IN THE SUPREME COURT OF FLORIDA

HARRY JONES,

Appellant

v.

STATE OF FLORIDA,

Appellee

Case No. SC06-474

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Jones." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The following are examples of other references:

> "**PC/14 327**" references page 327 of volume 14 of the 14-volume record on appeal of the postconviction proceedings;
>
> **"IB"** indicates Jones' Initial Brief in this appeal.

The trial court for purposes of these postconviction proceedings took judicial notice of the "entire record," including "the testimony of everybody that appeared at the trial" (PC/14 420). Therefore, when appropriate, the State will refer to that record in the direct appeal, which will be referenced using the following convention:

> **TT/vol# page#** references the transcript for the original direct appeal in this case, and R/**vol# page#** references the non-transcript record on appeal for the original direct appeal in this case.

The record transmitted to this Court for the postconviction proceedings also includes much of the direct appeal record. For example, the trial testimony begins in the postconviction record at PC/7.

For references to pages, the State will use the clerk's page-stamp for the record if it exists.

Unless the contrary is indicated, **bold-typeface** emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; and, all other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

The State submits its own rendition of the case and facts.

A. Procedural and Factual Background: Trial and Direct Appeal.

The subject of this appeal is circuit court case #91-1932-AF, from the Second Judicial Circuit, in and for Leon County, in which Harry Jones was indicted for the murder of George Wilson Young, Jr., and other felonies (R/1 1-2). A May 1992 jury trial (R/2 through R/4) resulted in "a hung jury and a mistrial," Jones v. State, 648 So.2d 669, 672 (Fla. 1994).

After a November 9-13, 1992, jury trial (TT/II through TT/V), Jones was found guilty of each count of the indictment (R/5 786-90).

On direct appeal, Jones v. State, 648 So.2d 669 (Fla. 1994), affirming Jones' convictions and sentences, summarized the basic facts of this crime:

> On June 1, 1991 sometime between 6:30 and 7:00 p.m., the victim in this case, George Wilson Young, Jr., went to a liquor store on the west side of Tallahassee. While Young was talking with his friend Archie Hamilton, who worked at the store, Harry Jones and Timothy Hollis came in. When Hollis, who was intoxicated, appeared to get sick, Jones took him to the rest room. According to Mr. Hamilton, Jones returned from the rest room to see Young pay for a half pint of gin from money Young pulled from his pocket. Young then helped Jones take Hollis outside, and agreed to give the two men a ride home. Several witnesses testified that they saw the three men leave the liquor store in Young's red Ford Bronco II a little before 7:00 p.m. Hollis's mother testified that Jones and a white-haired man brought her son home in a red truck and then left the house together. A clerk at a local convenience store testified that he saw Young and Jones together sometime between 7:30 and 8:00 p.m., when they purchased a six-pack of beer.
>
> According to other testimony, at approximately 8:05 p.m., Young's truck was involved in an accident on the north side of town. Jones, the only occupant, was taken to the emergency room and admitted to the hospital.
>
> When authorities realized that the owner of the truck Jones was driving was missing, a detective was sent to question Jones. Jones told the detective he borrowed the truck from a black man in "Frenchtown" for twenty dollars. The next day, when authorities learned that Jones had

> been seen with Young prior to the accident, two officers went to question Jones again. While in Jones' hospital room, the officers seized a bag of clothing that had been placed in the corner of Jones' room. The clothing had been removed from Jones by hospital personnel after the accident. The following day, law enforcement seized lottery tickets and cash that had been removed from Jones' pockets and placed in hospital security.
>
> On June 6, 1991, Young's body was found in Boat Pond on Horseshoe Plantation in Northern Leon County, to the east of where the accident occurred. Witnesses who found the body testified that they previously had seen Jones fishing in other ponds on the plantation. Experts testified that soil and pollen samples taken from the shoes and pants that were seized from Jones' hospital room were similar to samples taken from Boat Pond. There also was testimony that the lottery tickets seized from hospital security had been purchased at the same place and time as tickets found in Young's truck.
>
> According to the medical examiner, Young died as a result of fresh-water drowning. Although the medical examiner was unable to determine whether Young was conscious at the time he drowned, he was able to determine that Young was alive at the time he was submerged because of plant material that had become lodged in his lungs and throat. The medical examiner further testified that, among other injuries, Young suffered a fractured arm and several fractured ribs that were consistent with premortem defensive injuries.
>
> Kevin Prim, who had been housed in the medical cell with Jones, testified that Jones told him that he met a "guy" at a liquor store. After observing the guy pull money from his pocket to pay for his purchase, Jones talked the guy into giving him and his intoxicated "cousin" a ride home. After dropping the cousin off, Jones and the guy went to a pond where a struggle ensued when Jones attempted to take the guy's money. Jones also admitted breaking the man's arm during the struggle and then holding him down in the water until he stopped "popping up." Although Jones presented evidence in an attempt to discredit this testimony, another cellmate testified that he overheard Jones tell Prim that he had killed a man.

648 So.2d at 672-673.

Because one of the current appellate claims, **ISSUE II** ("ARGUMENT II," IB 68-91), alleges ineffective assistance of counsel (IAC) in the penalty phase, the State elaborates on some on those proceedings.

On November 13, 1992, the trial court conducted the jury penalty phase. (TT/VI 947-1004). The State relied on the "evidence previously adduced during

the guilt phase of the trial" and four additional exhibits. (TT/VI 949) The four exhibits were a Dade County judgment and sentence for attempted robbery (TT/VI 949-50), a Dade County judgment and sentence for robbery (TT/VI 950-51), a Dade County judgment and sentence for robbery with a firearm (TT/VI 951), and a Dade County judgment and sentence for robbery with a firearm and kidnapping (TT/VI 951-52).

In the jury penalty phase, Jones' older sister, Betty Jones Stewart, testified for him. (TT/VI 952-57) She is a sworn "police officer for Metro Dade." (TT/VI 953, 956) She had been employed at Metro-Dade Public Safety for 16 and one-half years by the time she testified at the penalty phase. (TT/VI 956) Officer Stewart indicated that "Harry" (Jones) was born in South Carolina and raised in Miami. The whereabouts of Harry's father were unknown. (TT/VI 953) Her penalty-phase testimony continued:

> Q Did Harry ever know his father?
>
> A For a short time, until he was about five years old. *** Up until he was about five or six years old.
>
> Q And do you recall the circumstances under which the father left?
>
> A Yes. My father was very abusive to my mother. He beat her a lot. Harry was very attached to my father and he was very young and he didn't understand.
>
> After my father left, he had a very hard time dealing with the fact that he didn't have a father and it became difficult for Harry just to adjust without a father.
>
> Q Mrs. Stewart, was there any abuse toward Harry from his father?
>
> A Not that I am aware of.
>
> Q Subsequently, did another man take the place of Harry's father in the home?
>
> A Several years after my father left, I was in the sixth grade. So Harry is four years younger than I am. My mother worked several jobs, trying to

> take care of us, and it became hard for her so she met this other man and he worked and he started to help her raise us. And they eventually got married and moved in, moved together. My stepfather was an alcoholic. My mother became an alcoholic after my father left, I guess dealing with all the pressure. And my stepfather and my mother, they began to fight a lot.

(TT/VI 953-54) Officer Stewart told the jury that both her mother and stepfather were alcoholics and that Harry and their stepfather did not get along, Harry "didn't accept his stepfather." (TT/VI 955) When asked whether "something terrible" happened in one of the fights between her mother and stepfather, she responded:

> Yes. My stepfather, he was in the war and when he drank, he would always start talking crazy and they drank a lot and he would start talking out of his head, if you've ever seen anyone talking out of his head. So he became very abusive and one night he and my mother fought and my mother stabbed him to death. And she was sent away to prison. I was about 15 or 16. She went away for about three years.

(TT/VI 955) Harry was not home during the incident, but he was living there at the time. She indicated that the incident profoundly changed Harry:

> He became a different person. He wasn't controllable. … I was about 16 and my older sister was 18 and we had some help from my aunt and we basically raised Harry. I got a job and my older sister was 18. My brother was about 19 or 20. So we were able to stay together as a family so we wouldn't be separated to foster homes and here and there. And Harry just – he never adjusted to it and he just started to rebel and get in trouble at that point.

(TT/VI 955-56)

Harry Jones also testified in the jury penalty phase. Among other things, he indicated that he obtained his GED. (TT/VI 957-68) He said that one day his father "took me to the store and bought me some things and told me he wasn't going to see me no more." He testified that his father picked him up at school and "bought a box of cookies and told me to go home." The lady with whom the father was leaving did not want Harry to come with his father, her, and her

family. (TT/VI 958-59) Jones' testimony continued:

> Q Harry, do you wonder what it would have been like if your father had stayed around?
>
> A Yes, sir. I would have been different.
>
> Q Did you and your father get along?
>
> A Yes, sir.
>
> Q Did you do things together?
>
> ***
>
> A He was a mechanic and when I wasn't in school he used to take me to the job and take me fishing and things like that.

(TT/VI 959)

Jones told the jury that eventually his mother met and married another man, but "I didn't want him to be my daddy *** I wanted my own daddy." (TT/VI 959-60)

Concerning his mother killing his stepfather, Jones testified:

> Q Harry, where were you when you found out that your mother had killed your stepfather?
>
> A At my aunt's house.
>
> Q Where was that?
>
> A She lived in the apartment building next to us.
>
> Q … And do you recall how long your mother was in prison?
>
> A Three years and eight months.
>
> Q What did you do during that period of time, Harry?
>
> A I growed up and I started playing Little League football.
>
> Q Were your sisters trying to take care of you the best they could?
>
> A They couldn't give me the things I needed. They were working and it was always – you know, wait around and talk about the bills that needed to be paid and things that they couldn't do because they had to pay bills.

> It was – if my daddy hadn't went away, none of this would have ever happened.

(TT/VI 960)

Jones admitted to serving prison time in the past, but he had been out of prison since 1987, and on May 31, 1991, he had been working at the Catfish Pad for about six weeks. (TT/VI 961) He said that "Paul" taught him how to bake at the Catfish Pad and that he "got a raise to $4.50." (TT/VI 964) Jones was "always asking for hours" to work, and, shortly before the victim was killed, "Paul" told him that he was giving Jones "more responsibility," more hours to work, and a raise to $5.00 per hour. (TT/VI 964)

Jones testified that on May 31, 1991, he went out drinking gin and beers with Timothy Hollis until about 5am. (TT/VI 962-63) The next morning, he resumed drinking and drank beer and alcohol throughout the day. He "really liked to drink." (TT/VI 965) He said that after the accident [with the victim's truck], his blood alcohol measured ".269, two and a half times the legal drunk level or whatever you call it of .1." (TT/VI 966) On cross-exam, he testified that he was drunk when he committed his prior robberies. (TT/VI 967-68)

The prosecutor argued that several aggravators apply. (See TT/VI 975-80) Among other things, in arguing CCP, he pointed to the carelessness of the victim "clearly showing the effects of alcohol, pulling out that roll of money" (TT/VI 979)

Defense counsel, Gregory Cummings, told the jury that "the life of Harry Jones is in your hands," and he argued to the jury that Jones' life should be spared. He urged them to use their "humanity." (TT/VI 988-89) He argued extensively against the heinous, atrocious, and cruel aggravator. (See TT/VI

990-92) He also contended that the cold, calculated, and premeditated aggravator did not apply to the facts. (TT/VI 992-93) Defense counsel argued at length that Jones was substantially impaired, for example pointing to his high blood alcohol level, two and one-half times the legal limit. (TT/VI 993-95)

Defense counsel reminded the jury of his sister's testimony, and appeared to refer to Jones breaking down and crying while testifying (See TT/VI 995), and at the postconviction evidentiary hearing defense counsel indicated he recalled that Jones "broke down in tears" (PC/12 94). Defense counsel continued to emphasize to the jury Jones' drinking problem:

> Ladies and gentlemen, a life sentence is not forgiveness. A life sentence is not forgiving him what you found him guilty of. Ladies and gentlemen, Harry's character is flawed. But that is not an aggravating factor. His character is flawed when he drinks. He admitted that he had been drinking on all the occasions he got in trouble, all the times that Mr. Wade [the prosecutor] talked about. His character is flawed but it is not flawed to the extent that the recommendation of death is appropriate. The death penalty is certainly not appropriate here. Harry is prepared to put his life in your hands as he was to let you make the determination you made today. ***
>
> One life has been lost. The Court is going to tell you, human life is at stake. There's one more at stake. Make a determination and weigh the factors and tell the Court, Judge, we recommend that life is appropriate in this case. Life without parole for 25 years. Harry will be in his 50's. By then, a man in his middle ages, maybe by then he can become a productive member of society. There is still a chance. There is always a chance and I ask you to give Harry that chance.

(TT/VI 995-96)

The jury recommended death by a 10-to-2 vote. (R/5 785; TT/VI 1002)

Defense counsel (R/5 791-96) and the State (R/5 810-18) submitted written sentencing memoranda, and on November 18, 1992, the trial court conducted a

sentencing hearing. (TT/VI 974-93)[1] Among other contentions, defense counsel orally advocated against HAC and CCP (TT/VI 978-82) and requested that the trial judge study his memorandum (TT/VI 983). When the judge asked Jones if he wanted to say anything, Jones personally addressed the Court. He apologized to the victim's son for the loss of his father: "… I realize how he feels losing a father because I lost my father at a young age. Even though my father didn't die or got killed by anyone, when he left out of my life it was like the devil had come to me. I never saw him no more." (TT/VI 983-84)

Jones said he has a "whole lot of good in" him and he wants to work with young people "to try to straighten them out where they don't have to go through the things that I went through, to try to put some guidance in their life." (TT/VI 983-84) Jones continued by indicating that no matter what the sentence, he "won't be getting out … in the near future" and by pleading:

> But there is young inmates in prison, I guess you know that, probably over seventy-five percent of the inmates in prison are between the age of eighteen to twenty-five years old, and I think I can work with some of those inmates and try to like get them on the right track. And I think if not many, even if I can turn one around to keep them from going through this, that I will be of some use to try to get them to become a productive member of society. Once again, sir, I would just like to say I'm sorry all this came about, and I ask you to spare my life.

(TT/VI 984)

On November 20, 1992, the trial judge sentenced Jones to death (R/5 821, 828-36; TT/VI 995-1009). The trial court found the following aggravating circumstances: (1) Jones was previously convicted of another violent felony,

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[1] "Volume VI" includes four bound transcripts. Pagination in the first volume is numbered in type in the upper-right corner of each page and ends at "1005," but the volume for November 18, 1992, is numbered with ink-stamps in the lower right of each page and begins with page "974."

listing Jones' prior convictions for Attempted Robbery, Robbery, two counts of Robbery with a Firearm, and Robbery with a Firearm and Kidnapping; (2) the murder was committed while Jones was engaged in the commission of a robbery[2]; and (3) the murder was especially heinous, atrocious, or cruel. (R/5 829-32) Concerning HAC, the trial court explained:

> … the evidence presented by the medical examiner regarding the seriousness of the wounds to the victim indicated that the wounds were consistent with defensive, premortem injuries. The wounds consisted of an acute fracture of the long bone in the forearm, fractured ribs, numerous tears of the skin of the left arm and numerous blows to the head. The evidence clearly reveals that the victim, George Young, Jr., experienced a great deal of pain and terror as he attempted to avoid being killed.

(R/V 831-32; TT/VI 1002) The trial court rejected CCP. (R/V 832; TT/VI 1002)

Concerning mitigation, the trial court found a statutory mitigating circumstance: (1) Jones' capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was substantially impaired. The trial court explained that the "evidence established that Defendant had been drinking beer and gin on the day of the murder and the evening prior to the murder. Defendant testified that his medical records indicate that his blood alcohol level was 0.269. Defendant further testified that when he was drinking he got into trouble." The trial court gave this mitigator, whether viewed as statutory or non-statutory, "some weight." (R/V 834; see TT/VI 1002)

The trial court found the non-statutory circumstance that (2) Jones suffered from "childhood traumatic and a difficult childhood." The trial

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[2] The trial court "combined" the aggravator of "committed for pecuniary gain" with the while-engaged-in-commission-robbery aggravator, (R/5 831)

court's order explained:

> Defendant and his sister both testified that when the Defendant was five or six years of age his father dropped Defendant off, gave him some money, left with his girlfriend, and Defendant has not seen his father since. Both Defendant and his sister testified that Defendant was close to his father.
>
> Further, both Defendant and his sister testified that Defendant's mother stabbed and killed Defendant's step-father and spent three years in prison. While Defendant's two sisters and his aunt attempted to raise the Defendant, he never adjusted and started getting into trouble.

(R/V 834-35; see TT/VI 1005-1006) The trial court gave this mitigator "some weight," reasoning that it was not entitled to "great weight" because of "its remoteness in time and the fact that his similarly situated sisters have become productive citizens … ." (Id.)

The trial court also found that (3) Jones had the love and support of his family and gave it "some weight." (R/V 835; see TT/VI 1006)

On November 10, 1994, this Court released Jones v. State, 648 So.2d 669 (Fla. 1994), and on January 25, 1995, rehearing was denied. Jones affirmed the conviction and death sentence. It held that items seized from Jones' hospital room and from hospital security were illegally seized evidence and testimony relating thereto should have been suppressed, 648 So.2d at 678, it also held that the error was harmless, reasoning:

> At the time of the accident, Jones was the only occupant in George Young's truck. Jones had been seen with Young a relatively short time before the accident. The accident occurred on the north side of town not far from where Young's body was later found. Jones admitted to a cellmate that he took a man he met in a liquor store to a pond where the two struggled when Jones tried to take the man's money. He also admitted pushing the man's head under water until he stopped struggling. On this record, there is no reasonable possibility that the outcome of Jones' trial would have been different had the illegally seized evidence been suppressed.

Id. at 678-79.

After rejecting an appellate claim concerning the admissibility of photographs, Id. at 679, Jones also rejected appellate claims that "the automatic application of the 'during the course of a felony' aggravator, section 921.141(5)(b), fails to adequately narrow the class of felony murders eligible for the death penalty," Id., and attacking HAC and its application here, Id. Concerning appellate claims pertaining to the trial court's handling of mitigation, Jones held:

> Jones specifically contends that the court failed to adequately consider uncontroverted evidence that he was intoxicated at the time of the murder and that the court all but rejected evidence of Jones' traumatic childhood when it noted that, because of the remoteness in time and the fact that Jones' similarly situated sisters have become productive citizens, this factor is not entitled to great weight.
>
> First, it is clear from the sentencing order that the trial court considered Jones' intoxication in finding that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This was consistent with defense counsel's reliance on the evidence of intoxication in arguing that the mental mitigating factor should be found.
>
> The trial judge also found Jones' traumatic and difficult childhood to be a mitigating factor but determined that it, like the mental mitigator found, was not entitled to great weight. The trial court properly found and considered in mitigation Jones' intoxication at the time of the murder and his unfortunate childhood. While these mitigating factors were entitled to some weight, the weight to be given was within the trial court's discretion. ***. We find no abuse of discretion here.

Id. at 679-80.

Jones petitioned the United States Supreme Court for certiorari, which was denied June 19, 1995, Jones v. Florida, 515 U.S. 1147 (1995)

B. Procedural and Factual Background: Postconviction Proceedings.

By order dated August 21, 1996, this Court extended the time for Jones to

file his "pleadings under Florida Rule 3.850" to August 20, 1997. (PC/2 180)

On March 21, 1997, defendant, through counsel, filed a "shell" Rule 3.850 motion for postconviction relief. (PC/2 235-47) On July 21, 1997, in response to Jones' motion concerning funding (PC/2 250 et seq.), the trial court stayed for nine months the time for Jones to file an amended Rule 3.850 motion. Extensive public records demands and litigation ensued. (See PC/2 284 – PC/3 456; PC/XI)

On February 20, 2003, the trial court ordered that Jones file his amended Rule 3.850 motion within 30 days. (PC/3 463-64) On March 19, 2003, Jones, through counsel, filed his amended 3.850 motion. (PC/3 465-573, PC/4 574-82)

The claims in the amended 3.50 motion included assertions in Claim I that the prosecution withheld information concerning Kevin Prim (PC/3 467-83) and concerning the victim's condition the night of the murder, alleging that he was "extremely intoxicated at the time" (PC/3 483-85). These matters are raised in the initial Brief under **ISSUE I** ("ARGUMENT I," IB 46-67).

The amended 3.850 also argued that trial defense counsel was ineffective during the penalty phase because he failed to put a mental expert on the witness stand (CLAIM IV, PC/3 506-12) and failed to put on some lay witnesses "regarding the context in which Mr. Jones grew up" (CLAIM IV, PC/3 512-16) These matters are argued in **ISSUE II** ("ARGUMENT II," IB 68-91)

"Improper shackling" was argued in CLAIM VII of the amended 3.850 (PC/3 539-40), and it is now the subject of ISSUE III ("ARGUMENT III," IB 92-94). Improper prosecutorial argument was included in the amended 3.850, as CLAIM VIII (PC/3 541-45), which is also the subject of part of **ISSUE III** ("ARGUMENT

III," IB 94-98)

On May 27, 2003, the State responded in writing to the amended 3.850 motion (PC/4 583-600), and on June 20, 2003, Jones replied to the response (PC/4 614-34)

Apparently, on January 16, 2004, a Huff,[3] hearing was held and an evidentiary hearing was granted upon Claims I, II, III (in part), and IV. (See PC/5 802, 891, 912)

On April 15, 2004, (PC/12 & PC/13) and April 16, 2004, (PC/14) the trial court conducted an evidentiary hearing. The circuit judge indicated that he took 30 pages of notes from the evidentiary hearing. (PC/14 421-22)

At the outset, the trial court announced that the evidentiary hearing concerned Claims I, II, and IV. (PC/12 3)

Jones, through postconviction counsel, called his trial defense counsel, Gregory Cummings, as a witness. His testimony appears to have consumed the entire morning. (See PC/12 3-112) He has been a member of the Florida Bar since 1980, worked in a small firm for about a year, then at the public defender's office for about three-and-one-half years. (PC/12 4) When his public defender caseload reached about 150, he left the P.D.'s office, worked at Dept. of Banking and Finance for nine months, then went into private practice. (PC/12 4-5) His main interest was criminal defense, but this was his first capital case. (PC/12 5) While in the P.D.'s office he had handled "several hundred cases," including bad checks, rapes/sexual batteries, "25 to 30 robberies," cases involving shootings, and 5 to 7 jury trials a year (PC/12 62-63). Cummings

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[3] Huff v. State, 622 So. 2d 982 (Fla. 1993).

testified that he was "involved in three death penalty cases last year" in which he was lead counsel. (PC/12 81)

On September 17, 1991, the circuit judge appointed Cummings, and on September 20, 1991, Cummings formally appeared for Jones. (PC/12 6-7, 97-98. See also R/1 32) Until September 16th, 17th or even the 18th or 19th, Mr. Taylor and Ms. Showalter would have been counsel of record for Jones. (PC/12 98) The Public Defender confirmed that until her Office represented Jones until September 16. (PC/13 135) Cummings assumes that, when he took over Jones' representation, they gave him "everything that they could" ethically give. (PC/12 98)

Cummings concluded that he hoped he did a "hundred and ten percent" on this case. (PC/12 66) He provided an overview of his trial prep for this case:

> I reviewed documents, depositions, talked to Aloi or Paul Williams for them to do certain things. I certainly talked to Mr. Jones on several occasions. I drove this route that Mr. Jones and the victim took many times. ***
>
> I think I even had Paul Williams drive it, the investigator[,] drive it a couple of times. Just go out to the scene, talk to people, review records. Yes, whatever you normally would do and talk to people about what else maybe you could do or what they would do.

(PC/12 66)

In preparing this case, Cummings testified that he is "not afraid to ask questions." (PC/12 83) Cummings testified that "there were people I was talking to about this one." One of them was "Randy Murrell, who was well-versed in trial strategies and death penalty cases *** and has probably tried more murder cases than anybody else in the public defender's office." Cummings may have also discussed the case with Lynn Thompson, who was one of Ted Bundy's lawyers

and has tried many cases. (PC/12 81-82. See also concerning Murrell PC/12 88) He may have also consulted Manny Garcia. (PC/12 83)

Concerning Jones' previous lawyer, Gene Taylor, Cummings said that he "was a good friend, and … although there was a conflict, … he was more than willing to help Mr. Jones." (PC/12 82)

Cummings said that Jones was proactive in this case. Cummings kept Jones "involved in what was going on." Although Jones said he could not remember all of the facts "surrounding the accident," he was able to provide family history and his own history and his "up-and-down relationships," including with a female whose name Cummings could not recall. (PC/12 67) Cummings used Jones as a resource. "Mr. Jones was always coherent" and was "able to communicate … in … an adequate manner in order to present the defense." (PC/12 68-69) Jones was "always very polite and respectful." (PC/12 69)

Cummings characterized Mr. Wade's (the prosecutor's) reputation:

> … Mr. Wade and I have worked together since a long time ago, since the early '80's, and he's always, as I am, I just tell him what's going to happen … he has never hidden anything. He has been a good lawyer in that respect, or all respects actually.

(PC/12 17) For this case, when asked if there was [a]ny reason to believe that he [Wade] was trying to hide the ball from you in this case," he responded, "Not at all." (PC/12 99)

1. Prim claims.

Cummings discussed his assessment of Kevin Prim, and Prim's denial that he (Prim) was given any deal or promise for his statement implicating Jones. (PC/12 7-30) On cross-examination, Cummings clarified some offense reports were dated after the trial and the day before the sentencing. (PC/12 100) Neil Wade,

the trial prosecutor, testified at the evidentiary hearing that he was not aware of the offense reports regarding Prim, that is, evidentiary hearing Defense Exhibits 7, 8, 9, and 10, until sometime after the trial. He "believed" that it was after sentencing. (PC/14 321-22) "[W]hatever we knew about, in terms of arrests, was available to Counsel. *** To the extent that I knew something, I would make that available to Mr. Cummings." (Id. 323)

Deputy Michael Woods also testified that, before Prim testified at trial, he (Wood) was not aware that Prim had been recently arrested. (Id. 338) Prim did not admit to being a crack addict. (Id. 339) Concerning two petty theft arrests, Wood later responded "Yes" to the question: "Subsequent to before he testified and subsequent to his arrest." (Id. 349) He indicated it was before the second trial. (Id. 350) Twice Prim called Wood after being arrested, but Wood did not help Prim with the new arrests. (Id. 351-52) Wood indicated that the he thought of the "petty thefts … as insignificant." (Id. 352) In one of the thefts, Prim stole honey buns and in the other, a rotisserie chicken. (Id. 353) He thought that those crimes "were talked about at the trial." (Id. 354)

Sgt. Jeffrey Johnson, Tallahassee Police Dept., testified concerning the timing of the incidents pertaining to the offense report marked as defense Exhibit #8. (PC/14 358-62) On October 24, 1992, no suspect was listed, and sometime between November 11 and 18, 1992, Prim became a suspect. November 19, 1992, Prim was arrested by other officers. (Id. 359-61) He later narrowed the time that Prim became a suspect to November 18, 1992. (Id. 364) Concerning Defense Exhibits #9 and #10, the offense and the arrest occurred on November 19, 1992. (Id. 364) Johnson did not know Prim was a witness in a murder case

until about a week before the evidentiary hearing. (Id. 362)

Cummings said that Watson "started off as a defense witness," but at the end of his deposition, "he said, oh, yeah, Harry Jones told me he did it." (PC/12 88; see also PC/12 100-101) He said that Mr. Prim's name appears on a billing from investigators Aloi and Williams, "and I would hope that" Mr. Prim's background was "one of the things we were looking into." (PC/12 102) He said that Prim using drugs might be usable, "[d]epending on the circumstances." (PC/12 102)

Cummings acknowledged some police reports, including one regarding a November 19 arrest of Prim for theft and possession of paraphernalia, which was after the guilt phase of the trial (PC/12 26, 28)

Jones also proffered as Defense #13 a police report concerning a burglary of the residence of George Young, Jr., on February 28, 1991, and as Defense #14 and offense report for criminal mischief at Jessie's Florists on May 5, 1991. (PC/12 33-35)

Later in the evidentiary hearing, Assistant Public Defender Ines Suber testified. (PC/13 145 et seq) Her files have been destroyed. (PC/13 153) She testified that when she represented Kevin Prim, Prim told her that he had made statements to Mike Wood and that Prim said "he was expecting to be ROR['d] [released on own recognizance]." (PC/13 150-51) She said that, as a result, she moved for Prim to be ROR'd. She concluded that she got him the ROR. (PC/13 151) She said that her ROR motion was able to represent that the prosecutor did not oppose the ROR. (PC/13 152) Her motion was introduced in the evidentiary hearing; it says nothing about the reason for moving for the release. (See

Defendant's Exhibit #21) She said she was never aware of any altercation between Prim and Jones (PC/13 155) and that when incarcerated witnesses and clients get into fights, "they are transferred" to another county jail. (PC/13 156)

On cross-examination Suber acknowledged the following sequence of the clerk's stamps:

> September 12 3:32PM Order releasing Prim (PC/13 157);
>
> September 12 3:56PM Suber's motion for ROR (PC/13 158-59);
>
> September 13 3:10PM Release from the jail (PC/13 157-58).

She indicated that she told Mr. Taylor, who was representing Jones at the time, of Prim's ROR expectations. (PC/13 160-61)

Assistant Public Defender Nancy Showalter testified that Gene Taylor represented Jones, and she was second chair. He was "lead counsel." (Id. 192) She said that when "we" talked with Jones, he was told not to talk with other inmates about his case. She did not "believe" that she spoke with Cummings about this case after he took over representation. (Id. 199)

The prosecutor, Neil Wade, testified at the evidentiary hearing that he made no promises to Prim and no one else did to his knowledge (PC/14 327). He continued:

> When Mike Wood first told me about Kevin Prim, of course, one of the first things I wanted to know is whether he or anybody else he knew made any promises to him or any threats to him to get him to talk about what he knew. He told me he did not. Now, I did not make any promise to Mr. Prim that he would be RORd or anything of that nature.

(Id. 327)

Wade later reiterated, "I never talked to him [Prim] about giving him an ROR." (Id. 334)

Wade did not doubt that Suber had contacted him, but his decision that "an ROR was the best thing to do" was due to a confrontation between Prim and Jones, to insure Prim's safety and maintain peace in the jail. (Id. 328) He explained that the alternative of transferring inmates in this type of situation is "something we had started doing more recently where the inmate is being held on serious charges. At that time Prim was being held on a theft charge, grand theft, petty theft, or both." (Id.) In reconstructing his day looking at his calendar, Wade testified that "Prim was RORd probably before he came to the State Attorney's Office for me to talk to him." (Id. 329-30) Wade testified: "I never made a decision that he would be a witness until after I had personally talked to him." (Id. 333)

Wade said that Cummings listed Suber as a witness and there is a notice indicating that he intended to take her deposition, but there is "no record of what she would have said back then." (Id. 330-31)

Deputy Michael Wood testified no promises were made to Prim to give him an ROR. (Id. 337-38) Wood had no knowledge of any promise to ROR Prim nor did he orchestrate or participate in any such promise "or anything else for Kevin Prim's testimony." (Id 341-42) Wood picked up "Prim at the jail when he was RORed." (Id. 341-42) Prim gave a taped statement immediately after he was RORed. (Id. 342-43)

2. Claim concerning DUI notes.

Cummings testified regarding the contents of some notes that postconviction counsel said he obtained from the State Attorney's file. According to Cummings,

the last page of the notes said: "witness saw victim driving earlier in the evening obviously DUI at 6:00P.M." Cummings did not know who wrote the notes and, other than his assumption, he did not know the identity of the "witness." Trooper Ross' name is handwritten on the previous page.(PC/12 30-31) After the trial court ruled that the handwritten notes were inadmissible, the notes were proffered as Defense #12. (PC/12 32) Trooper Ross was not called as a witness at the evidentiary hearing. (See PC/12 2, PC/13 115-17, PC/14 241-42) The prosecutor testified regarding the proffered notes that he did not recognize the handwriting in them, and the judge reminded postconviction counsel that the notes had not been admitted into evidence. (PC/14 324-25) Wade explained that it did not make sense that the notes referred to the trooper seeing the victim DUI:

> If Trooper Ross told me that, my first question would be, well, Trooper, why did he then get killed? Because if he is DUI, why didn't you pull him over? *** [I]f he was drunk enough to be perceived as DUI; he'd have gotten arrested. I don't understand.
>
> It is illogical to me that a trooper would ever tell me something like that. But even if somebody said he was intoxicated or under the influence of alcohol an hour before he is seen at the liquor store – the people at the liquor store described his behavior and conduct to Mr. Cummings and to the jury.

(Id. 325)

3. Penalty phase claims.

Concerning mitigation for the penalty phase (**ISSUE II**), Cummings testified at the evidentiary hearing that the "approach" to the penalty phase now is different than it was at the time of the 1991 trial. (PC/12 60; see also PC/12 110-11: after this trial, "mental health issues" have developed into "a major mitigating factor") At the time of the trial, there was only one mitigation

expert around. (PC/12 86-87)

As noted above, Jones was articulate, polite, and respectful in his interactions with Cummings. (See PC/12 67-69) Showalter testified that Jones was not unwilling for Taylor and herself to develop mitigation. (Id. 194) She testified about Taylor getting Berland to evaluate Jones and Berland's report. (Id. 197-98) Cummings also testified that Jones also showed no signs of hallucinating or being delusional or paranoid. (PC/12 70, 71-72) In interacting with Jones, Cummings saw nothing that would lead him "to believe Mr. Jones had some mental health issues." (PC/12 71) He "never had any problems meeting with Mr. Jones." (PC/12 73) Jones "seemed to be able to relay the facts, communicate, understand the law … ." (PC/12 51) Cummings' notes attached to his May 19, 1992, motion for payment of fees and costs includes many entries that indicate communications/conferences with Jones. (See Defense Exhibit #15)

Cummings was aware that Jones' blood alcohol level was "above point two something" and that a "trace of cocaine" was also found in Jones' blood. (PC/12 48-49) Jones introduced the June 1, 1991, lab report showing a blood alcohol of 263 mg and the presence of cocaine metabolites. (Defense Exhibit #17; PC/12 49) Cummings was "aware that [Jones] had used cocaine." (PC/12 50) However, Jones never admitted that he committed this murder. (PC/12 85) Cummings elaborated on re-direct examination:

> [I]t's a tough position when your client says he didn't do it, but yet he's found guilty and he has to get up there and tell them, well, I was intoxicated and such, it puts you in a tou[gh] position.
>
> But also the toxicology report that we would have had to have dealt with, or we would have dealt with, talks about cocaine in his system. And that would have opened up cross-examination as to Mr. Jones' cocaine use.

(PC/12 106) He continued by indicating that the goal would be to "avoid a jury hearing about illegal drug use, cocaine, which is worse than alcohol." (PC/12 107)

Cummings testified that he "was familiar with the use of mental health experts and the benefits that they could have" (PC/12 72). Cummings had reviewed mental health mitigators "numerous times in attempts to become familiar with them." He explained that "I'm sure my bill reflects my research on mitigators and such" (PC/12 47). Among the handwritten items attached to Cummings May 19, 1992 motion for fees are the following: "10-1 Review Hosp Records," "2-12 Prep … Mit factors/Family," "2-12 LR Mit Factors. D's background," "2-13 Prep … for family," "2-15 Miami," "2-23 Research - … Mit factors," "3-21 Sentencing Phase," "4-12 LR – Experts Testimony," numerous entries for trial prep 5-8 to 5-15, "5-15 … Review Penalty Phase." (Defense Exhibit #15) The May 12, 1992, motion did not include work done between then and the November 1992 trial.

Cummings did not hire a mental health expert, but he reviewed a memo from Assistant Public Defender Nancy Showalter "about her conversations with Dr. Berland." (PC/12 41) Cummings had obtained, reviewed, and highlighted some DOC records concerning Jones' mental health. (PC/12 42) Cummings did not recall if he had spoken with Berland over the phone, and he did not note every phone call he made. He had no notes of having called Berland. (PC/12 42-47)

At "some point," Cummings "probably made a decision not to use a mental health expert based upon what that graph, the results of the testing show." (PC/12 46; see also PC/12 74-75) He elaborated:

> I believe the non-use [of a mental health expert] was based upon the evaluation by Dr. Berland, the results reflected in the graph that you have as Exhibit No. 16, and Mr. Jones' DOC records, along with just knowing Mr. Jones and communicating with him during the period of the trial, or the preparation and trial.

(PC/12 50-51) He may have asked additional experts, such as Harry McLaren, to assist in interpreting test results. (PC/12 89) He believed that "[a]t some point in time somebody told me" what the graph meant. (PC/12 105)

Dr. Berland had advised not to do a brain scan "because it may come back negative and we would have to eat it at trial." (PC/12 73) Mental health experts "can be very helpful, but they can also come up with information that could be harmful, too." (PC/12 74)

As part of his trial prep, Cummings had highlighted parts of the DOC records and "starred" some areas of them. (PC/12 74) Cummings obtained the DOC records from the Public Defender's Office. (PC/12 109) The DOC records were introduced at the evidentiary hearing as State's Exhibit A. (PC/12 103) Cummings reiterated that there were aspects of Jones' DOC records that he did not want the jury to hear (PC/12 60-61). He had "highlighted the areas that were bad." (PC/12 76-77) Specifically concerning a report by Laura A. Prado, MD, Cummings elaborated:

> … [T]his is at the Union Correctional Institution Neuro Psychiatric Department in Raiford, Florida. And the part that I highlighted, and surrounding areas, it says: He is not suffering from any disabling mental illness, but prognosis is guarded with respect to his anti-social behavior.
>
> Psychological testing revealed no sexual hangups, no schizophrenic process, nor is he suffering from any thought disorder. Passive aggressive features were described.
>
> The part that I specifically highlighted was: But prognosis is guarded with regards to his anti-social behavior.

***

> But it talks about there are no hallicinations or delusions. He is well-oriented in all spheres; that is, to time, place and person. He reveals his previous charges prior to coming to prison. [See also PC/12 83: "denied hallucinations," "No delusional ideas"]
>
> Clinically he is of average intelligence and has good plans for the future.
>
> ***
>
> Mood and affect are appropriate. And immediately after that, it talks about diagnostic impression is a personality disorder, anti-social personality.

(PC/12 75-77) Cummings interpreted the report to indicate that there is "potentially anti-social behavior developing and watch out for it in the future … ." (PC/12 76)

Cummings said he had also highlighted parts of a 1978 DOC report by Hugo Santiago Ramos, a psychologist at the DeSoto Correctional Institution, including its narrative of Jones breaking into a house while completely nude and "Anti-social personality." The report recommended that Jones be placed in a mentally disordered sex offender program, which Cummings not only highlighted but also starred. The report also said that Jones is "highly rebellious and non-conformist." (PC/12 79-80)

Cummings explained the tactics of not raising mental health as an issue:

> … [T]his evidence was out there, and certainly available to the State. But when you raise a mental health issue, there's a good chance that it is going to come in. Because on cross-examination, if we get an expert that says: A, B and C; the State would say, well, did you have a chance to review this record and bring out these results, and did they have an affect on your diagnosis, or your testimony today?
>
> So, I mean, a lot of this stuff, just about everything I highlighted would probably come back to haunt us at some point in time.

> And I still think that way today. *** I don't know if I made that specific decision based on what I'm saying today, but the way these things are highlighted and noted leads me to believe that's why a decision was made not to use a mental health expert, in addition to the results of the graph.

(PC/12 80-81)

Although Cummings said that his file does not explicitly state why he did not use a mental health expert, (PC/12 90) he said that his current thinking, and assumes he was thinking the same thing back then, is that "he did not have mental issues enough to overcome some of the bad things I found in there." (PC/12 83-84) "[T]he file is not empty as to any indication that I just plain overlooked it." "I think this document hurt more than helped." (PC/12 90) On redirect-examination, he continued his explanation that Berland's graph was "not good" and, concerning Jones' DOC records, that "it's not good. And at some point in time, I would have had to have made a decision that it just wasn't an avenue to approach." (PC/12 107-108) He said that he assumes that he had "read every word in this pile of papers in front of" him at the evidentiary hearing. (PC/12 109)

Cummings said that he did not recall whether he reviewed Jones' school records. (PC/12 52), but he indicated that in the Dillbeck case, "they got ahold of school records," but that "[d]idn't work either." (PC/12 95-96) On redirect-examination, when asked if he obtained records or did he rely on what the Public Defender had obtained, he said he "didn't get any school records" and he "didn't believe [he] got anymore DOC records" and he reiterated that he did not recall. (PC/12 111-12) Showalter testified that Defense Exhibit 23 shows that Jones was arrested when he was 11 years old for stealing money from

another student in junior high school, and as a result, Jones was sent to the Florida School for Boys. (PC/13 201-202) When Jones was 16 years old, he was being charged as an adult; "burglary was first." (Id. 202) Showalter read into the record:

> Begins, 16 years old, burglary, GT, which would be grand theft, then attempted strong-arm robbery, pled guilty one year jail on that, grand theft burglary, … probation, … robbery … robbery.

(PC/13 202) She continued by enumerating Jones' DOC sentence when Jones was 17 years old, DOC sentence for a violation of probation, 21 months for armed robbery, "arm robbery," traffic and misdemeanor offenses, in 1990 a sexual battery was dropped to aggravated battery, and tampering with a witness. (Id. 202-203)

Dr. Berland, a forensic psychologist, testified at the evidentiary hearing. (PC/14 265 et seq) He has testified 90% to 95% of the time for the defense (PC/14 268), and the 1991 work he did on this case was a "freebie" (Id. 303-304). He discussed the evaluation he did on Jones for Taylor and related exhibits. (See Id. 269-74) He did not recall ever being contacted by Greg Cummings to do any additional work, which he would have been willing to do. (Id. 274-75) In response to a request by postconviction counsel, he interviewed Jones on February 25, 2003. (Id. 275) He also reviewed records and interviewed several people. (Id. 276-78) He concluded that Jones meets the criteria for extreme mental or emotional disturbance and explained his opinion. (Id. 279 et seq) Berland testified about the violence and other incidents in the home. (Id. 293-97) He said that Jones "denied everything" so he did not think that Jones was malingering. (Id. 283; 304-305) Because Jones suffered some brain injury

when he wrecked the victim's vehicle, it would be "difficult … to ferret out whether there is evidence of a pre-existing brain injury." (Id. 287-88) "[N]ot all brain injured people are mentally ill … " (Id. 293) Concerning his advice to Showalter to not "be so quick to run out and have a brain scan," he discussed the nature of scans and brain tissue. (Id. 289-90) He discussed the MMPI test administered to Jones, indicating that "Scale 4 … can measure potentially criminal thinking" but "in the long run, the biological mental illness is a more salient, more persistent adverse influence on his behavior." (ID. 298-99) He continued:

> And it will interact with any potentially criminal inclinations he has. It will potentiate the criminality because of poor judgment and because of drug abuse and alcohol abuse and so forth.

(Id. 299) He said that a court reporter in another case erred in recording testimony that the MMPI test overestimated mental illness in black males by as much as 90%. (Id. 310-11)

Berland later indicated that he "wouldn't rule out" anti-social personality disorder. There may be some evidence of it. It may be "mixed in." (Id. 317-18)

According to Berland, in 2003 for these postconviction proceedings he did not administer the new MMPI because of "efficiency and to focus on his mental state back then as much as possible." (Id. 311) When Berland testified in 2004, he still had not talked with Cummings. (Id. 312)

Berland relied on the W-A-I-S test in determining that Jones has brain damage. He "supposed" that this reliance upon an IQ test for this purpose is controversial, then, when pressed, said he did not know. (Id. 313-15) On redirect, he testified that he "thought it was valid." (Id. 319)

Berland discussed Jones' IQ scores of 103, 109, and 106; he said that the mentally ill can have above average intelligence. (Id. 291-92) Concerning the DOC records, he indicated that, other than the one possibility of a psychotic disturbance, "there were no findings of mental illness by DOC staff." (Id. 306, 306-307) He was not aware of any DOC records showing any hallucinations. (Id. 306)

Berland said that he did not review the trial transcript to see if it revealed any evidence that Jones was acting paranoid at the time of the crime. (Id. 315-16)

The State called forensic psychologist Dr. Harry McLaren as a witness at the evidentiary hearing. (PC/14 377 et seq) Dr. McLaren has worked on hundreds of times in capital cases and testified over 100 times in them. (PC/14 378, 379) Most of the time, he testifies for the defense (Id. 379), but at the capital appeals stage he acknowledged that the greatest majority of work is done for the State (Id. 404). McLaren explained Jones' MMPI scores (Id. 380-89) and indicated that Jones' profile "is often encountered with violent criminals. It is a malignant profile" (Id. 382) He elaborated:

> They have behaviors unpredictable and erratic and may involve strange sexual obsessions and responses. Usually, there will be anti-social behavior resulting in legal complications. These individuals also lack empathy and are non-conforming and impulsive.
>
> ***
>
> … In their early family histories, they learn that relationships were dangerous due to constant confrontation with intense family conflicts. They were rejected. ***
>
> ***

> Crimes are likely to be bizarre and often extremely violent including homicide and/or sexual assault. Their behaviors are usually impulsive, poorly planned without apparent reason … .

(Id. 384-86; see also Id. 388-89)

Unlike Berland, McLaren reviewed the trial transcripts in this case (Id. 389-90). McLaren said that the facts of this murder fit Jones' MMPI profile:

> In regard to it being a homicide where there was apparent excessive force, broken arm, both ribs on both sides of the body broken, facial injuries. And the drowning, if it is true, that the victim was killed by being held beneath the water, conscious or unconscious, until he drowned until his head stopped bobbing up, according to one of the, quote, jailhouse snitch's rendition of Mr. Jones' statements.
>
> This would be – sounding kind of cruel to me. And it would seem to me that some of the people that I've examined to generate profiles like this.

(Id. 390-91)

McLaren also reviewed the DOC psychological reports from Cummings' file (Id. 391) and discussed the potential devastating rebuttal that prosecutors can muster (Id. 392-93). He pointed out that DOC diagnosed Jones with anti-social personality disorder, not psychotic passive aggressive personality. DOC found no delusions, hallucinations. (Id. 395) He explained the desirability of avoiding "testimony where the jury would perceive the person as very wicked, evil, bad, dangerous … ." (Id. 407)

Concerning Jones' IQ scores, McLaren said that "[t]here are an awful lot of normal [people] walking around with" them. (Id. 396) He elaborated. (See Id. 396-99)

McLaren indicated that there is nothing to indicate brain damage (Id. 399) and that "a lot of information suggest[ed] that [Jones] didn't suffer from a major mental illness" (Id. 405-406). This information also included McLaren

listening to Jones' witnesses testify at the postconviction hearing concerning his childhood. (Id. 413) McLaren refused to give an opinion regarding statutory mitigation. (Id. 415)

McLaren had not personally examined Jones (Id. 410-11),[4] but he concluded that if he were to examine Jones and if he had complete access to all of Jones' records, there is "an extremely high likelihood" of Jones "being diagnosed with an anti-social personality disorder," which usually does not play well with a jury. (Id. 400)

Cummings testified that "every person who would sit in a jury would understand a little boy's … love for his father and that person leaving him." (PC/12 95) He indicated that a "serious consideration" in evaluating potential witnesses for the penalty phase is "an ability to communicate well with some emotion, not overwhelming emotion" (PC/12 95)

Jones' former girlfriends, Pamela Williams and Gwen Fryson, were hostile towards Jones; "they didn't like him." (Id. 307)

Concerning calling family members at the penalty phase, Cummings said the judge "sort of threw" him when he announced that the penalty phase would start about an hour after the trial ended and he did not recall, assuming the mother was at the trial, why he did not call her to testify, (PC/12 53) but Jones' sister (Officer Stewart) "was obviously, and always was, going to be the only family member to testify." (PC/12 52)

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[4] He stated that he has observed Jones' behavior for a couple of days. (PC/14 411)

Cummings said he was "sure" he had spoken with Jones' mother and father[5]. (PC/12 52) He said he spent a morning and maybe also part of an afternoon "talking with the family" in Miami (PC/12 51) to discuss Jones' background and childhood (PC/14 366). At another point, Cummings estimated that the meeting was a "couple of hours." (PC/14 365) Several people were at the Miami meeting, including another one of Jones' sisters and, he thought, Jones' mother. (PC/12 54) He could not say that is all he did, but he thought that would "perhaps" be enough in this case because Officer Stewart was "very articulate and could identify the family, … the way the family was through the years, and how she observed Mr. Jones growing up … ." (PC/12 52) He was sure that he talked to Officer Stewart "at various times," but he had no independent recollection of it. (PC/14 370) He said he does not bill every call. (Id.)

He elaborated that Officer Stewart "was the most articulate, *** [a]nd she was somebody that you could believe. She was a police officer *** that the State could not attack her credibility … ." (PC/12 91; see also PC/12 105)

> She was, in my choice of the family, the best person to explain Mr. Jones' childhood and the family dynamics as they were when he was growing up. *** Well, she seemed to be leading – the person I talked to most. She's a police officer. She was good at asking questions and wanting, you know, here is my number, contact me. Yeah, I think the family looked up to her, too.

(PC/12 92) Cummings believed that Stewart was one of the siblings who helped raise Jones when their mother went to prison, (PC/12 92-93) and he added that he thought that Jones looked up to Officer Stewart also. (PC/12 92)

He did not "believe" that he had spoken with any of Jones' teachers or

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[5] He later said he did not recall if he spoke with the biological father. (PC/12 53)

coaches; he had no recollection of why it was not done. (PC/12 54-55)

Cummings has no current recollection whether Jones had a daughter. (PC/12 55)

Other witnesses who testified at the postconviction evidentiary hearing concerning potential penalty phase evidence included the following.

Joseph Accurso, who was the football coach for Jones when Jones was 13 years old (PC/13 118-19); he indicated that Jones was "very bright," "pretty independent," and "[v]ery respectful," (PC/13 120-21) but Jones became "involved" with marijuana and left the football team (PC/13 121) and Jones was strong (PC/13 123); he has not had any contact with Jones since then (PC/13 124).

Sam Middleton was married to Jones' cousin. (PC/13 137) He said that Jones was a "[g]ood child to me," Jones' father left the mother, the step-father drank, the "rest of them drank," and that the kids had a hard time after the mother went to prison. (PC/13 139-40) He answered almost all of the questions with "yes" and "no." (See PC/13 136-44)

Bertha Middleton testified that she is Jones' first cousin. (PC/13 162-63) She said that Jones wanted to be like his father (PC/13 164-65), she did not recall Jones' mother and her boyfriend "Tommy" getting into fights (Id. 165), Jones "made good grades" (Id. 171), it was difficult financially for the mother to raise the children after the father left (Id. 165-66), Jones started to get into trouble when his mother went to prison (Id. 166-67), robbing and breaking into places (Id. 171). The other kids in the family were upset when the mother was imprisoned. (Id. 170) The other kids "turned out good children." (Id. 171)

She could not recall if Jones was sent to reform school, but she heard about Jones being sentenced to prison. (Id. 171) She said that she has "no idea" whether Jones' mother would have testified for him at the trial. (Id. 167-68) When asked how much involvement she had with Jones before Jones' father left, she said, "Not that much." And, after Jones' father left, her contacts with Jones did not increase "that much." (Id. 168) She did not know how old Jones was when his father left. (Id. 170)

Kay Underwood dated Jones when she was about 16 or 17 years old. Initially, her mother was not "too happy" about her relationship with Jones. (PC/13 175) Jones was seven years older than she. (PC/13 180-81) Their relationship became "intimate" (Id. 181), but they did not live together (Id. 184). She attended Florida A&M in 1984, and Jones was sent to prison sometime after that. Jones was incarcerated shortly after she met him. (Id. 182) Jones visited her while he was on work release. They planned to get married after she finished college. (Id. 175-76) They eventually broke up when she returned home from school. (Id. 176-77) She married someone else, but in 1989 when she had "trouble" with her marriage she came to see Jones one time (Id. 185-86). She eventually learned that Jones was imprisoned for robberies. (Id. 182-83) She visited Jones in prison. (Id. 184-85) Jones is fairly intelligent (Id. 187), loved his mother (Id. 177), knew the Bible extensively (Id. 178), and was kind to her (Id. 179). He helped her become independent from her mother. (Id. 189-90) Jones has always been her "number one friend." (Id. 186) He is still supportive of her (Id. 190), and she would have testified at trial if asked (Id. 180). Jones had a daughter, Tasheba Allen, (Id. 179), but he was not married to the mother (Id.

185). She saw no signs of Jones having any mental problems. (Id. 187) Jones used marijuana, and she did not know if he used cocaine. (Id. 183-84)

Johnnie "Donnie" Lambright, Jones' older brother, testified. (PC/13 204, 208) Jones' father abused the mother (PC/13 205-206), but Jones was usually asleep when it occurred (Id. 209). The whole family was shocked when the mother was sent to prison. (Id. 206) Lambright went into the Army to provide some support for the family. (Id. 206) Lambright completed his education prior to going into the Army, their sister owns her own business as a health care provider, and his other sister is now a retired police officer. (Id. 209-210) He has had "[v]ery much difficulties" with alcoholism. (Id. 206) Lambright loves his brother and would have testified for him if asked. (Id. 207)

Theresa Valentine testified that she is six years older than her brother, Harry Jones. (PC/13 212) Their father was a heavy drinker and abused their mother on weekends. (PC/13 212-13) Their mother and her boyfriend, "Tommy," fought on the weekends, and she went to prison for killing him. (Id. 213-14) When the mother went to prison, she and her sister financially supported the family with jobs. (Id. 214-15) Her brother Donnie did not provide support for the family until after he "got out of the military." (Id. 217) She never had problems with alcohol (Id. 219) and she has "a facility for senior citizens and a facility for mental retardation. (Id. 222) Jones started getting into trouble after their mother was imprisoned, and she pointed to an incident in which Jones stole a bicycle, it had something to do with the football team. (Id. 219-20) At some point, Jones was sent to reform school. (Id. 220) Jones continued to get into trouble after their mother was released from prison. (Id. 221) She

would have testified for him, if asked. (Id. 216)

Diane Jones, Jones' older sister, (PC/13 223-24) testified that Jones' nickname was "Beaver" because he was the "baby of the family." (PC/13 224) She talked about the father leaving (Id. 225), the mother's boyfriend "Tommy," who drank on weekends and got into physical fights with the mother (Id. 226-27), who also would be drinking (Id. 230), and the "dramatic effect" the mother's imprisonment had on Jones (Id. 227). Jones was age 17 and unmarried when she had a daughter. (Id. 229) Jones got his GED in prison. (Id. 231) She could not recall if Jones' daughter ever went to see Jones in prison before he was sentenced to death. (Id. 232) She recalled Cummings coming to Miami, but she thought he only stayed about a half hour, she did not recall Cummings asking about the impact of the mother's imprisonment on Jones, she was in the room with them for about five minutes, and he did not ask her to testify. (Id. 232-35, 238) She was not present for the trial, and she admitted that "There's no excuse." (Id. 236) The mother did not come to the trial either. (Id.)

The same Betty Joan Stewart who testified at the penalty phase also testified at the evidentiary hearing. She narrated many of the events to which she testified in 1992. (See PC/14 243-62) She said that Cummings' visit to their house in Miami was for "less than an hour." (PC/14 256-57) She said that she had not reviewed her trial testimony and did not recall it, (Id. 259-60) but when asked whether the record of the trial speaks for itself concerning any differences, she concluded, "Basically the same." (Id. 263)

4. Shackling.

At the close of the evidentiary hearing the circuit judge indicated that

there was a shackling claim. He stated: "That was totally false, false allegation … . *** He was, in fact, shackled during preliminary hearings. He was never shackled during jury selection or the trial. *** [H]e was never shackled in front of the jury." (PC/14 423) There was no objection to the judge's comments, nor was there any proffer of any contrary evidence.

5. Judicial notice of entire record.

The circuit judge took "judicial notice of the entire record, … not only the testimony of Michael Wood but the testimony of everybody who testified at the trial will be considered." (PC/14 420)

6. Post-evidentiary hearing proceedings.

The judge ordered written closing arguments, (PC/14 422) and on May 13 and 14, 2004, the parties filed their written memoranda arguing the evidence from the evidentiary hearing (PC/5 767 et seq., 799 et seq.).

On May 4, 2004, through a Notice of Filing, Jones filed the deposition of Kevin Prim taken November 7, 1991. (PC/4 718-66)

About April 11, 2005, Jones, through counsel, filed a supplemental postconviction motion (PC/5 845 et seq), which the State opposed as untimely (PC/5 912 et seq).

C. The trial court's orders on appeal.

On September 23, 2005, the trial court filed its Order Denying Grounds 1, 2, 3, 4, & 13 of Amended Motion to Vacate Judgment and Sentence. (PC/5 926 et seq.) The trial court wrote:

> This cause came on for hearing on Grounds 1, 2, 3, 4 and 13 of the Amended Motion to Vacate Judgments of Conviction [sic] and Sentence filed

pursuant to Rule 3.850 and rule 3.851, Florida Rules of Criminal Procedure, on behalf of the Defendant. The Court having considered the amended motion, the evidence presented, argument of counsel, the record, and being otherwise fully advised, finds as follows:

1. Defendant was indicted on July 18, 1991, on the charges of First Degree Murder, Robbery and Grand Theft of a Motor Vehicle. (Exhibit A, Indictment).

2. Defendant was found guilty after a jury trial on November 12, and 13, 1992, as charged on all counts and upon conclusion of the penalty phase of the trial the jury recommended by a vote of 10 to 2 that Defendant be sentenced to death on the murder conviction. (Exhibit B, Verdict [Trial]; Exhibit C, Verdict [Penalty Phase]) Defendant on November 20, 1992, was sentenced to death on the charge of First Degree Murder. (Exhibit D, Judgment & Sentence, 11-20-92).

3. Defendant's convictions and death sentence were affirmed on direct appeal by The Florida Supreme Court, *Jones v. State*, 648 So.2d 669 (Fla. 1994) and certiorari was denied by The United States Supreme Court, *Jones v. Florida*, 515 US 1147 (1995).

4. Defendant in Ground 1 of his motion claims the State withheld evidence which was material and exculpatory in nature and/or presented misleading or false evidence, thus rendering defense counsel's representation ineffective. Defendant further claims that he can establish that the testimony of both Kevin Prim and Detective Mike Wood was false and that the State failed to correct the testimony during the trial. In advancing his claim Defendant relies on the hearsay testimony of assistant public defender, Maria Suber, who testified that Kevin Prim advised her that he had made statements to certain individuals and expected to be released on his own recognizance. (Exhibit E, Transcript, 3.850 hearings, P. 150, l. 13 through P. 151 l. 8). For Defendant to prevail he must demonstrate that the evidence allegedly withheld is favorable to the Defendant because it is materially exculpatory or impeaching, that the evidence must have been withheld by the State, either wilfully or inadvertently, and that prejudice to the Defendant must have ensued. Defendant has failed to carry his burden.

Detective Mike Wood testified at the evidentiary hearing that no promises were made to Kevin Prim to release him on his own recognizance if he gave a statement, and such testimony reaffirmed his trial testimony. (Exhibit F. 3.850 Transcript, P. 337, l. 22 through P. 338, l. 4; Exhibit G, Trial Transcript (TT), P. 533, l. 10 through P. 536, l. 3). Further, Neil Wade, the assistant state attorney who tried the case, testified that no promises were made to Kevin Prim that he would be released on his recognizance for his testimony, but rather his decision was made as a result of a confrontation between Kevin Prim and the Defendant after Defendant learned that Kevin Prim was talking to the

State. Mr. Wade further felt that the releasing of Kevin Prim would insure his safety coupled with the fact that Kevin Prim was in jail on non-violent theft charges. (Exhibit H, 3.850 Transcript, P.327, l. 5 through P. 329, l. 2).

Defendant in advancing his claim completely ignores the trial testimony of Jay Watson that he overheard Defendant tell Kevin Prim that he was in jail for killing a man, and that he observed the confrontation between Defendant and Kevin Prim which resulted in the deputies removing Kevin prim from the cell they shared. (Exhibit I, TT, P. 701, 1.13 through P. 702, l. 2; Exhibit J, TT, P. 718, ll. 2-16).

Next Defendant claims that the State failed to disclose exculpatory information regarding Kevin Prim's drug addiction and his criminal activity during the period of time Defendant was being tried and sentenced. However, Defendant has failed to demonstrate that Kevin prim was or is addicted to drugs or that he was under the influence of drugs at the time of his testimony at either trial, or during the period of time he shared a cell with Defendant.

Finally, in Ground One of his motion Defendant alleges the State failed to inform the defense that Kevin Prim had committed some robberies before, during and after the trials. It is undisputed that the first trial took place May 13-15, 1992; the second trial November 10-13, 1992, and the sentencing on November 20, 1992. While the record is silent regarding any robberies allegedly committed by Kevin Prim between the two trials, the record is clear that Mr. Prim picked up a grand theft charge that was pending when he testified at the second trial and that defense counsel was aware of the charge and questioned him regarding the same. (Exhibit K, TT, P. 688, ll. 8-22).

An examination of the offense report dated October 24, 1992, and the two offense reports dated November 19, 1992, clearly reveals that Kevin Prim was arrested on all three arrest reports on November 19, 1992, at 4:15 pm, less than 24 hours prior to Defendant's sentencing on November 20, 1992, and six days after the second trial. (Exhibit L, TPD arrest reports). The prosecuting attorney would not have been aware of the arrests until some time later, which in this case was after sentencing. (Exhibit M, 3.850 Hearing Transcript, P. 321, 1.17 through P. 322, 1.11).

Defendant has failed to demonstrate that the State withheld favorable evidence which was materially exculpatory and impeaching, that the evidence was withheld either intentionally or inadvertently, and that Defendant was thus prejudiced. Ground 1 of Defendant's motion is without merit.

5. Defendant in Ground 2 of his motion alleges counsel was ineffective in a number of ways, to-wit:

(a) failing to discover that the witness, Kevin Prim, was a crack addict and using this information to impeach him at trial;

(b) failing to discover that Kevin Prim was under the influence of cocaine when he testified at trial;

(c) failing to investigate and discover that the victim's girlfriend's business had been vandalized some time prior to the trial and that the victim's home had been burglarized some time before the murder;

(d) failing to effectively impeach the witness, Kevin Prim, with his four convictions;

(e) failing to effectively cross-examine the witness, Paul Fontaine, to show there were oak trees behind the restaurant where Defendant worked; and

(f) failing to investigate where Defendant was living and how he did his laundry.

To prevail in his motion Defendant must demonstrate that counsel made such serious errors that he did not function as counsel guaranteed by the Sixth Amendment, and that counsel's errors were so serious as to deprive Defendant of a fair trial.

While Defendant claims that the witness, Kevin Prim, was a crack addict and under the influence of cocaine when he testified, Defendant has failed to demonstrate or offer any evidence whatsoever to support his claim.

While Defendant claims that counsel was ineffective for failing to investigate and discover that the victim's home had been burglarized some four months prior to the murder, and that victim's girlfriend's business had been vandalized some two months prior to the murder, he has failed to demonstrate what relevance, if any, such events had to the murder of the victim, much less show that the reports of such events would have been admissible at trial.

Defendant next claims that counsel was ineffective for failing to cross-examine the witness, Paul Fontaine, to show the existence of oak trees behind the restaurant where Defendant was employed. Here Defendant has failed to demonstrate the existence of oak trees on the property, much less ineffectiveness of counsel.

While Defendant also claims that counsel was ineffective in failing to investigate where Defendant was living at the time of the murder and the manner in which Defendant did his laundry, once again Defendant has failed to offer any evidence in support of his claim.

Defendant in his never-ending quest to find fault with counsel next claims counsel was ineffective for failing to impeach the witness, Kevin

Prim, with his prior convictions. In advancing this claim Defendant ignores the fact that the State on direct examination of Mr. Prim brought out the fact that he had been convicted of felonies five times. (Exhibit N, TT, P. 676, 1.24 through P. 667, 1.13). Defendant further ignores the fact that the record clearly demonstrates that trial counsel competently cross-examined Mr. Prim. (Exhibit O, TT, P. 685, 1.5 through P. 687, 1.17). Ground 2 of Defendant's motion is without merit.

6. Defendant in Ground 3 of his motion raises claims of newly discovered evidence, to-wit:

(a) The witness, Kevin Prim, had certain charges disposed of by the State in exchange for his testimony at trial;

(b) The witness, Kevin Prim, knew at the time he made a statement to Detective Mike Woods that Defendant's lawyer, Gene Taylor, was an assistant public defendant; and

(c) Since the trial Defendant has discovered new evidence from his former employer, Paul Fontaine, that Defendant was working for Mr. Fontaine at the time of the murder.

To qualify as newly discovered evidence, the evidence must have been unknown by the Trial Court, by the party, or by counsel at the time of trial and it must appear that Defendant or his counsel could not have known them by the use of due diligence.

This Court, at an earlier hearing, ruled that Defendant would have known that he was working for Paul Fontaine at the time of the murder, and thus this point would not constitute newly discovered evidence.

While Defendant has made conclusory claims relating to charges being dropped against the witness, Kevin Prim, in exchange for his testimony and relating to whether Kevin Prim knew Defendant was being represented by Gene Taylor of the public defender's office, he has failed to demonstrate any factual basis for the claims much less that if it did qualify as newly discovered evidence that it would probably produce an acquittal at trial. Ground 3 of Defendant's motion is without merit.

7. Defendant in Ground 4 of his motion claims Trial Counsel was ineffective in failing to adequately investigate and prepare mitigating evidence to challenge the State's position in the penalty phase of the trial.

During the penalty phase of the trial, counsel called two witnesses - Betty Jones Stewart, Defendant's sister, and the Defendant. Mrs. Stewart testified how the Defendant and the family were abandoned by their father; that their father had been abusive toward Defendant's mother; how the Defendant had a hard time dealing with the abandonment; how Defendant's mother became an alcoholic and married an abusive alcoholic

man with whom she fought quite often; how Defendant's mother stabbed the step-father to death during one of their fights and had been sent to prison; and how the Defendant had become uncontrollable after his mother went to prison and started getting into trouble with the law. (Exhibit Q, TT, P. 958, 1.1 through P. 961, 1.9).

Defendant presented numerous witnesses at the motion hearing: Johnnie Lambright, brother of Defendant; Theresa Valentine, sister of Defendant; and Evelyn Diane Jones, sister of Defendant. An examination of their testimony clearly demonstrates that their testimony would have been merely cumulative to the testimony of Defendant's sister, Betty Jones Stewart.

Trial Counsel testified at the motion hearing that he made a conscious decision to rely on Defendant's childhood in mitigation and that he only called Defendant's sister, Betty Jones Stewart, as a mitigation witness because he believed that she was the most articulate and that as a police officer the State could not attack her credibility. (Exhibit R, 3.850 transcript, P. 91, 11.2 through P. 92, 1.19). Trial Counsel's decision was reasonable under the norms of professional conduct.

8. Defendant in Ground 4 of his motion also claims Trial Counsel was ineffective for failing to investigate or present mental health mitigation during the penalty phase of the trial. Defendant relies on the testimony of Robert Berland who testified that in 1991 he conducted an MMPI-1 on the Defendant and relied in large part on those results in reaching his conclusions. (Exhibit S, 3.850 Transcript, P. 270, 11.7-14; Exhibit T, 3.850 Transcript, P. 279, 1.23 through P. 280, 1.19). While Dr. Berland believes the interviews of Defendant in 2003 supported what he found in 1991, Dr. Berland readily admitted that in 1991 he did not administer the newer test, MMPI-2, even though the same had been available since 1989. (Exhibit U, 3.850 Transcript, P. 283, 1.19 through P. 284, 1.1; Exhibit V, 3.850 Transcript, P. 308, 11.21-25). Further Dr. Berland when confronted with the findings of The Supreme Court of Florida relating to a case in which Dr. Berland had testified and concluded that the older version of the MMPI overestimated the degree of mental illness in black males by as much as 90%, claimed that said finding was incorrect or the result of an error in reporting. ***Philmore v. State***, 820 So.2d 919 (Fla. 2002). It is undisputed that Dr. Berland administered the older version of the MMPI on Defendant and that Defendant is a black male.

An examination of the record clearly reveals that counsel spoke with and observed the Defendant; investigated possible mental health mitigation; investigated the information in Defendant's Department of Corrections' records; considered the downside of presenting mental health mitigation, and made a reasoned, informed and professional decision not to present mental health mitigation during the penalty phase of the trial. (Exhibit W, 3.850 Transcript, P. 67, 1.1 through P. 86, 1.9;

Exhibit Y, 3.850 Transcript, P. 90, 1.19 through P. 91, 1.4). Defendant's ground is without merit.

9. Defendant in Ground 13 of his motion claims the trial court proceedings were fraught with procedural and substantive errors which cannot be harmless when viewed as a whole since the combination of errors deprived Defendant of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments. The Court has reviewed the entire record and found that the individual claims of error are without merit. It follows that Defendant's cumulative claim of error is also without merit.

Accordingly, it is

ORDERED AND ADJUDGED that Grounds 1, 2, 3, 4, and 13 of the Amended Motion to Vacate Judgments of Conviction and Sentence are Denied.

[Attachments to Order omitted]

The trial court also rendered a detailed Order Denying Grounds 5, 6, 7, 8, 9, 10, 11, 12, and 14 of Motion for Postconviction Relief. (PC/6 1030 et seq.)

SUMMARY OF ARGUMENT

Appellant Jones has failed to meet his burdens as to each of the three issues and all of their sub-issues.

ISSUE I asserts that the State failed to disclose a promise to Kevin Prim that he would be released from jail on his own recognizance (ROR) if he cooperated in the prosecution against Jones. However, the only definitive evidence concerning this claim is that there was no such promise. Instead of relying upon competent evidence, Jones builds his argument on hearsay and inferences. Prim may have subjectively hoped that his cooperation would reap an ROR, but his hope is not the stuff of Brady or Giglio. As such, there is competent and substantial evidence supporting the trial court's finding, meriting affirmance.

ISSUE I also claims that the State withheld evidence of Prim's latest arrests for theft and related investigations, but defense counsel was apprised of the gravamen of Prim's record and even the prosecutor did not know of some thefts for which Prim was investigated and arrested because those events had not even occurred at the time of trial.

ISSUE I also contends that the State withheld information concerning Prim's crack use, but the supposed foundation for this claim is another event that occurred after the trial, and Jones failed to prove that usage with actual evidence. The identity of the white residue on a tube in Prim's pocket remains unproved, as was the identity of the person who wrote on a sheet of paper that a victim was DUI and the identity of the person who supposedly witnessed the DUI.

Prim may have had false hopes and Prim may have been "busy" stealing, but Jones should not be allowed to "steal" this conviction with unsupported allegations of de minimis insignificance, especially compared to the strength of the advocacy of defense counsel and the strength of the case against Jones.

ISSUE II's attack on effectiveness of counsel at the penalty phase improperly "hindsights" defense counsel's reasonable strategies and reasonable efforts for trial. Jones tenders an expert who would have jeopardized the two jurors' votes for life with his entanglement of sociopathic diagosis and opened-doors to DOC records pertaining to anti-social personality disorder, suggesting a dangerous criminal; and, the expert's "potentiate[d]" jargon would have likely alienated the jury, or at best for Jones, caused the jurors to wonder, "What the heck is this guy talking about?"

Jones does also propose some additional plain-speaking lay witnesses to testify at the penalty phase regarding Jones' family and childhood, but they add nothing significantly beneficial for Jones' cause beyond the family member who defense counsel actually called during the penalty phase trial, that is, an articulate, 16-year police veteran. Further, the proposed additional witnesses would have brought their own negative baggage to the jury, which further highlights defense counsel's competency, and, indeed, wisdom in carefully selecting the officer to testify for Jones.

ISSUE III, under the rubric of IAC, raises shackling and improper-prosecutorial-argument claims. Concerning the supposed shackling, Jones failed to proffer the evidence so that this Court could meaningfully review his claim, leaving as essentially uncontested the trial court's observations that there was no shackling. Jones has also failed to meet his weighty burdens of establishing IAC regarding the prosecutor's arguments to the jury. The prosecutor's arguments were based upon the evidence adduced at trial, based upon a comparison of that evidence with the defense argument, and based upon the proper application of death-penalty principles to the facts of this case.

For these reasons, and all of the reasons argued in this brief, the State respectfully submits that the trial court's postconviction orders should be affirmed.

ARGUMENT

ISSUE I

WHETHER APPELLANT HAS DEMIONSTRATED THAT THE TRIAL COURT ERRED IN DENYING POSTCONVICTION BRADY/GIGLIO CLAIMS. (RESTATED)

In Issue I ("ARGUMENT I"), Jones contends that the trial court, after a

postconviction evidentiary hearing, erred by denying his postconviction claims pertaining to Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972).[6] He argues that the trial court erroneously rejected his arguments that the prosecution violated Brady and Giglio by failing to disclose that it promised to release Kevin Prim on his own recognizance (IB 58-66) and violated Brady by failing to disclose information of Prim's "ongoing criminal activity, including crack cocaine usage" (IB 62-64). It also states that the trial court did not rule on a claim arguing the failure of the prosecution to disclose that Trooper "Ross observed the victim DUI in the northern part of Leon County prior to his meeting Mr. Jones" (IB 66).

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[6] While Jones explicitly states (IB 46) that "ARGUMENT I" concerns Brady and Giglio, Jones also summarily mentions (IB 54) in passing, in one sentence, that this issue may also apply to an ineffective-assistance-of-counsel (IAC) claim. The State contends that such a claim is waived on appeal. See Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence, that the prosecutor engaged in improper burden shifting"; "Because Lawrence's bare claim is unsupported by argument, this Court affirms the trial court's summary denial of this subclaim"), citing Shere v. State, 742 So.2d 215, 217 n. 6 (Fla. 1999), Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1999), Coolen v. State, 696 So.2d 738, 742 n. 2 (Fla.1997). See also U.S. v. Wiggins, 104 F.3d 174, 177 n. 2 (8th Cir. 1997) ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention"; "Failure to specify error or provide citations in support of an argument constitutes waiver, ... so we decline to reach the propriety of the district court's actions in this regard"); U.S. v. Williams, 877 F.2d 516, 518-19 (7th Cir. 1989) (failure to designate on appeal specific evidence contested waives the issue; "Neither this court nor the United States Attorney has a duty to comb the record in order to discover possible errors"). "For the record," the State notes that the arguments it poses under this issue would also be applicable to both the deficiency and prejudice prongs of ineffective-assistance-of-counsel claims: For example, as argued infra, trial defense counsel effectively cross-examined Prim with ample materials and information and followed-up in his closing argument. However, if Jones attempts to develop IAC in his reply brief, the State objects, or in the alternative requests an opportunity to fully develop an answer to any such arguments.

A. Standard of review.

Riechmann v. State, 32 Fla. L. Weekly S135, 2007 WL 1074938, *5 (Fla., April 12, 2007)(rehearing pending), recently summarized a postconviction petitioner's burdens to establish a claim pursuant to Brady:

> *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. *Mordenti*, [894 So.2d 161,] at 168 (*citing Guzman v. State*, 868 So.2d 498, 508 (Fla.2003)). To establish a Brady violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *See Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).
>
> To establish prejudice or materiality under *Brady*, a defendant must demonstrate "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." *Smith v. State*, 931 So.2d 790, 796 (Fla.2006) (*citing Strickler v. Greene*, 527 U.S. 263, 289[, 119 S.Ct. 1936, 144 L.Ed.2d 286] (1999)). "In other words, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* (*quoting Strickler*, 527 U.S. at 290[, 119 S.Ct. 1936]).
>
> *Ponticelli v. State*, 941 So.2d 1073, 1084-85 (Fla. 2006). With regards to *Brady*'s second prong, this Court has explained that "[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense ... had the information." *Provenzano v. State*, 616 So.2d 428, 430 (Fla.1993) (*citing Hegwood v. State*, 575 So.2d 170, 172 (Fla.1991); *James v. State*, 453 So.2d 786, 790 (Fla.1984)). Questions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence. *Way v. State*, 760 So.2d 903, 911 (Fla. 2000). This Court then reviews de novo the application of the law to these facts. *Lightbourne v. State*, 841 So.2d 431, 437-38 (Fla.2003).

Riechmann also summarized Giglio:

> A *Giglio* violation is demonstrated when it is shown (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. *Guzman v. State*, 941 So.2d 1045, 1050 (Fla. 2006). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable probability that it could have affected the jury's verdict.

> Id. Under this standard, the State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt. Id.; *see also Mordenti v. State*, 894 So.2d 161, 175 (Fla. 2004).

Accordingly, "*Giglio* stands for the proposition that a prosecutor has a duty to correct testimony he or she knows is false when a witness conceals bias against the defendant through that false testimony." Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001), quoting Routly v. State, 590 So. 2d 397, 400 (Fla. 1991).

As in Brady claims, for Giglio claims this Court defers "to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence." Guzman v. State , 941 So.2d 1045, 1049-50 (Fla. 2006).

Guzman, 941 So.2d at 1050-1051, elaborated and compared the tests under Brady and Giglio:

> The test of materiality under Brady is whether disclosure of the evidence to the defense would have created a reasonable probability, sufficient to undermine confidence in the outcome, of a different result. *Cardona v. State*, 826 So.2d 968, 973 (Fla. 2002). The same test applies under the prejudice prong of a claim of ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Rutherford v. State*, 727 So.2d 216, 219-20 (Fla.1998); *see also Trepal v. State*, 846 So.2d 405, 438 (Fla.2003) (Pariente, J., specially concurring).
>
> As we stated in our previous opinion in this case, the test of materiality under *Giglio* is more 'defense friendly' than the *Brady* materiality test. *Guzman*, 868 So.2d at 507. [Guzman v. State, 868 So.2d 498 (Fla.2003)] In fact, the test under *Giglio* is the same as the harmless error test of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *DiGuilio*. *See United States v. Bagley*, 473 U.S. 667, 680, 105 S.Ct. 3375, 87 L.Ed.2d 481 ('[T]he fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.'); *Guzman*, 868 So.2d at 508 ('The State bears the burden of proving that the presentation of the false testimony was harmless beyond a reasonable doubt.').

The State respectfully submits that under the applicable tests, ISSUE I

should be rejected, and the trial court's denial of these claims should be affirmed.

B. Application of standard to the facts of this case: Prim.

Concerning Jones' postconviction claim alleging that the prosecution withheld information from the defense that it had promised Kevin Prim to ROR him, Jones has not demonstrated on appeal that the trial court erred.

There was no promise to Prim. The trial court accredited the testimony of the trial prosecutor and lead investigator:

> **Detective Mike Wood testified at the evidentiary hearing that no promises were made to Kevin Prim to release him on his own recognizance** if he gave a statement, and such testimony reaffirmed his trial testimony. (Exhibit F. 3.850 Transcript, P. 337, l. 22 through P. 338, l. 4; Exhibit G, Trial Transcript (TT), P. 533, l. 10 through P. 536, l. 3). **Further, Neil Wade, the assistant state attorney who tried the case, testified that no promises were made to Kevin Prim that he would be released on his recognizance** for his testimony, but rather his decision was made as a result of a confrontation between Kevin Prim and the Defendant after Defendant learned that Kevin Prim was talking to the State. Mr. Wade further felt that the releasing of Kevin Prim would insure his safety coupled with the fact that Kevin Prim was in jail on non-violent theft charges. (Exhibit H, 3.850 Transcript, P. 327, l. 5 through P. 329, l. 2).
>
> Defendant in advancing his claim completely ignores the trial testimony of Jay Watson that he overheard Defendant tell Kevin Prim that he was in jail for killing a man, and that he observed the confrontation between Defendant and Kevin Prim which resulted in the deputies removing Kevin prim from the cell they shared. (Exhibit I, TT, P. 701, l. 13 through P. 702, l. 2; Exhibit J, TT, P. 718, ll. 2-16).

As documented by the trial court, there was "competent, substantial evidence" supporting the trial court's finding that the prosecution did not promise to release Kevin Prim on his own recognizance in exchange for his testimony against Jones.

Jones did **not** call Prim as a witness at the postconviction evidentiary

hearing.

Michael Wood, who was the investigator for this case, did testify at the evidentiary hearing that no promises were made to Prim to give him an ROR:

> Q Were any promises made to Mr. Prim for an ROR if he gave a statement?
>
> A No, sir, there were not.
>
> Q Were any promises to give him an ROR made to him after he gave the statement?
>
> A No, sir, there were not.

(PC/14 337-38) He continued by testifying: "I had no knowledge, nor did I orchestrate nor did I participate nor promise any ROR or anything else for Kevin's testimony." (Id. 341-42)

Neil Wade, who was the prosecutor for this case, testified at the evidentiary hearing that he made no promises to Prim:

> Q … Were any promises given or expectations made to Mr. Prim –
>
> *** [Defense's objection overruled]
>
> THE WITNESS: Not by me and not to my knowledge.
>
> Q Did you make efforts to seek out whether there had been any promises made?
>
> A When Mike Wood first told me about Kevin Prim, of course, one of the first things I wanted to know is whether he or anybody else he knew made any promises to him or any threats to him to get him to talk about what he knew. He told me he did not. Now, I did not make any promise to Mr. Prim that he would be RORd or anything of that nature.

(PC/14 327) Wade later reiterated, "I never talked to him [Prim] about giving him an ROR." (Id. 334)[7]

Accordingly, Prim appears to have been ROR'd in order to go to Wade's

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[7] Accordingly, on November 7, 1991, Prim testified at his deposition that he was not promised anything in exchange for his cooperation in this case. (See PC/4 729-30)

office for Wade to interview him. Wade explained that he "never made a decision that he [Prim] would be a witness until after I had personally talked to him." (PC/14 333) Therefore, the decision to use Prim as a witness was made after the Wade-Prim interview and after the ROR; the ROR was not a result of the content of the interview.

Watson, testified at trial that he was 67 years old at that time (TT/IV 700) and that, while in a jail cell, he overheard Jones talking with Kevin Prim about Jones' case (Id. 700-701). In spite of Watson's advice to Prim not to talk about this case, Jones responded that he and Prim were "good friends" and continued to talk about it (Id. 701). Watson's trial testimony continued:

> Q Mr. Watson, in the course of those discussions, did you ever overhear Harry Jones say whether or not he had in fact killed the man, George Wilson Young, Jr.?
>
> A He didn't call a name but he said he killed a man. That was the reason he was in jail.

(Id. 701; see also Id. 707)

Further, as the trial court's order indicated, Watson testified at trial concerning the confrontation between Prim and Jones:

> … [W]hen Kevin [Prim] came back in the cell, they almost fought, and deputies and things pulled Kevin out and I didn't see him again.

(TT/IV 718)

Watson testified at trial that he tried to stay out of the discussions about Jones' case and tried to stay away from them after that. (Id. 702) Watson said that no one in law enforcement had made any promises to him about how he would be treated, and, although Wade eventually told Watson's sentencing court that he had cooperated, Watson was sentenced to prison. (Id. 702-703).

Based upon Wood and Wade's postconviction testimony alone as a fact-

determination based upon "competent, substantial evidence," the trial court's finding and denial of this claim merits affirmance. See also, e.g., Dailey v. State, 32 Fla.L.Weekly S293, 2007 WL 1556674, *3 (Fla., May 31, 2007) (accreditation of prosecutor's postconviction testimony) (rehearing pending).

Even assuming, arguendo, that Prim had a subjective hope that he would be ROR'd in exchange for cooperating in this case, it does not assist Jones here. A witness's purely subjective hope of reward does not constitute Brady or Giglio material. See, e.g., Melton v. State, 949 So.2d 994, 1010 (Fla. 2006)("While Lewis may have had great expectations based upon his cooperation with the State, he testified only that he hoped to obtain a deal at some point in the future"). However, here, Prim did not testify at the evidentiary hearing and so an assessment of even Prim's subjective expectations would be based upon hearsay, which would not constitute competent substantial evidence. Therefore, if the trial court had granted this claim, it would have constituted reversible error.

In other words, here law enforcement hid nothing from the defense and certainly nothing favorable to the defense that it did not already essentially possess, hid nothing prejudicial to the defense, and hid nothing "material." See also Ventura v. State, 794 So.2d 553, 563 (Fla. 2001), quoting Tarver v. Hopper, 169 F.3d 710 (11th Cir. 1999)("[N]ot everything said to a witness or to his lawyer must be disclosed. For example, a promise to 'speak a word' on the witness's behalf does not need to be disclosed. Likewise, a prosecutor's statement that he would 'take care' of the witness does not need to be disclosed. Some promises, agreements, or understandings do not need to be

disclosed because they are too ambiguous, or too loose or are of too marginal a benefit to the witness to count."); Depree v. Thomas, 946 F.2d 784, 797-98 (11th Cir. 1991).

The State disputes Jones' conclusion (IB 60) that Wood's "report mentions the alleged altercation as **first coming up** during Prim's interview with Wade." The discussion of the altercation **in front of Wood**, as Wood notes in his report, does not establish when it "first [came] up," and it does not affect when and why **Wade** had initiated Prim's release.

Jones' Initial Brief (IB 48; see also IB 58-59) cites to Suber's (Prim's attorney) testimony at "EHT 151" and argues that "Prim had been promised an ROR." In addition to Wade's and Woods' testimony contradicting any such conclusion, the State disputes such an inference from Suber's evidentiary hearing testimony.[8] Instead, she qualified her conclusion that "[s]omeone had made a promise" by indicating that she could not say that Wood made a promise. She appears to have inferred the promise based upon her perception of Prim's statements to her, her confirmation with Wood that Prim had talked with Wood,

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[8] While Happ v. Moore, 784 So.2d 1091, 1096 n. 5 (Fla. 2001), does not reach any holding on whether an inmate-witness' attorney can testify without a waiver from the inmate, it mentions without criticism the attorney's testimony:

> Happ's attorney presented witness Hugh Lee who allegedly had proof that Miller had admitted to lying during his testimony at the initial trial. Lee was a public defender whom Miller had asked to speak with prior to the trial's commencement. The trial court ruled that the attorney-client privilege would not prevent Lee from telling the court what Miller had said and permitted trial counsel to proffer Lee's testimony.

The State maintains its position (PC/12 127-28, 128-29, 148-50, 154; PC/5 804) that the inmates-trial-witness's attorney-client privilege should not be summarily cast aside. Admittedly, however, the State did not cross-appeal this issue.

and Prim's apparent release from jail the same day that she filed her motion to have Prim ROR'd. (See PC/13 151) Indeed, her motion does not indicate the reason for the ROR, and it does not indicate the reason that prosecutor Wade did not oppose an ROR. (See Defense Exhibit #21) Suber had no specific recollection of the details of the conversation that she said she had with Wade (PC/13 153).

Thus, the State disputes the inference Jones appears to make (at IB 58-59), which appears to be based upon Suber's inference, that she "confirmed the nature of the agreement" or "verified the agreement" or "confirmation of the deal." This is incorrect. Instead, Suber said she confirmed that Prim had made a statement (See PC/13 151). Contrary to Jones' assertion (IB 59), the "conflict memo" does not assist Jones' claim; it does not state that law enforcement made any promise, but rather, it states that "As a result of his [Prim's] information he expected to be ROR'd." (Defense Exhibit #20)

Jones (IB 48-49, 59, 60) highlights the facts that Suber was unaware of Wade's motive concerning the Prim-Jones altercation for releasing Prim (See PC/13 155), that her motion for ROR did not mention the altercation, and that Wood did not note in his report why Prim was being released (See PC/14 345-46; Defense Exhibits #3 & #21). These facts do not support Jones' postconviction claim. Suber's unawareness of the motive and her omission of **any** reason in her ROR motion do not negate the motive or establish any secret deal between law enforcement and Prim. Similarly, the absence of Wood noting **any** reason for Prim's release does not resolve anything concerning the reason for the release.

Assistant Public Defender Suber testified at the 2004 evidentiary hearing

that when her clients have "got[ten] into fights with witnesses in a case, … they are transferred either to Quincy Jail, to the Jefferson Jail, or the Wakulla Jail for their protection pending trial." (PC/13 156) For the sake of argument, overlooking the fact that she was only one of many assistant public defenders and that she could not possibly know what happens in every criminal case in Leon County, prosecutor Wade explained that the practice in Leon County has evolved over time:

> The alternative discussed by Miss Suber of transferring him is something we had started doing more recently where an inmate is being held on serious charges. At that time Prim was being held on a theft charge, grand theft, petty theft, or both.

(PC/14 328)

A version of what happened that is consistent with the prosecutor's testimony as well as Suber's is that Suber or her office called the prosecutor or his office and asked if the State had any objection to ROR'ing Prim and the prosecutor's office responded, "no objection." There may have been no explicit discussion between the two offices concerning the rationale for the ROR, although each office had its own (different) rationale for pursuing an ROR. Indeed, Suber acknowledged the following sequence of the clerk's stamps:

September 12 3:32PM Order releasing Prim (PC/13 157);

September 12 3:56PM Suber's motion for ROR (PC/13 158-59);

September 13 3:10PM Release from the jail (PC/13 157-58).

In his closing argument, defense counsel fully exploited Prim's situation, and any additional information that the ROR was from law enforcement would not have made a bit of difference in the outcome of the trial, for example:

> I submit to you, he [Prim] used an opportunity to get out. Once that opportunity was made available to him – remember, detective Wood picked him up at the jail when he was released. How convenient.
>
> ***
>
> Ladies and gentlemen, he's [Prim is] still out walking the street, a person who's been convicted several times of felonies, been to prison two times, …
>
> ***
>
> Ladies and gentlemen, Kevin Prim is not a believable witness. The Statements allegedly made to Kevin Prim never occurred. Mr. Taylor was very specific. He told Harry several times, do not talk to anyone about your case.

(TT/V 867-69) Indeed, Gene Taylor testified at the trial for Jones and confirmed that he was Jones' attorney for a period (TT/V 807-808) in which he conducted extensive discovery on Jones' behalf (Id. at 810), that he told Jones' not to discuss his case with others (Id. at 809), but that Jones was very active in preparing his defense (Id. at 810-12), and that he (Taylor) received information that he passed on to Jones that Prim was cooperating with the State (Id. at 814).

Accordingly, Gregory Cummings, Jones' defense counsel at the time of trial, had listed both Taylor and Suber as defense witnesses for trial (PC/1 61, 65), and he was aware that Prim was released from jail at approximately the same time as his statement to the prosecutor in this case. (PC/12 9-10) Jones now relies heavily upon this same fact, known and used by defense counsel in the trial, for his postconviction inference that Prim was released pursuant to a prosecution promise.

Further, Suber testified that she communicated her understanding of the deal, as relayed to her by Prim, to Gene Taylor, (PC/13 160) who was

representing Jones at that time (PC/13 126-28, 135). Therefore, even accepting Prim's hopes for an ROR at face value, they were communicated to Jones' attorney.

Concerning Jones' argument (IB 61-62) contrasting Prim's trial testimony with the inferred hope for an ROR, the State respectfully submits that it is not, and should not be, responsible for a witness' subjective hopes when the State did not communicate any such promise. Indeed, here, assuming that Prim did subjectively hope-for or even subjectively expect to be ROR'd in exchange for his release, there is nothing to indicate that the State was hiding those subjective expectations from the defense. Moreover, as mentioned above, Jones' attorney, not the prosecution, possessed whatever information or inference Suber had concerning Prim's hopes. Contrary to Jones' unsupported assertion (IB 61-62), Wade did not know that Prim was lying when he testified.

Mansfield v. State, 911 So.2d 1160, 1178 (Fla. 2005), is on point:

> Mansfield also claims that Randall lied at the trial when he stated that he did not expect to receive any benefits for his testimony against Mansfield. Assistant State Attorney Sedgwick stated in her opening statement that Randall would tell the jury that no agreement existed, although Randall was hoping that his cooperation would affect his upcoming sentencing. Mansfield asserts that this statement and the fact that Sedgwick spoke to a prosecutor on Randall's behalf within a month of Mansfield's trial conflicted with Randall's testimony that he did not expect any benefit as the result of his testimony.
>
> The postconviction court found there was no evidence that Randall was promised any benefit in exchange for his testimony. We do not find that the trial court's finding was error. We agree and affirm the postconviction court's denial of this claim.

Keeping in mind that Kevin Prim was in jail only[9] for petit theft or theft

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[9] "Only," in terms of its contrast to this brutal murder.

when he was released (PC/14 339; see also PC/4 728), his release from jail was common knowledge (See TT/IV 684-85), and, indeed, as further developed infra, defense counsel pressed the point to the jury in his closing argument (See TT/V 867-68). In other words, defense counsel skillfully employed the gravamen of the information in this claim. Therefore, even if somehow there was no competent evidence supporting the trial court's finding and even if somehow Jones' inference based upon Suber's inferences and hearsay were determinative of whether a law-enforcement promise had been made, there would be no prejudice or harm incurred from the non-disclosure, thereby meriting affirmance.

Here, Prim was like witness-Freeman in Ponticelli v. State, 941 So.2d 1073, 1089 (Fla. 2006):

> Freeman was significantly impeached on his capacity for truthfulness and his incentive for testifying against Ponticelli. Therefore, informing the jury that Freeman might be testifying falsely because of his hope for an unguaranteed, unspecified award would not have rendered him 'sufficiently less credible in the jury's eyes' to establish a reasonable possibility that this contributed to the verdict. Therefore, we deny this claim. *Cf. Marshall*, 854 So.2d at 1252 (denying *Giglio* claim based on the State's alleged promise to a witness because 'even assuming that the alleged promise was made,' defense counsel impeached the witness regarding the subject of the promise, and the witness was not "the sole witness to testify in regard to the events surrounding the murder").

Accordingly, Jones also has not demonstrated that the trial court erred in rejecting his postconviction claim that the prosecution withheld information from the defense concerning Prim's "ongoing criminal activity, including crack cocaine use" (IB 62). The trial court's findings and rulings merit affirmance:

> Finally, in Ground One of his motion Defendant alleges the State failed to inform the defense that Kevin Prim had committed some robberies before, during and after the trials. It is undisputed that the first trial took place May 13-15, 1992; the second trial November 10-13, 1992, and the sentencing on November 20, 1992. While the record is silent regarding any robberies allegedly committed by Kevin Prim between the two

> trials, the record is clear that Mr. Prim picked up a grand theft charge that was pending when he testified at the second trial and that defense counsel was aware of the charge and questioned him regarding the same. (Exhibit K, TT, P. 688, ll. 8-22).
>
> An examination of the offense report dated October 24, 1992, and the two offense reports dated November 19, 1992, clearly reveals that Kevin Prim was arrested on all three arrest reports on November 19, 1992, at 4:15 pm, less than 24 hours prior to Defendant's sentencing on November 20, 1992, and six days after the second trial. (Exhibit L, TPD arrest reports). The prosecuting attorney would not have been aware of the arrests until some time later, which in this case was after sentencing. (Exhibit M, 3.850 Hearing Transcript, P. 321, 1.17 through P. 322, 1.11).
>
> Defendant has failed to demonstrate that the State withheld favorable evidence which was materially exculpatory and impeaching, that the evidence was withheld either intentionally or inadvertently, and that Defendant was thus prejudiced. Ground 1 of Defendant's motion is without merit.

(PC/5 929-30)

Jones' argument (IB 62-64) ignores the effective advocacy of trial defense counsel, as mentioned above and in the Statement of the Case and Facts supra. It was absolutely clear at trial that Prim had an extensive criminal record, including five felony convictions (TT/IV 677). Defense counsel's cross-examination of Prim elicited from him that he had been "arrested a number of times" after his release, including Prim's acknowledgement of an arrest "for the grand theft of a substantial amount of money." (TT/IV 685) Defense counsel then proceeded to hammer Prim concerning several offenses and dispositions and implied that Prim hoped to get out of jail in exchange for his cooperation against Jones (See Id. 685-89, 694) and followed up in his closing argument (See TT/V 867-69).

Here Prim is like witness-Randall in Mansfield v. State, 911 So.2d 1160, 1177-78 (Fla. 2005):

> The jury was made aware of Randall's past federal convictions, his current state charges, the fact that he had escaped from a federal halfway house, and the numerous times Randall had informed on other fellow inmates. We find no error in the trial court's determination that extra charges pending against Randall would not have made Randall sufficiently less credible in the jury's eyes than he already was, and thus there is no reasonable likelihood that the jury would have found Mansfield not guilty had the jury known about these federal charges.

Moreover, as suggested by the trial court's order, Jones' argument would cast a nearly impossible burden upon the prosecution to know nearly hour-by-hour whether its witnesses have become even a suspect in a crime in a case investigated by an agency not involved in the murder case. Here, this murder was investigated by the Sheriff's Office (See, e.g., TT/III 508-564), and, as the trial court found (PC/5 929), unknown to the prosecutor until later (PC/14 321-22); at some point in time, the Tallahassee Police Department was investigating theft-related crimes in which Prim eventually became a suspect (See Defense Exhibits #8, #9, #10). Indeed, the jury penalty phase was completed on November 13, 1992, the Spencer hearing was November 18, 1992, and sentencing was November 20, 1992. (See TT/VI four bound transcript volumes) Prim was not a suspect in one of the incidents until November 18, 1992, he was not arrested until November 19, 1992, (Id. 364), and for two of the police reports (#9 and #10), the offenses and the arrests were on November 19, 1992 (PC/14 363). Officer Johnson, of the Tallahassee Police Dept., did not even know Prim was a witness in a murder case until about a week before the 2004 evidentiary hearing. (PC/14 362)

Concerning the allegation of Prim's crack use, Jones' postconviction motion alleged that Kevin Prim was a "Crack Addict" (PC/3 488), that Prim "expressed" a "desperate need for crack" (Id. 489), that Prim had a "severe crack

addiction" (Id. 490), and that Prim's "true motive" for cooperating with the prosecution was to "get out of jail at any cost to satisfy his need for crack cocaine" (PC/3 474). The trial court ruled (PC/5 930) that Jones utterly failed to prove any of those allegations at the postconviction evidentiary hearing. In contrast to Jones' allegations against Prim, in the 10 years since the trial became final, Jones has been able to muster a police report indicating that when the Tallahassee Police Dept. arrested Prim for Petty Theft on November 19, 1992, (after the jury trial) he had in his pocket a three inch glass tube that appeared to the officer to be crack paraphernalia. (See Defense Exhibit #10) In addition to the near-impossible burden Jones' argument would impose on the prosecution, as discussed above, Jones has failed to prove that a chemical test confirmed the nature of the residue on the tube and that the evidence of the tube would have been otherwise admissible at Jones' trial, and, in any event, in contrast to trial defense counsel's competent use of his existing information concerning Prim, this one reported incident pales. This would not have made Prim any "less credible in the jury's eyes than he already was," Mansfield.

C. Application of standard to the facts of this case: Victim's alleged DUI.

Jones complains (IB 66-67) in the current appeal that some notes constitute Brady material.

Jones' postconviction motion alleged (PC/3 483) that he could establish that the State withheld evidence that the victim was seen an hour before encountering Jones "in the Northern part of Leon County" in an "extremely intoxicated" condition. When it came time for Jones to prove this allegation,

all Jones could muster were some notes that postconviction counsel says he obtained from the State Attorney's Office (PC/12 31). On the first page of the notes, "Trooper Donald Ross" and some facts were written. On their second page, the notes said:

D very drunk but V probably quite intoxicated too.

Wit saw V driving earlier in evening, obviously DUI at 6 p.m.

(Defense Exhibit #12) There is no indication of who took the notes, when, and under what circumstances. There is no indication of whether the supposed information is derived from hearsay, double hearsay, triple hearsay, or hearsay to the umpteenth power. There is no indication of who "Wit" is, was, or will be. On appeal (IB 66 n. 6), Jones speculates concerning the creation of the notes, but speculation is no substitute for authentication, relevancy, and non-hearsay.

Indeed, the trial court ruled that the notes were not admissible, and so the notes are only in the postconviction record as proffered. (See PC/12 31-33) As such, they cannot be the basis of relief for this claim, and Jones has not contended on appeal that the notes were properly authenticated or demonstrated that they were otherwise competent evidence of anything.

Jones concedes that the lower court failed to address this claim, and he therefore failed to obtain a ruling from the trial court on it. There is no trial court ruling on this claim to appeal. See, e.g., Farina v. State, 937 So.2d 612, 629 (Fla. 2006)("failure to obtain a ruling on a motion or objection fails to preserve an issue for appeal"); Armstrong v. State, 642 So.2d 730 (Fla. 1994)("trial judge reserved ruling on this issue and apparently never

issued a ruling ..., this issue is procedurally barred"); Stone v. State, 378 So.2d 765, 768 (Fla. 1979)("appellate court must confine itself to review of only those questions which were before the trial court and upon which a ruling adverse to the defendant was made").

Moreover, even erroneously accepting Jones' appellate speculation at face value, the prosecution at trial and the State's evidence had essentially conceded the fact that this appellate claim asserts. (See, e.g., TT/II 214-15, 282, 283, 287, 298; TT/V 845; TT/VI 979; see also TT/IV 586-88; PC/6 1056-57). Indeed, the prosecutor argued to the jury:

> George Young [the victim] had begun to drink again that last year of his life and that too made him vulnerable because alcohol, as we all know, can cloud your judgment and prevent you from seeing the danger of situations that you're entering.

(TT/V 860) Therefore, the victim's condition was not hidden from the defense. There is no Brady violation and certainly no prejudice has been demonstrated.

D. Retroactive harmless error analysis.

Jones argues (IB 64-66) that, because of the other arguments Jones makes in ISSUE I, there should be a retroactive re-conducting of the harmless error analysis in the direct appeal of Jones' conviction and death sentence, Jones v. State, 648 So.2d 669 (Fla. 1994). As a preliminary matter, the State contests Jones assertion (IB 66) that this was "clearly a felony-murder case only." The jury was instructed on both felony murder and premeditated murder (TT/V 916-18), and there was extensive evidence of both felony murder and premeditation (See, e.g., prosecutor's argument at TT/V 848 et seq).

The State has seven responses to this retroactive-harmless-error claim.

First, Jones has not shown where this claim was timely raised with the

trial court. It appears that a similar argument was raised in **2005** through a "Supplemental Motion …" (PC/V 845 et seq.), which the State opposed as untimely because it was filed outside of the 30-day limit for amendments afforded by Rule 3.851(f)(4), Fla.R.Crim.P. (PC/5 912 et seq) The State maintains its assertion that this claim was not timely raised in the trial court. See also Fla.R.Crim.P. 3.851(d)(time limit of one-year after judgment and sentence final).

Second, Jones has not shown where **both** parties were afforded an opportunity to argue this claim on the merits to the trial court and where the trial court adversely ruled on it. It is therefore unpreserved. See Farina; Armstrong; Stone.

Third, Jones' claim improperly jumbles standards of judicial review. In essence, he is attempting to use a Brady/Giglio claim, for which the trial court is the primary factual arbiter, in order to retroactively re-evaluate a harmless error analysis, for which this Court is the arbiter. An argument similar to Jones' claim here was recently rejected in Carratelli v. State, 32 Fla.L.Weekly S390, 2007 WL 1932240 (Fla. July 5, 2007).

Fourth, the gravamen of this claim is analogous to the argument that inadmissible evidence cannot be considered in evaluating sufficiency of evidence on appeal. Such an argument is meritless, See Lockhart v. Nelson, 488 U.S. 33 (1988); Stroud v. United States, 251 U.S. 15 (1919).

Fifth, this Court's opinion in the direct appeal is final and stands on its own, given the constellation of facts presented at that time.

Sixth, even if all of the preceding five arguments are rejected, the

factual basis of this claim depends upon the trial court's acceptance of the evidence that supposedly provides the foundation for this claim. As the State has extensively argued supra in this issue and as the trial court essentially found, that factual foundation is ineffectual.

Seven, while Prim's testimony was a significant part of the State's case against Jones, Jones overlooks additional weighty incriminating evidence against him, such as:

- ? Watson's testimony that he overheard Prim admit to the murder (TT/IV 700-702);
- ? the plant life found in the victim's esophagus (Compare TT/IV 655-58 with TT/IV 615-19);
- ? the extensive nature of the victim's injuries and his torn clothing (TT/IV 649-55);
- ? Jones position to view the victim flashing a roll of money (See TT/II 277-79, 298-99);
- ? the victim last seen alive in the company of Jones and another person who was nearly incapacitated while they drove off together in the victim's vehicle (TT/II 280-84, 299-302) and the victim being found dead a few days later (TT/III 425-27);
- ? Jones' lying to Wood that he obtained the victim's vehicle by borrowing it from someone in Frenchtown for $20, by stating he did not know the other person's name, and by stating that the other person is not white (See TT/III 514-15); and,
- ? Jones wrecking the victim's truck about an hour after being seen driving off with the victim (Compare TT/II 353-58 with TT/II 302, 315-16).

(See also prosecutor's closing argument at TT/V 841-62, 905-13) Even if Prim's testimony were totally excluded, any error discussed in Jones v. State, 648 So.2d 669, would still have been harmless.

Indeed, in conclusion, for this claim as well as the Brady and Giglio claims, what is harmless and non-prejudicial is the evidence that **Jones**

produced at the postconviction evidentiary hearing; it is insignificant, especially in light of the totality of facts in this case.

ISSUE II

WHETHER JONES HAS DEMONSTRATED THAT THE TRIAL COURT ERRED IN RULING THAT HE FAILED TO ESTABLISH BOTH PRONGS OF AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM PERTAINING TO THE PENALTY PHASE OF THE TRIAL. (RESTATED)

Issue II ("ARGUMENT II," IB 68-91) argues that defense trial counsel, Greg Cummings, was constitutionally ineffective under Strickland v. Washington, 466 U.S. 668 (1984), at the penalty phase of the proceedings that resulted in the 10-2 jury recommendation of death (R/5 785; TT/VI 1002) and subsequent sentence of death (R/5 821, 828-36; TT/VI 995-1009).

Since the trial court conducted an evidentiary hearing on this matter, the trial court's factual determinations are entitled to special deference on appeal:

> Generally, this Court's standard of review following the denial of a postconviction claim where the trial court has conducted an evidentiary hearing affords deference to the trial court's factual findings. *McLin v. State*, 827 So. 2d 948, 954 n.4 (Fla. 2002). 'As long as the trial court's findings are supported by competent substantial evidence, "this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."' *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997) (*quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984)).

Walls v. State, 926 So. 2d 1156, 1165 (Fla. 2006).

In addition to the deference attached to the trial court's factual determinations, trial counsel's judgment is entitled to deference, rather than hindsighted second-guessing. Jones' postconviction burden is "heavy." Recently, Dillbeck v. State, No. FSC# SC05-1561 (Fla. May 10, 2007)(pending rehearing),

collected cases and summarized the standard of appellate review concerning claims of ineffective assistance of counsel:

> We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). As we stated in *Wike v. State*, 813 So. 2d 12, 17 (Fla. 2002), this standard requires a defendant to establish…:
>
> > 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.
>
> *Id.* (*quoting Strickland*, 466 U.S. at 687); *see also Rutherford v. State*, 727 So. 2d 216 (Fla. 1998). ***
>
> To establish deficient performance under Strickland, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness' based on 'prevailing professional norms.' 466 U.S. at 688; *Wike*, 813 So. 2d at 17. 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' *Strickland*, 466 U.S. at 689.
>
> To establish prejudice, "[t]he defendant 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." 466 U.S. at 694, 104 S.Ct. 2052; *see also Wike*, 813 So.2d at 17.

Here, not only was the trial court's Order solidly grounded on the record and law, but also, trial counsel's performance was imminently reasonable, and Jones has not demonstrated that there was a "reasonable probability" of a life sentence, even armed with "distorting effects of [his] hindsight."

In this case, for mitigation in the penalty phase, Jones contends that trial counsel should have done more in terms of mental health experts as well as lay witnesses. However, as to both assertions, "[a]n ineffective assistance claim does not arise from the failure to present mitigation evidence where that

evidence presents a **double-edged sword**," Reed v. State, 875 So.2d 415, 437 (Fla. 2004), citing Carroll v. State, 815 So.2d 601, 614-15 & n. 15 (Fla. 2002); Asay v. State, 769 So.2d 974, 988 (Fla. 2000). And, as to both assertions, the ability of the defense to find additional evidence years after the conviction and sentence does not per se establish ineffectiveness of counsel.

A. Another mental expert.

The trial court's Order pertaining to Claim IV of the postconviction motion (PC/3 502-21) found and ruled concerning the mental health expert:

> 8. Defendant in Ground 4 of his motion also claims Trial Counsel was ineffective for failing to investigate or present mental health mitigation during the penalty phase of the trial. Defendant relies on the testimony of Robert Berland who testified that in 1991 he conducted an MMPI-1 on the Defendant and relied in large part on those results in reaching his conclusions. (Exhibit S, 3.850 Transcript, P. 270, ll. 7-14; Exhibit T, 3.850 Transcript, P. 279, l. 23 through P. 280, 1.19). While Dr. Berland believes the interviews of Defendant in 2003 supported what he found in 1991, Dr. Berland readily admitted that in 1991 he did not administer the newer test, MMPI-2, even though the same had been available since 1989. (Exhibit U, 3.850 Transcript, P. 283, l. 19 through P. 284, l. 1; Exhibit V, 3.850 Transcript, P. 308, ll. 21-25). Further Dr. Berland when confronted with the findings of The Supreme Court of Florida relating to a case in which Dr. Berland had testified and concluded that the older version of the MMPI overestimated the degree of mental illness in black males by as much as 90%, claimed that said finding was incorrect or the result of an error in reporting. Philmore v. State, 820 So.2d 919 (Fla. 2002). It is undisputed that Dr. Berland administered the older version of the MMPI on Defendant and that Defendant is a black male.
>
> An examination of the record clearly reveals that counsel spoke with and observed the Defendant; investigated possible mental health mitigation; investigated the information in Defendant's Department of Corrections' records; considered the downside of presenting mental health mitigation, and made a reasoned, informed and professional decision not to present mental health mitigation during the penalty phase of the trial. (Exhibit W, 3.850 Transcript, P. 67, 1.1 through P. 86, 1.9; Exhibit Y, 3.850 Transcript, P. 90, 1.19 through P. 91, 1.4). Defendant's ground is without merit.

In addition to the trial court's well-documented order, the State also notes that Jones has had about 10 years to prepare his evidence for the 2004 evidentiary hearing, and the best and only expert evidence he could produce was Dr. Berland's testimony. A crucial aspect of Berland's testimony concerned **anti-social personality disorder**, which he said may be applicable to Jones. Berland indicated that he "wouldn't rule out" anti-social personality disorder. There may be some evidence of it. It may be "mixed in." (PC/14 317-18) He discussed the MMPI test administered to Jones, indicating that "Scale 4 … can measure potentially criminal thinking" but "in the long run, the biological mental illness is a more salient, more persistent adverse influence on his behavior." (ID. 298-99) He continued:

> And it will interact with any potentially criminal inclinations he has. It will potentiate the criminality because of poor judgment and because of drug abuse and alcohol abuse and so forth.

(Id. 299)

Accordingly, Dr. McLaren testified at the evidentiary hearing that Jones' MMPI profile "is often encountered with violent criminals. It is a malignant profile." (Id. 382) He later elaborated that "[u]sually, there will be **anti-social behavior** resulting in legal complications. These individuals also lack empathy and are non-conforming and impulsive."

McLaren reviewed the DOC psychological reports from Cummings' file (Id. 391) and discussed the potential devastating rebuttal that prosecutors can muster (Id. 392-93). He pointed out that DOC diagnosed Jones with **anti-social personality disorder**, not psychotic passive aggressive personality. Contrary to Berland, DOC found **no delusions, hallucinations**. (Id. 395) He explained the

desirability of avoiding "testimony where the jury would perceive the person as very wicked, evil, bad, dangerous … ." (Id. 407)

McLaren indicated that there is nothing to indicate brain damage (Id. 399) and that "a lot of information suggest[ed] that [Jones] didn't suffer from a major mental illness" (Id. 405-406).[10]

While McLaren had not personally examined Jones, McLaren read the trial transcript (Id. 389-90), unlike Berland (Id. 315-16), and struck home with the facts of this case: "Crimes are likely to be bizarre and often extremely violent including homicide and/or sexual assault. Their behaviors are usually impulsive … ." **McLaren said that the facts of this murder fit Jones' MMPI profile**:

> In regard to it being a homicide where there was apparent excessive force, broken arm, both ribs on both sides of the body broken, facial injuries. And the drowning, if it is true, that the victim was killed by being held beneath the water, conscious or unconscious, until he drowned until his head stopped bobbing up, according to one of the, quote, jailhouse snitch's rendition of Mr. Jones' statements.
>
> This would be – sounding kind of cruel to me. And it would seem to me that some of the people that I've examined to generate profiles like this.

(Id. 390-91)

Consistent with McLaren's warning about the desirability of avoiding "testimony where the jury would perceive the person as very wicked, evil, bad, dangerous … ," (Id. 407) Cummings testified:

> … [T]his evidence was out there, and certainly available to the State. But when you raise a mental health issue, there's a good chance that it is going to come in. Because on cross-examination, if we get an expert

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[10] Concerning Jones' IQ scores, McLaren said that "[t]here are an awful lot of normal walking around with" them. (Id. 396-99)

> that says: A, B and C; the State would say, well, did you have a chance to review this record and bring out these results, and did they have an affect on your diagnosis, or your testimony today?
>
> So, I mean, a lot of this stuff, just about everything I highlighted would probably come back to haunt us at some point in time.
>
> And I still think that way today. *** I don't know if I made that specific decision based on what I'm saying today, but the way these things are highlighted and noted leads me to believe that's why a decision was made not to use a mental health expert, in addition to the results of the graph.

(PC/12 80-81)

DOC said that Jones had "no schizophrenic process," is not "suffering from any thought disorder," "no hallucinations or delusions," " well-oriented in all spheres," "speech was well-organized," "no evidence of any thought disorder." (PC/12 75-77) These observations comported with Cummings' observations of Jones, as he viewed and spoke with Jones many times (See Defense Exhibit #15) and concluded that Jones was articulate (See PC/12 67-69), always coherent (PC/12 68), showed no signs of hallucinating or being delusional or paranoid (PC/12 70, 71-72), saw nothing that would lead him "to believe Mr. Jones had some mental health issues" (PC/12 71), "seemed to be able to relay the facts, communicate, understand the law" (PC/12 51).

Cummings pointed out the DOC records indicating that Jones is "not suffering from any disabling mental illness, but prognosis is guarded with respect to his **anti-social behavior**." Cummings continued:

> Mood and affect are appropriate. And immediately after that, it talks about diagnostic impression is a personality disorder, **anti-social personality**.

(PC/12 75-77) Cummings interpreted the report to indicate that there is "potentially anti-social behavior developing and watch out for it in the future

… ." (PC/12 76)

Cummings said he had also highlighted parts of a 1978 DOC report by Hugo Santiago Ramos, a psychologist at the DeSoto Correctional Institution, including its narrative of Jones breaking into a house while completely nude and "**Anti-social personality**." The report recommended that Jones be placed in a mentally disordered sex offender program, which Cummings not only highlighted but also starred. The report also said that Jones is "highly rebellious and non-conformist." (PC/12 79-80)

Although Cummings said that his file does not explicitly state why he did not use a mental health expert, (PC/12 90) he said that his current thinking, and assumes he was thinking the same thing back then, is that "he did not have mental issues enough to overcome some of the bad things I found in there." (PC/12 83-84) "[T]he file is not empty as to any indication that I just plain overlooked it." "I think this document hurt more than helped." (PC/12 90) On redirect-examination, he continued his explanation that Berland's graph was "not good" and, concerning Jones' DOC records, that "it's not good. And at some point in time, I would have had to have made a decision that it just wasn't an avenue to approach." (PC/12 107-108) He said that he assumes that he had "read every word in this pile of papers in front of" him at the evidentiary hearing. (PC/12 109)

Cummings testimony that "just about everything I highlighted would probably come back to haunt us at some point in time" was not only well-reasoned, it was downright prophetic, as it now is "haunt[ing]" Jones at the postconviction phase of his case.

In sum, Cummings carefully evaluated Berland's testing of Jones, DOC mental health records, and his own interactions with Jones and made a well-reasoned strategic choice not to pursue a mental health expert any more than had already been done.

Accordingly, Patton v. State, 878 So. 2d 368, 375-376 (Fla. 2004), collected cases concerning the negative impact of a diagnosis of antisocial personality disorder:

> The difference between a disorder and a disease is not insignificant. *See Elledge v. State*, 706 So. 2d 1340, 1346 (Fla. 1997) (affirming death sentence where trial court denied statutory mental health mitigator based on the expert testimony that defendant had antisocial personality disorder and that such disorder is not a mental illness, but a life long history of a person who makes bad choices in life and that these choices are conscious and volitional); *Rose v. State*, 617 So. 2d 291, 294 (Fla. 1993) (finding that trial court properly denied relief on claim of ineffective assistance of counsel where counsel conducted a sufficient investigation of mental health mitigation but made a strategic decision not to present such evidence because psychologist determined defendant had an antisocial personality disorder but not an organic brain disorder); *see also Long v. State*, 610 So. 2d 1268, 1272 (Fla. 1992) (affirming death sentence, noting that state's mental health expert testified during guilt phase in regard to defendant's insanity defense, that although defendant 'did suffer from a severe antisocial personality disorder, it was his opinion that Long did not suffer from a mental illness or disease'); *Jennings v. State*, 453 So. 2d 1109, 1112 (Fla. 1984) (affirming death sentence, noting that state's psychiatric expert in penalty phase testified that although appellant 'had a character or personality disorder which is not easily cured, appellant did not suffer from any mental disease or defect'), *vacated on other grounds*, 470 U.S. 1002 (1985).

Indeed, even Berland's testimony would have, even within itself and certainly through other experts such as McLaren, opened the door for the criminal personality of antisocial personality disorder.

This Court upholds choices of defense counsel made after reasonably, Strickland, evaluating the situation, as Cummings did here given all of his

facts and observations. See Sliney v. State, 944 So.2d 270, 283-84 (Fla. 2006)("we agree that it was an acceptable strategy for defense counsel to elect not to present only part of the report and risk the admission of Dr. Silver's full opinion on cross-examination"), citing Gaskin v. State, 822 So.2d 1243, 1249 (Fla.2002) ("Due to the fact that most of the witnesses who testified at the evidentiary hearing admitted on cross-examination that they were aware of other, very negative information about Gaskin, we agree with the trial court that Gaskin has not demonstrated that he was deprived of a reliable penalty phase proceeding."); Looney v. State, 941 So.2d 1017, 1027 (Fla. 2006)(Cummings, defense counsel; "This Court has established that defense counsel is entitled to rely on an evaluation conducted by a mental health expert for trial, even if, in retrospect, that evaluation is less than perfect"); Jones v. State, 928 So.2d 1178, 1184 (Fla. 2006)(collecting cases; "evidence Defendant suggests should have been presented during the penalty phase was inconsistent with evidence that was actually presented by the defense at the penalty phase"; "Strategic decisions do not constitute ineffective assistance if alternative **courses of action** have been considered and rejected"; "no deficient performance because counsel felt that the child abuse strategy would be ineffective and that introducing evidence of the defendant's consumption of alcohol would be inconsistent with his theory of the case"); Dufour v. State, 905 So.2d 42, 52 (Fla. 2005)(collecting cases; "pursuing a voluntary intoxication defense in Dufour's case would have been totally inconsistent with the defense theory presented that Dufour did not commit the murder").

Dillbeck v. State, 32 Fla. L. Weekly S228 , 2007 WL 1362899, 10 (Fla. May 10, 2007), recently put it well, in upholding a "reasonable, strategic decision": "Counsel knew that introducing the mental mitigation and the model prisoner mitigation would open the door for the State to introduce evidence." Here, counsel knew that introducing mental mitigation "would open the door for the State to introduce evidence" showing that Jones was either at, or at least heading towards, sociopathy.

B. More lay testimony.

As in mental experts, defense counsel need not call witnesses who would have presented evidence that would have been a "**double-edged sword**," Reed; Rose v. State, 617 So.2d 291, 295 (Fla. 1993)("Rose's brother admitted that Rose is a violent person when he is drinking or on drugs and that this has been a continuous pattern since childhood. In light of the harmful testimony that could have been adduced from Rose's brother and the minimal probative value of the cousins' testimony, we are convinced that the outcome would not have been different had their testimony been presented at the penalty phase").

Moreover, evidence that is cumulative to what defense counsel actually adduced during the trial does not entitle a defendant to Strickland relief. For example, in Looney v. State, 941 So.2d 1017, 1026 (Fla. 2006), mitigation evidence was presented at trial through Looney's natural mother and Looney's natural grandmother: "With respect to the traumatic incidents surrounding Looney's removal from the custody of his natural mother and grandparents by a child services department in Texas, defense counsel did in fact present evidence of these events at trial." See also Gorby v. State, 819 So.2d 664, 675

(Fla. 2002)("if Gorby's father had testified during the penalty phase, the majority of his testimony would have been cumulative to that of Dr. John Goff, Gorby's confidential mental health expert who testified during the guilt-innocence phase, as well to that of Gorby's other family members who testified during the penalty phase").

Here, as in Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990), the defendant contended that "counsel was derelict in not calling additional family witnesses to tell of his difficult background." Here, as well as there, the defendant "testified in great detail during the penalty phase, thereby giving the jurors an opportunity to observe his conduct and demeanor and to hear his life story." And, here and there, the defendant's sister also testified.

Indeed, it is not the volume of witnesses who testify or who could have testified that is important, but rather their quality, their likely impact on the jury, as reasonably evaluated by defense counsel.

Accordingly, here the trial court found:

> 7. Defendant in Ground 4 of his motion claims Trial Counsel was ineffective in failing to adequately investigate and prepare mitigating evidence to challenge the State's position in the penalty phase of the trial.
>
> During the penalty phase of the trial, counsel called two witnesses - Betty Jones Stewart, Defendant's sister, and the Defendant. Mrs. Stewart testified how the Defendant and the family were abandoned by their father; that their father had been abusive toward Defendant's mother; how the Defendant had a hard time dealing with the abandonment; how Defendant's mother became an alcoholic and married an abusive alcoholic man with whom she fought quite often; how Defendant's mother stabbed the step-father to death during one of their fights and had been sent to prison; and how the Defendant had become uncontrollable after his mother went to prison and started getting into trouble with the law. (Exhibit Q, TT, P. 958, 1.1 through P. 961, 1.9).

> Defendant presented numerous witnesses at the motion hearing: Johnnie Lambright, brother of Defendant; Theresa Valentine, sister of Defendant; and Evelyn Diane Jones, sister of Defendant. An examination of their testimony clearly demonstrates that their testimony would have been merely cumulative to the testimony of Defendant's sister, Betty Jones Stewart.
>
> Trial Counsel testified at the motion hearing that he made a conscious decision to rely on Defendant's childhood in mitigation and that he only called Defendant's sister, Betty Jones Stewart, as a mitigation witness because he believed that she was the most articulate and that as a police officer the State could not attack her credibility. (Exhibit R, 3.850 transcript, P. 91, 11.2 through P. 92, 1.19). Trial Counsel's decision was reasonable under the norms of professional conduct.

(PC/5 933-34) Again, there was competent, substantial evidence to support the trial court's findings.

Here, Cummings went to Miami and personally interviewed family members (PC/12 51-52; PC/14 366) and selected Jones' older sister to testify at the penalty phase. (TT/VI 952; PC/12 92). She was a 16-year veteran of the Miami Dade police department (TT/VI 953, 956), articulate, measured, and very knowledgeable concerning Jones' childhood (See TT/VI 952-57; PC/12 52). He was sure that he talked to Officer Stewart "at various times," but he had no independent recollection of it. (PC/14 369-70) He said he does not bill every call. (Id.)

He elaborated that Officer Stewart "was the most articulate, *** [a]nd she was somebody that you could believe. She was a police officer *** that the State could not attack her credibility … ." (PC/12 91; see also PC/12 105)

> She was, in my choice of the family, the best person to explain Mr. Jones' childhood and the family dynamics as they were when he was growing up. *** Well, she seemed to be leading – the person I talked to most. She's a police officer. She was good at asking questions and wanting, you know, here is my number, contact me. Yeah, I think the family looked up to her, too.

(PC/12 92) Cummings believed that Stewart was one of the siblings who helped

raise Jones when their mother went to prison, (PC/12 92-93) and he added that he thought that Jones looked up to Officer Stewart also. (PC/12 92)

Even judged by hindsight, Cummings chose Stewart wisely. (See TT/VI 952 et seq.) Armed with her position as a 16-year police officer, she articulated key events in Jones' life:

- Jones knew his father "until he was about five years old. *** Up until he was about five or six years old" (TT/VI 953-54);
- Their father did not abuse Jones (TT/VI 954);
- Jones "was very attached" to their father (TT/VI 954);
- The "father was very abusive" to their mother and "beat her a lot" (TT/VI 954);
- After their father left the home, Jones "had a very hard time dealing with the fact that he didn't have a father and it became difficult for Harry just to adjust without a father" (TT/VI 954);
- After the father left, their "mother worked several jobs, trying to take care of us" (TT/VI 954);
- It was "hard" on the mother (TT/VI 954);
- Their mother "met this other man and he worked and he started to help her raise [them]" and "they eventually got married and moved in, moved together" (TT/VI 954);
- Jones "didn't accept his stepfather" (TT/VI 955);
- Their "stepfather was an alcoholic" (TT/VI 955)
- Their "mother became an alcoholic" (TT/VI 954; see also 955)
- Their "stepfather and … mother … began to fight a lot"; he became " became very abusive" (TT/VI 954, 955;
- The stepfather "was in the war and when he drank, he would always start talking crazy" (TT/VI 955);
- "[O]ne night" their mother and the stepfather "fought" and the mother "stabbed him to death" (TT/VI 955);
- Their mother "was sent away to prison" "for about three years" when Stewart "was about 15 or 16" (TT/VI 955);

- When the mother was sent to prison Jones "became a different person. He wasn't controllable" (TT/VI 955); "he just started to rebel and get in trouble at that point" (TT/VI 956);
- Stewart "got a job" (TT/VI 956);
- Stewart and her sister, with the assistance of their aunt, "basically raised" Jones (TT/VI 955-56);
- They "stay[ed] together as a family so [they] wouldn't be separated to foster homes and here and there" (TT/VI 956).

As the trial court found, these were essentially the same facts to which the witnesses testified at the postconviction evidentiary hearing.

Indeed, the postconviction witnesses would have showed more of the other edge of the "double-edged sword," Reed.

Joseph Accurso, who was Jones' football coach, testified that even that early, Jones became "involved" with marijuana and left the football team (PC/13 121-22), and Theresa Valentine, Jones' older sister, (PC/13 212), testified about an incident in which Jones stole a bicycle, and it had something to do with the football team (Id. 219-20).

Diane Jones, another older sister (PC/13 223-24) was not present for the trial, and she admitted that "There's no excuse." (Id. 236) The mother did not come to the trial either. (Id.) Even though she came from the same family as Jones, she never had problems with alcohol (Id. 219) and she has a "facility for senior citizens and … mental retardation. (Id. 222)

Diane Jones also testified that their brother Donnie did not provide support for the family until after he "got out of the military." (Id. 217)

Contrary to Diane Jones, Johnnie "Donnie" Lambright, Jones' older brother (PC/13 204), testified that he joined the military to assist with supporting the family. (PC/13 206)

Bertha Middleton, Jones' first cousin (PC/13 162-63), testified that Jones was into robbing and breaking into places when he started to get into trouble (Id. 171). The other kids in the family were upset when the mother was imprisoned (Id. 170), but the other kids "turned out good children." (Id. 171)

Kay Underwood dated Jones when she was about 16 or 17 years old. (PC/13 174-75) They became "intimate." (Id. 181) Initially, her mother was not "too happy" about her relationship with Jones. (Id. 175) She said that Jones did not have a problem with alcohol, but she admitted that Jones used marijuana, but she did not know if he used cocaine. (Id. 183-84)

C. The prejudice prong.

Jones has not only failed to establish Strickland deficiency, he has also failed to satisfy Strickland's prejudice prong, that is that "it was reasonably likely that absent counsel's errors he would have received only a life sentence," Bertolotti v. State, 534 So.2d 386, 391 (Fla. 1988). Here as in Bertolotti, "[c]onsidering the nature of this offense," and the fact that the Defendant "had previously been convicted of three violent felonies," Jones failed to satisfy the prejudice prong. Indeed, Jones had been previously convicted of the **four** offenses of (1) attempted robbery (TT/VI 949-50), (2) robbery (TT/VI 950-51), (3) robbery with a firearm (TT/VI 951), and (4) robbery with a firearm and kidnapping (TT/VI 951-52). And, as the trial court found in 1992, the evidence supported HAC.

As in Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997),

> In light of the substantial, compelling aggravation found by the trial court, there is no reasonable probability that had the mental health expert testified, the outcome would have been different. Haliburton has

> shown neither deficiency nor prejudice, and the trial court properly denied this claim.

Accordingly, Hannon v. State, 941 So. 2d 1109, 1137-1138 (Fla. 2006), held:

> Based on the brutal and disturbing nature of these murders [HAC], there is no reasonable possibility that Hannon would have received a life sentence. Therefore, Hannon has failed to demonstrate that if the mental health and lay witness testimony presented during the postconviction evidentiary testimony had been offered at trial 'the result of the proceeding would have been different,' *** Our confidence in the outcome of this case has not been undermined. … Accordingly, this claim is without merit.

Indeed, it is likely that if Jones put into evidence an expert who implicates sociopathy and who tried to explain it to the jury in terms of "potentiat[ing] the criminality," see Kimbrough v. State, 886 So.2d 965, 980 (Fla. 2004)("mental health issues which could have been presented as mitigation but asserted that Berland would have found them difficult to present"), and if he had put on those laypersons who testified at the evidentiary hearing, he would have risked the two juror votes that Mr. Cummings was able to garner for a life recommendation.

ISSUE III

WHETHER TRIAL COURT ERRED IN DENYING THE "IMPROPER SHACKLING" AND THE "IMPROPER PROSECUTORIAL ARGUMENT" CLAIMS. (RESTATED)[11]

A. Shackles.

The trial court (PC/6 1032) relied upon Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985), to rule that this claim is procedurally barred, and, accordingly, the State asserts it here:

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[11] For the two-pronged standards for measuring an IAC claim, see Issue II.

> It is a matter cognizable only by means of specific objection at trial and presentation on appeal and we will not allow this habeas corpus proceeding to become a direct vehicle for belated appellate review

However, the State must acknowledge Hendrix v. State, 908 So.2d 412, 425 (Fla. 2005), citing Sims v. State, 602 So.2d 1253, 1256 (Fla.1992)(addressing on the merits whether counsel was ineffective for failing to object to restraints used during trial); Marquard v. State, 850 So.2d 417, 431 (Fla. 2002) (same), which stated: "To the extent that Hendrix claims his counsel was ineffective for failing to object [to shackling], this Court can review such claims." Therefore, although Jones' attempt (PC/3 540, IB 92) to assert shackling as a standalone claim in this postconviction appeal is procedurally barred, Hendrix indicates that his claims (PC/13 539, IB 92) that counsel was ineffective for failing to protect him from the shackling can be addressed on appeal if otherwise preserved within the postconviction proceedings, See Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992)("insufficient Mendyk's factual allegations regarding … (4) the failure of defense counsel to challenge Mendyk's being shackled during trial").

Jones argues (IB 92) to this Court that he was prepared to show shackling at the evidentiary hearing, but he fails to show where he proffered that evidence for the record, thereby failing to preserve this issue. As Finney v. State, 660 So.2d 674, 684 (Fla. 1995), explained:

> The claim is not properly before the Court because Finney never proffered the testimony he sought to elicit from the witness and the substance of that testimony is not apparent from the record. § 90.104(1)(b), Fla.Stat. (1991); *Lucas v. State*, 568 So.2d 18, 22 (Fla.1990) (proffer necessary to preserve claim that trial court improperly excluded testimony). Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was

> erroneous and if erroneous what effect the error may have had on the result. *See Ketrow v. State*, 414 So.2d 298 (Fla. 2d DCA 1982).

Therefore, there is nothing cognizable on appeal to ascertain whether Jones would have been able to establish the surrounding circumstances for the purported shackling, including, for example, whether anything obstructed the jury's view. See, e.g., Stewart v. State, 549 So.2d 171, 174 (Fla. 1989)("Stewart had remained stationary during the trial, thus giving the jury no opportunity to see him walk in shackles, and that the shackles were barely visible under the table"); Hendrix v. State, 908 So.2d 412, 425 (Fla. 2005)("witnesses testified that the shackles were not visible to the jury").

In contrast to the absence of any record-evidence whatsoever, proffered or admitted, to support this claim, the trial court stated in open court that Jones was "never shackled during the jury selection or trial … he was never shackled in front of the jury." (PC/14 423; see also PC/6 1032). There are analogous areas in which the trial judge may directly observe events or situations and take action accordingly. For example, in Dorsey v. State, 868 So.2d 1192, 1194 (Fla. 2003), the prosecutor tendered as a race-neutral reason for a peremptory strike of a potential juror, "To me, she appeared disinterested. She did not-wasn't listening to anything." Dorsey explained the direct-observation role of the trial judge:

> The principle that emerges from … [the caselaw], in tandem, is that the proponent of a strike based on nonverbal behavior may satisfy its burden of production of a race-neutral reason during the second step of the process described in Melbourne **only if the behavior is observed by the trial court or otherwise has record support**. Once this burden of production is satisfied, the proponent is entitled to the presumption that the reason is genuine.

868 So.2d at 1199. Analogously here, the trial judge announced on the record

what he observed in the courtroom. His observation should be binding on appeal unless a party contests the observation with some sort of "record support," such as at least a proffer. See also Fla.R.Crim.P. 3.830 (provides for "criminal contempt" where "the court saw or heard the conduct constituting the contempt committed in the actual presence of the court"). Here, Jones had an opportunity for the two days of the evidentiary hearing in which to state on the record that he desired to proffer evidence of shackling, but he did not. Therefore, it is "impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result," Finney. This and any related claim is unpreserved.

Further, defense counsel cannot be deficient for failing to know of, and be guided by, any case decided after the 1992 trial. Therefore, for example, trial defense counsel was not ineffective due to any alleged (IB 94) application of Deck v. Missouri, 544 U.S. 622, 125 S.Ct. 2007 (2005). See State v. Lewis, 838 So. 2d 1102, 1122 (Fla. 2002) ("appellate counsel is not considered ineffective for failing to anticipate a change in law"), citing Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992) ("Defense counsel cannot be held ineffective for failing to anticipate the change in the law."). See also Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 841 (1993)(Strickland's prohibition against evaluating trial defense counsel's performance against hindsight is a protection for counsel).

B. Prosecutor's arguments.

On direct appeal defendant did not raise any claim in regard to the prosecutor’s closing argument. See Jones, 648 So.2d at 673 n.4. These claims

attempt to avoid his procedural default by transforming it into those of ineffective assistance of counsel; accordingly, he is not entitled to relief. See Brown v. State, 755 So. 2d 616, 621 n.7 (Fla. 2000) (claims of ineffective assistance may not be raised as a substitute for failing to raise underlying claim on direct appeal); cf. State v. Riechmann, 777 So. 2d 342, 353 n.14 (Fla. 2000) (postconviction motion is not a second appeal).

Even if defendant's subclaims of ineffective assistance of counsel in relation to the failure to object to specific arguments by the prosecutor are reviewable in a Rule 3.850/3.851 proceeding, defendant was not entitled to relief, as the trial judge found. (See PC/VI 1032-33)

As a general principle, whether to object to closing argument is generally a matter of trial strategy. See Zakrzewski v. State, 866 So.2d 688, 693 (Fla. 2003)("decision not to object to improper comments is fraught with danger," but "a decision not to object to an otherwise objectionable comment may be made for strategic reasons") citing Chandler v. State, 848 So.2d 1031, 1045 (Fla. 2003), Ferguson v. State, 593 So.2d 508, 511 (Fla. 1992) ("The decision not to object is a tactical one"), McCrae v. State, 510 So.2d 874, 878 (Fla. 1987)("Whether to object to an improper comment can be a matter of trial strategy upon which a reasonable discretion is allowed to counsel").

Here, defense counsel testified concerning his general strategy: "… [M]y theory, or my strategy of objections, I don't object during a trial to everything that is objectionable. Because it disrupts maybe the jury. They may get a different feeling towards me." (PC/12 57-58) Here, given the nature of the prosecutor's comments and given evidence amassed against Jones, as, for

example, excerpted in the bullets at the end of Issue I supra, the objections about which Jones complains on appeal pale, insufficient to constitute any Strickland deficiency or prejudice.

Moreover, the arguments by the prosecutor were not improper and thus defendant cannot establish Strickland's requisite deficiency or prejudice. "'The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.'" Mann v. State, 603 So. 2d 1141 (Fla. 1992), quoting Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985)).

Defendant first argues (IB 94-95) that the prosecutor improperly commented upon his fifth amendment right not to testify, citing page 846 of the trial transcript. Contrary to defendant's characterization of the argument, viewed in the context in which it arose, the prosecutor was addressing the fact that while there was no eyewitness to the actual killing of the victim and there was overwhelming circumstantial evidence. (See TT/V 844-48). Indeed, immediately prior to the statement this claim targets, the prosecutor pointed out that "only through piecing together the evidence do we know what happened … ." (TT/V 846) And, the prosecutor also properly argued, based upon the evidence, the lies that Jones told to Deputy Wood: "… after the body is discovered, he said, 'I didn't kill that white man. I got the truck in Frenchtown.'" He then continued by highlighting Jones' statements to Prim and Watson. (PC/V 857)

Further, defense counsel's closing argument emphasized the State's burden:

> Now the State has accepted the burden of proof. Understand and you agreed during voir dire that the State has the burden in this case. The Defense need not come forward with anything. You promised to hold the State to

> that burden and I'm holding you to that burden, holding you to that promise.

(TT/V 864) Accordingly, the judge properly instructed the jury on the State's burden of proof beyond a reasonable doubt (See TT/V 923-25) and the Defendant's exercise of his "fundamental right … not to be a witness in this case. You must not view this as an admission of guilt or be influenced in any way by his decision. No juror should ever be concerned that the Defendant did or did not take the witness stand to give testimony in the case." (Id. 926-27) Therefore, these reminders hammered the proper burden upon the State, put the prosecutor's remarks in a proper context, eliminated any danger to Jones' rights, and rendered it reasonable for defense counsel not to object.

Accordingly, even if the argument was improper, Jones cannot establish Strickland prejudice in light of the totality of the evidence, the totality of the arguments and jury instructions, and these two lines among two prosecution closings consisting of about 41 pages and 9 pages of transcript (TT/V 841-62, 905-13). Jones has failed to establish that there is a reasonable probability of a different result.

Concerning the claim (IB 95) attacking prosecutor's rebuttal closing argument (TT/V 905), the prosecutor may properly argue that, based upon the evidence, the defense theory is not credible. Therefore, this comment leads into a discussion that attempts to focus the jurors upon Jones lying to Deputy Wood. When viewed in its entirety (See TT/V 905-913), the prosecutor's argument was not improper and certainly not at the level of Strickland prejudice.

Finally, pertaining to the penalty phase, defendant challenges, in part, the following argument by the prosecutor:

> This case on its face and on its facts and in light of the evidence presented here this afternoon deserves and requires on the law the death penalty. We as a community, as a people, revere and treasure life and that's what makes it so hard for us to tell someone else that their life should be forfeited, even someone who commits so terrible a crime as this. And yet to preserve life for others, for the protection of people we do not even know, that's exactly what the law requires of you, what the facts and the law merit, to come back and tell the Court exactly that.
>
> We have to make the penalty as terrible as the crime itself. Life is precious and it was no doubt precious to George Wilson Young, Jr. None of us here knows when our time is going to get cut short by an accident or disease. But to have it stolen from us for money, out of boredom, stolen from us by a deliberate and cruel act, the life of this Defendant is no doubt precious to him, but **this terrible crime**, when you **view the aggravating circumstances**, requires the most terrible penalty. Does this diminish us, does this make us less, does this reduce us or lower us to the level of **someone who goes out and deliberately takes a life**? No. ***No, because the difference between murder and self defense, between crime and punishment, is all the difference in the world.*** We do not do this, we do not ask you to do this out of vengeance or anger.

(TT/VI 986-87, underlined-italics emphasis added to that portion of the closing argument this claim contests) It is obvious that the prosecutor was not pushing "future dangerousness" (IB 95), but rather he was arguing that a "**terrible**," "**deliberate**[]" and **inexcusable (not self-defense)** killing, as in this case, merits the death penalty. Viewed in its entirety, the argument was proper. In any event, it does not reach Strickland prejudice. Confidence remains in the outcome.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's denial of postconviction relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on July 24, 2007:

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CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted, served, and certified,

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