**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC06-474**

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**HARRY JONES,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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

# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This appeal is from the denial of Appellant=s motion for post-conviction relief by The Honorable William L. Gary, Circuit Judge, First Judicial Circuit, Leon County, Florida. This appeal challenges Appellant=s convictions and sentences, including his sentence of death. References in this brief are as follows:

"EHT." refers to the transcript of proceedings held on April 15-16, 2004.

"PC-R." refers to the post-conviction record on appeal.

"TT." refers to the trial transcript in this matter.

"R." refers to the record on appeal of the direct appeal in this matter.

All other references will be self-explanatory or otherwise explained herein.

## REQUEST FOR ORAL ARGUMENT

This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to develop the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Appellant, through counsel, accordingly urges that the Court permit oral argument.

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## STATEMENT OF THE CASE AND FACTS

### I. PROCEDURAL HISTORY

On June 25, 1991, Mr. Jones was charged by information with second-degree murder, robbery, and grand theft of a motor vehicle (R. 4-5) On July 18, 1991, Mr. Jones charged by superceding indictment with first-degree murder, robbery, and grand theft of a motor vehicle. (R. 1-2) Mr. Jones entered a plea of not guilty. (R. 18-20) Mr. Jones was tried by jury in May, 1992. The jury was unable to reach a verdict and a mistrial was declared. Mr. Jones was tried again in November 1992, and the jury returned verdicts of guilt on all charges. (R. 786-90) The jury recommended death by a vote of 10-2. (PC-R. 93) The trial court sentenced Mr. Jones to death on November 20, 1992. (R. 828-36) Mr. Jones timely sought direct appeal to this Court. (PC-R. 149-50) This Court affirmed Mr. Jones' convictions and death sentence. Jones v. State, 648 So. 2d 669 (Fla. 1994). The United States Supreme Court denied certiorari. Jones v. Florida, 515 U.S. 1147 (1995).

Mr. Jones filed a post-conviction shell motion on March 21, 1997. (PC-R. 235-47) Mr. Jones filed an amended post-conviction motion on March 19, 2003. (PC-R. 468-573). A Huff[1] hearing was held in the matter on January 16, 2004. The trial court granted an evidentiary hearing as to the majority of sub-

claims in Claims I-IV of Mr. Jones' amended motion. The court withheld consideration of Claim XIII (cumulative error) until the conclusion of the evidentiary hearing.[2] An evidentiary hearing was held in this matter on April 15-16, 2004. (PC-R. 85-86). Both Mr. Jones and the state submitted post-hearing written argument. (PC-R. 767-834) On April 11, 2005, Mr. Jones filed a supplemental 3.851 motion averring that a witness would testify that trial witness Kevin Prim stated that he testified falsely at Mr. Jones trial. (PC-R. 888-911) On September 23, 2005, the trial court entered two separate orders denying relief as to Mr. Jones' amended post-conviction motion. (PC-R. 926-1103) One order dealt with claims summarily denied and the other dealt with claims for which an evidentiary hearing was granted.[3] Mr. Jones sought timely appeal. (PC-R. 1104-05) This appeal follows.

**II. STATEMENT OF THE EVIDENTIARY HEARING FACTS**

Greg Cummings testified that he is an attorney and has practiced in Tallahassee since 1985. (EHT. 4) Cummings worked

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1 Huff v. State, 622 So.2d 982 (Fla. 1993)

2 There was no written order as to the scope of the evidentiary hearing.

3 The orders did not address or acknowledge Mr. Jones' supplemental 3.851 motion filed April 11, 2005. Mr. Jones requested, after this matter was appealed, for this Court to relinquish jurisdiction so that the trial court could hear the supplemental motion. This Court, in an order dated November 2, 2006, by a vote of 5-2, denied Mr. Jones' request to relinquish. Thus, the supplemental motion is still

for the Public Defender's office handling felony cases, but no capital cases. (Id.) Cummings handled no murder cases while at the Public Defender. (EHT. 5) Cummings eventually went into private practice. (Id.) Cummings began representation of Mr. Jones in 1991 and this was his first murder case and first penalty phase. (EHT. 5-6) Cummings was appointed to the case because of a Public Defender representation conflict between Mr. Jones and witness Kevin Prim. (EHT. 7) Cummings became aware that Prim had been released from jail in close proximity to giving a statement against Mr. Jones. (EHT. 8) Cummings was "certainly" interested in the circumstances of Prim's release, or "ROR". (Id.) Cummings identified a document, Defense Exhibit 3, that is a copy of a supplemental police report, authored by lead detective Mike Wood of the Leon County Sheriff's Office, from Cummings' file. (EHT. 9) Cummings noted that the date September 12 is circled and above the word "released" is the word "how?", written in Cummings handwriting. (EHT. 9-10) Cummings stated that he never saw the Public Defender's internal conflict memorandum regarding their withdrawal from the Mr. Jones' case. (EHT. 11) Cummings would have wanted to know about any promises made to Prim in exchange for his testimony. (Id.) Cummings would have used any evidence of a deal "whole heartedly and with much force." (EHT. 12)

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pending in circuit court and is not a subject of this appeal.

Cummings recalled that as trial approached, he was aware of some ongoing criminality by Prim. (EHT. 14) Cummings testified that any new or ongoing criminality by a state witness "certainly benefits the defense in any cross-examination." (Id.) Cummings agreed that the trial record questions of Prim would reflect what he knew about Prim's ongoing criminal behavior. (EHT. 15) Cummings agreed that exclusive of snitch testimony, the case was largely circumstantial. (EHT. 16) Cummings identified a police report dated July 11, 1992, and signed by Mike Wood. (EHT. 18) The report relates to Kevin Prim. (EHT. 19) Cummings identified a police report dated November 19, 1992, regarding Kevin Prim. (EHT. 21) The report references two separate thefts by Prim, one on October 24, 1992, and one on November 11, 1992. (Id.) The lower court took judicial notice that the jury was sworn in on November 10, 1992, at 9:25 a.m. and the trial began at that time. (Id.) Cummings was not aware, at the time of trial, of Prim's involvement in the criminal activity reflected in the report of November 19th. (EHT. 22) Cummings would have certainly been interested in this information or, in his words, he would "have had a field day with that information." (Id.) Cummings identified a petit theft arrest report with a date of November 19, 1992. (EHT. 23) Kevin Prim is the arrestee in the report. (EHT. 24) Cummings

was not aware of this report or arrest and stated that he "certainly" would have wanted the information. (EHT. 25) Cummings identified a supplemental arrest report related to a drug paraphernalia arrest of Kevin Prim. (Id.) Prim was found in possession of a crack pipe. (EHT. 26) Cummings was not aware of this arrest. (Id.) Cummings would have wanted to know that Prim was a drug addict and would have asked him about this. (EHT. 29)

Cummings identified notes that stated, in part, "witness saw victim driving earlier in the evening obviously DUI." (EHT. 30) These notes were under the name Don Ross, a Florida Highway Patrolman. (EHT. 31) Cummings said this indicates to him that Ross "saw the victim in this matter driving earlier in the evening obviously DUI and didn't do anything about it." (Id.) Cummings was not aware of this information at the time of trial. (Id.) Cummings recalled that part of the state's theory was that the victim would not have let Mr. Jones drive his vehicle. (EHT. 33) Cummings would have wanted the information in this note. (Id.)

Cummings identified an incident report dated February 27-28, 1991 regarding a burglary of the victim's home. (EHT. 34) Cummings identified an incident report dated May 5, 1991 regarding an incident at "Jessie's Florist." (EHT. 35)

Cummings did not receive the information contained in this report at the time of trial. (Id.) Cummings stated that he would have been interested in the reports and would have used them to Mr. Jones' benefit if he could. (EHT. 36-37)

Cummings testified that Mr. Jones did nothing to impede Cummings' penalty phase investigation. (EHT. 38) Mr. Jones never asked Cummings not to investigate or present mitigation. (Id.) Mr. Jones never asked Cummings not talk to certain witnesses, including family and friends. (EHT. 39) Cummings did not recall if he asked his investigators to investigate mitigation. (Id.) Cummings testified that there was a plea offer for a life sentence in this case. (Id.) The offer was made more than once, Cummings thought before both trials, but definitely before the second trial. (Id.) Cummings testified that he believed a penalty phase was a likely occurrence in this case. (EHT. 40) Cummings never hired a mental health expert in this case, never filed a motion requesting appointment of a mental health expert, and never sought to have Mr. Jones examined for competency, sanity, or statutory mitigation (EHT. 41) Cummings testified that there is a memorandum in his file written by Nancy Showalter. (Id.) Cummings identified the document. (EHT. 41-42) Cummings had the document. (EHT. 42) Cummings did not recall making contact with Berland (Id.)

Cummings agreed that there is nothing in his file to suggest that he talked to Dr. Berland or any other mental health expert. (EHT. 43) Cummings did not "recall speaking with anybody about that document (the Showalter memorandum)." (Id.) When asked whether he spoke with anybody about the presentation of mental health evidence in Mr. Jones' case, Cummings stated, "Well, I'm going to tell you I don't have any specific recollection. My file does not recall it." (Id.) Cummings' bill for services does not reflect any conversation with a mental health expert. (Id.) Cummings did not recall ever speaking with Mr. Jones' public defenders. (EHT. 45) Cummings identified a "graph" from his file that was with some records of the Department of Corrections. (Id.) Cummings testified, examining the graph that was in his file, that "I can't tell you specifically remembering, but at some point in time I probably made a conscious decision not to use a mental health expert based upon what that graph, the results of the testing show." (EHT. 46) Cummings agreed that his file and bill in this case do not reflect that he ever spoke with a mental health expert. (Id.) Cummings testified that he cannot be certain he spoke with an expert. (EHT. 47) Cummings stated that Mr. Jones would not have refused evaluation by a mental health expert. (Id.) Cummings testified that if he had evidence of mental illness and

brain damage to support statutory mental health mitigation, he would have wanted to present it. (Id.)

Cummings testified that Mr. Jones' intoxication at the time of the crime was something he wanted to establish. (EHT. 48) Cummings identified a hospital toxicology report that stated Mr. Jones' blood-alcohol level at .263 with traces of cocaine. (EHT. 49) Cummings was aware of this report as well as the fact that Mr. Jones had drug use issues, specifically cocaine. (EHT. 49-50)

Cummings testified that in preparation for penalty phase, he spent "a morning" with Mr. Jones' family. (EHT. 51) Cummings stated that he thought that would be enough. (EHT. 52) Cummings stated that Mr. Jones' sister "always was" going to be the only person to testify. (Id.) Cummings did not talk to any teachers or get school records. (Id.) Cummings did not recall why Mr. Jones' mother was not called to testify. (EHT. 53) Further testifying as to why only Mr. Jones' sister testified, Cummings stated, "The trial had ended and the judge gave us – he said, we'll start the penalty phase in about an hour. And that sort of threw me. And I don't know who was in a very good emotional state to testify at that time." (Id.) Cummings did not recall if he ever spoke with Mr. Jones' father. (Id.) Cummings stated that he was aware that Mr. Jones had multiple

siblings and would have wanted them to testify if they could provide information additional to that of Betty Jones Stewart. (EHT. 54) Cummings testified that he would want someone such as a teacher or coach to testify and does not know why "it didn't get done" in this case. (EHT. 54-55) Cummings did not recall talking to Kay Underwood, a former girlfriend of Mr. Jones, and did not recall her name. (EHT. 55) Cummings testified that he does not recall being aware that Mr. Jones had a ten year old daughter at the time of the trial. (Id.) Cummings thinks he may have read this recently and "it was like news to me maybe, I don't know." (Id.) Cummings testified that he believes he could have done more to develop the penalty phase of Mr. Jones' case, both as a matter of hindsight and because "I think there probably could have been some more done at that point in time too." (EHT. 60)

Cummings testified that he "wasn't the most experienced felony lawyer" when he was with the public defender, but he had handled several hundred cases. (EHT. 63-64) Cummings stated that the fact that this was his first death penalty case made him nervous. (EHT. 65-66) Cummings had conversations with Mr. Jones about the case. (EHT. 67) Cummings stated, when asked by the prosecutor if he was concerned about Mr. Jones' being violent, "I never had those concerns with Mr. Jones. He was

always very polite and respectful, and I hope I was the same to him." (EHT. 69)

Cummings testified that he recalled the memorandum written by Nancy Showalter about Dr. Berland's evaluation. (Id.) The memorandum referred to "aggressive behavior" by Mr. Jones, but Cummings never saw any evidence of this. (EHT. 70) Cummings testified that his meetings with Mr. Jones did not raise any mental health concerns. (EHT. 71) The memorandum states that Dr. Berland recommended against having a brain scan done. (EHT. 73) Cummings testified that he received DOC records and mental health reports. (EHT. 74) There were areas of the records that he "starred." (Id.) Cummings stated that the graph of Dr. Berland's MMPI results was found with the DOC records.[4] Cummings stated that he highlighted a portion of a report by a DOC psychiatrist which stated that "progress is guarded with respect to his anti-social behavior." (EHT. 76) Cummings stated that he highlighted some areas "that were bad." (EHT. 77) The report stated that there were no hallucinations or delusions

[4] The records which Mr. Cummings reviewed were a copy of his original file. The copy was provided to the 2nd Circuit State Attorney's Office by undersigned counsel at their request. Cummings' original file, prior to being in the possession of undersigned counsel, was in the possession of Capital Collateral Representative and Capital Collateral Regional Counsel-North. Prior to being in the possession of CCR/CCRC-N, the file was in the possession of attorney James Lohman. Prior to Lohman, the file was in possession of CCR during an earlier assignment to Mr. Jones' case.

noted. (EHT. 78) Cummings identified another DOC report which noted psychiatric disabilities and anti-social personality disorder. (EHT. 79) Cummings stated that the reports would have been a concern in presenting a mental health defense. (Id.) Cummings added that he does not know that a specific decision was made to forego mental health testimony because of the records. (EHT. 80) Cummings speculated that that may have been the case. (Id.) Cummings speculated as to some experienced attorneys he may have talked to. (EHT. 81-83) Cummings identified a 1977 DOC psychiatric report in which Mr. Jones allegedly denied hallucinations. (EHT. 83) Cummings stated that he "assumes" he was thinking that, based on this, Mr. Jones did not have sufficient "mental issues." (EHT. 84)

Cummings testified that Mr. Jones always denied committing the crime. (EHT. 85) Cummings stated that although mitigation "experts" were not in common use at the time of Mr. Jones' trial, mental health mitigation was "pretty-well established." (EHT. 86-87) Cummings stated that he would not have known how to interpret the MMPI results from Dr. Berland's evaluation. (EHT. 88-89) Cummings acknowledged that he is only speculating as to why he did not further investigate the mental health issue presented by Dr. Berland's evaluation. (EHT. 90)

Cummings testified that he focused on Mr. Jones' childhood

in presenting mitigation. (EHT. 91) Cummings stated that he used only Mr. Jones' sister Betty because she was more articulate, stable, and credible. (EHT. 91) Cummings testified that although Betty testified to Mr. Jones' father's abandonment at trial, "in the family setting where I was, I think, all the members added to what took place the day Mr. Jones' father dropped him off and left him and never came back." (Id.) Cummings did not have a recollection whether any other family member could have contributed to the penalty phase presentation. (EHT. 94)

Cummings testified that assumes the Public Defender gave him everything they had on Mr. Jones' case within ethical bounds. (EHT. 98) Cummings did not recall Ines Suber being called or subpoenaed as a witness in Mr. Jones' case. (EHT. 98-99) Cummings had no reason to believe the prosecution was hiding any evidence from him. (EHT. 99)

Cummings agreed that the Public Defender's Office would not be under an obligation to him to divulge privileged information, even though it may be exculpatory. (EHT. 104) Cummings did not make a strategy decision not to present coaches, teachers, or like witnesses. (EHT. 105) Cummings agreed that if he had testimony reflecting significant mental illness and brain damage, it would have been better to put the evidence on because

when “you get the right person to explain it, it’s hard to overcome.” (EHT. 108) Cummings agreed that the DOC records did not contain any written notes, only stars and highlights. (EHT. 109) Cummings agreed that although he personally did not detect mental illness in Mr. Jones, Showalter’s memo of Dr. Berland’s evaluation certainly reflects it. (EHT. 110) Cummings agreed that Dr. Berland would be a better person to make a judgment as to the existence of mental illness, “by far.” (Id.) Cummings added that if he got this case today, the first issue he would try to deal with is whether mental illness is at play. (Id.) Cummings stated that he had no capital experience at the time of the trial and does not remember the conflict list requiring any for handling a capital case. (EHT. 111) Cummings stated that his investigator was not obtained to investigate mitigation. (EHT. 112)

Dr. Joseph Accurso has been a practicing chiropractor for 35 years at his practice in South Miami. (EHT. 118) Dr. Accurso coached youth football in Miami from 1960-65 and 1968-76 at the Southwest Boys’ Club. (EHT. 119) As a coach, Dr. Accurso became acquainted with Mr. Jones when Harry was approximately thirteen years old. (Id.) Accurso testified that Mr. Jones had a “rough home-life.” (EHT. 119-20) Dr. Accurso testified that Harry was a “bright-eyed” boy who was an

"absolute, fabulous football player." (EHT. 120) Accurso stated that although Harry was an excellent player, he stood up for and had a "soft spot in his heart" for the kids who were not as good and were picked on. (Id.) Accurso added that ". . . that impressed me. It impressed all the coaches. He was a real leader and a real good kid." (Id.) Accurso stated that Harry was respectful to him as the football coach. (Id.) Harry "always showed up at practice and he worked hard." (EHT. 121) Harry was a bright kid and "the leader on the team." (Id.) Harry was respectful of other players and was never in fights. (Id.) Dr. Accurso stated that eventually Harry began to hang out with another troubled kid and may have began using marijuana. (EHT. 121-22) Dr. Accurso stated that Harry was one of the kids that he "loved to have babysit for my kids." Dr. Accurso testified that when he heard about Mr. Jones' murder conviction, it was a surprise to him. (EHT. 122) Dr. Accurso added that Harry "was a real special kid when he was 13." (Id.)

Nancy Daniels testified that she is the Public Defender for the Second Judicial Circuit and has been since 1990. (EHT. 125) Daniels recalled her office representing Mr. Jones. (EHT. 126) Daniels had a specific recollection of a conflict that arose in the representation of Mr. Jones. (Id.) The conflict involved another public defender client named Kevin Prim. (Id.) Daniels

identified and recognized the conflict memo written to her by Gene Taylor regarding Mr. Jones' case. (EHT. 127) The memo reflects Mr. Taylor's basis for the conflict. (Id.) The memo reflects that Ines Suber received some information regarding a release on recognizance for Kevin Prim. (EHT. 128) Daniels stated that Gene Taylor "absolutely" would be accurate in his communications to her. (EHT. 130) Daniels trusts Suber. (Id.) Daniels office ultimately certified a conflict. (EHT. 131) Daniels was aware of the basis for the ROR motion filed by Suber. (EHT. 134)

Sam Middleton testified that he is sixty-four-years old, lives in South Miami and has since 1950. (EHT. 137) Middleton testified that he knows Harry Jones and is married to Mr. Jones' cousin. (Id.) Middleton was approximately twenty-five and Mr. Jones three-years old when they first met. (Id.) Both Middleton and Mr. Jones are originally from South Carolina. (EHT. 138) Harry was a good child who treated Middleton with "great respect." (EHT. 139) Harry was well-mannered towards Middleton and treated Middleton as an authority figure. (Id.) After Mr. Jones' mother was sent to prison, Mr. Jones and his siblings "missed the mother and they had to fend on their own." (EHT. 140) Middleton last saw Mr. Jones before he moved to Tallahassee. (Id.) Middleton eventually became aware that Mr.

Jones had some legal troubles as a young adult. (EHT. 142) Middleton never saw Mr. Jones drunk or using drugs. (EHT. 143) Middleton stated that Mr. Jones hung out with "regular boys in the community." (Id.) Middleton never saw Mr. Jones with a firearm and he believes Mr. Jones had a job. (Id.)

Ines Suber is an Assistant Public Defender and has been since 1987. (EHT. 145) Suber previously worked for the Attorney General. (EHT. 146) In 1991, Suber was a felony lawyer with the public defender and represented Kevin Prim. (Id.) The assistant state attorney assigned to the Prim case was Brad Thomas, not Neill Wade. (EHT. 147) Prim discussed with Suber the fact that he had given a statement against Mr. Jones and stated his expectations as a result of the statement. (EHT. 147-48) Suber testified that when Prim contacted her, he was advising her about what to do. (EHT. 150) Prim told Suber that he had made statements to certain individuals, including Mike Wood. (Id.) Prim was expecting to be released based on his statement and he wanted Suber to communicate that to the proper authorities, including the State Attorney. (EHT. 151) Prim had been promised an ROR. (Id.) Suber confirmed that the statement had been made by contacting Mike Wood and then secured Prim's release. (Id.) Subere's ROR motion indicates that Suber contacted Neill Wade about a possible ROR for Prim and that Wade

had no objection to Prim's release. (EHT. 152) Suber identified the conflict memo written by Gene Taylor and stated that Taylor's recitation is in fact what she told him. (EHT. 152-53) Suber stated that "[e]verything is accurate." (EHT. 153) Suber testified that when she discovered the potential conflict with Prim and Mr. Jones, she contacted Taylor as a matter of office policy. (Id.) Suber testified that prior to Prim providing a statement against Mr. Jones, she did nothing to secure his release. (EHT. 154) It was only after her conversation with Prim about the alleged statement that she moved for Prim's release. (EHT. 155) Suber's motion for Prim's release, was "absolutely not" related to any alleged physical altercation between Prim and Mr. Jones. (Id.) Suber stated that she was "never" aware of a physical altercation. (Id.) When asked about the basis for the ROR motion, Suber testified:

> The motion that I made was based on what Mr. Prim had said the State had promised him. And I asked for an ROR, I got him the ROR. It was not based on any fights. I was not asking for him to be transferred to another prison because he – or another jail to be held, because of altercations with someone. I was asking for an ROR and that's what I got.

(Id.) When asked whether it made sense to her as an experienced public defender that someone would be released because of a fight with another inmate, Suber stated, "It has never happened.

. . .” (EHT. 155-56) Suber stated that she would not have unilaterally contacted Greg Cummings about Prim’s statement to her. (EHT. 156) Suber stated that she was contacted by post-conviction counsel for Mr. Jones about this issue; she did not initiate contact. (Id.) Suber testified that the bottom line is that Prim told her that he expected to be released based on his statement against Mr. Jones. (Id.)

Suber testified that she did not believe what Prim told her about his expectations in being released was confidential. (Id.) Prim expected her to communicate this to the proper authorities. (Id.) Suber testified that she would not have contacted Mr. Cummings. (Id.) Prim did not intend to keep the communication in question confidential. (EHT. 160)

Bertha Middleton testified that she lives in South Miami and has for forty-four years. (EHT. 162) Mr. Jones is Bertha’s first cousin. (EHT. 163) Both Bertha’s and Mr. Jones’ family lived in South Carolina prior to moving to Miami. (Id.) The families lived in a three bedroom wooden farmhouse with eight children and two adults. (EHT. 163-64) The culture in Miami was “totally different” from what they experienced in South Carolina. (Id.) Miami was more racially segregated than the country where they lived in South Carolina. (Id.) Bertha recalled Mr. Jones’ father being sent to jail. (Id.) Mr. Jones

told Bertha that he wanted to be like his father. (EHT. 165) After Harry's father went to prison, things were difficult for Harry's mother. (EHT. 166) Life was doing field work, picking cotton and beans, and raising five kids at the same time. (Id.) Mr. Jones was affected when his mother was sent to prison. (EHT. 166-67) Mr. Jones' trouble with the law started after his mother was sent to prison. (EHT. 167) Harry was a quiet, respectful child and never treated Bertha badly. (Id.) After Mr. Jones' mother went to prison, he had no parental guidance, there were "just five children taking care of themselves." (Id.) Harry's mother, Sarah, loved him and was "very protective." (Id.) Bertha recalled the children helping their mother with the field work in South Carolina. (EHT. 170) The children were very emotional when their mother was sent to prison. (Id.) After Harry's mother was sent to prison, child services did not check on the kids. (Id.) Harry and his siblings were all under the age of eighteen when their mother was sent to prison. (EHT. 173)

Kay Underwood lives in Miami and has for thirty years. (EHT. 174-75) Underwood knows Mr. Jones. (EHT. 175) Underwood and Mr. Jones dated when they were younger; Underwood was in her late teens and Harry in his early twenties. (Id.) Underwood went to Florida A & M University in 1984. (EHT. 176) Harry was

imprisoned sometime after that and got himself transferred to a work camp near Tallahassee to be with her. (Id.) Mr. Jones visited Underwood and they discussed plans to get married. (Id.) Underwood testified that Mr. Jones intended on following through with those plans. (Id.) In 1986, Underwood had to leave school and return home to Miami. (EHT. 177) As a result, her relationship with Mr. Jones ended. (Id.) Mr. Jones was a caring person towards Underwood. (Id.) Underwood stated that Mr. Jones told her that his problems began when his mother was sent to prison. (Id.) Harry loved his mother very much and she loved him. (Id.) Mr. Jones is very knowledgeable about the bible and even considered becoming a minister. (EHT. 177-78) Underwood is still friends with Harry and has been for twenty-plus years. (EHT. 178) Mr. Jones has been a good and kind friend. (Id.) Harry has a daughter named Tasheba that is approximately twenty-one years old and who he expresses interest in. (Id.)

Underwood's mother did not like her relationship with Mr. Jones initially because he was older than her. (EHT. 181) Mr. Jones was unemployed when the two were dating. (Id.) Mr. Jones was eventually incarcerated. (EHT. 182) Underwood later learned that robbery was involved. (EHT. 183) Underwood does not know details of the robberies. (Id.) Underwood does not

recall Mr. Jones having a problem with alcohol or using cocaine. (Id.) Underwood remembers Mr. Jones using marijuana. (EHT. 184) Underwood never saw Mr. Jones with a gun. (Id.) Underwood visited Mr. Jones 2-3 times per month when he was incarcerated. (Id.) During his stay at the work camp, Mr. Jones was employed at a restaurant. (EHT. 185) Underwood stated, "Harry was – has always been my number one friend, or the best friend that I have ever had, so he was the type of friend that I could always go to and talk to him about the most difficult times in my life, and he would be supportive or positive . . . ." (EHT. 186-87) Mr. Jones was an intelligent person. (EHT. 187) Underwood came from a protected childhood and it does not surprise her that Mr. Jones would not use drugs or alcohol around her. (EHT. 189) She believes he did this out of respect. (Id.) Underwood stated that she feels that Mr. Jones helped her become a more independent person and grow out of her protected childhood. (EHT. 190)

Nancy Showalter testified that she is an Assistant Public Defender in the Second Circuit and has been since 1986. (EHT. 191-92) Showalter and Gene Taylor represented Mr. Jones in this case. (EHT. 192) Showalter identified the memorandum she drafted regarding Dr. Berland and recalled her dealings with Berland. (Id.) Showalter and Taylor discussed the presentation

of mitigation in the case. (EHT. 194) Showalter had conversations with Mr. Jones and he never indicated unwillingness to present mitigation. (Id.) Showalter identified a mitigation information form with Taylor's handwriting, the purpose of which is to develop background information on the client. (Id.) The document reflects that Mr. Jones has a child named Tasheba that he saw three months prior to the interview. (EHT. 196) Dr. Berland's evaluation was arranged by Taylor and Berland made some preliminary findings. (EHT. 197) Showalter does not recall any further conversations with Dr. Berland beyond what is in the memo. (Id.) Showalter stated that in one of the first conversations she had with Mr. Jones, she impressed upon him to talk to no one about his case, including people at the jail. (EHT. 199) Mr. Jones understood this. (Id.) Showalter does not recall speaking with Greg Cummings about this case. (Id.)

Showalter tried to be accurate in drafting the memorandum regarding her conversation with Dr. Berland. (Id.) The in-take interview also indicated a criminal incarceration history. (EHT. 202)

Johnny Lambright testified that he is Mr. Jones' brother and was born in Holly Hill, South Carolina. (EHT. 204) Lambright stated that life in South Carolina was hard and that

people in Florida were different than those in South Carolina. (EHT. 205) The family lived on a plantation in South Carolina where they farmed the land, but did not own it. (Id.) The family farmed cotton. (Id.) Harry's father "was not a father" and physically and verbally abused their mother. (Id.) Lambright was a junior in high school when his mother went to prison. (EHT. 206) The whole family was shocked. (Id.) Lambright went in the Army to attempt to provide financial support to his siblings. (Id.) Lambright stated that he has had a life-long struggle with alcoholism which he attributed to his desire "to escape" the memories of his childhood. (EHT. 206-07) Lambright stated that he and all his siblings were affected by their difficult childhood. (EHT. 207) Lambright loves his brother and that is why he is testifying for him. (Id.) Lambright feels that his brother's life should be saved. (Id.) Lambright stated, when asked whether Harry's mother loved him, "Very much so. That was her baby." (Id.)

Lambright and a sister got part-time jobs after school when their mother went to prison. (EHT. 209) An aunt also helped out some. (Id.) Lambright stated that the stress that led to his alcoholism started with his mother's incarceration. (EHT. 210) Lambright has had legal troubles because of his alcoholism, including two DWIs. (EHT. 210-11)

Theresa Valentine is Mr. Jones' older sister by six years. (EHT. 212) Theresa's father was a heavy drinker and very abusive. (EHT. 212-13) The family moved to Miami when Theresa was young. (Id.) Tommy, her mother's boyfriend, and her mother were involved in fights on the weekend. (EHT. 214) There was violence in the home and Mr. Jones was a witness to it. (Id.) When their mother went to prison, the kids had a rough time. (Id.) Theresa was the oldest and in charge of the others. (Id.) While there was some help, others were not able to provide full time care for the kids. (EHT. 215) There was little financial assistance and Theresa and Betty had to work multiple jobs. (Id.) Theresa is a spiritual woman and she turned to God to help her deal with the trauma of her childhood. (Id.) Theresa feels like she was affected by her childhood. (EHT. 216) Theresa loves her brother and would like to see him live. (Id.) Harry was special to his mother and she loved him. (EHT. 217) Theresa's brother Johnny tried to help out when her mother was in prison, but he was in the military. (EHT. 217-18) Theresa did not have problems with alcohol or the law. (EHT. 219) Harry was sent to reform school at one point. (EHT. 220) Theresa left home when she was twenty-one, after her mother was out of jail. (EHT. 221) The first time Harry got into legal trouble was after his mother had gone to prison. (EHT. 222)

Theresa works as a business owner in the health care field. (Id.)

Diane Jones lives in Miami and is Harry Jones' sister. (EHT. 224) Diane recalled that when he was a child, Harry's mother nick-named him "Beaver" after the title character in the television show "Leave it to Beaver." (Id.) Her father was an alcoholic. (EHT. 225) When the family moved from South Carolina to Florida, Harry was four or five years old and their father was still with the family. (Id.) Their father had left the family once before as well. (Id.) Diane stated that the kids had conflicted feelings about their father leaving; they were saddened by the loss but also happier because "there was no more fighting" between their mother and father. (EHT. 226) Harry's father was partial to him and his leaving affected Harry. (Id.) Harry's mother was also very distraught when their father left. (Id.) Harry's mother met another man named Tommy who drank heavily. (EHT. 226-27) Tommy and the children's mother would engage in physical fights when they were drinking. (EHT. 227) When the children's mother was sent to prison for killing Tommy, it had a dramatic affect on Harry. (Id.) Harry would visit his mother in prison and it had an obvious affect on Harry. (EHT. 228) "[E]verytime we would go there he would – you know, you could see the action in his face,

and the moods, the mood swing he would be in, you could tell that basically everybody was affected, because we didn't want to leave her there." (Id.) The children were teased and taunted, on multiple occasions, about their mother being in prison. (EHT. 229) Diane was an unwed mother at sixteen-years old and was once charged with food-stamp fraud. (Id.) Diane recalls that her mother became violent and fought with her boyfriend when she drank alcohol. (EHT. 230) Harry was a smart student, but his mother's incarceration affected his academic performance. (Id.) Diane stated that Harry did not make it through junior high, but later got his GED while incarcerated. (EHT. 231) Harry has a daughter who is now 21 years old. (Id.) When she was a child, Harry had a relationship with her and would take care of her at times. (Id.) Harry's daughter has visited him on death row. (EHT. 232) Greg Cummings did not ask Diane about testifying. (Id.) Diane loves her brother and believes his life is worth saving. (EHT. 233) When Cummings came to Miami, he talked to Diane, Betty, and their mother. (Id.) They talked about her mother's past, but she does not recall them talking about Harry. (Id.) They talked about her mother's fighting and violence with both their father and Tommy. (EHT. 233-34) Diane did not recall discussing the impact on Harry of his mother being sent to prison. (EHT. 234-35) There

was no discussion about Harry's legal troubles. (EHT. 235) Cummings stayed approximately thirty minutes. (Id.)

Betty Stewart is Mr. Jones' older sister by four years and testified at Mr. Jones' trial. (EHT. 243) Mr. Jones was born in Holly Hill, South Carolina where the family lived. (EHT. 243-44) Betty recalled that Harry was born in her grandparents' house and that her mother was on the floor and bleeding severely. (EHT. 244) Their father was Harry Emanuel Jones and their mother was Sarah Jones. (Id.) Betty stated that from the time she could remember the relationship of her parents was "very violent" and her father beat her mother repeatedly in front of the children. (EHT. 244-45) Both Betty and Harry witnessed the beatings. (EHT. 245) Theier father was an alcoholic. (Id.) When he would beat their mother, Betty and Harry would try to stop him and Harry would hang on to his mother. (Id.) The police would come to the house. (EHT. 246) Harry's father was in and out of prison. (Id.) The family share-cropped on the farm of a white man. (EHT. 247) The family worked in exchange for a place to live. (Id.) The violence by their father towards their mother got worse; they would often flee into the streets to escape him. (EHT. 248) The police would come but they did not do anything. (Id.) The cultural difference between South Carolina and Miami was

overwhelming. (Id.) The other kids teased them because they were different, especially in the way the spoke with an African accent called Geeche. (EHT. 249) Ultimately, their father abandoned the family and left with another woman. (Id.) Harry was very close with his father and went everywhere with him. (Id.) When their father left, the family was "very, very poor." (EHT. 250) Their mother was uneducated and had not worked previously. (Id.) The children did without clothing or food and "suffered traumatically." (Id.) Mr. Jones' mother ultimately met a boyfriend who moved in with them. (EHT. 251) He had a job and helped provide for the children. (Id.) The boyfriend, Tommy, would drink and become violent on the weekends. (Id.) Betty described him as a "Baker Act." (Id.) Their mother drank too and it "destroyed her." (Id.) Because of what happened with their father, Mr. Jones' mother began to fight back when Tommy became violent. (EHT. 252) The children witnessed the crying, screaming, and hitting each other with knives and irons. (Id.) There was bloodshed and the kids would have to clean up the bloody mess when Tommy and their mother were sent to jail. (Id.) Harry was about 10 years old when his mother went to prison for killing Tommy. (Id.) This was "the most horrible time." (Id.) The kids were left crying and screaming and had no one. (EHT. 253) Child services did not

intervene. (Id.) The kids had no financial means until Betty and her sister got jobs after school. (Id.) Harry was the youngest and his mother's incarceration was hardest on him because he did not understand. (EHT. 254) Harry felt like, after losing another parent, he did not have anybody. (Id.) Other people in the community would tease the kids about their mother being in prison and being "crazy." (Id.) The kids were also teased about having to wear the same clothes to school every day. (EHT. 255) Eventually, partly out of loneliness and desperation, Betty became pregnant as a teenager. (Id.) Betty did not get married and feels that the pregnancy was a result of the loss of her mother and the need for someone to love her. (Id.) The family was hopeless and Harry was deteriorating, hanging out with the wrong friends. (EHT. 256) Betty and Theresa tried to help Harry, but their lives were spinning out of control. (Id.) When Greg Cummings came to Miami, he was there less than one hour. (EHT. 257) Betty stated that she loves her brother and that she would have asked the jury to spare his life because "he didn't have a chance." (EHT. 258) Betty recalled some of her trial testimony. (EHT. 259-263)

Dr. Robert Berland testified that he is a forensic psychologist. (EHT. 265) Dr. Berland was received by the lower court as an expert in forensic psychology without objection.

(Id.) Dr. Berland lived and practiced in Tallahassee from 1977 to 1987 and knew Gene Taylor. (EHT. 269) Dr. Berland identified Defense Exhibit 22, the memorandum written by Nancy Showalter. (Id.) Dr. Berland did "limited" work in this case in 1991. (EHT. 270) Dr. Berland was seeing another client and was asked to perform an MMPI on Mr. Jones which he did. (Id.) Berland identified Defense Exhibit 16 as the raw data from the MMPI he administered to Mr. Jones. (EHT. 271) Dr. Berland opined that the data indicated Mr. Jones may have been trying to hide his mental illness. (EHT. 272) There were no attempts to fake mental illness. (Id.) Mr. Jones' "F score" indicated a "chronic psychotic disturbance" that he probably had for at least two years at the time the test. (Id.) Psychotic disturbance is defined by three main symptoms, hallucination, delusion, and biologically based mood disturbance. (Id.) Mr. Jones' MMPI profile was not unusual; it was a typical chronic psychosis profile. (EHT. 273) The profile was especially high on the mania scale. (Id.) Scales 2 and 4 were elevated which is typical in drug abusers. (EHT. 274) The elevated scale 4 could be influenced by character disorder and/or biological mental illness and Berland stated that probably both were involved. (Id.)

Dr. Berland was never contacted by Greg Cummings about his

involvement in the case. (Id.) Dr. Berland interviewed Mr. Jones on February 25, 2003 at Union Correctional Institution. (EHT. 275) Berland inquired about history of head injury, hospitalization (either medical or mental health), drug and alcohol abuse, and general family history. (Id.) Berland did an assessment of Mr. Jones' mental illness history. (Id.) Berland also assessed possible brain damage and various non-statutory mitigators. (Id.) Berland reviewed numerous documents, including police reports, depositions, DOC records (both classification and medical), and hospital records from the time of Mr. Jones' accident related to this case. (Id.) Dr. Berland interviewed witnesses, including ex-girlfriends of Mr. Jones and his sisters. (EHT. 277) The witnesses were interviewed in 2004, but Dr. Berland would have preferred to have interviewed them closer to the time of the alleged crime. (Id.) Dr. Berland stated that witness interviews provide outside corroboration independent of the defendant. (EHT. 278) These "multiple measures" help to substantiate findings. (Id.)

Dr. Berland testified that Mr. Jones meets the criteria for application of the extreme mental or emotional disturbance statutory mitigating factor. (EHT. 279) Asked for his basis for this finding, Dr. Berland cited the results of the 1991 MMPI, which was likely "understated", indicating mental illness.

(EHT. 279-80) This mental illness includes hallucinations, delusional paranoid thinking, and mood disturbance. (EHT. 280) The mental illness predated the accident that Mr. Jones was in at the time of the alleged crime. (Id.) There was no evidence that Mr. Jones exaggerated mental illness on the MMPI; in fact he attempted to deny symptoms of mental illness. (Id.) However, the lay witnesses that Dr. Berland talked to described symptoms of mental illness, including hallucinations and delusions. (EHT. 281) These interviews indicated unfounded paranoia, anger, and thought process disturbance. (Id.) There were also descriptions of mood disturbance and depression. (EHT. 282) These symptoms began in Mr. Jones' early teens which "is not uncommon to genetic disorders." (Id.) There were also descriptions of manic disturbance, but these were not as episodic. (Id.) Dr. Berland opined that, based on the MMPI and the witness interviews, Mr. Jones has suffered from mental illness since his early teens. (EHT. 283) Dr. Berland testified that the witness interviews "absolutely" supported the results of his MMPI. (Id.) "[T]here was considerable consistency." (EHT. 284)

Dr. Berland testified that in his opinion the substantial impairment statutory mitigating factor applies in Mr. Jones' case. (Id.) This was based on his biological mental illness

which resulted in involuntary choices, behavior, and judgment. (Id.) Added to this is the fact that Mr. Jones was substantially under the influence of alcohol and cocaine at the time of the alleged offense. (EHT. 285) Mr. Jones' symptoms of mental illness were "much worse" when he was under the influence of alcohol. (Id.) This made Mr. Jones' "psychosis. . . more intense." (Id.) Dr. Berland's evaluation revealed a number of evidentiary items that indicated Mr. Jones' intoxication at the time of the alleged offense. (Id.) These items included the hospital lab work and the witnesses who were with Mr. Jones that day. (EHT. 286) Dr. Berland stated that the intoxication would have aggravated Mr. Jones' underlying mental illness, making him more inclined toward criminal activity and violence. (Id.) These influences were "biological and involuntary." (Id.) Dr. Berland's evaluation revealed a history of alcoholism by Mr. Jones, starting at age 12 or 13, and crack cocaine abuse, at least 6 months prior to the alleged offense. (EHT. 287) Dr. Berland's evaluation revealed brain impairment in Mr. Jones. (Id.) Dr. Berland stated, regarding Showalter's statement in her memo that he advised not to be hasty in having a brain scan done, that he was referring to scans, such as CT and MRI, which only reflect structural damage. (EHT. 290)

Dr. Berland reviewed the WAIS testing done by the

Department of Corrections during Mr. Jones' previous incarceration. (Id.) The WAIS is a tool for measuring brain impairment. (EHT. 291) It is a "conservative measure" that "won't tell you there is brain injury when there isn't." (Id.) The results he reviewed were obtained in 1978, pre-dating the crime and suggesting brain injury prior to the alleged crime. (Id.) Dr. Berland opined that the WAIS results "provide very strong evidence" that Mr. Jones has suffered from brain impairment since at least age 19. (EHT. 292) Also, the continuous manic disturbance that was described in Mr. Jones suggests mental illness that is partly the result of brain injury. (Id.)

There was evidence that Mr. Jones was witness to extreme violence as a child. (EHT. 293) This evidence came from Mr. Jones' sisters and was consistent from one to another. (Id.) There was a great deal of physical fighting between the natural parents. (Id.) Also, there was extreme violence, both verbal and physical, between Mr. Jones' mother and "step-father." (EHT. 294) This often involved weapons, including knives. (Id.) This was particularly true when they drank on the weekends. (Id.) Children, such as Mr. Jones, who have mental illness, are particularly affected by exposure to this type of violence. (EHT. 295)

Dr. Berland's evaluation revealed the existence of extreme family circumstances in the Jones house. (Id.) This included the physical violence and Mr. Jones' mother ultimately being imprisoned for murder, resulting in social and financial hardship. (Id.) There was very little money for the kids, who were ostracized by others. (EHT. 296) There was "extreme financial depravation." (Id.) The children described their lives as "spinning out of control." (Id.) Mr. Jones' sisters related that after their mother went to prison, they were unable to control him. (EHT. 296-97) There was a lack of parental control that the sisters attributed to some of Mr. Jones' problems. (EHT. 297)

Dr. Berland reviewed Mr. Jones' prison records. (Id.) Dr. Berland testified, "[T]here was a consistent pattern of outstanding reports, even making reference to some of those minor infractions and basically dismissing them as inconsequential and still giving him maximum gain time throughout the years. . ." (Id.) Mr. Jones received "outstanding performance" on work assignments and "outstanding or above satisfactory" on his housing assignment. (Id.) Mr. Jones ultimately progressed to a work release assignment. (EHT. 298)

Dr. Berland was aware of Mr. Jones' criminal history in

developing his opinions. (Id.) In terms of possible anti-social personality, Dr. Berland testified that even if it exists, Mr. Jones' "mental illness is a more salient, more persistent adverse influence on his behavior." (EHT. 299) Dr. Berland reviewed the DOC records which suggested possible anti-social personality disorder. (Id.) Dr. Berland testified that those references do not change any of his opinions. (EHT. 299-300) Dr. Berland stated that he attempted, unsuccessfully, to obtain the early DOC MMPI done at the same time. (EHT. 300) Such testing data would have been a more accurate reflection of Mr. Jones' mental state than the speculation by DOC doctors. (Id.)

Dr. Berland agreed that there are times when an attorney may not call him for strategic reasons. (EHT. 303) Dr. Berland reiterated that there was no evidence of malingering by Mr. Jones and that "no rational person" would be able to come to such a conclusion. (EHT. 305) The DOC records had one reference to a psychotic disturbance, but no other findings of mental illness. (EHT. 306) The DOC records did not note hallucinations. (Id.) Statements from people adverse to Mr. Jones, made to Dr. Berland, suggested mental illness in Mr. Jones. (EHT. 307) These were former girlfriends who did not like Mr. Jones and were mad at him. (Id.) The 1991 MMPI

suggested, by the elevated F score, that Mr. Jones' had brain damage which had existed at least two years prior. (EHT. 308) Mr. Jones was not given another MMPI in 2003 because the other MMPI was done closer to the time of the crime and trial. (Id.) Further, an additional MMPI would have been duplicative and unhelpful. (Id.) Mr. Jones was given the MMPI as opposed to the MMPI2 which was only two years old in 1991. (EHT. 309) Dr. Berland stated that the MMPI, still today, is viable. (Id.) Further, in his opinion, in 1991 the MMPI2 had not been adequately researched. (EHT. 310) Dr. Berland has never talked to Mr. Jones' trial attorney, either in 1991 or recently. (EHT. 312-13) Dr. Berland testified that is his opinion that, in Mr. Jones' case, there is evidence consistent with brain damage. (EHT. 313) This was primarily based on Mr. Jones' scores on a WAIS test given in 1978, a time when he would have had no reason to fake the results. (EHT. 314) Dr. Berland testified that there is some minor disagreement about using the WAIS as a diagnostic tool for determining brain damage. (EHT. 315) (EHT. 317) Dr. Berland cannot rule out a diagnosis of anti-social personality. (Id.) Dr. Berland agreed that Mr. Jones' history shows evidence of violent tendencies and inability to conform to rules. (Id.) However, not all anti-social behavior is the result of ASPD. (Id.) It may be, as in Mr. Jones' case,

enhanced or potentiated by mental illness. (EHT. 318) The mental illness is more salient "because it is biological and involuntary in its influence." (EHT. 318)

Neill Wade testified that he was "certainly" aware that Mr. Cummings was interested in Kevin Prim's criminal activities. (EHT. 321) Mr. Cummings cross-examined Prim regarding his criminal history at both trials. (Id.) Wade testified that he was not aware of the October and November, 1992 arrests of Prim until after the trial. (Id.) Wade believes it was after sentencing. (EHT. 322) If Wade had been aware of the arrests of Prim, he would have "obviously. . . given that to Mr. Cummings." (Id.) Wade would have been obligated to do so. (Id.) While Wade would not have investigated Prim's background for counsel, he would have disclosed what he knew of Prim, including his crack cocaine use. (EHT. 323) Wade recalled that part of the state's theory in this case was that the victim in the case would not have let Mr. Jones drive his vehicle. (EHT. 327) Wade recognized notes from the state attorney file regarding Trooper Don Ross. (EHT. 326)

Wade testified that Mike Wood told him no promises were made to Kevin Prim. (EHT. 327) Wade stated that he did not personally make any promises to Prim. (Id.) Wade recalled Prim's ROR being based on a confrontation between Prim and Mr.

Jones. (EHT. 328) Wade does not doubt that he talked to Ines Suber about the ROR. (Id.) Wade stated that the ROR is not something he ever discussed with Prim. (EHT. 328-29) Wade recalled that he became aware of Prim's involvement on September 9th, but did not talk to Prim until September 12th. (EHT. 329) Wade thinks Prim was ROR'd before coming to the State Attorney's Office to talk to him. (Id.) Wade stated that Mike Wood has assured him that he never promised Prim an ROR. (EHT. 330)

Wade was not privy to Prim's conversation with Ines Suber or his stated expectations. (Id.) Wade acknowledged that Mike Wood's report recounting Prim's release from the Leon County Jail makes no reference to a confrontation with Mr. Jones. (EHT. 333) Wade acknowledged that when Prim was asked about his ROR in deposition, he mentioned nothing about the alleged confrontation. (EHT. 334)

Mike Wood testified that he is a deputy sheriff with the Leon County Sheriff's Office and has been for twenty-one years. (EHT. 337) Wood was the detective on this case and was contacted by Kevin Prim. (Id.) Wood testified that no promises of an ROR were made to Prim. (EHT. 338) Wood agreed that "you could probably do better" than using a witness like Prim to make a case. (Id.) Wood stated that he was unaware that Prim had several arrests in the week leading up to trial. (Id.) Wood

knew Prim had been arrested; he believes for petty theft. (EHT. 339) Wood would have determined what Prim's criminal history was. (Id.) After the ROR, Wood was the one who picked Prim up and took him to the State Attorney's Office. (EHT. 340) Wood recognized a document, admitted as Defense Exhibit 4, that is a subpoena for Kevin Prim and acknowledged that it was signed by Neill Wade and sent care of Wood. (EHT. 341) Wood testified that he picked Prim up when he was ROR'd and took him to the State Attorney's Office. (Id.) Wood is sure that Wade talked to Prim before taking a taped statement, but Wood is not sure what was said. (EHT. 342) The meeting with Wade and Prim occurred immediately after the ROR. (Id.) This is when Prim's taped statement occurred. (Id.) The time between the ROR and the statement with Neill Wade was about fifteen minutes, the driving time between the jail and the courthouse. (Id.) Wood could not recall any violence or alleged threats associated with the ROR. (EHT. 343) Kevin Prim made the initial contact with Wood. (EHT. 344) Wood did not know Prim, but Prim had Wood's name "somehow." (Id.) Wood identified his supplemental report and stated that his signature on the document indicates his review and approval of the contents. (EHT. 345) In the report, Wood does not mention why Prim was released from jail. (EHT. 346) There is nothing in the report about an alleged threat.

(Id.) Wood was not aware of any threat against Prim. (Id.) Wood recalls being advised that Prim had been arrested again after his ROR. (EHT. 349) He believes the arrest was for two petty theft cases. (Id.) This was prior to Prim's trial testimony. (Id.) Wood is not sure if he advised the State Attorney of this. (Id.) Wood is not sure when the arrests occurred. (EHT. 350) Wood knew about the re-arrests. (EHT. 351) The arrests were Tallahassee Police Department arrests, but "[u]sually, when we had an encounter like that, he (Prim) would tell the police officer that he was working for Mike Wood." (Id.) The police officer would then call Wood in the middle of the night and Wood would "respond accordingly." (Id.) Prim would seek Wood's assistance because he believed he had an angle with Wood. (Id.) Wood did not help Prim when he was called. (EHT. 352) Wood thought of the petty theft cases as "insignificant." (Id.) Wood agreed that Prim was an important witness in this case. (EHT. 353) Wood is not sure of the dates of the petty thefts he has testified about. (EHT. 356) The arresting agency was Tallahassee Police Department. (Id.) There could be other Prim arrests that Wood was not aware of. (EHT. 357)

Jeffrey Johnson testified that he is a police officer with the Tallahassee Police Department and has been so for twenty-

three years. (EHT. 358) Johnson was a patrol officer in 1991 and was with general property in 1992. (Id.) Johnson recognized Defense Exhibit 8, a police report. (EHT. 359) Johnson wrote the report which was regarding crimes and an arrest of Kevin Prim. (Id.) Johnson stated Prim became a suspect between November 11 and 19 and was arrested on the 19th. (Id.) Prim was picked out of a line-up on the 18th. (EHT. 360) Johnson stated that he did not write the report for October 24th. (EHT. 362) Johnson did not know that Prim was a witness in this case until a week prior to the evidentiary hearing. (Id.) Johnson only remembers being assigned to one of the cases where Prim became a suspect and he made an arrest. (EHT. 363) Johnson interviewed Prim and did not believe he was telling the truth. (Id.) Johnson thought he was lying. (Id.) Had Johnson known Prim was a witness in a death penalty case, he would have reported it to the investigating officer in the case. (Id.)

Greg Cummings testified that he met with Mr. Jones' family on a Sunday morning in February, 1992. (EHT. 365) The meeting lasted about two hours. (Id.) Parts of Mr. Jones' childhood were discussed. (EHT. 366) At trial, Cummings presented what he thought was significant. (Id.) Cummings stated that he billed 5.5 hours for the Miami trip, which would have included the meeting as well as travel. (EHT. 369) This was the only

time Cummings billed for mitigation investigation. (EHT. 370) Cummings agreed that anti-social personality disorder is not an aggravating factor and can even potentially be mitigating. (EHT. 373) Cummings reviewed the 3.850 motion and met with the state attorney to discuss it. (EHT. 374) During this meeting, "there were all sorts of suggestions on who may have done what; and the State, you may have done this or the reasons why." (EHT. 375) Cummings testified that he has no memory of why he did not hire an expert or talk to Dr. Berland. (Id.) Cummings testified that he met with attorney Jeff Hazen, Mr. Jones' post-conviction counsel, and told Hazen that he had met with Mr. Jones and that "there didn't appear to be anything wrong." (EHT. 375-76) Today, Cummings would have a doctor ready to testify regarding mental health. (EHT. 376) This case was Cummings' first murder case and first death case; he is much more experienced now. (Id.)

Dr. Harry McClaren testified at the hearing. However, McClaren testified that he has not seen Mr. Jones, cannot offer any diagnosis, and could not testify before a jury in this case. Further, the trial court, in its order of disposition, does not acknowledge Dr. McClaren's testimony.

## SUMMARY OF THE ARGUMENTS

(I) Kevin Prim was the crucial witness against Mr. Jones, providing testimony of an alleged confession in a circumstantial case. Prim was released from jail, as promised by the state, in exchange for providing a statement against Mr. Jones. This deal, facilitated by the state, was not disclosed to Mr. Jones. In addition to the deal for Prim's release, several instances of criminal activity, related to Prim's cocaine addiction, one on the day he testified, went undisclosed despite the state's knowledge. In addition to the undisclosed evidence, the state presented, or allowed to stand, false testimony regarding Prim's release from jail. Prim testified that his release from jail was based on an altercation with Mr. Jones. This testimony was false, the state knew it, and yet allowed the testimony to stand. Brady and Giglio violations resulted.

(II) Mr. Jones' trial counsel was aware of potentially powerful mental health mitigation yet, despite that knowledge, failed to investigate. There was no reasonable strategy in in failing to investigate and present mental health evidence. In failing to investigate mental health, trial counsel prevented the presentation of statutory mental health mitigation and several elements of non-statutory mitigation. In addition to the nonexistent mental health investigation, trial counsel

conducted a deficient investigation of non-statutory mitigation. Trial counsel conducted a brief, minimal investigation of Mr. Jones family and, as a result, failed to inform the jury of the full non-statutory mitigation that defined the entirety of Mr. Jones' life. Trial counsel's failure to present any mental health evidence or the entirety of non-statutory mitigation, as a result nonexistent or deficient investigation, prejudiced the result of Mr. Jones' sentencing proceedings.

(III) The lower court erred in summarily denying Mr. Jones' claims of ineffective assistance of counsel regarding his being shackled at trial and improper prosecutorial comments. Mr. Jones was shackled without justification at trial and counsel failed to protect his rights in this regard. Further, the prosecutor made improper comments at both phases of trial and counsel failed to object. Trial counsel was ineffective as to both the shackling and improper comments. The files and records do not refute these claims and the lower court erred in not granting an evidentiary hearing.

## ARGUMENT I

**MR. JONES WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND/OR EXCULPATORY IN NATURE AND PRESENTED INTENTIONALLY FALSE AND/OR MISLEADING TESTIMONY. SUCH ACTIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING. THE LOWER COURT ERRED IN DENYING APPELLANT RELIEF ON THIS BASIS.**

The issue presented here is whether or not the state committed a violation of Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), or both.

### FACTS

#### A. Witness Kevin Prim's ROR

Greg Cummings became aware that Kevin Prim had been released from jail in close proximity to giving a statement against Mr. Jones. (EHT. 8) Cummings was "certainly" interested in the circumstances of Prim's release, or "ROR." (Id.) Cummings identified a document from his file, Defense Exhibit 3, a copy of a supplemental police report authored by lead detective Mike Wood. (EHT. 9) Cummings noted that the report states Prim was released from the Leon County Jail on September 12, 1991, and transported to the State Attorney's Office for an interview with prosecutor Neill Wade. (Id.)

Cummings noted that the date September 12th is circled and above the word “released” is the word “how?,” written in his handwriting. (EHT. 9-10) Cummings would have wanted to know about any promises made to Prim in exchange for his testimony. (EHT. 11) Cummings would have used any evidence of a deal “whole heartedly and with much force.” (EHT. 12)

Nancy Daniels recalled the conflict that arose in Mr. Jones’ case involving Kevin Prim. (EHT. 127) Daniels identified the conflict memo written to her by Gene Taylor regarding Mr. Jones’ case. (Id.) The memo reflects that Ines Suber received some information regarding a release on recognizance for Kevin Prim. (EHT. 128) Daniels stated that Gene Taylor “absolutely” would be accurate in his communications to her. (EHT. 130) Daniels trusts Ines Suber. (Id.)

Ines Suber represented Kevin Prim in 1991. (EHT. 145) The assistant state attorney assigned to the Prim case was Brad Thomas, not Neill Wade. (EHT. 147) Prim discussed with Suber his expectations as a result of a statement he gave against Mr. Jones. (EHT. 148) Suber testified that when Prim contacted her, he was advising her what to do. (Id.) Prim told Suber that he had made statements to certain individuals, including Mike Wood and was expecting to be released based on his statement. (Id.) Prim wanted Suber to communicate that to the

proper authorities, including the State Attorney. (EHT. 151) Prim had been promised an ROR. (Id.) Suber confirmed that the statement had been made by contacting Mike Wood and then secured Prim's release. (Id.) Suber's ROR motion indicates that she contacted Neill Wade and that Wade had no objection to Prim's release. (EHT. 152) Suber testified that Taylor's conflict memo is accurate. (EHT. 153) Suber testified that prior to Prim providing a statement against Mr. Jones, she did nothing to secure his release. (EHT. 154) It was only after her conversation with him about the alleged statement that she moved for Prim's release. (EHT. 155) Suber's motion for Prim's release was "absolutely not" related to any alleged physical altercation between Prim and Mr. Jones. (Id.) Suber stated that she was "never" aware that Prim and Mr. Jones had a physical altercation at the jail. (Id.) When asked about the basis for the ROR motion, Suber testified flatly that the ROR motion was based solely on the promise to Prim, not any alleged fight. (Id.) When asked whether it made sense to her as an experienced public defender that someone would be released because of a fight with another inmate, Suber stated, "It has never happened. . ." (EHT. 155-56)

Neill Wade testified that Mike Wood told him no promises were made to Kevin Prim. (EHT. 327) Wade stated that he did

not personally make any promises to Prim. (Id.) Wade recalled Prim's ROR being based on a confrontation between Prim and Mr. Jones. (EHT. 328) Wade does not doubt that he talked to Ines Suber about the ROR. (Id.) Wade stated that the ROR is not something he ever discussed with Prim. (EHT. 328-29) Wade thinks Prim was ROR'd before coming to the State Attorney's Office to talk to him. (EHT. 329) Wade acknowledged that Mike Wood's report recounting Prim's release from the Leon County Jail makes no reference to the release being based on a confrontation. (EHT. 333) Wade acknowledged that when Prim was asked about his ROR in deposition, he mentioned nothing about the alleged confrontation. (EHT. 334) Mike Wood testified that no promises of an ROR were made to Prim. (EHT. 338) Wood agreed that "you could probably do better" than using a witness like Prim to make a case. (Id.) After the ROR, Wood was the one who picked Prim up and took him to the State Attorney's Office. (EHT. 340) The meeting with Wade and Prim occurred immediately after the ROR. (EHT. 342) This is when Prim's taped statement occurred. (Id.) The time between the ROR and the statement with Neill Wade was about fifteen minutes, the driving time between the jail and the courthouse. (Id.) Wood could not recall any violence or alleged threats associated with the ROR. (EHT. 343) Kevin Prim made the initial contact with Wood.

(EHT. 344) Wood did not know Prim, but Prim had Wood's name "somehow." (Id.) Wood identified his supplemental report and stated that his signature on the document indicates his review and approval of the contents. (EHT. 345) In the report, Wood does not mention why Prim was released from jail. (EHT. 346) Wood stated he was not aware of any threat against Prim. (Id.)

**B. Witness Kevin Prim's crack cocaine addiction and undisclosed crimes and arrest**

Greg Cummings identified a motion he filed pre-trial requesting that the state furnish the criminal record of Kevin Prim. (EHT. 13) Cummings recalled that as trial approached, he was aware of some ongoing criminality by Prim. (EHT. 14) Cummings testified that any new or ongoing criminality by a state witness "certainly benefits the defense in any cross-examination." (Id.) Cummings agreed that the trial record questions of Prim would reflect what he knew about Prim's ongoing criminal behavior. (EHT. 15) Cummings identified a police report dated July 11, 1992 and signed by Mike Wood. (EHT. 18) The report relates to Kevin Prim. (EHT. 19) Cummings identified a police report dated November 19, 1992 regarding Kevin Prim. (EHT. 21) The report references two separate thefts by Prim, one on October 24, 1992, and one on November 11, 1992. (Id.) Cummings was not aware of Prim's

involvement in the criminal activity reflected in the report of November 19th. (EHT. 22) Cummings would have certainly been interested in this information or, in his words, he would "have had a field day with that information." (Id.) Cummings identified a petit theft arrest report with a date of November 19, 1992. (EHT. 23) Kevin Prim is the arrestee in the report. (EHT. 24) Cummings was not aware of this report or arrest and stated that he "certainly" would have wanted the information. (EHT. 25) Cummings identified a supplemental arrest report related to a drug paraphernalia arrest of Kevin Prim. (Id.) Prim was found in possession of a crack pipe. (EHT. 26) Cummings was not aware of this arrest. (Id.) Cummings stated his belief that the police reports, at least those from the October 24 and November 11 arrests, are Brady material and should have been turned over. (EHT. 28)

Neill Wade testified that he was "certainly" aware that Mr. Cummings was interested in Kevin Prim's criminal activities. (EHT. 321) Wade testified that he was not aware of the October and November, 1992 criminality and arrest of Prim until after the trial. (Id.) If Wade had been aware of the arrests of Prim, he would have "obviously. . . given that to Mr. Cummings." (EHT. 322) Wade would have been obligated to do so. (Id.)

Mike Wood stated that he was unaware that Prim had several

arrests in the week leading up to trial, although he knew Prim had been arrested again after his ROR. (EHT. 338, 349) He believes the arrest was for two petty theft cases. (Id.) Wood is not sure if he advised the State Attorney of this. (Id.) Wood testified that if Wade said he did not know about the petty theft arrests, then Wood probably did not tell him. (Id.) Wood is not sure when the arrests occurred. (EHT. 350) The arrests were Tallahassee Police Department arrests, but "[u]sually, when we had an encounter like that, he (Prim) would tell the police officer that he was working for Mike Wood." (EHT. 351) The police officer would then call Wood in the middle of the night and Wood would "respond accordingly." (Id.) Prim would seek Wood's assistance because he believed he had an angle with Wood. (Id.) Wood did not help Prim when he was called. (EHT. 352) Wood thought of the petty theft cases as "insignificant." (Id.)

Jeffrey Johnson testified that he is a police officer with the Tallahassee Police Department and has been so for twenty-three years. (EHT. 358) Johnson was a patrol officer in 1991 and was with general property in 1992. (Id.) Johnson recognized Defense Exhibit 8, a police report. (EHT. 359) Johnson wrote the report which was regarding crimes and an arrest of Kevin Prim. (Id.) Johnson stated Prim became a suspect between November 11$^{th}$ and 19$^{th}$ and was arrested on the

19th. (Id.) Johnson interviewed Prim and thought he was lying. (Id.) Had Johnson known Prim was a witness in a death penalty case, he would have reported it to the investigating officer in the case. (Id.)

**C. Notes on Trooper Ross**

Greg Cummings identified notes that stated, in part, "witness saw victim driving earlier in the evening obviously DUI." (EHT. 30) These notes were under the name Don Ross, a Florida Highway Patrolman. (EHT. 31) Cummings said this indicates to him that Ross "saw the victim in this matter driving earlier in the evening obviously DUI and didn't do anything about it." (Id.) Cummings was not aware of this information at the time of trial. (Id.) Cummings recalled that part of the state's theory was that the victim would not have let Mr. Jones drive his vehicle. (EHT. 33) Cummings would have wanted the information in this note. (Id.)

Neill Wade recalled that part of the state's theory in this case was that the victim in the case would not have let Mr. Jones drive his vehicle. (EHT. 327) Wade recognized notes from the state attorney file regarding Trooper Don Ross. (EHT. 326)

**LAW**

**A. Brady**

In order to prove a violation of Brady, a claimant must

establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or had "impeachment" value, and that this evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles, 514 U.S. at 433-434; Mordenti v. State, 894 So. 2d 161 (Fla. 2004); Hoffman v. State, 800 So. 2d 174 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001); Young v. State, 739 So. 2d 553 (Fla. 1999). On the other hand, if Mr. Jones' counsel was or should have been aware of the information, his counsel was ineffective in failing to discover and utilize it, Strickland v. Washington, 466 U.S. 668 (1984), and this Court must still weigh the prejudice to Mr. Jones due to counsel's failure. See Cardona v. State, 826 So. 2d 968, 917 (Fla. 2002); Trepal v. State, 836 So. 2d 405 (Fla. 2003) (same test used for prejudice or materiality in Brady and Strickland claims).

A proper materiality analysis under Brady also must contemplate the cumulative effect of all suppressed information. Further, the materiality inquiry is not a "sufficiency of the evidence"

test. Id. at 434. The burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 120 S.Ct. 1495 (2000); Kyles, 514 U.S. at 434. Or, in other words, "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. Rather, the suppressed information must be evaluated in light of the effect on the prosecution's case as a whole and the "importance and specificity" of the witness' testimony. United States v. Scheer, 168 F.3d 445, 452-453 (11th Cir. 1999).

Brady requires disclosure of evidence which impeaches the prosecution's case or which may exculpate the accused "where the evidence is material to either guilt or punishment." The evidence at issue here certainly meets that test.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

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

Strickland at 685. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady at 87. These facts raise a reasonable

likelihood of a different result. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the facts about Prim and they did not. The state failed to disclose exculpatory and impeachment evidence that was in their possession at the time of Mr. Jones' trial. This failure undermines confidence in the reliability of Mr. Jones' convictions, as well as the reliability of his death sentence. Berger v. United States, 295 U.S. 78, 88 (1935).

**B. Giglio**

In Giglio v. United States, 405 U.S. 150, 153 (1972), the United States Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." This result flowed from the Supreme Court's recognition that a prosecutor is:

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

Berger v. United States, 295 U.S. 78, 88 (1935). Accordingly, the Court concluded that the Fourteenth Amendment "forbade the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of

death, due process is violated and the conviction, death sentence, or both must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution has a duty to alert the court, the defense, and the jury when a state's witness gives false testimony. Napue v. Illinois, 360 U.S. 264 (1959). The prosecutor must refrain from the knowing deception of either the court or the jury during a criminal trial. Mooney. A prosecutor is constitutionally prohibited from knowingly relying upon false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957).

In cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in **any reasonable likelihood** have affected the jury's verdict." United States v. Bagley, 473 U.S. at 678, quoting United States v. Agurs, 427 U.S. at 102. (emphasis added). If there is "any reasonable likelihood" that uncorrected false or misleading argument affected the jury's determination, a new trial is warranted. As the United States Supreme Court explained in Bagley, this standard is the equivalent of the harmless beyond a reasonable doubt test. Thus, where the prosecution violates Giglio and knowingly presents either false evidence or false argument in order to secure a conviction, a reversal is required unless the error is proven harmless beyond a

reasonable doubt. Bagley, 473 U.S. at 679 n.9. See United States v. Alzate, 47 F. 3d 1103, 1110 (11th Cir. 1995).

**ANALYSIS**

**A. Prim's ROR and criminal activity**

The lower court's eleven page order denying the claim regarding Prim's ROR relies on the bald assertions of Wood and Wade that no promises were made. (Lower Court Order/ p.3) The lower court also relies on the testimony of Jay Watson, who merely testified that he overheard the same alleged confession that Prim heard. (Id.) To be clear, Watson never testified that he heard any "confession" independent of Prim. The lower court's order completely fails to account for all the evidence, contrary to Wood and Wade's denial, indicating, clearly, an ROR in exchange for Prim's statement.

The lower court's failure to account for Ines Suber's testimony is glaring. Suber stated affirmatively that Prim told her he had been promised an ROR for giving a statement against Mr. Jones. Further, he expected her to effectuate his release based on the promise. Clearly, Prim would not have requested this if he had not been promised such a deal. Such a request, had a promise not been made, would have been nonsensical. Further, Suber spoke with the investigator on the case (she believed it was Wood) and ***confirmed the nature of the agreement***. There is absolutely no indication that Suber was untruthful about this. The lower court never questioned

Suber's credibility; rather, the lower court almost ignores Suber's testimony as if it did not exist. Suber's testimony that Prim communicated the deal to her, that she verified the deal, and that she procured his ROR on that basis has not been rebutted in any way.

In addition to Suber's direct testimony, the conflict memo written by Gene Taylor 13 years prior to the hearing in this case confirms Suber's testimony vis-vis Prim and the ROR. The memo confirms, without variation, Suber's testimony. Certainly, the memo demonstrates that Prim expected a deal for his statement.

The lower court also ignores Suber's testimony regarding the alleged altercation. In sum, Suber testified that she was never aware of any altercation and that Prim never mentioned it to her. Also, Suber's motion for ROR contains no reference to an altercation. The motion for ROR, according to Suber, was based only on Prim's statement to her about the deal and her confirmation of the deal with the investigator. Finally, Wade approved the ROR without any discussion of an altercation.[5] Suber was firm that the ROR was not based on an altercation.

The lower court also ignores Wood's supplemental report (Defense

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[5] It is also notable that Suber moved for the ROR by contacting Neill Wade, the prosecutor on Mr. Jones' case, rather than Brad Thomas, the prosecutor on Prim's case. This fact would seem to suggest that the ROR was based on something relevant to Mr. Jones' case, such as the statement Prim provided. It would also tend to confirm that Suber did what Prim suggested; seek the ROR from Wade based on Prim's

Exhibit 3) and part of his hearing testimony. Wood's supplemental report, dated October 17, 1991, reflects that Kevin Prim was released from the Leon County Jail on September 12th prior to giving a statement to Wood and Wade. The report references no connection between Prim's release and the alleged altercation. Further, Wood testified at the evidentiary hearing that he was not aware of any such altercation being the basis of the ROR. In fact, he could not recall the altercation at all. Wood's report also contradicts Neill Wade's testimony that he did not agree to an ROR until after he spoke with Prim (In fact, Wade later corrected his testimony and stated that his calendar indicates that he did not speak with Prim until after he was ROR'd). Wood's report clearly states that Prim was released prior to Prim speaking with Wade. Additionally, Wood testified at the hearing that he picked Prim up at the jail after he had been ROR'd. Further, the report mentions the alleged altercation as first coming up during Prim's interview with Wade. Thus, Wade knew about the altercation only after Prim had been ROR'd.

The lower court also ignores the fact that in Prim's deposition, when asked about the basis for his ROR, Prim never mentions the altercation. Neill Wade acknowledged this in his testimony. The deposition (PC-R. 720-66), simply makes no reference to an alleged altercation being the basis for the ROR. In fact, in the deposition,

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statement in the Jones' case.

Prim states that the ROR was already "in the process" prior to his giving a recorded statement. (PC-R. 729-30) Mr. Wade, present at the deposition does not correct this in any way. Clearly, if the ROR was based on the altercation, Mr. Wade would or should have made this clear.

Aside from Wood's and Wade's denials of any deal for the ROR, all of the evidence and circumstances, ignored by the lower court, indicate that Prim's ROR was given in exchange for his statement against Mr. Jones. The denials of Wood and Wade are simply not supported by facts. Suber's testimony, the conflict memo, Wood's report and testimony as to the alleged altercation, and Prim's deposition all contradict the lower court's finding. The lower court's factual finding that no deal for the ROR occurred is simply unreasonable and unsupportable. A Brady violation occurred. The state never informed Mr. Jones' counsel of the deal for the ROR, a deal which is substantiated by the facts adduced at the evidentiary hearing.

In addition to withholding evidence of the ROR deal, it is also clear that the state presented Prim's false testimony at trial about why he was ROR'd. At trial, Kevin Prim testified that his release was based on his attorney's actions related to an alleged confrontation with Mr. Jones. (TT. 678, 684) As the evidentiary hearing evidence demonstrates thoroughly, this testimony was an

absolute lie. Further, and more importantly, the evidence shows that Mr. Wade knew this testimony was false when he allowed it to be presented. If the testimony was true, why did Mr. Wade not correct Prim's testimony during his deposition, when he mentioned nothing about an altercation? All of the evidence, save Wade's and Wood's unsupported denials, indicates that the ROR was based on an exchange for the statement. Certainly, the evidence has eviscerated the falsehood that Prim was ROR'd because of an altercation, testimony the state allowed to stand at trial. In sum, Mr. Wade knowingly presented materially false testimony. His testimony to the contrary is belied by the facts. Prim's false testimony is not harmless beyond a reasonable doubt. A Giglio violation occurred.

As to the undisclosed police reports and arrests involving Prim, the lower court essentially holds that because prosecutor Neill Wade was unaware of the reports and arrest, there was no Brady violation. This holding clearly ignores established precedent that "the state", for purposes Brady, encompasses more than just the prosecuting attorney. Jones v. State, 709 So. 2d 512, 519-20 (Fla. 1998); Garcia v. State, 622 So.2d 1325, 1330 (Fla. 1993). Further, a Brady violation may occur without a willful withholding by the prosecutor. Mordenti at 161 (suppression of evidence by the state may be either willful or inadvertent). The evidence certainly established ongoing criminal activity, including crack cocaine use, by Prim up to and

during the time of trial that Mr. Jones was unaware of. The reports and the testimony of Officer Johnson are unequivocal. The lower curt's application of the legal standard is simply incorrect.

The lower court also holds, in terms of the Brady violation as to Prim's crack cocaine usage, that there is no evidence establishing Prim "was or is addicted to drugs or that he was under the influence of drugs at the time of his testimony." The trial court's holding in this regard simply ignores the reports. The report in fact states that Mr. Prim was found with a crack pipe in his possession when arrested on November 19, 1992. Additionally, the July 11, 1992, report involving Prim's claim of false imprisonment noted Prim's involvement with crack cocaine dealers (This is, of course, in addition to Prim's fleeing from the police after being advised he was wanted on **EIGHT** outstanding warrants). The reality is that Prim's criminal activity and desperate desire to be ROR'd were clearly based on cocaine addiction.

Prim's criminal activities, as reflected in these reports, were clearly impeaching of Prim and undisclosed to Mr. Jones. Greg Cummings testified unequivocally that he was not aware of the crimes and arrests at issue and would have used them vigorously. There is simply no doubt that this information, given the proximity of the criminal activity to the trial, could have been used to thoroughly undermine Prim's credibility, especially considered with other

available impeachment of Prim, including the true nature of his ROR. The fact that Prim was using crack cocaine, and obviously committing crimes to support his habit, at the time of trial, even the very day he testified, would have likely caused the jury to completely discount him.

The prejudice of the undisclosed deal for the ROR, as well as the deliberately false testimony regarding that deal, and the ongoing criminal activity and cocaine usage by Prim, is apparent. Kevin Prim was the critical witness in the case against Mr. Jones. There is simply no other direct evidence of guilt against Mr. Jones aside from the alleged confession to Prim; Greg Cummings stated this himself. Mike Wood stated that he would not want to use a witness like Prim if he did not have to. Prim was the key to the case, otherwise the state would never get near him.

A critical component of the prejudice analysis in this case is this Court's opinion on direct appeal analyzing the Fourth Amendment violation that occurred. Jones v. State, 648 So.2d 669 (Fla. 1994). On direct appeal, Mr. Jones alleged a Fourth Amendment violation when officers illegally seized a bag of clothing from his hospital room. This Court held that in fact an illegal warrantless seizure of Mr. Jones' clothing occurred. Id. at 675. Further, the Court rejected the state's theories as to exigent circumstances, open view, and plain view. Id. at 676-78. However, this Court found the

warrantless seizure to be harmless. In doing so, the Court stated:

> 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 679. The Court also briefly cited the circumstantial evidence that Mr. Jones was found in the victim's truck and that he and the victim had been seen together. Id.

Clearly, this Court viewed Kevin Prim as the crucial witness against Mr. Jones. It is his testimony only that the Court cites to in finding the Fourth Amendment violation harmless. Without Prim's testimony of a direct admission, this Court could not have found the error harmless and would have reversed. Thus, the prejudice of the suppressed deal and criminal activity related to Prim is unarguable. It is not surprising that the lower court, in its order, never substantively addresses the prejudice prong of either the Brady or Giglio violations, under their respective standards. As stated, the lower court instead finds that the ROR deal did not occur and that

the criminal/drug activity was unknown by the prosecutor. However, when substantively examined, the prejudice is clear.

Moreover, given the nature of the testimony at the evidentiary hearing, this Court's ruling on Mr. Jones' Fourth Amendment claim must be reexamined. Prim's testimony is obviously no longer worthy of the weight given to it by this Court on direct appeal, and when excised from the harmless error analysis, the result of this Court's opinion on direct appeal would have been different. It is also notable in this context to point out that Prim was the only witness to substantiate the robbery charge. No other evidence, circumstantial or otherwise, proved the robbery. Further, given that this was clearly a felony-murder case only, the state's case for first-degree murder evaporates with him.

**B. Notes regarding Trooper Ross**

Although the lower court failed to address Mr. Jones' claim regarding notes from the state attorney file regarding Trooper Don Ross, evidence was certainly presented on this point. As Greg Cummings testified, the notes indicate that Ross observed the victim DUI in the northern part of Leon County prior to his meeting Mr. Jones.[6] As both Cummings and Neill Wade testified, the state's theory

[6] Although not established entirely by the evidence, the notes would appear to have been made either during Ross' grand jury testimony or a private interview, as there was no testimony about this subject in either Ross' deposition or trial testimony.

was that the victim would not have allowed Mr. Jones to drive his vehicle and that thus, Mr. Jones presence in the vehicle when he crashed was the result of a robbery and murder.

Clearly, these notes indicate that the victim was extremely intoxicated, a fact not revealed at trial. This would have obviously explained why Mr. Jones was driving the victim's vehicle. That is, the victim, because he was drunk, asked Mr. Jones to drive. The state no doubt wanted to assert that the victim would not have let Mr. Jones drive his car and clearly did so, as Wade conceded.

The notes as to Trooper Ross would have allowed Mr. Cummings to prevent such an argument by the state. In concert with the other undisclosed evidence, such evidence would have created a reasonable probability of a different result. A Brady violation occurred when this material, exculpatory evidence, in possession of the state, was not disclosed.

## ARGUMENT II

**MR. JONES WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE FOR DEATH. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE .**

The issue presented in this argument is whether or not trial counsel provided effective assistance at the penalty phase of Mr. Jones' trial consistent with the United States Constitution and the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, 685 (1984).

**FACTS**

**A. Mental Health Expert**

Greg Cummings did not have co-counsel assisting him in this case. (EHT. 37) Mr. Jones did nothing to impede the penalty phase investigation. (EHT. 38) Cummings believed a penalty phase was likely. (EHT. 40) Cummings never hired a mental health expert in this case, never filed a motion requesting appointment of a mental health expert, and never sought to have Mr. Jones examined for competency, sanity, or statutory mitigation. (EHT. 41) There is a memorandum in Cummings' file written by Nancy Showalter about her conversations with Dr. Robert Berland. (Id.) (Defense Exhibit 22) Cummings "obviously had that document." (EHT. 42) Cummings did not

recall making contact with Berland. (Id.) There is nothing in his file to suggest that he talked to Dr. Berland or any other mental health expert. (EHT. 43) Cummings did not "recall speaking with anybody about that document (the Showalter memorandum)." (Id.) When asked whether he spoke with anybody about the presentation of mental health evidence in Mr. Jones' case, Cummings stated, "Well, I'm going to tell you I don't have any specific recollection. My file does not recall it." (Id.) Cummings suggested that the reason he did not follow up with Dr. Berland is because he "didn't know Dr. Berland." (Id.) Although Cummings speculated that he may have spoken with an expert about concerns he had related to Mr. Jones' DOC records, he has no specific recollection of it. (EHT. 46) Further, his file does not reflect any such conversation. (Id.) If Cummings had evidence of mental illness and brain damage to support statutory mental health mitigation, he would have wanted to present it. (Id.) Cummings' non-use of a mental health expert was based on Dr. Berland's MMPI, the DOC records, and "just knowing and communicating with" Mr. Jones. (EHT. 50-51) Cummings highlighted areas of Mr. Jones' DOC records that he was concerned about, specifically references to anti-social personality disorder. (EHT. 76-80) At the time of Mr. Jones' trial, mental health mitigation was "pretty-well established." (EHT. 86-87) Cummings agreed that if he had testimony reflecting significant mental illness and brain damage, it would have

been better to present the evidence. (EHT. 108)

Mr. Jones' intoxication at the time of the crime was something Cummings wanted to establish at penalty phase. (EHT. 48) Cummings identified a hospital toxicology report that stated Mr. Jones' blood-alcohol level at .263 with traces of cocaine. (EHT. 49) Cummings was aware of this report and had it as part of his file. (Id.) Cummings was aware that Mr. Jones had drug use issues, specifically cocaine. (EHT. 50)

Dr. Robert Berland was received by the lower court as an expert in forensic psychology without objection. (Id.) Dr. Berland did "limited" work on this case in 1991. (EHT. 270) Dr. Berland was asked to perform an MMPI on Mr. Jones which he did. (Id.) Berland opined that the data indicated Mr. Jones may have been trying to hide his mental illness and there were no attempts to fake mental illness. (EHT. 271) Mr. Jones' score indicated a "chronic psychotic disturbance" that he probably had for at least two years prior to the test. (Id.) Psychotic disturbance is defined by three main symptoms: hallucination, delusion, and biologically based mood disturbance. (Id.) Mr. Jones' MMPI profile was a typical chronic psychosis profile. (EHT. 273) The profile was especially high on the mania scale and high on scales typical in drug abusers. (EHT. 273-274) The elevated scale 4 could be influenced by character disorder, biological mental illness, or both. (Id.) Both were

probably involved. (Id.)

Dr. Berland was never contacted by Greg Cummings. (EHT. 274) Dr. Berland interviewed Mr. Jones at death row in 2003 at the request of CCRC. (EHT. 275) Berland did an assessment of Mr. Jones' mental illness history and assessed possible brain damage, as well as various non-statutory mitigators. (Id.) Berland reviewed numerous documents and interviewed witnesses. (EHT. 275-77)

Dr. Berland testified that Mr. Jones meets the criteria for application of the extreme mental or emotional disturbance statutory mitigating factor. (EHT. 279) This is based on the diagnosis of mental illness substantiated by the MMPI and witness interviews. (EHT. 280-84)

Dr. Berland testified that in his opinion the substantial impairment statutory mitigating factor applies. (Id.) This was based on Mr. Jones' biological mental illness which resulted in involuntary choices, behavior, and judgment. (Id.) Added to this is the fact that Mr. Jones was substantially under the influence of alcohol and cocaine at the time of the alleged offense. (EHT. 285) The intoxication would have aggravated underlying mental illness, making Mr. Jones more inclined toward criminal activity and violence. (Id.) These influences were "biological and involuntary." (Id.) Dr. Berland's evaluation revealed a history of alcoholism by Mr. Jones, starting at age 12 or 13, and crack cocaine abuse, at least 6

months prior to the alleged offense. (EHT. 287) Finally, Dr. Berland's evaluation revealed brain impairment in Mr. Jones. (Id.) This was based on the WAIS results obtained in 1978. (EHT. 292)

Dr. Berland's evaluation also revealed the existence of extreme violence and extreme family circumstances in Mr. Jones' childhood. (EHT. 293-97) Dr. Berland also reviewed Mr. Jones' prior incarceration records which revealed "outstanding performance" on work assignments and "outstanding or above satisfactory" on his housing assignment. (EHT. 297) Mr. Jones ultimately progressed to a work release assignment. (EHT. 298) In terms of anti-social personality disorder, Dr. Berland testified that even if it exists, Mr. Jones' "mental illness is a more salient, more persistent adverse influence on his behavior." (EHT. 299) Dr. Berland reviewed the DOC records which suggested possible anti-social personality disorder and he stated that those references do not change any of his opinions. (EHT. 299-300)

**B. Lay Witnesses**

Cummings testified that in preparation for penalty phase, he spent "a morning" with Mr. Jones' family. (EHT. 51) Cummings stated that he thought that would be enough. (EHT. 52) Cummings stated that Mr. Jones' sister "always was" going to be the only person to testify. (Id.) Cummings did not talk to any teachers or get school records. (Id.) Cummings did not recall why Mr. Jones' mother was

not called to testify. (EHT. 53) Further testifying as to why only Mr. Jones' sister testified, Cummings stated, "The trial had ended and the judge gave us – he said, we'll start the penalty phase in about an hour. And that sort of threw me. And I don't know who was in a very good emotional state to testify at that time." (Id.) Cummings did not recall if he ever spoke with Mr. Jones' father. (Id.) Cummings testified that he would want someone such as a teacher or coach to testify and does not know why "it didn't get done" in this case. (EHT. 54-55) Cummings did not recall talking to Kay Underwood. (EHT. 55) Cummings testified that he does not recall being aware that Mr. Jones had a ten year old daughter at the time of the trial and thinks he may have read this recently. "[I]t was like news to me maybe, I don't know." (Id.)

Dr. Joseph Accurso testified that he was Mr. Jones youth football coach and knew that Harry had a rough home life. (EHT. 118-19) Harry was a "bright-eyed" boy and an "absolute, fabulous football player." (EHT. 120) Harry was respectful, stood up for other kids, and was a leader on the football team. (Id.) Harry practiced and worked hard. (Id.) Harry was a kid that Accurso "loved to have babysit for my kids." (EHT. 122)

Sam Middleton testified that he is married to Mr. Jones' cousin Bertha. (EHT. 137) Harry was a good child who treated Middleton with "great respect." (EHT. 139) Harry was well-mannered and

treated Middleton as an authority figure. (Id.) Middleton never saw Mr. Jones drunk, using drugs, or with a firearm. (EHT. 143)

Bertha Middleton testified that she is Mr. Jones' first cousin and that they grew up in a wooden farmhouse in South Carolina. (EHT. 163) Between the families, there were eight children and two adults. (Id.) The culture in Miami was totally different than what they experienced in South Carolina. (EHT. 164) Mr. Jones, as a child, told Bertha that he wanted to be sent to prison like his father. (EHT. 165) The kids helped their mother work the fields (EHT. 170), picking cotton and beans. (Id.) Harry was a quiet and respectful child who never treated Bertha badly. (EHT. 167) Harry's mother's incarceration was "very emotional" on the children. (EHT. 170) No one from social services ever checked on the kids. (Id.)

Kay Underwood and Mr. Jones dated when they were younger; she in her late teens and he in his early twenties. (Id.) Underwood went to Florida A & M University in 1984 and Harry got himself transferred to a work camp near Tallahassee to be with her. (Id.) Mr. Jones visited Underwood and they discussed plans to get married. (Id.) In 1986, Underwood had to leave school and return home to Miami. (EHT. 177) As a result, her relationship with Mr. Jones ended. (Id.) Mr. Jones was a caring person towards Underwood. (Id.) Underwood stated that Mr. Jones told her that his problems began when his mother was sent to prison. (Id.) Mr. Jones loved his mother

very much. (Id.) Underwood knew Mr. Jones' mother. (Id.) Mr. Jones' mother loved him. (Id.) Mr. Jones is very knowledgeable about the bible and even considered becoming a minister. (EHT. 178) Underwood is still friends with Mr. Jones and has been for twenty-plus years. (Id.) Mr. Jones has been a good and kind friend to Underwood. (Id.) Mr. Jones has a daughter named Tasheba that is approximately twenty-one years old and who Mr. Jones expresses interest in. (Id.) Underwood does not recall Mr. Jones using alcohol or cocaine (EHT. 183), but he probably did not use it around her out of respect. (EHT. 189) Mr. Jones is an intelligent person. (EHT. 187) Added Underwood, "Harry was – has always been my number one friend, or the best friend that I have ever had, so he was the type of friend that I could always go to and talk to him about the most difficult times in my life, and he would be supportive or positive . . . ." (EHT. 186-87)

Nancy Showalter identified a mitigation information form with Gene Taylor's handwriting. (EHT. 195) The purpose of the form is to develop background information on the client. (Id.) The document reflects that Mr. Jones has a child named Tasheba. (EHT. 196) The document indicated that Mr. Jones saw his daughter three months prior to the interview. (Id.)

Johhny Lambright, Mr. Jones' brother, testified that life in South Carolina was hard and that people in Florida were different.

(EHT. 205) The family sharecropped on plantation land. (Id.) Mr. Jones' father was verbally and physically abusive. (Id.) He "was not a father." (Id.) Lambright has had a lifelong struggle with alcoholism that is directly related to the difficulties of his childhood, particularly his mother's incarceration. (EHT. 206-07, 210) He has had legal troubles because of his alcoholism. (EHT. 210) Lambright loves his brother and feels that his life should be saved. (EHT. 207) Harry's mother loved him very much. (Id.)

Theresa Valentine, Mr. Jones' eldest sister, testified that her father was a heavy drinker and very abusive. (EHT. 212-13) Theresa's mother and boyfriend Tommy were involved a lot of violence that Mr. Jones was witness to. (EHT. 214) While there was some help, Theresa and Betty could not provide care for the kids. (Id.) There was little financial assistance while their mother was in prison. (EHT. 214-15) Harry's problems began after his mother was sent to prison. (EHT. 219) Theresa is a spiritual woman that turned to God to deal with the trauma of her childhood. (EHT. 215-16) Theresa loves her brother and would like to see him live. (EHT. 216)

Diane Jones, Mr. Jones' youngest sister, recalled that when he was a child, Harry's mother nick-named him "Beaver" after the title character in the television show "Leave it to Beaver." (EHT. 224) Harry's father was an alcoholic and had left the family once before as well. (EHT. 225) The kids had conflicted feelings about their

father leaving; they were saddened by the loss, but also happier because “there was no more fighting.” (EHT. 226) Harry’s father was partial to him and his leaving affected Harry. (Id.) When the children’s mother was sent to prison, it had a dramatic affect on Harry. (Id.) Harry would visit his mother in prison and it had an obvious affect on him. (EHT. 228) “[E]verytime we would go there he would – you know, you could see the action in his face, and the moods, the mood swing he would be in, you could tell that basically everybody was affected, because we didn’t want to leave her there.” (Id.) The children were teased and taunted about their mother being in prison. (EHT. 229) Diane was an unwed mother at sixteen years old and was once charged with food stamp fraud. (Id.) Harry was a smart student, but his mother’s incarceration affected his academic performance. (Id.) However, he later got his GED while incarcerated. (EHT. 231) Harry has a daughter who is now 21 years old. (Id.) When she was a child, Harry had a relationship with her and would take care of her at times. (Id.) Harry’s daughter has visited him on death row. (EHT. 232) Diane loves her brother and believes his life is worth saving. (EHT. 233)

Betty Stewart, Mr. Jones’ sister, testified that he was born in Holly Hill, South Carolina where the family lived. (EHT. 243-44) Betty recalled that Harry was born in her grandparents’ house and that her mother was on the floor and bleeding severely. (EHT. 244)

The parents relationship was “very violent”, with the violence witnessed by the kids. (EHT. 244-45) Harry’s father was an abusive alcoholic and when he would beat their mother, Betty and Harry would try to stop him. (Id.) Harry’s father was in and out of prison. (EHT. 246) The family sharecropped on the farm of a white man and worked for him. (EHT. 247) The family worked in exchange for a place to live. (Id.) The family ultimately moved to Miami and the violence by their father got worse; they would often flee into the streets to escape him. (Id.) The police would come but they did not do anything. (Id.) The cultural difference between South Carolina and Miami was overwhelming. (Id.) The other kids teased them because they were different, especially in the way they spoke with an African accent called Geeche. (EHT. 249) When their father left, the family was “very, very poor.” (Id.) Their mother was uneducated and had not worked previously. (Id.) The children did without clothing or food and “suffered traumatically.” (Id.) Their mother’s new boyfriend was violent and drank a lot. (EHT. 251) Betty described him as a “Baker Act.” (Id.) Betty stated that her mother drank too and that it “destroyed her.” (Id.) Mr. Jones’ mother began to fight back when Tommy became violent and the children witnessed the crying, screaming, and violence with knives and irons. (Id.) There was bloodshed and the kids would have to clean up the bloody mess when they were sent to jail. (Id.) According to Betty,

"the most horrible time" was when their mother was sent to prison. (EHT. 252) The kids were left crying and screaming and no social service agency came to the home. (EHT. 252-53) There were limited financial means. (Id.) Visiting his mother in prison was hardest on Harry because he was the youngest and did not understand. (EHT. 254) Harry felt like, after losing another parent, he did not have anybody. (Id.) Other people in the community would tease the kids about their mother being in prison and being "crazy." (Id.) The kids were also teased about having to wear the same clothes to school every day. (EHT. 255) Betty became pregnant as a teenager. (Id.) Betty did not get married and feels that the pregnancy was a result of the loss of her mother and the need for someone to love her. (Id.) At the time of Mr. Jones' trial, Greg Cummings came to Miami once to speak with Betty. (Id.) He was there less than one hour. (EHT. 257) Betty loves her brother and would have asked the jury to spare his life because "he didn't have a chance." (EHT. 258)

**LAW**

In order to prevail on his claim of ineffective assistance of counsel, Mr. Jones must prove two elements, deficient performance by counsel and prejudice. Strickland v. Washington, 466 U.S. 668 (1984). In order to establish that counsel's performance was deficient, Mr. Jones "must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing

professional norms." Id. at 688. To establish prejudice Mr. Jones "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. At 694.

Beyond the guilt-innocence stage, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to **investigate** and **prepare** available mitigating evidence for the sentencer's consideration. See Phillips v. State, 608 So. 2d 778 (Fla. 1992); State v. Lara, 581 So.2d 1288 (Fla. 1991); Stevens v. State, 552 So.2d 1082 (Fla. 1989). See also Eldridge v. Atkins, 665

F.2d 228, 232 (8th Cir. 1981) ("[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty").

Counsel here did not meet rudimentary constitutional standards. As explained in Tyler v. Kemp, 755 F. 2d 741 (11th Cir. 1985):

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to confidence in that decision.

Id. at 743 (citations omitted).

Counsel's highest duty is the duty to investigate and prepare. Where counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g, Thomas v. Kemp, 796 F. 2d 1322, 1324 (11th Cir. 1986) (little effort to obtain mitigating evidence), cert. denied, 107 S.Ct 602 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses was not the result of a strategic decision made after reasonable

investigation), cert. denied, 471 U.S. 1016 (1985). See also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). The key aspect of the penalty phase is that the sentence be individualized, focused on the particularized characteristics of the individual defendant. Penry v. Lynaugh, 488 U.S. 74 (1989); Gregg v. Georgia, 428 U.S. 153 (1976). This did not occur in Mr. Jones' case.

The Eleventh Circuit has established that defense counsel has an independent responsibility to investigate potential mitigating evidence before making a decision whether to present it. Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994); Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) (counsel cannot make a strategic decision to not present mitigation when counsel has “failed to investigate his options and make a reasonable decision between them”); Harris v. Dugger, 874 F. 2d 756, 763 (11th Cir.), cert. denied, 493 U.S. 1011 (1989) (explaining that counsel must gather enough information regarding potential mitigation to make an

"informed judgement"). Further, the cases make it clear that "the mere incantation of the word 'strategy' does not insulate attorney behavior from review. Cave v. Singletary, 971 F. 2d 1513, 1518 (11th Cir. 1992), citing Lightbourne v. Dugger, 829 F. 2d 1012, 1026 (11th Cir. 1987).

In Wiggins v. Smith, 123 S.Ct. 2527 (2003), the United States Supreme Court expanded on the duties of counsel to conduct a "reasonable investigation." Wiggins involved a decision by trial counsel to limit the scope of mitigation investigation. Id. at 2533. In rejecting counsel's decision in Wiggins not to present significant mitigating evidence, the Court, citing its opinion in Williams v. Taylor, 529 U.S. 362 (2000), held that before counsel may limit the presentation of mitigating evidence, counsel must fulfill the obligation to ***conduct a thorough investigation of the defendant's background***. Id. at 2535. Wiggins further held that a limitation on the scope of mitigation investigation must be reasonable in order to be considered legitimately strategic. Id. at 2536.

Furthermore,

> '**It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction**. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. **The duty to investigate exists regardless of the accused's admissions or statements to the lawyer**

> **of facts constituting guilt** or the accused's stated desire to plead guilty.' 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

Rompilla v. Beard, 125 S.Ct. 2456, 2466 (2005)(emphasis added).

**ANALYSIS**

**A. Mental Health**

The lower court's order addressing Mr. Jones' claims of penalty phase ineffectiveness in failing to present mental health evidence rests on two premises. First, the lower court appears to find that Dr. Berland's testimony and diagnosis would have reduced credibility because he used an MMPI rather than the MMPI II. (Lower Court Order/p. 9) Second, the lower court finds that Greg Cummings made an informed decision not to present mental health evidence based on Cummings review of DOC records. (Lower court Order/p. 10)

First, as to Dr. Berland's use of the MMPI as opposed to MMPI II, Dr. Berland testified that the MMPI II was only two years old at the time and had not been researched enough to completely ensure its reliability. Further, Dr. Berland testified that the MMPI was perfectly viable in measuring mental illness in 1991 and still today for that matter.[7] In sum, there was nothing wrong with using the

[7] The lower court also cites to Dr. Berland being "confronted" by the state about this Court's opinion in Philmore v. State, 820 So. 2d 919 (Fla. 2002), wherein the state asserts that Dr. Berland conceded that the MMPI overestimates mental illness in black males. However, no actual testimony from Philmore was introduced in this record. Further, the Philmore opinion is unclear as to whether or not Dr. Berland

MMPI, then or now.

Regarding Cummings' "informed" decision as to rejecting the use of mental health evidence, there is simply insufficient evidence that that the decision was informed at all. The lower court ignores that all Cummings' statements about an "informed" decision were entirely speculative. Cummings stated that he had no recollection of talking to any mental health expert about Dr. Berland's testing. There is no evidence in Cummings' file to suggest that he ever spoke with a mental health expert. Cummings' billing records in this case reveal no calls or conversations with a mental health expert. Cummings never filed a motion to have an expert appointed. As Cummings admitted, when he spoke with post-conviction counsel a couple months prior to the hearing, he told counsel that he visited Mr. Jones, thought he was okay, and did not feel there were any mental health issues. The "investigation" of mental health that the lower court alludes to does not exist. There is zero evidence to support Cummings' speculation. All the state could point to at the hearing were some "highlights" and "stars" made on the DOC records.

In addition to these obvious unreasonable factual findings, the

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ever conceded the overestimation. The only thing definitive about this Court's opinion in this regard is that Dr. Berland "conceded" that he used the MMPI, as he stated he did in this case. Philmore at 937. Additionally, Dr. Berland testified that if this Court's opinion or any transcript states that he did testify as to an overestimation, there is some sort of error involved because that is not what he said.

lower court fails to acknowledge, ***at all***, the plethora of powerful mitigating evidence, both statutory and non-statutory, that Dr. Berland testified to. Dr. Berland testified that Mr. Jones suffers from a chronic psychotic disturbance which involves hallucination, delusion, and mood disturbance. In testing, there were no attempts by Mr. Jones to fake mental illness. Berland opined that the statutory mitigator of extreme mental or emotional disturbance applies based on testing and interviews that revealed wide-ranging mental illness, including chronic psychosis, paranoia, anger, thought process disturbance, mood disturbance, depression, and manic disturbance. Berland found that the substantial impairment statutory mitigator applies as well. This finding is based on Mr. Jones' mental illness, which impairs his choice making and judgment, the fact that Mr. Jones was substantially under the influence of alcohol and cocaine at the time of the incident, and Mr. Jones' history of alcohol and cocaine use. Additionally, Dr. Berland testified that Mr. Jones suffers from brain impairment and has since at least the age of 19. Further, Dr. Berland testified that Mr. Jones' history revealed the existence of exposure to extreme violence in childhood as well as extreme family circumstances during childhood. Finally, Dr. Berland testified that his evaluation revealed, based on positive evaluation records, Mr. Jones ability to adapt to prison life. None of this evidence, though clearly available to Cummings, was presented

to the jury.

None of the above evidence submitted through Dr. Berland is even acknowledged by the lower court, much less analyzed in light of Strickland. The lower court ignores the mental health mitigation that was available to Cummings had he pursued any investigation. Despite the lower court's finding, there is no evidence to support the notion that he did. Rather, the evidence clearly indicates that Cummings was aware of existing mental health issues (the Showalter memo to Berland, Defense Exhibit 22), but simply failed to investigate. This was not a strategy. The mental health mitigation presented by Dr. Berland at the hearing was powerful and compelling. It was available to Mr. Cummings had he investigated. He did not. The decision not to investigate or present this mitigation was certainly uninformed. Had the evidence been presented, the result of the penalty proceedings would have been different. Cummings decision here, not to follow up on the mental health mitigation that he was clearly aware of, is not reasonable. Even if Cummings did have concerns about anti-social personality disorder, it was unreasonable not retain a mental health expert, or at least talk to Dr. Berland, and determine how such a diagnosis, if it even existed, factored into Mr. Jones' overall mental health. The fact is that, whatever decision Cummings made, it was thoroughly uninformed in terms of Mr. Jones' mental health history and status.

**B. Lay Witnesses**

The lower court ruled that the lay witnesses presented in support of mitigation were "merely cumulative" to the witnesses presented at trial and that Mr. Cummings made a "conscious decision" to present only Mr. Jones' childhood through his sister. (Lower Court Order/p. 9)

As to the court's finding that the hearing witnesses were merely cumulative, the order makes a conclusory finding without even analyzing what was presented at the hearing. In fact, the court fails to acknowledge that several witnesses even testified, including Dr. Joseph Accurso and Kay Underwood. The witnesses at the evidentiary hearing presented many mitigating facts never presented at trial.

Dr. Accurso testified about Mr. Jones' youth and the fact that Harry was an excellent football player, a respectful child, and a leader on the team. Dr. Accurso also stated that he liked to have Harry babysit for his children. Sam Middleton testified that Harry was a good child who treated him with respect and as an authority figure. Bertha Middleton testified to the upbringing in South Carolina and the cultural differences between South Carolina and Miami. Bertha also testified as to the emotional toll of Harry's mother going to prison and the fact that there was no assistance from protective services. Kay Underwood testified extensively about her

friendship with Mr. Jones and how kind and caring he had been to her. She talked about his knowledge of the bible and thoughts of becoming a minister. Underwood affirmed Mr. Jones' and his mother's mutual love for each other. Underwood further testified about Mr. Jones' daughter and his love for her. Johnny Lambright, Mr. Jones' brother, testified Harry's early life in South Carolina and the fact that he (Lambright) has struggled with alcoholism and legal troubles because of his childhood. Lambright also stated his love for his brother, his belief that Harry's life is worth saving, and the fact that Harry's mother loved him dearly. Theresa Valentine testified as to the difficulties for the children in surviving after their mother went to prison and stated her love for her brother. Diane Jones testified passionately about Harry having to visit his mother in prison and the affect it had on him. Diane testified regarding Harry being intelligent and ultimately getting his GED in prison. Diane also affirmed Harry's love for his daughter, Tasheba. Further, Diane testified that she became an unwed mother and was charged with food stamp fraud. Diane also stated her love for her brother. Betty Jones testified about the upbringing in South Carolina, the cultural differences between South Carolina and Miami which made the family feel like outsiders, the poverty the family endured, Harry's childhood visits to see his mother in prison, and her own struggles as an unwed teenage mother, a fact she related directly to her

traumatic childhood. Betty stated her love for Harry and her request for mercy.

Contrary to the lower court's finding, none of this evidence was presented at penalty phase. The evidence is not cumulative. Further, in addition to this evidence, all of the children provided additional compelling testimony regarding the extreme violence that marked their entire childhood. It is also important to note that all of Mr. Jones' siblings testified to difficulties in their own lives as a result of their childhood, facts that would have rebutted the state's false notion at trial that Betty, as a police officer, had "done fine."

The lower court's finding that Cummings made a "conscious decision" to use only Betty as a mitigation witness implies an informed strategy. The testimony at the hearing contradicts this finding. While Cummings testified that he spent "a morning" with Betty, Diane, and their mother, the girls testified that it was less than an hour. Cummings did not talk to any teachers or coaches and did not recall why not. Cummings did not recall ever speaking with Mr. Jones' father. Cummings did not recall speaking with Kay Underwood or any other friends. Cummings did not know that Mr. Jones had a daughter. Cummings did not know why Mr. Jones' mother was not called to testify. The fact is, Cummings talked to three mitigation witnesses for less than an hour, leaving him simply uninformed as to

the breadth of Mr. Jones' life. This was, rather than a conscious decision, an uninformed decision. Further, it was an uninformed decision that prevented the jury from hearing a tremendous amount of mitigation reflecting the entirety of Mr. Jones' life. Had the decision been informed and the entirety of lay mitigation presented, in combination with the powerful mental health testimony, a different result was likely.

## ARGUMENT III

**THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. JONES' CLAIMS OF IMPROPER SHACKLING AND PROSECUTORIAL MISCONDUCT. THESE VIOLATIONS DENIED MR. JONES HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. FURTHER, TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PROTECT MR. JONES' RIGHTS REGARDING THESE VIOLATIONSARGUMENT IIMR. GRIM WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL WHEN HIS ASSIGNED ATTORNEY FAILED TO ADEQUATELY INVESTIGATE AND/OR PRESENT EXCULPATORY AND IMPEACHMENT EVIDENCE AND TESTIMONY, AND FAILED TO ADEQUATELY PREPARE FOR AND CHALLENGE THE EVIDENCE PRESENTED BY THE STATE. AS A RESULT, CONFIDENCE IN THE JURYíS VERDICT IS UNDERMINED. THE LOWER COURT ERRED IN DENYING THIS CLAIM AFTER AN EVIDENTIARY HEARING. THE FILES AND RECORDS DO NOT REFUTE THE CLAIMS AND THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING .**

### A. IMPROPER SHACKLING

In his 3.850/1 motion, Mr. Jones averred that he "was shackled in view of the jury at his capital trial. During voir dire, Mr. Jones was shackled in front of the venire. Members of the venire, from which the ultimate jury panel was selected, had a full view of the shackles which were placed on Mr. Jones." (Motion at p. 75) Further, Mr. Jones alleged that trial counsel was ineffective in failing to protect his rights in this regard. (Id at 76.)

Mr. Jones was prepared to present witnesses at an evidentiary hearing substantiating his claim that a shackling device was utilized

in front of the jury. These witnesses include members of the jail staff, Mr. Jones' trial attorney, and at least one member of the media.

The lower court, on the record at the evidentiary hearing (EHT. 423) and in its written order (Order of Summarily Denied Claims/ p. 3) simply states as a matter of fact that the shackling never happened. The lower court fails to cite to any portion of the record which refutes the claim. The court acts as a witness, not subject to examination, and simply denies the claim without a hearing.

The lower court's ruling in this regard is in direct contravention of this Court's longstanding precedent in Lemon v. State, 498 So. 2d 923 (Fla. 1986). There, this Court held that unless the files and records in this case refute a post-conviction claim, the claim is entitled to an evidentiary hearing as a matter of right. As stated, the lower court here does not reference any of the files or records in summarily denying the claim. Further, this was not a successor motion where, apparently, less emphasis is placed by this Court on granting evidentiary hearings. The lower court erred.

The practice of shackling as such was expressly disapproved in Elledge v. Dugger, 823 F. 2d 1439 (11th Cir.), modified on other grounds, 833 F. 2d 250 (11th Cir.), cert. denied, 485 U.S. 1014 (1987). In addition, the Court noted there was nothing to indicate that the Supreme Court did not intend its rulings to apply to the

penalty phase of a capital case. Elledge, 823 F. 2d at 1451. At no time was there "any showing that the shackling was necessary to further an essential state interest. . . [and] [t]he trial court never "polled the jurors to determine whether any of them would be prejudiced by the fact the defendant was under restraints." Elledge, 823 F. 2d at 1452, quoting Woodard v. Perrin, 692 F. 2d 220, 221 (1st Cir. 1982).

In Deck v. Missouri, 125 S.Ct. 2007 (2005), the United States Supreme Court decided issues apparently left open by Elledge. First the Court held that "we must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." Deck at 2015. Thus, shackling during the penalty phase is bound by the same restriction applied to guilt-phase proceedings. Also, the Court held, arguably for the first time, that "the defendant need not demonstrate actual prejudice to make out a due process violation" where he has been forced without adequate justification to be restrained in front of the jury. Id. There was no stated justification for the restraints in this case. Again, as stated, there is also no record basis for the court's denial of an evidentiary hearing. A hearing is necessary to resolve this issue.

**B. IMPROPER PROSECUTORIAL ARGUMENT**

Mr. Jones further alleged that improper prosecutorial arguments were made at guilt and penalty phase. During closing argument at the

guilt phase, the prosecutor made an obviously inappropriate comment on Mr. Jones' Fifth Amendment right:

> They put Mr. Hollis out that night and Harry Jones followed the victim back outside. Johnnie Mae Hollis does not know what happened after that and only through piecing together the evidence do we know what happened after that. We do not know how he persuaded George Young to drive him further to go up further in the northeast part of the county up to Boat Pond. **And that's one of those questions like I told you at the outset that we simply are never going to be able to answer because only two people know how he talked him into that. Only two people know and one of them is dead.** I've got a couple of theories, but they're theories. I can speculate like anybody else, but I don't know.

(TT. 846) (emphasis added). Trial counsel failed to object to this blatantly improper comment at any point in the proceedings. Next, the prosecutor improperly disparaged defense counsel's closing argument and Mr. Jones' defense:

> I think what you have just experienced may be best referred to as a shotgun of the imagination defense. **It is not truly a defense. It's a distraction**. In this case I hope an attempt to distract you.

(TT. 905)(emphasis added)

During the prosecutor's closing argument at the penalty phase, he made a blatantly improper "future dangerousness" argument:

> [T]he 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**.

(TT. 986-87) (emphasis added) The prosecutor's argument here was an attempt to equate a jury recommendation of death with self-defense. Obviously, the prosecutor meant to suggest to the jury that their potential death recommendation was a justified measure to prevent Mr. Jones from committing violence again. Such an argument is universally proscribed. Despite the clear inappropriateness of the argument, trial counsel again failed to object, either contemporaneously or at the conclusion of argument.

This type of argument, which denigrates and disparages the defense case, was completely improper and should have been objected to. Trial counsel failed to, at any point, object to this obvious improper comment.

Improper argument by a prosecutor reaches the threshold of fundamental unfairness if it is "so egregious as to create a reasonable probability that the outcome was changed." Brooks v. Kemp, 762 F. 2d 1383, 1403 (11th Cir. 1985). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland. Defense counsel was ineffective for his failure to object. Well-established Florida law has condemned such impermissible argument. Starting with Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985), the Court sounded an

alarm that instances of prosecutorial misconduct were improper. "We are deeply disturbed as a Court by the continuing violations of prosecutorial duty, propriety and restraint. Later, in Jackson v. State, 522 So. 2d 802 (Fla. 1988), the Court agreed that "the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations." Id. at 809. Bertolotti and Jackson lay out the deficient performance of defense counsel when they fail to object to prosecutorial misconduct. See also, Hudson v. State, 538 So. 2d 829 (Fla. 1989). When a timely objection is made the offending argument constitutes reversible error. Had defense counsel performed effectively, Mr. Jones would be entitled to relief. Even if not successful at trial, the objection would have preserved the issue for review. Clearly, the improper conduct by the prosecutor "permeated" the trial, therefore, relief is proper. See Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

The lower court erred in not granting an evidentiary hearing as to the prosecutorial comments and trial counsel's failure to object to these comments. The lower court cites to the comments in summarily denying the claim and states that they

were not improper.[8] (Order of Summarily Denied Claims at p. 4) Alternatively, the court holds that the claim should have been raised on direct appeal and was being "recast" as a post-conviction claim. (Id.) The lower court's order ignores the improper nature of the comments and the fact that the comments were not objected to and thus, not preserved for review on direct appeal. The lower court erred.

[8] In brief, inadvertent testimony at the hearing, trial counsel stated that the argument regarding Mr. Jones' Fifth Amendment right appeared to him to be improper and, further, he had no explanation for why he did not object. (EHT. 57-59)

## CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing, Mr. Jones respectfully urges this Court to reverse the lower court's order and to grant him relief on the arguments as this Court deems proper, including vacating his convictions and sentences.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Counsel for Mr. Jones certifies that all parties were served with a true copy of this Initial Brief of Appellant on this 20th day of April, 2007, by U.S. Mail.

## CERTIFICATE OF TYPE SIZE AND STYLE

Counsel certifies that this Initial Brief was generated in a Courier New non-proportional 12-point font.

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