

In the context of newly-discovered evidence, this Court has held that the analysis requires a judge "to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).

In Lightbourne v. State, 742 So. 238 (Fla. 1999), this Court

reiterated the need for a cumulative analysis in the newly-discovered evidence context, including the consideration of evidence that a court determines is, by itself, procedurally barred.

This Court must consider Mr. Suggs' claims cumulatively to determine if he received the fair adversarial testing he was entitled to. Once this has been done, it will be clear that Mr. Suggs did not receive a constitutionally adequate adversarial testing. The State's circumstantial case against Mr. Suggs was weak from the beginning, dependent upon the testimony of jailhouse informants Taylor and Byars, who received favors in exchange for their testimony. No physical evidence directly linked Mr. Suggs to the crime. The medical examiner was uncertain that the time of death may have been after Mr. Suggs was already in jail. The State obtained no confessions from Mr. Suggs.[18] The weapon used to kill victim Pauline Casey was never found. Mr. Casey and Mr. Hamilton perjured themselves. Similar crimes were being committed by Mr. Wells long after Mr. Suggs

[18]Mr. Kimmel claimed that Mr. Suggs confessed to a public defender investigator some years before, however, Mr. Suggs repeatedly denied his involvement in the murder and Mr. Stewart corroborated Mr. Suggs' denial. Mr. Stewart testified: "Our job was to try to get our client off at that point in time and not concede the fact that he was going to be found guilty, because **he told us he didn't do it,** and we did the best we could under those circumstances with what we had to work with..." (PC. Ev. at 149).

was convicted.

Mr. Suggs' jury was prevented from hearing significant amounts of favorable and exculpatory evidence about the time of death, and the true nature of Taylor and Byars' motivation to testify, which, in turn, results in a loss of confidence in the reliability of the outcome of both the guilt and penalty phases of the trial. This is in addition to counsel's failure to know or object to the obvious prosecutorial misconduct and improper arguments was deficient performance.

Mr. Suggs has established that he is entitled to a new trial to show that a "collegial" atmosphere is not more important than refuting the facts and putting the State to its burden of proof. Mr. Suggs' rights should not have been compromised so the defense and State could get along better. This attitude is contrary to law and contrary to counsel's ethical duties to zealously present his client. Mr. Suggs is entitled to a new trial that is free from the types of errors that occurred in Mr. Suggs' trial.

The flaws in the system that sentenced Mr. Suggs to death are many. They have been pointed out not only throughout this brief, but also in Mr. Suggs direct appeal and while there are means for addressing each individual error, addressing each error only on an individual basis will not afford

constitutionally adequate safeguards against Mr. Suggs improperly imposed death sentence. This error cannot be harmless. The results of the trial and sentencing are not reliable. Relief is warranted.

CONCLUSION

Mr. Suggs submits that relief is warranted in the form of a new trial and/or a resentencing proceeding. To the extent that relief is not granted on issues on which the lower court did rule, Mr. Suggs requests that the case be remanded so that full consideration can be given to his other claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first-class postage prepaid, to Charmaine M. Millsaps, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050 this 13th day February, 2004.

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial Brief satisfies the Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

_____

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