IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1387

KENNETH HARTLEY

Appellant

v.

STATE OF FLORIDA,

Appellee

ON APPEAL FROM THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS

1. Procedural History

Mr. Hartley, along with Ronnie Ferrell and Sidney Johnson, was charged by indictment with the first-degree murder of Gino Mayhew, with armed burglary, and with aggravated assault. (R. 1016) The three defendants were tried separately and were convicted of first degree murder, robbery, and kidnapping. Id. Mr. Hartley and Mr. Ferrell were sentenced to death, and Mr. Johnson was sentenced to life in prison. Id. (Upon information and belief, Mr. Ferrell's death sentence has been vacated by the Circuit Court after a post-conviction evidentiary hearing.)

Upon appeal, the verdict and sentence were upheld by the Florida Supreme Court. Hartley v. State, 686 So. 2nd 1316 (Fla. 1996) (R. 1022) Subsequently, the United States Supreme Court denied Mr. Hartley's Petition for Review by a Writ of Certiorari. Id.

On September 15, 1998, the Capital Collateral Regional Counsel for the Northern Region filed an initial shell motion for post-conviction relief and, thereafter, this motion was amended and supplemented several times. (R. 1-42; 43-48; 49-55; 87-177; 179-200; 201-271; 272-392; 395-396; 397-398; 399-401; 402-403; 2223-2225; 2226-2229)

Eventually, an evidentiary hearing was held and the Circuit Court denied relief on all of Mr. Harley's claims, either summarily, upon the face of the 3850/1 motions and the record, or based upon the testimony presented at the Evidentiary Hearing. (R. 1494-2212)

During Mr. Hartley's protracted post-conviction procedures in the Circuit Court, Mr. Hartley was initially represented by the Capital Collateral Regional Counsel, and then was represented, by appointment through the Capital Case Registry, by Attorney Jefferson Morrow.

During the Evidentiary Hearing, a conflict arose between Mr. Morrow and Mr. Hartley when Mr. Hartley asserted that Mr. Morrow had demanded payment to do further work from Mr. Hartley's family while also being paid by the state as Registry Counsel. Therefore, Mr. Hartley filed a bar complaint and Mr. Morrow was relieved of the duty to defend Mr. Hartley. However, Mr. Hartley was not permitted to be present at the "hearing" before Judge Moran, the Chief Judge, whereat Mr. Morrow was allowed to withdraw as Mr. Hartley's counsel.

Subsequently, Dale Werthing was appointed from the Registry to represent Mr. Hartley. Therefore, Mr. Hartley privately retained Attorney Kenneth Malnik to represent him, Mr. Malnik, despite claiming on the record that a

mental health expert was required, presented no further witnesses. Mr. Malnik did represent Mr. Hartley at a status conference or a “Huff” proceeding on an amended motion for post-conviction release. At that hearing, Mr. Hartley, appearing by telephone from death-row, was invited to address the court, and he did so, expressing concerns that investigations had not been done by counsel as Mr. Hartley had instructed and had expected and, thus, that the full and fair adjudication of his 3850/1 motion had been compromised.

Mr. Hartley was frustrated that his lawyers were not sufficiently investigating the case and presenting available evidence and he was equally frustrated by the court in his attempts to make a full, complete, and accurate record of his concerns. His statements to the Court were struck on the ground that he was not sworn as a witness after being invited to speak. Similarly, his procedural rights had been violated when he was not allowed to attend the hearing at which Mr. Morrow was allowed to withdraw so that he could put on the record the fact that Morrow demanded money to do the investigation Mr. Hartley sought.

Mr. Malnik filed a premature Notice of Appeal while the Circuit Court was still considering a motion for

rehearing. Mr. Hartley then retained present counsel, but the court disposed of all pending motions without permitting that counsel to argue the procedural concerns which were frustrating Mr. Hartley's efforts to have his case properly investigated.

Ultimately, a Notice of Appeal was timely filed and, after the record was returned sua sponte by this Court's Clerk to the Duval Clerk for proper pagination, the instant appeal follows. (R. 2424-2432)

2. Trial Testimony

At trial, Sidney Jones testified that he worked in the victim's crack cocaine business. Hartley v. State, 686 So. 2nd 1316 (Fla. 1996). He testified that on April 22, 1991 that he was selling crack cocaine out of his Chevrolet Blazer in an apartment complex in Jacksonville. Jones testified that he saw Mr. Hartley, Mr. Ferrell and Mr. Johnson near the Blazer with Mr. Hartley holding a gun. Johnson said he saw Mr. Hartley force the victim into the driver's seat and that Hartley climbed into the back seat behind the victim. Ferrell allegedly got into the front passenger seat, while Johnson stood outside the Blazer talking to Hartley. Jones then saw the Blazer start up

and leave the apartment complex at a fast speed. Jones said Ferrell shouted out of the Blazer that the victim would “be back.” Johnson followed the Blazer in a truck.

Police officers testified on April 23, 1991, they found the victim’s Blazer parked in a field behind an elementary school and the victim’s body was in the Blazer in the driver’s side seat. The victim had been shot five times. Based upon the crack dealer’s statement about seeing Hartley, Ferrell and the victim leaving in the Blazer with Johnson appearing to follow in the truck, the three defendants were arrested. Mr. Hartley told the police that he didn’t know the victim, but the testimony was that he had allegedly made statements to other witnesses that he had robbed the victim on a previous occasion. A jailhouse snitch, who was Hartley’s cellmate, testified that Hartley had advised him that the plan was Sylvester Johnson’s and that they planned to rob some “dreads” and then decided to “get” the victim.

Yet another jailhouse snitch testified that Hartley denied involvement in the murder but admitted to robbing the victim prior to the murder. Subsequently, this snitch testified Hartley made incriminating statements.

And still another snitch indicated that Hartley made an incriminating statement by saying he was afraid Ferrell was going to testify against him when Ferrell was just as guilty.

All of the crucial witnesses against Mr. Hartley had been convicted of various felony charges and, thus, were waiting to be sentenced to potentially long prison terms when they provided all of the inculpatory evidence against Mr. Hartley. See Hartley v. State 686 So 2nd 1316 (Fla. 1996)

Mr. Hartley's trial lawyer was Attorney Willis. Mr. Willis presented no Guilt Phase witnesses and one lay witness in the Penalty Phase. A public defender, Alan Chipperfield, testified in the Penalty-Phase as an expert regarding the incarceration assurance of the fifteen-year and twenty-five year mandatory minimum sentences, and the Reverend Coley Williams, the Hartley's family pastor, testified that Hartley had a quite peaceful spirit, attended church off and on, came from a good family and was intelligent. Hartley v. State 658 So. 2nd 1316, 1319 (Fla. 1996).

After Reverend Williams concluded his brief testimony, the entirety of the mitigation evidence, Attorney Willis rested the defense case. The prosecutor, apparently surprised that no expert testimony had been presented regarding the important mental health mitigators, asked the trial judge to determine why no such evidence was being presented. (TR. Vol. LXX 2554-2555) Mr. Willis then explained that while "we are aware that the Court entered an Order transporting him for that purpose (to

obtain psychiatric evaluation) we did not request it to be done." Id.

Given the lack of evidence presented by the defense in the Penalty Phase, it was not surprising that the Court found minimal mitigation and sentenced Mr. Hartley to death.

On appeal, the Florida Supreme Court struck the HAC aggravator, which had been based on the alleged "execution style killing," as there was no evidence to support such a finding in the jailhouse snitch's testimony. However, the Court found this error to be harmless beyond a reasonable doubt in light of the aggravators and the dearth of mitigation. Hartley v. State, 658 So. 2nd at 1323. The Court also noted that the sentencing Order was erroneous insofar as it showed no basis for the CCP aggravator. Nevertheless, the Florida Supreme Court noted that the error was harmless beyond a reasonable doubt because of factual bases provided by the testimony of the jailhouse snitches. Id.

3. The Evidentiary Hearing

Mr. Hartley was granted an Evidentiary Hearing on three claims. First, he was granted a hearing on Claim XXI (21), which contended that trial counsel was ineffective for failing to present penalty phase mitigation witnesses. Secondly, in a related claim, he was granted a hearing on his claim that Trial Counsel was ineffective for failing to present mitigation

evidence, for failing to prepare for the penalty phase of the trial, and for failing to present witnesses.

In support of these claims, hearing counsel presented the testimony of Shawn Jefferson, Mr. Hartley's brother, Coach Stevens, Cheryl Daniels, Jean Daniels, Ronnie Groomes, Tanya Hawk, Dorothy Cherry, and Robert Willis, his trial counsel.

Mr. Jefferson testified that his full name is Vanchi Lashawn Jefferson and he is Mr. Hartley's brother. (R. 1571) He was an NFL football player for twelve years and at the time of his testimony was still playing. (R. 1571) He denied that he would ever say anything like he didn't want his career to be damaged by being related to Kenneth Hartley. (R. 1572)

Mr. Jefferson was the person who hired Mr. Willis. (R. 1573) He testified that he was always available to talk to Mr. Willis but that the only time he spoke with him was when Willis needed money. Mr. Jefferson borrowed money from his agent to pay Mr. Willis' bill initially because he had just started in the league as a late round draft pick. (R. 1573) Whenever Mr. Jefferson heard from Mr. Willis it was "send… more money." Id. He did hear from Willis several times but it was always about money. Id. Jefferson made sure that Willis had all the phone numbers to get in contact with him. Further, Mr. Jefferson was "absolutely" available to testify in the Penalty Phase. (R. 1574)

Mr. Jefferson testified he would have testified about growing up with his brother, going to church, singing gospel, and those sorts of things, and he would have certainly have told the jury that the things the prosecutor said about Mr. Hartley were not true. (R. 1576) Mr. Jefferson would have testified that his brother was a caring person and moved the jury with the wonderful human anecdote about his brother's eagerness to sing despite having less than a golden voice. Id.

Mr. Jefferson and Mr. Hartley played sports together, and in fact, Mr. Hartley introduced Mr. Jefferson to sports and encouraged Mr. Jefferson to play to his fullest. Id. In fact, Mr. Jefferson credits Mr. Hartley with planting the seed in his heart which permitted him to persevere and prosper in the NFL for so long. Id. Mr. Jefferson hears Mr. Hartley's voice telling him come on and to push on and he does. Id. (It is not conceivable that Mr. Jefferson would "wash his hands" of Mr. Hartley!)

Mr. Jefferson described being on Boy's Club basketball and football teams with Mr. Hartley and about his high school basketball experience, although he was ultimately cut from the high school team, fortunately picked up football instead. (R. 1576)

Mr. Jefferson did not recall ever talking to an investigator for Attorney Willis about his memories of Mr. Hartley or, for that matter, about anything. (R. 1577)

Mr. Jefferson testified that the whole family tried to attend the trial as much as each member of the family could, although the trial was so hard on his mother that he only encouraged her to attend to the extent that her health could take it. (R. 1577) Of course, she attended anyway. (R. 1577)

Finally, Mr. Jefferson testified that his mother transferred her sons, Shawn and Kenneth, from their high school to a different high school because of gang trouble or potential gang trouble at their former school. (R. 1579) The neighborhood was tough. Id.

On cross examination, Mr. Jefferson testified that he recalls visiting his brother in jail. (R. 1584) He further testified, that at one point, he was the national spokesman for the Atlanta Falcons, and that he did volunteer work for the Boys and Girls Clubs, making tickets available to the kids." (R. 1586 – 1587) Throughout his career, he tried to help less fortunate people see football games. He also talked about his dedication to his profession and was proud of the fact that he only missed one game in his whole NFL career playing hurt at least 60% of the time. Id. Clearly, Mr. Hartley had taught him well.

Finally, the prosecution attempts to insinuate some meaning from the fact that Mr. Jefferson is not paying for Mr. Hartley's current counsel and to manufacture some lack of affection or feeling for his brother, forcing Mr. Jefferson to describe some of the financial pressures imposed on him as a successful man who comes from a large, working family. Frankly neither this testimony nor the prosecutor's inquiry seems particularly relevant to any of the issues in this case but, if anything, Mr. Jefferson's honest, emotional response would have struck a credible chord with the jury. It would have emphasized, not minimized, the brother's love. Mr. Jefferson's dedication to his family and his love for his brother comes through powerfully in his testimony, it is Attorney Willis who is motivated by money, not Mr. Jefferson. (There is a further irony here in that the reason that Mr. Morrow withdraw is that Mr. Morrow attempted to get funds from Mr. Jefferson despite the fact that he was being paid by the Registry.)

Finally, Mr. Jefferson testified that Mr. Willis did not explain to him the bifurcated nature of a death penalty case. (R. 1611) In fact, there is no evidence in the record the unique nature of a Penalty-Phase was discussed with anyone by Attorney Willis.

Next, Coach Stevens, Freddy Stevens, testified that he was a football coach and school teacher at Raines High School for

years. (R. 1627) When he was at Raines he knew both Shawn Jefferson and Kenneth Hartley. (R. 1627 – 1628) He described Mr. Hartley as "mannerable" (R. 1628) and confirmed that Shawn Jefferson and Ken Hartley were inseparable in high school. Id. Although he had more expense with Shawn, Coach Stevens descried them both as polite and cooperative. (R. 1628)

Coach Stevens knew that Kenneth Hartley was on trial in 1994, but the Coach was never contacted by the defense attorney. Id. He would have testified had he been contacted. (R. 1629)

Cheryl Daniels, Mr. Hartley's sister, testified at the evidentiary hearing that she recalled talking to Attorney Willis about the case in 1994. (R. 1634-1635) Mr. Willis told her he was going to win the case and that she shouldn't worry about it. Id. She was not contacted or prepared to testify in the penalty phase, which was held ten days after the conviction (R. 1636) She was not advised and did not know that she could come to court and testify on behalf of her brother to show the good part or the good side of her brother. Id. She would have testified, had she been contacted about growing up with him in the same house, about the very loving family that they had, and about Ken's very jovial "jokeable" nature. (R. 1636)

Cheryl could have testified that Ken was a very good brother, very good, as she put it, especially in his ability to relate to old folks. (R. 1636-1637) When others might say

something, presumably negative about an elder, Ken would be the type of person who would say “don’t do that!.” (R. 1637) Ms. Daniels testified that Ken is a caring person, and is especially so when it comes to caring for the vulnerable.

Cheryl would have testified that Kenneth Hartley was a very caring, very sweet person. Id. As Ms. Daniels testified, “Ken, loved everyone, there was no single person that he didn’t love.” Id. Had she been called to testify she would have used this enthusiasm for Ken to help the jury understand the kind, caring, funny, loving, sweet side of Kenneth Hartley, which she had first-hand opportunity to witness during their many years living together under the same roof in the same family. Id. She was able to testify to these things and was willing to testify to these things if only Mr. Willis had contacted her. Further, she had given Mr. Willis a list of names of other people he could contact who’d testify about Mr. Hartley’s good qualities.

Ms. Daniels also testified that she went to church with both Mr. Jefferson and Mr. Hartley and did community activities with both of them.

Ms. Daniels called Mr. Willis the day after the guilty verdict was returned, and she was crying. (R. 1645) Mr. Willis said “Kiddo calm down.” He suggested that the verdict was based on the previous manslaughter charge and that he was going to appeal it, but she never heard from him again. (R. 1645)

(Surely, this could not have been when Mr. Willis alleged the family had washed its hands of Kenneth!) Ms. Daniels affirmed that both she and Shawn would have been proud to testify for her brother, and she explicitly denied the prosecution's cynical suggestion that Mr. Jefferson would have been "better off" in California than testifying. (R. 1647-1648)

Jean Daniels, Mr. Hartley's mother, testified that Mr. Willis called her one time, and then never called her again. (R. 1652) She apparently testified at a bond hearing when Mr. Hartley first got arrested, but Mr. Willis never called her about the penalty phase, nor did he explain to her that there would be a penalty phase. (R 1652)

Mrs. Daniels would have testified that Kenneth Hartley was raised in the church, that he had a curfew at night, and that he was a good boy. She could have testified about the rough neighborhood they lived in and the problems of a young man growing up there. (R. 1653)

Mrs. Daniels could have also testified that Mr. Hartley sang in church and was an Usher in the Evergreen Baptist Church. Id. She told about his kindness to elderly people and his eagerness to help them out anyway he could. (R. 1653 - 1654) Mr. Hartley "loved old people." Id.

Finally, Mrs. Daniels explained again that Mr. Jefferson was concerned about her health and her ability to handle the

stress of the trial when he urged her not to attend the trial. (R. 1659 – 1660) Her son was simply worried about her. Id.

After Mr. Hartley was convicted, Mrs. Daniels did not hear from Mr. Willis. (R. 1662) He never talked to her about what was going to happen next or about what she might be able to do to help Kenneth avoid the death penalty. (R. 1662 – 1663) If he had spoken to her, she would have testified and told the jury what a good boy her son was and about the problems of growing up in their neighborhood. Id. Her testimony that, even after Mr. Hartley left home, he called or otherwise had daily contact with her every single day would have been particularly powerful. (R. 1664)

Denise Groomes testified that she is a school teacher in Jacksonville who has been friends with Kenneth Hartley since they were children. (R. 1671) She was never contacted by Mr. Willis, despite the fact that she could have testified to the fact that Ken was a well mannered child who was raised with a lot of ethical values, who went to church, and was who active in the community. (R. 1671) She testified that he attended church and played sports. Id. She had not known him to get in trouble. Id. Ms. Groomes certainly would have testified had she been contacted. (R. 1679)

Tanya Hawk testified at the evidentiary hearing that she knew Kenneth Hartley in elementary school and grew up with him.

(R. 1681) She would have testified that she has known Kenneth since she was a little girl and has "loved him" from the third grade on. Id. Her knowledge of Ken was "all good points." (R. 1683) She has had a crush on him since the third grade and he has always helped her out. When she needed or wanted something all she had to do was "look to Kenneth" and he would help her out greatly. Ms. Hawk also noted how helpful Kenneth was to elderly people and had personally witnessed his kindnesses when they were growing up. Id. When she needed something that "you needed like a man to do," such as lift something heavy or things like that, Mr. Hartley would be the one that would help her. (R. 1684) Ms. Hawk testified that she visited Mr. Hartley in prison several times and knew about some of his problems with the law.

Although Ms. Hawk told the lawyers she would be willing to be a character witness for Mr. Hartley, they did not contact her or use her. (R. 1690)

Dorothy Cherry testified that she knows Kenneth Hartley very well, although she is a bit older than him, because he was a friend of the family. (R. 1701) She was never contacted by his defense attorney, despite the fact that she could have testified that he has always been a great guy to her and she does not know anything bad about him. (R. 1703) He has always been wonderful and upright "in her book." Id. Had she been

called as a witness she would have testified favorably to this. (R. 1704)

In fact, after Mr. Hartley got out of prison, he went to stay at her place to get out of his old neighborhood. (R. 1710) Mr. Hartley stayed with her for approximately sixty days but eventually went back to the neighborhood where his family was and he grew up. (R. 1711)

Ms. Cherry denied ever being contacted by Attorney Willis. (R. 1713)

At the Evidentiary Hearing Mr. Hartley himself testified. (R. 1715) Mr. Hartley testified that his whole family could have testified at the Evidentiary Hearing and that they were all willing to come in and testify as character witnesses and to show his good side. (R. 1716 – 1717) He told Mr. Willis the family and friends would testify. Id.

Mr. Hartley denied that Mr. Willis ever used a private investigator and he certainly never met with one. Id. Mr. Hartley instructed Willis to find whatever records he could find when he was going to school. (R. 1717) However, Mr. Willis, did not come to see Mr. Hartley very often although Mr. Hartley did give him a list of possible witnesses.

When Mr. Hartley would talk to Mr. Willis, Mr. Willis would say “don’t worry about it we got the case beat.” (R. 1718) When Mr. Hartley arrived in Jacksonville for trial, Mr. Hartley did

not feel Mr. Willis was ready for trial. Id. From day one, Mr. Willis said he was going to win the case, but Mr. Hartley did not even completely understand there was a Penalty Phase part to the case. Id. Besides the names of family members, he gave Mr. Willis other references who could have testified.

Mr. Hartley confirmed that Willis did not call the witnesses that Mr. Hartley wanted him to call because they testified at the Evidentiary Hearing but did not testify at the trial. (R. 1722) He told Mr. Willis he wanted those witnesses called. Mr. Hartley told him that he wanted everybody who testified at the Evidentiary Hearing to testify and even some more who were not discovered because there was no investigator to look for them, although Mr. Hartley gave Willis specific namesm including Franky Daniels, Bruce Capers, Anthony Grant, Calvin Grant, and Ricky Daniels. Mr. Hartley further explained that "just like everybody that come through the system," we (defendants) are ignorant of the system, so he didn't know that he had to tell the judge about what his lawyer hadn't done or wouldn't do. (R. 1723) Mr. Hartley, somewhat grimly and with a disturbing ring of truth, mused "when you got an ignorant lawyer and an ignorant client, what you got?" (R. 1724)

Mr. Hartley testified that he was not told about "a penalty phase" but that he was told that "next he was going to call some witnesses, so I gave him some witnesses' names and he called

that guy Chipper or something like that." (R. 1727 – 1728) Mr. Hartley says he called "Chipperfield and Reverend Williams and stuff like that and I was saying what's going on with the other witnesses, my mom, my dad, my sisters and brothers you know." (R. 1728)

Mr. Willis never talked to him about having a penalty part of the trial if the jury convicted him of first degree murder. (R. 1728) Thus, when the trial was going and when he got convicted, Mr. Hartley was not advised about the nature of the Penalty Phase or how the life and death decision was to be rendered or arrived at. Id. Mr. Willis did not break things down to where Mr. Hartley could understand what he was saying. (R. 1729)

Mr. Hartley further expressed his opinion that he was being tried because the prosecution did not feel he had done enough time on the manslaughter case and that he was being asked to pay a debt to society that could never be paid. (R. 1730) Mr. Hartley denied that Mr. Willis ever explained that the maximum penalty for first degree murder was death. Id. Mr. Willis simply did not tell him anything except that he was going to win the case. (R. 1731)

Mr. Willis stated that Mr. Hartley had been set up and that Willis had witnesses, but he didn't call them. Id. Willis did provide him with depositions that he took of witnesses but

Willis did not sit down and talk to him about the trial or selecting a jury before the trial began. Id. Regarding the issue of life imprisonment or death, Mr. Willis did not talk about that with Mr. Hartley. (R. 1732)

Finally, Attorney Willis testified that he represented Mr. Hartley at the trial. (R. 1751) Mr. Willis could not recall speaking with the defendant regarding the bifurcated nature of the capital proceeding or a specific defense strategy with relation to the penalty phrase. (R 1751-1752) Nonetheless, Mr. Willis said he is sure they went over what they might do and who they might call. (R 1752) Willis denied being given any names, although he was aware of Mr. Jefferson, the football player. (R 1752) Mr. Willis was also aware of Cheryl Daniels. Id.

Mr. Willis testified that Cheryl Daniels acted as the contact person with the family. Id. However, he had no recollection about talking with her about being a witness. (R. 1753)

Mr. Willis said he had no recollection of the defendant asking him to call any specific person as a witness. (R. 1754) He remembered the name of Coach Stevens but did not recall Tiffany Groomes, or Tanya Hawk. Id. Mr. Willis did not recall Dorothy Cherry or Reverend Phoenix or Reverend Watson. (R. 1754 – 1755) He did recall that they called a Reverend as a witness. (R. 1755) Mr. Willis testified that he was interested in family

first and foremost, teachers and preachers. (R. 1755) He denied any knowledge of Calvin Grant. Id.

Reverend Coley Williams, who did testify, may or may not have been provided by the defendant. (R. 1755 – 1756) Mr. Willis did remember that he called two witnesses and that one of them, Attorney Chipperfield, came in and testified on technical matters regarding "life being life." (R. 1756)

Mr. Willis denied any memory of Bruce Capers or Cedric Cicero. Tellingly, Mr. Willis indicates that "we were very interested in getting witnesses after this verdict came back," which would be in the period between the end of the guilt phrase and the ten days before the penalty phrase was to begin. This, then, according to Mr. Willis' testimony, was the very brief time period when he was interested in getting witnesses for the penalty phrase. (R. 1764) Willis' testimony indicates that he had done no preparation for the penalty-phase prior to losing the guilt-phrase. Id.

Mr. Willis goes on to explain how disappointed he was to lose the guilt-phase. (R. 1765) Further, he remembered, upon losing the guilt-phase, being "in a real – I don't want to use the word desperate because that was probably over dramatizing it, but we were very seriously interested in getting witnesses to come in and testify." (R. 1765) Mr. Willis continued, "I recall that it was getting close and I was faced with a prospect

of having nothing to put on and I didn't –obviously we didn't want that. So – and I cannot remember individual conversations and all that sort of thing. I have just a general memory of, please, let's find some witnesses, and our primary interests back then was to get the family to come in and that we were unable to do. Now that's my memory." (R. 1765)

Mr. Willis attempts to explain the absence of any memoranda in his file regarding the possible testimony of family members by stating that he knew that they would provide general background information. (R. 1776) Mr. Willis has little or no memory of specifically talking to anyone in this ten day period when he was allegedly so urgently seeking witnesses. (R. 1767 – 1768)

Mr. Willis stated that the purpose of providing Mr. Chipperfield's testimony was to make the jury secure that the person they sentenced to life would actually serve life.

Mr. Willis testified that he spoke to the prosecutor shortly before the hearing and discussed in great detail the claims in this case and that Shawn Jefferson was important to the case. (R. 1769 – 1770)

The third issue upon which Mr. Hartley was granted an evidentiary hearing was the issue of whether the counsel was ineffective for failing to adequately consult or retain a mental health expert and failing to present mental health mitigation

during the Penalty Phrase of the trial. See Ake v. Oklahoma, US ( )

As no mental-health expert has been presented to the Circuit Court and no evidence to support this claim has been introduced as of this time, Mr. Hartley cannot pursue this claim based upon the record as it now stands. However, Mr. Malnik indicated to the court that he intended to call mental-health witnesses and it is unclear to current counsel why no attorney has pursued that avenue, from trial counsel forward. This is one of the issues which evidence the failures of counsel to represent Mr. Hartley and to investigate and prosecute the case as post-conviction counsel in Florida are expected to by this Court. Therefore, in Argument III, under the precedent of Peede (and the Order in Happ), Mr. Hartley prays that this case be remanded so that a typically full and thorough investigation, including an investigation into the mental health mitigation, can be done.

Finally, at the Evidentiary Hearing testimony was taken regarding the issue of the newly discovered evidence from Mr. Johnson that key prosecution witnesses were lying.

Mr. Johnson testified that, while he doesn't really know Mr. Hartley, he knew him generally and had a mutual friend. (R. 2742) Mr. Johnson knew Mr. Hartley was in jail in 1993 and 1994 when he was sentenced to death. Id. Mr. Johnson also knew Mr.

Bronner and Mr. Brooks, who testified against Mr. Hartley. Id. In fact, Johnson was in a jail cell with them. Id.

While Johnson, Bronner, and Brooks were incarcerated together, Bronner and Brooks talked about their testimony against Mr. Hartley to Mr. Johnson. (R. 2742- 2743) Initially, Mr. Johnson noticed that Mr. Brooks would be called out of his cell for very long visits every couple of weeks or so and when he returned he would be loaded down with jailhouse bounty such as cigarettes, lighter, candy bars and chewing gum. (R. 2743 – 2744) He would say he was at the State Attorney's office when he came back loaded down with these goods. (R. 2744) He would say that the State Attorney had been rehearsing him to testify and say that they were feeding him Jenkins Barbeque, Red Lobster, or whatever he wanted and that they would give him cigarettes and stuff. (R. 2744) He would say that although he was signed out for visitation he was really at the State Attorney's office. Id.

Subsequently, on the day that Brooks was released, Brooks and Bronner and Johnson all went to court together. Id. (Johnson refers to Brooks as "Tank" and to Bronner as "Jabbo", which are their street names.) While the three were waiting to go to Court, Brooks said, about his testimony against Mr. Hartley at trial, that "man, I did some f'd up stuff, it was real f'd up what I did." Id. Mr. Brooks told Johnson that he lied on "Kip," who is Mr. Hartley. Id. Then, Johnson continued, Johnson said he

didn't like "Duck" and he didn't know "Fish," but he said he lied on "Kip." (R. 2745) He said he lied on "Kip" because "Kip" had it hard and he said he lied on him. Id.

Johnson testified that Brooks said that the State told him exactly what to testify to against Mr. Hartley. Id. Johnson testified that Eric Brooks told him that Brooks intentionally lied in Court against Hartley to help the State win a conviction of murder. (R. 2746)

Ronald Bronner, Mr. Bronner, another state witness, told Mr. Johnson that the prosecutor asked him if he knew "Kip" and "Duck," and Mr. Bronner replied that he did. (R. 2747) The prosecutor then told Mr. Bronner that he was going to put Mr. Bronner in the cell with Kip and Duck so that he could get them to tell him what they did and what they knew about the murder. Id. Bronner told the prosecutor that they had told him that they didn't know nothing about the murder, so the prosecutor told Bronner if he would play ball he could get free and that a prosecutor was going to tell Bronner what to say that Mr. Hartley and Mr. Ferrell allegedly said. (R. 2747 – 2748) Mr. Bronner told Johnson that he agreed to do it and the prosecutor asked him to recruit some more guys and that's when he recruited Eric Brooks and "Skag" and some more guys. (R. 2748) Ronald Bronner frankly admitted to Mr. Johnson that he, Bronner, went to Court and lied against Mr. Hartley. (R. 2748)

Mr. Johnson further testified that he was being harassed by State Attorney Bateh, the prosecutor on Mr. Hartley's case. (R. 2749) Mr. Johnson testified that Mr. Bateh approached him and asked if he was Jimmy Johnson, to which Mr. Johnson said "no," because his name is James Johnson.

Subsequently, Mr. Bateh properly addressed Mr. Johnson and said that the wanted to talk to Mr. Johnson about Mr. Hartley. Id. At that time Mr. Bateh declined to identify himself to Mr. Johnson. (R. 2749)

Mr. Johnson's lawyer told him that Mr. Bateh wanted to get a statement from him regarding Mr. Hartley, but Mr. Johnson, who had a case pending, did not want to talk to the State at that time. Id. Nevertheless, Mr. Bateh kept approaching him and trying to talk to him. (R. 2750) Eventually, Mr. Bateh even attempted to subpoena him. Id. A deposition or a sworn statement had been arranged and Mr. Johnson was threatened by the state with jail if he didn't attend. (R. 2750 – 2751)

Ultimately, Mr. Johnson testified that, when he went outside to wait for his ride, the detective came out and arrested him on an outstanding warrant from Georgia. (R. 2751) Mr. Johnson testified that he was handcuffed extremely tightly, so that his wrist still hurt from the handcuffing months later. Id. After they handcuffed him, they took him to the State Attorney's office. Id.

Mr. Bateh said that Georgia had declined to extradite him on the warrant, but Mr. Bateh went ahead and called the Georgia authorities and asked them to come get him. Id. This was done because Mr. Johnson said that he was not going to honor the subpoena in the Hartley matter. (R. 2752) Then, although they took Mr. Johnson to jail, the Georgia authorities never did come to get him, and they finally let him go. (R. 2753)

Mr. Johnson specifically felt harassed by Mr. Bateh when Mr. Bateh told him that Johnson did not want Bateh "for an enemy." (R. 2754) Mr. Johnson interpreted that to mean that Mr. Bateh would do the same thing to him that he did to Mr. Hartley, which is to "frame him." (R. 2754) Also, Mr. Bateh brought up Johnson's son, who was only 11 years old, and Johnson took that inquiry as a threat against his family. (R. 2754)

Mr. Johnson testified that he feared retribution from the state on his pending case for trafficking in cocaine. Mr. Johnson testified that he was afraid that Mr. Bateh would manufacture some evidence or witnesses in the same way that he did to convict Mr. Hartley. (R. 2782 - 2783)

Finally, Attorney Willis testified generally as to his experience and professional background. (R. 1890) Willis testified that he was retained to defend Mr. Hartley. (R. 1891) Willis explained that Ronald Wright had advised that someone had confessed to him and sent him a letter which corroborated that

confession to the crime with which Mr. Hartley has been charged. (R. 1894) Willis explained that Mr. Bateh objected to this evidence, arguing that people often brag about murder in jail for status purposes and that Mr. Bateh cited a psychiatric study in the support of that argument. (R. 1894 - 1895)

Mr. Willis agreed that the longer Mr. Hartley was in jail the stronger against him got because the State recruited several jailhouse informants or snitches as witnesses and Willis recalled that Mr. Bateh commented that the case got stronger after Mr. Hartley went to jail. (R. 1897) Hartley told Willis he didn't hang around the witnesses, the victim, or the other defendants. (R. 1896) They couldn't have known anything about him, unless they were told. Id.

Mr. Willis also testified that Mr. Bateh has a reputation for using jailhouse witnesses that is very well established in the jurisdiction. (R. 1899) Mr. Willis was aware of that fact in 1994 and recalled that Mr. Bateh made the comment that the case got much stronger against Mr. Hartley once Mr. Hartley went to jail. Id. Mr. Bateh further stated that when Mr. Hartley was first arrested that the case was not all that strong, but he felt it had gotten stronger, and Willis believed that was due to a reference made about jailhouse informants. Id.

Regarding the penalty-phase investigation, Mr. Willis confirmed that that there was no folder or investigation for

Hartley's school records in his files. (R. 1900) Willis testified that prior to the guilt-phase they had discussed the penalty phase generally. Id. However, he could not state the specifics of any such discussion. Id. Willis then stated that his view was that the primary defense for Mr. Hartley was in the guilt-phase and that Mr. Willis felt strongly that there was a high probability that he was going to get the death penalty in the guilty-phase. Id. Therefore, Willis explained that his primary focus was on the guilt/innocence phase. (R. 1900 - 1901)

Willis stated that once the guilty verdict came in that the defense had a week and a half or two weeks in which time Mr. Willis "made an effort to gather witnesses" to put on as part of the penalty phase. Willis explained, "I don't know if you characterize that as an investigation or not, but that effort to get witnesses, I think I have discussed with you before, was largely unsuccessful. I was not able to get the witnesses I would have liked to have had." (R. 1901)

Mr. Willis could not specify what, if any, penalty-phrase preparation he did prior to the verdict being rendered, but he did say that, after the verdict was rendered, there was a heightened degree of activity. Willis also affirmed that he had no folder in his file that specifically separated out or had anything to do with penalty phase witnesses. Id. Willis

contended that there were notes in his file of outlines of arguments and things like that. Id. (Mr. Willis' file was introduced into evidence as defendant's Exhibit 1 and is, Appellant suggests, supportive of Mr. Hartley's contention that the file contains virtually no penalty-phase work. Willis also confirmed that the file contained several memos of persons who were inmates who claimed to have overhead the State's witnesses scheming to get their testimony coordinated and straight, but Willis did not recall the information in the file that Officer Floyd had overhead the witnesses scheming to get the testimony straight.)

Mr. Willis acknowledged that he did not use the perjury conviction of witness Sidney Jones or the Jones' convictions for other crimes that could have been used to impeach Mr. Jones, and Willis testified that he apparently did not realize that Mr. Jones had four others besides the two convictions that he did use. Willis confirmed that, had he known about those other crimes, he certainly would have used them to impeach Mr. Jones. (R. 1904) (Mr. Jones testified briefly and admitted to these crimes, including perjury. R. 1983 - 1984)

Mr. Willis recalled that he knew Cheryl Daniels before the Hartley trial and had represented her before. (R. 1905) He stated that Ms. Daniels operated as a liaison with the family. (R. 1905 – 1906) Mr. Willis did not have a memory of talking to

Mr. Hartley's mother specifically, although he did remember having a telephone conversation with Mr. Hartley's brother, Shawn Jefferson, one time. (R. 1907)

Mr. Willis seemed to testify that he recalled the brother not wanting to be associated with Mr. Hartley. (R. 1907) Willis cited an article in the paper that he believes supported this. Id. However, the article associating Shawn Jefferson with Mr. Hartley appeared when Mr. Jefferson was playing for the Super Bowl and that would have been after the trial was concluded. (R. 1908) Ultimately, Willis simply said, "I thought I remembered something," but concluded that he may have been wrong. (R. 1908) The article was admitted as Defense Exhibit 2 and was part of Mr. Willis' file. Id.

Mr. Willis confirms that Mr. Jefferson paid his fees and costs. (R. 1912) Mr. Willis testified that he believed from some source that Mr. Jefferson was unavailable to him as a witness or he would have called him. (R. 1913)

Mr. Willis did not recall any conversation with Mr. Jefferson specifically about testifying or about being a witness, however. (R. 1915) Mr. Willis testified that he believes Mr. Jefferson said he loves his brother very much but Mr. Jefferson had a good thing going in the NFL and he couldn't afford to be associated or involved with Mr. Hartley. (R. 1915) Mr. Willis finally stated that just too much time has gone by

for him to remember exactly what was said. Id. Mr. Willis concluded that Jefferson didn't want to have anything to do with the case "in a general sense." (R. 1916) Willis emphasized, however, that he could not tie Mr. Jefferson's statement to involvement in the penalty-phase. (R. 1916)

Mr. Willis testified that Cheryl Daniels had told him that no one wanted to testify. (R. 1927 – 1928) Willis claimed that she said that the family was not willing to support him any further after the verdict came in. Id.

2. The Circuit Court's Order

On June 10, 2004, the Circuit Court entered an "Order Denying Defendant's Amended Motion for Post-Conviction Relief" (R. 1494 – 1852) and an "Amended Order Denying Defendant's Amended Motion for Post-Conviction Relief." (R. 1853 – 2200) These Orders deal with the ineffective assistance of counsel claims, the claims summarily denied, the claim filed pursuant to Ring v. Arizona, and the newly discovered evidence claim questioning the credibility of the state's witnesses. (R. 1494 – 2212)

In denying Claim One, regarding the one year time limitation for filing a motion under Rule 3.851, the lower court correctly cited Florida Supreme Court precedent. (R. 1496 –

1497) The Defendant does not appeal the denial of this claim. Id.

In denying Claim Two, regarding the constitutionality of the HAC aggravating factor as it was not proved beyond a reasonable doubt, the Court found the Claim to be procedurally barred. (R. 1497) Further, the Court cited the Florida Supreme Court's finding on appeal that there was not sufficient evidence to support HAC was harmless beyond a reasonable doubt. Id. Because HAC is inapplicable, the court's ruling on this Claim is not being appealed. Id.

In denying Claim Three, that the HAC instruction was unconstitutional, the lower court found this claim procedurally barred. (R. 1497) It is not being appealed.

Regarding Claim Four, the court found this claim insufficiently pled. It is not being appealed.

In denying Claim Five, regarding the newly discovered evidence that Sidney Jones had a "testifying relationship" with the state prior to his trial on other charges, the lower court denied this Claim based on insufficiency of pleading and noted that Defendant has an ongoing investigation but, due to the fact that counsel has not fully investigated this and other claims, as of yet has not presented evidence in support of the Claim. Therefore the Order is not being appealed at this time.

In denying Claim Six, the Defendant does not appeal the Court's denial of this Claim regarding the funding of the CCRC or the Denial of his Access to Public Records.

On denying Claim Seven, regarding the sufficiency of jury instructions of CCP and pecuniary gain and the proportionality of the death sentence, the Defendant does not appeal the court's denial based upon the procedural bar, the law of the case doctrine, and the Florida Supreme Court's statement that it reviews all death sentences for proportionality purposes. However, the Defendant explicitly reserves the right to further raise a claim of newly discovered evidence of the absence of relative culpability between co-defendants based upon the information and belief that Mr. Ferrell may receive a life sentence or had his sentence vacated.

Regarding Claim Eight, regarding prosecutorial misconduct in jury argument, the Appellant does not appeal the court's finding of a procedural bar.

Regarding Claim Nine, regarding the jury interview, Appellant does not appeal the court's Order finding a procedural bar and finding that there has been no evidentiary presentation that would provide him with relief.

Regarding Claim Ten, regarding the jury instructions, the Appellant does not appeal the court's finding of procedural bar.

In denying Claim Eleven, regarding the ineffective assistance of counsel for failing to present penalty phase witnesses, the court found that the Defendant has not proven his claim after the Evidentiary Hearing. Appellant claims that this is error and that the case should be reversed and remanded for a new trial on this issue. The court has ignored the greater weight of the evidence in accessing Mr. Jefferson availability and Mr. Willis' testimony.

In denying Claim Twelve, regarding the admission into evidence of an alleged jailhouse statement to his cellmate, the court ruled that the claim is conclusory and not supported by adequate argument. The Appellant does not appeal this Claim.

In denying Claim Thirteen, regarding the constitutionally of Florida Capital Punishment sentencing scheme, the lower court denies the claim as procedurally barred. The Appellant does not appeal this ruling on the ground that Ring v. Arizona has been held not to be retroactive, although Appellant does note that the U.S. Supreme Court has not ruled yet on the applicability of Ring to the Florida Statute.

In denying Claim Fourteen, regarding the reliability of the transcript, the court found this Claim procedurally barred. Appellant does not appeal this holding.

In denying Claim Fifteen, regarding the introduction of gruesome and shocking photographs, the court holds that this Claim is procedurally barred. Appellant does not appeal.

In denying Claim Sixteen, regarding ineffective assistance for failing to question potential jurors and for various juror related issues, the court holds that this Claim was not adequately pled. Appellant does not appeal this holding.

In denying Claim Seventeen, regarding jury instructions on expert witnesses, the court holds the Claim is procedurally barred. Appellant does not appeal this issue.

In denying Claim Eighteen, regarding the court's refusal to find and weight mitigating evidence, the court held that the Claim is procedurally barred. The Appellant does not appeal this finding.

In denying Claim Nineteen, regarding the introduction of non-statutory aggravating factors, the court finds that the Claim is insufficiently pled and procedurally barred. The Appellant does not appeal this holding.

In denying Claim Twenty, regarding the advisory nature of the jury recommendation diminishing the jury sense of responsibility, the court finds the Claim procedurally barred. Appellant does not appeal this Claim.

In denying Claim Twenty-One, regarding the ineffective assistance of counsel for failing to present available

mitigation during the penalty phase, the court found that that the numerous witnesses presented were either unwilling or unable to testify during the penalty phase of the trail and therefore denied the Claim. Appellant appeals this ruling.

In denying Claim Twenty-Two, regarding the ineffective assistance of counsel to present a mental health expert or failing to present evidence of Defendant's brain damage during the penalty phase, the court held that the evidence failed to establish that either prong of Strickland was violated. Appellant does not appeal this holding. However, Appellant does contend that post-conviction counsel should have retained an expert to consider the mental health mitigation and raises this as Argument III in this appeal as a general due process violation.

In denying Claim Twenty-three, regarding the jury instruction on aggravating circumstances, the court held that the standard jury instructions were used and further that the Claim is procedurally barred. Appellant does not appeal this holding. However, Appellant notes that the United States Supreme Court has not ruled on the applicable of Ring to Florida nor on the continuing viability of Florida's position as the only state that permits non-unanimous determinations of aggravating factors or of recommendations of death.

In denying Claim Twenty-four, regarding the prosecutorial misconduct during trial by improperly arguing character and victim impact information, the court held that this Claim is procedurally barred. Appellant does not appeal that holding.

In denying Claim Twenty-five, regarding the burden shifting of the hearing instructions, the court rules this is procedurally barred and that the constitutional argument is without merit. Appellant does not appeal this holding.

In denying Claim Twenty-six, regarding the prosecutorial misconduct in the jury argument, the court held that this Claim is procedurally barred. Appellant does not appeal this Claim.

In denying Claim Twenty-seven, regarding the adequacy of the jury instructions on the requirement that its recommendation could only be rendered by a majority, the lower court finds this Claim procedurally barred noting that the standard penalty phase instructions were utilized. Appellant does not appeal this holding.

In denying Claim Twenty-eight, regarding the State's argument of lack of remorse, the court finds that this claim should be raised on direct appeal and is procedurally barred. The Appellant does not appeal this holding.

In denying Claim Twenty-nine, regarding a Brady violation, the court finds that the allegation is conclusory and the evidence does not support the Claim. However, to the extent

that the presentation of misleading evidence constitutes a Giglio violation, a derivative of a Brady violation, evidence was presented that the prosecutor intentionally presented false testimony to secure the conviction of Mr. Hartley and the lower court has failed to address this evidence and Mr. Hartley explicitly raises this issue on appeal.

In denying Claim Thirty, regarding the constitutionality of executing individuals for crimes committed under the age of 18, the lower court held that Atkins is inapplicable to Mr. Hartley, and Appellant does not appeal this finding.

Regarding the Ring Claim, the lower court, citing Florida Supreme Court precedent, finds Ring inapplicable to the Florida Statute. Appellant does not appeal this holding. On the Amended Claim regarding the appointment of a psychologist the Court rules that the Defendant was not entitled to the appointment of a mental health expert. As the record now stands, Appellant does not appeal.

Regarding the supplement to the 3.850 Motion, regarding the ineffective assistance of counsel for failing to investigate potential alibi witnesses, the court denies this claim based upon the evidence presented, or not presented. Appellant does not contest this holding based upon the record as it now stands; however, in Argument III he maintains that post-conviction counsel failed to adequately investigate the case and

specifically to locate witnesses for this Claim. To that extent he does not appeal the court's holding as to this precise alleged mitigation.

Regarding the Claim that Counsel was ineffective in the Penalty Phase for failing to present mitigation evidence that the Defendant prevented an inmate of the Duval County Jail from hanging himself and performed CPR on this person while awaiting trial, the Court finds that the Appellant has not satisfied either prong of Strickland. Appellant appeals this holding.

Regarding the third supplemental Claim that post-conviction counsel has failed to secure public records, the court denies this Claim based upon precedent that there is no constitutional right to effective counsel in post-conviction. Appellant agrees that the courts thus far have declined to extend the constitutional right to effective assistance of counsel to counsel in post-conviction, but appeals the court's holding to the extent that Appellant maintains this case should be remanded for further post-conviction proceedings pursuant to the general due process provisions of Peede.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that he be granted oral argument on his claims. He is unconstitutionally incarcerated under a sentence of death, and his convictions are tainted with constitutional infirmity. Thus, this Court should hear Appellant's contentions fully argued pursuant to the practice and rules of this Court.

REFERENCE KEY

"R" -- Record in post-conviction;

"T" -- Transcript of Trial;

"EX" -- Post-conviction evidentiary hearing exhibit;

"P" -- page; and

"pp" -- pages.

Other citations will be identified to the extent necessary for clarification.

SUMMARY OF ARGUMENTS

I. The lower court erred in denying appellant relief on his claim that trial counsel provided prejudicially ineffective assistance of counsel in the penalty phase of his trial.

II. The trial court erred in denying appellant's claim that newly discovered evidence establishes that the state presented false testimony in violation of Brady v. Maryland and Giglio v. U.S. and violated appellant's rights under the Sixth, the Eighth, and the Fourteenth amendments.

III. Appellant's constitutional rights to due process and his right to a full and fair hearing were violated by his counsel's failure to fully investigate his claims and the lower court's failure to address his concerns about counsel's preparation and investigation.

ARGUMENT I

The Lower Court Erred In Denying Appellant Relief On His Claim That Trial Counsel Provided Prejudicially Ineffective Assistance of Counsel In the Penalty Phase of His Trial

1. Standard of Review

Because an evidentiary hearing was held on Appellant's claim that trial counsel at the second penalty phase was ineffective, this Court must defer to the hearing court's factual findings to the extent that they are supported by competent, substantial evidence but review de novo the hearing court's application of the law to those facts. Stephens v. State, 748 So. 2d 1028, 1031-32 (Fla. 1999); Philmore v. State, No. SC04-1036, pp. 7-8 (Fla. 2006). In sum, this Court conducts an independent de novo review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. State v. Reichmann, 777 So. 2d 342, 350 (Fla. 2000); Cherry v. State, 781 So. 2d 1040 (Fla. 2000); and Cave v. State, 899 So. 2d 1042, 1052 (Fla. 2005)

2. The Strickland Standard

To obtain relief on his claim that penalty phase trial counsel provided ineffective assistance, Appellant must establish that deficient performance of counsel and the prejudice he suffered as a result of that deficient performance.

Strickland v. Washington, 466 U.S. 668 (1984); Rutherford v. State, 727 So. 2d 216, 218 (Fla. 1998).

To establish deficient performance, Appellant must show that counsel's conduct was outside the broad range of competent performance required under prevailing professional standards. Strickland, 466 U.S. at 688. Secondly, Appellant must show that this deficient performance prejudiced him by so effecting the fairness and reliability of the proceedings that confidence in the reliability of the outcome is undermined. Id. At 694; Rutherford, at 727 So. 2d at 220; Gore v. State, 846 So. 2d. 461, 467 (Fla. 2003). Further, Appellant must satisfy the evidentiary requirements of both "prongs" of Strickland to prevail, and, if a court holds that the Defendant has failed to meet his burden in his showing regarding either prong, the court does not need to make a determination on the merits of his case as to the remaining prong. Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001).

Finally, Strickland emphasized that the exacting nature of Appellant's burden requires the Court to be "highly deferential" when assessing the quality of trial counsel's performance. Strickland, 466 U.S. at 689. Thus, Strickland counsels the court to beware "the distorting effects of hindsight," to "reconstruct" the circumstances of counsel's challenged conduct, "and consider" counsel's perspective at the time. Id. Because

of the difficulty "inherent in making the evaluation," the court must "indulge a strong presumption" that counsel's performance is constitutionally adequate. Id.; Philmore v. State, supra.

In assessing the second prong, or "the prejudice prong, both Strickland and this Court's repeated application of the Strickland standard emphasize the importance of determining whether or not there was a genuine adversarial testing of the issue to be resolved. Strickland, 466 U.S. at 695. Thus, Appellant suggests that, in the instant case, the determinative touchtone is, whether there was, in fact, a genuine adversarial testing of the question of whether the appropriate penalty to be imposed in this case is Death? See, Harvey v. State, No. SC-75075, P. 26-27, revised opinion (Fla. 2006) (Judge Anstead dissenting)

3. Ineffective Assistance Of Counsel In The Instant Case

The lower court failed to consider the un-rebutted fact that Attorney Willis did not investigate, prepare, or take any substantial steps to present a penalty phase in Mr. Hartley's case. Mr. Willis' own testimony was that he rested his entire hopes for prevailing on winning a not guilty verdict and then when the guilty verdict came back he was surprised and unprepared to make a case for life.

At the Evidentiary Hearing, Attorney Willis testified that he represented Mr. Hartley at the trial. (R. 1751) Mr. Willis could not recall speaking with the defendant regarding the bifurcated nature of the capital proceeding or the specific defense strategy with relation to the penalty-phase. (R 1751-1752) However, Mr. Willis said he is sure they went over what they might do and who they might call. (R 1752) Willis denied being given any names, although he was aware of Mr. Jefferson, the football player. (R 1752) Mr. Willis was also aware of Cheryl Daniels. Id.

Mr. Willis testified that Cheryl Daniels acted as the contact person with the family. Id. However, he has no recollection about talking with her about being a witness. (R. 1753)

Mr. Willis said he had no recollection of the defendant asking him to call any specific person as a witness. (R. 1754) He remembered the name of Coach Stevens and did not recall Tiffany Groomes, or Tanya Hawk. Id. Mr. Willis did not recall Dorothy Cherry or Reverend Phoenix or Reverend Watson. (R. 1754 – 1755) He did recall that they called a Reverend as a witness. (R. 1755) Mr. Willis testified that he was interested in family first and foremost, teachers and preachers. (R. 1755) He denied any knowledge of Calvin Grant. Id.

Reverend Coley Williams, who did testify, may or may not have been provided by the defendant. (R. 1755 – 1756) Mr. Willis did remember that he called two witnesses and that one of them Al Chipperfield came in and testified on technical matters regarding "life being life." (R. 1756)

Mr. Willis denied any memory of Bruce Capers or Cedric Cicero. Tellingly, Mr. Willis indicates that "we were very interested in getting witnesses after this verdict came back," which would be in the period between the end of the guilt-phase and the ten days before the penalty-phase was to begin. This then, according to Mr. Willis' testimony was a very brief time period when he was interested in getting witnesses for the penalty-phase. (R. 1764) This would indicate that he had done no preparation for the penalty phrase prior to losing the guilt-phase.

Mr. Willis goes on to explain how disappointed he was in losing the guilt-phase. (R. 1765) Further, he remembered that upon losing the guilt phase he remembers being "in a real – I don't want to use the word desperate because that was probably over dramatizing it, but we were very seriously interested in getting witnesses to come in an testify." (R. 1765) Mr. Willis continues that, "I recall that it was getting close and I was faced with a prospect of having nothing to put on and I didn't – obviously we didn't want that. So – and I cannot remember

individual conversations and all that sort of thing. I have just a general memory of, please, let's find some witnesses, and our primary interests back then was to get the family to come in and that we were unable to do. Now that's my memory." (R. 1765)

Apparently, Mr. Willis then attempts to explain the absence of any memoranda in his file regarding the testimony of any family members would be because he knew that they would provide general background information. (R. 1776) However, basically Mr. Willis has no memory of specifically talking to anyone in this ten day period when he is now so urgently seeking witnesses, having lost the guilt phase. (R. 1767 – 1768) If he talked to Cheryl Daniels, they didn't discuss the penalty-phase. He reassured her, perhaps and didn't talk to her again.

Mr. Willis does state that the purpose of providing Mr. Chipperfield's testimony was to make the jury secure that the person they sentenced to life will actually serve life. Chippenfield's testimony was not mitigation, and not about Mr. Hartley specifically.

Mr. Willis also testifies that he spoke to the prosecutor shortly before the hearing and discussed in great detail about the claims in this case and about Shawn Jefferson being important to the case. (R. 1769 – 1770) However, there is no record of him speaking to Mr. Jefferson, or to anyone in the family. According to his testimony, he thought he'd win the

guilty-phase and also thought that the guilt-phase was his defense against death. He didn't prepare a penalty-phase.

Mr. Hartley's testimony is that Willis hardly talked to him at all and never talked to him about any substantive events. This testimony is corroborated by that of almost all of the many witnesses who testified at the Evidentiary Hearing. Mr. Jefferson testified that Willis was only interested in the money when Willis talked to him. There is no evidence that Willis even hired an investigator for the case.

The file, which is in evidence, is completely bare of Penalty Phase work, and Mr. Willis' testimony does not provide any indication that non-memorialized work was done. Willis admits that, while he may have thought a little about the Penalty Phase prior to the verdict, he remembers no work that he did before that time.

Subsequently, after the verdict, Willis' testimony, as the court somehow finds credible in its Order, is that Cheryl Daniels told him that, in essence, everyone wiped their hands of Kenneth Hartley when the verdict came in. As inconsistent as this is with the testimony of every other witness, and as inconsistent as this is with the actions of the family during the trial, Mr. Willis allegedly relied on this one phone call, during which there is no indication he explained what a Penalty Phase even was to Cheryl Daniels, let alone to anyone else in

the family, to explain the family's lack of participation and to justify the termination of his Penalty Phase preparation. That one phone call with Cheryl Daniels is all there is in the record to support the factual basis of the Circuit Court's Order denying relief on this Claim.

Further, trial counsel offers no explanation for the fact that he did not seek a mental-health expert's opinion to establish statutory mitigation and neither trial counsel nor trial counsel's meager trial file can identify an investigator. Thus, no mental health testing was done, and no records of any kind were sought or obtained. Trial counsel offers no explanation for not even looking into Mr. Hartley's past as if, at 24, he had had no life. Had trial counsel done even a small amount of preparation, the readily available witnesses who testified at the Evidentiary Hearing would have rewarded him with a plethora of mitigation. Mr. Jefferson would have explained his big brother's inspiration, Ms. Hawk his helpfulness, his sister his kindness to the elderly. Jean Daniels could have described the polite son who would call her or check on her every day even after the neighborhood streets had tried to swallow him. The available mitigation was manifest.

Mr. Willis, with a modest amount of labor, could have presented evidence that Mr. Hartley and Mr. Jefferson, then a

standout NFL player, were very close growing up, often playing sports together, going to church, and singing in the choir. Mr. Jefferson could have testified that Mr. Hartley was a caring person who was always willing eager to join in the choir despite the fact that his singing provided a certain amount of levity due to the fact that he did not exactly have a golden voice. This is the sort of testimony which humanizes a defendant in the eyes of a jury. Further, Mr. Jefferson could have testified that Mr. Hartley got him into sports and is the very person who Mr. Jefferson credits with encouraging him to reach his full potential. Mr. Jefferson testified that Mr. Hartley planted the seed in his heart which permitted to last in the NFL for so long. This is powerful mitigation and Mr. Jefferson should have been allowed to tell the jury that he hears Mr. Hartley's voice telling him to push on and to try harder, which he then does. Clearly, Mr. Hartley believed in, loved, and nourished his brother's precious talents.

The jury should have been told about Mr. Hartley and Mr. Jefferson playing together on Boy's Club basketball and football games and about the two of them playing high school basketball together. Attorney Willis could have obtained Mr. Hartley's school records and presented the jury with the documentation of a life.

Seeing Mr. Hartley's mother in attendance, the jury could have been told that Mr. Jefferson was worried about her health and the toll the trial was taking on her and that Mr. Hartley did not want her to come because of his love and worry for her. She came anyway. It is not credible that she would not want to testify for her son's life.

Mr. Jefferson's portrayal of his mother's insistence on attending the trial despite the problems and the anguish that she was obviously going through is also completely inconsistent with a woman who would wash her hands of her son upon the return of a guilty verdict, as Mr. Willis would have us believe.

The jury should have also heard that Mr. Hartley's football coach, Freddy Stevens, had both Mr. Jefferson and Mr. Hartley on his team in high school and found Mr. Hartley always well mannered and inseparable from his brother. Mr. Hartley was always cooperative and the coach has nothing negative to say about his experience coaching of Mr. Hartley.

Cheryl Daniels could have testified that she grew up with Mr. Hartley and would have told the jury how loving her brother was and how he lightened the family atmosphere with his jokes. He was a very, very good brother, as she would gladly have told the jury. Especially impressive is Ms. Daniels' testimony about Mr. Hartley's ability to relate to the elderly. Mr. Hartley did not like to hear people make fun of the elderly, and would ask

them not to do so. Mr. Hartley is a caring person and he displayed, in Ms. Daniels' experience, that caring and compassion for the vulnerable.

A jury, weighing the good and bad in a person's life, would surely have been moved by her description of Mr. Hartley as a very caring and very sweet person who "loved everyone." The gregariousness of her exaggeration belies the genuineness of her affection. Ms. Daniels could have helped the jury to understand the kind, caring, funny, loving, sweet, characteristics of Mr. Hartley's personality which she had the opportunity to witness first hand during their many years living together under the same roof in the same family.

Ms. Daniels, like her brother, could have also led Mr. Willis to numerous other witnesses and testified that she provided him with a list of names of other people he could contact. Further, she corroborated Mr. Jefferson's testimony about going to church with Mr. Hartley and doing community activities with him. She testified that she called Mr. Willis the day after the guilty verdict came in and he told her to calm down that he was going to appeal it. He did not discuss the penalty phase and she never heard from him again. Ms. Daniels has affirmed that both she and Shawn would have been proud to testify for her brother and she explicitly denied the prosecutor's cynical suggestion that Mr. Jefferson would have

been “better off” in California than in testifying for his brother’s life.

Jean Daniels, Mr. Hartley’s mother, testified that Mr. Willis called her one time, and then never called her again. She apparently testified at a bond hearing when Mr. Hartley first was arrested, but Mr. Willis never called her to testify in the penalty-phase nor did he explain to her that there would be a Penalty Phase.

Mrs. Daniels would have testified about how Kenneth Hartley was raised up in the church, how she had a curfew for him at night and that he was a good boy. She could have testified about the rough neighborhood they lived in and the problems of a young man growing up there.

Mrs. Daniels could have also testified that Mr. Harley sang in church and was an Usher in the Evergreen Baptist Church. Id. She told about his kindness to elderly people and his eagerness to help them out anyway he could. Mr. Hartley “loved old people.”

Finally, Mrs. Daniels explained again that Mr. Jefferson was concerned about her health and her ability to handle the terrible stress when he urged her not to attend the trial. Her son was simply worried about her.

Mrs. Daniels never talked to Mr. Willis about what was going to happen after the verdict or about what she might be

able to do to help him avoid the death penalty. If Mr. Willis had spoken to her, she would have testified and told the jury what a good boy her son was, about the problem of growing up in their neighborhood. Id. Then, even after Mr. Hartley left home, he called or otherwise had daily contact with her every single day.

Denise Groomes testified that she is a school teacher in Jacksonville who has been friends with Kenneth Hartley since they have been children. She was never contacted by Mr. Willis despite the fact that she could have testified to the fact that Ken was a "mannerable" child who was raised with a lot of ethical values, who went to church and was active in the community. She testified that he attended church and played sports. She had not known him to get in trouble. Ms. Groomes certainly would have testified had she been contacted.

Tanya Hawk testified at the Evidentiary Hearing that she knew Kenneth Hartley in elementary school and grew up with him. She has know Kenneth since she was a little girl and has loved him ever since. Her knowledge of Ken was "all good points." She's had a crush on him since the third grade and he has always helped her out. When she needed or wanted something all she had to do was "look to Kenneth" and he would help her out greatly. Ms. Hawk also noted how helpful Kenneth was to elderly people and had personally witnessed his kindnesses to others when they

were growing up. Whenever she needed something that “you needed like a man to do,” such as lift something heavy or things like that, Mr. Hartley would be the one who would help her. Mrs. Hawk testified that she visited Mr. Hartley in prison several times and had heard about some other problems with the law. Still, the man she knew, the good, helpful friend, is the man they jury needed to know as well.

Although Ms. Hawk told the lawyer she would be willing to be a character witness for Mr. Hartley the lawyer did not contact her to testify.

Dorothy Cherry testified that she knows Kenneth Hartley very well, although she is a bit older than him, because he was a friend of the family. She was never contacted by his defense attorney, despite the fact that she could have testified that he has always been a great guy to her and she does not know anything bad about him. He has always been wonderful and upright in her book. Had she been called as a witness she would have testified to these qualities, which the jury never heard about.

In fact, after he got out of prison, Mr. Harley went to stay at her place to get out of his old neighborhood. Mr. Hartley stayed with her for approximately sixty days but eventually went back to the neighborhood where his family was and he grew up. (R. 1711) Importantly, she knew him well enough

that, after the manslaughter case, she had no fear of having him stay with her.

Mrs. Cherry denied ever being contacted by Attorney Willis. Thus, the jury was denied the opportunity to hear why she trusted and believed in Mr. Hartley.

At the evidentiary-hearing, Mr. Hartley himself testified. He stated that his whole family would have testified to show his good side. Like Ms. Daniels, he told Mr. Willis that. It would seem, however, that Mr. Willis thought that death had been ordained when the guilt-phase was lost.

Mr. Hartley denied that Mr. Willis ever used a private investigator and he certainly never met with one. Tellingly, Mr. Willis couldn't name one. Mr. Hartley told Mr. Willis to find whatever records he could find when he was going to school. Willis had no records. When Mr. Hartley would talk to Mr. Willis, Mr. Willis would say, "don't worry about it we got the case beat." When Mr. Hartley arrived in Jacksonville for trial, Mr. Hartley did not feel Mr. Willis was ready for trial. From day one Mr. Willis said he was going to win the case, and Mr. Hartley did not even completely understand there was a separate penalty-phase part to the case. Willis himself said he had no witnesses, and there was no investigator to look for witnesses, although Mr. Hartley gave Mr. Willis specific names including

Franky Daniels, Bruce Capers, Anthony Grant, Calvin Grant, and Ricky Daniels.

Mr. Hartley further explained that “just like everybody that come through the system,” we are ignorant of the system, so he didn’t know that he had to tell the judge about what his lawyer hadn’t done or wouldn’t do. Mr. Hartley summed up the problem: “when you got an ignorant lawyer and an ignorant client, what you got?” In this case, an untested, unchallenged, and unnecessary death sentence.

Mr. Hartley testified that he was not told about “a penalty phase” but that he was told that “next he was going to call some witnesses, so I gave him some witnesses’ names and he called that guy Chipper or something like that.” Mr. Hartley says he called “Chipperfield and Reverend Williams and stuff like that and I was saying what’s going on with the other witnesses, my mom, my dad, my sisters and brothers you know.” Mr. Willis never talked to him about having a penalty part of the trial if the jury convicted him of first degree murder. Thus, when the trial was going and when he got convicted Mr. Hartley was never advised about the nature of the Penalty Phase or how the life and death decision was rendered. Mr. Willis simply did not tell him anything except that he was going to win the case. Mr. Willis stated that Mr. Hartley had been set up, that Willis had witnesses, but that he didn’t call them.

Mr. Willis himself could not recall speaking with Mr. Hartley regarding the bifurcated nature of the capital proceeding or the specific defense strategy with relation to the penalty-phase.

Mr. Willis explained how disappointed he was in losing the guilt phrase. He remembered, upon losing the guilt-phase, being "in a real – I don't want to use the word desperate because that was probably over dramatizing it, but we were very seriously interested in getting witnesses to come in an testify." He continued, "I recall that it was getting close and I was faced with a prospect of having nothing to put on and I didn't – obviously we didn't want that. So – and I cannot remember individual conversations and all that sort of thing. I have just a general memory of, please, let's find some witnesses, and our primary interests back then was to get the family to come in and that we were unable to do. Now that's my memory."

Finally, the attorney's file is bare of the indicia of penalty-phase preparation. Mr. Willis attempts to explain the absence of any memoranda in his file regarding what the testimony of any family members might be because he knew they'd provide general background information. However, he has no record and no memory of specifically talking to any of the family except Cheryl, who called distraught, in the ten-day period when he was so urgently seeking penalty-phase witnesses.

In sum, the overwhelming weight of the evidence is that trial counsel did not prepare for a Penalty Phase, did not properly investigate for mitigation to present at a Penalty Phase, and did not seek or obtain any records that could have been introduced or have led to mitigation that could have been presented, and that, had counsel rendered effective performance to Mr. Hartley, Mr. Hartley would have likely received a life sentence.

4. Conclusion and Relief Sought

Based on the foregoing, Appellant respectfully prays that this Court vacate the death sentence imposed upon him and order this matter remanded to the Circuit Court for a new Penalty Phase trial.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT THE STATE PRESENTED FALSE TESTIMONY IN VIOLATION OF BRADY V. MARYLAND AND GIGLIO V. U.S. AND VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, THE EIGHTH, AND THE FOURTEENTH AMENDMENTS

1. The Standard of Review

This court reviews legal questions de novo as per Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 2000). Reference is given to the circuit court's findings of fact if they are supported by competent, substantial evidence. Melendez v. State, 718 So. 2d 746, 747 (Fla. 1998).

2. The Giglio Standard

To prove a Giglio violation, Appellant must establish that the State knowingly put on false testimony that Mr. Hartley made material inculpatory statements to jailhouse informants. Ventura v. State, 794 So. 2d 553 (Fla. 2001); see Guzeman v. State, 868 So. 2d 498 (Fla. 2004). A statement is material if there is a reasonable probability that the false evidence may have effected the judgment of the jury. Vertura v. State, 794 So. 2d at 563.

3. The Prosecution's Presentation of False Testimony

At the Evidentiary Hearing, Appellant presented credible evidence that, at the trial, the prosecution elicited false testimony without which the conviction of Mr. Hartley cannot stand. Given the paucity of evidence against Mr. Hartley about the jailhouse snitch testimony, there can be no question of materiality or prejudice. Mr. Hartley's sentence and conviction depend solely upon credibility.

Mr. Johnson testified that, while he doesn't really know Mr. Hartley, he knew him generally and had a mutual friend. Mr. Johnson knew Mr. Hartley was in jail in 1993 and 1994 when he was sentenced to death. Mr. Johnson also knew Mr. Bronner and Mr. Brooks, who testified against Mr. Hartley. In fact, Johnson was in a jail cell with them.

While Johnson, Bronner, and Brooks were incarcerated together, Bronner and Brooks talked about their testimony against Mr. Hartley to Mr. Johnson.

Initially, Mr. Johnson noticed that Mr. Brooks would be called out of his cell for very long visits every couple of weeks or so and when he returned he would be loaded down with jailhouse bounty such as cigarettes, lighter, candy bars and chewing gum. Brooks would say he was at the State Attorney's office when he came back loaded down with these goods. He would say that the State Attorney had been rehearsing him to testify

and say that they were feeding him Jenkins Barbeque, Red Lobster, or whatever he wanted and that they would give him cigarettes and stuff. Although he was signed out for visitation he was really at the States Attorney's office.

Subsequently, on the day that Brooks was released, Brooks and Bronner and Johnson all went to court together. While the three were waiting to go to Court, Brooks said, about his testimony against Mr. Hartley at trial, that "man, I did some f'd up stuff, it was real f'd up what I did." Mr. Brooks told Johnson that he lied on "Kip" who is Mr. Hartley. Then, Johnson continued, Brooks said didn't like "Duck" and he didn't know "Fish," but he said he lied on "Kip." Brooks said he lied on "Kip" because "Kip" had it hard and he said he lied on him.

Further, Johnson testified that Brooks said that the State told him exactly what to testify to against Mr. Hartley. Eric Brooks told him that Brooks intentionally lied in Court against Hartley to help the State win a conviction of murder.

Mr. Bronner told Mr. Johnson that the prosecutor asked him if he knew "Kip" and "Duck," and Mr. Bronner replied that he did. The prosecutor then told Mr. Bronner that he was going to put Mr. Bronner in the cell with Kip and Duck so that he could get them to tell him what they did and what they knew about the murder. Bronner told the prosecutor that they had told him that they didn't know nothing about the murder, so the prosecutor

told Bronner if he would play ball he could get free and that a prosecutor was going to tell Bronner what to say that Mr. Hartley and Mr. Ferrell allegedly said. (Mr. Bronner told Johnson that he agreed to do it and the prosecutor asked him to recruit some more guys and that's when he recruited Eric Brooks and "Skag" and some more guys. Ronald Bronner frankly admitted to Mr. Johnson that he, Bronner, went to Court and lied against Mr. Hartley. It is difficult to imagine a clearer Giglio violation, if Ronald Johnson is credible. His credibility is supported by the State's subsequent actions.

Mr. Johnson further testified that he was being harassed by State Attorney Bateh, the prosecutor on Mr. Hartley's case. (R. 2749) Mr. Johnson testified that Mr. Bateh approached him and asked if he was Jimmy Johnson, to which Mr. Johnson said no because his name is James Johnson.

Subsequently, Mr. Bateh properly addressed Mr. Johnson and said that he wanted to talk to Mr. Johnson about Mr. Hartley.

At that time Mr. Bateh declined to identify himself to Mr. Johnson. Mr. Johnson's lawyer told him that Mr. Bateh wanted to get a statement from him regarding Mr. Hartley, but Mr. Johnson, who had a case pending, did not want to talk to the State at that time. Nevertheless, Mr. Bateh kept approaching him and trying to talk to him. Eventually, Mr. Bateh even attempted to subpoena him.

A deposition or a sworn statement had been arranged and Mr. Johnson was threatened by the state with jail if he didn’t attend.

Ultimately, Mr. Johnson testified that, when he went outside to wait for his ride, the detective came out and arrested him on an outstanding warranty from Georgia. Mr. Johnson was handcuffed extremely tightly, so that his wrist still hurt from the handcuffing months later. After they handcuffed him, they took him to the State’s Attorneys office. Mr. Bateh said that Georgia had declined to extradite him on the warrant, but Mr. Bateh went ahead and called the Georgia authorities and asked them to come get him. This was done because Mr. Johnson said that he was not going to honor the subpoena in the Hartley matter. Then, although they took Mr. Johnson to jail the Georgia authorities never did come to get him and they finally let him go. The State’s conduct here is obviously intended to silence Johnson. The State’s concern is, thus, an indicia of credibility.

Mr. Johnson specifically felt harassed by Mr. Bateh further when Mr. Bateh told him that Johnson did not want Bateh for an enemy. Mr. Johnson interrupted that to mean that Mr. Bateh would do the same thing to him that he did to Mr. Hartley, which is to frame him.

Also, Mr. Bateh brought up Johnson's son, who was only 11 years old and Johnson took that inquiry as a threat against his family.

Mr. Johnson testified that he feared retribution from the state on his pending case for trafficking in cocaine. Mr. Johnson testified that he was afraid that Mr. Bateh would manufacture some evidence or witnesses in the same way that he did Hartley.

Mr. Johnson has nothing to gain at this time from coming forward and speaking truthfully. Conversely, he had much to fear. He is obviously still in jeopardy and, from his perspective, faces a hostile and vindictive State Attorney's office.

The State Attorney and the hearing court maintain that Mr. Johnson's testimony was not believable; however, neither are able to offer any reason that Mr. Johnson would come forward and would expose himself to the very stiff and prohibitive perjury prosecution enacted to help guarantee the truth of testimony in capital cases. Further, the state and the lower court overlook the lack of credibility of the witnesses, which the state selected, prepared, and presented. If the State asserts the witnesses are lying now, were they lying at trial? Mr. Jones has now testified that he mis-stated the number of felonies that he had at the time that he testified, apparently forgetting

about four of them, which Mr. Willis testified he would certainly have pointed out to the jury. Mr. Jones also forgot to mention his perjury conviction. For the state now to attack or reject Johnson's testimony by nitpicking the logic of the liars' alleged statements to him is to ignore the fact that Brooks and Bronner would put a man on death row at the State's behest to save themselves extensive jail sentences. It is completely consistent with common sense to expect that their explanations of the lies that they testified to might have some minor inconsistencies or some incongruities, but they are the state's witnesses. Nothing they say effects Mr. James Johnson's credibility. The important thing is that Mr. Johnson has no reason at all to fabricate his testimony, while, as the prosecutor noted, gloating at the strange and sudden improvement of his case against Mr. Hartley after Mr. Hartley was incarcerated in the Duval County Jail, and the State's witnesses had much to gain by making the case against Mr. Hartley. There was no case against Mr. Hartley until he was put in the county jail. Mr. Johnson's testimony, that both Brooks and Bronner testified explicitly and without qualification that they lied to secure Mr. Hartley's conviction and to curry favor for their own exculpation renders that case unpalatable to a judicial system dependent upon reliable adversarial testing. Notably, Mr. Johnson is the only witness who had nothing to gain, and much to

lose, by coming forward. While the state questions why he didn't come forward sooner, it simultaneously lashes out at him for coming forward at all. Perhaps Mr. Johnson was afraid. With witnesses like Brooks and Bronner making the prosecution's case after the accused is locked up, there is indeed much to fear.

3. Conclusion and Relief Sought

Based upon the foregoing, Appellant prays that this Court vacate his convictions and sentences and remands this case back to the Circuit Court for a new trial.

ARGUMENT III

APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FULL AND FAIR HEARING WERE VIOLATED BY HIS COUNSEL'S FAILURE TO FULLY INVESTIGATE HIS CLAIMS AND THE LOWER COURT'S FAILURE TO CONSIDER HIS CONCERNS ABOUT THE SUFFICIENCY OF COUNSEL'S PREPARATION AND INVESTIGATION

1. The Standard of Review

This Court, in Peede v. State, 748 So. 2d 253 (Fla. 1999), concluded that the process before the Hearing Court had failed to satisfy this Court's due process concerns regarding the adequacy of the defendant's preparation and representation in the lower court. In that case, this Court remanded the case to the Circuit Court so that those concerns could be alleviated. While Appellant concedes all courts have refused to extend the Sixth Amendment's constitutional right to effective assistance of counsel to post-conviction, the Circuit Court and this Court retain general powers to supervise the process to which the Defendant is due.

In Peede this Court was not satisfied that it could rely on the record developed below. Similarly, in the instant case, there are due process concerns which, Appellant contends, require this Court to relinquish jurisdiction and remand the case to the Circuit Court with directions that Appellant be permitted to conduct a proper investigation and to present that

evidence to the Court for consideration. Further, Appellant should be allowed to retain an expert to explore the mental health mitigation that might be available in this case.

2. The Facts

In the post-conviction proceedings below, Mr. Hartley was represented by at least four attorney's offices. Initially, the Capital Collateral Regional Counsel for the Northern Region of Florida represented him. Subsequently, that office was closed by the state or conflicted off, and Attorney Morrow was appointed pursuant to the Florida Registry procedure. Mr. Morrow conducted the Evidentiary Hearings that have been summarized herein.

Although Mr. Morrow was being paid pursuant to the Registry Statute, he demanded money from Mr. Hartley's brother if he was to conduct any investigation. Mr. Hartley considered this to be extortion and filed a bar complaint against Mr. Morrow. Mr. Morrow then moved to withdraw, but Mr. Hartley was excluded from that hearing before the chief judge, Judge Moran as he wanted to put his concerns about the investigation on the record. With Mr. Hartley excluded, the hearing was held, and Mr. Morrow was allowed to withdraw. Thereafter, Attorney Westling was appointed pursuant to the Registry Statute.

Mr. Hartley, not wishing to be represented by Mr. Westling, retained private counsel, Kenneth Malnik, to represent him. Mr.

Hartley expressly paid Mr. Malnik funds so that an investigation could be conducted. Mr. Malnik retained an investigator but, thereafter, did not pay her and, although an initial investigation was started, nothing further was done. Mr. Malnik did not conduct any investigation himself, nor did he attempt to utilize the provision of the Registry Statute to pay for the investigation to which Mr. Hartley is entitled and for which the Registry Statute provides funds.

Ultimately, no adequate investigation has been conducted. Since Mr. Hartley's trial lawyer didn't investigate either, there never has been an adequate investigation of the informants in the guilt-phase of this case.

Further, neither Morrow nor Malnik did any mental health mitigation investigation nor has any mental health expert been retained to examine the case and determine the applicability of the important mental health mitigators.

Mr. Hartley wanted to put his problems on the record at Mr. Morrow's hearing, and Mr. Hartley was invited to speak before the Court, but, upon determining that Mr. Hartley was not sworn (he was attending the hearing by phone at the prison), the Court, struck his statements on the grounds that they were not sworn.

Mr. Hartley merely wants to have his case adequately investigated and to be properly represented by conflict-free

counsel. Under the authority of Peede, this Court should exercise its supervisory powers and overarching duty to give primacy to the interests of justice and remand this case so that an adequate investigation can be done.

3. Conclusion and Relief Sought

Based on the foregoing, Appellant prays that this Court relinquish jurisdiction and remand this case to the Circuit Court so that he can have the opportunity to have a complete investigation done, can consult a mental-health expert, and have representation by a conflict-free counsel in post-conviction.

Certificate of Font and Service

Below signed counsel certifies that this brief was generated in Courier New 12 point font pursuant to Fla. R. App. P. 9.210 and served on all parties hereto by Federal Express mail on this 28th day of November, 2006.

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