IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 05-2265

CROSLEY A. GREEN,

Appellant/Cross-Appellee,

v. **CAPITAL POSTCONVICTION CASE**

STATE OF FLORIDA

Appellee/Cross-Appellant.

INITIAL BRIEF OF APPELLANT/CROSS-APPELLEE

MARK S. GRUBER
Florida Bar No. 0330541
DAPHNEY E. GAYLORD
DAVID HENDRY
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544

COUNSEL FOR APPELLEE/
CROSS-APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

While sitting in a truck during a rendezvous in Holder Park, Chip Flynn and Kim Hallock were accosted by a man with a gun. According to Hallock, the man robbed them, and while holding them at gunpoint drove them to a deserted area. Hallock was able to pass Flynn's gun to him while his hands were tied behind his back. After Hallock was taken out of the truck, Flynn managed to dive from the truck with his gun and a struggle ensued. During an exchange of gunfire, Flynn was shot in the chest. Hallock drove off to a friend's home, passing numerous homes, businesses, and a hospital while the perpetrator fled on foot. More than an hour passed before law enforcement responded to the scene and Flynn died before the paramedics arrived.

Crosley Green eventually was arrested, tried and convicted for the first degree murder of Flynn. The jury recommended death by a vote of eight to four and the court sentenced him to death. After his conviction and sentence were affirmed on appeal, Green sought postconviction relief. After extensive postconviction litigation, the court affirmed the judgments of guilt but vacated Green's death sentence and ordered a new penalty phase. Crosley Green appeals the lower court's denial of his guilt phase claims and seeks provisional review of those penalty phase claims which the court denied. The State appeals the court's vacatur of the death sentence.

References to the record on direct appeal are in the form, e.g. Dir. I, [page] 234. References to the postconviction record are in the form, e.g. PC-R I, 234.

REQUEST FOR ORAL ARGUMENT

In light of the gravity of the case and complexity of the issues raised herein, Crosley Green through counsel requests oral argument.

STATEMENT OF THE CASE AND OF THE FACTS

Procedural History

A Brevard County grand jury indicted Mr. Green for one count of first degree murder, two counts of kidnapping, and two counts of robbery with a firearm. Dir. XIII, 1283-85. A jury trial was held in Brevard County from August 27 to September 5, 1990. The jury returned a guilty verdict as to all counts on September 5, 1990. Dir. X, 1977. At the conclusion of the September 27, 1990 penalty phase, the jury recommended a sentence of death by a vote of eight to four. Dir. Vol. XII 2333. On February 8, 1991, the trial court sentenced Mr. Green to death. Dir. XIII, 2454; XV, 2837-47.

On direct appeal, this Court affirmed Mr. Green's convictions and sentences. *Green v. State*, 641 So.2d 391 (Fla. 1994), *cert. denied*, 115 S.Ct. 1120 (February 21, 1995). The claims raised on direct appeal were that the trial court erred in (1) admitting evidence of dog scent tracking; (2) denying

Green's motion to suppress Kim Hallock's photographic and in-court identifications; (3) denying Green's motion for the jury to view the murder scene; (4) instructing the jury on flight; (5) considering as separate aggravating circumstances that Green committed the murder for pecuniary gain and Green committed the murder during a kidnapping; (6) finding that the murder was heinous, atrocious, and cruel; and (7) refusing to find certain mitigating circumstances. Green also argued that (8) the death penalty is disproportionate; and (9) the heinous, atrocious, or cruel aggravator is unconstitutionally vague. This Court denied the first five issues on the merits. As to the seventh issue, this Court agreed that the sentencing order did not "strictly" comply with *Campbell v. State*, 571 So.2d 415, 420 (Fla. 1990), but found that its requirements had been met anyway. With regard to the ninth issue, the court found that error under *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926 (1992) had not been preserved. As to the sixth and eighth issues, the court struck the HAC aggravator but found that, in light of other cases, the three remaining valid aggravating circumstances, and no mitigators, that Green's death sentence is proportionate." *Id.*

There were a number of delays in the postconviction litigation that followed. They were occasioned by under funding of CCR, public records litigation, post-trial re-investigation

by the State prompted by some media attention to this case, and the State's motion to replace Crosley Green's long standing lawyers with new counsel from CCRC-M, among other things. The postconviction court found that the fully pled motion for postconviction relief dated November 30, 2001 was timely filed. PC-R XXIV, 4098. An abbreviated version of the claims stated in that motion are:

CLAIM I: Ineffective assistance and due process violations regarding a juror whose family member was murdered and may have made a throat slashing gesture during the trial.

CLAIM II: Rules against interviewing jurors are unconstitutional.

CLAIM III: Guilt phase ineffective assistance based on: failure to obtain and maintain file, failure to investigate and develop issues relating to cross-race identification, failure to develop issues relating to the victim's truck, footprint impressions, ballistics, the initial police investigation, and the state's theory of flight.

CLAIM IV: Newly discovered evidence of recanting witnesses.

CLAIM V: The dog track evidence violated *Strickland, Brady and Giglio*.

CLAIM VI: Use of Green's New York robbery case in support of the prior violent felony aggravator violated *Johnson v. Mississippi, Giglio, Brady, and Strickland*.

CLAIM VII: Ineffective assistance at the penalty phase due to the failure to investigate and present available mitigation.

CLAIM VIII: *Apprendi* (later treated as a *Ring* claim).

CLAIM IX: Improper burden shifting instructions and ineffective assistance for failure to object.

CLAIM X: Execution by lethal injection is cruel or unusual

punishment.

CLAIM XI: Cumulative error.

CLAIM XII: Green may be incompetent at time of execution.

All of the claims listed above were alleged as federal and state claims for relief. The postconviction court conducted a Huff hearing on May 13, 2002, and on July 22, 2002 summarily denied some of the claims, set others for an evidentiary hearing, and specified other legal claims for resolution at a later date. PC-R XXIV, 4093-4129. The court also entered an order dated October 28, 2003 denying a motion for reconsideration of its summary denial of the due process components of Claim I. PC-R Vol. XXI, 3585-88. The court's final order disposing of all remaining claims after receiving evidence and entertaining written and oral argument on various dates was entered November 22, 2005, and incorporated the two previous orders as attached exhibits. PC-R XXIV, et seq.

Statement of facts

On direct appeal, this Court stated the facts presented at trial in its opinion issued February 21, 1995. *Green v. State*, 641 So.2d 391. There was no forensic evidence connecting Crosley Green to the crime other than the dog tracking testimony. The gun on the scene was Flynn's. Green was developed as a suspect mostly through police interviews of Kim Hallock and some street investigation. John Parker, Green's

trial counsel, described himself as being optimistic so long as he thought the main evidence against his client would be Hallock's testimony. The case took a turn for the worse when Sheila Green and Lonnie Hillary took the stand.

Sheila Green, Crosley Green's younger sister, and Lonnie Hillary, Sheila's common law husband at the time, were arrested along with others on federal drug trafficking charges while Crosley Green was awaiting trial in this case. Sheila was released pre-trial. Sheila and Hillary were tried about eight weeks prior to Crosley Green's trial. Hillary was acquitted and released, and Sheila was convicted and remanded to await sentencing. After a number of discussions with state and federal prosecutors, which are described below, both agreed to testify against Crosley Green.

At Green's trial, Sheila said that Crosley admitted the shooting to her but described it as unintended. Dir. Vol. V, 854-61. Hillary said that he saw Green the morning after the shooting. Green said that he got in a truck with a man and a woman, and when the woman tried to run, he fucked up. *Id.* 869-78. The prosecution also presented the testimony of Jerome Murray, who said that he overheard Green make an incriminating statement.

The entirety of the prosecution's evidentiary presentation to the jury in the penalty phase was devoted to showing that

Crosley Green previously had been convicted of a 1977 armed robbery in New York. The State called three witnesses, none of whom had any personal knowledge about the offense, and introduced a "Criminal Registration Form" which Green had executed at the Brevard County Sheriff's Department in order to obtain a driver's license and apply for a job. Dir. XII, 2192-95. That and a fingerprint card filled out in conjunction with it were the only documentation offered at trial in regard to the New York offense. Defense counsel called two witnesses to offer background mitigation, Shirley (Allen) Green White and Damon Jones. Ms. White talked briefly about the murder/suicide of Crosley Green's parents and about the defendant's son. Jones described an occasion where the defendant saved him from drowning. Dir. XII, 2219-29.

The jury returned an eight to four recommendation for the death penalty. In sentencing Green to death, the trial judge[1] found four aggravating factors: (1) Green was previously convicted of a violent felony; (2) the capital felony was committed while Green was engaged in kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, and cruel. The judge found no statutory or nonstatutory mitigating factors. *Green v. State,*

[1]The trial judge was Judge Antoon. The posconviction judge was Judge Jacobus.

supra. On appeal, this Court struck the HAC aggravator, but found that the sentence was proportional based on the remaining three aggravators and absence of mitigation. *Id.*

A substantial amount of evidence was presented at the postconviction evidentiary hearing. It is discussed in more detail below in connection with individual claims. In summary, Green offered the testimony of his trial attorney, John Parker. Parker spoke about his professional background, the circumstances of his appointment, his trial strategies, the scope and results of his pretrial investigation, his pretrial motions, his discussions with defense witnesses, and he was examined specifically about each of the claims that were under consideration at the evidentiary hearing. Gregory Hammel, who represented Green as a public defender before that office withdrew due to a conflict of interest, also testified. Sheila Green and Lonnie Hillary testified and recanted their trial testimony about Green having made a number of admissions. Both had made public recantations and they were examined about them. Jerome Murray was called to testify about a public recantation he had made. Family members who testified about both guilt phase issues and background mitigation were Hamp Green, Shirley Green White, and Selestine Peterkin. Marjorie Hammock provided detailed testimony about Crosley Green's background. She is an LCSW with substantial expertise in capital case mitigation and

had conducted an extensive postconviction investigation into Crosley Green's personal and family history. Additional witnesses included Odell Kiser, the dog handler for the sheriff's office at the time of the initial investigation, and Tom Fair, the head of the sheriff's homicide division at the time. Fair was examined as a hostile witness with regard to a number of documents, referred to below as 3 X 5 cards. It is argued below that they were *Brady* material that had been unfairly concealed. Dr. Warren Woodford was called as an expert in dog tracking. A law professor, David Dow, spoke about the obligations of defense counsel in a capital case. Among other things he referred to the ABA Guidelines and offered several opinions about where he felt defense counsel had fallen short. Green also called Dr. William Shields, a professor of biology at Syracuse University, in rebuttal to evidence regarding postconviction mitochondrial DNA testing on some hair fragments found in the truck.

The State called Leslie Louis, John King, Nancy Rathman, Don Ladner, Karen Korsberg, Shawn Weiss, who were all FDLE officers and lab personnel, with regard to that testing. Dr. Martin Tracey, a biology professor at FIU in Miami, testified about the statistical analysis of their results. Their testimony was offered to show that the hair fragments may have been Green's. The State also called Bobby Mutter, who was in charge of the

police canine training and utilization at the time. He disagreed with Dr. Woodford's testimony. Layman Lane was offered as a previously undiscovered witness to an alleged admission. Rick Jancha was the US attorney who prosecuted the drug case against Sheila Green and Lonnie Hillary. He and Phil Williams, who was co-prosecutor at the trial in this case, testified about the discussions that led to Sheila Green and Hillary testifying against Green.

The court also accepted numerous exhibits, including recordings of public recantations by various witnesses and a CBS 48 Hours episode devoted to this case. Although Green's claims about the use of expert witnesses regarding cross-race identification were summarily denied, the court allowed an affidavit about the subject by Dr. Brigham, a psychology professor, to be proffered.

The postconviction court accepted written argument from both sides after the conclusion of taking evidence. Thereafter, the United States Supreme Court released *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). At trial, the State urged, and the trial court eventually found, that Green previously had been convicted of committing an armed robbery with a firearm in New York. However, the evidence in postconviction showed that Green had pled to a lesser offense of simple robbery, and that the final disposition of the case was

what was termed a Youthful Offender Adjudication which under the New York penal code was not a criminal conviction. Trial counsel had not sought the New York file. The postconviction court denied Green's guilt phase claims, but vacated the death sentence and ordered a new penalty phase before a jury because of the false evidence about the New York offense in light of *Rompilla v. Beard*.

SUMMARY OF THE ARGUMENT

Crosley Green defends against the State's challenge to the lower court's vacatur of his death sentence. He also provisionally appeals the court's adverse decisions about some of his penalty phase claims, and directly appeals the lower court's denial of his guilt phase claims. In a separate habeas petition, he argues that the death penalty is now disproportionate in light of new evidence.

The postconviction court did not err in finding ineffective assistance of counsel under *Rompilla v. Beard*. Here, the timing of *Rompilla* was fortuitous, to say the least. This case is either not significantly distinguishable from *Rompilla*, or to the extent that it is, it is an even more compelling case for relief. On appeal, this Court struck the heinous, atrocious and cruel aggravating circumstance, but affirmed the death penalty in light of the three remaining valid aggravating circumstances. Arguably the most grave of those three aggravators was a prior

violent felony based solely on a purported conviction for armed robbery out of New York. Trial counsel never tried to obtain the New York case file. Collateral counsel easily obtained the file, which showed that the original charge had been reduced to the equivalent of a strong armed robbery. The case had been disposed of with what was termed a youthful offender adjudication, which under New York law was not a criminal conviction at all. Moreover, the case file contained a parole officer's report which raised questions about whether Crosley Green had committed any offense in the first place; revealed that Green did not have the money to post bail whereas the co-defendant did and had his charges were dropped; and detailed other significant mitigating circumstances that could have been presented at the penalty phase here.

Although the court granted relief, it erred in finding that the youthful offender adjudication was a criminal conviction. Green pled to the reduced charge, and then about week later, in accordance with New York procedure, his conviction was vacated and replaced with the youthful offender disposition. According to the New York penal code and this Court's decision in *Merck v. State*, that disposition did not result in a criminal conviction.

The lower court also erred in rejecting Green's claim of ineffective penalty phase assistance based on counsel's failure to investigate and present available mitigation. Trial counsel

did not even begin to investigate mitigation prior to trial because he thought he was going to win the case outright. His case turned sour when Crosley=s sister, Sheila, and her common law husband, Lonnie Hillery, gave testimony for the State.

There were only a few weeks between the verdict and the penalty phase. Trial counsel spent about ten hours preparing for the penalty phase, and the entire penalty phase defense occupies about twenty pages of the record. An expert attorney who testified at the evidentiary hearing termed the effort as Agrossly inadequate.@ By contrast, collateral counsel presented extensive and detailed background mitigation which would have humanized Crosley Green by presenting evidence of the 'compassionate or mitigating factors stemming from the diverse frailties of humankind.' Trial counsel=s efforts failed to secure the individualized sentence the constitution requires, by failing to focus the jury's attention on the "particularized characteristics of the individual defendant."

Defense counsel had known that Sheila and Hillery were going to testify, but had not deposed them. Both have since recanted their testimony. The postconviction judge, who was not the trial judge, rejected their recantations, but did so for impermissible reasons. In particular, the judge relied on the State=s presentation of Anewly discovered evidence of guilt.@ The court erred in doing so. The state’s evidence in question was not

very probative; it consisted of a belated recollection of a purported admission by someone who was doing prison time when he testified at the evidentiary hearing for felonies involving dishonesty. The State also presented the results of post-trial mitochondrial DNA testing on some hair fragments that were found in Flynn=s truck, which showed only that Crosley Green was a possible contributor. The use of mDNA in forensic identification is far less reliable than use of nuclear DNA. The number of possible contributors to those hair fragments equals the population of the U.S. The court erred in considering this evidence which infringed on Green=s right to jury trial which requires proof beyond a reasonable doubt.

The court erred in rejecting Green=s claim that his right to an effective defense which had access to exculpatory and impeaching evidence was denied by the misleading and at times outright deceptive conduct of the law enforcement officers who originally investigated this case. Collateral counsel=s investigation unearthed a number of documents, including 3 X 5 cards, which the head of the Brevard Sheriff's homicide division at the time of trial, Detective Fair, said he was Ashocked@ to see in court.

The prosecution=s theory at trial was that Ms. Hallock viewed a shoe box full of about seventy photographs of black males, none of which were of Crosley Green. She purportedly

picked out a number of them while making clear that they were not photos of the perpetrator; they merely shared some similar facial characteristics. A police artist used this information to prepare a composite sketch, which in turn provided a lead to the defendant. The police then made a special plane trip to the prison where they obtained a Afresh@ photo of him. When Ms. Hallock was shown that, she purportedly made a prompt identification.

That theory was debunked at the evidentiary hearing. The truth is that Ms. Hallock picked out a number of photos, but she identified some of them as Alook a-likes@ and others as Apossible suspects.@ At the same time, the investigating officers developed leads from other sources and labeled some of them as Apossible suspects.@ They kept track of the results with the 3 X 5 cards and associated booking photos and field investigation reports which had clear notations as to whether the subject was a Apossible suspect@ or a mere look a-like, or had some other role. The overwhelming probability is that his photo was in the shoebox, that Hallock saw it, and passed it over in favor of others,: and that the plane trip was in part a ruse to obtain a particularly distinct photo and gratuitously show that Green was an ex-con. Even if not, the 3 X 5 cards show that Hallock was completely unable to make a positive identification immediately after the incident **B** in fact she was perfectly willing to

identify people who could not have had anything to do with the crime **B** and the documents could have been used to impeach her testimony later on.

The court erred in rejecting a number of other claims, including one based on counsel=s failure to effectively challenge dog tracking evidence and the State=s failure to disclose exculpatory evidence about it. The jury was told that the dog had never made a mistake in various training and certification procedures. An examination of training records showed the dog's poor performance plus expert testimony showed that under the circumstances there was no way to tell who or what the dog tracked.

The court also erred by denying claims alleging that counsel was ineffective for failure to seek to have juror Harold Guiles excused for cause because of his statement during voir dire that his niece had been murdered three years earlier, or for failure to use a peremptory challenge to strike him. The court erred in summarily denying a motion to interview jurors, especially when a strong inference was shown that one of them, probably Mr. Guiles, had engaged in misconduct. Defense counsel was ineffective because he did not confront Hallock at trial with police reports showing that this was a drug deal gone bad and that she, rather than the perpetrator, had been the one to tie Flynn's hands. Defense counsel failed to properly impeach a

state witness, Jerome Murray. The court erred by summarily denying a claim based on particular issues related to cross race identification. Also, a number of other claims are asserted to preserve them for future review.

ARGUMENT ON CROSS APPEAL

THE POSTCONVICTION COURT DID NOT ERR IN FINDING INEFFECTIVE ASSISTANCE OF COUNSEL UNDER ROMPILLA V. BEARD

The postconviction court found as follows:

> In sentencing the Defendant to death, the trial court found the following aggravating factor: Green was previously convicted of a violent felony. . . . Specifically, the trial court found that "the State however did establish beyond a reasonable doubt that the Defendant was convicted of another armed robbery on January 26, 1977, in the State of New York. This aggravating circumstance does exist." . . . .
>
> During the penalty phase on September 27, 1990, the State presented testimony from three witnesses pertaining to the prior violent felony conviction. Bob Rubin testified that he was a parole officer with the State of Florida Department of Corrections from 1977 to 1989. Mr. Rubin testified that he supervised the Defendant's parole on armed robbery that originated from the State of New York. . . . Mr. Rubin further testified that on March 2, 1978, the Defendant came to his office and advised that he needed some form of identification for employment purposes because he could not secure a birth certificate or any other substantial form of identification. . . . .
>
> Mr. Rubin testified that he suggested to the Defendant to register as a felon with the Brevard County Sheriffs Office, then he would be able to obtain necessary identification documents. . . . The State

> introduced into evidence a "Criminal Registration Form" which indicated that the Defendant was a convicted felon. . . . . Rusself Cockriel with the Brevard County Sheriffs Office testified to the Defendant's fingerprints on a fingerprint card taken in conjunction with registering as a convicted felon. . . . Daniel Kopper, a police officer in 1976 with the village of Albion in New York State, testified that he responded to the scene of the New York incident, and was later notified that the Defendant had [pled] guilty to robbery and was sentenced as a youthful offender. . . . After the jury returned an eight to four advisory recommendation for the death penalty, the Court ordered a pre-sentence investigation. The pre-sentence investigation reported "JUVENILE RECORD: none ascertained." The pre-sentence investigation listed under the Defendant's adult record an armed robbery from Albion, New York . . .

PC-R XXIV, 4064-77.[2] The Court further found that:

> The evidence presented to this Court in the post-conviction proceeding showed that on January 19, 1977, the Defendant [pled] guilty to "robbery in the third degree" in the State of New York, not armed robbery as found by the trial court in 1990 in this case. The robbery offense occurred in County of Orleans in New York on April 18, 1976. . . . At the time of committing the offense, the Defendant was eighteen years old. . . . On January 25, 1977, at the sentencing proceeding, Judge Hamilton Doherty pronounced the sentence:
>
> Well, the Court finds that you are eligible

[2]The PSI listed the New York offense under "Adult Record," as a first degree felony punishable by life for which the defendant was "adj. as youthful offender." The classification of the offense as a first degree felony punishable by life was never true of the plea or disposition.

for youthful offender treatment, and the conviction of robbery in the third degree is vacated and the finding of youthful offender is made. That may not sound like any big deal, but what that does is relieve you of a criminal record. You now have no criminal record in spite of the fact that this was a serious crime.

We're giving you that consideration because of your age. For your adjudication as a youthful offender, it's the judgment of this Court that you be, and you hereby are, sentenced to an indeterminate term not to exceed four years at the Elmira Reception - or an indeterminate term not to exceed four years under the supervision of the Department of Correctional Services of the State of New York, . . .

Mr. Parker, the Defendant's penalty phase counsel, testified at the evidentiary hearing that he made no efforts to verify the New York offense by obtaining the Defendant's court file from New York. Mr. Parker testified that the reason that he did not attempt to obtain the file was because the Defendant admitted to committing the crime. . . . .

Here, Mr. Parker knew that the State of Florida intended to use the New York offense as a prior violent felony conviction for aggravation. Yet, he completely failed to even attempt to obtain the file. As shown at the evidentiary hearing, the State could not obtain the file, only defense counsel could. Capital Collateral counsel was able to easily obtain the file. Defense counsel's only reason for not obtaining the file was because he remembered the Defendant informing him that he committed the offense.

In *Rompilla*, the United States Supreme Court held that even when a capital defendant himself has suggested that nothing in mitigation is available, a defense counsel is bound to make reasonable efforts to obtain and review material that counsel knows the

> prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial. This is not a situation where Mr. Parker was unaware that the State planned to use the New York offense case as aggravation. At the evidentiary hearing, Mr. Parker did not testify as to any reasoned strategic judgment in failing to investigate or obtain the file pertaining to the New York offense. Under the specific facts of this case, this Court finds that counsel's performance was deficient in failing to investigate or obtain the file pertaining to the New York offense.

Id.

In reviewing a claim of ineffective assistance of counsel under *Strickland*, the performance and prejudice prongs are mixed questions of law and fact subject to a *de novo* review standard, but the trial court's factual findings are to be given deference.

This case is either not significantly distinguishable from *Rompilla*, or to the extent that it is, it is an even more compelling case for relief. Although Mr. Parker raised an objection at the *Spencer* hearing due to the State=s failure to produce a certified copy of the judgment and sentence, as the *Rompilla* Court said, ACounsel=s obligation to rebut aggravating evidence extended beyond arguing it ought to be kept out.@ 125 S.Ct. 2465 n.5. The *Rompilla* Court pointed to the ease with which defense counsel could have examined the file of the prior conviction, the certainty that the prosecution would offer evidence of that conviction in the penalty phase, and the

usefulness of the information contained in the file. Here, as the court found, postconviction counsel easily obtained the file. PC-R XXIV, 4071. The effort and resources required to obtain the file involved only a minimal amount of postage and a perhaps a phone call or two. An issue in *Rompilla* was whether counsel made a strategic decision about how to deploy their limited time. The prior conviction in *Rompilla* was the result of a trial; here, the entire record of the New York case comprised short transcripts of a plea and disposition hearing, along with a few other documents such as a PSI which questioned whether Green was even involved in the offense. Green=s entire New York case file can be read in less than half an hour. Cf. *Rompilla*: AThe ease with which counsel could examine the entire file makes application of this standard correspondingly easy. Suffice it to say that when the State has warehouses of records available in a particular case, review of counsel=s performance will call for greater subtlety.@ 125 S.Ct. 2465 n.4.

Defense counsel here knew that the State would be relying on the New York case. In fact, the entirety of the prosecution=s penalty phase evidentiary presentation was devoted to the New York case. While there was important information about mitigation in the prior offense case file both here and in Rompilla, there was no contention in *Rompilla* that he had not been convicted of the prior violent offenses. In fact, the

Rompilla Court rejected the government=s argument that examination of the file would have been fruitless because it would only confirm the fact of the prior convictions. Here, the prosecution contended that Green had a prior conviction for armed robbery, a contention that was ultimately accepted as true by the sentencing judge. An examination of the file would have proven that contention to be false as a matter of historical fact.

Mr. Parker admitted that he made no attempt to verify the New York offense by obtaining or investigating the prior case file. The reason he gave for his failure to do so was that, according to him, Green admitted committing the crime.[3] The express holding of *Rompilla* is that, Aeven when a capital defendant=s family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.@ 125 S.Ct. 2460.

The only evidence of tension between Crosley Green and Mr. Parker reflected Green=s concern about the progress of his case.

[3]This is not conceded, but in view of the holding of *Rompilla*, the accuracy of this statement does not affect the disposition of this claim.

There was no lack of cooperation. By contrast, the relationship between Rompilla and his lawyers was stormy at best. The Court noted that Rompilla=s contributions to any mitigation case were Aminimal.@ He walked out on them when they attempted to speak to him about the subject, and was even actively obstructive by sending them on false leads. Even so, the Court found that counsel=s failure to examine the file could not be excused by the conduct of the client. Here, there was no unhelpful conduct.

Mr. Parker conducted ***no*** independent investigation of Crosley Green=s New York case. In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), the Court stressed that defense counsel's investigations "should comprise efforts to discover all reasonably available mitigating evidence and *evidence to rebut any aggravating evidence that may be introduced by the prosecutor*." *Id*. at 2537 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93 (1989) (emphasis added). Moreover, the Court found that Rompilla=s lawyers had breached their obligations under the ***1982*** guidelines:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to

investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty."

1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). The Court described this statement as being put Ain terms no one could misunderstand in the circumstances of a case like this one.@ The Court also cited the 1989 Guidelines, which imposed a Asimilarly forceful directive@ that required counsel to Amake efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports.@ Guideline 11.4.1.D.4 (1989). This guideline was promulgated after Rompilla=s trial. However it was in effect at the time of trial here. In particular, one of the first steps counsel should take as part of a "thorough investigation of the defendant's background" is to seek "reasonably available" records about the defendant's history, including records about his "educational history," his "prior adult and juvenile record," his "prior correctional experience" and his "medical history." ABA Guideline 11.4.1(D)(2)(c)-(d) (cited in *Wiggins*, 123 S.Ct. at 2537). Referring to ABA Guidelines, the Court noted that among those topics that should be considered for presentation are ". . . prior adult and juvenile correctional experience . . . " *Id*. (citing 1989 ABA Guidelines 11.8.6, at 133). The ABA Guidelines advise that counsel should "seek necessary releases for securing confidential records[.]" ABA Guidelines ' 11.4.1(D)(2)(d). Collateral counsel was able to obtain the New York file through the mail. Defense counsel

could and should have done the same. The prosecutor=s arguments in these proceedings that he did not know what was in the New York file because the authorities there would not give him access to it simply highlights the fact that defense counsel is in a better position to investigate his client=s background.

Although the court rejected the argument that the New York offense was not a conviction, the court still found prejudice.

> [P]rejudice is still manifest because the jury heard that the Defendant was convicted for a prior "armed" robbery and sent to prison. The judge also made the finding that the Defendant was convicted of a prior "armed" robbery. The bulk of the State's penalty phase case was devoted to this prior New York conviction. The prejudice is that for an "armed" robbery conviction, the Defendant had to be "armed with a deadly weapon," threatened "immediate use of a dangerous instrument," or displayed a firearm. N.Y. Penal Law Â' 160.15. In the subject case, the State argued in the penalty phase that the Defendant displayed a firearm in robbing and kidnapping Kim Hallock and Chip Flynn. (See Exhibit "C," pgs. 112-113, 116). The fact that the jury was left with the false impression that the Defendant had been convicted of a prior offense in which he robbed someone with a firearm, similar in nature to the crime charged in this case is highly prejudicial. The difference in a lay person's mind between an "armed robbery" and a robbery is substantially different. This Court recognizes that both are, as a matter of law, violent felonies and count as aggravators under our death penalty law; however, the difference in the finder of fact's mind cannot be overlooked. The trial judge even found that the Defendant was convicted of an armed robbery which was an erroneous finding of fact.

> Had Mr. Parker received the New York file, he would have found information regarding the crime to which the Defendant [pled], and would have found information that could have mitigated the New York conviction. For instance, there was a substantial identification question, the co-defendant's case was nolle pressed for lack of evidence, and the Defendant was in New York as a migrant worker with no family or friends to help him obtain a release from jail. There is information in the New York file that the Defendant pled to get out of custody and resolve the case. There was a real question if the Defendant was ever involved in the New York crime.
>
> This Court finds that the failure to investigate, obtain, and review the New York file constituted deficient performance under both *Strickland* and *Rompilla*, and the failure to do this was sufficiently prejudicial to the Defendant in the penalty phase of this case to warrant a new penalty phase proceeding.

PC-R XXIV, 4076-77.

The jury was told and the trial judge found that Crosley Green had been convicted and sent to prison for armed robbery. That is also what he had been convicted of in this case, a point the prosecutor argued to the jury and the judge. It was simply untrue. In order for Mr. Green to have been guilty of robbery in the first degree he would have to have caused "serious physical injury," been "armed with a deadly weapon," threatened "immediate use of a dangerous instrument," or displayed a firearm. N.Y. Penal Law ' 160.15 (McKinney 1987). Robbery in the third degree requires only that one "forcibly steals

property." N.Y. Penal Law ' 160.05 (McKinney 1987). He originally pled to a third degree robbery, which does not involve the use of a weapon or even actual force, and the conviction for that offense was vacated a week later.

If counsel had examined the file he would have found a New York Parole Report prepared by Officer V. L. Stevenson which described the circumstances of the offense this way:

> This lad is now confined as a result of his allegedly participating in the robbery of a service station while armed with a weapon. The instant offense is alleged to have occurred on 4/18/76 when the Kendall all night gas station located on West Avenue in Albion, New York was robbed of about $70. This youth and his co-defendant Hardy supposedly robbed the station but this lad has denied from the beginning that he [had] any involvement whatsoever in the crime. According to the youth, Hardy was released on bail and shortly thereafter was arrested with two other individuals for an additional robbery at which time he was placed on probation for a period of five years. Strangely enough, in this youth's probation report, it states that the district attorney felt that the evidence against co-defendant Hardy was insufficient for the Grand Jury to return an indictment and dismissed all charges against him. There are no real details of the instant [offense], there are never any indications that he was identified by anyone and he apparently was finally persuaded to plead guilty after spending about ten months in County Jail and being a migrant in the area, he had no one to testify in his behalf. He still denies any knowledge of the offense whatsoever and from the writer's point of view, it is somewhat believable. He had only been known to the courts on one other occasion.

PC-R XV, 2246-49. As the postconviction court found, the Afact that the jury was left with the false impression that the Defendant had been convicted of a prior offense in which he robbed someone with a firearm, similar in nature to the crime charged in this case is highly prejudicial. The difference in a lay person's mind between an "armed robbery" and a robbery is substantially different.@ Both the deficiency and prejudice prongs of Strickland have been established, and the court=s decision to grant relief should be affirmed.

ARGUMENT ON APPEAL

ARGUMENT I

THE POSTCONVICTION COURT ERRED IN FINDING THAT GREEN=S NEW YORK YOUTHFUL OFFENDER ADJUDICATION WAS A PRIOR CONVICTION UNDER THE FLORIDA DEATH PENALTY STATUTE.

A youthful offender adjudication in New York is not the same thing as a youthful offender conviction in Florida. NY Crim.Pro.L. ' 720.35 provides that: AA youthful offender adjudication is not a judgment of conviction for a crime or any other offense. . .@ NY Crim.Pro.L. ' 720.10 defining terms and procedures provides:

> 4. "Youthful offender finding" means a finding, substituted for the conviction of an eligible youth, pursuant to a determination that the eligible youth is a youthful offender.
> 5. "Youthful offender sentence" means the sentence imposed upon a youthful offender finding.
> 6. "Youthful offender adjudication". A

> youthful offender adjudication is comprised of a youthful offender finding and the youthful offender sentence imposed thereon and is completed by imposition and entry of the youthful offender sentence.

The commentary to this section provides:

> The youthful offender procedure authorized in this article provides an avenue for the court to exercise discretion upon conviction of certain young offenders by: a) relieving the offender of the lifelong stigma of a criminal conviction; and b) eschewing imposition of certain mandatory sentences of imprisonment. This ameliorative device has existed by statute in one form or another in New York for over one half a century (see L.1944, c. 632).
>
> Briefly, the present procedure covers juvenile offenders and youths who are charged as adults with crimes committed between their 13th and 19th birthdays. They are tried as "apparently eligible youths" under normal CPL procedures, with one exception for privacy (see CPL ' 710.15) and, upon conviction, the court determines eligibility for youthful offender treatment. If a youthful offender finding is made, the conviction is vacated and replaced by that finding. Sentence is then imposed under a special provision of the Penal Law (' 60.02). The youthful offender finding and sentence merge into a "youthful offender adjudication" (see subd. 4 of this section), instead of a judgment of conviction, which is maintained as a confidential record (see CPL ' 720.35). If the youthful offender finding is not made, the criminal action continues on to its normal conclusion (see CPL ' 720.20 [4]).

Peter Preiser, *PRACTICE COMMENTARIES*, 1995 Main Volume, NY Crim.Pro.L. ' 720.10. *Also see* William C. Donnino, *PRACTICE COMMENTARY*, 1997 Main Volume, ' 60.02 Authorized disposition;

youthful offender:

> Certain youths convicted of a crime which was committed when they were less than 19 years of age may have that conviction set aside and a "youthful offender adjudication" substituted, with the effect that such a youth does not stand convicted of a crime and the records of the transgression are sealed [see CPL article 720]. That extension of grace to the young offender is designed to facilitate the youth's rehabilitation.

Id. AThe primary advantage of such treatment is the avoidance of the stigma and practical consequences which accompany a criminal conviction.@ *People v. Cook*, 338 N.E.2d 619 (N.Y. 1975) *citing People v. Shannon,*139 N.E.2d 430 (N.Y. 1956); *Practice Commentary*, McKinney's Cons. Laws of N.Y., Book 11A, CPL art. 720; *People v. J. K.*, 1987, 137 Misc.2d 394, 520 N.Y.S.2d 986 (Civil defendant's youthful offender adjudication was not judgment of conviction for a crime or any other offense, and thus was not relevant to witness' credibility); *Gold v. Gartenstein*, 1979, 100 Misc.2d 253, 418 N.Y.S.2d 852 (Youthful offender treatment is not a judgment of conviction for crime); *People v. Y. O. 2404*, 1968, 57 Misc.2d 30, 291 N.Y.S.2d 510 (No youth adjudicated as youthful offender can be denominated a criminal by reason of such determination, nor can such determination be deemed a conviction).

The New York court followed this procedure. Crosley Green's conviction was vacated, and the result of the proceeding was

that he was not convicted of a crime. The postconviction court found:

> The evidence presented to this Court in the post-conviction proceeding showed that on January 19, 1977, the Defendant [pled] guilty to "robbery in the third degree" in the State of New York, not armed robbery as found by the trial court in 1990 in this case. The robbery offense occurred in County of Orleans in New York on April 18, 1976. . . . At the time of committing the offense, the Defendant was eighteen years old. . . . On January 25, 1977, at the sentencing proceeding, Judge Hamilton Doherty pronounced sentence:
>
> Well, the Court finds that you are eligible for youthful offender treatment, and the conviction of robbery in the third degree is vacated and the finding of youthful offender is made. That may not sound like any big deal, but what that does is relieve you of a criminal record. You now have no criminal record in spite of the fact that this was a serious crime.
>
> We're giving you that consideration because of your age. For your adjudication as a youthful offender, it's the judgment of this Court that you be, and you hereby are, sentenced to an indeterminate term not to exceed four years at the Elmira Reception - or an indeterminate term not to exceed four years under the supervision of the Department of Correctional Services of the State of New York . . .

A youthful offender adjudication in New York is analogous to a juvenile delinquency adjudication in Florida. A juvenile delinquency adjudication cannot be used to support the prior violent felony aggravator. *Merck v. State*, 664 So.2d 939 (Fla.

1995) (Juvenile adjudication was not a "conviction" within meaning of statute making a prior conviction of a capital felony or felony involving the use of or threat of use of violence to a person an aggravating circumstance supporting imposition of death penalty, and trial court's consideration of prior juvenile adjudication rendered imposition of death penalty invalid as inclusion of juvenile adjudication was not mere surplusage. . . F.S.1993, '' 39.053, 921.141(5)(b).) Also *Henyard v. State*, 689 So.2d 239 (Fla. 1996)(same); *Williams v. State*, 707 So.2d 683 (Fla. 1998) (confinement to juvenile facility pursuant to adjudication of delinquency is not "sentence of imprisonment" as contemplated under statutory aggravating circumstance). In *Merck*, the court said: "We find the inclusion of this juvenile adjudication similar to the erroneous inclusion of community control as an aggravating factor in *Trotter v. State*, 576 So.2d 691 (Fla. 1990). As noted in *Trotter*, penal statutes must be strictly construed in favor of the one against whom a penalty is imposed. *Id*. at 694." *Trotter* was decided December 20, 1990. Crosley Green's final sentencing hearing took place on February 8, 1991.

The *Merck* holding is also consistent with cases predating the trial in this case. In *J.B.M. v. State*, 560 So.2d 347 (Fla. 5th DCA 1990) the court held that a juvenile who committed a delinquent act that would be a felony if committed by an adult

did not, when subsequently found to be in possession of a firearm, violate section 790.23(1), Florida Statutes. Also: *M.W.B. v. State*, 335 So.2d 10 (Fla. 1st DCA 1976) (three-year minimum mandatory sentence for a "conviction" of specified crimes while in possession of a firearm is inapplicable to juvenile proceedings); *Jackson v. State*, 336 So.2d 633 (Fla. 4th DCA 1976) (prior adjudication of delinquency does not constitute a "conviction" for purposes of impeachment).

Merck itself dealt with an out-of-state offense. The *Merck* Court noted that the prior disposition in question "was a juvenile adjudication, not a ›conviction' as defined under North Carolina or Florida statutes. . . . [T]he juvenile adjudication was not a conviction within the meaning of section 921.141(5)(b), Florida Statutes (1993). This is expressly mandated in section 39.053, Florida Statutes (1993), and section 7A-638, General Statutes of North Carolina (1993)." The postconviction court here erred by relying on federal cases dealing with the federal sentencing guidelines. The court erred by not applying New York=s interpretation of its own law as well as *Trotter* and progeny.

Moreover, any argument that the underlying elements and facts of the offense should control the way Florida classifies it would have been stronger in *Merck* than here. In *Merck*, the prosecution introduced the testimony of the victim of the North

Carolina shooting as well as that of the investigating officer. Defense counsel in *Merck* apparently did not realize that there was an issue as to the status of the disposition of the North Carolina charge and did not object to this testimony until the State sought to introduce the North Carolina judgment of delinquency. Thus, the *Merck* Court had a full record of the underlying facts of the offense before it. Here, the State introduced the testimony of the officer who arrested Mr. Green based on information received, not on anything he witnessed, along with the testimony of Crosley Green=s Florida probation officer,[4] who likewise had no personal knowledge of the New York offense. The *Merck* Court found that both the receipt of that (otherwise competent) evidence and the trial court=s ruling that the out-of-state disposition constituted a prior violent felony under '921.141(5)(b), Fla.Stat. were error. Here, the sentencing court could only rely on representations by the State (including the Florida PSI) regarding the disposition of the New York case, because the State never offered any competent evidence about the underlying facts.

ARGUMENT II

THE STATE'S FAILURE TO DISCLOSE EXCULPATORY INFORMATION ABOUT A PRIOR OFFENSE VIOLATED BRADY, AND ITS MISLEADING PRESENTATION TO

[4]He had been placed on probation as the result of a cocaine possession conviction in Florida.

THE PENALTY PHASE COURT VIOLATED GIGLIO.

The State knew that the status of the purported prior offense was a debatable issue before the trial began. This fact is demonstrated by a series of letters exchanged between Assistant State Attorney Chris White, his paralegal, and various New York authorities:

> As we discussed the other day, this office is currently prosecuting Crosley Alexander Green for first degree murder. (See enclosed copy of indictment). In considering the appropriate sentence for this offense, and specifically, whether the death penalty should be imposed, the judge and jury are to consider whether the defendant has ever been convicted of a violent felony. (Copy of statute enclosed).
>
> Upon calling your Clerk's Office for certified charging document and any sentencing documents my paralegal was told that the file was sealed because Mr. Green was a juvenile at that time. If you can obtain an order authorizing the above referenced file, the Clerk will send us the requested documentation.
>
> I appreciate your willingness to help in this matter. As I indicated, the trial is set for August 27, 1990, so if you could accomplish this in the next two weeks it would allow proper disclosure of the documents to the defense. Thank you for your cooperation.

Letter from Chris White to James Punch, District Attorney, Albion, New York, dated August 3, 1990. PC-R XXXI, 5889-5931.

> Dear Madam:
> Pursuant to our telephone conversation of this date, I have reviewed the N.Y.S. Criminal Procedure Law to determine if there

> was any method by which I could provide you with a Certificate of Conviction relative to the above captioned matter. In New York State youthful offender adjudication is not considered a conviction.
> I am attaching herewith a photo copy of the relevant section of law which refers to this particular matter. I have not found a basis under which I could provide you with a certificate indicating adjudication.
> I am sorry for any inconvenience this may have caused.

Letter from Milford L. Phinney to the Florida State Attorney=s office dated September 7, 1990. *Id.* Thus the State knew that Green=s youthful offender adjudication did not constitute a conviction under New York law prior to the penalty phase.

> Dear Mr. Phinney:
> Pursuant to our telephone call earlier this date, I am faxing to you with this letter copies of our statute and of a recent decision by the Florida Supreme Court indicating that a juvenile conviction (adjudication of delinquency) can be considered as prior convictions for purposes of proving a prior conviction of a violent offense.
> As is indicated by the case and by the statute, the relevant fact is that he was adjudicated a youthful offender for a violent felony. I can only properly prove this fact by a certified copy of the actual adjudication as a youthful offender.
> I appreciate your willingness to take the time to readdress this matter with Judge Dadd. If I can assist you in any way please call me.

Letter from Chris White to Milford L. Phinney, dated September 19, 1990. *Id*.

The penalty phase took place September 27th. Instead of a

certified record, the State put on the testimony of three witnesses, none of whom had any direct knowledge of the status of Mr. Green's prior conviction. This was the entirety of the state's case to the jury.

After the penalty phase but prior to the final sentencing hearing, the State received the following letter:

> This letter is in reply to yours of September 14[?], 1990 wherein you request all available information relative to this former releasee's prior criminal history. Relative thereto, and our subsequent telephone conversation of November 29, 1990. please be advised that Mr. Green was Adjudicated a Youthful Offender on January 25, 1977 and was sentenced to an indeterminate term of 4 years by Judge Hamilton Doherty of the Orleans County Court. However, contrary to what I stated to you during our conversation, given the fact that he was Adjudicated a Youthful Offender, I am unable to release to you the documents concerning the underlying indictment and conviction for which the Youthful Offender adjudication was ultimately substituted.
>
> Mr. Green was paroled on March 6, 1980 and remained under the jurisdiction of this agency until December 24, 1980, when he was discharged.

Letter from William K. Altschuller to Christopher R. White, dated December 3, 1990. *Id.*

In closing argument to the jury, the prosecutor argued:

> The first [aggravating circumstance] that I'd ask you to consider is whether we have shown that the defendant has previously been convicted of a felony involving the use or threat of use of violence, and here in this case obviously this morning I'm sure all

> of you realized that the testimony about the robbery in New York was in order to satisfy that requirement; and we submit to you that it is extremely significant that early in his life this defendant had, in fact, already committed a robbery in New York for which he was convicted and sentenced to prison as a youthful offender . . . .

Dir. XII, 2284.

The prosecutor argued the purported New York conviction in his sentencing memorandum. Dir. XV, 2819-20. In his oral argument in favor of a death sentence before the judge on November 7, 1990, he again urged the court to find that the New York offense constituted a prior violent felony conviction. Dir. XIII, 2378-80. The final sentencing hearing in this case took place in open court on February 8, 1991. At that time, without correction or comment from the State, the Court found that AThe State, however, did establish beyond a reasonable doubt that the defendant was convicted of another armed robbery on January 26, 1977, in the State of New York.@ Dir. XIII, 2440. That finding was factually false, and it obviously affected the judgment of the Court. Crosley Green was never convicted of an armed robbery in New York and whatever conviction he did have was vacated long before this trial.

A conviction should be invalidated and a new trial granted when a prosecutor knowingly uses false testimony and there is any reasonable likelihood that the false testimony could have

affected the judgment of a jury. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 341-42, 79 L.Ed. 791 (1935); *Tompkins v. Moore*, 193 F.3d 1327, 1339 (11th Cir. 1999) (For *Giglio* purposes, "the falsehood is deemed to be material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Id*. (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976))). In *Napue v. Illinois*, the Supreme Court held that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id*. at 269, 79 S.Ct. at 1177; *United States v. Anderson*, 574 F.2d 1347, 1355 (5th Cir. 1978) (A conviction cannot stand if the prosecution passively but knowingly allowed false evidence to go uncorrected or allowed the jury to be presented with a materially false impression). The materiality prong is easier to establish with *Giglio* claims than with *Brady* claims. For *Giglio* purposes, "the falsehood is deemed to be material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Alzate*, 47 F.3d at 1110 (quoting *Agurs*, 427 U.S. at 103, 96 S.Ct. at 2397). These principles apply to the penalty phase as

well as the guilt innocence phase of a capital trial. *E.g.*, *Craig v. State*, 685 So.2d 1224, 1229 (Fla.1996).

By eliciting evidence designed to get around his lack of a judgment and sentence, by repeatedly arguing to the jury and the court that Crosley Green had a criminal conviction, and by standing silent when the PSI reported both a criminal conviction and the lack of a juvenile record, the prosecutor knowingly presented false or misleading evidence and passively but knowingly allowed false evidence to go uncorrected.

Brady

There are three elements of a *Brady* claim: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Way v. State*, 760 So.2d 903, 910 (Fla. 2000) The Supreme Court has held that the [prosecutor's] duty to disclose such evidence is applicable even though there has been no request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 [, 96 S.Ct. 2392, 49 LED.2d 342] (1976). The State's failure to disclose any of the information about the status of the New York offense which was contained in the correspondence cited above violated these principles.

ARGUMENT III

DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE BY FAILING TO INVESTIGATE AND PRESENT AVAILABLE MITIGATION.

Penalty phase ineffective assistance was alleged in Claims VI and VII of the motion for postconviction relief which addressed the purported New York prior conviction and failure to present available mitigation respectively. The postconviction court conducted an evidentiary hearing on these claims. Although the court granted relief under *Rompilla*, the court did not find that counsel had provided ineffective assistance by failing to investigate and present available mitigation. Crosley Green provisionally seeks review of that finding. Ineffective assistance is a mixed question of law and fact which is reviewed *de novo*, with deference to the court=s findings of primary, historical fact and credibility determinations.

Trial Proceedings

About three weeks elapsed between the guilt and the penalty phases: September 5 to September 27, 1990. The penalty phase had been set on September 12, but the record reflects that the there were no courtrooms available, so the case had to be continued for a short period of time. Dir. XII, 2-4. Knowing that the case would be continued, defense counsel made an unopposed motion for the appointment of a mental health expert; otherwise, the record does not reflect that counsel requested

any more time to prepare for the penalty phase. It is also apparent from the record that the Court intended that the penalty phase be conducted either immediately or very shortly after guilt phase.

The entirety of the prosecution=s evidentiary presentation to the jury in the penalty phase was devoted to showing that Crosley Green previously had been convicted of a 1977 armed robbery in New York. Defense counsel called two witnesses to offer background mitigation, Shirley (Allen) Green White and Damon Jones. Ms. White talked briefly about the murder/suicide of Crosley Green=s parents and the defendant=s son, and Mr. Jones described an occasion where the defendant saved him from drowning. The entirety of the defense evidentiary presentation excluding cross examination and pleasantries consisted of about eight pages of trial transcript. Dir. XII, 2219-29. As Mr. Parker said, A[I]t was relatively short.@ PC-R III. Counsel argued insufficiency of the evidence to sustain the HAC aggravator, but not the prior violent felony aggravator. Defense counsel=s closing argument regarding background mitigation occupies one page of transcript about the murder/suicide and drowning incident, Dir. Vol. XII 2312-13, and twelve lines about the defendant=s son. *Id*. 2314. His total argument comprises twelve pages of trial transcript. The final sentencing hearing in this case took place in open court on

February 8, 1991. The trial judge found four aggravating factors: (1) Green was previously convicted of a violent felony; (2) the capital felony was committed while Green was engaged in kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, and cruel, and no mitigation. The court agreed that the contemporaneous convictions for kidnapping and robbery could not be used to support the prior violent felony aggravator because doing so would amount to improper doubling. Likewise, the robbery convictions and pecuniary gain aggravator merged. On appeal, this Court struck the heinous, atrocious and cruel aggravator. The Court then found the death sentence proportional "in light of other cases, the three remaining valid aggravating circumstances, and no mitigators." *Green v. State*, 641 So.2d at 394.

Defense Counsel=s postconviction evidentiary testimony.

Crosley Green=s defense attorney at trial was Mr. John Robertson Parker. He began his legal career with the State Attorney=s Office, Eighteenth Circuit, advanced through the ranks there, went into private practice for a period of time during which he was appointed to represent Mr. Green in this case, and later went back to the State Attorney=s Office, where he remains to this day. He had some experience prosecuting first degree murder cases. Crosley Green=s case was the first capital murder

case he ever defended. He recalled attending one capital defense seminar prior to this case.

His private practice was a solo practice and a large part of his business consisted of court appointments. PC-R III. He was assisted by two individuals working part time, and for this case he secured the appointment of an investigator, Robert Cook. PC-R II, 305. Mr. Cook was not given any specific assignments, with regard to background mitigation. Mr. Parker was the only one on the defense team who had any capital case experience. *Id*. 307.

Mr. Parker did not request the appointment of co-counsel. When asked why, his response was that AI thought I was a pretty damn good lawyer.@ PC-R III, 388. He could not recall whether he was aware that the ABA Guidelines recommended the appointment of co-counsel in capital cases at the time of trial. Id. 393. Going into the trial, Mr. Parker was fairly confident that the case would not result in a penalty phase. PC-R III, 471. During the course of the trial his view on that point changed Adramatically.@ *Id*. There were about three weeks between receipt of verdict and the penalty phase (September 5 to September 27, 1990). Mr. Parker did not ask for a continuance to prepare for the penalty phase during that time. *Id*.

Mr. Parker did not recall obtaining *any* records regarding Crosley Green=s background in preparation for the penalty phase.

PC-R III, 478-79. Mr. Parker reviewed his own attorney fee affidavit. It reflected the following times spent speaking to potential background mitigation witnesses: two hours telephone conference with Damon Jones, a two hour office conference with Selestine Peterkin, two tenths of an hour a piece speaking with a Fred Vickers and an M. Fields, and a one hour conference with the client at the jail on the day before the penalty phase. PC-R III, 477-78. That adds up to three hours and twelve minutes. Mr. Parker described a conversation where he Asat down with Crosley@ and told him AThis is what you need to do. You need to tell me who can I go to . . . I need some folks that are going to say good things about you.@ Green provided the names of some family members and others who might help. Of those, two were unwilling to help. (Mr. Parker thought these were the Fred Vickers and M. Fields noted above.) Selestine Peterkin had testified briefly for the defense in the guilt phase. Dir. 1718. According to Mr. Parker she laughed inappropriately when he attempted to call her to the stand, so he determined not to use her as a witness. *Id*. 335. He was therefore left with only the two witnesses he did call. According to his attorney fee affidavit, the only conference Mr. Parker had with Crosley Green in preparation for the penalty phase was a one hour consultation at the jail on September 26, the day before the penalty phase took place.

Collateral counsel offered Professor David Dow, a member of the University of Houston law faculty and Co-director of the Texas Innocence Network, as an expert attorney in capital defense. PC-R IX, 1296 et. seq. Confronted with Mr. Parker=s explanation that he did not request co-counsel because he thought he was a good lawyer, Professor Dow said that the ABA guidelines Astate quite explicitly that death penalty trials are different from other criminal trials, even other serious felonies. The skills that are required as a death penalty lawyer are, therefore, similarly distinctive.@ *Id*. 1316. Based on Mr. Parker=s testimony at his deposition and at the evidentiary hearing, Professor Dow=s opinion was that Mr. Parker had not satisfied the 1989 ABA guidelines legal education requirement that the lawyer attend sessions that deal specifically with the defense penalty cases. ABA Guideline 5.1(1)(A) Lead trial counsel.[5] Dow said that Supreme Court jurisprudence and the Guidelines recommend that the punishment phase investigation should start immediately upon counsel=s appointment. *Id*. 1325 (referring to ABA Guidelines 11.4.1).

One of the reasons the punishment phase investigation should begin early is that, as in this case, Mr. Green=s family was spread over a wide geographical area. *Id*. As a practical

[5]Dow generally confined his references to the 1989 Guidelines.

matter, the punishment phase investigation is more difficult that the guilt/innocence phase investigation. *Id*. 1326. The prudent lawyer realizes that, in most death penalty cases, it is the punishment phase investigation that really matters. *Id*. Moreover, even where the lawyer feels confident about the guilt/innocence phase, he needs to know what the penalty phase evidence will be in picking a jury. *Id*. Based on his review of Mr. Parker=s billing records, Professor Dow said that Ahe didn=t begin to do any of that until the trial was over.@ *Id*. 1324.

Reviewing Mr. Parker=s billing record, and giving him the benefit of the doubt, Professor Dow estimated that Mr. Parker spent less than ten hours investigating mitigation. Professor Dow=s opinion was that the amount of time spent was Agrossly inadequate@ and failed Ato even come even remotely close to objective standards of reasonableness.@ PC-R IX, 1331. In addition to *Wiggins* and the Guidelines, his opinion was based on *Strickland, Williams v. Taylor*, *infra*, his experience of having testified at ineffective assistance of counsel hearings in both state and federal courts, and also on personal experience.

The Guidelines 11(4)(2) require that counsel maintain close contact with the client throughout preparation of the case. It appeared from Mr. Parker=s billing records that he had Avery little@ contact with his client. PC-R IX, 1338. Professor Dow said: AHe=s way outside the norm, because he never conducted an

initial interview of sufficient length.@ Professor Dow said that ***Wiggins*** and ***Williams v. Taylor*** Acondemn the idea of waiting for the [the client=s] family members to come to you.@ ***Id.*** The job of the lawyer is to go find them. Moreover, relationships with the family members who are facing the death penalty are not relationships that are easily formed. The Guidelines specifically call for mitigation experts for two reasons: One is the time required to investigate mitigation; and Two is the skills required for the work are skills that criminal defense lawyers normally do not have, unless they have substantial penalty phase defense experience. ***Id***. at 1348-49. **Mitigation Presented at the Evidentiary hearing.**

Professor **Marjorie Hammock** has been an instructor in the Department of Social Work at the University of South Carolina, Benedict College since 1999; and maintains an independent practice as a social work consultant. PC-R IV, 657-58. At the time of the hearing she had spent about 100 hours working on this case. She reviewed the defendant=s correctional records, school records, medical records, New York State correctional records, and similar records pertaining to his family members. She interviewed the defendant, all of his living siblings, some aunts and uncles, a teacher, and conducted follow up interviews. ***Id***. 684-85. All of this was typical of the work that would be done in conducting what she termed a bio-psychosocial

assessment. *Id.* This is a term of art used to described a more comprehensive evaluation than a social history, but it deals with the same general kind of information and analytical interpretation of it. *Id*. 716.

Crosley was born in 1957. His father was Booker T. Green, and his mother was Constance Tomasina Green. Shirley Green White is the oldest sister. Hamp Green is the defendant=s younger brother. Selestine Juanita Peterkin is Crosley Green=s older sister. With regard to Crosley Green, Ms. Hammock observed a pattern of frequent exposure to violence both at home and in the community. *Id*. 692. The defendant witnessed his father physically and verbally abusing his mother. Early on, he assumed the role of protector with regard to his sisters and peacemaker with regard to his parents. This was corroborated by other members of his family.

According to Shirley Green White, Crosley was the one family member who was close to sister Rosemary, who suffered multiple disabilities including mental retardation and seizures. The rest of the family verbally abused Rosemary, and she had no friends. PC-R IV, 626. Crosley alone was very kind to Rosemary; he had a way of making her laugh. AIt=s **B** it=s the way he would tickle her. She would burst out and just laugh and Papa [Crosley Green] laughing . . . you see a teardrop out of his eye sometimes.@ *Id*.

Most of the older children received very harsh punishment. *Id*. 702. They reported being beaten with hoses by both the father and the mother until they had welts. *Id*. According to Hamp Green, the mother=s methods of disciplining the children involved the use of switches, extension cords, water hoses, and confinement in a closet. *Id*. 562-63. Rosemary was left in the closet overnight. *Id*. Selestine Peterkin also recalled beatings with an extension cord and a paddle. *Id*. 665. The beatings left welts and bruises. *Id*. 562, 665. Some of them left permanent scars. *Id*. 711. The beatings and arguments between the parents occurred every week. *Id*. 562. Although the mother administered the beatings more frequently, when the father did become involved it was usually severe and out of a great deal of anger. The father was described as Aout of control violent when he was drinking.@ *Id*. 711. Hamp Green confirmed that the father drank a lot and that this contributed to the conflicts in the family. *Id*. 562.[6] Selestine Peterkin recalled an instance where she witnessed the father beat the mother. Her mother suffered a black eye, possibly a chipped bone, and was treated at the hospital. *Id*. 660. Domestic violence culminated in the murder/suicide of Crosley Green=s parents. According to

[6]The court reporter noted that Hamp Green became Avisibly upset@ at this point in his testimony.

Ms. Hammock, the fact that Crosley Green was not present for the murder/suicide did not diminish the trauma he experienced, rather it impacted him Aperhaps even more so, because . . . he had the self appointed sense of his role of protector of his mom and also calming down his father.@ *Id*. 693.[7] Ms. Hammock described some of the professional literature dealing with he effects of exposure to violence. Subjects become suspicious of everyone and everything around them. It interferes with both academic and social maturity. Its negative effects were demonstrated by alcohol abuse and dependence and criminality in the defendant and other members of his family. *Id.* 695. This pattern extended back over three generations. Lack of satisfactory work histories, failure to complete high school and emotional disorders were all consistent with this pattern. *Id*. 695-96. Hamp Green has attempted suicide twice. Selestine has continuous medical problems that may have an emotional component. *Id.* 715.

Ms. Hammock described the poverty which the defendant experienced as a child. *Id*. 698. Their housing was extremely

[7]Although trial counsel presented the fact of the murder/suicide to the court, he was unable to present the testimony described here in rebuttal to the State=s argument that the mitigating effect of the murder/suicide was lessened because the defendant was not present when it happened. In any event, according to Selestine Peterkin, Crosley was able to attend the funeral, and permanently came back to Florida a month or two later after the murder/suicide. *Id*. 663.

poor and especially transitory because they were migrant workers, often did not have enough money to pay rent. Although the father worked from sun up to sundown and the mother carried a second job, there was never enough money to meet even basic needs. According to Hamp Green, all the children worked in the groves. *Id*. 553. They were paid as a family, and the parents kept the money. *Id*. The defendant did this willingly because he saw his role as being important in contributing to the family income. *Id*. 698. The children wore hand me down clothing and frequently did not have anything clean to wear. *Id*. 558.

Generally, the only thing the whole family did together was work in the groves. *Id*. 557. The mother was usually at the bar into the wee hours of the morning. *Id.* 707. Both parents also had extramarital relationships that kept them away from their children. *Id.* 703. Ms. Hammock=s over-all sense of the defendant=s family was one of Aoverwhelming abuse and neglect.@

The defendant began drinking around the age of twelve. *Id*. 709. Later his substance abuse expanded to include marijuana and cocaine, LSD, quaaludes, uppers and downers (id. 182), Aalmost everything and anything@. *Id.*

At the time of Crosley Green=s trial, Hamp Green was in custody in Fort Pierce. PC-R IV, 574. No one from the defense team contacted him. He would have been willing to help the

defendant. *Id*. Shirley Green White did not meet with trial counsel, either at her home or his office. *Id*. 636-38. She did not receive any correspondence from him. *Id*. 638. He spent about ten minutes with her in the courthouse. *Id*. The purpose of that conversation was to enlist her aid in persuading Crosley Green to take a plea deal. She did not recall being asked about any of the matters described above. *Id*. She did testify at the penalty phase. That testimony comprises only five pages of transcript. She said that coming forward and talking about her family life was very hard. *Id*. Selestine Peterkin recalled meeting with defense counsel twice prior to trial. *Id*. 666. She heard what Mr. Parker said during the evidentiary hearing testimony about her laughing when she talked to him. *Id.* She said, AI remember that day when he said I was laughing in court. I wasn:t laughing. I was crying.@ *Id*.

"[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *State v. Riechmann*, 777 So.2d 342, 350 (Fla. 2000) (citing *Rose v. State*, 675 So.2d 567, 571 (Fla. 1996)); *Ragsdale v. State*, 798 So.2d 713, 716 (Fla. 2001). Trial counsel's performance is deficient if counsel fails to make a reasonable investigation of possible mitigating evidence in preparation for the penalty phase of a capital trial. *See*

Lambrix v. Singletary, 72 F.3d 1500, 1504 (11th Cir. 1996); *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986). Counsel's performance is unreasonable where counsel makes only a desultory or cursory effort to find mitigating evidence. *See Lambrix*, 72 F.3d at 1504; *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987) (counsel's investigation consisted only of consultation with probation officer and one interview with defendant and parents). "[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated." *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002); *Davis v. State*, 875 So.2d 359 at 365 (Fla. 2003).

To determine whether there is a reasonable probability that the result of the proceeding would have been different had mitigating circumstances been presented and its significance explained, the court must evaluate the totality of the evidence adduced at trial and in the postconviction proceedings. *Wiggins*, 539 U.S. at 524, 123 S.Ct. at 2543; *Williams*, 529 U.S. at 399, 120 S.Ct. at 1516 (In determining prejudice, a court examines whether the "entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised a 'reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence."). This Eighth Amendment right

to offer mitigating evidence "does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present, and insist on the consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind."' (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)). To secure the individualized sentence the Constitution requires, "the jury's attention should be focused" on the "particularized characteristics of the individual defendant." *See*, *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989) (quoting and relying on *Gregg v. Georgia*, 428 U.S. 153, 206 (1976); *Woodson v. North Carolina; Lockett v. Ohio*, 438 U.S. 586 (1978)). The entirety of the defense evidentiary presentation excluding cross examination and pleasantries consisted of about eight pages of trial transcript. Dir. XII, 2219-29. Defense counsel=s closing argument regarding background mitigation occupies one page of transcript about the murder/suicide and drowning incident, *id*. 2312-13, and twelve lines about the defendant=s son. *Id*. 2314. His total argument consisted of twelve pages of trial transcript. Even so, the jury recommendation was close, eight to four. In contrast, the postconviction hearing showed that there was a wealth of mitigating evidence available to defense counsel. The mitigation that should have been presented in all reasonable

probability would have altered the balance of aggravating and mitigating circumstances, and persuaded the court that this was other than the most aggravated and least mitigated of cases.

ARGUMENT IV

GREEN=S CONVICTIONS ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AS ESTABLISHED BY NEWLY DISCOVERED EVIDENCE

This claim was presented as a component of Claim IV in the motion for postconviction relief (page 60), and was a subject of the evidentiary hearing. The substance of the claim raised newly discovered evidence based upon the recantation testimony of Sheila Green and Lonnie Hillery, and recantations by Jerome Allen Murray.

To satisfy the standard for collateral relief based on newly discovered evidence, it is necessary for a court to conduct a two part analysis that must be satisfied in order to set aside a conviction or sentence on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of diligence." Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See*, *Lightbourne v. State*, 841 So.2d 431

(Fla. 2003), citing *Jones v. State*, 709 So.2d at 512 (Fla. 1998).

Sheila Green and Lonnie Hillery were key prosecution witnesses. At Crosley Green=s trial, Sheila said that he admitted being the one who shot Flynn. He said he had never intended Athings to go that way,@ but Flynn pulled a gun and was shot when a struggle ensued. Hillery=s trial testimony was that the defendant said that Asome people came through and was trying to buy something from him and they tried to get him, and he said he just fucked up.@ Dir. V, 874. Sheila executed an affidavit recanting her testimony while this case was still on direct appeal. Hillery has also publically recanted a number of times, and both recanted their trial testimony at the evidentiary hearing.

The circumstances under which Sheila and Hillery became prosecution witnesses were the subject of extensive and sometimes conflicting testimony at the evidentiary hearing, however certain facts are clear. Sheila, Hillery, O=Connor Green, Terry Spruill, and Sherry Green were arrested on federal drug charges while Crosley Green was awaiting trial in this case. Sheila was released on bond while Hillery, the father of her son, remained in custody. All of the co-defendants were approached about giving testimony against Crosley Green.

While still in custody, Hillery entered negotiations which

eventually led to a proposal whereby he and Sheila would both enter pleas, each would cooperate with the authorities (although the prosecutors made assurances that Sheila would not have to testify against anyone), he would receive a reduced sentence, and Sheila would plead to a state rather than federal charge of sale of cocaine, which would likely result in probation. PC-R XXXI, 5792. Lonnie rejected the offer. Both went to trial. He was acquitted and released. She was remanded pending sentencing, where she faced a minimum mandatory ten years imprisonment.

Negotiations then resumed. This time a deal was reached whereby both testified against Crosley Green, and the State agreed to appear at Sheila=s sentencing and speak on her behalf, which eventually was done.

Sheila executed an affidavit recanting her testimony shortly after Crosley Green=s trial. In it Sheila said her testimony against Crosley Green was false and had been motivated by the fear of not seeing her children again and the pressure placed upon her by the State and federal prosecutors and the Brevard County Sheriff=s Office. Since then both Hillery and Sheila have given detailed public recantations. When they were called to testify at the evidentiary hearing the court warned both Hillery and Sheila at some length that they could be charged with perjury if they recanted their testimony at the evidentiary

hearing. Hillery declined an offer of counsel and proceeded to testify. Sheila, on the other hand, initially invoked her rights, then requested and received additional time to consult with counsel. Then, against her counsel=s advice, she too took the stand and recanted her trial testimony. Through their testimony, behavior and demeanor, both showed that they fully realized that their recantation testimony was a serious matter and that what they were doing was not in their personal best interests.

Sheila described the emotional distress she felt after she had been remanded pending sentencing. She attempted to commit suicide during that time and was on suicide watch when she agreed to testify against Crosley Green. Hillery said that he gave false testimony against Crosley Green because he wanted to help Sheila. PC-R II, 220. Both described arrangements whereby they were assisted by the State and sheriff=s office in maintaining contact.

The Court erred in rejecting Sheila Green's recantation

The postconviction court found that Sheila=s recantation was not credible. In particular, the court cited a letter written by her attorney which, according to the court, showed that she was the one who initiated the negotiations which resulted in her giving state=s evidence. PC-R XXXI, 5840-41 (Letter from Jeffrey Dees). In fact, that letter was written after Sheila had been

remanded and attempted suicide. Dir. V, 878. By then, she already knew about the ultimately fruitless negotiations between the authorities and Hillery which would have required her to testify against Crosley Green, so she knew about the State=s interest in her. Concurrently with that letter, her attorney also told the US prosecutor that she was willing to testify against two of the co-defendants in the drug case, O=Conner Green and Terry Spruill. *Id.* In other words, the evidence cited by the court is not evidence that Sheila initiated anything. Rather the opposite. It shows a desperate single mother of four facing ten years in prison belatedly reacting to earlier overtures which had been rejected by offering to testify against anyone who might be of interest to the other side. Her recantation was originally made shortly after the trial, repeated a number of times in settings which invited intense scrutiny, and was presented during the postconviction hearing in the face of serious threats against her penal interests, against the advice of counsel after thorough consultation with him, and with nothing to gain personally. According to objective criteria, her recantation testimony was more credible than her trial testimony.

As for materiality, Mr. Parker described her testimony as pivotal. He said that he felt optimistic about winning until she testified. After that, he told his client that she had just

put him on death row, and tried to settle the case with a plea bargain.

Hillery was a witness who had nothing to gain but everything to lose by recanting his trial testimony: his job, imprisonment, his wife. Even with that knowledge weighing heavily on his mind, Hillery was forthright in providing his testimony in the postconviction proceedings. Hillery=s main focus at trial was protecting the mother of his son. Both he and Sheila described the emphasis that was placed by all parties to the negotiations on protection of the children and ensuring that Sheila was there to raise them.[8] Both testified that they were able to maintain contact even after Sheila=s conviction with the assistance of the Chris White and state investigator Knight. In particular, at the time of the evidentiary hearing, Hillery no longer had any contact with the Green family. His recantation testimony was

[8]There appears to have been some conflation during the evidentiary hearing between the propriety of inducements and whether there were any inducements at all. The State freely admitted that there were inducements. The issue here was credibility of the recantations versus that of the trial testimony. In that regard, evidence about motivations was relevant whatever prompted them.

consistent with known events, straightforward, and offered against any interest he could conceivably have except telling the truth.

The postconviction court made a credibility finding against Hillery, but did not offer any reason for doing so. The court went on to find that Athe outcome of the trial would not have been different if Lonnie Hillery had not testified.@ The court also based its conclusion on the trial testimony of Jerome Murray, the postconviction testimony of Layman Lane regarding an alleged admission, and postconviction mitochondrial DNA (mDNA) testing on hair fragments found in the victim=s truck which did not exclude the defendant as being the contributor. The latter two items were offered, over Green=s objection, as newly discovered evidence of guilt.

The Court erred in rejecting Lonnie Hillery=s recantation by relying on trial testimony which was shown to be incredible

Murray=s trial testimony was that he heard Green say that he had killed a man and that he was going to disappear. Dir. VII, 1229. Murray publically recanted his testimony in three out of court statements, but at the postconviction hearing he invoked his rights. According to Murray=s various statements after Green=s trial, he simply fabricated information about the Flynn case when he was approached by investigating officers because he was threatened with being an accessory or because he was afraid of being arrested for a violation of probation or because he

thought law enforcement might kill him or for some other reason. The court analyzed the three statements and concluded that their introduction would not have changed the outcome of the trial if they were introduced as substantive evidence under 90.804(2) or 90.801(1). In each of the statements, Murray said that his trial testimony was a lie, and the court found that they would only become impeachment of his original testimony.

Murray=s personal circumstances do not inspire confidence in anything he ever said. His criminal history reflects at least three felony convictions, including one for a sexual assault, and one misdemeanor which was pending at the time of the trial in this case. Vol. XXXI 5448-61. The first time FDLE officers contacted him about this recantations he was too drunk to give a statement. He did give a statement later on, but eventually said he had been drinking then, too.

As for his trial testimony, Murray said he witnessed Green make the admission amidst a crowd at an outdoor hang-out termed A21 Jump Street@ at around eleven or twelve at night. [9]

Murray admitted that he had been drinking heavily that night, but he denied using drugs. In fact he denied being a drug user. Dir. App. 1258. He could offer no additional

[9]If that was supposed to be the night of the murder, then his times are inconsistent with the facts. Murray indicated that the date was on the weekend or close to the weekend, whereas the crime occurred on Tuesday night.

information on who he was with at the time he heard Green=s purported admission, other than describing them as a bunch of Acrack heads.@ He could offer no reason why he was with a bunch of crack heads if he did not use drugs. In fact, at the evidentiary hearing he admitted that he had been using crack cocaine and as well as drinking daily at the time he said he heard Green make an incriminating statement, PC-R Vol. II 269, behavior that is amply corroborated by his criminal history, his contacts with investigators in connection with this case, and every other bit of information about him that appears on this record. The point here is that the postconviction court went beyond merely finding that Jerome Murray=s out of court recantations would not be accepted as substantive evidence supporting a claim for collateral relief. The court erroneously went on to base a credibility finding against Lonnie Hillery in part on Jerome Murray=s trial testimony. The court could and should have considered Murray=s post trial behavior, if not for the truth of the matter asserted, then for the proposition that his trial testimony could not now be used to reject Hillery=s recantation.[10]

The Court erred in relying on the State=s presentation of

[10]In short, this was cherry-picking.

newly discovered evidence of guilt

Layman Lane

Layman Lane was a new witness unearthed by the State in 1999. He appeared at the evidentiary hearing in shackles because recently he had been convicted of aggravated assault and operating a chop shop. PC-R IX, 1429. He admitted to three or four other felony convictions. *Id.* He said that he encountered Green a few days after the murder. AI remember he said that he just shot somebody, but that=s been so long ago.@ PC-R IX, 1433. Lane testified that he was a crack cocaine addict and high cocaine when he heard the defendant make an incriminating statement, he was not sure if the conversation took place in the daytime or in the evening, did not recall anything about what Crosley Green was wearing or anything else about his appearance at the time, and was not sure who else was present when the statement was made. *Id*. 1437-38. Although the statement was allegedly made in 1989, Lane did not discuss the details of this alleged conversation with law enforcement until 1999, years after the conviction. Mr. Lane said at his deposition that if he were to be called to the evidentiary hearing, he would deny everything he said in his deposition. *Id*. 1435. His testimony was not credible.

The Court erred in considering MDNA testing results

A substantial portion of the State=s case at the

postconviction hearing was devoted to the results of mDNA testing conducted during a post-trial FDLE investigation into this case during 1999 - 2000 on a few hair fragments that had been found in Flynn=s truck. Mitochondrial DNA is found within mitochondria, which are circular structures surrounding the cellular nucleus that provide a cell with energy. MDNA, unlike nuclear DNA, cannot be used to establish positive identification because mDNA consists of but a single "marker" that is approximately 16,569 base pairs in length. A matching sequence offers only probabilistic evidence of identity or non-identity. By comparison, nuclear DNA consists of approximately three billion base pairs and many discrete markers, or loci, that may be compared to establish a positive match between DNA samples. Because mDNA has only one marker, the probability of a random match is much higher between mDNA samples than between nuclear DNA samples. As a result, mDNA is significantly less probative of identity than is nuclear DNA. Also, whereas nuclear DNA is inherited from both parents, mDNA is inherited maternally. Consequently, mDNA cannot discriminate between two individuals who are maternally related, as nuclear DNA analysis is able to do. In fact, apparently unrelated individuals might share an unknown maternal relative at some distant point in the past.

Dr. Martin Tracey calculated the statistical probability that the DNA sequence of one person, selected at random from the

relevant population, would likewise have a DNA sequence matching that of the hair fragments. The statistical analysis here showed only that the contributor of the hair fragments belonged to a class of people the size of the population of the United States. The postconviction court found only that the test results Adid not exclude the Defendant as being a contributor.@ PC-R XXIV, 4053.

The Court erred in considering newly discovered evidence of guilt., thereby violating the Defendant=s right to trial by jury under the Sixth and Fourteenth Amendments

The testimony of Layman Lane and the mDNA testing were cited by the postconviction court as newly discovered evidence that the State could present on retrial as a basis for finding that Lonnie Hillery=s recantation did not reach the probability of a different result standard set in *Jones v. State*, 591 So.2d 911 (Fla. 1991). Although Layman Lane was not a credible witness and the mDNA results were so inconclusive that they lacked probative value, the court erred in considering them at all. This evidence stands alone; it has no nexus with the recantations -- or with any other allegations in the motion for postconviction relief. Stand alone substantive evidence of guilt is the type of evidence that must be subjected to fact finding by a jury, not a judge, pursuant to *Apprendi v. New Jersey*, 530 U. S. 466 (2000) and *Ring v. Arizona*, 122 S.Ct. 2428 (2002). If the jury verdict is undermined by newly discovered evidence, but

the court is persuaded that the defendant would be found guilty on retrial because of new substantive evidence presented for the first time by the State, then henceforth the Defendant=s judgment of conviction would rest solely on the judge=s fact finding with regard to that new evidence, not on the original jury verdict.[11] Such a result would violate Green=s right to trial by jury under the Sixth and Fourteenth Amendments to the federal constitution as well as Florida's constitutional guarantee of his right to a jury trial. Art. I, '' 16, 22, Fla. Const.

Moreover, the due process clause of the Fourteenth Amendment requires the state to prove its case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). Ordinarily, a prisoner seeking postconviction relief has the burden of overcoming a conviction which had been based on proof beyond a reasonable doubt as determined by a jury. Here, the State=s newly discovered evidence was considered under the *Jones* standard, which required only that it persuade the court that a retrial would not result in a different outcome. Where, as here, such evidence was relied on to sustain the conviction, then the Defendant=s right to have the accusations against him be proven beyond a reasonable doubt has been violated.

---

[11]If the evidence offered by the postconviction defendant did not have such an effect, then the court could and should have ruled accordingly, rather than resort to the State=s newly discovered evidence.

This situation is analogous to the structural versus trial error distinction discussed in *Neder v. U.S.*, 527 U.S. 1, 119 S.Ct. 1827 (1999). Structural errors ›defy analysis by Aharmless error@ standards.= @ *Neder*, 527 U.S. at 7, 119 S.Ct. at 1833. The category of structural error includes the denial of the right to a jury verdict of guilt beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078 (1991). The *Sullivan* Court noted that a reviewing court considering whether an error is harmless ordinarily "looks … to the basis on which ›the jury actually rested its verdict.'" *Id*. 508 U.S., at 279, 113 S.Ct. 2078. Where a defendant offers newly discovered evidence, especially a recantation by a witness who testified at trial, the postconviction court can compare that evidence to what was presented at trial. Where the State offers new substantive evidence of guilt which does not purport to impeach or corroborate any specific set of facts presented either at trial or in postconviction, there is nothing for the court to compare the evidence to. Here, the court=s approach failed to distinguish between speculation directed toward confirming the jury's verdict and speculation directed toward making a judgment that the jury has never made. *Neder*, 527 U.S. at 38. Scalia, J. concurring in part and dissenting in part. However, unlike *Neder*, the issue here does not involve merely the omission of an instruction on a factually undisputed element of a complex crime

rather the issue here is actual guilt or innocence.

ARGUMENT V

THE COURT ERRED IN DENYING GREEN=S BRADY CLAIM BASED ON SUPPRESSION OF 3 X 5 CARDS AND RELATED DOCUMENTS

Law enforcement officers investigating this case suppressed evidence favorable to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This count was pled in the motion to vacate, Claim III (F) p. 56-57. The postconviction court conducted an evidentiary hearing on this claim and denied it on the merits. PC-R XXIV, 4044.

Documentary evidence supporting this claim was received in evidence as defense exhibits 3 & 4. Vol. XXXI 5933-52. The composite exhibit includes copies of a series of 3" X 5" cards with information about certain individuals hand written on them. They each have a number handwritten in the upper right corner. They were accompanied by police reports which referred to the names on the cards. Mr. Parker identified them as a type of police record of arrests. *Id.* 203. There were also blurry copies of what appeared to be booking photographs accompanied documents titled Acase memorandum@ with names, addresses and other identifying data of the individual.

Tom Fair testified at the evidentiary hearing. PC-R V, 837 et seq. In 1989 he was supervisor of the homicide squad for the Brevard Sheriff=s Department. As such he was the supervisor of

the two lead agents in this case, Dets. Nyquist and Halloway. He identified the documents in question. The 3 X 5 cards had notations that he personally made as Ms. Hallock was going through some loose photographs. The individuals in the photographs corresponded to the persons on the cards and other documents in the exhibit. The cards also had Agent Nyquist=s handwriting on them, which he recognized. *Id*. 841.

Ms. Hallock viewed around seventy loose photographs when she first spoke to the police at the sheriff=s office the night of the offense. Dir. IV, 779-81. The State=s version of what happened was advanced through the testimony of the investigating officers at a number of points in the trial. *Id*.; Dir. XI, 2087, 2102, and 2123. According to that testimony, Ms. Hallock viewed the photographs in order to pick out individuals who had facial characteristics similar to those of the perpetrator, such jaw-line, shape of the nose, size of forehead and so on. The idea was not to see if she could identify the perpetrator, but rather to assist a police artist in creating a composite drawing of the suspect. Ms. Hallock did pick out a number of photos. According to the officers, she expressly did not identify any of the photos as being that of the actual perpetrator. At some point thereafter, the photographs were returned to wherever they came from so that, despite defense counsel=s efforts to find out, it became impossible to reconstruct whose photographs were shown

to Ms. Hallock or which ones she picked out.

According to this version of events, a composite drawing was made and circulated, and as a result, Crosley Green was developed as a suspect. The literal testimony of the officers in the trial proceedings was that they did not have a Acurrent@ photograph of Crosley Green; however they consistently gave the impression that they did not have *any* photograph of him. The officers therefore made a plane trip to the Department of Corrections to obtain a prison photo.[12] *Id*. 337. They used this photograph to construct a photographic lineup, from which Ms. Hallock identified Crosley Green.

This version of events was false in a number or ways. At the evidentiary hearing, Officer Fair at first related the same version as above in the course of identifying the documents. When his attention was directed to notations on the cards such as APOSS SUSPECT, PHOTO PULLED BY VICTIM@, APOSS LOOK-A-LIKE@, ANAME OFFERED BY BAILIFF & STAMP AS POTENTIAL SUSPECT@ and so on, he gave an explanation that was consistent with this version.

[12]At the postconviction evidentiary hearing, Fair said flatly that he was unable to obtain a booking photograph of Crosley Green from within the Sheriff=s Department at the time of the initial investigation, although he acknowledged that pulling booking photos was a routine. Id. 324. At that point in his testimony, Crosley Green=s booking photo dated August 15, 1986 was received in evidence as defendant=s exhibit 4. Collateral counsel had obtained this photo on request from the sheriff=s office.

As an example, he said the card marked number eight which corresponded to a Wilfred Mitchell and had the phrase ASOURCE OF STAMP@ on it meant that an informant named Wilfred Mitchell told Agent Stamp that Crosley Green looked like the composite. PC-R V, 840-43. He denied that the card showed that Wilfred Mitchell was a suspect. He said that the notation on the card AB/M@ meant that Wilfred Mitchell was a black male. He was then confronted with his pre-trial deposition, in which he had testified that Stamp=s source was a black female. *Id*. His explanation was that he did not know if Stamp may have had more than one source.

Fair maintained this version to the point that it defied the obvious. Card #3, Tommy Goodwin, bore the notation APOSSIBLE LOOKALIKE. PHOTO PULLED BY VICTIM@. Fair denied that he was a suspect. AThey're all possible lookalikes.@ *Id.* Card #4, James Earl Gilmore, bore the notation, APOSS. SUSPECT, PHOTO PULLED BY VICTIM@. According to Fair APOSS. SUSPECT@ did not mean that Gilmore was a possible suspect. AThese are all that she pulled out, stated they were not the shooter, but there were similarities in the eyes, nose, hair, whatever.@ *Id*. 844-46. When asked whether the wording referring to APOSS. SUSPECT@ might be a bit confusing, he replied, ATo you, yes . . . to me, not at the time I made this.@

When confronted with Card #5, Eddie Leon Dennison, Fair finally changed his story. *Id*. The card bears the notation

Aname offered by Dale Stamp as a potential suspect.@ Fair agreed that meant that Dennison was a potential suspect. But he reverted to his previous position when confronted with Card #6, Johnnie Smiley. That card bears the following notation: APoss. suspect; V pulls photo from Pak.@ Fair denied that the notation meant that Smiley was a suspect:

> Q. Number six, Johnnie Smiley is possible suspect . . . victim pulls photo from pack. You=re saying that is not a possible suspect?
> A. Facial similarities.
> Q. But not a suspect?
> A. Not a suspect.

PC-R V, 846.

Crosley Green had a card. Its notation was ASuspect by General Physical, Location of Res. & M.O.@ This time Fair agreed that the word Asuspect@ meant suspect. *Id*. 847.

According to Fair, Eddie Dennison, whose card has the notation Apotential suspect@, and Crosley Green, whose card has the notation Asuspect@, were suspects. A[T]hose were the two people that drew our attention.@ *Id*. 851. James Earl Gilmore, whose card bears the notation APoss. suspect@, and Johnny Smiley, whose card bears the notation APoss. suspect; V pulls photo from PAK@, were not suspects. Tommy Goodwin=s card has the notation APoss. look-a-like. Photo pulled by vict.@ Wilfred Mitchell, whose notation was Asource of Stamp indicates composite look-a-like.@ Obviously some were suspects and some were not. Wilfred

Mitchell's card was there because he purportedly identified Crosley Green as a suspect, a fact which is not indicated on the card in any way. This testimony is completely incredible.

The 3 X 5s and corresponding police reports support a different version of events. That is, Ms. Hallock was simply asked to look through the loose photos and see how she responded. The photographs were all those of local black males roughly around the age of the perpetrator, who had the kind of contact with law enforcement that resulted in their pictures being taken in the field or elsewhere. Out of those, she picked a number of photographs, and said something that prompted the officers to note the individual's name and other identifying information, describe him as a possible suspect, and follow up the lead. Some were look a-likes only and those were noted accordingly.

The overwhelming likelihood is that Crosley Green's 1986 booking photo on his drug possession charge or even some other photograph from surveillance of other activities, was mixed in with the loose photos. The area was simply not that large or heavily populated, the whole Green family was under surveillance and all of the young males in his family had had their photographs taken by law enforcement at some time or other. Crosley had been to prison, and a two year old booking photograph is not especially old. If the sheriff's department

had as many as seventy photographs of local young adult black males who had been arrested or photographed in the field, it would be unusual for Crosley Green=s photograph to be left out.

If that is true, then there was a problem with the identification. Ms. Hallock's ability to identify anyone either then or later would have been called into question merely because she identified a number of different individuals as possible suspects. At best, that shows that she was too uncertain to rule those persons either in or out. That alone would have provided a new basis for impeachment of her identification. If Green=s photo was not among those she looked at, and if she was not instructed to pick out and did not pick out anyone as being a possible suspect, which was the version of events presented at the trial level and the version Fair tried to maintain in the postconviction hearing, then her later identification of a known photograph of Crosley Green would be (and was) bolstered. The 3 X 5s and the notations on them designating certain individuals as possible suspects, of whom three got that way because she pulled their photos, shows that version to be patently unbelievable.

There are further reasonable inferences. If Green=s photo was in there and she initially rejected it, the State=s whole case would be in serious trouble. Moreover, absent the 3 X 5s, there was no record of what photographs Ms. Hallock looked at or

who she picked out. That was the position maintained by the State and the police throughout the trial proceedings, and it was something that defense counsel spent extra effort to find out about in the discovery process. Without any record of what photographs Ms. Hallock looked at and without some compelling explanation of why a photograph of Crosley Green in particular was not there, it would not have been plausible for an officer to testify at a later date that he specifically remembered that Green=s photograph was not among those she looked at (and therefore must have rejected). Crosley Green is the type of person whose photograph one would expect to be in there. Some fact had to be interjected to show that, despite there now being no record of whose photographs were there and whose she picked out, it can now be said confidently that at least Crosley Green=s was not among them. Sending a plane to pick up a current photo of a suspect is such an event. Doing so was legitimate **B** it makes sense to use the most recent available photograph in a photo lineup where the offense was very recent. However, it did not hurt the case against Crosley Green that it also allowed the police to say that they knew they did not have a photograph handy, because they had to go through all that effort to get one. The problem with that story is that they did not have to go through any effort to get one. Even if they did not have one already, getting a photograph from their archives or ID division

would have been at least as quick and easy as flying to the DOC.[13] The contention here is not that the trip to the DOC did not happen, or necessarily that the police did not have a picture of Crosley Green already in their possession. Rather, the contention is that they used the plane trip (which they were going to take anyway) to evade disclosing that there were records of the photographs Ms. Hallock picked out and to conceal the fact, shown by those records, that she identified at least three people other than the defendant as being possibly the perpetrator.

Trial counsel Parker, said that he had never seen these documents before they were shown to him at the evidentiary hearing, particularly the 3 X 5s. PC-R III, 346. He had requested all available discovery. He did recall having a photograph of Wilfred Mitchell and Aan attempt on my part to introduce that particular photograph to show that Mr. Mitchell indeed fit the exact description of the person that Ms. Hallock was describing@. *Id*. 347. Defense counsel said, A[I]f I had these particular documents, I would have utilized them during the course of the suppression hearing regarding identity.@ *Id.* 348. He said that he Acertainly . . . would have used them to attack the suggestiveness of the identification process. It was

[13]Collateral counsel got one with a phone call.

my approach that those photographs, or the photographs that she looked at, may . . . have . . . found their way back into the lineup that was utilized. This particular exhibit that you showed me, I would have explored the possibility of those particular people as suspects, and I believe would have attempted to bring that out, in light of what I perceived to be the poor quality of the identification in the first place.@ PC-R III, 350-51.

When asked whether there was any record regarding the loose photographs that were viewed by Ms. Hallock, Fair said, AIt=s very possible that the only existing records are these three by five cards with that notation on them. . ..@ PC-R V, 855-56. He said that there was no other way to track down which photographs were viewed.@ *Id*. The 3 X 5 cards were not provided to the State Attorney=s office because Athey=re my work product.@ *Id*. He had no recollection of disclosing their existence to the State Attorney=.

Fair was also questioned about some police reports and other documents which appeared to show that Crosley Green remained in the Titusville area after the offense.[14] PC-R V, 858-59, ACase Memorandum.@ *Id*; 863. When questioned further about his

[14] ASIG 14 . . . CROSLEY GREEN IS SITTING ON A PORCH IN THE FRONT OF THE PALM TERRACE APTS . . .@, dated April 9, 1989, five days after the offense.

disclosure of these documents he said, AI=m shocked that they showed up today.@ PC-R V, 865. All of them could have been used by defense counsel to rebut the State=s theory of flight. Fair and other homicide officers generated these documents in the early stages of the investigation, chose not to disclose them, and they contained information which the defense could have used for a number of exculpatory purposes including impeachment. Overall, this evidence reflects a culture of selective nondisclosure and fact-tailoring in the sheriff=s office that lingered right up until the former head of the homicide division offered inconsistent and at times palpably incredible testimony at the evidentiary hearing. The court erred in denying this claim.

ARGUMENT VI

THE COURT ERRED IN DENYING GREEN=S CLAIM FOR RELIEF BASED ON INDIVIDUAL INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL AND NONDISCLOSURE OF EXCULPATORY EVIDENCE

Mr. Green was denied effective assistance of counsel pretrial and at the guilt/innocence phase of his trial in violation of the Sixth, Eighth, and Fourteenth Amendments. Counsel failed to adequately investigate, prepare and present the defense case and challenge the State's case. Where exculpatory evidence was suppressed or concealed, Mr. Green is entitled to relief under *Brady* and/or *Giglio*. This claim was

pled as Claim III in the motion for postconviction relief. The postconviction court summarily denied subclaims relating to cross-race identification, including failure to retain an expert witness. Otherwise, the court conducted an evidentiary hearing and ultimately denied the following subclaims:

Ineffective assistance for failure to maintain file

Trial counsel rendered prejudicially ineffective assistance of counsel by his failure to obtain, maintain, preserve and completely and accurately transfer Mr. Green's file. A basic duty of trial counsel is to maintain a full and complete file on his client through trial, and to ensure a smooth transfer of the complete file to the appellate attorney after conviction and sentence are rendered. Mr. Parker failed in this regard. Assistant Public Defender Gregory Hammel testified at the evidentiary hearing that he maintained a file on the Crosley Green case that was the size of an accordion folder or possibly larger. He said that the file could have exceeded 100 pages, and included his own notes, discovery documents, police reports, and witness statements. Hammel=s representation lasted for approximately four months before the case and files were transferred to Parker. Mr. Hammel even represented Crosley Green at a bond hearing where Scott Nyquist testified regarding a suggestive photographic lineup. Hammel remembers submitting an affidavit stating that Crosley=s photograph was much darker

than the other five photographs of alternate suspects. Hammel testified that he is a copious note taker and his notes related to his representation of Crosley Green would have been in the file. After the file was transferred to Mr. Parker, it was lost or Adestroyed@ by Mr. Parker, thus depriving the file and Crosley Green of vital exculpatory information discovered in the initial stages of the case. Mr. Parker testified at the evidentiary hearing that he remembers that the file he received from the Public Defender=s Office was Aslim@ or Aminimal,@ and was perhaps eventually Adestroyed@ after the trial to free up space in his office.

Exculpatory and impeaching evidence relating to the initial police investigation

An evidentiary hearing was held on the failure of trial counsel to investigate and present exculpatory and impeaching evidence relating to the initial police investigation. The 1999 FDLE investigation includes previously withheld or newly discovered evidence that Kim Hallock and Flynn were initially approached by the perpetrator attempting to sell them drugs, and that, contrary to her trial testimony, she was the one who tied Flynn's hands behind his back.

The three law enforcement officers who first responded to Hallock's 911 call were officers Wade Walker, Diane Clark, and Mark Rixie. According to their police statements, Rixie and Clark traveled had proceeded directly to the scene, but had

difficulty finding it. Walker met Hallock at David Stroup's residence, from where she had made the 911 call, then drove her to the orange grove scene and met up with Clarke and Rixie.

Deputy Walker reported the "drug deal gone bad" version orally to FDLE sometime in 1999, as shown by the following excerpt from the FDLE report:

> Deputy Walker stated to Inspector Ladner and SA King that . . .
>
> Hallock told him that Flynn and she were sitting in the area of Holder Park, (scene #1) earlier in the evening when they were approached by a black male, who offered to sell them some "drugs." Flynn exited the truck at this time and forced the black male to leave. A short time later the same black male returned and at gunpoint removed Flynn from the truck. Hallock stated that the black male then made her tie Flynn's hands behind his back with a shoestring.

Hallock gave a taped, sworn statement at 8:20 am the morning of April 4, 1989. In it, she did not say anything about the black male attempting to sell drugs. According to this statement, she handed the black male the shoe lace, which he then used to tie Flynn's hands.

A handwritten police statement dated 8/28/89 with the names Diane Clarke and Mark Rixey underlined on the front page was obtained through the Ch. 119. It was not disclosed to the defense at trial. It contains the following statement: AMark & Diane suspect girl did it, she changed her story couple times. . . .[?] She [?] said she tied his hands behind his back.@

This is consistent with Dep. Walker's recollection that Hallock said that she was the one who did the actual tying of Flynn's hands, and inconsistent with Hallock's subsequent statements and eventual trial testimony.

Defense counsel testified during the evidentiary hearing on October 29, 2003, having reviewed the 1999 written statement by Deputy Walker to the FDLE, that had he had the information contained in the statement by Deputy Walker at the time of trial he would have used it to impeach Ms. Hallock..

> Q. With regard to either one, I have the issue of the drug deal, and the issue of the hand tying. Are both areas where you would have used this information to impeach Ms. Hallock, is that true?
>
> A. Yes.

PC-R III, 405.

> A. I recall the statement and I=m looking at what Deputy Wade alleges Ms. Hallock said, and I can tell you, at no time, did Ms. Hallock ever testify to me that was, in fact, what occurred, in terms of this black male approaching, and Chip making him leave.
>
> What actually was testified to was that Ms. Hallock and Chip were smoking dope in the car, and this black man came by, the window was down, and this black man gratuitously said, you know, there are Brevard County sheriff@s deputies that patrol this area, you have got to be careful.
>
> That was the end of it until Mr. Flynn had to relieve himself. At that time, he stepped out of the truck , and he was accosted by this person.

> If Ms. Hallock told the deputy that, that is news to me.
>
> [T]here was an issue regarding who actually tied Mr. Flynn. It was my recollection, and my whole theory was that she, indeed, tied his hands. As I recall her testimony, she said that the defendant tied his hands, was in the process of tying his hands, and as a result of that process, the gun inadvertently fired into the ground. . . . a projectile was never found . . . .
>
> Q. This was your theory that she was the one that tied him, correct?
>
> A. Absolutely.
>
> Q. Which would indicate that these documents, apparently stemming from what Deputy Walker has to say, would support your theory?
>
> A. Absolutely.
>
> Q. If you had known this information at the time of trial, would you have used it?
>
> A. Oh, yea, because that went to the heart of my defense. The heart of it that this was not a man who did this. She couldn't describe who this person was. She said it was a blur. She said there was no way.

PC-R III, 399-401.

Defense counsel did not confront Hallock at trial with either the drug deal gone bad scenario or with Deputy Walker's report that she had been the one to tie Flynn's hands. Defense counsel did, however, argue to the jury that Flynn's hands appeared to have been tied "for comfort."

> The manner in which Mr. Flynn was tied, not crisscrossed behind his back, not

> crisscrossed like this (indicating), ladies and gentlemen, so he can be secured but tied like this (indicating) for comfort, not crisscrossed where he wouldn't be so much of a threat but tied in a comfortable fashion where he could be a threat.

Dir. X, 1859. As the prosecutor put it, defense counsel was "alluding" to the theory that Kim Hallock. "a jealous lover of Chip Flynn," was the real killer. *Id*. 1875.

This evidence was inconsistent with the State's entire theory of the case. It tends to show that the killing was the result of a prearranged plan committed by one or more persons who knew the victim, not a chance encounter robbery gone bad.

Failure to impeach Jerome Murray.

A party may attack the credibility of any witness by showing that he previously had been convicted of a felony or a crime involving dishonesty. F.S. '90.610(1). Defense Counsel failed to properly impeach Jerome Murray. Murray=s testimony was key to the state=s case of proving flight. During the trial, Mr. Parker attempted to impeach Jerome Murray by asking: AAre you the same Jerome Murray that=s been convicted of sexual assault?@ Dir. VII, 1240-41. The Court sustained an objection and instructed the jury to disregard the question and answer. Otherwise defense counsel did not attempt any further impeachment based on Murray=s prior record.

In fact, Murray had three prior felony convictions at the

time of trial. PC-R XXXI, 5448-61. Defense counsel could not recall whether he had obtained copies of Murray=s prior convictions, but in any event he did not use them if he did. PC-R III, 450. His excuse for failing to properly impeach the witness was both that Murray was not credible anyway, and that the question about a prior sexual assault successfully conveyed to the jury that there was a prior conviction for a serious crime. *Id.* However, a jury is presumed to follow the judge's instructions as to the evidence it may consider. *Burnette v. State*, 157 So.2d 65, 70 (Fla.1963); *Grizzell v. Wainwright*, 692 F.2d 722, 726-27 (11th Cir. 1982). Counsel=s excuse was inadequate as a matter of law. Counsel knew that Murray would be testifying for the prosecution. Counsel failed to obtain or use documentation that was easily available from the local court files which would have provided a new and effective basis for impeachment.

ARGUMENT VII

THE COURT ERRED IN SUMMARILY DENYING GREEN=S CLAIM BASED ON DEFENSE COUNSEL=S FAILURE TO CHALLENGE CROSS-RACE IDENTIFICATION

This claim was pled as claim III(b) in the motion for postconviction relief. Collateral counsel proffered the testimony of an expert in the field of cross-race identification, Dr. Brigham. The court summarily denied this claim, which was erroneous as a matter of law.

Defense counsel did not raise the special problems attendant on cross-race identifications. Defense counsel failed to investigate and prepare a defense on this issue in three ways: (1) Failure to retain an expert witness; (2) Failure to request a special instruction; and (3) Failure to cross examine and argue.

1. Failure to retain an expert witness

In *McMullen v. State*, 714 So.2d 368 (Fla. 1998), this Court held that the admission of expert testimony regarding eyewitness identification is **B *and had always been* B** discretionary with the trial court. The majority opinion cited the Court's earlier holding in *Johnson v. State*, 438 So.2d 774 (Fla. 1983) in support of this proposition, while conceding that Johnson could have been misinterpreted as a per se rule of inadmissibility.

In the postconviction motion and in an attached affidavit, Green proffered the testimony of Dr. John Brigham, a professor of psychology at Florida State University, the same expert whose testimony was proffered in *McMullen*. As there, he would have explained that "countless scientific studies have been conducted indicating that psychological factors, which are largely unknown to laypersons, can affect the accuracy of eyewitness identifications." Specifically, Dr. Brigham could have testified about the following six issues: (1) eyewitness identifications are incorrect much more often than the average person thinks;

(2) a witness's confidence or certainty in an identification is unrelated to the accuracy of the identification; (3) cross-racial identifications are more difficult than same-race identifications; (4) 'unconscious transference,' i.e., it is easier for a person to remember a face than to remember the circumstances under which the person saw the face; (5) the accuracy of facial identifications decreases in stressful situations; and (6) the accuracy of identification decreases as the interval between the event and the time when the witness attempts to retrieve the memory increases." He also would have said that this information was available at the time of Crosley Green's trial.

Defense counsel did not make any effort to obtain such expert assistance or testimony because he simply did not "think of it." Deposition of John Parker, Appendix F, 3.850. As such, he did not make an informed strategic decision to forego expert assistance. In fact, by his own admission, he did not make any conscious decision at all. Even if the trial court had declined to admit such evidence, counsel was ineffective for failure to at least make the attempt to obtain an expert on this issue and to proffer the testimony. Moreover, expert assistance would have been useful in cross examining Kim Hallock, even if the expert had not been permitted to testify.

The postconviction court summarily denied this claim based

on the misapprehension that *Johnson* had created a per se inadmissibility rule. PC-R XXIV, 4111-12. According *McMullen*, that reading was incorrect as a matter of law. Generally, a defendant is entitled to an evidentiary hearing unless the postconviction motion or any particular claim in the motion is legally insufficient or the allegations in the motion are conclusively refuted by the record. *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000). Additionally, where no evidentiary hearing has been held, an appellate court must accept the defendant's factual allegations as true to the extent that such allegations are not refuted by the record. *Peede v. State*, 748 So.2d 253, 257 (Fla. 1999). The postconviction court=s summary denial of this claim violated Green=s right to due process of law.

2. Failure to request a special instruction

If *Johnson* is interpreted as a categorical prohibition of cross-race identification expert testimony on the rationale that the jury can be relied on to evaluate the evidence without expert assistance, then it is all the more imperative that the jury be given an instruction on such evidence where one applies. Defense counsel's failure here even to attempt to obtain an expert was compounded by his failure to seek a cautionary instruction. The giving of a cautionary instruction was one of the reasons why the Johnson court approved the lower court's

refusal to admit expert testimony on the issue of eye witness identification. The *Johnson* opinion does not spell out what the "cautionary instructions" being referred to were, however such instructions do exist and were available through basic legal research at the time of Crosley Green's trial. *See e.g*. *People v. Harris*, (CA 1989) 767 P.2d 619 ("In evaluating the testimony of witnesses on the issue of identification you may consider whether or not the witness is of the same race as the individual he is attempting to identify. If the witness is not, you should consider the effect this would have on an accurate identification."); *United States v. Telfaire*, 469 F.2d 552, 561 (Dist. Col. 1972) ("In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. If this is also your own experience, you may consider it in evaluating the witness's testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of the defendant's race that he would not have greater difficulty in making a reliable identification."), concurring opinion; *United States v. Thompson*, 31 M.J. 125 (C.M.A.1990) (calling for cross-racial identification instruction when requested by counsel and when

cross-racial identification is a "primary issue"); *People v. Wright*, 45 Cal.3d 1126, 248 Cal. Rptr. 600, 755 P.2d 1049 (1988); *State v. Cromedy*, 727 A.2d 457 (N.J. 1999) (reversible error not to have given an instruction that informed the jury about the possible significance of the cross-racial identification factor). Since then, *see also* 35 *AmJur POF* 3d 1 (1996), Challenge to Eyewitness Identification Through Expert Testimony, I(D): Jury Instructions as an Alternative to Expert Testimony (ss 13 to 15); id. s.15 Text of Instruction.

The postconviction court summarily denied this claim, stating:

> Florida does not have an instruction on cross-race identification and all of the cases cited by the Defendant in support of his proposition are out-of-state or federal cases. Counsel is not ineffective for failure to request an instruction that the Defendant cannot show that anyone in Florida has ever used.

(20-21). However, a claim of ineffective assistance of counsel is not evaluated according to the practice in this, as opposed to any other state. *Strickland v. Washington*, was adopted in Florida in *Downs v. State*, 453 So.2d 1102 (Fla. 1984). The court erred by summarily denying this component of the claim.

3. Failure to cross examine and argue.

Defense counsel did not conduct any cross examination of Kim Hallock or provide any argument to the jury regarding the

factors that the courts and experts have deemed relevant to cross race identification. For example, defense counsel did not inquire into the extent of Hallock's past contacts with African Americans. See *Telfaire*, supra. During the motion to suppress identification, Parker briefly questioned Hallock about her contacts with African Americans. Her replies showed that there had been virtually none. (Dir. XI, 71). This line of questioning could and should have been used at trial during cross examination, but was not.

ARGUMENT VIII

THE COURT ERRED IN DENYING RELIEF WITH REGARD TO DOG TRACKING EVIDENCE

In violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, the State withheld and/or counsel failed to discover impeaching dog track evidence in violation of *Brady v. Maryland* and/or *Strickland*; in either case, the state affirmatively misled the jury to believe that no such evidence existed in violation of *Giglio*. Defense counsel was ineffective for failing to challenge the state's case and failing to investigate and present expert testimony in opposition to the dog track evidence presented by the state. This claim was pled as Claim V in the motion for postconviction relief. The Court summarily denied this claim with regard only to the *Brady* component of claim, but otherwise granted an evidentiary hearing.

At trial, the State presented dog tracking evidence to prove that a police dog named Czar tracked the perpetrator=s scent from Holder Park to Crosley Green=s sister=s house. The jury was misled to believe that this dog was very reliable, had never made a mistake, and followed Crosley Green=s scent from Holder Park to his sister=s house on Briarcliffe the morning after the murder. The dog handler, O=Dell Kiser, essentially denied that the dog had ever made a mistake in test tracking. Dir. VIII, 1452; VII, 1388, 1390-92. Bobby Mutter, the Director of dog training for the sheriff=s office said the dog was one of the better ones he had seen. *Id*. at 1477.

Discovery documents introduced at the evidentiary hearing show that the dog did make mistakes. Notes from the state attorney=s office reveal that they were aware of the mistakes. At the evidentiary hearing, Deputy Kiser admitted that the dog made Asome mistakes@ in test tracking. PC-R V, 794. The record showed that Czar was an old dog whose track record reflected many mistakes in tracking and following commands.

Giglio violations are evidenced by memoranda found in the state attorney=s file regarding Czar=s substandard performances in tracking. In a memorandum introduced at the evidentiary hearing entitled ANOTES TO FILE: ODELL KISER@ the state attorney references approximately ten instances where the dog had trouble tracking. The state attorney references in his memorandum that

he needs to Adiscuss@ these mistakes with Kiser. Additional paperwork and testimony introduced at the evidentiary hearing reveals further tracking mistakes made by Czar. PC-R V, 823-25. A conviction obtained by the knowing use of false evidence is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgement of the jury. *U.S. v. Argurs*, 427 U.S. 97 (1976); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942). In the case at bar, the state knowingly misrepresented the dog=s track record to the jury.

Trial counsel never consulted an expert in dog tracking in this case. At the evidentiary hearing, Green called Dr. James Woodford who has extensive knowledge in chemistry, dog tracking, canine olfactory senses, and tracking dog certification. By the early 1980s, there existed voluminous written materials and reference books concerning dog tracking. Dr. Woodford described this time period as a type of AGolden Age@ of dog tracking. Many experts in this subject area were available in 1989 to refute the testimony of Deputy Kiser and Bobby Mutter. Had trial counsel consulted an expert in this area, the expert would have insisted upon reviewing the dog=s training, certifications, and track record to assist in the defense of this case. Defense counsel failed to file a pretrial motion to exclude dog tracking evidence, a point commented on by the trial judge. *Cf Tomlinson*

v. State, 176 So. 543 (Fla. 1937), *Edwards v. State*, 390 So.2d 1239 (Fla. 1st DCA 1980), *Davis v. State*, 35 So. 76 (Fla. 1903) and *Toler v. State*, 457 So.2d 1115 (Fla. 1st DCA 1984).

In the case of *Matheson v. State*, 870 So.2d 8 (Fla. 2d DCA 2003), concerning a dog=s qualifications, the Court ruled observed that Athe most telling indicator of what the dog=s behavior means is the dog=s past performance in the field.@ *Id*. 15. Although the above case deals with dogs alerting for the presence of illegal drugs rather than trailing or tracking a suspect, it is applicable because no matter what the specific task that a dog is allegedly performing, the dog needs to be specifically trained to perform that particular task.

In the case at bar, it is undisputed that Czar tracked on sand, then grass, then concrete. This is commonly known as Variable Surface Tracking (VST). Due to Czar=s lack of training in VST, the testimony concerning the dog track should not have been admitted at trial. Due to counsel=s lack of investigation and preparation, there was no adequate challenge of this evidence.

Dr. Woodford explained that variable surface tracking is extremely difficult for a dog to perform. PC-R V, 919; VI, 938-41.

> This is a blind track. This had no scenting . . . It made itBit made tracking impossible really. It made tracking have no basis in

> logic or science or anything. There=s no handle or hook to give it**B**to give the**B**to call this even a track, you don=t know what it=s tracking. We don=t know what this dog really tracked. It went along a path. It was guided along a path. . . . .
>
> The dog was elderly. The dog was like nine years old or something, wasn=t it? He=s about nine or ten years old. It was an old dog. He was about ready. It was on its last leg. For drug dogs, even a twelve year old dog has got to be retired. That=s just a drug dog. They can=t do it anymore. They=re not reliable.

PC-R VI, 944-45.

Dr. Woodford discussed the dog=s AWorking Dog Training and Utilization Record.@ In test tracking the dog tracked only one time in April of 1989, 2 times in March of 1989, 2 times in February of 1989, one time in January of 1989, and one time in November of 1988. PC-R VI, 953-56. The November 3, 1988 record showed a satisfactory rating, yet notes from the state attorney=s office reflect that the dog tracked the wrong suspect. *Id*. 956-58. This tracking mistake, six months prior to the tracking in this case, was not revealed to the jury. Instead, the jury heard that the dog had never made a mistake and had never had problems. After a mistake such as this, Dr. Woodford explained that re-testing and certification, especially in light of the dog=s age, is a must. *Id*. 959-60. Four months after Czar tracked in this case, the dog received a rating of unsatisfactory [Au@]. *Id.* PC-R VI, 962. The court erred in

denying relief based on Brady, Giglio, and Sixth and Fourteenth Amendment violations.

ARGUMENT IX

THE COURT ERRED IN DENYING GREEN=S INEFFECTIVENESS CLAIM BASED ON TRIAL COUNSEL=S FAILURE TO CHALLENGE A PROSPECTIVE JUROR.

Trial counsel was ineffective for failure to seek to have juror Harold Guiles excused for cause because of his statement during voir dire that his niece had been murdered three years earlier, or for failure to use a peremptory challenge to strike him. This claim was pled as a component of Claim I in the motion for postconviction relief. The Court summarily denied all substantive components of the claim, but granted an evidentiary hearing as to the allegations of ineffective assistance of counsel. During jury selection, defense counsel moved that juror Harold Guiles be excused for cause due to his exposure to pretrial publicity. Dir. I, 88-91. The motion was denied. Later on in the voir dire, the following exchange took place:

> THE COURT: Have any of you been the victim of a crime or has any member of your immediate family been the victim of a crime?
> MR. GUILES: My niece was murdered, but that's not immediate family.
> THE COURT: How long ago was that?
> MR. GUILES: Three years ago.
> THE COURT: Three years ago?
> MR. GUILES: (Nods head).
> THE COURT: Where was it?
> MR. GUILES: In Naples.'

> THE COURT: Would you able to set aside that?
> MR. GUILES: Well, it doesn't seem like it's the same kind of thing.
> THE COURT: Would you be able to set it aside and not let it affect this case?
> MR. GUILES: Yes.

Dir. I, 118-120. Mr. Guiles was asked no further questions by either counsel or the Court about this event. Mr. Parker did not seek to have him excused for cause on this basis, and did not use a peremptory challenge to strike him. PC-R III, 375 et. seq. Mr. Parker did not know why he did not ask any further questions, or challenge for cause. *Id*. 379. With regard to the use of a peremptory challenge, Mr. Parker expressed concern with the remaining members of the venire panel, but otherwise could not remember why he did not exercise a challenge. *Id*. 380. Mr. Parker acknowledged that in his postconviction deposition **B** with regard to a challenge for cause other than the one he had made based on pre-trial publicity **B** he said that: AI can tell you, if I didn=t make a motion to excuse him for cause because of a family member, I should have. If I didn=t, I can=t tell you why.@ *Id*. 383.

Collateral counsel=s expert attorney witness, Professor Dow, said: A[T]he only circumstances under which a potential juror who has had a member of his or her family murdered . . . is if . . . that juror opposed the death penalty. . . Outside of that fairly narrow exception . . . the conventional wisdom is that such

jurors should be excluded, preferably for cause. But if the judge doesn=t accede to remove the juror for cause, then, through the use of a peremptory challenge.@ PC-R IX, 1360-61. Professor Dow also stressed that Awhether a particular decision is characterized as strategic is how much investigation there had been.@ ***Id***. Jury selection ***is*** the means by which defense counsel investigates potential jurors, and unlike other types of defense investigation it takes place entirely on the record. The record here reflects **no** such investigation regarding Mr. Guiles. This was deficient performance. It also defies common sense that Mr. Parker would not at least inquire further, or that he would refrain from seeking a challenge for cause on a solid ground when he had already asked for and been denied one earlier.

Prejudice is shown here because actual bias against a defendant on a juror's part is sufficient to taint an entire trial. See *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). "If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel." *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.), *cert. denied*, 434 U.S. 818, 98 S.Ct. 58, 54 LED.2d 74 (1977). *Dickson v. Sullivan*, 849 F.2d 403, 408(9th Cir. 1988) ("If only one juror was unduly biased or improperly influenced, Dickson was deprived of his

sixth amendment right to an impartial panel."); "Doubts regarding juror bias must be resolved against the juror." *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir .1991).

Where there are similarities between the juror's experiences and the facts on trial, the juror's bias may be presumed. See *Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992) ("Courts have presumed bias in cases where the prospective juror has been the victim of a crime or has experienced a situation similar to the one at issue in the trial."); *Burton v. Johnson*, 948 F.2d 1150, 1154 (10th Cir. 1991) (determining that bias presumed where juror who was victim of spousal abuse sat in a murder trial and the defendant's defense was battered wife syndrome); *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979) (concluding that bias presumed where juror's sons were heroin users and in the case being tried defendants were charged with distributing heroin); *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1, 8 (3rd Cir. 1957) (finding that in a robbery case bias presumed where juror was a victim of robbery); *See Dyer v. Calderon*, 151 F.3d 970, 984 (9th Cir. 1998) (bias presumed in prosecution for murder where juror intentionally failed to disclose that her brother had been killed under suspicious circumstances), *cert. denied*, 525 U.S. 1033, 119 S.Ct. 575, 142 LED.2d 479 (1998). Counsel=s failure to do anything, even to ask additional questions, in response to the juror=s revelation that

one of his family members had been murdered, was deficient performance, and demonstrates prejudice.

Moreover, facts supporting the juror misconduct claim, *infra*, should be considered in connection with the prejudice occasioned by defense counsel=s failure to challenge or at least question juror Guiles. The person who made the gesture drove off in a burgundy Aerostar van, two-tone, tinted with gold on the bottom. Dir. IX, 1625-30. None of the male jurors admitted to possessing such a vehicle. Mr. Guiles said:

> THE COURT: Mr. Guiles, you told me what kind of car you drove today.
> MR. GUILES: Dodge pickup truck, sir.
> THE COURT: Is that the only car you have?
> MR. GUILES: No. I have a Buick, '89 four-door Buick Century.
> THE COURT: Those are the only two cars you have?
> MR. GUILES: Yes, uh-huh.
> THE COURT: You don't have any other motor vehicles?
> MR. GUILES: No.

Id. at 1634-40. However, investigation by collateral counsel has shown that at the time of the trial, juror Harold E. Guiles and one Harold E. Guiles, Jr., DOB 6/19/51, presumably juror Guiles' son, were both listed as residing at the same address; and that from that time to the present, one of them was the owner of **B** also registered to that same address **B** a Ford Aerostar van. From this it appears that Mr. Guiles was in fact the person who made the throat slashing gesture. Whether or not

that amounted to juror misconduct, it demonstrates that Aone juror was unduly biased@, and thereby demonstrates prejudice as a result of ineffective assistance.

ARGUMENT X

THE COURT ERRED IN SUMMARILY DENYING GREEN=S DUE PROCESS CLAIMS BASED ON JUROR MISCONDUCT

This claim was pled as a component of Claim I of the motion for postconviction relief and summarily denied.

During jury selection, defense counsel moved that juror Harold Guiles be excused for cause due to his exposure to pretrial publicity. Dir. I, 88-91. The motion was denied. Later on in the voir dire, Mr. Guiles said that his niece had been murdered three years ago. He said only that it had happened in Naples, and he affirmatively answered a general question about whether he Awould be able to set it aside and not let it affect this case.@ Dir. I, 118-20. Mr. Guiles was asked no further questions by either counsel or the Court about this event. Mr. Parker did not seek to have him excused for cause on this basis, and did not use a peremptory challenge to strike him.

During the trial, defense counsel made a motion for mistrial based on juror misconduct. His investigator had spoken with a witness, Tim Curtis, who in turn reported a chance encounter with one of the jurors in the parking lot outside the courthouse. Curtis had told the investigator that he had made

eye contact with the juror. Both of them were in their vehicles. They smiled at each other and shook their heads from side. The juror then made a slashing gesture with his finger across his throat. Dir. VIII, 1545-55. Curtis was then examined and confirmed this account, but indicated some uncertainty as to whether the person he saw was, in fact, a juror. Dir. IX, 1625-30. After he was given an opportunity to look at the jurors, Curtis said he had originally thought the person he saw was a juror, but now he had changed his mind. *Id.* 1634-40. He also described the person he had seen make the throat slashing gesture as an older white male driving a burgundy Aerostar van. He was certain about the model because he ran an auto parts shop for a living. The court then individually questioned the jurors who fit that description about what vehicles they drove. Mr Guiles said that he drove a blue and white pickup. He denied owning a van. He said he also had a Buick Century, and he expressly denied having any other vehicles. *Id*. The motion for mistrial was then abandoned.

In 1999, Mr. Curtis executed a document which states in pertinent part:

> After I testified I was in the parking lot at the courthouse when a juror, a white male made a slashing motion with his finger across his throat, indicating to me that Green was dead. I told a person the next day Green is dead, knowing that a jury member had made up his mind to convict Crosley

> Green. The next day I was brought into court to identify the juror. Prior to the hearing I had lunch with two detectives from the Sheriff's office who told me that if I identified this juror, there would be a mistrial and Crosley Green would go free. I lied at the hearing. I told the judge that I did not see the man who did this slashing motion. In fact I did see the man and he was on the jury and in court this day.
>
> I have read and reviewed this statement and it is true to the best of my knowledge.
>
> /s/ Timothy Curtis 8-6-99 @ 7:00 p.m.
>
> Witnessed By:
>
> /s/ Paul J. Ciolino 8-6-99 /s/ Joseph M. Moura 8-6-99

Appendix A, PC-R XIV, 1948-52. Also quoted in the order summarily denying certain claims. PC-R XXIV, 4105-06. These statements are also consistent with what Mr. Curtis said on a nationally televised video tape. However, Curtis invoked the Fifth Amendment in the postconviction proceedings and refused to answer any questions about whether he saw a juror make the throat slashing gesture. The court summarily denied this claim after finding that it was based on the document cited above. The court found that: AThere is no sworn testimony or evidence that the person who Tim Curtis saw making the slashing gesture was a juror.@ *Id*.

On the other hand, as alleged in detail in the motion for postconviction relief, at the time of the trial, juror Harold E.

Guiles and one Harold E. Guiles, Jr., presumably juror Guiles' son, were both listed as residing at the same address; and that from that time to the time the motion was filed, one of them was the owner of **B** also registered to that same address **B** a Ford Aerostar van. That is enough to raise a serious question about whether Mr. Guiles was in fact the juror that Curtis claimed he saw.

The court=s summary denial of this claim was contrary to the basic rule that a defendant is entitled to an evidentiary hearing unless the allegations are conclusively refuted by the record. *Freeman v. State*, 761 So.2d 1055, 1061 (Fla.2000). The allegations are based on numerous documents and interviews, one of them videotaped. The fact that Curtis invoked his privilege against self incrimination did nothing to refute the allegations on the record; if anything it did the opposite. It did close down one avenue of postconviction investigation, thereby lending more urgency to Green=s motion to interview at least Mr. Guiles. **The court erred in denying Green=s motion to interview jurors.**

A motion to interview jurors, and Mr. Guiles Jr., was filed contemporaneously with the motion for postconviction relief. The court erred in denying that motion.[15] By invoking his right to remain silent, Tim Curtis closed down further investigation

[15]It was mooted by the summary denial of claims relating to juror misconduct.

into allegations regarding the throat slashing gesture and whether he or the juror were less than truthful about it. Florida Rule of Professional Conduct 4-3.5(d)(4), generally prohibits postconviction juror interviews, provides a mechanism for defendants to interview jurors when there are good faith grounds for a challenge. "The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court." *Suggs v. State*, 923 So.2d 419 (Fla. 2005).

The test established by this Court is that the moving party must make sworn allegations that, if true, would require a new trial. *Johnson v. State*, 804 So.2d 1218 (Fla. 2001); Suggs. The court denied Claim I because, without Curtis' testimony, the court found the claim to be too speculative. However, the court went on to address the merits of the claim, assuming *arguendo* that the person who made the slashing gesture was a juror and the gesture meant that the juror believed the Defendant to be guilty. It is asserted here that the court was required to conduct that additional inquiry because the facts alleged in Claim I, if true, would require a new trial pursuant to Johnson, and the court would therefore have erred by denying the motion to interview jurors.

Generally, the court found that the slashing gesture was an

expression of the juror:s mental processes and that any of the juror:s potential testimony would address only matters inhering in the verdict, citing, inter alia, *Devoney v. State*, 717 So.2d 501 (Fla. 1998). However, Deceptive answers to the judge's questions about the vehicle owned or driven constituted overt misconduct, and show consciousness of wrongdoing. Florida Standard Jury Instructions in Criminal Cases, 1.01 (Pretrial Instructions) states: "You should not form any definite or fixed opinion on the merits of the case until you have heard all the evidence, the argument of the lawyers and the instructions on the law by the judge . . . . During the course of the trial the court may take recesses, during which you will be permitted to separate and go about your personal affairs. During these recesses you will not discuss the case with anyone nor permit anyone to say anything to you or in your presence about the case." Deciding the case -- and the penalty (before there was even a verdict of guilt) -- prematurely, is misconduct. *Scott v. State*, 619 So.2d 508, 509 (Fla. 3rd DCA 1993) (labeling premature deliberations, in the form of jury comments, as improper); *Brooks v. Herndon Ambulance Service*, 510 So.2d 1220, 1221 (Fla. 5th DCA 1987) (finding premature jury discussions to be improper). Whether or not deliberations were undertaken prematurely is an appropriate subject of judicial inquiry. The timing of deliberations does not inhere in the verdict. *Johnson*

v. State, 696 So.2d 317, 323 (Fla.1997). "[P]otentially harmful misconduct is presumptively prejudicial". *Russ v. State*, 95 So.2d 594, 599 (Fla. 1957); *Amazon v. State*, 487 So.2d 8, 11-12 (Fla. 1986); *Williams v. State*, 793 So.2d 1104 (Fla. App. 1 Dist. Aug 30, 2001)(Affidavits alleging that two jurors discussed defendant's case during trial and expressed an opinion as to guilt before the close of the evidence . . . precluded summary dismissal of postconviction relief motion, even though the affidavits did not allege that the jurors relied on outside information in coming to their opinion, that the jury had any opportunity to gather information outside of the record, or that the jurors lied or provided incomplete information during voir dire). The court erred by summarily denying relief.

CLAIMS ASSERTED TO PRESERVE REVIEW

ARGUMENT XI

THE RULES PROHIBITING MR. GREEN'S LAWYERS FROM INTERVIEWING JURORS ARE UNCONSTITUTIONAL.

ARGUMENT XII

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS CONSTRUED BY THE UNITED STATES SUPREME COURT IN RING V. ARIZONA.

ARGUMENT XIII

THE PENALTY PHASE JURY INSTRUCTIONS UNCONSTITUTIONALLY SHIFTED THE BURDEN TO MR. GREEN TO PROVE THAT DEATH WAS INAPPROPRIATE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant/Cross-Appellee has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on August 2nd, 2006.

_____
__
MARK S. GRUBER
Florida Bar No. 0330541
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant/Cross-Appellee, Courier New 12 point font, pursuant to Fla. R. App. 9.210.

_____
__
MARK S.GRUBER
Florida Bar No. 0330541
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

Counsel for Appellant

Copies furnished to:

Barbara Davis
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd.,5th Floor
Daytona, Beach FL 32118

Crosley Alexander Green
DOC #902925; P5202S
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026