SUPREME COURT
STATE OF FLORIDA

Case SC06-2375

CURTIS W. BEASLEY
Appellant/Petitioner
-vs-

STATE OF FLORIDA
Appellee/Respondent

Appeal from the Tenth Judicial Circuit Court, Polk County, Florida,
Order Denying Motion to Vacate (Fla.R.Crim.P. 3.850)
(Death Penalty)

PRINCIPAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, CURTIS WILKIE BEASLEY, a Florida death row prisoner, appeals the denial of his motion for post-conviction relief brought pursuant to Fla.R.Crim.P. 3.850.

Beasley was indicted February 1, 1996, for the first degree murder of Carolyn Monfort August 21, 1995. (R 1:156-62) The Indictment also charged Beasley with robbery and grand theft auto. (*Id.*) A notice of intent to seek the death penalty was filed February 16, 1996. (R 1:7) After discovery was conducted and pre-trial motions were filed, the case was tried to a jury commencing January 26, 1998, before Cecelia Moore, Circuit Judge. (R 1:76-86) The jury returned a verdict of guilty as charged February 18, 1998. (R 164-65) The jury returned to hear the penalty phase case February 26, 1998, and recommended the death penalty the following day. (R 1: 87-90; 1:163) After conducting a *Spencer* hearing April 20, 1998, and considering the sentencing memoranda required of counsel, the court May 22, 1998, sentenced Beasley to death for the Monfort murder. (R1:94-95; 1:98; 1:166-71; 2:174-82) On May 27, 1998, Beasley was also sentenced to fifteen years for robbery and five years for grand theft auto. (R 2:186-90)

Beasley appealed, claiming: "(1) the trial court erred in denying Beasley's motion for judgment of acquittal at the close of the evidence; (2) Beasley's conviction for first degree murder (based either on premeditation or felony murder)

is not supported by competent, substantial evidence; (3) the trial court erred in denying Beasley's request to invoke the rule of sequestration as to the victim's daughter and son, who were key witnesses in the case; (4) the trial court erred in finding the heinous, atrocious, or cruel aggravating circumstance; (5) the trial court erred in finding the pecuniary gain/course of robbery aggravating circumstance; (6) the trial court erred in rejecting, as mitigating factors, Beasley's poor/rural background, the death of Beasley's father, Beasley's expressions of sorrow regarding the victim's death and gratitude for her kindness (coupled with his continued claim of innocence), and Beasley's claim of good behavior during the trial; and (7) Beasley's death sentence is not proportionate." *Beasely v. State,* 774 So.2d 649, 657n.4 (Fla. 2000). The judgment and sentence, however, were affirmed October 26, 2000, and a motion for rehearing denied December 21, 2000. *Id.* at 675.

Beasley filed January 17, 2002, a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850, requesting leave to amend and an evidentiary hearing. (R 2:248-94) The State responded. (R 2:297-99) Owing to a conflict of interest, the Capital Collateral Regional Counsel who had been representing Petitioner was permitted to withdraw August 29, 2003, and a registry attorney was appointed to undertake Beasley's representation. (R 2:309-10) After being granted a stay of proceedings with leave to investigate and amend as necessary (R 2:325-26),

registry counsel on September 20, 2004, filed an amended motion for post-conviction relief. (R 2:327-3:399) The registry attorney petitioned for and was granted leave to withdraw March 16, 2005, at which time undersigned counsel was appointed. (R 3:411-12) Pursuant to an Order setting deadlines (R 3:413), counsel adopted and supplemented the amended post-conviction motion (R 3:415-16), to which the State responded. (R 3:417) After conducting a *Huff* hearing, the court agreed to conduct an evidentiary hearing on claims one, two and three as well as one of the supplemental claims. (R 3:419-20)

The claims as stated in the motion to vacate were tried at the evidentiary hearing January 9-10, 2006.

STATEMENT OF FACTS

Trial stage: The facts of the case as adduced at trial and set forth in *Beasley v. State*, 774 So.2d 649, 653-58 (Fla. 2000), are:

> On August 24, 1995, Jane O'Toole, who had not heard from her mother, Mrs. Monfort, for two days, traveled to her mother's home in Dundee, Florida, to make sure that she was alright. Several morning newspapers lay in their wrappers outside the house. While searching through the home, Jane found her mother's body in the blood-stained laundry room. Mrs. Monfort had been severely beaten and was dead.
>
> The last time that Jane spoke to her mother was on August 21, 1995. On that day, Mrs. Monfort, who worked in real estate, had dressed in business clothes in anticipation of her Monday morning meeting. The defendant, Curtis Beasley ("Beasley"), was there, dressed for work. Mrs. Monfort knew Beasley through her daughter's former husband, with whom Beasley had attended high school. Beasley was staying at Mrs. Monfort's house for a few days, while doing some pressure washing and painting at the Lake Marie Apartments (the "apartments"). The apartments were owned by Mrs.

Monfort's son-in-law, Neal O'Toole (Jane's husband), and managed by Mrs. Monfort.

Before moving into the Monfort home, Beasley had been living at Steve Benson's house. Approximately one or two months earlier, Beasley had borrowed $600 from Dale Robinson, a friend with whom he had previously resided, to place his old van back into operation to commute to and from the painting job. At this time, however, Beasley had no transportation of his own. For this reason, he had recently been staying as a guest in the Monfort home, so that Mrs. Monfort could drive Beasley to and from work at the apartments. Dale Robinson had the impression that Beasley spent the night at Mrs. Monfort's house and remained at Benson's home during the day. In fact, on Sunday, August 20, Officer Pierson (a witness at trial) saw Beasley at Steve Benson's house, wearing a checkered “western-style” shirt during the day. However, Beasley apparently spent the night of the 20th at the Monfort home, because he was there at 8 a.m. the next morning, when the housekeeper, Mrs. Ferguson, came to clean the house. While cleaning that day, the housekeeper saw a checkered shirt lying on a wicker chest at the foot of the bed in the guest bedroom, which Beasley was using.

Later on the 21st, Jane called her mother and arranged for Beasley to help Jane move some of her grandmother's furniture. Mrs. Monfort had transported Beasley to work at the apartments at about 8:20 a.m. that day, and he returned to the Monfort home sometime in the late morning, after the housekeeper had left for the day. Jane picked Beasley up before noon (he was by himself at the Monfort home at that time), and he helped her move the furniture. In the process of this furniture move, Beasley told Jane that he would be in Alabama the following week to take care of an inheritance. He also asked Jane for some money. She replied that she had only a few dollars with her, but that her husband would pay him (for pressure washing the apartments) later. After the work had been completed, Jane drove Beasley back to the Monfort home around noon. Again, no one else was at home at that time.

The evidence demonstrated that, until 7:01 p.m. on the evening of August 21, phone calls were being made from the Monfort residence. These phone calls, including some to the United Kingdom, were made to people Beasley knew, but Mrs. Monfort did not know. A newspaper lying on the coffee table in Mrs. Monfort's living room had one of those telephone numbers written on it in Beasley's handwriting.

The evidence established that, after Mrs. Monfort had transported Beasley to the apartments on the 21st, she went to her business meeting at 9 a.m. Later that day, she met with Mr. Rosario, a prospective tenant at the apartments, at 2 p.m. At 5 p.m., she again met with Mr. Rosario at the apartments. He gave

her a deposit (first and last month's rent) in the form of eight $100 bills, and another $100 for a bedroom set which Mrs. Monfort sold to him. She wrote a receipt for the money, a copy of which appeared in the receipt book later found in her car. She left the apartments sometime between 5:30 and 5:45 p.m. That was the last time Mrs. Monfort was seen until the discovery of her body on August 24.

It was Mrs. Monfort's habit, between 6 and 8 p.m. on week days, to prepare and consume one or two drinks before dinner. These would always contain vodka and tonic, with either a lime twist or a lemon twist. When Mrs. Monfort's body was discovered, a drinking glass with a lime twist was found at her feet. Two empty tonic water bottles were in the kitchen garbage can, which the housekeeper had emptied earlier in the day. There were no other signs of food preparation in the house.

Sometime between 8:30 and 10 p.m. that night, Beasley drove Mrs. Monfort's car to Haines City to visit Dale Robinson. At that time, Beasley was driving a light-colored car (either white or blue), which he told Robinson belonged to a lady friend Beasley was working for, and at whose house he had stayed a few nights. During the visit, Beasley showed Robinson a $100 bill, offering it in partial payment of his debt. After Robinson suggested to Beasley that the money should be used to purchase some crack cocaine for them to smoke, Beasley left Robinson's house and did not return.

The next day, Beasley arrived at a bus station in Miami. He no longer had Mrs. Monfort's car with him,FN1 and, at this point, he called the Malcolms, whom he had not contacted in over three and a half years. Although Beasley was known to Mrs. Malcolm to be a “snappy” dresser, when he arrived in Miami, he was wearing clothes that he said were “new” which looked odd together-a pair of dress shoes, a pair of jeans with no belt, and a brightly colored t-shirt. Beasley claimed to have lost his wallet, his traveler's checks, and all of his clothes on the bus. He told Mrs. Malcolm that he was vacationing in Miami after having visited unidentified friends in Fort Myers. He stayed with Mrs. Malcolm for a few days, then was permitted to stay at the house of Mr. Malcolm's mother (Mrs. Bennis) while she was away for two weeks. During this time, phone calls began to appear on Mrs. Bennis's bill to some of the same numbers (including calls to the United Kingdom) that had appeared on Mrs. Monfort's bill on August 21. The phone numbers belonged to persons known to Beasley but not to Mrs. Bennis.

FN1. After Beasley had been taken into custody, Mrs. Monfort's car was eventually found in a parking lot at a Howard Johnson Hotel in Orlando, approximately two and a half miles from the bus station, and within two miles of three different locations to which telephone calls had been made from the

Monfort home on August 21. The relevant telephone numbers belonged to persons known to Beasley (two attorneys and the husband of a former sister-in-law), but not known to Mrs. Monfort. The officer who responded to the call from Howard Johnson's was told that the vehicle had been there approximately two weeks. Although the car's dome light had been removed, the car was not damaged, and the odometer reflected that it had been driven very few miles since an oil change that had occurred on a date prior to Mrs. Monfort's death. The car's license plate had expired three months earlier, the doors and trunk were locked, and there was no evidence that anyone other than Mrs. Monfort and Beasley (whose cigarette butts were in the car) had been inside it.

During this period of time, Mrs. Monfort's body was discovered. She had been bludgeoned to death with a blunt instrument. Near her body was a bloody hammer head, wrapped in two dish towels. The head of the hammer protruded through the fabric of one towel. The hammer head had been broken off of its handle, which also lay near the body. Mrs. Monfort had some hairs FN2 in her right hand. There was blood on the floor, blood splattered everywhere in the laundry room, blood splattered in the dining room near the laundry room door, and some apparent blood smeared on the laundry room door frame. An earring was found in the dining room, lying next to a table leg. Mrs. Monfort's purse was near her feet, and she was dressed in the same business clothes she had worn to work on the morning of August 21.

FN2. Microscopic examination of these Caucasian human head hair fragments showed that they were consistent with the known head hair sample from Mrs. Monfort. Therefore, the hairs could have come from her. There was nothing inconsistent in any way between Mrs. Monfort's known hairs and the hair fragments. On the other hand, the hairs were microscopically different from Beasley's known head hair sample. Therefore, the hairs could not have come from him.

The medical examiner who conducted Mrs. Monfort's autopsy testified as to the injuries observed upon examination. Mrs. Monfort had been struck with a blunt object, sustaining injuries on her face and head and typical defensive injuries to the backs of both hands (bruises and abrasions), on the back of the upper arms, and on the back of the left forearm (bruises). The left half of Mrs. Monfort's face was severely injured. There was a large laceration (10 inches by 3/4 inch) extending from almost the top of her head down to her mouth. There was a large bruise on the left half of her face, and multiple lacerations in front of her left ear, on her left cheek, and in the area behind her left ear. There were bruises on both eyes and over her right cheek, and lacerations on the right half of her forehead. All of these injuries were inflicted antemortem. There was also a fracture of her cheekbone (“zygoma”), and a fracture of her

left upper jaw (left “maxilla”). These were open fractures, well seen through the laceration on her face.

The lacerations on her face and head ranged in size from 3/4 by 1/4 inch up to 10 inches by 3/4 inch. There were about nine lacerations on the left side of her head and face; two more lacerations of the right aspect of her forehead; four lacerations on the back of her head, and two others behind her left ear. This made a total of fifteen to seventeen lacerations on (or blows to) Mrs. Monfort's face and head, not including those consistent with being defensive lacerations.

There was also a depressed fracture of the left temporal (skull) bone having the shape of a figure eight; each half of the shape was 1 3/4 inches in diameter, and consistent with being imposed with the round part of a hammer. Mrs. Monfort's brain was lacerated from small fragment formation in the fracture area. There were subdural subarachnoid hemorrhages under the membrane that covered the brain (contusion hemorrhages into the superficial part of the brain, or the cortex). The cause of death, in the medical examiner's opinion, was blunt trauma to the head; while a hammer could have caused the injuries, the impact pattern did not suggest whether the head or the claw end had been used.

After Mrs. Monfort's body was discovered, an investigation of the crime scene was conducted. The only rooms which appeared to have been disturbed were the dining room, the utility (or laundry) room, and the garage. The investigators testified that they did not look under the beds in either the master bedroom or the guest room. All of the beds were made, and the master bed had folded linens on it, suggesting that no one had slept in the house after the housekeeper had cleaned. Photographs of the interior of the home demonstrated that, other than the three disturbed areas, the remainder of the home appeared to be in impeccable order. The garage door was closed, and Mrs. Monfort's car was missing. The $100 bills Rosario had given to Mrs. Monfort were gone.

Beasley had also disappeared from the premises, but he had left behind a box of his business cards and a box of Doral cigarettes in the guest bedroom. He also left a shaving kit and a can of shaving cream on the back of the toilet fixture in the guest bathroom.

While the crime scene was being investigated, the home was secured, and members of Mrs. Monfort's family were not permitted to enter the house. The family members left the house at the end of the day, after the crime scene was released, but before the investigation team had completed work. Before they left, the lead detective (Detective Cash) asked family members to return to the house the next day, to attempt to identify any missing valuables. They agreed

to call Detective Cash after they arrived, so that she could join them at the home.

The next day, Neal O'Toole, Bud Stalnaker (Mrs. Monfort's son) and Bud's wife (Sherry) went to the Monfort home. While looking for missing items of personal jewelry or other valuables, they found a bank bag containing money under the mattress in the master bedroom, but nothing under the bed. In the guest bedroom, Bud also looked between the mattress and the box springs, but found nothing. When he lowered himself to the floor to look under the bed, however, he observed a pair of shoes placed neatly together, with a wadded-up shirt next to the shoes.FN3

FN3. At trial, Bud Stalnaker testified that he did not go near the laundry room, and did not place the shirt under the guest bed.

Detective Cash had already been contacted, and no one touched either the shoes or the shirt until she arrived at the Monfort home and was advised of the discovery made by Bud. Detective Cash and her partner went immediately into the guest room, where she reached under the bed and retrieved the shirt. She obtained a bag from her car, and when she unfolded the shirt on the bag, she discovered apparent blood on the shirt. Detective Cash then placed the shirt in the bag, and the bag in the trunk of her car.

Subsequent DNA testing on the blood taken from the shirt showed that all parameters tested were consistent (none were inconsistent) with Mrs. Monfort's blood. The testing excluded Beasley as a donor of the blood. The housekeeper identified a picture of the shirt as being the same pattern (but a little lighter) as the shirt which she had seen in the guest bedroom where other items belonging to Beasley were located on the morning of August 21. Officer Pierson identified the shirt as being the same shirt Beasley had worn when he saw him at Benson's house on August 20.

A search for Beasley was initiated from central Florida. During this time, Beasley continued to stay at Mrs. Bennis's house in Miami until he became involved in a physical altercation with Mr. Malcolm. After that, Malcolm's brother transported Beasley to a bus station in Fort Lauderdale. Beasley was eventually found in Alabama, living in a motel with Jeff Ellis. Beasley had grown a beard, and was working at Herndon Electric Company under the false identity of “William Benson.” The signature of “William Benson” on certain electric company employment application papers was positively identified by a handwriting expert as Beasley's. When Beasley was discovered, he identified himself as Curtis Wilkie Beasley, and offered no resistance. He was placed under arrest by Officer Jones, orally advised of his Miranda rights, and transported to the Dale County, Alabama, jail. While taking a cigarette break with Officer Jones at the jail, Beasley told Jones that he knew he was in trouble

because, when he had gone back to the house, it was surrounded by FBI agents. Beasley said that after he saw the FBI agents he left.

Postconviction hearing: The testimony adduced during the evidentiary hearing January 9-10, 2006, is hereinafter condensed directly from the transcript with the page number preceding the testimony:

Byron P. Hileman (T5) testified that he served as second chair counsel to Beasley. (T6) His primary duty was to help investigate penalty phase issues, but he also played a significant role in both guilt phase discovery and in cross-examining witnesses at trial whose discovery he had handled. Thus, he was active in both the guilt and penalty parts of the trial. (T7) Robert Norgard, however, was lead trial counsel and responsible for making ultimate decisions, to which Hileman would defer.

Hileman was admitted to the Florida Bar in 1977, although he began (T8) practicing law as a Special Assistant Public Defender in 1976, during his senior year at Florida State University College of Law. He primarily practices criminal defense (T8) and is admitted to practice in the United States District Court for the Middle District of Florida and the Eleventh Circuit. In addition to criminal and capital trials, he has taken direct appeals and appeals on habeas corpus matters. He is a sole practitioner. (T9) He has have been certified as first chair, second chair, and appellate counsel in capital death cases for almost ten years and is also a registry attorney. Beasley's case was his third case as second chair. (T10)

In Beasley’s case, he assisted in discovery and investigatory matters, traveling to Miami and Alabama, where he conducted depositions and investigation. He supervised the investigator, Darrell Burnham, who conducted investigations in Tampa and Miami as well. (T11)

Hileman recalled that Beasley maintained his innocence throughout the investigation, trial and sentencing, which gave rise to a defense a contention that someone else must necessarily have committed the murder. Toward that end, the defense team pursued a number of theories. One theory focused on specific people there was some reason to believe could have been involved. Some of the focus had to do with some very unusual circumstances in the case which suggested the involvement of other people to the exclusion of Beasley. (T12) In particular, Hileman said, the victim’s stolen vehicle was located in Orlando “months and months and months after” Beasley’s arrest. The defense team also tried to establish Beasley's itinerary because he said he had left the area and traveled a certain route and “ultimately had contact with witnesses which might have provided, if not a full alibi, certainly an explanation of where he was when the State was accusing him of having run because he had consciousness of guilt.” The goal was to show that Beasley did not run; that, in fact, he had business with folks and, in fact, traveled to see those folks.

Hileman recalled that the State showed that Beasley wound up in Miami the August 22 based on the testimony of a witness who picked up Beasley at the bus station in Miami. (T13) Hileman was delegated the responsibility for working with Burnham to investigate that journey. Beasley told counsel he left with an acquaintance for Tampa before the murder would have occurred; he rented a motel room in Tampa; then he boarded a bus and road to Fort Myers and then continued on to Miami, where he was met by friends. Hileman said he attempted to establish whether there was a record of Beasley staying at a motel or hotel in Tampa. He sent Burnham to a hotel Beasley mentioned and asked to search the records. Hileman talked to the hotel on the phone directly. Burnham also was directed to inquire of the (T14) bus company in an effort to see if he could establish an itinerary or any kind of ticketing information that might support Mr. Beasley's version of those events. The problem, he said, was that, although it could be established that there were bus routes that would have taken Beasley from where he was to where he said he went, precise times could not be found. (T15) “We couldn't verify with exactitude any particular bus that he might have taken, nor could we get any ticketing information that would have corroborated that story.”

However, Hileman doesn’t recall ever seeking to issue subpoenae duces tecum to directing the bus company to provide bus routes and ticketing information for the specific date, August 21st, 1995.

Asked whether presentation to the jury of a putative itinerary based on established bus routes would have been helpful to the defense, Hileman opined that it would have been helpful to shown a time frame to help the jury understand how long the journey would have taken. “But my memory of it is that...at the end of the day, really all we had was an allegation by the state that Mr. Beasley had committed this murder and then hidden and run away. What I had hoped we could establish was that, indeed, he was not (T16) fleeing, that he had a purpose in mind; that is, particularly, to reach some friends that he wanted to contact, and that he was in the process of doing that. Obviously, that would have not ruled out him having committed the murder. It's not an alibi. On the other hand, it certainly was suggestive that he was not fleeing…out of a feeling of guilt from having committed this murder.”

Hileman recalled that Norgard had mentioned retaining a forensic expert to tell the jury about the bloody shirt under the bed, but “it was not pursued very far, but mentioned only in passing.” Asked whether he believed it would have been helpful to have a witness say that a shirt, wet with blood, could not have been placed by the (T17) killer shortly after the crime on white carpet and not have stained the carpet, Hileman responded: “That's a hard question for me to answer…this reason: We made a major issue out of that faux pas. That is one of the most suspicious circumstances I personally have ever seen in a murder

investigation. I was appalled by it. I was outraged by it personally. And I believe, if my memory serves, I'm the one that cross-examined Detective Cash about it and, I mean, we lit into her and we brought those points out on cross-examination in no uncertain terms. I think there was a tendency -- at least, my memory of it is that it was so obvious to us that I don't know that I even thought about the advisability of having an expert. I mean, we have pristine white carpet and a shirt with considerable amounts of blood on it. We have a laundry room where the blood is literally all over all four walls. And this person is supposed to have gone into the bedroom and taken the shirt off and not left a drop of blood. You know, that's beyond the range of believability, in my opinion. So I don't know that I ever really thought much about it." Nevertheless, Hileman recalls Norgard mentioning hiring a blood spatter expert at one (T18) point.

Hileman was doubtful that he would have been able to elicit from Detective Ann Cash her opinion that it would have been impossible for that bloodstained shirt to have been placed on the white carpet at a time when the blood was still fresh and not have stained the white carpet.

Asked whether it would have been appropriate to ask Lieutenant Elmo Brown how the bloody shirt could have been under the bed at the time crime scene technicians were collecting evidence and not been discovered, Hileman responded that it "certainly would have been appropriate, yes."

Hileman does not recall initiating any efforts to have the bloody shirt excluded from evidence as unreliable, although he recalled talking about it. “I believe we did seek to have it excluded. And I believe the court ruled on it. That's my best memory of it. I don't recall the details.” He agreed that such a motion would have been proper and worth a try. Hileman agreed that the basis for such a motion would have been that Ann Cash had not collected the dirty clothes in the dirty clothes hamper; released the crime scene to the family; and the family discovered the shirt, so the crime scene was clearly contaminated. (T21) Photographs of the crime scene clearly showed clothes in the laundry basket with blood on them, but the dirty clothes basket was not taken as evidence and not processed as evidence, but left there. “[T]he family, very shortly after the crime scene was released, which was very quickly, came in with a cleaning crew and I think they threw everything out and cleaned up everything so nobody could have recovered that after the fact, and it was not recovered.” (T23) Hileman agreed that Detective Cash's failure to take and process the laundry basket, and the delay in finding and processing the bloody shirt seemed to breach chain of custody of the bloody shirt and would have tended to support a proper motion to exclude that from evidence. (T24) Hileman opined that it was “one of the more sloppy jobs of crime processing I've ever seen in a case.” Ideally, a forensic crime scene

technician would be called as an expert witness to rebut allegations by the other side that they had properly investigated the scene, yes. (T25)

Inasmuch as the housekeeper testified that she saw a shirt, closely resembling the one later found with blood on it, on a chest at the end of the bed, with the implication that she picked it up and put it in the dirty clothes hamper the day that the murder occurred, would have been another factor added to the motion to exclude the bloody shirt as unreliable evidence. (T26) So, unless Mr. Beasley was in the habit of wearing a shirt two days in a row, he probably would have changed his shirt. The housekeeper testified that she had seen Beasley wearing a different shirt, a light-blue shirt, when he left the house on the morning that the state theorized the murder occurred.

Hileman found it strange that Lake Hamilton police officer Leo Pierson would have burned into his memory the small detail that on the day the murder was thought to have occurred, Beasely was wearing the shirt later found under the bed with blood on it. In light of the housekeeper's testimony that she saw Beasley wearing a light blue shirt when he left the house the morning of August 21, 1995, the defense team tried to establish the improbability that Pierson's memory was accurate. (T27)

Although Dr. Alexander Melamud testified to time of death (T28) and was very expansive in his discussions, Hileman recalled that he the doctor was

unwilling to commit himself to anything but a range of when the death might have occurred, nor would he try to make it more precise than within the range. (T29) Given that Dr. Melamud seemed to be unwilling to render an opinion that one blow to the head with a hammer would have rendered the victim unconscious, a forensic pathologist's testimony might have been helpful, Hileman admitted, but he was (T30) unaware of what the opinion of the defense's forensic pathologist had been or of any specific strategic or tactical reason why the forensic pathologist was not called to testify.

The defense team viewed Steven Benson as another potential suspect. "He was discussed numerous times in that light." Benson had a (T31) lengthy history of extreme mental instability, he was around the scene near the time of the murder, a reputed drug user of some magnitude, and there was even an unverifiable rumor at one point that he had attacked somebody with a hammer previously. In deposition, Tomas Rosario said that when he met Carolyn Monfort at the apartment for which he paid the first month rent, he saw a workman with a limp or at least some injury to his leg. The defense team established that at the time, Benson had such an (T32) injury to his leg that was obvious to anyone who would have watched him try to walk or watched him try to work. Because Rosario paid Monfort cash and the motive for the murder presumably was to take her money, the fact that Benson apparently witnessed the payment was something in which the defense team was

very interested. The defense, however, could not put Benson at the house or in any kind of ongoing relationship with the decedent. When interviewed, Benson was nearly incoherent and not very helpful or informative. Moreover, “we just didn't have enough information to make a viable presentation of him as an alternative suspect.”

Additionally, the court had granted the State's motion in limine that excluded from any examination of Benson (T33) the fact that he had witnessed his mother beat his father to death with a hammer. The court ruled that the death of Steve Benson's relative did not appear relevant to any issue in the case at that time.

By the end of trial, however, it had been shown that Benson was, in fact, acquainted with Monfort and the rest of her family as well as Beasley; (T34) that everybody knew everybody else; someone answering the description of Benson was seen by Rosario working on the house at the time that Rosario paid Monfort $800 cash; Benson had, at one time, had money, but lost that money owing in large part to alcohol and drug abuse and was currently then down on his luck and in need of money; Benson was being represented by Ed Leinster for an injury and the car Beasley was alleged to have stolen (T35) was found within miles of Leinster's Orlando office at a time when Beasley presumably couldn't have driven it there himself. In light of all that, Hileman agreed that Benson had been shown to be relevant and it would have been appropriate to ask the judge to reconsider the

earlier ruling. (T36) He is unaware of any strategic or tactical decision not to do that or why that would have been ill advised. “I don't recall us even discussing it.” (T37-38)

It was undisputed by several witnesses that there was a longstanding relationship between Byron Hunt and the defendant. Jane Hunt, who became Jane O'Toole, formed a relationship with Beasley while she was married to Byron Hunt. Beasley gave his lawyers a considerable amount of background information about Monfort’s daughter, Jane O’Toole, her family and what transpired among them. But Hileman didn’t recall eliciting from Jane that Beasley baby-sat for her or he had delivered money to attorneys on her behalf, although Hileman agreed those were things that should have been brought out at trial. Nevertheless, he recalled, the evidence was overwhelming that Beasley was not a stranger or drifter. (T40) They had all known each other for years.

Hileman admitted that the defense’s “attempts to establish coherent alternative theories of the crime were of limited success.” The strongest case the defense had, he said, was an attack upon the reliability of the state's case and that it fell short of beyond-a-reasonable-doubt.

Hileman had no recollection of presenting to Rosario a photographic lineup to determine whether Rosario could identify Benson as the person he saw at the apartment. (T41) The defense relied upon the description given by Rosario, which

fit Benson and the particularly the unique aspect of his leg injury, which was very definitely well established and incontrovertible.

When first interviewed by Detective Cash, Rosario said his meeting occurred at a later time of day than that to which he testified, (T42) an hour to an hour and a half difference, (T43) but Hileman did not recall the discrepancies in times being established and knew of no reason to not address that issue. (T44)

Michael Lykins, who was listed as a witness by the state, would have been able to testify that Mr. Beasley borrowed Monfort's car on several occasions and that it wouldn't have been unusual for someone to have seen him in her car. (T45) The State sought to show that Beasley drove the car between 8:00 and 10:00 at night to a fellow's house and gave him a $100 bill. The witness, however, was unable to narrow down specifically when that occurred, other than to say that it was before he learned of Monfort’s murder. In addition, the State established that when the car was found, there were Doral cigarette butts found in the ashtray which were tested and determined to have Beasley’s DNA on them. In light of those two things, Hileman agreed it would have been helpful to call Lykins to show that it would not have been unusual for Mr. Beasley (T46) to have been seen driving Monfort's car with her permission and smoking cigarettes while she's in there or while he's in there.

Hileman believed it to have been made abundantly clear that Monfort’s car had to have been parked where it was later found at a time when Beasley could not have been the person driving. An Orlando police officer testified that the area where the car was parked when it was found had been repaved completely at a time long after the murder and a matter of only a few weeks before it was found. The car itself did not show the kind of deterioration that a car left out in the open for months would have shown. Moreover, because (T47) Beasley's whereabouts were accounted for during that time, it was clear he could not conceivably have placed the car there.

Although Hileman recalled being aware that Beasley contended that he had called and left a message for Monfort on her voice mail while he was in Miami (T48) and that it certainly would have been helpful to have had that evidence, but he did not recall prosecuting any motion to compel or to sanction the State for the apparent disappearance of the voice mail recordings.

The defense team began preparation of a penalty phase case for mitigation well before the conviction. The preparation consisted primarily of interviews with family and friends. The approach adopted was to show the crime in the context of Beasley's entire life. While there were some (T49) negatives, such as drug use and other problems, a lot of people said nice things about him and he had done nice things. The defense team decided to take the positive approach. Hileman’s role was

to talk to family members and some friends. Through the interviews Hileman developed Beasley's life history and the affirmative things that could be said about him. Beasley, however, didn't want his family dragged into his defense; he was reluctant, but he allowed it.

A psychological evaluation was performed, Hileman recalled, although it not produce any mitigating evidence that was thought of sufficient importance to rely upon. It was not the primary thrust of the case for mitigation. (T51)

Hileman didn't recall ever developing any evidence that tended to show that Monfort would have been rendered uncounscious with a single hammer blow to the head, although he would or should have presented it had it existed.

Hileman also did not recall anything regarding bailiff coming into the courtroom about ten minutes before the verdict ultimately was returned and announcing that if the jury was not back in fifteen minutes, the court was going to sequester the jury. (T52-53)

After examining Petitioner's exhibit 1, noted that it is an evidence insert that the sheriff's office attaches to reports to list items of evidence taken into possession. That particular exhibit describes items collected by the case agent that included (T54) that included a gym bag containing personal belongings presumably owned by Beasley. But Hileman does not recall ever examining the

bag or its contents. (T55) Nor did he recall Beasley ever telling him that he believed there were bus tickets in that bag. (T56)

On cross-examination, Hileman agreed that he exerted considerable effort to corroborate some type of timeline of Beasley's whereabouts on the date that Monfort was murdered. (T57) It was a task of critical importance. “I was very concerned about the bus tickets, about the hotel accommodations, about the timeline with the schedule of the buses. Anything that anyone said to me about that, I would have (T58) immediately asked Mr. Burnham to run down. For example, I had him go to Tampa from the site where Mr. Beasley told us he left from by car, and we timed that. We also tried to get the registration documents from the…Holiday Inn, if I recall correctly, in Tampa. We tried to get a bus schedule to see if we could identify what bus trip he would have been on in order to try to establish those timelines. Mr. Burnham traveled that entire route. We deposed any witnesses we knew of in Miami, again, to try to backtrack from there.” (T59) Hileman recalled that there was no inordinate delay in pursuing efforts to corroborate what Beasley told him. The failure to obtain bus and hotel records was simply a result of the passage of time, not a result of being dilatory. (T60-62)

Although Beasley told his lawyers that he got a ride to Tampa from a drug dealer he feared and with whom he sought to sever his association, Hileman did

not recall ever getting a name or any other information that would have allowed him to contact the man as a witness. In addition, although Beasley gave Hileman a Colombian telephone number to someone who might be able to locate the drug dealer, the number was found to be disconnected. “I had no name, so it was a dead end. We couldn't proceed any further.” (T63-64)

Beasley had friends in South Florida with whom he had longstanding relationship. He wanted to go visit with them in any case. But his trip to see them had mixed purposes because the with whom he didn't want to have any further association coerced Beasley into riding with him to Tampa to assist in transporting or hiding drugs or drug money. (T65) Beasley said he arrived in Tampa, got a hotel room, “then lit out on his own to avoid this fellow.”

“I don't recall anyone in South Florida saying that they had lengthy advance notice. Beasley apparently phoned ahead shortly before he arrived.” (T66) Beasley arrived in Miami with little or no luggage, claiming his luggage was lost or stolen in Fort Myers; “he didn't even have a change of clothes, as I recall.” (T67)

Hileman asked Beasley whether a claim for lost luggage was made, but learned that it had not. Beasley never provided any receipts from his journey to Tampa, Fort Myers or Miami. Hileman recalled personally talking to a Tampa Holiday Inn records custodian who said they did not have a record of him checking

in, but that that did not necessarily mean because the record may have been purged. (T68)

Hileman recalled the State introducing evidence that telephone numbers called from the Monfort residence on the last day the victim was seen alive matched those dialed (T69) on the phone where Beasley stayed in Miami. (T70)

Hileman felt counsel did a good job, a very professional job in pointing out to the jury through cross-examination that the crime scene had not been properly searched. He recalled the testimony of Laurie Ward, who said that she specifically did not look under Beasley's bed, but was very skeptical of it. (T71) Although she testified that there was no evidence of a struggle in the bedroom; there was no blood, clearly, on the carpet, and there was no other sign of any disarray that would have indicated any kind of a fight or anything took

place there, (T72) Hileman said: "I don't accept that as a justification…."

Hileman considered the failure of crime scene technicians to check and preserve clothing in the laundry room to be significant because "there was potential blood-spatter evidence on the clothing and the baskets in which the clothing sat, which was obviously unavailable," and (T73) "had crime scene investigators retained the blood spattered basket and laundry as evidence, potentially the shirt would have never gotten under the bed because it would have been in evidence." Beasley admitted to having worn the shirt previously, you

would expect it to end up in the dirty clothes hamper. (T74) Photographs showed the clothing could have been a mixture of men's and women's, but there was no clear picture showing that shirt in that pile of clothes. “There was a pile of clothes, numerous items, not distinguishable individually.” (T75) The only rooms where obvious evidence of the homicide was found were the kitchen, laundry and garage. (T76)

Norgard was the primary decision maker in this case. Norgard made the final decisions.

Hileman recalled investigating Steven Benson as a potential suspect in the Monfort murder because he was also a suspect relation to the murder of a man named Belcastro who apparently had been killed with a hammer. (T77) To that end, Hileman talked to police witnesses in Orlando, trying to get details and police reports. Investigative information showed it was a drug-related killing and Benson was acquainted with Belcastro, “suggesting by implication that Mr. Benson was familiar with death by hammer.” However, “Belcastro was also very well acquainted with Mr. Beasley.” Attorney Leinster also was involved in that group. Belcastro had been the (T78) subject of a wiretap where Beasley's phone calls were intercepted as well, coming from Belcastro's house. “So in order to implicate Mr. Benson in any of this, Mr. Beasley would have also been drawn into this entire

matter of Mr. Belcastro's death because of Mr. Beasley's association with Mr. Belcastro as well."

Moreover, Hileman recalled no evidence that indicated Benson was inside of Carolyn Monfort's house on the last day she was seen alive. "Close to it, but not in it."

Because there was evidence that Beasley previously had access to Monfort's car, the fact that there may be have been evidence within (T79) the vehicle, such as fingerprints or cigarette butts, that indicated he had been in the car was of no great significance. Thus, Hileman was not concerned by the connection between Beasley and the car, but with the allegation that he had the car on the day of the murder and was responsible for its disappearance. (T80) Lykins had no information that would have refuted the allegations. (T81)

Hileman recalled that the car was discovered at a place and time when Beasley could not have put it there because he had been in custody, (T82) which was uncontradicted. "I believe the only attempt by the state to connect Mr. Beasley with the car was the fact that it had been found or discovered in the general area where his attorney, Mr. Leinster, had an office…. [T]here was some involvement there between Mr. Beasley and Mr. Leinster, but no evidence was adduced to that effect. But there was also the additional information that the numbers that were

being called from Mrs. Monfort's home were to Mr. Leinster's office. The same location as well." (T83-86)

Beasley did not ask Hileman to do anything in this case that he ignored or failed to follow up on except that Beasley told him at one point he believed a drug dealer had secreted a large sum of cash in or around Monfort's home (T87); believing he did not have probable cause to seek and obtain a search warrant or subpoena, he did not follow up. (T88)

Hileman had some evidence that would tend to indicate Benson could have committed the murder, but "there was a decision made…that we did not have sufficient evidence to create a viable defense of that kind."

As to the effectiveness of the cross-examination of Detective Cash, Hileman opined: "I felt [cross-examination of Detective Cash] was effective at the time it happened. I remember feeling that way and being kind of elated about the fact that I thought we had done a good job in impeaching the thoroughness and competency of that crime scene investigation." (T89)

Hileman thought Dr. Melamud's testimony was harmful to Beasley's case, "but it was, to some degree, attenuated by the inexactitude of the testimony. In other words, yes, it would have been better had we been able to rule Mr. Beasley out from the perspective of the time of death. And Dr. Melamud's calculation included him within that framework. But we did attenuate that by Dr. Melamud's

admissions that he could not be precise and that there was a wide range of possibilities. So that's the best I can do with that." (T90)

Hileman did not recall ever considering employing an forensic investigation expert to further demonstrate that the sheriff's office botched the investigation. "I don't remember considering that question. I can't say that we didn't, but I don't remember it. At the suggestion of Mr. Daly when he asked me the question earlier, now that I look back upon it, it certainly would have been helpful. As you point out, there would have been consequences with regard to closing argument that may have outweighed that situation. I don't recall ever making that evaluation, though." (T91) "In deposition," he recalled, "I think I was expressing how strongly I felt that we had impeached their investigation by the cross-examination."

Hileman said: "I felt [Beasley] should testify. I felt that because of the nature of our (T92) defense, it was important for him to tell the jury that he didn't do this. I'm sure I expressed those feelings to him. I believe Mr. Norgard did, too. We also discussed the negatives with him, because there were negatives…. I believe I would have told him that I felt he should testify."

Norgard would have borne the responsibility for preparing Beasley to take the witness stand. Beasley's testimony would have been important "especially in a case where you don't have overwhelming physical evidence to tie the defendant to (T93) the crime…."

Although “Beasley did not refuse to allow presentation of a case for mitigation, …he was reluctant. “He mentioned to me at several points that he was very uncomfortable with his family being drawn into the matter.” He never forbade talking to them, “but he certainly was not anxious for me to do so.” Beasley “did not seem focused on that portion of the trial. His strong emphasis throughout the trial was that he didn't kill this woman. And I think he felt that that was the important part of this trial and that the presentation of mitigation in penalty phase was simply of no interest to him. He was certainly disinterested comparatively.”

Part of Beasley’s reason for not wanting to testify was his prior record, which included crimes of dishonesty, which would have been put before the jury during the guilt phase. (T94) Likewise, Beasley did not want counsel to argue during the penalty phase that he committed this crime because of his drug history and drug use. “He denied the crime itself. He denied the current serious abuse of drugs, although he did have a history. And he was not comfortable with us raising that and making an issue of that, is my memory of it.”

Although Beasley did not limit presentation of mitigation evidence “in the sense of saying don't present this evidence; I clearly (T95) recall his very reluctant attitude toward presenting any negative material.”

Asked on cross-examination whether he or Norgard had ample opportunity to prepare Beasley for his testimony, Hileman said: “I know we discussed it at

some length. I don't know whether Bob had individual sessions where I might not have been present, but I know I discussed it with him and I discussed it with him in Bob's presence and Bob in mine. Without remembering exactly how much time we spent or the exact logistics of it, all I can tell you is that if we had even thought there was a possibility of presenting his testimony, I know I would have been over there at night or whenever necessary, to discuss it with him, and I'm assuming Bob would have, too. I don't recall us having done that, but I honestly don't have an active memory of when we went to see him or how many (T96) times we saw him or how long we spent with him about that particular subject."

At the time of jury selection, there was no firm decision as to whether Beasley should testify, but there was a belief that he should. After the state rested, the defense requested some time to assess and prepare the defense and the judge granted some time. (T98) "I did not feel pressured by the court. I felt when we asked for time to do what we needed to do, the court gave us all the time that we needed.

Hileman had no recollection of Beasley ever indicating that he needed additional time to make a decision as to whether to testify or to prepare to testify. "I do recall him being ambivalent, as I think most defendants are in a situation like that, and very anxious and nervous. So he may have felt he needed more time. I don't know, but I don't recall him telling me." (T99)

Hileman said: “I did the best job I could. As you know, standards of practice evolve. I always have 20-20 hindsight, and there are probably things I could think (T100) of to do today that I didn't do then, but I did everything I knew how to do.”

Asked on redirect whether it was true that the State rested its case on Friday afternoon and Beasley was to take the stand, if at all, the following Monday; Hileman and Norgard went to the jail to visit with Mr. Beasley on Sunday afternoon to both talk to the defendant and prepare him for testimony, but owing to jail procedures, they were required to leave (T101) after about a half an hour; Hileman said: “I don't specifically remember the length of time we were there…. I do recall being hurried because I'm always hurried by the people at the jail when I have a major case like this and need hours of time literally with the defendant, but I honestly don't remember the exact length of time. The jail records, I would hope, would demonstrate that.” Although he could not recall whether counsel spent more than a half an hour with Beasley, Hileman opined “if we didn't have but a half an hour, that, in my opinion, would be inadequate.” (T102) On Monday morning, Hileman recalled, Beasley “was anxious. I know he was hesitant. I know he had concerns. And I do believe I recall him being upset that we had not had as much time as he wanted us to have. But, again, I believe we tried to remedy that by asking the court for additional time prior to him having to make that decision…. [H]e was agitated on the subject of whether to testify or not, and was concerned

about the period of time we had had to (T103) discuss it, and other issues…." (T104)

Hileman agreed that, with the possible exception of preliminary discussions, the date of Burnham's appointment would reflect fairly accurately (T105) when he started investigating the case.

Hileman said he didn't believe Ann Cash's explanation of why she missed finding the shirt under the bed because she knew Beasley stayed at that house in a spare bedroom for some period of time while he was working for Monfort and she described seeing little (T106) pieces of copper wire she believed represent drug paraphernalia on the on the carpet next to the bed where the shirt was later found. She also noted that there didn't seem to be any blood trail leading to any other part of the house, (T107) but Hileman said he didn't accept that explanation either because the State offered robbery as the motive for the murder which would necessitate examining the entire house to evaluate whether items of value were missing.

Although Hileman did not recall the precise nature of the questioning, he recalled discussing with Cash that it "was very unusual that it would be the family, not the police officers, doing the inventory of the jewelry and other valuables at a murder scene where robbery was ostensibly (T108) the motive."

Javier Marulanda may have been the name of the man Beasley said drove him to Tampa. (T109)

One other area that Hileman recalled not pursuing, notwithstanding Beasley's request, was that Beasley said he procured drugs for Jane O'Toole. Hileman said he and Norgard took the position that it wasn't relevant to the crime because there was no allegation that O'Toole was involved. "We simply refused to go down that road and develop that evidence," (T110)from a tactical and strategic point of view. (T111-112)

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At the time of his appointment to Beasley's case, Norgard (T115) had been involved in at least 200 capital cases, with more than 40 capital trials in the majority of which he served as lead counsel. (T116) Although more than half resulted in conviction, he won 7 or 8 acquittals and some not-as-charged lesser-included verdicts and three to four mistrials. Six cases resulted in the imposition of the death sentence.

As he prepared for and conducted Beasley's trial, Norgard believed Beasley's testimony would have been helpful to his defense. (T117) Although he

did not conduct a formal preparation session with Beasley, went over with him the various subject areas that would have been relevant to his testimony. (T118) During the trial, he believed there would be a period of time during which he could conduct a session prior to Beasley having to take the stand. However, he said: “I do not normally ask my client questions and, you know, get their answers in a mock examination. That's not how I prepare the client to testify. What I talk about is the subject areas that they would be asked about. (T119) I discuss with them what the state might ask them in that context.”

Norgard, however, did not recall whether he and Hilamn went to the jail the Sunday before Beasley was to take the stand.

He also did not recall Beasley saying he would not testify because he felt unprepared. “I do not recall him saying I'm ready to testify or saying I'm not ready to testify. I don't recall either one of those.” Nor did Norgard recall asking for more time to prepare or decide. (T120)

Norgard explained that the theory of the defense as it related to the shirt was that it was planted after the homicide and was not something that was placed there by Mr. Beasley shortly after the homicide. (T121) “One of the things that stands out in my mind is that there was a fairly small object detected on the carpet next to the bed that they actually collected during the initial processing. And one of the points that we made is, how could they be on the floor collecting an item of

evidence but not have looked under the bed and seen the shirt. So part of the theory that the shirt was planted was predicated on the fact that, from our standpoint, (T122) the crime scene technicians had done a very thorough job of the homicide scene and not found the shirt. And, therefore, someone had to have put it there after the processing."

Norgard believed it was obvious that multiple hammer blows to the head of the victim would have sprayed blood all over the killer and then, according to the State's case, the killer would have been wearing that shirt. (T123) But the defense tried to show that a killer could not have walked through the house over white carpet and not left a trail of blood to get the shirt under the bed. The defense theory was that the shirt was placed under the bed at a time when the blood had already dried, thus, there was no transfer to the carpet. (T124)

Norgard did not associate a blood spatter expert. Although Norgard agreed that he would not be able to show the jury that the killer "would have been drenched in blood or to what extent the person would have got spatters on them," viewing photographs of the immediate area of the crime scene indicated that the killer, too, would have been splattered with blood and could not have walked to the bedroom without transferring liquid blood to the carpet. (T125) Norgard said his method of conducting the trial was to establish points through a combination of getting witnesses to admit to certain facts, but "perhaps not asking them an

ultimate question where, being adverse witnesses, there would have been a favorable answer, but then saving it for argument." An example of that, Norgard said, was the examination of "the person who we felt was the most likely person to have planted the shirt…, the guy who found it, Bud Stalnaker…. [O]bviously, Bud Stalnaker was not going to say: 'Yeah, I planted the shirt.' But what we did was develop the circumstantial evidence of the family's efforts to try to find evidence on Mr. Beasley, despite the police telling them not to." (T126) Moreover, Norgard said he tried to build foundation for an argument to the jury.

Although Norgard did not recall filing a motion in limine to exclude the bloody shirt, he said (T127) "My position would be that the chain of custody… and how it was found goes to its weight, not its admissibility." (T128-129)

Asked whether a forensic expert would have been useful in demonstrating that one theory regarding how the shirt got under the bed was more likely than the other, Norgard said "A forensic expert could have added to the obvious, yes." (T130-131)

Norgard did not recall noting the discrepancy between when Detective Cash testified she collected the bloody shirt and athletic shoes and placed them in evidence and when the evidence log said she actually placed the items in evidence. (T132) "I can't really comment on how important that would be." (T133) "It's not that uncommon in police reports that there are typographical errors or mistakes

made. That's certainly, depending on their explanation, one of many what I would characterize as being sloppy aspects of the investigation." (T134-135)

Norgard explained that Cash was the lead investigator and that crime scene technicians processed the scene, collected the evidence, photographed things, supervised by Lieutenant Elmo Brown. (T136) Norgard recalled Brown being asked "if he knew that Curtis Beasley slept in that room and whether he knew that on the 24th. And he responded that, yes, he did. And he was asked whether on the day that he was looking in that room, whether he looked under the bed, and he said, no, he did not." Asked whether he thought it would have been appropriate to ask him whether looking under beds is included in crime scene procedure, Norgard responded: "There were no ifs, ands, or buts about it, the police made a major blunder by not looking under the bed. I mean, if by aggressive cross-examination, you wanted me to ask the guy, you know, you know, you did something really stupid or, you know, be aggressive with him. I mean, they admitted they didn't look under the bed. I mean, part of what you have to understand here is our theory was that they had looked under the bed, that there wasn't a shirt there, and that now they're covering their rear ends after a key piece of evidence is located. (T137) My experience has been with the crime scene technicians that they're going to do a very thorough job. There's two directions you could have gone on. You could have said, okay, you didn't look under the bed, so you're a stupid idiot and we could beat

them up on the stand about not doing something that they didn't do, versus we think you did a very thorough job, we feel like you did look under the bed, and now in retrospect, you're having problems with your recall and you really did check under the bed…. [T]hey collected some very minute item that was on the floor right next to the bed. And it's just hard for me to believe that they're on their knees collecting something off the floor, and somebody didn't turn their head and look under the bed and not see anything." (T138) "We asked him the questions we felt we needed to ask him."

Asked whether he recalled asking Brown how it was that there was no blood transfer from a bloody shirt to white carpet, Norgard said he didn't know whether the question was asked "or that was something that we saved for argument." "I know that they were asked: 'Was there any blood on the white carpet.' That did come out into evidence."

Moreover, Norgard explained: "Two plus two, you don't have to say it's four…. You put two, you put the plus sign, you put the two there, and you don't necessarily ask the witness does that equal four. But what you do is you put the pieces in place to later argue, particularly when you're dealing with adverse witnesses who are trying to, you know, cover themselves in terms of why they didn't find the shirt and that type of (T139) thing."

"The whole scenario," Norgard said, "does not make sense. [S]omeone killed that lady. There were no bloody pants found at the scene, no bloody shoes, no bloody socks, no other clothing items. So, obviously, if the person were wearing pants, wearing shoes, those were…taken from the scene, yet a shirt was left…. [T]hat doesn't make much sense." (T140)

Asked whether a blood splatter expert or a crime scene investigator could have helped the defense, Norgard said "Certain things are so obvious…. [Y]ou don't need a quantum physicist to tell you two plus two equals four. I can't even say it was a conscious strategic decision." Moreover, Norgard did not consult a forensic expert or blood splatter expert to determine whether they would be helpful.

The record reflects that Norgard sought and obtained the appointment of John Feagle as a pathology expert in this case. (T141) Norgard recalled that he associated Feagle primarily to address the issue of time-of-death. "That was something that was very important to the guilt phase of the case." Norgard recalled that Dr. Melamud was the medical examiner in the case, but that there was nothing that he testified to that Norgard felt was challengeable. (T142) Norgard, however, did not specifically recall what we talked to Dr. Feagle about. "I have a recollection that it had to do with the time-of-death issue. Had Dr. Feagle given us anything that would have been a basis to challenge Dr. Melamud's time of death

we would have used Dr. Feagle…. [T]hat decision was not solely just based on Dr. Feagle, but also reviewing textbooks such as the Forensic Medicolegal Aspects of Death, which is reviewed by forensic pathologists as being sort of the bible of their profession. There's two extensive chapters in there on time of death. So, I mean, we would have reviewed that as well, independent of what we may have done with our expert.

Norgard did not recall consulting Dr. Feagle with regard to when the victim would have been rendered unconscious by blows to the head with this hammer, (T143) although had Feagle had an opinion as to when the lady was rendered unconscious different than Dr. Melamud, we would have certainly raised that issue."

"[N]o doctor would say that she was hit one time, rendered unconscious, because there w[as] evidence of defensive wounds. [W]e got Dr. Melamud to acknowledge that if an arm just happened to be in the area where the blows were striking, that didn't necessarily indicate a defensive wound. And the defensive wound is a term of art that (T144) reflects injuries to extremities when someone is being attacked."

Norgard believed Melmud's opinion to a medically correct answer. (T145)

Norgard did not believe the evidence implicated Steven Benson as equally as Beasley. "He wasn't the person whose bloody shirt was allegedly found in his

room. He wasn't the person who left the area, changed his appearance, adopted an alias. (T146)

Nevertheless, in view of the facts that someone with a leg injury similar to Benson's was present when Tomas Rosario paid Monfort $800 cash; Benson had fallen on hard times and was in need of cash; Benson knew Monfort and her family and had an ongoing relationship with them; he knew where Monfort lived and had been to her house; and there had been some hard feelings between Benson and members of Monfort's family; Norgard agreed that Benson had a motive, "[b]oth financial and in terms of the dynamics with the relationship…." (T147-149)

Although Norgard said the defense tried to develop evidence during the course of the trial tending to show that someone else committed the murder, (T150-151) he believed it would have been unwise to call Benson as a witness to confront him with the evidence that implicated him.

Notwithstanding that he showed through the course of the trial the facts tending to make Benson a suspect, Norgard did not think it worthwhile to ask the court to reconsider its order excluding any questions regarding Benson witnessing his mother beating his father to death with a hammer. "I think it was a good judicial ruling." (T152) "[I]t was something that we raised because of the unique aspect of a hammer being a common theme throughout."

Although Benson may have been a suspect in the Belcastro murder, Beasley was as well, Norgard recalled. (T153)

Benson had motive, opportunity and means to commit the murder, Norgard agreed; “those things, to a certain extent, were developed during the trial.”

The order excluding the evidence “was a potential appellate issue, but in my opinion, not a strong one, not worthy of raising on appeal.” (T154)

Norgard did not recall tasking his investigator to conduct an independent investigation of the murder, but contends that was done through discovery and depositions. “We had an opportunity to talk to Mr. Benson in a deposition and question him.” The nature of this case, he said, “was such that many people who knew both Mr. Beasley and Mr. Benson or people who knew Benson (T155) were part of the state's discovery response in this case.”

Norgard did not recall Beasley asking that Norgard confer with him prior to taking depositions of the O’Tooles and Stalnakers. (T156) It is fairly common that defendants wish to confer about people to be deposed, Norgard said. “Sometimes in the context of handling a case, you have an opportunity to do that. Sometimes you don't. If a client specifically asks me to do that, I would make every effort to do it. If circumstances were such where they asked me to do it but I couldn't do it, I would be the first person to go to them and say, I'm sorry I didn't get to consult with you before the depo, but here's why it didn't happen. They would get a copy

of the depo transcript, and I would tell them: ‘If there is something that you wanted me to ask them that you felt was important that they needed to be asked that I didn't ask, I'll move the court…to re-depo, and tell the court why.’” Depositions were taken of the O’Tooles and Stalnakers and copies of the transcripts were given to Beasley, Norgard said. “I can tell you, I was never asked to go to the court and ask to have anybody re-deposed.” (T157)

Norgard disagreed with the contention that he allowed the state to portray Beasley as a drifter who drifted into the lives of Monfort, the O’Tooles and Stalnakers, killed Monfort, then drifted off. “These people were asked about their relationship with Mr. Beasley in detail.” Although he may not have asked about Beasley babysitting the O'Toole's children and that he delivered money for them previously, Norgard said: “The relationship that was developed at trial was that it's not like they felt he was a bad guy. He was somebody they liked…. That all came out pretty clearly at (T158) the trial. (T160-162)

On cross-examination Norgard explained that a “straw man” is a term of art in criminal trial practice (T163) that refers to the accused pointing to another person as being a potential perpetrator, suggesting to the jury a reasonable doubt that the defendant committed the crime. “You don't necessarily have to prove the other person committed the murder, but if you can, in the jury's mind, get them to have some doubt as to who committed the crime, that could be the basis for a

reasonable doubt." (T164) Norgard believed using Benson as a straw man would have failed badly because there was no evidence that Benson was in the house the day Monfort was last seen alive. "It was a strategic decision not to present Benson as a straw man (T165) when the state chose not to present Mr. Benson as a witness." Moreover, Norgard recalled that Beasley believed Benson had nothing to do with the crime. (T166)

"Going into the trial," Norgard recalled, "I was reasonably sure that [Beasley] was going to testify…. The guilt phase of the case was tried that he might not testify. (T167) But in a circumstantial evidence case, I think it's important that the client be in a position, if at all possible, to explain the circumstances. I felt very strongly that he should testify." (T168)

However, disclaimed ever having a "formalized" discussion with Beasely regarding his decision as to whether to testify. Instead, Norgard said, he had many discussions with Beasley over time about a variety of things, rendering a formal discussion unnecessary. The major factors weighed in deciding whether to testify (T169) were: the perception of what had been accomplished in attacking the State's case during the case in chief; and whether to risk revealing that Beasley had prior convictions. Beasley was concerned about the jury learning of his criminal history because "throughout the trial, there were many things brought out about Mr. Beasley that were very positive, that he was basically a good person." (T170)

Beasley felt that the image developed in the guilt phase of the trial would be damaged by the jury finding out that he had prior criminal convictions. The prior convictions were for worthless checks, which were not terrible, but, nevertheless, crimes of dishonesty or false statement or felony. “[T]here was the feeling that that would make it look like, you know, he was a criminal that would steal money. A dishonest person. (T171) [P]art of the state's theory was that [Monfort] was murdered to take property…for financial gain.”

Efforts to track down any leads provided by Beasley included questioning Beasley regarding long-distance phone toll records of calls made from Monfort's residence, learning from him why they were made and what they involved. One of the things Beasley revealed was that one of the numbers (T172) was to a telephone chat line in England that enable Beasley to contact this international drug dealer. Norgard also recalled that at one point, Beasley wanted a search of Monfort’s house done in an effort to locate either drugs or money in an air conditioning duct. In addition, Norgard recalled trying to develop some tangible evidence that would show when and where Beasley was other than in Polk County at the time of the (T173) homicide.

The information Beasley gave them, however, could not be corroborated. No hotel records could be found, notwithstanding repeated efforts. (T174) And it was Beasley’s theory that it was the drug dealer who killed Monfort. (T175)

Darrell Burnham and Hileman were delegated the task of following up on leads given by Beasley, while Norgard focused on preparing to cross-examine the state's witnesses. (T176) The investigator and second chair reported a lot of dead ends. (T177)

Norgard contended that, based on his experience and knowledge of these types of cases and these types of (T178) scenes, a crime scene expert was not necessary, be it a blood splatter or any other type of expert. "In any homicide case, you are going to have…many different disciplines of the forensic sciences represented…. I am not necessarily going to get a forensic expert for every expert the state has…. It's my judgment call as to when I think one is needed or would be helpful." (T179)

Norgard said he never considered requesting additional DNA testing to determine whether DNA belonging to someone other than Beasley's was on the shirt.

Beasley never expressed any dissatisfaction with Norgard's preparation preparation of him for the trial.

Norgard explained that residual doubt is the notion that although jurors in a bifurcated trial may find a defendant guilty, nevertheless may not be confident in their verdict enough to give the (T180) defendant the death penalty. Although not currently an admissible mitigating factor, Norgard said, it is one of the intangible

things that you know jurors think about when they come to making a decision as to recommend life or death. Moreover, the concept of residual doubt impacted his analysis and decision in terms of the mitigation, as to whether the presentation of Beasley in the penalty phase of trial would include his drug use or other criminal activity. (T181)

Beasley's major concern during the penalty phase was maintaining the image that he was a good person. Beasley did not want to interject evidence, either at the penalty phase of the trial or the Spencer hearing, of a negative nature. "That was something he was very sensitive about." Beasely understood if the jurors had a residual doubt in the penalty phase, but then evidence of his criminal history and drug use were brought out, the residual doubt might evaporate. (T182)

In what he described as a "trifurcated system" in which there is the guilt phase, the penalty phase, and the Spencer hearing, Norgard believed that the evidence of Beasley's drug use was best presented solely to the judge during the Spencer hearing. "Certain things that we know are mitigating factors, actually to a jury, are negative, and jurors react badly to them." But even at the Spencer (T183) hearing, Norgard said, Beasley "did not want Judge Moore to hear the full details of some of the negative sides of his life." Although Norgard believed mitigation should be presented at the Spencer hearing, "Beasley was very adamant about not wanting to do it." One thing that Norgard wanted to do, but did not in deference to

Beasley's views, was to present the hearsay statements of a state witness who had disappeared but had given a statement that he had been shuttling crack cocaine to Beasley throughout the day of the homicide occurred. "Cocaine is a…fairly significant (T184) mitigating factor."

Norgard did not consider it necessary to call Michael Lykins to testify that he had observed, on occasions prior to the homicide, Beasley driving Monfort's car. (T185) Norgard believe there was ample evidence that Monfort had transported Beasley in her car on many different occasions, providing an innocent explanation of how the cigarette butts could have been placed in there.

Norgard said he was prepared to try Beasley's case in 1998 and in his opinion he did a professional job. (T186)

Norgard did not recall bringing to the attention of the State that the contents of Monfort's voice mail obtained from GTE as part of the investigation had been lost. Although he vaguely recalled Beasley telling him he had called Monfort that week from South Florida and left a message. Norgard said he did not consider challenging the prosecution on grounds that the state lost potentially exculpatory evidence because he believe the case law to be clear that where there's a destruction of evidence, it must be shown to have been done in bad faith, "and there was no evidence of bad faith." (T188) "Given the current case law, I would probably be even less inclined to file such a motion," Norgard said.

SUMMARY OF ARGUMENT

Beasley contends counsel were ineffective and deprived him of a fair trial in contravention of the Fifth and Sixth Amendments to the United States Constitution for failure to fully investigate facts and circumstances, prepare and present a defense, raise appropriate objections and test the State's case.

Bloody shirt: One of cornerstones of the State's case against Beasley was the apparently unopposed introduction into evidence of a blood-stained plaid shirt said to have been worn by Beasley and found under his bed. Counsel, however, failed to confront this aspect of the State's case in several respects: first, counsel did not consult with an expert in forensic crime scene investigation; second, counsel did not consult with a blood splatter expert; third, counsel did not challenge the introduction of the shirt into evidence; and, lastly, counsel failed to aggressively cross-examine the State's witnesses with regard to the shirt. Counsel both suspected the bloody shirt to have been planted where it was found and, thus, the subject of evidence tampering. Yet a motion to exclude the shirt from evidence was neither considered, nor properly investigated. Counsel ought to have retained a forensic crime scene expert and a blood splatter expert, compiled deposition testimony in support and filed a motion challenging the introduction of the bloody shirt into evidence. In the event the motion failed, counsel should have done far more than was done to show its unreliability as evidence.

Missing voicemail: Both Hileman and Norgard recalled Beasely telling them he had called Monfort's telephone and left a voicemail a day or two after he left. Neither remembered ever getting the voicemail records from the State. Moreover, they had vague recollections that the voicemail records had been lost by the Sate. Yet they did not litigate the lost, potentially exculpatory evidence, notwithstanding such a motion may very well have resulted in charges against Beasley being dismissed. Even if the motion failed, more could have been placed on the record, including the contents of the voicemail, if that was known. As it is, counsel inexplicably waived a meritorious challenge to the State's case.

Timeline: Counsel were ineffective for failure to establish a timeline for the trip Beasely said he took to Miami in two respects: (1) the investigation was not undertaken until it was too late; and (2) they didn't at least show how long it would have taken to travel there by bus via the route established by testimonial evidence. Beasley's trip to Miami was a partial alibi that limited the time available to do commit the crime charged by the State. Nevertheless, the effort to corroborate Beasley's trip was not undertaken until nine to 14 months after counsel and investigators were appointed. The passage of time resulted in unavailability of records. Even without records, though, counsel could and should have demonstrated the timeline through evidence, rather than leave it to conjecture.

Michael Lykins: Michael Lykins was listed as a witness by the state and would have been able to testify that Beasley borrowed Monfort's car on several occasions and that it wouldn't have been unusual for someone to have seen him in her car. (T45) The failure to call Lykins resulted in an inability of the defense to refute the testimony of Jane O'Toole that she never saw Beasley driving her mother's care, which coupled with Dale Robinson's testimony that sometime between three and seven days prior to his interview, Beasley drove Monfort's car to his house, purportedly to give him a $100 bill. The failure to call Lykins ultimately resulted in the defense being unable to show a reasonable theory of innocence in an entirely circumstantial case.

Preparation to testify: Both Hileman and Norgard believed that Beasley should testify in his defense. Neither, however, remember dedicating any time to preparing him for his testimony. As a result, Beasley was the only prospective witness who had not been the beneficiary of an opportunity to know the nature of the interrogation to which they would be subjected. As such, Beasley was entirely without sufficient knowledge to make a decision whether to testify.

Moreover, counsel were inadequate in confronting and testing the State's case.

ARGUMENT

The standard for determining claims of ineffective assistance of counsel is

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish that counsel's deficient performance prejudiced his defense, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. As this Court has held, "[i]neffective assistance of counsel claims are mixed questions of law and fact, and are thus subject to plenary review based on the *Strickland* test. Under this standard, the Court conducts an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings." *Hodges v. State,* 885 So.2d 338, 346 (Fla.2004) (citation omitted).

Hendrix v. State, 908 So.2d 412, 419 -420 (Fla. 2005); *Rose v. State,* 675 So.2d 567, 569 -70 (Fla. 1996).

In Claim One of his motion to vacate, Beasley contends counsel were ineffective and deprived him of a fair trial in contravention of the Fifth and Sixth Amendments of the United States Constitution for failure to fully investigate facts and circumstances, prepare and present a defense, raise appropriate objections and test the State's case.

Bloody shirt: One of cornerstones of the State's case against Beasley was the apparently unopposed introduction into evidence of a blood-stained plaid shirt

said to have been worn by Beasley and found under his bed. Counsel, however, failed to confront this aspect of the State's case in several respects: first, counsel did not consult with an expert in forensic crime scene investigation; second, counsel did not consult with a blood splatter expert; third, counsel did not challenge the introduction of the shirt into evidence; and, lastly, counsel failed to aggressively cross-examine the State's witnesses with regard to the shirt.

Counsel for Beasley believed the shirt was planted under the bed, most likely by Bud Stalnaker, after the house and its contents were released to Carolyn Monfort's relatives at the conclusion of the forensic investigation. (T120) They both disbelieved the State's explanation that crime scene technicians did not look under the bed, especially in light of the fact that a technician collected a small piece of copper wire mesh from next to the bed where the shirt ultimately was found. (T122) Moreover, counsel believed it impossible that the killer could have repeatedly bludgeoned the head of Carolyn Monfort with a hammer and then traversed white carpet to the room where Beasley stayed, disrobed and put the shirt, wet with blood, under the bed as the State suggested. (T23;122-23) Counsel believed the killer would necessarily have been dripping Monfort's blood and incapable of moving anywhere in the house without leaving a trace of blood. Counsel also believed that the crime scene investigation was deficient in several respects, not the least of which was the failure to inspect and collect the laundry

and laundry basket that had been splattered with blood, from which they theorized the bloody shirt was taken. This was all the more likely inasmuch as the housekeeper testified that she saw a shirt, closely resembling the one later found with blood on it, on a chest at the end of the bed, with the implication that she picked it up and put it in the dirty clothes hamper the day that the murder occurred. (T25) The housekeeper also testified that she had seen Beasley wearing a different shirt, a light-blue shirt, when he left the house on the morning that the state theorized the murder occurred. (T26)

Unfortunately, so "obvious" were these things to counsel, neither counsel recalled ever considering the notion of retaining a forensic expert; to them it was "obvious" that the bloody shirt discovered after the crime scene was released to relatives could not have been placed there immediately after the crime. Asked whether it would have been helpful to show the defense theory through testimony, Norgard said, "A forensic expert could have added to the obvious, yes." (T129-30) Moreover, Norgard opined that, although it was not a conscious or strategic decision, he did not believe a forensic crime scene expert or blood spatter expert was required in the circumstances of the case. (R140) Norgard said his method of conducting the trial was to establish points through eliciting admissions to facts on cross-examination, but refraining from asking an ultimate question and saving it for argument. (T125)

While the defense theory was obvious to counsel, it apparently was not obvious to the jury.

The problem was that counsel failed to investigate to determine whether what was obvious to them could be effectively made obvious to the jury through testimony. An independent expert forensic crime scene investigator could have told the jury the defense theory, rather than leaving it for argument. The jury is instructed to rely on the evidence in reaching its verdict; the jury is further instructed that argument by counsel is not evidence, merely suggested ways of looking at the evidence. Argument is not a substitute for evidence, especially where it is unlikely that cross-examination will bring out the entirety of the facts on which the defense theory rests. In this case, the defense needed to show, through evidence: that the killer would have been splattered and almost dripping with blood; that it was unlikely that the killer could have traversed the white carpet to the bedroom, disrobed and not have left a trace of blood; that the crime scene technicians did not find the bloody shirt under the bed because it wasn't there when they searched the house for other evidence to help solve the crime; that the failure to inspect and collect the laundry basket and its contents rendered the evidence of the shirt itself unreliable.

A blood splatter expert might have been able to tell the jury whether the shirt could have been worn by the killer, whether the killer could have traversed the

white carpet without leaving a trace of blood and then placed the shirt, still wet with blood, under the bad and again not leave a trace of blood. Counsel, however, did not consult the expert.

Had counsel for the defense consulted experts and sought to develop their theory of defense before the trial, it would have been appropriate to file a motion in limine to exclude the bloody shirt from evidence as unreliable and the result of probable tampering. Although Hileman agreed that a motion to exclude the bloody shirt would have been appropriate, he did not recall prosecuting one. (T23) Norgard either considering or filing a motion in limine to exclude the bloody shirt because, he said, "My position would be that the chain of custody… and how it was found goes to its weight, not its admissibility." (T126-27)

Counsel, however, appears to have misconstrued the law. While a mere break in the chain of custody is not in and of itself a basis for exclusion of physical evidence, an indication of a probability that the evidence has been the subject of tampering is a basis for seeking its exclusion. *Bush v. State,* 543 So.2d 283, 284 (Fla. 2nd DCA 1989); *Beck v. State,* 405 So.2d 1365 (Fla. 4th DCA 1981); *Bernard v. State,* 275 So.2d 34 (Fla. 3d DCA 1973). In resolving claims of evidence tampering, a court begins with the premise that relevant physical evidence is admissible "unless there is an indication of probable tampering." *Murray v. State,* 838 So.2d 1073, 1082 (Fla. 2002); *Peek v. State*, 395 So.2d 492,

495 (Fla.1980); *see also Dodd v. State,* 537 So.2d 626 (Fla. 3d DCA 1988). A defendant seeking to exclude suspect evidence bears the initial burden of demonstrating the probability of tampering. *Murray,* 838 So.2d at 1082; *State v. Taplis,* 684 So.2d 214, 215 (Fla. 5th DCA 1996) ("[T]he burden of one attempting to bar otherwise relevant evidence is to show a likelihood of tampering (probability)....") Once the Defendant meets his burden, the burden shifts to the proponent of the evidence to submit evidence that tampering did not occur. *Murray,* 838 So.2d at 1082; *Taplis v. State,* 703 So.2d 453, 454 (Fla.1997) ("[O]nce evidence of tampering is produced, the proponent of the evidence is required to establish a proper chain of custody or submit other evidence that tampering did not occur."). *See also Dodd v. State,* 537 So.2d 626 (Fla. 3d DCA 1988). *See also Taylor v. State,* 855 So.2d 1, 25 (Fla. 2003).

The record of proceedings, however, shows that no such motion was attempted, notwithstanding it was more than colorable. Hileman agreed that it would have been appropriate to have sought by motion in limine to have bloody shirt excluded from evidence. (R20-23) Ideally, a forensic expert would have been called to establish the proper procedures for investigating a crime scene and that the discovery of the bloody shirt departed so far from those procedures so as to render the evidence entirely untrustworthy. (R24) The entire significance of the bloody shirt was that it was discovered under the bed in which Beasley was said to

have slept and, therefore, linked him to the crime. The fact that counsel did not seek exclusion of such untrustworthy and unfairly prejudicial evidence is unreasonable. Norgard declined to take a position as to whether it would be reasonable to attempt to exclude the bloody shirt from evidence on grounds that its probative value was outweighed by undue prejudice. 120-129

The Eleventh Circuit Court of Appeals has found that "[n]o reasonable lawyer would forgo competent litigation of meritorious, possibly decisive claims…." *Huynh v. King,* 95 F.3d 1052, 1057 (11th Cir. 1996)(tactical decision to file untimely a motion to suppress on the remote chance that it may result in federal habeas review is objectively unreasonable). A determination as to whether Beasely was prejudiced under *Strickland* by counsel's failure to file a motion to suppress the relevant evidence involves an examination of two questions: First, was there a meritorious claim that necessitated the filing of the motion? Second, if there was a valid motion to exclude, was the evidence that should have been excluded at trial so critical that, but for counsel's failure to file the motion, there is a reasonable probability that the verdict would have been different? *Huynh v. King*, 95 F.3d 1052, 1058 (11th Cir. 1996). Given the entirely circumstantial nature of the case, exclusion of the only physical evidence remotely linking Beasely to the murder would have been more than enough to obtain a different outcome.

Instead of seeking to exclude the evidence, counsel relied on eliciting admissions from the State's witnesses during cross-examination in an effort to show that it was untrustworthy, but doing so only through argument based on inferences from the testimony. Hileman admitted that it was doubtful that he ever would have been able to elicit from Detective Ann Cash her opinion that it would have been impossible for that bloodstained shirt to have been placed on the white carpet at a time when the blood was still fresh and not have stained the white carpet. (T18) Nor was Lieutenant Elmo Brown asked how the bloody shirt could have been under the bed at the time crime scene technicians were collecting evidence and not have been discovered, notwithstanding that the question "certainly would have been appropriate." *Id.* Norgard believed and attempted to establish that the crime scene technicians had done a very thorough job of the homicide scene, but did not find the shirt because it was not there. (T122) But the technicians refuted to support this theory. On the other hand, Norgard believed that the cross-examination of Elmo Brown was adequate to demonstrate inept forensic procedures notwithstanding those questions were never asked because "you know, two plus two, you don't have to say it's four." (R135-138) This, notwithstanding that Norgard avoided taking a position on whether it would have been reasonable to cross-examine Ann Cash on the discrepancy between when she collected the bloody shirt and logged it into evidence. (R131-135)

Moreover, counsel failed to properly confront the evidence of the bloody shirt, notwithstanding they believed it to have been entirely unreliable evidence. As such, Beasely was deprived of his Fifth and Sixth Amendments to effective assistance of counsel and a fair trial.

Missing voicemail: Both Hileman and Norgard recalled Beasely telling them he had called Monfort's telephone and left a voicemail a day or two after he left. Neither remembered ever getting the voicemail records from the State. Moreover, they had vague recollections that the voicemail records had been lost by the Sate.

Although Hileman recalled being aware that Beasley contended that he had called and left a message for Monfort on her voice mail while he was in Miami (T48) and that it certainly would have been helpful to have had that evidence, but he did not recall prosecuting any motion to compel or to sanction the State for the apparent disappearance of the voice mail recordings.

Hileman had no explanation for not prosecuting a motion involving the disappearance of voicemail records for Monfort's telephone, notwithstanding Beasley claimed to have called her from Miami shortly after his arrival and before her lifeless body was discovered. (R47) However, Norgard said that based on his understanding of case law then and now, he would not have filed a motion challenging the trial and conviction on grounds that the state had mishandling and

lost the contents of Monfort's telephone message system because he could not show bad faith (R 186-188), notwithstanding the lost evidence would tend to show that Beasley was unaware of Monfort's murder.

While Norgard is correct that loss or destruction of evidence potentially useful to the defense violates due process only if the defendant can show bad faith on the part of the police or prosecution, *Guzman v. State*, 868 So.2d 498, 509 (Fla.,2003); *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), he gives us no information that would support his analysis. Under *Youngblood,* bad faith exists when lawmen destroy or suppress evidence believed to exonerate a defendant; bad faith turns on the investigator's or prosecution's "knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood* at 57. "Evidence that has not been examined or tested by government agents does not have 'apparent exculpatory value' and thus cannot form the basis of a claim of bad faith destruction of evidence." *Guzman v. State,* 868 So.2d 498, 509 (Fla.,2003); *See Youngblood* at 57; *see also King v. State,* 808 So.2d 1237, 1242 (Fla.2002) (defendant failed to show bad faith destruction of hair and tissue evidence because the defendant failed to show police made a conscious effort to prevent the defense from securing the evidence); *Merck v. State,* 664 So.2d 939, 942 (Fla.1995) (defendant failed to show bad faith in a police detective's failure to preserve a pair

of pants found at a crime scene, because the detective believed they did not have evidentiary value).

As with the exclusion of the bloody shirt, Norgard waived an issue and declined to make a record that could be subjected to review according to the applicable standards. Neither we nor Norgard seems to know what was on the voicemail and whether law enforcement officers knew before they lost the recordings. The knowledge may have lent itself to a different standard of review. The analysis seems to turn on whether the evidence was exculpatory or merely potentially useful.

> The Supreme Court has recognized that, when dealing with potentially exculpatory or useful evidence that is permanently lost, "courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." *California v. Trombetta*, 467 U.S. 479, 486-87, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) (*citing U.S. v. Valenzuela-Bernal,* 458 U.S. 858, 870, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)). In addressing the government's constitutional duties to preserve evidence, the Court stated:
>
> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality ... evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.
>
> *Id.* at 488-89, 104 S.Ct. 2528 (*citing U.S. v. Agurs*, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). However, in cases where the destroyed evidence is determined to have been potentially useful, as opposed to materially exculpatory evidence, a due process violation requires a showing of

> bad faith on the part of the State. *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

State v. Gomez, 915 So.2d 698, 700 (Fla. 3 DCA 2005). If, as Norgard suggested, the State had lost the voicemail before it was examined, perhaps the Youngblood standard is applicable. However, it the State examined the voicemail and did not reveal an exculpatory message from Beasley, the "*Brady* standard of materiality applies where the prosecutor fails to disclose favorable evidence to the defense. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." *Guzman v. State*, 868 So.2d 498, 506 (Fla. 2003). "Under *Brady*, the undisclosed evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*, citing *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Had the defense been able to play a voicemail recording as described, or at least had a stipulation that it and its contents existed, the evidence probably would have resulted in a different verdict.

Moreover, counsel failed to properly litigate a motion crucial to the defense. As such, Beasely was deprived of his Fifth and Sixth Amendments to effective assistance of counsel and a fair trial.

Timeline: Counsel were ineffective for failure to establish a timeline for the trip Beasely said he took to Miami in two respects: (1) the investigation was not undertaken until it was too late; and (2) they didn't at least show how long it would have taken to travel there by bus via the route established by testimonial evidence.

Although Byron Hileman recalled attempting to establish whether there was a record of Beasley staying at a motel or hotel in Tampa. He sent his appointed investigator, Darryl Burnham, to a hotel Beasley mentioned and asked to search the records. Hileman talked to the hotel on the phone directly. Burnham also was directed to inquire of the (T13) bus company in an effort to see if he could establish an itinerary or any kind of ticketing information that might support Mr. Beasley's version of those events. The problem, he said, was that, although it could be established that there were bus routes that would have taken Beasley from where he was to where he said he went, precise times could not be found. (T14) "We couldn't verify with exactitude any particular bus that he might have taken, nor could we get any ticketing information that would have corroborated that story." *Id.* However, Hileman doesn't recall ever seeking to issue subpoenae duces tecum directing the bus company to provide bus routes and ticketing information for the specific date, August 21, 1995. *Id.* Hileman agreed that showing the jury a putative itinerary based on established bus routes would have been helpful to the

defense, showing a time frame to help the jury understand how long the journey from Dundee to Tampa to Fort Myers and on to Miami would have taken.

Darryl Burnham's billing record as contained in the court file, details that he did not undertake to verify the route or investigate the bus or hotel records until September 3, 1997. Norgard had been attorney of record since his appointment June 6, 1996, and Hileman had been second chair since his appointment January 16, 1997. Moreover, more than two years had passed since the records would have been created. Beasely had been in custody in Polk County since January 22, 1996. (T59) Although Hileman contended that there was no inordinate delay in pursuing efforts to corroborate what Beasley told him about his trip to Miami and that the failure to obtain bus and hotel records was simply a result of the passage of time, not a result of being dilatory. Darryl Burnham's billing record, however, says otherwise.

It seems inconceivable that counsel would have not asked Beasley where he had gone until between eight and 14 months after they began representing him. Even allowing for the passage of time and the destruction of bus and hotel records, it would have been possible to show the time it takes to travel from Dundee to Tampa; that buses departed Tampa September 21, 1995, and arrived at certain times in Fort Myers; that buses left Fort Myers at given times on September 21,

1995; that buses left Fort Myers at given times and arrived in Miami at given times.

Counsel established that Beasely told people the day before the murder that he planned to travel out of town. He in fact did. It was obvious from the evidence that he left the Monfort home sometime after 7:01 p.m. and arrived at a Miami bus station the following day. The journey had to have taken time. Why this was not shown to the jury is inexplicable and counsel did not attempt an explanation.

As such, Beasely was deprived of his Fifth and Sixth Amendments to effective assistance of counsel and a fair trial.

Michael Lykins: Michael Lykins was listed as a witness by the state and would have been able to testify that Beasley borrowed Monfort's car on several occasions and that it wouldn't have been unusual for someone to have seen him in her car. (T45) The State sought to show that Beasley drove the car between 8:00 and 10:00 at night to a fellow's house and gave him a $100 bill. The witness, however, was unable to narrow down specifically when that occurred, other than to say that it was before he learned of Monfort’s murder. In addition, the State established that when the car was found, there were Doral cigarette butts found in the ashtray which were tested and determined to have Beasley’s DNA on them. In light of those two things, Hileman agreed it would have been helpful to call Lykins to show that it would not have been unusual for Beasley (T44-46) to have been

seen driving Monfort's car with her permission and smoking cigarettes while she's in there or while he's in there.

Michael Lykin's testimony also would have contradicted the testimony of Jane O'Toole, who "testified that she never saw Beasley drive her mother's car. She said that her mother drove Beasley to and from work, as the housekeeper testified that Mrs. Monfort did on the day that she was killed. Jane herself drove Beasley on that day (when he helped move furniture), picking Beasley up and dropping him off at the Monfort house. No one testified that Beasley was permitted to drive Monfort's car; rather, there was only evidence that he was always a passenger in the car." *Beasely*, 774 So.2d at 659. The failure to call Michael Lykins ultimately contributed to the failure to demonstrate a reasonable theory of innocence in the entirely circumstantial case.

Preparation to testify: Both Hileman and Norgard believed that Beasley should testify in his defense. Neither, however, remember dedicating any time to preparing him for his testimony.

Hileman said: "I felt [Beasley] should testify. I felt that because of the nature of our defense, it was important for him to tell the jury that he didn't do this. I'm sure I expressed those feelings to him. I believe Mr. Norgard did, too. We also discussed the negatives with him, because there were negatives…. I believe I would have told him that I felt he should testify." (T91-92) Norgard would have

borne the responsibility for preparing Beasley to take the witness stand. (T93) Part of Beasley's reason for not wanting to testify was his prior record, which included crimes of dishonesty, which would have been put before the jury during the guilt phase. (T93) Asked on cross-examination whether he or Norgard had ample opportunity to prepare Beasley for his testimony, Hileman said: "I know we discussed it at some length. I don't know whether Bob had individual sessions where I might not have been present, but I know I discussed it with him and I discussed it with him in Bob's presence and Bob in mine. Without remembering exactly how much time we spent or the exact logistics of it, all I can tell you is that if we had even thought there was a possibility of presenting his testimony, I know I would have been over there at night or whenever necessary, to discuss it with him, and I'm assuming Bob would have, too. I don't recall us having done that, but I honestly don't have an active memory of when we went to see him or how many times we saw him or how long we spent with him about that particular subject." (T95-96)

Hileman had no recollection of Beasley ever indicating that he needed additional time to make a decision as to whether to testify or to prepare to testify. "I do recall him being ambivalent, as I think most defendants are in a situation like that, and very anxious and nervous. So he may have felt he needed more time. I don't know, but I don't recall him telling me." (T98)

Asked on redirect whether it was true that the State rested its case on Friday afternoon and Beasley was to take the stand, if at all, the following Monday; Hileman and Norgard went to the jail to visit with Mr. Beasley on Sunday afternoon to both talk to the defendant and prepare him for testimony, but owing to jail procedures, they were required to leave after about a half an hour; Hileman said: “I don't specifically remember the length of time we were there…. I do recall being hurried because I'm always hurried by the people at the jail when I have a major case like this and need hours of time literally with the defendant, but I honestly don't remember the exact length of time. The jail records, I would hope, would demonstrate that.” (T100-01) Although he could not recall whether counsel spent more than a half an hour with Beasley, Hileman opined “if we didn't have but a half an hour, that, in my opinion, would be inadequate.” (T101) On Monday morning, Hileman recalled, Beasley “was anxious. I know he was hesitant. I know he had concerns. And I do believe I recall him being upset that we had not had as much time as he wanted us to have. But, again, I believe we tried to remedy that by asking the court for additional time prior to him having to make that decision…. [H]e was agitated on the subject of whether to testify or not, and was concerned about the period of time we had had to (T102) discuss it, and other issues….” (T104)

Norgard recalled that as he prepared for and conducted Beasley's trial, he believed Beasley's testimony would have been helpful to his defense. (T116) Although he did not conduct a formal preparation session with Beasley, he went over with him the various subject areas that would have been relevant to his testimony. (T117) During the trial, he believed there would be a period of time during which he could conduct a session prior to Beasley having to take the stand. However, he said: "I do not normally ask my client questions and, you know, get their answers in a mock examination. That's not how I prepare the client to testify. What I talk about is the subject areas that they would be asked about. I discuss with them what the state might ask them in that context." (T118-19)

Norgard, however, did not recall whether he and Hilamn went to the jail the Sunday before Beasley was to take the stand. He also did not recall Beasley saying he would not testify because he felt unprepared. "I do not recall him saying I'm ready to testify or saying I'm not ready to testify. I don't recall either one of those." Nor did Norgard recall asking for more time to prepare or decide. (T119) "I was reasonably sure that [Beasley] was going to testify…. The guilt phase of the case was tried that he might not testify. (T166) But in a circumstantial evidence case, I think it's important that the client be in a position, if at all possible, to explain the circumstances. I felt very strongly that he should testify." (T167) The major factors weighed in deciding whether to testify were: the perception of what had been

accomplished in attacking the State's case during the case in chief; and whether to risk revealing that Beasley had prior convictions. (T168-69) Beasley was concerned about the jury learning of his criminal history because "throughout the trial, there were many things brought out about Mr. Beasley that were very positive, that he was basically a good person." (T169) Beasley felt that the image developed in the guilt phase of the trial would be damaged by the jury finding out that he had prior criminal convictions. *Id.* The prior convictions were for worthless checks, which were not terrible, but, nevertheless, crimes of dishonesty or false statement or felony. (T170 "[T]here was the feeling that that would make it look like, you know, he was a criminal that would steal money. A dishonest person. [P]art of the state's theory was that [Monfort] was murdered to take property…for financial gain." (T170-71)

Based on counsel's responses to interrogation, it does not appear they spent the time necessary to prepare Beasley to testify or to intelligently waive that right. Counsel spent far more time in preparing the State's witnesses, through taking their depositions, than preparing their own client. It was every bit as important for counsel to sit with Beasley and inform him of the questions they would ask and the information they would seek to show the jury. It was also important to inform Beasley of the questions the State would likely ask on cross-examination. Failure to do so left Beasley the only witness who had not previously been party to a

"practice session" with counsel in a deposition. Without that information, Beasley was unprepared to make a decision whether to testify.

Counsel's ineffective assistance deprived Beasley of his right to a fair trial under the Fifth and Sixth Amendments to the United States Constitution.

Testing the State's case: As to section 2, counsel failed to test the State's case by failing to firmly establish the fact of Mr. Benson's presence when Mr. Rosario paid Ms. Monfort $800 cash because they did not show Rosario a photopack to identify Steven Benson. (R41) And Mr. Hileman could think of no good reason for failing to emphasize the discrepancy in Rosario's trial testimony and earlier statements regarding the time of his meeting with Ms. Monfort. (R43-44)

Moreover, Mr. Hileman does not dispute failing to develop a coherent theory of defense other than reasonable doubt, notwithstanding that the circumstantial evidence lent itself to alternative theories of who committed the crime, when and why. (R40)

Moreover, the over-confidence of counsel and their belief that the defects in the State's circumstantial evidence case were obvious led them to a series of failures and omissions that ultimately doomed Mr. Beasley.

Mr. Hileman admitted that it would have been appropriate, after showing through cross-examination of the State's witnesses that Steven Benson knew the

victim, where she lived and saw her receive a large sum of cash, to have asked for a reconsideration of the order in limine excluding evidence that Steven Benson had witnessed the bludgeoning death of a family member with a hammer and was a suspect in the similar murder of his friend in Orlando. (R36) Mr. Norgard, however, defended his decision not seek reconsideration or appellate review of the court's order because he believed it to be a "good judicial ruling." (R 150-151)

Claims Two and Three: Beasley stands on the record without further argument.

CONCLUSION

Based on the foregoing facts, authority and argument, Curtis Wilkie Beasley prays an Order vacating his convictions and sentence of death, and remanding for a new trial and sentence.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed June 1, 2007, to Carol Dittmar, Assistant Attorney General, Criminal Appeals Division, Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013, and Curtis W. Beasley, DOC 356054, P2127S, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026-4420.

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing is written in Times New Roman 14 point and complies with the Florida Appellate Rules.

Respectfully submitted:

Date: October 2, 2007

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