IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-761

LOWER COURT CASE NO. 89-495

MARK ALLEN GERALDS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Geralds' motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied several of Mr. Geralds' claims without an evidentiary hearing. The circuit court held a limited evidentiary hearing on portions of Mr. Geralds' ineffective assistance of counsel, Ake, Brady and Giglio, newly discovered evidence and the jury qualification claims. The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation.

"R. ___." – record on direct appeal to this Court;

"R2. ___." – record on direct appeal to this Court following re-sentencing;

"PC-R. ___." – record on appeal from the denial of postconviction relief;

"Ex. ___." – exhibits admitted during the evidentiary hearing.

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

STANDARD OF REVIEW

Mr. Geralds has presented several issues which involve mixed questions of law and fact. This Court has reviewed such issues with a mixed standard of review. "Brady claims are mixed questions of law and fact. When reviewing Brady claims, this Court applies a mixed standard of review, "defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law." Johnson v. State, 921 So. 2d 490, 507 (Fla. 2005)(citations omitted).

Likewise, this Court has applied a similar standard of review for ineffective assistance of counsel claims. Evans v. State, 946 So. 2d 1, 24 (Fla. 2006).

The standard of review regarding Mr. Geralds' newly discovered evidence claim was explained by this Court in Blanco v. State: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court.'" 702 So. 2d 1250, 1252 (Fla. 1997).

REQUEST FOR ORAL ARGUMENT

Mr. Geralds has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Geralds lives or dies. This Court has not hesitated to allow

oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Geralds, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

On March 15, 1989, Mr. Geralds was indicted with one count of first degree murder, armed robbery and grand theft (R. 2232). Mr. Geralds' was convicted on all counts and the jury recommended death, by a vote of 8 to 4 (R. 2187). The trial court sentenced Mr. Geralds to death. On direct appeal, a re-sentencing was ordered. Geralds v. State, 601 So. 2d 1157 (Fla. 1992).

At his re-sentencing, a new jury recommended death. The judge imposed a death sentence. On appeal, this Court affirmed. Geralds v. State, 674 So. 2d 96 (Fla. 1996). Mr. Geralds filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied on October 7, 1996. Geralds v. Florida, 117 S. Ct. 230 (1996).

On April 22, 1997, Mr. Geralds began the postconviction process, filing public records requests pursuant to former Rule 3.852. In 1998, this Court promulgated a new rule concerning public records and Mr. Geralds spent the next few years litigating his records requests under Rule 3.852(h)(2) and (i).

After the lower court determined that the public records process had concluded, Mr. Geralds timely filed his Amended Motion to Vacate in January, 2001 (PC-R. 993-1203).

After a Huff hearing, the lower court granted a limited evidentiary hearing and summarily denied most of Mr. Geralds' claims.

An evidentiary hearing was held on September 23 and 24, 2003, and February 25, 2004.

At the February hearing, during the testimony of the trial prosecutor, it became obvious that while Mr. Geralds had requested the State's file under the various public records provisions, the complete file had not been produced. After bringing the matter to the Court's attention, counsel requested that she be allowed to conduct a thorough review of the file (PC-R. 2721). The Court granted the oral motion (PC-R. 2724).

Following the evidentiary hearing, Mr. Geralds received a full bankers box of records from the Florida Department of State Bureau of Archives and Records Management. The records were accompanied by a letter explaining that the records had not been previously sent to collateral counsel, though requested, due to an oversight. The records originated from the Office of the State Attorney from the Fourteenth Judicial Circuit and concerned the prosecution of Mr. Geralds for the crimes at issue.

Based on the records, Mr. Geralds filed supplements to his amended Rule 3.850 motion (PC-R. 1447-79, 1610-26). The lower court denied Mr. Geralds an evidentiary hearing on his supplemental claims (PC-R. 1528-36, 1642-3).

Closing arguments were submitted in late, 2005, after which the lower court denied all relief on January 18, 2006

(PC-R. 1737-54). Thereafter, a motion for rehearing was filed (PC-R. 1756-62), which the lower court denied (PC-R. 1809).

Mr. Geralds timely filed a notice of appeal.

STATEMENT OF FACTS

A. THE PROSECUTION'S THEORY OF THE CASE AT TRIAL

At trial, the prosecution's theory of the case was clear: Mr. Geralds, individually, planned to burglarize the victim's house. Upon breaking into the victim's home, by himself, he found the victim at home, beat her, tied her up and killed her. He stole jewelry and the victim's purse. He left the crime scene in the victim's car and abandoned it at the Cherry Street School. Later that day, he took a shower at his grandfather's house, gave Vicky Ward the victim's sunglasses and pawned the victim's gold herringbone necklace. Mr. Geralds acted on his own.

In order to support the theory, the prosecution presented the following at trial: A week before the crimes, the victim and her children ran into Mr. Geralds at the mall (R. 1466, 1479). The victim spoke to Mr. Geralds and told him that her husband was out of town (R. 1480). Thereafter, Mr. Geralds spoke to the victim's son, Bart, in the arcade (R. 1468). According to Bart, Mr. Geralds asked him questions about when his father planned to return[1] and what time Bart went to school (R. 1469).

[1]Bart testified that he told Mr. Geralds he did not know when his father planned to return from out of town.

The morning of the crimes, the victim drove her daughter, Blythe, to school just after 7:00 a.m. (R. 1489). Bart left for school at approximately 8:00 a.m. (R. 1471)

The victim's friend, Kelly Stracener spoke to the victim at approximately 9:00 a.m., for about ten minutes (R. 1417). Mrs. Stracener attempted to call the victim's home at 10:30 a.m., but there was no answer (R. 1417). So, Mrs. Stracener drove to the victim's home and arrived shortly before 11:00 a.m. (Id.). However, the victim's car was not in the driveway (Id.). A few minutes later, Mrs. Stracener came upon the victim's car which was parked at the elementary school (R. 1419).

Later that day, Mrs. Stracener received a phone call from Blythe, who explained that her mother had not picked her up from school (R. 1420). Mrs. Stracener picked up Blythe (R. 1422).

When Mrs. Stracener and Blythe arrived at the Pettibone home, Bart appeared at the door crying (R. 1424). Mrs. Stracener entered the house and found Mrs. Pettibone on the kitchen floor surrounded by a great deal of blood (R. 1426).

It was not long before crime scene personnel from the Florida Department of Law Enforcement (FDLE) arrived to photograph and collect evidence from the scene. Much blood was splattered throughout the kitchen, though pictures and furniture were out of place in the hallway and dining room (R. 1543-6). FDLE Analyst Jan Johnson testified that the blood

spatter indicated that there was a struggle between the victim and her assailant (R. 1636). Indeed, Analyst Johnson testified as to her opinion that a struggle began in the kitchen, near a desk and continued to the point where the victim was kneeling on the floor somewhere between the dining room and kitchen, until finally the victim was laying on the kitchen floor (R. 1642). Thereafter, the victim's body was dragged across the floor (R. 1640). A bloody knife was found in the kitchen sink – it belonged to the Pettibones (R. 1546). A path of bloody footprints was detected through the house (R. 1562). FDLE Analyst Laura Rousseau testified that the shoe tracks appeared to be consistent with only "one shoe tread design" (R. 1619).

The autopsy revealed ten areas of blunt trauma to the victim's body (R. 1836), and three stab wounds to the neck. The cause of death was determined to be exsanguniation (Id.).

As to Mr. Geralds' whereabouts on February 1, 1989, the prosecution presented evidence that Mr. Geralds went by his grandfather's house at approximately 11:30 a.m. and told his grandfather that he had been working on a boat (R. 1673). Mr. Geralds wore racing gloves – where the backs and fingers were not covered (R. 1675). Mr Geralds took a shower at his grandfather's house and left about an hour later (Id.).

Vicky Ward recalled that sometime at the end of January or early February, Mark Geralds visited her at work and gave her some red sunglasses (R. 1685). Mr. Geralds was replacing

a pair of bluish Bucci sunglasses that Ms. Ward had borrowed from him, but since she preferred red, he exchanged them for her (R. 1686).

According to Billy Danford, Mr. Geralds pawned a 24 inch herringbone necklace on February 1, 1989, at 2:00 p.m. for $30.00 (R. 1753, 1758). Mr. Danford testified that Mr. Geralds asked him whether the chain was real (R. 1757).[2]

In the days following the crimes, the victim's family attempted to identify items that were missing from the house (R. 1492-3). At trial, a pair of red Bucci sunglasses and a herringbone necklace were identified as the victim's (R. 1432-3, 1495-6, 1515). Blythe testified that she was "positive" that the sunglasses introduced at trial belonged to her mother (R. 1515), and that the herringbone necklace introduced at trial was "identical" to the one her mother wore (R. 1495). Mr. Pettibone, the victim's husband, also identified the necklace (R. 1525).

On March 1, 1989, Mr. Geralds was arrested. Mr. Geralds consented to the search of his motel room and automobile. During the search of his motel room, the police retrieved a pair of Nike sneakers (R. 1711). Analyst Rousseau testified that she conducted a presumptive test for blood on Mr. Geralds' shoes and a small area on his left shoe tested

[2]In closing argument, the prosecutor argued that Mr. Geralds did not know whether the chain was real because he had stolen it from the victim (R. 2056).

positive (R. 1721). On cross examination, defense counsel asked Analyst Rousseau:

> Q: To your knowledge was any further testing done with regard to those items in front of you?
> A: Not to my knowledge, I don't know, I have not seen the shoes since then.

(R. 1722-3). Also, FDLE Analyst Kenneth Hoag testified that he compared some of the shoe impressions from the crime scene to Mr. Geralds' shoes and those shoes "could have made the tracks" at the scene (R. 1728). However, Analyst Hoag found no "individual characteristics within the patterns" at the crime scene (Id.).

During the search of Mr. Geralds' automobile, the police retrieved some plastic ties. Clifford Hutchinson testified that the ties found in Mr. Geralds' automobile as well as one of the ties found at the scene were Thomas Industries ties (R. 1701-2).

Later that day, after obtaining a pawn receipt from Mr. Geralds' wallet, a herringbone chain was retrieved from a pawn shop (R. 1745). There appeared to be blood on the necklace (R. 1750).[3] FDLE Analyst Shirley Ziegler testified that the substance on the chain was blood and it was consistent with the victim's blood type and 5 enzymes (R. 1784).

[3]No DNA testing was conducted on the necklace. Prior to his trial, Mr. Geralds requested that DNA analysis be conducted on the necklace, but the State represented that the sample was too limited for DNA testing (R. 2).

Following Mr. Geralds' arrest for murder, the jury heard that he escaped from the Bay County Jail two weeks before his trial commenced (R. 1895).

Trial counsel did not present any evidence.

The jury convicted Mr. Geralds as charged and the following day, a brief penalty phase occurred and the jury recommended death. Mr. Geralds was sentenced to death.

On appeal, this Court vacated the death sentence and remanded for a new sentencing proceeding due to the prosecutor's improper references to Mr. Geralds' prior non-violent convictions. Geralds v. State, 601 So. 2d 1157, 1162 (Fla. 1992). After vacating Mr. Geralds' death sentence, this Court also struck the aggravators that the crime was committed to avoid arrest and that the crime was committed in a cold, calculated and premeditated manner. Id. at 1164.

At the re-sentencing proceeding, during his opening statement, trial counsel promised the jury that they would "learn and . . . hear that Mark Geralds is not the person that killed Tressa Pettibone." (R2. 336).

In the prosecution's case-in-chief, many of the same witnesses were called who had previously testified at the original trial. However, the prosecution also presented the extensive testimony of Investigator Bob Jimmerson. Inv. Jimmerson testified on behalf of several other witnesses including Analyst Rousseau, Clifford Hutchinson, Douglas Freeman, Vicky Ward and others. He told the jury that his

testimony was based on previous testimony, reports and what he had been told.

Indeed, Inv. Jimmerson unequivocally testified that the ties used to bind the victim's hands and the ties found in Mr. Geralds' automobile were Thomas Industry ties and that only 30,000-40,000 of those ties were produced a year (R2. 380, 403-4); that the shoe treads from Mr. Geralds' Nike shoes were the "particular tracks" he saw in the Pettibone home (R2. 402); that Mr. Geralds' grandfather saw Mr. Geralds' wearing gloves when he arrived at his home on February 1, 1989 (R2. 409); that Mr. Geralds was not working on a fiberglass boat on February 1, 1989 (R2. 409); that Mr. Geralds had taken a pair of red Bucci sunglasses to Vicky Ward on February 1, 1989 (R2. 410); that presumptive testing occurred on Mr. Geralds' Nike shoes and that the test indicated blood on the left shoe (R2. 413-4).

Inv. Jimmerson was also questioned about William Pelton, and he told the jury that he had confirmed Pelton's alibi for February 1, 1989 (R2. 421, 443). And, that there was no indication from the crime scene that more than one person was involved in the crime (R2. 441).

Rather than call Dr. Sybers, the medical examiner who testified in Mr. Geralds' trial and who conducted the autopsy, the prosecution presented the testimony of Dr. James Laurdison. Dr. Laurdison's testimony concerning cause and manner of death were consistent with Dr. Syber's findings.

However, Dr. Laurdison's testimony differed as to the number of blunt force injuries – he estimated between 10 and 15 (R2. 547). He believed the injuries were made by a fist or by a foot (R2. 564).

The prosecution also presented the testimony of Blythe and Bart Pettibone and read the jury the testimony of Ward and Danford. Defense counsel did not cross-examine Blythe and he requested that the prosecution not read the cross examination of Ward or Danford from the original trial.

In mitigation, trial counsel presented the testimony of Mr. Geralds' friend, Scott Hobbs who told the jury that Mr. Geralds was non-violent (R2. 626). Mr. Hobbs also discussed a time when his parents divorced and Mr. Geralds tried to take his mind off of his family problems (R2. 625). Mr. Geralds' former employer, Don Harlan testified that Mr. Geralds was a good worker (R2. 873). Mr. Harlan also briefly described that Mr. Geralds' changed after his parents divorced (R2. 675-6).

James Beller testified that he met with Mr. Geralds for a clinical interview and also administered a few tests to him (R2. 736). Based on the testing and interview, Mr. Beller diagnosed Mr. Geralds with bi-polar disorder and anti-social personality disorder (R2. 738). Mr. Beller also believed that Mr. Geralds was depressed from a young age (R2. 743).

Mr. Geralds testified and explained that he and his wife divorced because of the difficulties she had in being associated with him (R2. 699). Mr. Geralds also told the jury

that his parents had divorced when he was 15 years old (R2. 702). Mr. Geralds explained that at this time in his life it was very difficult and he got involved with a bad crowd (R2. 704-5).

Mr. Geralds told the jury that his ex-wife and daughter were threatened by Pelton (R2. 710). Specifically, Pelton told his ex-wife that "if Mark says anything to the police . . . something is going to happen to you and Jordan" (Id.). McGowan delivered a similar message to Mr. Geralds' ex-wife (R2. 711).

Finally, Mr. Geralds denied killing the victim (R2. 717).

Trial counsel also presented the testimony of Pelton. Pelton knew Mr. Geralds for several years, but denied having anything to do with the crimes (R2. 656). Pelton also denied threatening Mr. Geralds' family (R2. 643). Likewise, McGowan denied having made threats to Mr. Geralds' ex-wife (R2. 667).

The jury recommended the death penalty (R2. 858), and the trial court sentenced Mr. Geralds to death, finding three aggravators: the crime was committed in the course of a robbery or burglary; the crime was heinous atrocious and cruel; and the crime was cold, calculated and premeditated manner (R2. 366-76).

On direct appeal, this Court affirmed the death sentence, but struck the cold, calculated and premeditated aggravating factor because the evidence was insufficient to establish the aggravator. Geralds v. State, 674 So. 2d 96, 104 (Fla. 1996).

B. **THE POSTCONVICTION PROCEEDINGS**

1. The Undisclosed Exculpatory Evidence

During the evidentiary hearing, Mr. Geralds' introduced 52 documentary exhibits and a photograph in support of his claims.[4] Based upon the testimony provided by the trial prosecutor it is indisputable that many handwritten notes were not disclosed to Mr. Geralds' trial counsel. Additionally, FDLE notes and reports were not disclosed.

As to the notes, the trial prosecutor specifically testified that he did not believe he disclosed Defense Exhibits 1, 7, 11, 13, 16, 23, 28 (PC-R. 2303). Furthermore, he testified that Defense Exhibits 31, 32, 34, which consisted on handwritten notes by FDLE analysts, were not disclosed (PC-R. 2701).

Additionally, reports from Analysts Ziegler, dated April 3, 1989, and Smith, dated January 25, 1990 were not disclosed. See R. 2242-7, 2263, 2267, 2275-80, 2283-93, 2325, 2331, 2335-7.

The notes that were not disclosed dealt with several trial issues, including the victim's family's description of the jewelry that was missing following the crime; the descriptions did not include a herringbone necklace similar to the one obtained from Danford at the pawn shop.[5] See Def. Ex.

[4]One of the 52 documentary exhibits was trial counsel's file which has not yet been sent to this Court.

[5]Blythe testified in her deposition that law enforcement informed her that they wanted her to travel to the pawn shop

1. Also, the Bucci sunglasses that were obtained from Vicky Ward were not included on the list of missing items. Id. After Mr. Geralds was arrested on March 1, 1989, and a pair of sunglasses were recovered from Ms. Ward, law enforcement "updated" the list of missing items to include a pair of red Bucci sunglasses. Id. However, the herringbone necklace that was obtained later that day was still not identified as being missing. Id.

Also, in regard to the herringbone necklace, notes were not disclosed of an interview with Tony Swoboda, a jeweler, which occurred on January 26, 1990, three days before Mr. Geralds' capital trial commenced.[6] Swoboda confirmed to law enforcement that he had previously sold Mr. Geralds' a herringbone necklace "under the table".[7]

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with them because they had recovered the herringbone necklace that the family had identified as missing. See Defense Ex. 3. However, the herringbone necklace that was recovered did not match the description of the missing herringbone necklace.

[6]Trial counsel was aware of Swoboda because Mr. Geralds had informed him that he had received the herringbone necklace from him prior to the crimes (Def. Ex. 5). And, Inv. Jimmerson's told trial counsel that he was aware of information that Swoboda had previously sold Mr. Geralds the herringbone necklace (Def. Ex. 48). However, the interview with Swoboda did not occur until after Inv. Jimmerson's deposition. Indeed, as of January 3, 1990, no one had yet spoken to Swoboda to confirm Mr. Geralds' statement (Def. Ex. 50).

[7]The trial prosecutors conceded that Mr. Geralds' purchase of a chain "under the table" could explain why he would ask Danford if the chain was real when it was pawned (PC-R. 2245, 2347).

Indeed, Swoboda testified at the evidentiary hearing that he knew Mr. Geralds and that he had fixed a couple of pieces of jewelry for him over the years and sold him a gold herringbone necklace (PC-R. 2546). Swoboda sold Mr. Geralds the chain several months before the crimes at issue (PC-R. 2547).

Likewise, a note indicating that a pawn ticket had been recovered from Mr. Geralds' wallet on March 8, 1989, conflicted with testimony from witnesses who told the jury that the necklace was recovered on March 1, 1989. And, the records obtained from the jail also failed to reflect that Mr. Geralds had a wallet when he was arrested (Def. Ex. 46).

The trial prosecutor also testified that notes from witness interviews concerning Pelton's alibi were not disclosed. The notes revealed that in fact no one could provide an alibi for Pelton the day of the crimes. See Def. Ex. 13. This information was not disclosed to trial counsel in a written report and it was contrary to Inv. Jimmerson's testimony and report. See R2. 422.

Based on the notes, David Meadows testified at the evidentiary hearing. Meadows was Pelton's supervisor at the time of the crimes (PC-R. 2325). Meadows testified that his employees' time records were not always accurate, but "would [note] the hours they were credited with working that day but any time during the course of those hours, depending on who that person was and what their needs might have been, they

could come and go from the club." (PC-R. 2328). As to Mr. Pelton, Meadows recalled that he had freedom to "come and go" (Id.). Meadows also confirmed that while renovating Club La Vela, plastic ties were used to bind cables (PC-R. 2330).

In addition, the prosecutors did not disclose handwritten notes from FDLE analysts because they were not provided to the prosecution (PC-R. 2292, 2303, 2305). See Def. Exs. 23, 28. Some of the notes indicated that a bloody handkerchief was found at the crime scene (PC-R. 2292). Serological analysis determined that the blood on the handkerchief was ABO type "O", which was neither the victim's blood type nor Mr. Geralds' (PC-R. 2293). See also Def. Ex. 28. A suspect in the case, Kenneth Dewey Mayo, who was a former employee of the Pettibone Construction Company and a relative of the victim's step-mother-in-law was blood type "O" (Def. Exs. 20, 44).[8]

As to the serological analysis, Inv. Plenge told counsel, during his deposition, that the blood analysis from the various items found at the crimes scene matched the victim (Def. Ex. 47). Analyst Ziegler's report also contained information concerning the serological testing that was conducted on Mr. Geralds' Nike sneakers. Analyst Ziegler noted that no human blood "could be demonstrated" (Def. Ex. 20).

[8]Mayo was seen with scratches on his face shortly after the crimes occurred (Def. Ex. 44).

Other notes, from Analyst Smith, concerning the hair analysis evidences that hair found in the victim's left hand[9], and on her body, matched neither Mr. Geralds' nor the victim.[10] This information was not disclosed to trial counsel.[11] Analyst Smith's name was turned over to trial counsel in discovery, five days before trial commenced (R. 2326). However, his report, dated the next day, was not disclosed (Def. Ex. 36).[12]

As to evidence obtained from the crime scene, specifically the photographs, the trial prosecutor testified that it was trial counsel's responsibility to obtain the photos (PC-R. 2286). At the evidentiary hearing, a photo was admitted that appeared to show a different tread pattern at the crime scene than the tread pattern of Mr. Geralds' sneakers (PC-R. 2492; see Def. Ex. 25).

The trial prosecutor also testified that he did not possess the criminal records concerning witness Danford (PC-R. 2248).

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[9]According to the notes, "several" hairs were removed from the left hand of the victim (Def. Ex. 34).

[10]It was critical that the notes of the hair analysis be disclosed to trial counsel because only the notes reveal that the hair found in the victim's left hand did not match the victim.

[11]While Analyst Ziegler's name was disclosed in discovery, her April 14, 1989, report, regarding the results of the serological analysis was not. See R. 2242-7, Def. Ex. 20.

[12]The report revealed the results of the comparison of the unknown hairs to Mr. Geralds' but did not include information concerning the victim's known hairs. See Def. Ex. 36.

A few days before Mr. Geralds' capital trial began, trial counsel deposed Danford, owner of the pawn shop. During Danford's deposition, he denied having a criminal record. See Def. Ex. 9. However, undisclosed records reveal that Danford had been cited shortly before Mr. Geralds' capital trial for failing to properly document the transactions in his shop. See Def. Ex. 8. Danford's charges were resolved after he provided statements implicating Mr. Geralds but, before Mr. Geralds' trial. Id.

Prosecutor Grammer testified that had defense counsel known of the criminal charges and the favorable resolution of those charges for Danford, he could have attacked Danford's credibility and argued that Danford had testified against Mr. Geralds in order to curry favor with the prosecution (PC-R. 2253).

Furthermore, after Mr. Geralds' trial, but before his re-sentencing, Danford was investigated by the same prosecuting authority that was involved in Mr. Geralds' case (Def. Ex. 10).

2. The Disclosed Exculpatory Evidence

Trial counsel, Robert Adams was appointed to represent Mr. Geralds on March 14, 1989 (R. 2231). After being appointed, on July 7, 1989, Mr. Adams wrote to judge presiding over Mr. Geralds' case to inform him that he was "very ill" and had "not yet had the opportunity to start deposing prospective witnesses." (R. 2268-70). In fact, few

depositions were taken in Mr. Geralds' case. And, those that were taken occurred within weeks of trial.[13]

In September, 1989, 5 months before Mr. Geralds' capital trial, Mr. Adams' doctor sent a letter to the Court informing the Court: "Mr. Adams has been followed by me for viral hepatitis which often, as in this case takes somewhat of a protracted course and limits the patient's activities. Mr. Adams is still significantly ill and may only hold a part-time work schedule at this time." (R. 2274). Still, no depositions had been taken.

During trial, trial counsel had exculpatory information at his fingertips but failed to use it. For example, while Analyst Hoag testified at trial, trial counsel failed to question him about the number and location of the unidentified finger and palm prints that were found at the crime scene (Def. Exs. 26, 27, 31). Several of the prints which did not match Mr. Geralds, the victim, or her family, were located near the victim's body and on and around her jewelry box (Id.). Likewise, four prints were obtained from the victim's stolen automobile that were not matched to Mr. Geralds, the victim or her family (Id.).

[13]Trial counsel took Inv. Jimmerson and Plenge's depositions on November 30, 1989 (Def. Exs. 47, 48). Trial counsel took Kevin, Blythe and Bart Pettibone's depositions on January 3, 1990, three weeks before trial (Def. Exs. 3, 49, 50). Trial counsel took Danford's deposition on January 23, 1990, less than a week before trial (Def. Ex. 9). No FDLE analysts were deposed.

Also, during Blythe's statement to law enforcement, which occurred after Mr. Geralds was arrested for the crimes, she related the conversation that she had overheard when she and mother had encountered Mr. Geralds at the mall. During the conversation, the victim told Mr. Geralds that she was going to be visiting her husband in North Carolina next month (Def. Ex. 4). During Bart's deposition, he too discussed his conversation with Mr. Geralds at the mall. Bart told trial counsel that Mr. Geralds asked if the family still lived in the same house and when his dad was returning from his trip (Def. Ex. 49). These statements were inconsistent with the witnesses' trial testimony, yet, trial counsel failed to address the inconsistencies.

Likewise, Inv. Jimmerson's initial report contained conflicting information regarding the victim's sunglasses which were recovered in her stolen automobile (Def. Ex. 12).

Trial counsel was also aware that law enforcement had discovered that the tie straps used to bind the victim's hands were readily available in the construction community (Def. Exs. 12, 15, 42). And, that because Mr. Geralds was an electrician, it was not unusual for him to possess tie straps (Def. Ex. 15).

3. The Crime Scene

Stuart James, an expert in crime scene reconstruction, bloodstain pattern analysis and examination of physical

evidence testified at the evidentiary hearing. One area of inquiry concerned the value of presumptive blood testing:

> [C]ollectively presumptive tests are a very preliminary screening test for blood. They are not specific for blood. They will react with many peroxidase type materials like plant materials, vegetable materials and they will react to different degrees with bleaches, with iron oxides, meaning rust and things of that sort. Certain paints that contain, perhaps, lead and other metals can give positive a result to, well, especially to luminol. So for that reason the forensic community designates that any presumptive tests or collection thereof is nothing more than an indicator that blood may be present and that further testing is necessary before one can state with any certainty that the substance is blood.

(PC-R. 2487). Therefore, any testimony that a presumptive test that demonstrated a positive result meant that blood was present is false (PC-R. 2488). Mr. James also testified that presumptive testing is routinely inadmissible in court proceedings unless a confirmatory test has been performed to verify the results (PC-R. 2491). Trial counsel did not challenge the testimony about presumptive testing at Mr. Geralds' trial.

As to bloodstain analysis, Mr. James disagreed with Analyst Johnson's trial testimony concerning her conclusion that the victim was kneeling at the time of the trauma (PC-R. 2482). Mr. James explained that based on the bloodstain identified by Analyst Johnson, there was no way to tell the position of the victim at the time of the blood spatter (PC-R. 2485).

Mr. James was also asked to compare Defense Exhibit 25, which was admitted during the evidentiary hearing, with State Exhibits J-48, J-49, and J-50, which were introduced during Mr. Geralds' capital trial. All of the photos illustrated bloody shoe print impressions from the crime scene (PC-R. 2491-2). Mr. James testified that the shoe print illustrated in Defense Exhibit 25 appeared to be a different design than the shoe print seen in the photos introduced at Mr. Geralds' trial (PC-R. 2492).

Mr. James believed that the fingerprints and palm prints found near the body were scientifically relevant to the prosecution (PC-R. 2495). Similarly, the fact that the victim had hair in her hands that did not match Mr. Geralds' was a significant finding due to the condition of the victim and the crime scene (PC-R. 2496).

As an experienced criminalist, Mr. James believed that while it was clear that the perpetrator(s) had blood on his shoes, the quantity of blood at the crime scene increased the possibility that the perpetrator would have had blood on his clothing (PC-R. 2494). Trial counsel failed to present evidence showing that Mr. Geralds did not have blood on his clothes or appear to have been in a struggle when he was seen on the day of the crimes.

Indeed, Sheila Freeman, Mr. Geralds' aunt, was present at her father's house on the morning of February 1, 1989 (PC-R. 2223). She observed Mr. Geralds and did not notice any blood

or anything that indicated that he had been in a struggle (PC-R. 2223-4). Trial counsel never interviewed Ms. Freeman, but on the first day of Mr. Geralds' trial, he told her he may ask her to testify, so he sent her home (PC-R. 2224). However, he did not call her to testify (Id.).

4. "The Medical Examiner Problem"

At the evidentiary hearing, Mike Stone, a former assistant public defender, testified. Mr Stone was employed by the Office of the Public Defender for the Fourteenth Judicial Circuit in 1989, when Mr. Geralds' was indicted (PC-R. 2404). Mr. Stone left his employ in October of 1992, due to the "controversy over the Sybers matter" (PC-R. 2407). Mr. Stone explained that in the course of representing a capital defendant he learned that Dr. Sybers was under investigation for murder by the same state attorney's office that was prosecuting his clients (Id.).

In 1992, the Chief Assistant Public Defender told Mr. Stone that: "I think we have, Jim (Appleman) and I have managed to solve the medical examiner problem." (PC-R. 2414). And, the solution was to bring in other people (Id.).

5. Mitigation

Mr. Geralds' older sister, Lisa Johnson, testified at the evidentiary hearing. Ms. Johnson described her brother's personality as a child by saying that he "liked to do daredevil type things and he wasn't afraid of anything" (PC-R. 2432), and he was "reckless" (PC-R. 2434). Also, Mrs. Johnson

remembered that her brother had trouble in school – he did not want to be there (PC-R. 2433). Teachers often contacted Mr. Geralds' parents; one teacher suggested that their son see a psychiatrist (Id.). However, Mr. Geralds' father refused to take him to see a mental health professional (Id.).

Mr. Geralds' reckless behavior increased as he got older (PC-R. 2434). Mr. Geralds' began speeding and getting into auto accidents (Id.).

When Mr. Geralds was 15 years old his parents divorced and the divorce affected him the most of any of the children (PC-R. 2435). Mr. Geralds did not have anyone to help or support his (Id.). Mrs. Johnson noticed her brother having mood swings (Id.). A few years later, Mrs. Johnson learned that her brother did not have a place to live (PC-R. 2437).[14]

Vicki McCann also knew Mr. Geralds and saw the effect his parents' divorce had on him (PC-R. 2442). She recalled that after the divorce, Mr. Geralds became withdrawn and depressed (PC-R. 2442-3). It was during this time frame that Mr. Geralds told her that he felt like he did not fit in (PC-R. 2443).

Kenneth Scott Hobbs testified that he had known Mr. Geralds since they were young children (PC-R. 2528). Mr. Hobbs recalled that Mr. Geralds was a hyper teenager and a risk taker, though good-natured (PC-R. 2530). Mr. Hobbs never

[14]When Mr. Geralds was homeless he often showered at family members' homes (Id.).

saw Mr. Geralds' lose his temper (PC-R. 2531). Mr. Hobbs also recalled that Mr. Geralds' personality reminded him of his (Mr. Hobbs') wife's personality – she was diagnosed with bi-polar disorder (PC-R. 2532). Like his wife, Mr. Geralds appeared to experience extreme highs and lows, as well as sharing other similar personality traits (PC-R. 2532).

Shortly before the crimes occurred, Mr. Hobbs heard that Mr. Geralds was living on the street and met him for lunch (PC-R. 2542). Mr. Hobbs recalled that Mr. Geralds was manic – his personality was magnified (PC-R. 2536-7).

Additionally, James Beller, a psychologist testified. Mr. Beller had previously diagnosed Mr. Geralds as suffering from a bipolar and anti-social personality disorder (PC-R. 2566). However, when Mr. Beller initially diagnosed Mr. Geralds he did not have any collateral evidence to rely upon and primarily relied upon psychological test results (PC-R. 2567). After a much more comprehensive evaluation, Mr. Beller testified that Mr. Geralds is primarily a manic bipolar type (PC-R. 2566). Mr. Beller explained that "[t]o really diagnose bipolar it is important to have collateral contacts." Usually, we talk to family members, spouse, parents so on, so forth. We look for a genetic pattern which is very often present." (PC-R. 2567).

After conducting an evaluation that included interviews with family members and friends, Mr. Beller explained that Mr. Geralds was an impulsive, reckless child and "would have been

diagnosed as an attention deficit hyperactivity disorder, impulsive type." (PC-R. 2569). Mr. Beller described children like Mr. Geralds as needing "a lot of structure"; having difficulty planning and paying attention (PC-R. 2570). Mr. Beller also learned that Mr. Geralds' mental health disorder was genetically linked and other family members also suffered from bipolar disorder (PC-R. 2580).

Mr. Beller testified:

> Mark was born with a disorder, was born with a problem that would take more than parenting to fix. The best parents in the world are going to have problems with a child like that. But being like that there were bound to be conflicts, conflicts certainly with one parent or with both. You know, if there us a genetic history of emotional problems in the family going back one, two, three generations, and if the parents have, you know, their own kind of emotional issues to deal with, it's going to make that just worse. SO, you know, whatever negative stuff is there, whatever faults, inabilities that any of us have as parents, in a situation like that they're going to be magnified and they're going to manifest in the extreme as the situation becomes more and more dysfunctional.

(PC-R. 2580).

Mr. Beller also explained that the divorce of Mr. Geralds' parents had an affect on him because Mr. Geralds lost his structure and he was poorly equipped to deal with the tasks he was forced to deal with (PC-R. 2572).

Mr. Beller explained that when he was asked to evaluate Mr. Geralds at the time of his re-sentencing, the only materials trial counsel provided was "just anecdotal stuff" during the brief communications with trial counsel (PC-R. 2581). For example, Mr. Beller was unaware that one of Mr.

Geralds' teachers suggested that he see a psychiatrist (PC-R. 2592), or that a family member had been diagnosed with bi-polar disorder.

Mr. Beller also recalled that at the time of Mr. Geralds' re-sentencing, trial counsel, Mr. Adams was having health difficulties (PC-R. 2582). Trial counsel confided in Mr. Beller that he was very ill (PC-R. 2582).

SUMMARY OF ARGUMENT

The jury that convicted Mr. Geralds only heard part of the evidence. There was much exculpatory evidence that the jury never heard. If the State failed to disclose the evidence or trial counsel failed to present it, confidence in Mr. Geralds' conviction has been undermined. Based on the evidence that was presented to the lower court, the prosecution's trial theory is flawed, including the theory of who committed the crimes.

Similarly, confidence has also been undermined in Mr. Geralds' sentence of death. Trial counsel failed to present important mitigation, Meanwhile, the prosecution presented false and misleading testimony to the jury.

ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. GERALDS' CLAIM THAT HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

In order to ensure that a constitutionally sufficient adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. 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 v. Maryland, 373 U.S. 83, 87 (1963). In Strickler v. Greene, 527 U.S. 263, 281 (1999), the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." See Hoffman v. State, 800 So. 2d 174 (Fla. 2001); State v. Huggins, 788 So. 2d 238 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001). The State has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Strickler at 281. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a

"reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding

would have been different." Bagley, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995); Strickler v. Greene, 527 U.S. at 289-90.

This Court has indicated that the question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So.2d 553 (Fla. 1999). If it did, a new trial is warranted where confidence is undermined in the outcome of the trial. In making this determination "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So. 2d at 385. This includes impeachment presented through cross examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446.

The lower court's order denying Mr. Geralds' claim is flawed in several respects. First of all, the lower court's determination that Mr. Geralds did not show that several documents were suppressed is clearly rebutted by the record. Likewise, the court's prejudice analysis is made item by item and ignores the impact of the evidence to Mr. Geralds' case.

Also, the lower court fails to address many of the documents introduced at the hearing that the State conceded were undisclosed.

As to the Brady portion of Mr. Geralds' claim, the lower court only individually addresses Defense Exhibits 1, 5[15], 7, 8, 10, 13, 20, 25, 33 and 37.

Defense Exhibit 1 is the list with descriptions of the missing jewelry from the victim's home. As to Defense Exhibit 1, the lower court states that "because there is no showing that [the exhibit] was not contained" in the 543 pages of investigative material that were provided to defense counsel, there is no Brady violation (PC-R. 1747). However, the lower court ignores the prosecutor's testimony that the handwritten notes concerning the description of the missing jewelry was not disclosed (PC-R. 2303). At trial, the prosecution elicited testimony about the victim's family members providing a list of missing items of jewelry. One of those items was a herringbone necklace. However, Defense Exhibit 1 makes clear that the herringbone necklace described by the family as missing was not the necklace that was recovered from the pawn shop.

[15]Defense Exhibit 5 is actually a note authored by counsel during an interview with Mr. Geralds. Thus, the note is not Brady material.

The lower court also finds that Mr. Geralds did not establish that Defense Exhibit 20, Analyst Ziegler's April 3, 1989, report, was not provided with the April 14, 1989, materials (PC-R. 1748). However, it is undisputed that the State filed a series of detailed discovery responses, identifying all of the statements and reports of various witnesses. See R. 2242-7, 2263, 2267, 2275-80, 2283-93, 2325, 2326, 2331, 2335. The trial prosecutor indicated at trial and during the evidentiary hearing that he specifically listed what was disclosed (R. 1603; PC-R. 2300). Thus, while the prosecutor believed that he disclosed the report, he had no independent recollection of doing so (PC-R. 2683), and it is not listed on any of the discovery responses. Indeed, Analyst Ziegler's report was issued just over a week before the first discovery submission. And, her report was sent to the law enforcement, not the prosecutor. See Def. Ex. 20. Thus, Mr. Geralds submits that he established that the report was suppressed.[16]

Considering the exculpatory value of Analyst Ziegler's test results, that she testified at trial and that trial counsel did not ask a single question about the serological analysis, except as to the herringbone necklace, it is

[16]Should this Court find that the report was disclosed, then trial counsel was ineffective for failing to present the most exculpatory piece of evidence in the case, i.e., that there was a handkerchief found at the crime scene, near where a struggle occurred with blood on it that matched neither Mr. Geralds nor the victim's blood type.

unfathomable that trial counsel would not have used the evidence of the bloody handkerchief in arguing that Mr. Geralds' did not committ the crime. As the lower court pointed out in denying Mr. Geralds' ineffective assistance of counsel claim, trial counsel's closing argument makes clear that he was pursuing a defense that someone other than Mr. Geralds committed the crime (PC-R. 1742-3).

Indeed, the bloody handkerchief, in and of itself, demonstrates that someone other than Mr. Geralds struggled with the victim. The perpetrator was injured in the struggle and used the handkerchief to wipe or cover his or her wounds. The bloody handkerchief undermines confidence in the outcome of Mr. Geralds' conviction and sentence.[17]

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[17]If Mr. Geralds was present at the scene but did not harm the victim, then the analysis of culpability, statutory aggravators and mitigation is changed. In Enmund v. Florida, 458 U.S. 782 (1982), the Supreme Court established that the individualized sentencing that is required by the Eighth Amendment before the death penalty may be imposed must include a consideration of a particular defendant's culpability:

> The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence, which means that we must focus on "relevant facets of character and record of the individual offender.

458 U.S. at 798 (citing Lockett v. Ohio, 438 U.S. 586 (1978), and Woodson v. North Carolina, 428 U.S. 280 (1976)). The Supreme Court in Enmund concluded that the Eighth Amendment prohibits imposition of the death penalty for a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to

Furthermore, the fact that trial counsel was provided lists of the evidence collected from the scene and knew that "a white handkerchief with suspected blood" was collected does not relieve the prosecution of disclosing Analyst Ziegler's report. Indeed, the report is exculpatory because the serological analysis of the handkerchief was conducted and the results indicated that blood belonged to neither Mr. Geralds nor the victim (Def. Ex. 20). It is not the existence of the handkerchief that is material; it is the results of the serological analysis that are material.

Analyst Ziegler's report also makes clear that no blood could be demonstrated on Mr. Geralds' Nike sneakers (Def. Ex. 20). Yet, the jury heard that the shoe tested positive for blood by Analyst Rousseau, during presumptive testing (R. 1721). Again, this evidence was exculpatory to Mr. Geralds as there was no direct evidence tying him to the crimes. Certainly, the fact that no blood was found during serological testing could have been used by the defense to rebut Analyst Rousseau's testimony. And, additionally, could have been used by the defense to argue that the perpetrator who had struggled with the victim and walked through the bloody scene would have had blood on his shoes.

As to Defense Exhibit 25, the lower court determined that because trial counsel had access to the photograph, Mr.

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kill, or intend that a killing take place or that lethal force will be employed." Id. at 797.

Geralds' could not prove a Brady violation occurred (PC-R. 1748). The lower court's analysis is incorrect. In Strickler v. Greene, 527 U.S. 263, 281 (1999), the Supreme Court found items to have been suppressed and a Brady violation to have resulted when the prosecution failed to turn over exculpatory evidence, even though employing an "open file policy". The Supreme Court made clear that it is reasonable for defense counsel to rely on the "presumption that the prosecutor would fully perform his duty to disclose all exculpatory evidence." Id. at 284. Thus, the fact that trial counsel had "access" to the photograph is not sufficient to establish disclosure.

Throughout the trial and re-sentencing, the jury was specifically told and it was argued that there was no evidence at the crime scene indicating that anyone other than Mr. Geralds was present (R. 441). That testimony was false. Not only could another shoe print, that did not match Mr. Geralds, have supported the defense theory that Mr. Geralds did not commit the crime. It would also cast a shadow on the prosecution's theory of the case and law enforcement's investigation. See Kyles v. Whitley, 514 U.S. 419, 446 (1995).

Defense Exhibit 7 is Inv. Jimmerson's handwritten note, from his January 26, 1990, interview with Swoboda which confirmed Mr. Geralds' statement that he had purchased the herringbone necklace from Swoboda months prior to the time of the crimes. The lower court did not determine whether the note had been disclosed, because the court determined that

there is no prejudice. The lower court believed that because trial counsel knew of Swoboda and listed him as a witness on behalf of Mr. Geralds, there could be no prejudice. There is no doubt that trial counsel was aware of Swoboda and his importance to the case. Mr. Geralds' had told his counsel that he had purchased the herringbone necklace from Mr. Swoboda. See Def. Ex. 5.

However, it was not only that trial counsel was aware of the Swoboda's existence or that he could corroborate his client, but that the prosecution had confirmed Mr. Geralds' statement three days prior to trial. Had trial counsel known that Inv. Jimmerson had interviewed Swoboda, he could have cross-examined him about his knowledge that Swoboda corroborated Mr. Geralds' statement. Certainly, Mr. Geralds' credibility would have increased. Also, Swoboda told Inv. Jimmerson that he had sold the chain "under the table" to Mr. Geralds, which would also have explained why Mr. Geralds' asked Danford if the chain was real. Trial counsel could have eliminated or countered the prosecutor's argument that Mr. Geralds asked the question because the chain had been stolen from the victim. See PC-R. 2245.

Also, Swoboda's information had additional, powerful exculpatory value. First, the fact that Mr. Geralds' pawned the necklace rather than sold it outright makes more sense in light of the fact that it was his necklace and not stolen from the victim. Had Mr. Geralds sold the necklace to Danford

rather than pawned it, the necklace would have earned Mr. Geralds more money (R. 1758). It is logical that had the necklace belonged to Mr. Geralds, he would have rather pawned it, so that he could attempt to re-purchase it in the future.

The lower court failed to address the exculpatory nature of the information Inv. Jimmerson obtained from his interview with Swoboda. It is simply not enough that trial counsel be aware of a witness' potential testimony, when the State has actually obtained the exculpatory information. See Banks v. Dretke, 124 S.Ct. 1256, 1278 (2004); Kyles v. Whitley, 514 U.S. 419 (1995). Defense Exhibits 8 and 10 concern prosecution witness Danford and his having been arrested and investigated by the same prosecuting authority that was prosecuting Mr. Geralds. The lower court simply finds that "there is no evidence of any deal between the State and Billy Danford" and that Mr. Geralds does not deny pawning the necklace, thus there is no prejudice (PC-R. 1747). The lower court's analysis is in error. First, the trial prosecutor admitted that the exhibits concerning Danford were not disclosed (PC-R. 2248).[18]

In addition, Defense Exhibits 8 and 10 illustrate that Danford 1) was charged with three separate offenses, two of

[18]Pre-trial, defense counsel requested criminal histories on prosecution witnesses (R. 5). The State objected and the trial court sustained the objection in part, requiring the State to disclose those criminal histories it had in its file (R. 6).

which occurred during Mr. Geralds' prosecution and were resolved favorably for Danford prior to Mr. Geralds' trial. And, 2) Danford lied to trial counsel during his deposition. Had trial counsel known of Danford's criminal charges he could have attacked his credibility by showing the jury that Danford had lied under oath and also questioned Danford about his bias in desiring to please the State. Therefore, it was irrelevant whether there was a "deal" with Danford or not. The lower court's order ignores the United States Supreme Court's recognition that the possibility of reward or a witness' desire to please the State provides "a direct, personal stake in [a] conviction" and can "strengthen any incentive to testify falsely" United States v. Bagley, 473 U.S. 667, 683 (1985).

Also, whether or not Mr. Geralds disputes that he actually pawned the necklace is irrelevant.[19] At trial, trial counsel was unaware of any evidence to establish that Mr. Geralds' did not actually pawn the necklace. However, had he been aware that

Danford was involved in receiving stolen property, and had been charged with crimes concerning improperly documenting transactions, trial counsel may have determined that he could dispute Mr. Geralds' alleged pawning the necklace.[20] This

[19]Mr. Geralds did dispute this issue at his re-sentencing. See R2. 726.

[20]Mr. Geralds' jail records do not reflect that he possessed a wallet at the time he was arrested. See Def. Ex. 46.

Court must "consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So. 2d 373, 385 (Fla. 2001).

And, as to Defense Exhibit 10, it is clear that following Mr. Geralds' conviction, but prior to his re-sentencing, Danford was again a target of an investigation by the same prosecuting authority that prosecuted Mr. Geralds'. The investigation appears to have been in much greater depth with information that Danford was engaged in receiving stolen property (Def. Ex. 10). Again, Danford was not prosecuted.

Defense Exhibit 13 evidences an interview that occurred between Inv. Jimmerson and Greg Toirac on January 27, 1990, two days before Mr. Geralds' trial commenced. Neither the notes or the substance of the interview was revealed to defense counsel. The lower court held that trial counsel was aware of Toirac because he was listed as a prosecution witness. Indeed, defense counsel knew of Toirac. See R. 2325. However, trial counsel's knowledge of Toirac was that he provided an alibi for the whereabouts suspect William Pelton.

The notes from the interview that occurred five days after Toirac was listed as a prosecution witness reflect that Toirac was not as certain as Inv. Jimmerson's written report indicated. In fact, Toirac made clear that Pelton's time for the day of the crimes was written by Dave Meadows and not

Pelton. No formal time keeping device was utilized. Neither Meadows name nor an accurate reflection of the "alibi" was provided to defense counsel in discovery. Trial counsel proceeded to trial and the re-sentencing, under the impression that Toirac was prepared to offer an alibi for Pelton.

Had trial counsel known that Pelton's alibi was simply that Meadows had written in hours that only reflect how many hours Pelton had worked and not what times he had worked, and that Pelton would often come and go from work (PC-R. 2328), trial counsel could have legitimately pointed the finger at Pelton as having committed the crimes.[21]

As stated previously, as to the evidence the lower court addresses, the court's analysis is in error. In determining the merits of Mr. Geralds' claim under Brady, the court was required to determine whether in the absence of the evidence Mr. Geralds received a fair trial. Kyles v. Whitley, 514 U.S. 419 (1995). In doing so, the lower court was required to evaluate the evidence in terms of its cumulative effect on the fairness of the trial, not item by item. Id. at 436.

Furthermore, the lower court simply failed to address evidence that was admitted and shown to have been suppressed. For example, the lower court ignored Defense Exhibit 11 which was a handwritten note by Inv. Jimmerson indicating that he

[21]This evidence combined with the fact that there was a plethora of physical evidence found at the crimes scene that did not match Mr. Geralds or the victim would have been powerful exculpatory evidence.

recovered a pawn ticket from Mr. Geralds on March 7, 1989, six days after the herringbone necklace was recovered from the pawn shop. The note is inconsistent with the evidence that Inv. Jimmerson obtained the pawn ticket on March 1, 1989, which led the police to the pawn shop where the victim's family identified the necklace. See R. 1747. In addition, Mr. Geralds maintained that he did not have a pawn ticket or a wallet in his possession when he was arrested on March 1, 1989 (R. 728).

Likewise, the lower court did not address Inv. Jimmerson's handwritten notes regarding his initial interview with the victim's husband. The notes reflect that Mr. Pettibone thought that there may be short plastic ties at his home, where the crime occurred. Obviously, if there were plastic ties at the scene, there existence may have been relevant to premeditation and aggravating factors. Or, trial counsel could have used such information to demonstrate the commonality of the ties in the construction industry and lessen the weight of the evidence that Mr. Geralds possessed plastic ties.[22]

The lower court also ignores the fact that the prosecutor conceded that FDLE notes were not disclosed to trial counsel (PC-R. 2303). The notes contain information that was not

[22]In this regard, trial counsel could have pursued the make of the ties to show that Thomas Industry ties were very common.

contained in any FDLE report and consist of exculpatory information. For example, the notes concerning the location of the finger and palm prints lifted from the crime scene and the victim's automobile show that prints were lifted from the kitchen floor where the victim was killed, in the automobile that was stolen by the perpetrator and around the victim's house where the perpetrator searched for items of value.[23] See Def. Ex. 31. Thus, while a report concerning the finger and palm print analysis was disclosed in September, 1989, the notes are more specific as to the number and location of the prints.

Likewise, the report and notes of the hair analysis were not disclosed to trial counsel. On January 24, 1990, the prosecution listed Analyst Larry Smith as a witness. The next day, four days before Mr. Geralds' capital trial, Analyst Smith issued his report. The report and notes reflect that hair evidence was collected from the crime scene and the victim's automobile. See Def. Exs. 34 and 36. Specifically, hair was collected from the victim's left hand, her right index finger, her neck and chest, that does not match Mr. Geralds.[24] Upon reading the analysts' notes, it is clear that

[23]Mr. James, a criminalist testified that the location of the prints as well as the fact that they did not match Mr. Geralds, the victim, or her family was scientifically relevant.

[24]Again, Mr. James testified that the hair analysis was scientifically relevant.

the description of the hair does not match the description of the victim's hair. Id. Certainly the results of the hair analysis is exculpatory. After engaging in a struggle with the perpetrator, the victim had hair in her left hand that did not match Mr. Geralds or her hair. The hair evidence combined with other evidence as well as the evidence from trial undermines confidence in Mr. Geralds' conviction. See Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001)(Discussing the exculpatory value of hair found in the victim's hands that did not match the defendant).

Mr. Geralds also asserted some of the evidence introduced at the evidentiary hearing as violations of Giglio v. United States, 405 U.S. 150 (1972). Indeed, due process prohibits the prosecution from knowingly presenting false testimony. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935). "This rule applies equally when the state, although not soliciting perjured testimony, allows it to go uncorrected . . ." Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984).

For example, the prosecution possessed Analyst Ziegler's serological report (PC-R. 2683). At trial, Analyst Rousseau testified that she performed presumptive tests for blood on Mr. Geralds' sneakers. Analyst Rousseau testified that Mr. Geralds' left sneaker "came up positive for presumptive testing for blood". See R. 1720-2. The prosecution failed to

reveal that when the sneakers were tested by Analyst Ziegler she issued a report stating: "The tennis shoes were tested chemically for the presence of bloodstaining and none could be demonstrated." By allowing Analyst Rousseau to testify as she did while possessing Analyst Ziegler's report, the prosecution violated Giglio v. United States, 405 U.S. 150 (1972).

Furthermore, at Mr. Geralds' re-sentencing proceeding, the prosecutor questioned Inv. Jimmerson about the thoroughness of his investigation and confidence about Mr. Pelton's alibi:

> Q: Do you know any reason why Mr. Toirac would lie about Mr. Pelton's presence at work the day of this crime?
> A: No reason.
> Q: As a matter of fact he provided you a document; didn't he, saying that I know on February 1st he, William Pelton was here from 8 a.m. to 12 and from 1 'til 6?
> A: That's correct?
> Q: So, you verified that William Pelton was at work on the date of this crime?
> A: Yes, sir.

(R2. 443). The jury was told that Inv. Jimmerson had confirmed Mr. Pelton's alibi. However, Inv. Jimmerson's interview notes from January 27, 1989, indicate that no one was certain whether Mr. Pelton was at work on the morning of February 1, 1989.

The undisclosed statements, which contradicted Inv. Jimmerson's testimony were never memorialized in a written report and were suppressed by the prosecution. Trial counsel attempted to discredit the investigation and present another theory to the jury. The prosecution interfered with Mr.

Geralds' defense and presented testimony that was known to be false.[25]

Additionally, during the re-sentencing proceedings, Inv. Jimmerson testified about evidence that was presented in Mr. Geralds' initial capital trial. Much of Inv. Jimmerson's testimony was inaccurate and untrue. The prosecution failed to correct Inv. Jimmerson's testimony and allowed the jury to hear false testimony.

Inv. Jimmerson testified about the shoeprints found at the crime scene and the comparison to Mr. Geralds' Nike sneakers:

> Q: F-1 and F-2. Show you what has been admitted into evidence as state's F-1 and F-2 and ask if you can identify those as the shoes that you recovered from Mr. Geralds' motel room?
>
> A: F-1 is the right shoe which I collected on March 1, 1989 from Scottich Inns, room number 104, room rented by Mark Geralds.
>
> * * *
>
> Q: Now, in your investigative capacity, have you worked in reviewing and looking at shoe print and

[25]The suppressed notes also bear upon the outcome of Mr. Geralds' guilt phase because the statements were taken prior to Mr. Geralds' capital trial and never turned over to the defense or memorialized in a report. At trial, counsel's strategy was to argue that Mr. Geralds did not commit the crime. The notes and investigation of Mr. Pelton could have been used to support Mr. Adams' theory that the investigation was inadequate and that someone other than Mr. Geralds committed the crime.

patterns like in sand or in blood in comparing them to the tracks that you see on the bottom of the shoes?
A: Yes, sir.
Q: Did you see these particular tracks off these shoes in the Pettibone home?
A: Yes, sir.
Q: Did you see one consistent shoe track throughout the home?
A: Correct.

(R2. 401-2). Inv. Jimmerson's testimony is completely inaccurate and misleading. The testimony presented at Mr. Geralds' capital trial was that the tread pattern on his sneakers was similar to the tread pattern of the shoeprints at the scene. However, no class or wear characteristics could be identified. No match could be made. Certainly, the FDLE expert who examined the shoeprints and compared them to the sneakers did not conclude that the "particular tracks off [Mr. Geralds'] shoes" were the "shoes in the Pettibone home", as Inv. Jimmerson told the jury. The prosecution allowed Inv. Jimmerson's false testimony to go uncorrected and left the jury with false evidence that Mr. Geralds' shoes matched the shoeprints at the scene.

The prosecution's deception continued when later eliciting false testimony about the presence of blood on Mr. Geralds' left Nike sneaker:

Q: With respect to those shoes were you present when testing was done on the bottom of the shoes?
A: Yes, sir.
Q: Were they sprayed with what is known as Luminol?
A: Luminol and ---
* * *
A: It is a chemical test to detect human blood.
Q: Was those (sic) shoes sprayed?
A: Yes, sir.

Q: And did the test come positive (sic), showing there was blood on the shoes?
A: Positive on the left shoe.
* * *
Q: You had a positive reaction for blood?
A: That's correct.

(R2. 413-4). Inv. Jimmerson's testimony was false and again the prosecution failed to correct his testimony.

Inv. Jimmerson also misled the jury about the blood analysis and conclusion regarding the gold herringbone necklace. At the re-sentencing, Inv. Jimmerson testified that the lab determined that the blood found on the necklace "was of Mrs. Pettibone". (R2. 406). In actuality, the blood on the herringbone necklace was not matched conclusively to Mrs. Pettibone. The prosecution, again, presented testimony that differed from the previous testimony of Analyst Ziegler.

The lower court addressed Mr. Geralds' claim that false and misleading testimony was presented at Mr. Geralds' re-sentencing in a single sentence: "The Court also finds the testimony of Detective Jimmerson at the re-sentencing was not so inaccurate and untrue to constitute a ***Giglio*** violation." (PC-R. 1750). However, the lower court's analysis is in error. Mr. Gerald's established that the testimony used by the prosecution at his re-sentencing was false, and that the testimony was material. The "materiality" standard for a Giglio violation is whether the false testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." Giglio, 405 U.S. at 154. The false testimony presented

to the jury during Mr. Geralds re-sentencing was used to defeat trial counsel's evidence and argument that someone other than Mr. Geralds committed the crime. The prosecution allowed the jury to hear testimony that physical evidence from the crime scene matched Mr. Geralds and the victim. The jury was given a false impression of the strength of the evidence. There is certainly a reasonable likelihood that the false testimony affected the judgment of the jury.

All of the undisclosed evidence and misleading testimony undermine confidence in the outcome of Mr. Geralds' conviction and sentence. Relief is proper.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. GERALDS' CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS. AS A RESULT, CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE VERDICT.

> The United States Supreme Court has explained:
> A fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure an adversarial testing, certain obligations are imposed upon defense counsel. Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where trial counsel fails in his obligations, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Indeed, counsel's highest duty is the duty to investigate and prepare. In order to adequately represent a capital defendant an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v.Beto, 421 F.2d 636, 637 (5th Cir. 1970). Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986).

Furthermore, the Supreme Court also noted in Strickland that in the context of ineffective assistance of counsel, the correct focus is on the fundamental fairness of the proceeding:

> . . .[I]n adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the

> principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, **the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether**, despite the strong presumption of reliability, **the result** of the particular proceeding **is unreliable** because of a breakdown in **the adversarial process** that our system **counts on to produce just results**.

Strickland, 466 U.S. at 696 (emphasis added).

Mr. Geralds was denied the effective assistance of counsel at the guilt phase of his capital trial.

A. DEFICIENT PERFORMANCE

The State's theory at trial was that a week before the crimes, after unexpectedly meeting the victim and her children in the mall and learning that the victim's husband was out of town, Mr. Geralds' hatched a plan to burglarize the Pettibone home. On February 1, 1989, Mr. Geralds, who was familiar with the Pettibone home having previously worked there, entered the home and found the victim there. A struggle ensued and Mr. Geralds killed the victim using a weapon of convenience he found in the home – a knife. After which, Mr. Geralds searched the victim's home for jewelry and fled with jewelry and her purse in her automobile. In the hours following the crime, Mr. Geralds took a shower at his grandfather's home, and proceeded to distribute the evidence of his crime – a pair of sunglasses to Vicky Ward and pawn a bloody herringbone necklace for $30.00.

Items found at the crime scene, including plastic ties that were similar to those found in Mr. Geralds' car and shoe prints with a tread pattern similar to Mr. Geralds' tread pattern on his Nike sneakers were also introduced to support the prosecution. Additionally, Mr. Geralds' left shoe tested positively on a presumptive test and blood was detected on the pawned herringbone chain. The serological analysis demonstrated that the blood was consistent with the victim's.

As this Court recognized, Geralds v. State, 601 So. 2d at 1158, the case against Mr. Geralds was entirely circumstantial.

In his opening statements, trial counsel spent only a few moments informing the jury that the State's case was nothing more than a case of "coincidence" (R. 1414). However, there was much more to support Mr. Geralds' protestations of innocence than simply "coincidence". The jury never heard the considerable and compelling evidence that was exculpatory as to Mr. Geralds. Had trial counsel effectively represented Mr. Geralds, he could have proven that the prosecution's theory was flawed and the circumstantial evidence presented was misleading and untrue. Trial counsel could have exposed that someone other than Mr. Geralds was present at the crime and struggled with the victim prior to her murder. Had he adequately represented Mr. Geralds, the outcome of the case would have been different.

In addressing Mr. Geralds' evidence that trial counsel failed to effectively represent him, the lower court concluded "[T]rial counsel's final argument during the guilt phase addressed the issues raised by the defendant in this motion." (PC-R. 1742).[26] The court then proceeded to identify the places in trial counsel's closing argument where he questioned the State's evidence and argued lack of evidence. See Id. at 1742-3. Thus, the lower court's order reflects the position that it is not deficient to fail to present exculpatory evidence and challenge the prosecution's case against Mr. Geralds, since trial counsel pointed out to the jury in argument that the prosecution's case was really "a case of coincidence" and there may be doubt as to the defendant's guilt (PC-R. 1743). This position conflicts with the lower court's order sentencing Mr. Geralds to death wherein the court specifically commented that Mr. Geralds' testimony was the only "evidence" offered to establish that he did not kill

[26]The lower court also relied on the witnesses trial counsel presented and his closing argument at the re-sentencing in denying Mr. Geralds' guilt phase claim. Obviously, Mr. Geralds' re-sentencing occurred years after Mr. Geralds' original trial and therefore, trial counsel's closing argument at the re-sentencing or the fact that he requested an investigator has no relevance to his performance during Mr. Geralds' original trial. Furthermore, trial counsel's closing argument was not evidence. Thus, while trial counsel may have been attempting to follow a strategy "that focused on the circumstantial nature of the evidence in this case and the lack of definitive evidence to link the defendant with this crime", (PC-R. 1744), trial counsel had available evidence to prove that the physical evidence and witnesses linked someone other than Mr. Geralds' to the crime.

the victim (R2. 373), and the court disregarded trial counsel's argument.[27]

The lower court erred in adopting an illogical standard for deficient performance which is not supported by the law or the facts in Mr. Geralds' case. In other words, trial counsel's failure to present exculpatory evidence and challenge the prosecution's case was neither adequate nor reasonable.

First, the lower court ignores the fact that before trial counsel made his argument, the jury was specifically told: "The attorney will present their final arguments. **Please remember that what the attorneys say is not evidence**." (R. 1979)(emphasis added). Following the closing arguments, the jury was repeatedly instructed that it should consider the evidence in the case in deciding the verdict, and "[i]t is to the evidence introduced upon this trial and **to it alone** that you are to look for that proof." (R. 2096-7)(emphasis added). Thus, the jury was specifically told not consider trial counsel's argument as evidence **and** to base its decision only upon the evidence it heard. Based on the jury instructions

[27]The lower court's sentencing order reflects the correct view of analyzing evidence versus argument. Argument by trial counsel is simply not evidence and it is unreasonable for trial counsel to believe that argument may be substituted for evidence.

alone, it was inadequate and unreasonable for trial counsel to fail to present exculpatory evidence to support his theory that Mr. Geralds was innocent.

Also, caselaw concerning the adequacy of trial counsel's performance indicates that a reviewing court must consider the alleged deficiency in light of the facts confronting trial counsel. Strickland, 466 U.S. at 691. Trial counsel must "make reasonable investigations". Id. Indeed, the A.B.A. Standards for Criminal Justice that existed at the time of Mr. Geralds' capital trial make clear that trial counsel must explore all avenues leading to facts relevant to the merits of the case.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 692-3. Moreover, trial counsel who presents a "defense without evidence to support it," has been found ineffective. Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982).

1. The Crime Scene

As the State began to present its case, defense counsel's lack of knowledge and preparation became evident. Counsel had failed to interview or depose several crucial state

witnesses.[28] Furthermore, when they testified defense counsel either was unprepared to cross-examine them or unreasonably forfeited that opportunity.

Trial counsel was armed with information that completely undermined the State's case. Several hairs were collected from the crime scene.[29] There were hairs collected from the "neck area of Pettibone"; "chest area of Pettibone"; "underside of right leg of Pettibone"; "right leg of Pettibone" and **"left hand of Pettibone**" (Def. Exs. 34, 36). An FDLE lab analyst determined that the hair obtained from the crime scene, including from the hair the victim held in her hand, did not match Mr. Geralds (Id.). Furthermore, had trial counsel investigated, he would have learned that the hairs found around the victim's body and in her hand was not like the victim's hair. See Def. Ex. 34.

At trial, the prosecution presented testimony that the a physical struggle occurred between the victim (R. 1636). Yet, trial counsel failed to inform the jury that none of the hairs found at the crime scene, near the victim, even in the

[28]Contrary to the lower court's order, trial counsel deposed only a handful of witnesses. Of the witnesses deposed, most were deposed within three weeks of the trial. See Def. Exs. 3, 49, 50). Danford was deposed less than a week before trial. See Def. Ex. 9. Trial counsel did not depose a single FDLE Analyst.

[29]Mr. Geralds' pleads his allegations concerning the hair evidence in the alternative. Should this Court find that Analyst Smith's report was disclosed, then trial counsel was ineffective in failing to present the results of the hair analysis.

victim's grasp, or in the victim's stolen automobile, belonged to Mr. Geralds or had characteristics that matched the victim. See Def. Ex. 34, 36. Such powerful testimony not only undermines the prosecutor's theory of the case and the police investigation, but also provided extremely exculpatory evidence for Mr. Geralds.

This information was at Mr. Geralds' trial attorney's fingertips. During the deposition of Ron Plenge, crime scene technician for Panama City Police Department, Mr. Adams inquired about the analysis of the hairs found at the crime scene:

> Q: As a result of those samples having been sent off, are you aware of any reports with regard to the examination?
> A: Yes, but they are not formally written. I just spoke with the guy this morning that -- on the phone. He just completed all his examinations as far as hairs and stuff and --
> Q: I wonder if anything was positive with regard to the known samples that were sent in other -- other than Geralds?
> A: Say that again?
> Q: Well, I assume they were compared to something that was gathered from either the victim or the scene. Is that -
> A: Yes. Hair samples were -- What I'm talking about at this time is hair samples.
> Q: Okay.
> A: I mean those that were collected from the scene, --
> Q: As opposed to Geralds?
> A: -- and the vehicle, and the standard -- when I'm talking standard of Geralds, it's what I collected off him.
> Q: I see. Did you learn that there was any positive findings as to –
> A: No, they were all negative.

(Def. Ex. 47). Trial counsel failed to inquire further.

Furthermore, trial counsel failed to present evidence that a bloody handkerchief was found at the crime scene and the blood matched neither Mr. Geralds nor the victim (Def. Ex. 20).[30] Indeed, the bloody handkerchief, in and of itself, demonstrates that someone other than Mr. Geralds struggled with the victim. The perpetrator was injured in the struggle and left his blood at the scene. The bloody handkerchief undermines confidence in the outcome of Mr. Geralds' conviction and sentence

Likewise, trial counsel failed to present evidence that several finger and palm prints found at the crime scene did not match Mr. Geralds or any member of the victim's family.[31] See Def. Exs. 26, 31. Several fingerprints were found at the crime scene, including finger and palm prints lifted from the floor near the body of the victim. Id. In fact, after concluding that Mr. Geralds and none of the victim's family members matched one of the latent prints found on the jewelry

[30]Mr. Geralds' pleads his allegations concerning the bloody handkerchief in the alternative. Should this Court find that Analyst Ziegler's report was disclosed, then trial counsel was ineffective in failing to present the evidence of the bloody handkerchief in Mr. Geralds' defense.

[31]The evidence reflects that the prosecution disclosed the report concerning the finger and palm print analysis (R. 2284-8), however, the analysts notes of the location of the prints was not disclosed. Thus, Mr. Geralds' pleads his allegations concerning the finger and palm print evidence in the alternative. Should this Court find that trial counsel possessed the evidence, then he was ineffective in failing to present the results of the finger and palm print analysis in Mr. Geralds' defense.

box, the analyst still believed that the print had such investigative value that he entered the print into the Automated Fingerprint Identification System to determine if anyone in the system would match. Id. No reports indicate the result of this search.

Again, the effect of this simple information cannot be overstated: The fingerprint analysis proves that someone other than Mr. Geralds, a member of the victim's family and the other individuals who were believed could have made the print, left prints near the victim's body and on her jewelry box. Trial counsel's failure to present this was woefully deficient.

In addition to the unidentified fingerprints, the crime scene photos illustrate that a second shoeprint, different from the shoeprints which were similar to the tread on Mr. Geralds' sneakers was present at the crime scene (Def. Ex. 25; PC-R. ___).[32] Again, the value of an unidentified shoeprint, unlike the tread of Mr. Geralds' sneakers, would have been great in light of the prosecution's theory of the case and forensic evidence presented. A second pair of shoes, and thus logically, a second person, would have undermined the investigation by the Panama City Police Department investigators.

[32]Mr. Geralds' pleads his allegations concerning the photograph of a second shoe print in the alternative. Should this Court find that the photographs of the shoeprints were disclosed, then trial counsel was ineffective in failing to present the evidence in Mr. Geralds' defense.

Mr. James, a criminalist, testified at the evidentiary hearing that the hair found at the scene, it’s location and the fact that did not match Mr. Geralds was forensically relevant to the investigation of the crimes (PC-R. 2496). Also, the finger and palm prints found at the scene, their location and the fact that they did not match Mr. Geralds’, the victim, or her family members was forensically relevant to the investigation of the crimes (PC-R. 2495). Mr. James testified that the unidentified shoe print, that did not match Mr. Geralds’ was forensically relevant to the investigation of the crimes (PC-R. 2492).

Furthermore, Mr. Geralds' trial attorney was familiar with the bloody crime scene. The victim was beaten and stabbed. Analyst Johnson, opined that a struggle occurred over several areas of the kitchen. Analyst Johnson also testified about the blood spatter that was present:

> A: . . . And if you trace all these blood splatters you can see the head and tail of the blood spatter if you look at it real close. They're all coming back to this area, which would be the origin of bloodshed of the victim. This is where she was at the time of the bloodshed.
>
> And these spatters are coming from different angles, which to me indicate that she was in more than one position at the time of the bloodshed.
>
> * * *
>
> Q: (By the State) So you're dealing with the area near the refrigerator in this --
>
> A: Directly in front of the refrigerator.
>
> Q: And essentially the blood patterns in this particular show what?
>
> A: That there was a bloodshed did occur in this area and there was struggling in more than one location.

(R. 1635-6). Analyst Johnson also testified that the victim, covered in blood, was dragged to another location in the kitchen area (R. 1640).

Further, a central feature of the prosecution's case featured blood stained shoeprints located around the victim's house. FDLE Analyst Hoag testified that the tread pattern on Mr. Geralds' Nike sneakers was similar to the blood stained shoeprints around the house. However, no class or wear characteristics were identified, and thus no match could be made (R. 1728). In addition, Analyst Rousseau testified about Mr. Geralds sneakers: “[O]n the left shoe I found some areas that did test positively with Luminol and Phenophaline, another presumptive test for blood, and on the left shoe I found some areas that did test positively . . . the left shoe and on the inside portion of the outer sole area." (R. 1721).

Trial counsel was also aware and the prosecution presented information that the victim’s automobile was driven by the perpetrator to her son's school and abandoned (R. 1419). FDLE determined that no blood was detected anywhere in the front driver or passenger part of the car (Def. Ex. 29). No blood was found on the items found in the vehicle that belonged to the victim. No bloody shoeprints were found in the car (Id.). In fact, the car was impeccable, making it obvious that an individual who had blood on his person or shoes did not ride in the victim’s automobile. Also, no fingerprints belonging to Mr. Geralds were found in the car or

on any of the victim's personal items. No hair was found in the automobile which matched Mr. Geralds (Def. Ex. 36). However, a ring, not belonging to the victim was found in the car, but was never linked to Mr. Geralds. Trial counsel failed to present any evidence of the lack of physical evidence connecting Mr. Geralds to the crime. Trial counsel failed to present any evidence that when Mr. Geralds arrived at his grandfather’s house he did not have blood on his clothes or person and did not appear to have been in a struggle, yet witnesses were available to testify to just that (PC-R. 2223-4). Trial counsel failed to argue that the prosecution's theory of the case was flawed and impossible in light of the lack of forensic evidence in the case.

As to the strength of the comparison of the shoeprints found at the crime scene and Mr. Geralds' Nike sneakers, trial counsel failed to develop any evidence which illustrated the common tread design and size. In Ron Plenge's, crime scene report, he noted that there were similar shoeprints located in the Pettibone carport with a substance that looked like dry paint making the impression (Def. Ex. 15). Trial counsel could have used this comment in and of itself to illustrate that the comparison and similar tread pattern had little value to the case.

Counsel failed to ask any of the witnesses who viewed the crime scene, collected evidence and/or processed the automobile about the fact that there was absolutely no

presence of blood in the front seats of the victim's automobile. Such a simple question would have highlighted the weakness of the prosecution's theory and made it clear that if Mr. Geralds, stabbed the victim, struggled with the victim at the bloody crime scene and stepped in the blood and tracked it through the house, it would have been highly improbable for the victim's car to be free of blood in the front seats (PC-R. 2494). Yet, testimony to that effect was available (Id.).

Nail scrapings were taken from the victim. Again, the evidence did not match Mr. Geralds (Def. Ex. 35). Analyst Johnson testified that a struggle occurred. One of the victim's fingernails was even broken and found at the crime scene. Trial counsel did not investigate, ask a single question, or present any evidence regarding the exculpatory evidence.

Douglas Freeman, Mr. Geralds' grandfather, who saw Mr. Geralds within an hour or so of the crime was never asked a single question about whether or not Mr. Geralds had any blood on him or whether he appeared to have been in a struggle. Further, counsel should have made clear that the gloves Mr. Geralds wore on February 1, 1989, were driving gloves, which Mr. Freeman described as having the backs cut out of them and no upper material to cover the tops of Mr. Geralds' fingers (Def. Ex. 6).

At Mr. Geralds' capital trial, Analyst Rousseau testified that she tested Mr. Geralds' Nike sneakers “and on the left

shoe . . . came up positive for presumptive testing for blood". See R. 1720-2. The jury was left with the impression that blood was detected on Mr. Geralds' left Nike sneaker. Had trial counsel investigated, he would have learned that the tests performed do not necessarily mean that Mr. Geralds' shoe had blood on it. Rather, the tests merely detect any oxidizing material (PC-R. 2487). Therefore, any material that reacts with the chemicals administered and contains an oxidizing agent would also "test positively", or produce a light. Trial counsel failed to correct Analyst Rousseau's misleading testimony.

Furthermore, Analyst Ziegler's report makes clear that no blood could be demonstrated on Mr. Geralds' Nike sneakers (Def. Ex. 20). Trial counsel failed to present this evidence to the jury though it would have rebutted Analyst Rousseau's testimony concerning the presumptive testing.

2. Cross Examination & Impeachment

In addition, trial counsel also failed to effectively cross examine and impeach other critical prosecution witnesses. For example, the prosecution presented testimony that Mr. Geralds approached the victim and her children at the mall approximately one week before the crime (R. 1486).

During Mr. Geralds' trial, the victim's daughter, Blythe, testified about the conversation Mr. Geralds had with her mother:

> Q: And did you hear any conversation that went on between your mother or your brother and the defendant?

A: Yes, sir, my mother and him. I heard them talking.
Q: And was there any questions asked about your father and his work?
A: Yes, sir, he asked how his work was doing, my mother told him fine. And that he was doing a job out of town right at that point.
Q: Was there any other discussion about the house or your father or the family?
A: Not really, no.

(R. 1481-2). Additionally, Bart testified that Mr. Geralds approached him in the arcade at the mall and asked him how long his dad was out of town (R. 1467-8). He also testified that Mr. Geralds asked about Bart and his sister's daily schedule.

The prosecution's desire to establish that Mr. Geralds planned the burglary of the Pettibone house could not be clearer. However, trial counsel could have impeached Blythe and Bart Pettibone and shown that their testimony evolved over the course of time. See Def. Exs. 3, 4, 6, 12, 19, 39, 49).

In her pre-trial statement, Blythe told the law enforcement that while Mr. Geralds spoke to her mother about her father, her mom told Mr. Geralds that he was out of town in North Carolina and: "I'm going to go up and see him in about a month." (Def. Ex. 4). Had trial counsel asked Blythe about her earlier statement he would have allowed the jury to hear that the victim indicated that she would be out of town with her husband in about a month. Trial counsel could have argued that had Mr. Geralds wanted to burglarize the Pettibone home, both adults would be out of town within the next month.

Further, the victim told Mr. Geralds where her husband was and therefore there was no need to ask Bart Pettibone for this information.

Also, none of the statements made by Blythe and Bart occurred until after March 1, 1989, the day the police arrested Mr. Geralds and focused the homicide investigation on him. Blythe had been interviewed on four previous occasions and had never provided any information about Mr. Geralds' conversation with the victim.

Another inconsistency with which trial counsel failed to confront Blythe was her identification of the red Bucci sunglasses. At trial, Blythe identified the red Bucci sunglasses and testified that they belonged to her mother (R. 1496). Originally, none of the Pettibones reported the glasses missing. See Def. Ex. 1. It was not until after law enforcement collected the sunglasses from Ward did the family report that the sunglasses missing. Id. Upon being asked about sunglasses, the victim's family could only say that "possibly" a pair of sunglasses could be missing. Trial counsel did not elicit any of the inconsistencies from the victim's family.

Defense counsel's failure to adequately challenge the identification of the sunglasses was deficient. Had counsel presented the evidence that the sunglasses were never positively identified as the victim's (Def. Exs. 4, 19), along with the fact that Ward had requested a pair of red glasses

after Mr. Geralds had given her a pair of blue glasses, but before the homicide (R. 1685), it would have reduced the weight of the identifications.

In addition, trial counsel failed to question the witnesses about the description of the herringbone necklace that the family provided shortly after the crimes.[33] See Def. Ex. 1. The description provided to law enforcement does not match the herringbone necklace that was recovered at the pawn shop. Id.

3. Failure to Investigate and Present Witnesses

Counsel did not properly investigate Mr. Geralds' case. For example, the prosecution presented evidence regarding the plastic ties found in the trunk of Mr. Geralds automobile and the comparison to the ties found at the crime scene. Hutchinson testified that he was able to identify a Thomas industry tie (R. 1698).

Had defense counsel properly investigated his case he could have shown the jury that plastic ties are very common among individuals involved in the construction industry, like Mr. Geralds and Mr. Pettibone. See Def. Exs. 12, 16).

Likewise, trial counsel could have presented testimony that corroborated Mr. Geralds' statement that he possessed the

[33]Mr. Geralds' pleads his allegations concerning the notes describing the missing jewelry and other items in the alternative. Should this Court find that the list was disclosed, then trial counsel was ineffective in failing to present the information in Mr. Geralds' defense.

herringbone necklace prior to the crimes. Mr. Geralds specifically informed his attorney that he had purchased the necklace from Swoboda (Def. Ex. 5). Swoboda testified at the evidentiary hearing that he had sold Mr. Geralds the herringbone necklace "under the table" (PC-R. 2546).

4. Failure to Make Objections and Appropriate Motions

The prosecutor misstated evidence during his closing argument, when he told the jury that Mr. Geralds wore gloves in order to conceal fingerprints (R. 2039). However, prosecution witness, Freeman, was clear when he testified that the gloves Mr. Geralds was wearing on the day of the crime did not have any material over the upper portion of his fingertips -- gloves which would not prevent him from leaving fingerprints. Trial counsel unreasonably failed to object.

C. Prejudice

Had trial counsel investigated, prepared and presented the evidence that was readily available to him, the prosecution's theory of the case and evidence would have been seriously undermined. The jury would have heard irrefutable physical evidence that someone other than Mr. Geralds entered the victim's home, struggled with her, beat and killed her, rummaged her home for jewelry and valuables, and then stole her automobile. The evidence presented during Mr. Geralds' postconviction proceedings undermines confidence in the outcome of Mr. Geralds' conviction. Relief is proper.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. GERALDS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE DURING HIS RE-SENTENCING PROCEEDINGS IN VIOLATION OF MR. GERALDS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

A. INTRODUCTION

As explained by the United States Supreme Court, an ineffective assistance of counsel claim is comprised of two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

The United States Supreme Court explained the obligations of trial counsel in a capital case in Wiggins v. Smith, 123 S.Ct. 2527 (2003). In Wiggins, the Supreme Court addressed counsel's decision to limit the scope of the investigation into potential mitigating evidence and the reasonableness of that decision. The Court held that: "[I]nvestigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" 123 S.Ct. at 2527 (emphasis on original)(citations omitted). Indeed, in a sentencing proceeding, "The basic concerns of counsel . . . are to neutralize the aggravating factors advanced by the state, and to present mitigating evidence." Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994), cert. denied, 115 S. Ct. 499 (1994).

The obligations of trial counsel in investigating and preparing for a capital penalty phase were again addressed in Rompilla v. Beard, 125 S.Ct. 2456 (2005). In Rompilla, the Supreme Court held, "when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." Id. at 2460.

Mr. Rompilla's counsel had spoken to their client and family members on several occasions but had not received any helpful mitigation evidence. Mr. Rompilla was evaluated by mental health experts prior to trial in an effort to find mitigation evidence. See Rompilla, 2456 S.Ct. at 2461. However, the Supreme Court found that trial counsel's efforts fell below and objective standard of reasonableness for failing to obtain records which would have provided significant "mitigation leads." Id. at 2468.

> Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim.

Id. at 2465. Re-emphasizing the importance of the ABA Standards for Criminal Justice as a model for reasonable

conduct, the Court found that when trial counsel fails to "conduct a prompt investigation of the circumstances of the case[,]" that attorney has failed to provide effective assistance.[34] Id. at 2466.

As the United States Supreme Court has done, this Court has recognized that trial counsel has a duty to conduct an adequate and reasonable investigation of available mitigation and evidence which negates aggravation. State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000); see also, Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995). In Mr. Geralds' case, trial counsel failed to conduct an adequate or reasonable investigation into his case.

B. DEFICIENT PERFORMANCE

1. The Lower Court's Order

In denying Mr. Geralds' claim, the lower court noted that trial counsel was not ineffective because he had presented mitigating evidence and expert testimony concerning the statutory mental mitigating factors at the re-sentencing (PC-R. 1752). The court also noted that trial counsel had

[34]In Rompilla, the Supreme Court looks to the 1982 ABA Standards for Criminal Justice as the guiding principle for effective assistance of counsel. The standards in effect at the time of Mr. Geralds' re-sentencing proceedings required that trial counsel in a capital case "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c)(1989).

retained an investigator.[35] However, the lower court's order ignored the re-sentencing record and its own order imposing the death penalty. In sentencing Mr. Geralds' to death, the court did not even consider the statutory mental health mitigator that Mr. Geralds' suffered from extreme mental or emotional disturbance a the time of the crimes. Contrary to the court's postconviction order, trial counsel did not present this mitigator at the re-sentencing. See R2. 366-76. Furthermore, the lower court found that trial counsel had not established the statutory mitigator that Mr. Geralds' capacity to appreciate the criminality of his conduct was impaired (R2. 373).

In fact, in sentencing Mr. Geralds' to death, the lower court found that much of Dr. Beller's testimony actually supported statutory aggravating factors, not mitigation. See R2. 372. The court gave Mr. Beller's testimony as to mitigation "very little weight".

As to the two other non-statutory mitigators: that Mr. Geralds' has an ex-wife and daughter whom he loves; and that he came from a divorced family, the court gave "very little weight", partly because the mitigation was "not relevant to the crime" (R2. 374).

In the lower court's order denying postconviction relief, the court fails to address any of the evidence presented at

[35]Despite the lower court's appointment of an investigator, no motion for payment of costs was submitted to the court.

the evidentiary hearing or how it differed from the evidence presented at the re-sentencing.

2. Trial Counsel's Theory of Mitigation

At Mr. Geralds' re-sentencing, trial counsel told the jury that they would "learn and . . . hear that Mark Geralds is not the person that killed Tressa Pettibone". Trial counsel attempted to present a case for lingering doubt, even though lingering doubt is not permissible mitigation in Florida. See King v. State, 514 So. 2d 354, 358 (Fla. 1987). Whether trial counsel did not know the law, or simply ignored it, his actions prejudiced Mr. Geralds. While, trial counsel presented witnesses concerning William Pelton and Archie McGowan's alleged role in the crimes, he also presented some statutory and non-statutory mitigation to the jury in the form of two lay witnesses and a mental health expert. Trial counsel's presentations were inconsistent and illogical. Trial counsel argued that Mr. Geralds did not commit the crimes, but he also placed evidence before the jury that Mr. Geralds suffered from mental health disorders which impacted his culpability for the crimes.

Trial counsel presented the testimony of Inv. Nolin and Miller from the Bay County Sherriff's Office, who took a statement from Mr. Geralds about an alleged threat Pelton and McGowan made to Mr. Geralds' ex-wife if they were implicated in the crimes. Trial counsel also called both Pelton and McGowan to testify and asked them about the threats to Mr.

Geralds' ex-wife and their roles in the crimes. Both witnesses categorically denied the threats and any role in the crimes. Mr. Geralds testified that he had been told that Pelton and McGowan threatened his wife. Furthermore, trial counsel asked many of the prosecution's witnesses about Pelton and McGowan, including Inv. Jimmerson, who was asked about Pelton's alibi.

Obviously, when instructed, the jury was not told they could consider lingering doubt as mitigation. The trial court only addressed the lingering doubt aspect of trial counsel's penalty phase presentation to the extent that the court found that Mr. Geralds had lied during his testimony when he denied killing the victim (R2. 372-3, 374). The court specifically commented that Mr. Geralds' testimony was the only evidence offered to establish that he did not kill the victim and he gave that "evidence" no weight (R2. 373).

Trial counsel also placed scant testimony concerning mitigation before the jury: The jury learned that Mr. Geralds' parents divorced when he was a teenager and this was difficult for him (R2. 702). His mother was not very loving (Id.). Before the divorce, Mr. Geralds was a good worker, but he soon fell in with the wrong crowd and just did not care about anything (R2. 873). Mr. Geralds attempted to help his friend Scott Hobbs when Hobbs' parents divorced (R2. 625).

Also, clinical psychologist James E. Beller conducted a mental health evaluation of Mr. Geralds and testified at the

re-sentencing. Mr. Beller's conclusions and diagnosis were based entirely on the self-report of Mr. Geralds and limited testing (R2. 755-6). In fact, Mr. Beller received much of his information from Mr. Geralds regarding his background, because Mr. Geralds requested that Mr. Beller come back and speak with him (R2. 743). At the re-sentencing, Mr. Beller testified:

> Q: (By Mr. Adams) In this particular case did you reach any conclusions from what you did with regard to the MMPI?
>
> A: Yes, I did.
>
> Q: Can you tell these folks what your conclusions were?
>
> A: I diagnosed him as an anti-social personality disorder and as a bi-polar disorder manic.
>
> Q: You say bi-polar, my ears kind of go up. What does that mean or did we used to know it as something else?
>
> A: It used to be called manic depressive.
>
> * * *
>
> Q: When you said manic, what does that mean?
>
> A: Manic, bi-polar illness describes a cycle of behavior in which there is at least in Mr. Geralds' case one episode of major depression followed by an episode or several episodes of manic behavior. Manic behavior might be considered as a kind of internal and/or external hyperactivity. Some people who are manic, you can't tell by looking at them, it's all internal. They describe things like racing thoughts, restlessness, high energy. Very often they can go for long periods of time without sleep, sometimes for days. It's just a heightened state of internal mental activity.

(R2. 738-9). Based on testing, Mr. Beller concluded: "[T]hat was the profile that Mr. Geralds generated, an aggressive acting out profile." (R2. 742). After which, Mr. Beller briefly testified about Mr. Geralds feelings of depression as a child. (R2. 743-4). The jury unanimously recommended the death penalty. The trial court identified only four non-statutory mitigating factors, and disregarded the mitigation

concerning Mr. Geralds' testimony that he did not kill the victim (R2. 375). The trial court gave the other three mitigators "very little weight" (R2. 374). In addition, the trial court used much of Dr. Beller's testimony to support the cold, calculated and premeditated aggravating factor.

3. The Mitigation

At the re-sentencing, Mr. Beller testified about his diagnosis of Mr. Geralds' as bi-polar and antisocial. However, the prosecutor capitalized on Mr. Beller's inadequate evaluation by pointing out that Mr. Beller's conclusions were based primarily on testing (R2. 755-6):

> Q: You've discussed your testing, maybe I misstated my question. Who did you talk to?
> A: I didn't talk to anybody.
> Q: You -- I mean you talked to the defendant?
> A: For testing I talked to Mr. Geralds, yes.
> Q: Did you talk to the investigating officer?
> A: No, I did not.
> Q: Did you talk to the defendant's brother who lives here in town?
> A: No, I did not.
> Q: Did you talk to the defendant's sister who lives here in town?
> A: No.
> Q: Did you talk to the defendant's mother who lives here in town?
> A: No.
> Q: Did you talk to the defendant's grandfather who lives here in town?
> A: No.

(Id.). Because Mr. Beller's evaluation was incomplete and inadequate, the jury never heard about Mr. Geralds' mental health history which would have constituted mitigation.

At the evidentiary hearing, Mr. Beller testified about how a mental health professional diagnoses bi-polar disorder:

> Chiefly through psychological testing but psychological testing, the problem with that is that it can give you a probability. To really diagnose a bipolar it is important to have collateral contacts. Usually we talk to family members, spouse, parents, so on, so forth. We look for a genetic pattern which is very often present, but not always.

(PC-R. 2567). At the re-sentencing, Mr. Beller had no collateral evidence to evaluate Mr. Geralds (PC-R. 2567), but in conducting his postconviction evaluation, Mr. Beller spoke to Mr. Geralds' family members and friends (PC-R. 2568).

Likewise, a proper evaluation would have included additional testing. In his report, Mr. Beller reported: "Mr. Geralds reports that at various times in his life he has suffered blackouts and severe headaches. Between the ages of 14 and 25, Mr. Geralds reports pounding headaches in the frontal area of his skull. Two or three times these headaches were accompanied with nosebleeds." Mr. Geralds' self-report provided a great deal of helpful information about his mental state that was neither further developed nor corroborated. During postconviction, Mr. Beller conducted additional testing because "it's critical to understanding the person." (PC-R. 2568).

If trial counsel had investigated and provided the necessary materials to Mr. Beller, his evaluation would have produced **and supported** a diagnosis of a major mental health illness, bi-polar disorder, as well as other mental health problems, including that Mr. Geralds suffered from attention deficit hyperactivity disorder (ADHD), and depression as a

child (PC-R. 2569, 2570-2). Mr. Geralds' behavior as a child was characterized by extreme hyperactivity and impulsivity (PC-R. 2579).

Dr. Beller testimony would have established statutory mental health mitigators at the time of the crimes (PC-R. 2579)("All the testing that I did and all the people that I talked to describe impulsivity that could be extreme."). And, Mr. Geralds' mental health problems impair his abilities (PC-R. 2580).

Mr. Beller also clarified that anti-social personality disorder and an "acting out aggressively profile", as he described Mr. Geralds' at the re-sentencing, did not mean that an individual suffering from the disorder was violent, but reckless (PC-R. 2575-6). In fact, at the re-sentencing, Mr. Beller had no information as to how Mr. Geralds acted out (PC-R. 2578). In postconviction, Mr. Beller learned that Mr. Geralds' acting out behaviors were revealed in reckless driving, high-speed driving and that sort of activity (PC-R. 2578), not violence or harm to others. Mr. Beller also corrected his initial impression that Mr. Geralds was a psychopath based on his testing and collateral information obtained in postconviction (Id.).

The collateral evidence that Mr. Beller was provided in postconviction established the fact that other members of Mr. Geralds' family suffered from mental illnesses which required psychiatric commitment, including a maternal aunt (PC-R.

2580). And, that those close to Mr. Geralds' noticed changes in his personality that are indicators of bi-polar disorder (PC-R. 2435).

Had Mr. Beller been provided the collateral information, the prosecution would have been unable to minimize the results and conclusions of Mr. Beller's testimony.

As to other non-statutory mitigation, trial counsel failed to develop or present evidence regarding Mr. Geralds' childhood difficulties and early mental health problems, his family dysfunction and life of isolation.

Trial counsel could have presented a compelling life history to the jury, explaining how Mr. Geralds' mental health problems, including depression and ADHD interfered with his academics. At one point, his behavior became so extreme, that a teacher urged his parents to have him see a psychiatrist (PC-R. 2433).

Unfortunately, Mr. Geralds' problems went undiagnosed. Behaviors that were beyond his control were interpreted by his parents, teachers and religious leaders as willful and an indication of bad character.

Mr. Geralds and his father were close, and Mr. Geralds enjoyed working for his father's construction business, but as he grew older, his relationship with his mother became more and more problematic. Though he'd always been a high-energy kid who was always breaking things, in high school he began to

have real problems. Friends and family members trace his deterioration to his parents' divorce.

The divorce was finalized in 1983, when Mr. Geralds was a teenager (PC-R. 220). The situation was especially hard on Mr. Geralds, because while his siblings were already engaged to the people who would become their spouses and had those surrogate families to turn to, Mr. Geralds was basically on his own (Id.). Soon, Mr. Geralds began living in his car or at cheap motels and his existence became more and more marginalized (Id.). Even so, he tried to be a big brother to his friend Scott Hobbs when Scott's parents went through a divorce (PC-R. 2538). He discouraged Scott from drinking alcohol and generally tried to keep him from harm's way (Id.).

Mr. Hobbs recalled an incident not long before Mr. Geralds was arrested in 1989. He hadn't seen Mr. Geralds in a long time and had gone to pick him up from work (PC-R. 2536-7). From there they had gone to lunch and Mr. Geralds was "hyperactive, loud, and bouncing off the walls." Mr. Hobbs was sure Mr. Geralds was under the influence of some type of drug (Id.). Most likely, he was in a manic phase of his bi-polar disorder.

Had trial counsel presented all of the mitigation, including a complete picture of Mr. Geralds' mental and emotional functioning, he could have shown the jury an entirely different picture of Mr. Geralds than it received and have established much mitigation. However, trial counsel

simply did not speak to, uncover, or adequately present the relevant mitigation. Trial counsel's performance was deficient.

C. PREJUDICE

Had trial counsel investigated and prepared for Mr. Geralds' re-sentencing he would could have presented much mitigation on behalf of Mr. Geralds. He could have established mental health mitigation and shown the jury how Mr. Geralds' mental health effected his behavior and functioning.

In light of this Court's opinion from Mr. Geralds' direct appeal, only two valid aggravators exist in Mr. Geralds' case – that the crime was committed in the course of a burglary and that the crime was heinous, atrocious and cruel. In light of the mitigation presented during the evidentiary hearing, combined with the mitigation presented at trial, Mr. Geralds is entitled to relief. Confidence is undermined in the outcome.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. GERALDS' CLAIM THAT NEWLY DISCOVERED EVIDENCE OF A CONFLICT OF INTEREST VIOLATED HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Since Mr. Geralds' re-sentencing, information has come to light concerning the circumstances of the testimony of Dr. Lauridson, a pathologist, who testified to his findings regarding cause of death, the victim's injuries, and other matters at Mr. Geralds' re-sentencing. Dr. Laurdison's

testimony was argued to the jury in support of the aggravating factors.

Dr. Lauridson was retained because Dr. Sybers, the medical examiner who performed the autopsy and testified at Mr. Geralds' original trial, was being actively investigated for the first-degree murder of his wife.

Mr. Geralds was unaware that at the time of his re-sentencing, the prosecuting authority in and for Bay County and the Public Defender had agreed to allow Dr. Lauridson to testify in place of Dr. Sybers. Just prior to filing Mr. Geralds' amended Rule 3.850 motion, an evidentiary hearing was held in State v. Orme, Bay County Case No. 92-442, at which information surfaced revealing an agreement between the Public Defender and the State Attorney, Jim Appleman, about the use of Dr. Lauridson in pending cases and the inability of public defender's to challenge and impeach Dr. Sybers' report and previous testimony because of the active investigation. In Orme, Michael Stone testified:

> A: Well, we resigned, Pam [Sutton] and I, both from the Public Defender's Office in October, fairly early October.
>
> Q: For what reason?
>
> A: . . . The deeper reason which underlays all of this was the Sybers scandal. We had discovered in August of that year in another case, in a deposition in another case that Dr. Sybers changed his testimony, came up with some new testimony that was not in [the] autopsy report of eight months previous. Immediately thereafter, like the next day, I discover from the News-Herald, I believe it was, that he is being investigated, Dr. Sybers himself, for the possible murder of his wife. And I believe that is when it was announced that the State Attorney's office here had determined that there was insufficient evidence to proceed against him. This set

off a lot of alarms in my mind and red flags and everything because it appeared, and the more I looked into it the more clearly it appeared, that there was a good argument that Dr. Sybers was shading his testimony in favor of the prosecution in all of these, in perhaps, all of these cases which had autopsies in them, which usually meant they were my cases, in exchange for favorable treatment in the investigation that concerned him. And I certainly intended to raise that issue and I did in those cases that I was able to before my resignation. I intended to raise it in every case in which he had done an autopsy and was called upon to testify for the State.

* * *

A: Well, yes, Virgil Mayo was retiring and Mr. Laramore was coming in to replace him, he had not replaced him yet, but he was in evidence (sic), he came to my office at least once or twice and brought the very bad news about removing Pam Sutton from the capital division and having her do regular felony cases and I was extremely alarmed that he seemed to be working with the State Attorney's office, to quote, solve the medical examiner problem. And, in other words, get a, somehow get Sybers out of the way and get somebody else in and let's carry on as if nothing had happened. And I did not see this as something that we, the Public Defender's office or any of us PD's with actual cases should be doing. Because that conflict situation was in the interest of our clients to bring out, not to paper over.

Q: And did Mr. Laramore indicate whether you would be allowed to object to someone else testifying in place of Dr. Sybers?

A: I cannot remember if he specifically enjoined me from doing that. But I do remember the conversation where he announced that he thought he and Jim, meaning Jim Appleman, had solved the medical examiner problem. And I, you know, what he would have done had I not had to resign and proceeded to unsolve the problem for him in each of my cases. I don't know.

Q: And when you say, solve the problem, are you referring to the fact that --

A: Apparently he was referring then to this short term idea of bringing in another medical examiner to testify from Dr. Sybers' work instead of calling the doctor himself.

State v. Orme, Bay County Case No. 92-442.

Based on what Mr. Geralds learned from the testimony in Orme, he investigated and introduced similar evidence at his

evidentiary hearing concerning the agreement about Dr. Laurdison. Mr. Geralds' was diligent in bringing his claim. See Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979), standard modified in Jones v. State, 591 So. 2d 911 (Fla. 1991).[36]

At Mr. Geralds' evidentiary hearing, Mr. Stone testified to essentially what he had revealed at the Orme hearing, i.e., that in 1992, the Chief Assistant Public Defender told Mr. Stone that: "I think we have, Jim (Appleman) and I have managed to solve the medical examiner problem." (PC-R. 2414). And, the solution was to bring in other people (Id.).

Mr. Geralds was never made aware of the conflict between his interests and the agreement made by the Public Defender and the State Attorney. Mr. Geralds did not waive this conflict.

The circumstances surrounding Dr. Laurdison's testimony during Mr. Geralds re-sentencing prejudiced Mr. Geralds. On the one hand, it was important to call Dr. Sybers to testify in order to show his bias toward the State due to the investigation concerning his wife's death that was going on at the time of Mr. Geralds' original trial. On the other hand, Dr. Laurdison's findings concerning the injuries were more inflammatory than Dr. Sybers'.

[36]Contrary to the lower court's order, Mr. Geralds could not have known of the agreement at the time of his re-sentencing. Few people were aware of the agreement.

And, while trial counsel claimed that he wanted to present Dr. Sybers testimony to the jury (R2. 808), he never did.[37]

The agreement and trial counsel's failure to subpoena Dr. Sybers adversely affected trial counsel's representation of Mr. Geralds. See Cuyler v. Sullivan, 446 U.S. 335, 348-50 (1980); see also United States v. Cronic, 466 U.S. 648, 659-61 (1984); Osborn v. Shillinger, 861 F.2d 612, 625-26 (10th Cir. 1988). In such circumstances, "when the advocate's conflicting obligations have effectively sealed his lips on crucial matters," "[t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee." Holloway v. Arkansas, 435 U.S. 475, 490 (1978). Mr. Geralds was deprived of his Sixth Amendment right to counsel. Where "a conflict of interest actually affected the adequacy of his representation," Mr. Geralds "need not demonstrate prejudice in order to obtain relief." Cuyler, 446 U.S. at 349-50. Relief is proper.

ARGUMENT V

[37]The lower court's order suggests that the court did not allow trial counsel to subpoena Dr. Sybers (PC-R. 1751). But, the record reflects that trial counsel was aware of Dr. Laurdison's involvement in the case months before the re-sentencing. See Def. Ex. 21. Trial counsel failed to subpoena Dr. Sybers and when he requested a continuance to do so, the lower court denied the motion (R. 811).

MR. GERALDS WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DUE TO THE LOWER COURT'S ADVERSE RULING DURING THE POSTCONVICTION PROCESS.

A. MR. GERALDS HAS BEEN DENIED AN EVIDENTIARY HEARING ON SEVERAL OF HIS MERITORIOUS CLAIMS, INCLUDING CLAIMS THAT WERE BROUGHT AFTER HIS AMENDED RULE 3.850 MOTION WAS FILED DUE TO THE STATE'S OVERSIGHT IN DISCLOSING THE RECORDS. THE LOWER COURT'S ACTIONS DENIED MR. GERLADS DUE PROCESS, EQUAL PROTECTION AND ACCESS TO THE COURTS. MR. GERALDS HAS BEEN PREVENTED FROM DEVELOPING HIS CLAIMS.

1. Mr. Geralds' Supplemental Motions for Relief

a. Background

At the February, 2004, portion of Mr. Geralds' evidentiary hearing, trial prosecutor, Joseph Grammer testified. During his testimony Mr. Grammer referred to his trial file. In the course of cross examination, it became obvious that while Mr. Geralds had requested the State's file, the complete file had not been produced. After bringing the matter to the Court's attention, counsel requested that she be allowed to conduct a thorough review of the file (PC-R. 2721). The Court granted the motion (PC-R. 2724).

Following the evidentiary hearing, Mr. Geralds received a full bankers box of records from the Florida Department of State Bureau of Archives and Records Management. The records

were accompanied by a letter explaining that the records had not been previously sent to collateral counsel, though requested, due to an oversight at the Records Repository.

Based on the production of new records, Mr. Geralds filed two supplements to his pending Rule 3.850 motion (PC-R. 1447-79, 1610-26).

The lower court denied both supplements (PC-R. 1528-36, 1642-3).

b. The first supplement

Mr. Geralds first supplement to his Rule 3.850 motion was filed on July 20, 2004. The motion supplemented his claims that trial counsel was ineffective during the guilt and penalty phases
of his capital trial and that the State violated due process in failing to disclose exculpatory evidence to his trial attorney.

The specific information was pleaded in the alternative and concerned an investigative report about another suspect in the homicide of Tressa Pettibone. The investigative materials revealed that a burglary of a business occurred three days prior to the homicide in this case. The owners of the business that was burglarized resided near the victim and drove a similar vehicle. While successfully burglarizing the business, the individuals were unable to steal all of the valuables – which they knew were present. Information was provided that the homicide may have been related to the prior

burglary and confusion over the business owner's residence due to the similarities in the vehicles.

This information was never investigated or presented to Mr. Geralds' capital jury. Obviously, from the face of the information the jury could have concluded that the true motive for the crime was to attempt to steal the valuable merchandise that the burglars had left behind three days prior.

The jury would have also learned that the lead was not pursued which would have undoubtedly been important to trial counsel in demonstrating that law enforcement simply had not conducted a thorough investigation, but instead were rushing to judgement.

Other leads were also ignored by law enforcement: Law enforcement was informed that Hugo Blair, a former employee of Pettibone Construction, master-minded the robbery of the Pettibone household, while an associate committed the murder. There was no connection between Blair and Mr. Geralds. Sources informed law enforcement that Blair and his associate knew of the homicide before it was even reported and provided other details that were not made available to the public. Again, the simple fact that it was reported that Blair knew of the crimes before they were reported was information that defense counsel would and or should have investigated and presented to the jury, particularly in light of the fact that Mr. Geralds' case was circumstantial and there was much

evidence at the crime scene that was not linked to Mr. Geralds but was scientifically relevant to the crimes.

Also, less than two weeks prior to the homicide, the victim wrote a letter to a friend describing some of the problems occurring between her husband and her husband's stepmother. She also informed the person she was writing that her husband would be out of state working on a project for some time. Indeed, the victim's own relatives, i.e. her husband's stepmother-in-law and her children, were suspects in the homicide due to the ongoing family strife. However, during his investigation, trial counsel was led to believe that the family strife that had existed had been resolved before the date of the letter. Indeed, during depositions, trial counsel questioned witnesses about the victim's step-mother-in-law and her potential role in the homicide. Undoubtedly trial counsel would have wanted to obtain the victim's letter concerning the ongoing family dispute.

The records also disclosed that another former employee bragged about the Pettibone homicide and had scratches on his face. Again, the import of such information cannot be understated, yet, the jury was never made aware of any of these alternative suspects.

The efficacy of the police investigation was certainly information that was relevant to Mr. Geralds' defense. Along with all of the previously pled and presented evidence the defense could have further undermined the State's case.

Physical evidence found at the crime scene did not match Mr. Geralds'. The evidence along with the alternative suspects and motives would have provided powerful exculpatory evidence, especially since many of the leads were not fully investigated.

In yet another critical document, the victim's husband told law enforcement that he had done some work at the Cherry Street School and that many people were aware the he was to travel out of town at the time of the crimes. At trial, the State informed the jury that Mr. Geralds had learned of Mr. Pettibone's whereabouts and thus planned to rob the house while Mr. Pettibone was out of town. In fact, many people were aware of the same facts as Mr. Geralds, but the jury was not told this.

Also, had trial counsel effectively represented Mr. Geralds, he could have proven that the prosecution's penalty phase theory – that Mr. Geralds entered the Pettibone residence with the deliberate intent to murder the victim – was not true. Investigative leads were available that proved that Mrs. Pettibone left her residence the morning of February 1, 1989, and was seen in her blue Mercedes, alone shortly before the time of the crime.

This information would have impacted the determination of premeditation and the aggravating factor that the murder was committed in a cold calculated and premeditated manner. Considering that Mr. Geralds' original penalty phase jury

recommended death by a narrow margin, this evidence was relevant and critical to the sentencing calculus. The jury should have been provided with this information.

c. the second supplement

Mr. Geralds' second supplement to his Rule 3.850 motion was filed in June, 2005, after the State had provided legible and complete copies of documents to postconviction counsel. The motion supplemented Mr. Geralds' claims that trial counsel was ineffective during the guilt phase of his capital trial and that the State violated due process in failing to disclose exculpatory evidence to his trial attorney.

Specifically, the documents reflected that there was more to the Pettibone homicide than the State ever revealed or that trial counsel ever learned. For example, two days after the murder of Mrs. Pettibone, Sheila Hendley contacted law enforcement and stated that her boyfriend, Warren Cash, may be a suspect in the crimes. Upon being interviewed, Ms. Hendley spoke to the police at great personal risk: She was married with two children, but her husband had no idea that she was dating Mr. Cash. She informed law enforcement that three days prior to the crimes, Mr. Cash drove around the Cove area for a lengthy period of time. While Cash told her he was "looking for a place to rent", they drove by the victim's residence several times. Ms. Hendley told law enforcement that Cash was a "thief".

Detective Jones continued to investigate Cash and spoke to Bob Willoughby, an officer at Bay County Sheriff's Office, who knew Cash. Officer Willoughby "confirm[ed] Cash is crazy, likes to beat up his ex-wife".

Detective Jones spoke with Cash himself. Cash admitted that he was in the area of the victim's residence on the Sunday before the crimes, but he spent only an hour in the area. He also admitted that he had previously beaten his ex-wife. However, Cash stated that he had an alibi for the morning of the crimes, stating that he was at work.

Detective Jones interviewed Cash's ex-wife Denise Cash. Ms. Cash confirmed that her ex-husband was violent with her and had threatened her in the past. He had previously mentioned a woman named "Tereasa". Ms. Cash without knowing it, refuted Cash's alibi for the morning of February 1st, the day of the crimes. Ms. Cash knew that he ex-husband was not at work that morning, and that same day he brought her some money that he owed her.

However, the investigation of Cash went no further. Detective Jimmerson asked that Detective Jones stop investigating the lead. It appears that Detective Jones did as he was asked. No further follow-up investigation occurred.

In and of itself, the lead about Warren Cash would have been extraordinarily beneficial to the defense. The evidence against Mr. Geralds was circumstantial. No physical evidence proved that he was at the Pettibone residence the morning of

the crimes. In fact, evidence presented at the evidentiary hearing demonstrates that someone other than Mr. Geralds was present at the crime scene. Thus, trial counsel could have used the information about Cash to show the jury that evidence placed Cash "casing" the victim's house a few days before the murder; Cash had a history of violence toward women, Mr. Gerald's did not; Cash had no alibi and had lied to the police about an alibi for the morning of the homicide; Cash was in possession of money the day of the crimes; and at the very least that law enforcement were simply ignoring leads for no reason.

Additionally, the documents provide information about former employees of Mr. Pettibone's construction company having knowledge that "there was a key to the back door". This information would have been useful because the prosecution contended that there was no forced entry into the house because the victim allowed Mr. Geralds to enter the house because she knew him. Clearly, others knew of the key and could have obtained access without the victim knowing.

Indeed, Ray-Ray, who was an early suspect was also mentioned in the previously undisclosed documents as being upset with the victim's husband. No further follow-up investigation appears to have occurred.

Finally, once again the undisclosed documents reveal that there was "tension" within the Pettibone family. This

information should have been provided to defense counsel so that he could determine how to use it.

The documents provided critical leads for defense counsel to show alternative suspects to the jury. And, the efficacy of the police investigation was certainly information that was relevant to Mr. Geralds' defense. Along with all of the previously pled and presented evidence the defense could have further undermined the State's case.

d. An evidentiary hearing was required.

It was through no fault of Mr. Geralds' that the allegations contained in his supplements were not included in his Rule 3.850 motion. However, the State's error in failing to provide him with records prejudiced his case. Ventura v. State, 673 So. 2d 479, 481 (Fla. 1996)("The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act."). Indeed, the failure of the State to provide Mr. Geralds' with requested records, records to which he was constitutionally entitled caused the lower court to analyze Mr. Geralds' claims in a piecemeal fashion. Such an analysis is in error. See Young v. State, 739 So. 2d 553 (Fla. 1999); Jones v. State, 709 So. 2d 512 (Fla. 1998); Lightbourne v. Dugger, 742 So. 2d 238, 247-8 (Fla. 1999)(holding that when a prior hearing has been held, the court must conduct a cumulative analysis of the evidence so that the court has a

"total picture" of the case); State v. Gunsby, 670 So. 2d 920, 923-4 (Fla. 1996). As to Mr. Geralds' ineffective assistance of counsel claim and Brady claims, the lower Court concludes that an evidentiary hearing is not warranted because: 1) Mr. Geralds has not shown that the information was known to counsel or why it should have been disclosed to counsel (PC-R. 1530); 2) Mr. Geralds' has failed to demonstrate prejudice; and 3) has failed to allege what action was taken by law enforcement as to certain matters. However, Mr. Geralds is not required to prove his claims in his pleading. See Fla. R. Crim. P. 3.850.[38]

> Rule 3.850 states that:
> **a) Contents of Motion.** The motion shall be under oath and include:
>
> * * *
>
> (6) a brief statement of the facts (and other conditions) relied on in support of the motion.

Fla. R. Crim P. 3.850 (c)(6)(emphasis added). At the end of the Florida Rules of Criminal Procedure, this Court provides a form motion for filing a Rule 3.850 motion. See Fla. R. Crim. P. 3.987. In that form the following instructions are given:

> 14. State **concisely** every ground on which you claim that the judgment or sentence is unlawful. Summarize **briefly** the **facts** supporting each ground.

[38]Mr. Geralds case was governed by the former Rule 3.850 and 3.851 before the lower court.

Fla. R. Crim. P. 3.987 at page 321. This Court outlines a list of grounds that are properly raised in a form 3.850 motion:

> A.
> Ground
> 1:_____.
>
> Supporting FACTS (tell your story **briefly** without citing cases or law):
> _____.

Fla. R. Crim. P. 3.987. In each instance, the rule highlights brevity in pleading the facts.

Further, the lower court erred in applying the wrong standard to obtain an evidentiary hearing. The standard Mr. Geralds was required to meet was not the same standard as the substantive claim. Rather, the standard is whether the files and records conclusively show that Mr. Geralds was not entitled to relief. Lemon v. State, 498 So. 2d 923 (Fla. 1986). And, under Lemon, the facts and allegations contained in Mr. Geralds' supplements must be taken as true unless conclusively rebutted by the record. Id.

The rule does not require Mr. Geralds to plead all of the proof he would offer in support of the facts plead in his supplemental motions. It is at an evidentiary hearing that Mr. Geralds would be required to prove the facts alleged and carry his burden of proof as to his substantive claims.

Specifically, the lower court faulted postconviction counsel for pleading the claims in the alternative, i.e, this Court found it insufficient for counsel not to identify

whether trial counsel had the information contained in the supplement or if it had been withheld. See PC-R. 1529-30, 1642-3. However, it is completely proper for Mr. Geralds to plead his claims in the alternative and determine whether the trial prosecutor withheld or the trial attorney failed to use information he possessed at an evidentiary hearing. Indeed, it matters little whether the State failed to disclose or trial counsel failed to discover, the prejudice standard is the same whether analyzing a ineffective assistance of counsel claim or a Brady claim – relief is required if confidence is undermined in the outcome. See Robinson v. State, 770 So. 2d 1167, 1172 (Fla. 2000), citing Strickland v. Washington, 466 U.S. 668, 694 (1984). See Smith v. Wainwright, 741 F.2d 1248, 1256 (11th Cir. 1981). This Court has recognized the appropriateness in alternative pleading in cases such as this. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

Likewise, the lower court's reliance on Wright v. State, 857 So. 2d 861 (Fla. 2003), and Carroll v. State, 815 So. 2d 601 (Fla. 2002), was misplaced. In both of those cases, the circuit courts made findings **after** an evidentiary hearing was held at which evidence was presented and the courts had the opportunity to make findings in light of that evidence and the context of the case.[39] Mr. Geralds was denied such an

[39]Indeed, in Wright, the defendant was a successor and therefore this Court analyzed the evidence in addition to the evidence presented in his initial postconviction evidentiary hearing.

opportunity. In fact, in Mr. Geralds case, he presented evidence that is entirely consistent with the information included in his supplement. Thus, the lower court was required to view all of the evidence together before making any conclusions about the value of the evidence.

Likewise, the lower court ignored the cases that indicate that information regarding other suspects, leads and shoddy police investigation may constitute exculpatory information and may undermine confidence in the verdict. See Hoffman v. State, 800 So.2d 174 (Fla. 2001); Kyles v. Whitley, 514 U.S. 419 (1995). A hearing is required to determine if a defendant can meet the burden imposed by Brady. And, a proper materiality analysis under Brady also must contemplate the cumulative effect of all suppressed information. The evidence "must be considered in the context of the entire record." Occhicone v. State, 768 So. 2d 1037, 1041 (Fla. 2000).

Certainly, the confession by another individual is exculpatory and could have assisted Mr. Geralds' defense. And, certainly, because Mr. Geralds maintained his innocence and evidence at the crime scene demonstrates that someone other than Mr. Geralds was present, the information could have undermined confidence in the outcome of the proceedings. It is appropriate at a hearing to determine whether the information was credible or why law enforcement failed to investigate further. See Floyd v. State, 902 So. 2d 775 (Fla.

2005). It is not appropriate to make conclusions about the information based upon the pleading.[40]

As to the lower court's analysis of the impact of the evidence on the cold, calculated and premeditated aggravator, the lower court concluded that the claim is meritless because this Court struck the aggravator. However, such a conclusion overlooks the substantive claim and the fact that the jury heard the aggravator and the prosecutor argued that it was established.

Mr. Geralds is entitled to an evidentiary hearing.

2. The Summary Denial of Claims in Mr. Geralds's 3.850

a. Ineffective assistance of counsel claims

The lower court denied Mr. Geralds an evidentiary hearing as to several claims concerning trial counsel's ineffectiveness. Specifically, the court refused to allow Mr. Geralds to develop his claims that trial counsel was ineffective in his handling of Mr. Geralds' re-sentencing proceeding and for failing to object to improper prosecutorial argument and comments.

During Mr. Geralds' re-sentencing, prosecution witnesses Vicki Ward and Billy Danford were declared unavailable to

[40]In regard to the confession by another individual, the lower court states: "Did law enforcement determine the sources were unreliable . . ." (PC-R. 1530). Even if that were why the report was suppressed, the mere fact that another individual confessed and had information about the crime was exculpatory. It is not within law enforcement's discretion to determine what a trial attorney may find helpful, or a jury find credible.

testify, and the Court allowed the prosecutor to read their testimony from the previous trial into the record. Trial counsel specifically instructed the prosecutor not to read any portion of Danford or Ward's cross examinations from the previous trial (R2. 574). Here trial counsel's deficient performance clearly deprived Mr. Geralds' of his right to confront witnesses against him. Counsel had no strategy or tactic.

Furthermore, during Mr. Geralds' re-sentencing, Inv. Jimmerson was allowed to testify in a summary fashion regarding previous testimony, reports, and what others had told him. Often times, Inv. Jimmerson's testimony was not an accurate reflection of what prior witnesses said. For example, in testifying about the shoeprints at the crime scene and the comparison to Mr. Geralds' sneakers, Inv. Jimmerson testified:

> Q: Now, in your investigative capacity, have you worked in reviewing and looking at shoe print and patterns like in sand or in blood in comparing them to the tracks that you see on the bottom of the shoes?
> A: Yes, sir.
> Q: Did you see these particular tracks off these shoes in the Pettibone home?
> A: Yes, sir.
> Q: Did you see one consistent shoe track throughout the home?
> A: Correct.
> Q: That would be coming from the Nike type shoe?
> A: That's correct.

(R2. 401-2). Inv. Jimmerson's testimony is completely inaccurate and misleading. The testimony presented at Mr. Geralds' capital trial by Analyst Hoag was that the tread

pattern on his Nike sneakers was similar to the tread pattern of the shoeprints at the crime scene (R. 1728). However, no class or wear characteristics could be identified (Id.). The FDLE expert who examined the shoeprints and compared them to Mr. Geralds sneakers did not conclude that the "particular tracks off [Mr. Geralds'] shoes" were the "shoes in the Pettibone home", as Inv. Jimmerson told the jury.

Inv. Jimmerson also inaccurately related another expert's testimony during the re-sentencing concerning the presumptive blood testing of Mr. Geralds' sneakers. Inv. Jimmerson testified that the test "detect[ed] human blood" (R2. 413-4). On cross examination, Inv. Jimmerson testified that he had been told by FDLE that "[t]he test shows that it is blood." (R2. 414). In fact, such testing does not conclusively indicate the presence of blood, merely the presence of an oxidizing agent that could be blood, but Inv. Jimmerson didn't have the expertise to respond to trial counsel's questions.

The prosecution also elicited testimony from Inv. Jimmerson about the blood found on the herringbone necklace. He told the jury that the blood "was of Mrs. Pettibone" (R2. 406). In actuality, the blood on the herringbone necklace was not matched conclusively to the victim.

Inv. Jimmerson also inaccurately related the testimony of lay witnesses. One of these was the defendant's grandfather, Douglas Freeman. According to Inv. Jimmerson, Mr. Geralds went to his grandfather's home the day of the murder to take a

bath. Asked about the defendant's attire, Inv. Jimmerson responded, "Just casual clothes and wearing a pair of gloves, said he had been working on a boat and had fiberglass on him." (R2. 409.) In fact, Mr. Freeman never testified that the defendant was wearing gloves. At Mr. Geralds original trial, Mr. Freeman testified that, "I couldn't say I noticed he was wearing anything on his hands. They talked about some gloves, but I weren't paying too much attention to them. I don't know if whether he had them on his hands or what." (R. 1673).

Trial counsel was ineffective in failing to object and/or correct the inaccurate testimony.

Furthermore, trial counsel failed to subject the penalty phase testimony to an adversarial testing. At Mr. Geralds' original trial, Dr. Sybers testified:

> . . . Also important is the actual - the small plastic object which we see the long strips, is a very narrow, tiny strip. **If she were at all struggling - this is difficult to get that -** it's like a belt, like a man's belt, except the little tiny area here, the little plastic square is very tiny. So one must concentrate to get that little tiny plastic in that straw, in the square. **So any kind of struggle at all it would be difficult to spread that long strip of plastic through this.**

(R. 1853)(emphasis added). Most importantly, Dr. Sybers could not determine whether the victim was conscious or unconscious during the attack:

> Q: Now, with respect to the blunt trauma, the ten items, did you make a determination as to whether or not Tressa Lynn Pettibone was alive at the time of these ten blunt traumas to her person?
>
> * * *

A: She had to be alive in order to cause hemorrhage in the skin. If she were dead there would be no hemorrhage.

Q: Were any of these sufficient to knock her down on the floor to cause something to the back of her head or to the front of her head?

A: Yes, sir.

Q: And were they of such velocity to knock her unconscious?

A: Yes. sir, they could have.

Q: Now, with respect to the up-to-down type knife wounds that you've described. When the first two wounds were inflicted was she alive?

A: There was bleeding in tissue in the area, so yes, she was alive.

Q: Can you determine whether she was conscious?

A: No. I can't.

Q: With respect to this particular wound, to the left hand side. This is the wound that caused the death; correct?

A: That's correct.

Q: Was she alive at the time prior to that injury being inflicted?

A: Yes, sir, she was.

Q: Could you determine whether or not she was conscious?

A: No, sir.

* * *

Q: Okay, so the two on the right side, she would have to have been standing or kneeling.

A: Yes, sir.

Q: In conjunction with her size, could you determine whether or not she would be conscious or unconscious?

A: As to the final stab wound to [the] left neck she would be unconscious within a few minutes. But no, prior to the stabbing I could not tell.

(R. 1871-2). Also, Dr. Sybers testified that no defensive wounds were present.

The information Dr. Sybers provided during his trial testimony could have rebutted the aggravating factor of heinous, atrocious or cruel. At Mr. Geralds' re-sentencing, Dr. Lauridson was never asked about whether the victim was conscious during the attack. Trial counsel’s failure to

develop this information at the re-sentencing was ineffective.

Trial counsel failed to cross examine Dr. Lauridson's testimony in other ways as well. A startling inconsistency between the testimony of the two medical examiners is that Dr. Sybers said all of the victim's blunt force injuries, including the ones to her chest, could have been caused by a fist (R. 1855-64). Dr. Lauridson testified that the blunt force injury to the victim's chest was "very possibly" caused by a stomp from a tennis shoe, and claimed to be able to discern the pattern of the shoe's tread (R2. 563-4). Dr. Sybers said the victim had 10 contusions (R. 1836) and Dr. Lauridson claimed the victim had 10-15 blunt force injuries (R2. 347). It seems incredible that Dr. Lauridson could discern an additional 5 bruises and a shoe print from reviewing pictures of the autopsy when Dr. Sybers was unable to do so while actually performing the autopsy and having the benefit of the autopsy pictures. The re-sentencing jury, unlike trial counsel, had not heard Dr. Sybers' testimony, and trial counsel failed to cross examine Dr. Lauridson and bring this to the jury's attention.

In Mr. Geralds' claim that trial counsel was ineffective in failing to object to prosecutorial argument and comments, Mr. Geralds' pointed to specific instances where the prosecutor misled the jury. For example, during his opening remarks, Mr. Appleman told the jurors they would hear

testimony that the victim was found with a towel gagging her mouth (R. 1410). This assertion is clearly contrary to the evidence presented.

Also, during the guilt phase closing arguments, defense counsel failed to object when Mr. Appleman argued:

> "You know who the dummy is in this group? Right there. Right there is the dummy. Because he took that necklace thinking that he could go far across Hathaway Bridge and not get caught pawning it because he needed thirty bucks. He needed some money. And that's why he went into that house. And that's why he tied her up. And that's why he beat her. He beat her to get her to tell him where's the seven thousand dollars. **And she would scream every time he left that gag off her mouth**. And he hit her again. Ten times. **And the only way he could stop her from screaming was to stick that knife in her neck to the hilt, to the point where it cut off her windpipe and she couldn't scream no more**.

(R. 2055)(emphasis added). The prosecutor's argument was improper and unsupported by the physical evidence.

The prosecutor continued to engage in impermissible conduct by making improper “Golden Rule” argument:

> You remember Kelly Stracener’s time period of the phone call, getting ready, going by the house, for 20 minutes that doctor said those hands had to be tied together and she was alive for that blood to swell those hands to that extent. 20 minutes.
>
> **The last 20 minutes of Tressa Pettibone’s life her home had been invaded, her hands had been bound with a plastic strap that made them swell and hurt.** She received 10 to 15 blows of blunt trauma and three stab wounds to her body.
>
> Before she died her left eye was blackened with something like a fist. Her right eye was blackened with something like a fist. Before she died she received not one cut, but two cuts over the top of her left eye, blows that opened up her skin. Her jaw was slammed so hard that the inside of her mouth bled. And the left side of her face was struck so hard by one or two blows or a foot that her face was almost beaten beyond recognition.
>
> She received three blows to the chest. One of them, as the doctor indicated, had these little squiggly marks,

> little squares on them. Doctor, those consistent with a tennis shoe? Yes, Mr. Appleman.
>
> Well, what did they do? That stomp was so hard, it just didn't bruise the skin, it left an impression there that lasted upon her body and caused further injury to the inside, to the diaphragm.
>
> And then she was stabbed. Maybe not in that order. Stabbed twice. Two times in the right neck and a stab wound that severed her windpipe and severed her artery.
>
> She bled to death in her own home. A woman who was a caring person. That life was taken, Mr. Beller says, by an uncaring person. **And in her own home she took the last gasps of breath that she could and sucked blood into her lungs.**
>
> The courtroom is a place for truth. **For 20 minutes I've stood before you. For 20 minutes Tressa Pettibone suffered an agonizing beating and torture.**

(R2. 866-7)(emphasis added). The prosecutor invited the jury to experience what the victim experienced by describing her injuries blow by blow. When the prosecutor invokes the common timeframe, in a real sense the jurors have shared the victim's experience.

Arguments that invite the jury to put themselves in the victim's shoes are generally characterized as "Golden Rule" arguments and are improper. According to this Court, "the prohibition of such remarks has long been the law of Florida." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), citing Barnes v. State, 58 So. 2d 157 (Fla. 1951). Further, the Court emphasizes that, "[Closing argument] must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti at 134. Yet, in Mr. Geralds' case, trial counsel failed to object.

The prosecutor also denigrated the proper statutory and non- statutory mitigating factors, particularly the catch-all provision:

> And finally, the Court's going to say to you that you can take into consideration any other aspect of the defendant's character or record or any other circumstance of the offense. Take those into consideration, all of those things.
>
> Do you take into consideration the–now this man has been found guilty, now that he has a child? That should be in mitigation? Because he came from divorced parents, you should consider that? Because it was their fault? Because it was police officer's fault because they've come in here and lied? Because society caused him to do these things?

(R2. 861-2). The state impermissibly argued that the defendant, in putting on valid mitigating evidence authorized by statute, was trying to shift the blame for his actions. A defendant has a fundamental right to put on a defense, and "a prosecutor may not ridicule a defendant or his theory of defense." Riley v. State, 560 So. 2d 279, 280 (Fla. 3rd DCA, 1990), citing Rosso v. State, 505 So. 2d 611 (Fla. 3rd DCA 1987). Trial counsel's failure to object was ineffective.

Finally, the prosecutor attempted to inflame the passions of the jurors by appealing for them to do their duty, to live up to the higher ideal of Truth and send a message to Mr. Geralds, and to the community. See R2. 368. Such appeals have consistently been held to be improper. See Urbin v. State, 714

So. 2d 411 (Fla. 1998); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); Boatwright v. State, 452 So. 2d 666 (4th DCA 1984). Trial counsel failed to object.

Likewise, trial counsel failed to object when the prosecutor argued non-statutory and improper aggravating circumstances. The prosecutor urged the jury to find Mr. Geralds' intelligence be considered as aggravation:

> He had an IQ of 121 or thereabouts. Superior intelligence level. A man Mr. Beller said if he applied himself, yes, Mr. Appleman, he could get a master's degree; yes, he could do those things. Yes, Mr. Appleman, he knew right from wrong.... He's intelligent enough to know better. He knew right from wrong. He just didn't care.

(R2. 860-1).

The fact that Mr. Geralds exercised his right to present mitigation and was evaluated by Mr. Beller was used against him as nonstatutory aggravation and as an improper comment on the defendant's credibility. The prosecutor characterized a portion of the defense expert's testimony as, "He's manipulative. He's a loner, and yes, Mr. Appleman, on one of my tests he was good at making up stories." (R2. 861). The prosecutor's argument inaccurately reflects Mr. Beller's testimony. See R2. 754.

The lower court denied Mr. Geralds an evidentiary hearing because the court found the comments unobjectionable and/or Mr. Geralds failed to demonstrate prejudice (PC-R. 1381, 1383). The lower court's order is in error. Trial counsel's argument and comments were objectionable. Additionally, the

arguments and comments prejudiced Mr. Geralds, if not individually, then collectively. However, the court failed to review the arguments in connection with the other evidence of trial counsel's deficient performance. Mr. Geralds is entitled to an evidentiary hearing on his claims.

b. Newly discovered evidence claim

Additionally, Mr. Geralds requested an evidentiary hearing on new evidence that Dr. Lauridson testified falsely in the Orme case, prior to testifying at Mr. Geralds' re-sentencing. Specifically, in reviewing the Orme materials, Dr. Lauridson found that Dr. Sybers had made a "mistake" as to the time of death of the victim. Time of death was a central issue in the case. Dr. Sybers' error favored the prosecution's theory of the case and hurt the defense's. See Def. Ex. 22.[41] During Dr. Lauridson's deposition with Orme's attorney he intentionally did not inform trial counsel about Dr. Syber's error. Id.

In a letter to the prosecutor, Dr. Lauridson informed the prosecution that he had concealed Dr. Syber's error so as not to lend the defense's theory any support and to defeat any credibility it may have had. At Orme's trial, the prosecutor allowed Dr. Lauridson to testify falsely and failed to correct the false testimony.

[41]The lower court refused to admit the exhibit into evidence, thus, it is in the record, but it was not considered by the lower court. See PC-R. 2419.

Mr. Geralds' case was prosecuted by the same prosecuting authority in the Orme case and Dr. Lauridson also testified at Mr. Geralds' re-sentencing. Had he known that the prosecution and Dr. Lauridson conspired to falsify evidence in another capital case, he would have presented such evidence to the jury charged with determining whether he should live or die.

The lower court erred in denying an evidentiary hearing.

B. MR. GERALDS WAS DENIED DISCOVERY IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW.

In May, 2005, Mr. Geralds received documents from the Office of the State Attorney for the Fourteenth Judicial Circuit. Among those documents was a lead regarding Warren Cash.[42]

In investigating the information contained in the documents, Mr. Geralds' learned that Bob Willoughby, a former Bay County Sheriff's Officer was interviewed regarding his knowledge of Cash.

Mr. Geralds, through his investigator attempted to speak to Mr. Willoughby. Mr. Willoughby left a voice recorded message on Mr. Geralds' investigator's answering machine stating that he (Mr Willoughby) would not speak to anyone without a subpoena. Mr. Willoughby also instructed the investigator not to call again.

[42]Based on the documents received, Mr. Geralds' filed a second supplement to his Rule 3.850 motion, which contained allegations related to Warren Cash and the investigation of Cash by law enforcement of the crimes for which Mr. Geralds is convicted and sentenced to death. See PC-R. 1610-26.

Therefore, in order to speak to Mr. Willoughby, Mr. Geralds' counsel filed a motion for leave to depose Mr. Willoughby (PC-R. 1608-9). The lower court denied Mr. Geralds motion (Id.).

The lower court erred in denying Mr. Geralds' motion. The information concerning Cash's involvement in the crimes at issue was certainly relevant to Mr. Geralds' postconviction motion. In addition, postconviction counsel attempted to uncover the information, but Mr. Willoughby refused to speak to Mr. Geralds' investigator. Thus, postconviction counsel met the criteria set forth in State v. Lewis, 656 So. 2d 1258 (Fla. 1994). Mr. Geralds' must be allowed to depose Mr. Willoughby.

C. MR. GERALDS HAS BEEN DENIED ACCESS TO FILES AND RECORDS PERTAINING TO HIS CASE IN VIOLATION OF ARTICLE I, SECTION 24 OF THE FLORIDA CONSTITUTION, CHAPTER 119, ET. SEQ. FLA. STATS. AND FLA. R. CRIM. P. 3.852.

During his postconviction proceedings, Mr. Geralds did not receive the public records to which he was entitled. For example, there were no handwritten notes in the State Attorney's file received by Mr. Geralds. At the evidentiary hearing the prosecutor testified that notes from the Mr. Geralds' prosecution existed, but he did not know where they were (PC-R. 2689).

In addition, the Panama City Police Department (PCPD) responded to many of Mr. Geralds' 3.852 requests for records on individuals not by producing actual records, but instead by

producing print-outs essentially indicating whether or not the individual has a criminal record with the PCPD. Such information is inadequate for Mr. Geralds' investigative purposes and falls short of what he is entitled to under the law.

On October 1, 1998, a "new" Rule 3.852 went into effect, essentially requiring agencies producing records to forward those records to a central records repository rather than directly to postconviction counsel. Because Mr. Geralds had already begun the public records process, many of the agencies took the position that the "new rule" did not apply to his case and refused to send records to the repository. This resulted in piecemeal production of investigative files. Files from different agencies were produced months apart, thus Mr. Geralds was forced to file his 3.852(h)(2) requests months apart. The already confusing public records process soon became even more obscure. The end result of this public records snarl is that most of Mr. Geralds Rule 3.852(h)(2) record requests were struck, and he was forced to file the same requests for information under the more stringent Rule 3.852(i)(2). Because of the trial court's rulings, and due in large part to the procedural posture Mr. Geralds' case, Mr. Geralds has been denied access to records and to the public records process.

On September 28, 2001, the trial court issued an Order on defendant's 3.852(i) requests (PC-R. 963-6). In that order,

the trial court ruled that, “The persons listed by name in the 3.852(i) requests are relevant if accompanied by identifying information.” It is unclear what effect an individual’s birth date or home phone number has on their relevancy to Mr. Geralds’ postconviction claims, other than limiting Mr. Geralds’ access to public records. However, due to the lower court’s ruling, Mr. Geralds was denied access to public records.

Mr. Geralds was also not provided records on crucial State witnesses and involved parties. For instance, records were requested on Billy Danford. Mr. Geralds requested records on Danford from every major agency involved in the case. Mr. Geralds has never received any records on Danford from any agency. However, it was discovered during the course of investigation that Danford had several criminal charges pending against him in the 14th Circuit between 1987 and 1989. Danford appears as defendant in Clerk of Court Case Numbers 87-002499, 89-003000, and 89-008141. See Def. Ex. 8. Two of these include charges for Failure to Record a Transaction by a Pawn Broker, clearly relevant to the investigation of Mr. Geralds’ case and to Danford’s credibility as a witness. In fact, during Danford’s deposition he denied having a criminal record (Def. Ex. 9).

Another individual, William Pelton, was questioned by both law enforcement officers and representatives of the State Attorney’s Office in connection with the crimes at issue.

However, no notes regarding these conversations have ever been disclosed. In addition, no records have ever been produced in the following cases in which Pelton was a defendant: 86-001402; 86-001403; 87-001470; 87-001471; 87-005099; 93-008377; and 93-008494.

Mr. Geralds requests this Court order that the specifically identified records be produced.

ARGUMENT VI

THE LOWER COURT ERRED IN DENYING MR. GERALDS' CLAIM THAT HE MAY NOT BE EXECUTED BY LETHAL INJECTION WITHOUT VIOLATING THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In his Rule 3.850 motion, Mr. Geralds pleaded that:

> Experts in the field have concluded that lethal injection is the most commonly botched form of execution in the United States today. Problems have arisen in the breakdown of the drug sequence leading to gasping for breath and other indications of agony, prolonged difficulty in locating the vein, the straps so tight they impeded the flow of chemicals, prolonged interruption of the process, a kink in the tubing, the needle falling out or a vein collapsing during injection, an interaction of the drugs resulting in the chemicals clogging the IV tube, and unusual reaction to the drugs.
>
> * * *
>
> The consequences of a botched lethal injection can be horrifying . . . A mistake in sequencing due to mislabeling or other human error, . . . , can result in conscious suffocation, sensation like a "hot poker" in the arm, and painful and gradual paralysis and muscle contractions.
>
> * * *
>
> The Eighth Amendment "proscribes more than physically barbarous Punishments." Estelle v. Gamble, 429 U.S. 97, 102 (1976). It prohibits the **risk** of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death," Gregg v. Georgia, 428 U.S. 153, 173 (1976); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947). . . . The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," id. at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. Id. at 370 (emphasis added). . .

(PC-R. 1198-1200).

The lower court denied Mr. Geralds' claim based on this Court's decisions in Provenzano v. State, 761 So. 2d 1097 (Fla. 2000), and Sims v. State, 754 So. 2d 657 (Fla. 2000) (PC-R. 1384). Based on the recent events which occurred during the execution of Angel Nieves Diaz, and the expectation that a new protocol will be adopted, today, Mr. Geralds has

filed simultaneously filed with his brief a motion to relinquish jurisdiction to the lower court so that he can file an amendment to his lethal injection claim.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, Appellant, MARK ALLEN GERALDS, urges this Court to reverse the lower court’s order and grant him Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Ronald Lathan, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Fl 32399-1050, on April 16, 2007.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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